ACTIONES TIPS FOR TRAINERS

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

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Introduction

In the following the hypotheticals from each of the ACTIONES Modules are presented with the relevant notes for the discussion. These comments and suggestions highlight the cases that are at the basis of the hypothetical and the additional hints and suggestions that shall help the trainer in chairing the discussion regarding the cases.
It is important to highlight that the purpose of the hypotheticals to be to give the trainees a chance to critically analyze the provision of their own legal system as regards the fields covered by ACTIONES Handbook and verify their compliance vis-à-vis the standard of protection of fundamental rights guaranteed by the EU Charter. Thus, the scenarios presented in each of the hypotheticals do not entail a "correct" answer, rather they provide for different answers and (hopefully) trigger new questions and doubts that shall improve the level of protection of fundamental rights at national as well as European level.

Module 4 - Consumer protection

Hypothetical n. 1 - Ex officio judicial powers

1. Assessment of consumer status and applicability of consumer law
1.1. Availability of legal elements to assess the consumer status of the buyer in order to apply the directive on unfair contract terms: assessing the different elements of the cause of action

Please assume that neither REC nor Mr Verbeek invoke the application of consumer law to assess the enforceability of the penalty clause.
a) Would the judge have the power/duty to assess the status of Mr Verbeek as a consumer in order to apply consumer protection remedies?
b) Would the answer to the previous question differ depending on the availability of factual elements providing evidence of such a status? Could/should the judge actively investigate the plaintiff's status?

After letting judges discuss on these issues, the ECJ Faber case can definitively feed the discussion further. The trainer may refer to the following extracts:
ECJ Case C-497/13, Faber:
Distinction between two types of procedural law systems
Case A (legal classifications of legal matters and facts is a prerequisite in the proceedings and the judge may request clarifications to the parties): principle of equivalence is mostly relevant
Case B (the former incident does not apply): principle of effectiveness is mostly relevant
Case A, para. 38 ff., ECJ Case C-497/13, Faber: "it is, in principle, for the national court, for the purpose of identifying the legal rules applicable to a dispute which has been brought before it, to assign a legal classification to the facts and acts on which the parties rely in support of their claims. That legal classification is a prerequisite in a case in which, like that in the main proceedings, the guarantee or warranty in respect of the goods sold, on which the applicant is relying, may be governed by different rules depending on the purchaser's status. Such a classification does not, in itself, imply that the court is, of its own motion, exercising a discretion, but merely that it is establishing and ascertaining whether there is a statutory condition which determines the applicable legal rule.
In the same way that, within the context of the detailed procedural rules of its domestic legal order, the national court is called upon, for the purpose of identifying the applicable rule of national law, to classify the matters of law and of fact which the parties have submitted to it, if necessary by requesting the parties to provide any useful details, it is required, in accordance with the principle of equivalence, to carry out the same process for the purpose of determining whether a rule of EU law is applicable.
Case B, para. 40, para. 46-47: "It is thus only if the detailed procedural rules of the domestic legal order were not to provide the national court with any means which would make it possible for it to give the facts and acts at issue their precise classification, if that classification has not been expressly invoked by the parties themselves in support of their claims, that the question of whether the principle of effectiveness may authorise it to classify as a consumer a party who has not relied on that status would arise.
(...) the principle of effectiveness requires a national court before which a dispute relating to a contract which may be covered by that directive has been brought to determine whether the purchaser may be classified as a consumer, even if the purchaser has not expressly claimed to have that status, as soon as that court has at its disposal the matters of law and of fact that are necessary for that purpose or may have them at its disposal simply by making a request for clarification. (47) It must be added that the question of whether the consumer is assisted by a lawyer or not cannot alter that conclusion, as the interpretation of EU law and also the scope of

the principles of effectiveness and equivalence are independent of the specific circumstances of each case (see, to that effect, judgment in Rampion and Godard, EU:C:2007:575, paragraph 65)".

c) Moving from the perspective of Your own legal system, which obstacles, if any, would arise to the use of ex officio powers to investigate the legal status of the parties?

After ascertaining whether the legal systems of the participants are type A or type B, the trainer could focus on type B legal systems and deepen the issue about obstacles to the exercise of ex officio powers in these legal systems.
The discussion could relate to:
- whether the obstacles relate to the availability of legal assistance for the consumer and/or
- whether a distinction could be done between first instance and appeal judge, being (even) more limited ex officio powers for an appeal judge.

d) Would ECJ case law be a sufficient ground for conform interpretation or disapplication of internal procedural rules prohibiting inquiry into the status of the parties?
e) Would the principle of effectiveness, as established in the ECJ case law, be of particular help for making conform interpretation, disapplication and/or preliminary reference? Is the definition of the consumer status ex officio part of the right to effective judicial protection?
f) Would reference to article 47, CFREU, contribute to define ex officio power to determine the status of the parties?

In case any obstacle is identified, the issue to be addressed could relate to the way in which such obstacle should be faced and the conflict resolved. Depending on the conflicting internal norms, reference to case law could suffice (if the norm is sufficiently similar to the one examined by the ECJ) or conforming interpretation or disapplication could be used if requisites recur, or in any other case, especially if the applicable internal rule presents elements of specificity, the option of preliminary reference could be preferred. In all these cases, and especially in the latter, the judges could discuss whether the principle of effectiveness or art. 47 would be the legal basis for their choice. The trainer could refer to an abstract example, like the one in the ppt, to animate discussion (e.g., a national procedural norm requires a judge to identify the relevant law for the case on the basis of the claim filed and evidence provided by the plaintiff without any possibility for the judge to re-qualify the issue and facts at stake)

g) Could you refer to any existing example in Your national case law, that You wish to discuss in this international panel?

The judges are invited to discuss about their own examples if they have not done so before. Alternatively, the discussion can move on.

1.2. Availability of factual elements to assess the clause unfairness and power to investigate further. The ex officio power to seek additional evidence

The applicability of directive 93/13 is now assumed. Parties had not made reference to consumer law in their pleadings.
a) Can/should the judge, once the consumer status of the buyer has been assessed, apply domestic law on unfair contract terms implementing dir. 93/13?

Assume that in the national system there is a general rule that regulates contractual penalty and a consumer contract rule that makes clauses related to high penalty for breach unfair and hence not binding. The same assumption could relate the existence of a general rule on free choice of jurisdiction as opposed to a consumer protection rule limiting this choice in the case of consumer contracts.

a) Would the judge have the power/duty to assess the unfairness of the clauses related to the penalty and the choice of jurisdiction in application of consumer law although the plaintiff has expressly relied on a different set of rules, e.g. general contract law on excessive contractual penalties or general procedural law on choice of jurisdiction?

These issues could be examined jointly, as proposed in the ppt. They should follow from the previous discussion and open the discussion below. The steps are the following:

- *Qualification of the plaintiff's status*
- *Identification of relevant norms in respect of such status*
- *Application of the identified norms and therefore assessment of the term unfairness (see below)*

Unlike in the previous discussion, where the focus was on the ascertainment of the status of the plaintiff, here the focus is on the identification of the relevant norms to be applied.

The discussion could be more effective if, as proposed, a conflict is presented between consumer law and general contract/procedural law and it is assumed that the plaintiff has expressly referred to general law rather than consumer law.

Normally the identification of relevant norms to be applied is a task for the judge (jura novit curia), see Faber cited above. However, some limitations could arise in national procedural norms, should the judge be constrained by the claim expressed by the plaintiff. Indeed, the identification of a different legal basis could open up a different set of remedies and potential claims, remained unexpressed by the plaintiff. Once again these limitations could be confronted with the possibility of using conforming interpretation, disapplication of preliminary references in the light of the principle of effectiveness and/or article 47, CFRUE.

b) Would the judge have the power/duty to make further investigation about factual elements enabling this assessment (e.g. about the consumer's residence or the modes of pre-contractual negotiation, for example whether the penalty clause had been individually negotiated)?

The trainer may compare Pannon (where the Court seems to restrict the duty to examine unfairness to the extent that factual and legal elements are available) and Penzugyi (where the court acknowledges a judge's duty to investigate ex own motion whether a clause is unfair), part.:

Pénzügyi, paras 48, 54, 56

- *"In order to guarantee the protection intended by the Directive, the Court has also stated that the imbalance which exists between the consumer and the seller or supplier may be **corrected only by positive action unconnected with the actual parties to the contract** (Océano Grupo Editorial and Salvat Editores, paragraph 27, Mostaza Claro, paragraph 26, and Asturcom Telecomunicaciones, paragraph 31).*
- *(...) the term which the national court is examining in the main proceedings, like a term whose purpose is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an*

appearance could be a deterrent and cause him to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive (see Océano Grupo Editorial and Salvat Editores, paragraph 22).

- *(...) the national court must* ***investigate of its own motion*** *whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of the Directive and, if it does, assess of its own motion whether such a term is unfair."*

c) As a judge would You make a different assessment for each of the two clauses (penalty clause and choice of jurisdiction clause)? For example, would You take into account the different availability of public information concerning the residence of the consumer (jurisdiction clause) or how the penalty clause was negotiated?
d) Does the existence of the consumer's claim for penalty reduction reduce or increase the power of the judge to assess and investigate the unfairness with the aim of declaring the clause not binding?
e) Moving from the perspective of Your own legal system, which obstacles, if any, would exist to the use of ex officio powers in these circumstances?
f) Would ECJ case law be a sufficient ground for adopting a conform interpretation or disapplication of internal procedural rules that would otherwise prevent an ex officio declaration that the clauses (penalty clause and choice of jurisdiction clause) are non-binding?
g) Alternatively, on which basis could You conceive of the possibility of a preliminary reference to the ECJ concerning the interpretation of EU law in respect of any national rule opposing to the judicial power to ex officio declare the clauses as non-binding (rather than, e.g., simply reducing the penalty clause as valid)?
h) Would the principle of effectiveness, as established in the ECJ case law, be of particular help for adopting a conform interpretation, disapplication and/or preliminary reference?
h) Would a reference to article 47 CFREU contribute to create an ex officio power to declare the clauses non-binding?
i) How should the judge raise the issue of the non-binding nature of the clauses? Should the judge give parties the opportunity to present their observations? Would internal procedural rules allow for this?
i) Could you refer to any existing example in Your national case law, that You wish to discuss in this international panel?

1.3. Fair trial and consumer's interest in a judgment declaring the non-bindingness of the clause

a) How should the judge proceed in order to assess the interest of the consumer? Should the judge also ensure a fair trial in consideration of the defendant's position? Which procedural steps should be taken?
b) Does the principle *audi alteram partem* play a role when the judge raises ex officio questions to ensure consumer protection?
c) Moving from the perspective of Your own legal system, could the consumer oppose the judicial declaration of non-bindingness?
d) Could the consumer oppose the non-binding nature of either clause if ever he has an interest in doing so?

2. Non-binding nature of the penalty clause and judicial clause modification/adaptation/replacement

a) Suppose that a partial payment of the penalty has been made by Mr Verbeek. Moving from the perspective of Your own legal system, could the judge reduce the amount of the penalty or should he declare the contractual term non-binding and as a consequence set aside the penalty and oblige the seller to return the partial payment made by the buyer in respect of the penalty?

The trainer may refer to the ECJ judgment in Asbeek, see par. 58-9 in the ppt, excluding (for reasons of effectiveness and dissuasiveness) the power of reduction of the clause.

b) Suppose that the rule is to reduce the penalty but according to CJEU the clause should be declared non-binding. Would the EU principle of effectiveness, the one of dissuasiveness or art. 47 be a sufficient ground for the disapplication or adopting a conform interpretation of internal rules providing for a reduction of a penalty to enable the judge to declare the penalty clause non-binding?

The trainer may refer to some Italian judgments by appeal court (Milan, 2004) also excluding the application of art. 1384, It.c.c., to consumer contracts because of the nullity of the excessive penalty clause as opposed to the excessive penalty clause in other contracts, where the clause is not null and void and the judge has the power to reduce it under art. 1384.
The trainer should also consider the distinction between modifying an unfair clause (by reducing the penalty, e.g.) and replacing it with a statutory default rule (e.g. the statutory default interests for unpaid debts). An Italian decision by the Banking and Financial Arbiter (23 May 2014) applies the ECJ case law to exclude the application of default statutory interests in a consumer case. However, Italian scholars have been generally quite open to the application of default rules as a replacement for unfair clauses declared null and void. It should be added that such replacement is also provided by the law on late payment in commercial transactions after the enactment of the EU directive of 2011. By contrast, the text in force before this reform admitted the judicial power to reduce the penalty.
In a more general perspective the trainer could invite the judge to distinguish between cases in which the avoidance of the unfair clause simply releases the consumer of the burden to comply with excessive duties or limitations or also creates burdens for the consumer, such as in the cases in which the unfair clause limits the professional's liability or regards an essential aspect of the contractual transaction so impacting on the operability of the whole contract (like in the ECJ judgment in Kasler).

c) If the judge declares the clause non-binding, could the professional still seek alternative measures against consumer's default, e.g. damages?

The issue may be disputed (and hopefully discussed in class). Consideration could be attached to the distinctive feature of the penalty clause as clause automatically entitling the aggrieved party with a right to the penalty without any need for providing evidence of suffered loss. The same could apply to interest clauses, as functionally equivalent to a liquidated damage clause. The judges could be invited to discuss whether the use of damages could be compatible with the principles of effectiveness and the one of dissuasiveness, provided that a specific claim and the supply of distinct evidence is requested to the plaintiff, so that the material advantage normally provided by a penalty clause is in fact neutralized. The point below on the possible need to file a separate claim in a separate cause of action could shed further light to the discussion.

d) Moving from the perspective of Your legal system, would this amount to a separate claim to be enforced through a separate action or could this claim be considered under the original claim through which the plaintiff invoked the penalty as a measure against the consumer's default?

See under (c) here above.

Level II

a) Moving from the perspective of Your legal system, would there be any means to suspend or terminate a foreclosure procedure initiated to enforce title that itself is based on a clause which may be declared unfair and thus non-binding in light of EU principles and legislation?
b) If not, would the EU principle of effectiveness or art. 47 be a sufficient ground for the disapplication or adopting a conform interpretation of internal procedural rules preventing the executor judge from raising the issue of validity before the competent authority?
c) Alternatively, on which basis could You conceive of the possibility of a preliminary reference to the ECJ concerning the interpretation of EU law in respect of any national rule preventing the possibility of the executor judge raising the issue of validity before the competent authority?
d) If the judgment ascertaining the right of the vendor has become res judicata, is it still possible to terminate the foreclosure procedure? If not, on which basis could You conceive the possibility of a preliminary reference to the ECJ concerning the interpretation of EU law in respect of any national rule precluding this result?

The trainer should here trigger discussion about the application of the principle of effectiveness and art. 47, CFRUE, to the national procedural legal systems in respect of the possible limitations applicable to the debtor's right to object to a standing foreclosure procedure based on a title that might be found non-binding if fairness was assessed in the light of consumer law.
Limitations may regard:
- *like in Sanchez Morcillo, the right to appeal against a decision dismissing the debtor's objection to the foreclosure procedure;*
- *like in Aziz, the debtor's right to seek interim relief (staying of the foreclosure procedure) from both the judge in charge of the enforcement proceedings (who is not competent in respect of the validity of the title) and the judge in charge of the declaratory proceedings (who may only award damages but not influence the enforcement proceedings);*
- *like in Asturcom, the debtor's right to object to the foreclosure procedure because the title, on which the procedure is based, has already been disputed before a tribunal or an arbitration court and the decision has become final.*

Other limitations may be presented by participating judges and discussed in the light of the ECJ.
The purpose could be to examine to what extent the principle of effectiveness and art. 47 may help the judges to address this national legislation through disapplication, conform interpretation or preliminary reference.

Level III

a) Should the judge take into account the intended use of the foreclosed estate when deciding whether foreclosure should be suspended/terminated in the light of EU consumer law?
b) Would ex officio powers be more extended in light of the need to protect other fundamental rights such as the right to one's home (art. 7, CFREU)?
c) Which ex officio powers would be more extended, if any? Those of the judge when invoking the consumer status? Those of the judge to assess the unfairness and gather evidence in

relation to any such unfairness? Those of the executory judge when suspending or terminating the foreclosure?

d) Which link should be established between art. 47 and art. 7 (on fundamental right to respect for one's home) CFEU under this respect?

e) Could You please consider and raise any relevant case law from the perspective of Your legal system?

The trainer should here mainly refer to the ECJ judgment in the Kušionová case, where the Slovakian legislation on Voluntary Sale by Auction and the norms of the Civil Procedural Code are examined in the light of the principles of effectiveness, dissuasiveness and proportionality.
It should be recalled that the question of the ex officio judicial powers is here expressly addressed in the preliminary reference although the ECJ judgment makes no reference to this aspect in the course of the judgement. Indeed the issue relates to whether the ex officio assessment of clause unfairness may be bypassed by a creditor in a consumer credit contract thanks to the structure of the foreclosure proceeding as possibly enabling the creditor to escape from such assessment.
The ECJ finds this issue very relevant in a case in which the fundamental right to accommodation (being the family house the collateral for the credit contract) is affected by a foreclosure standing procedure.
In fact the ECJ finds that, on the one hand, pursuant to the Procedural Code, the judge may adopt interim measure (including the staying of the foreclosure procedure) in order to ensure effective consumer protection. On the other hand, thanks to a reform of the Law on voluntary Sale by Auction, the sale may be declared void and null and the consumer may be put in the same situation as before the sale. This measure is found both effective and dissuasive, also in respect of the right to accommodation.
The right to one's home is expressly taken into consideration when addressing the proportionality of the remedy against contract unfairness. In fact the assessment on effectiveness of consumer protection seems to absorb any distinct concern about proportionality.
Therefore the trainer could discuss whether the reference to article 7, CFREU has been pivotal in the ECJ reasoning or whether the main issue has been the one of effective consumer protection regardless the nature of the seized asset.

Hypothetical n. 2 - Remedies for non-conformity of goods

Level I.
The choice of remedies along the hierarchy provided by law.

At this level remedies are defined in the law; no contractual clause relates to remedies against non-conformity.

1.Judicial power and parties' power: general issues

a) Is the national judge constrained by the choice of remedy made by the parties?
b) What are the criteria upon which the parties' choice should be assessed?
c) What is the relevance of the principles of effectiveness, proportionality and dissuasiveness?
d) If the remedies sought by one or both parties turn out to be impossible or disproportionate to the non-conformity can the national judge:

- propose
- recommend a different remedy to the parties?

e) In exercising this power or in executing this duty is the national judge bound to follow the legal hierarchy of remedies defined by art. 3.3 of consumer sales directive?
f) Should the judge give the parties the opportunity to express their views after a new remedy is proposed? (compare with Banf Plus Bank)
g) Is the consumer's opposition to the solution binding for the judge?

CJEU case C-243/08 *Pannon*: "The national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, **except if the consumer opposes that non-application**."

2. Comparing repair and replacement (see Weber and Putz)

a) Upon which criteria should the judge assess the consumer's right to repair?
b) What should she/he compare the costs of repair with?
- The contract price of the car?
- The costs for car manufacturing?
- The costs of car replacement?
- The seriousness of the defect?
- Its impact on the consumer?

c) Do You see any substantial difference in this respect between Case A and Case B?
d) In Case B, to what extent should the judge take into account the special nature of the consumer's expectation, this being connected to her personal conditions (physical handicap)?

CJEU joined cases C-65/08 and C-65/09 and C-87/09, p. 75 and 76:
"[…] it must be pointed out that Article 3 aims to establish a fair balance between the interests of the consumer and the seller, by guaranteeing the consumer, as the weak party to the contract, complete and effective protection from faulty performance by the seller of his contractual obligations, while enabling account to be taken of economic considerations advanced by the seller.
In considering whether, in the case in the main proceedings, it is appropriate to reduce the consumer's right to reimbursement of the costs of removing the goods not in conformity and of installing the replacement goods, the referring court will therefore have to bear in mind, first, the **value the goods would have if there were no lack of conformity and the significance of the lack of conformity**, and secondly, **the Directive's purpose of ensuring a high level of protection for consumers**. The possibility of making such a reduction cannot therefore result in the consumer's right to reimbursement of those costs being effectively rendered devoid of substance, in the event that he had installed in good faith the defective goods, in a manner consistent with their nature and purpose, before the defect became apparent."

3. Assessing the claim for replacement in cases in which repair is not possible or excessively onerous (see Weber and Putz)

Let us assume that, for any of the reasons above, the judge rejects the claim for repair for either impossibility or its disproportionate nature.

a) Upon which criteria should the judge assess the consumer's claim for replacement?
b) Is there a substantial difference between Case A and Case B?

c) In particular should the consumer's request for a special entrance give rise to a different application of the principles of effectiveness and proportionality to the remedy of replacement? Can a remedy, considered disproportionate if the non conformity is minor, be instead held proportionate because it responds to the consumer's specific expectation?
d) In Case B, should the judge award replacement as the only remedy apt for a satisfaction in kind of the special needs of the consumer, regardless its onerous costs for the seller?

4. Allocating the costs of replacement
(see Weber and Putz)

a) When replacement is granted could the seller validly refuse to cover the whole costs of replacement and can the judge charge part of these costs to the consumer, absent a rule in the national legal system that regulates the matter?
b) Is there a substantial difference between Case A and Case B in this respect?
c) What, if any, would be the obstacles to this solution in Your legal system?

CJEU joined cases C-65/08 and C-65/09 and C-87/09, *Gebr. Weber and Putz*, p. 64:
"[…] Article 3(2) and (3) of the Directive is to be interpreted as meaning that, where consumer goods not in conformity with the contract which were installed in good faith by the consumer in a manner consistent with their nature and purpose, before the defect became apparent, are restored to conformity by way of replacement, **the seller is obliged either himself to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and installation of the replacement goods**.
That obligation on the seller exists **regardless of whether he was obliged under the contract of sale to install the consumer goods originally purchased**."

5. Considering the price reduction option
(*see Soledad Duarte Hueros; Banif*)

a) If repair is impossible and replacement disproportionate can the judge order price reduction even if this had not been raised by the parties in their pleadings?
b) Could the judge reduce the sale price despite the fact that the consumer has not filed such a claim? Does your legal system expressly recognize an ex officio power of the judge to propose a remedy that is regulated by legislation but not sought for by the parties?
c) To what extent should the judge take into account the special needs made clear by the consumer and engage in an assessment of the real effectiveness of the remedy for the specific consumer? (*compare this case with Duarte Hueros*)

CJEU case C-32/12 *Duarte Hueros:* "Directive 1999/44/EC […] must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the national court hearing the dispute **to grant of its own motion an appropriate reduction in the price of goods** which are the subject of a contract of sale in the case where a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity in those goods is minor, **even though that consumer is not entitled to refine his initial application or to bring a fresh action to that end**.

d) If the judge was to use this power, should she/he invite both parties to set out their views on the matter and remedy?

See facts of CJEU case C-312/14 *Banif* (where the individual views of the party to the domestic proceedings was discussed at length by the Court)

e) Can the consumer object to a price reduction and seek termination of the contract? If she/he does not object at first instance, can the consumer appeal the judgment, challenging the rejection of repair/replacement as a remedy?

3. Considering the contract termination option

Let us assume that, for some of the reasons discussed above, the judge rejects the claims for repair/replacement and does not apply the remedy of price reduction because not effective.

a) Could the judge then conclude that the contract should be terminated and restitution should be ordered, since none of the above remedies provide effective protection to the consumer?
b) Would the evaluation of non-conformity and the possibility of granting termination differ in cases A and B, when the alternative remedies are unavailable?
c) Let us assume that in case A the judge concludes that defect is minor, does lack of an effective remedy modify the evaluation of non-conformity also in this case?

Level II

Choice of remedies and contract private autonomy

Assuming the sale contract has been individually negotiated.

a) Can the parties negotiate a different hierarchy of remedy from that defined by art. 3, dir. 99/44? In other words is the hierarchy mandatory or the parties can redefine the hierarchy?
b) E.g., assuming that the contractual modification favors the consumer, could the parties have validly agreed that the consumer could seek price reduction without being obliged to seek repair or replacement? If it was so agreed, could the seller object to the consumer request for price reduction in circumstances in which the former is willing to repair the goods?
c) Can the parties exclude some of the remedies, for example termination? Would the evaluation differ if termination is sought by the consumer e.g. the consumer seeks termination claiming that the clause excluding termination is invalid because it violates the hierarchy of art. 3.3 of Consumer Sales directive?
d) What are the criteria that national judges must use to assess whether such a clause is enforceable?
e) Can they refer to the principles of effectiveness, proportionality, dissuasiveness?
f) Would art. 47 CFREU be applicable to such an assessment?

Let us assume that the case was brought before an arbitration committee or an arbitral tribunal:

g) would arbiters be subject to and apply the above principles to the same extent and in the same manner as courts?

Level III

Right to effective protection and out-of-court settlements

(see Alassini)

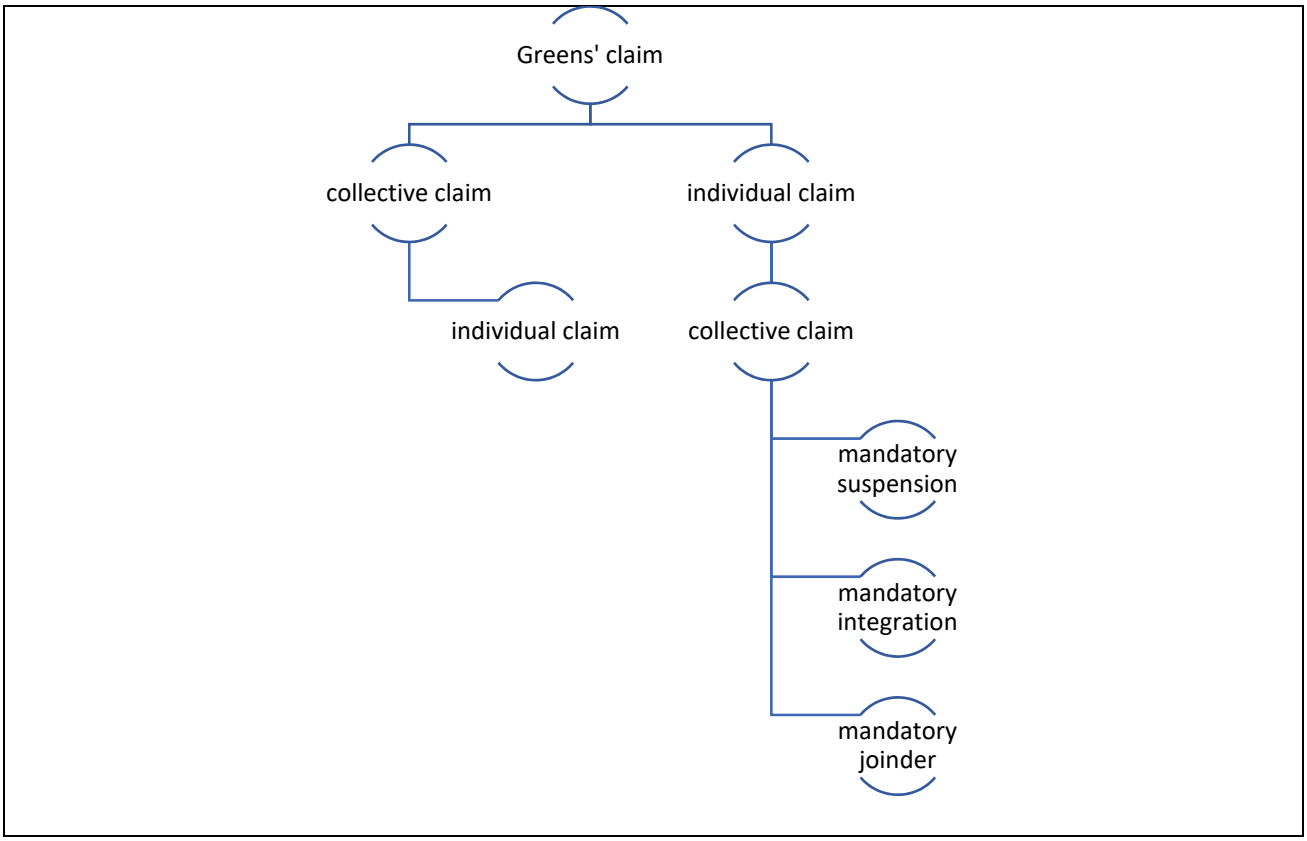
Please assume that, in this type of disputes, the national law obliges the parties to make an initial attempt to achieve a resolution through an out-of-court settlement procedure and that Mrs Brown files her judicial claim having failed to engage with the ADR procedure (generally mediation).

a) Could the judge reject the substantive claims, finding the action inadmissible in the absence of an attempt to use ADR, for example mediation?
b) Or would the judge be merely obliged to suspend the judicial procedure, assigning a term within which the parties should engage in the ADR procedure?
c) When considering these options, should she/he consider whether the ADR mechanism provides effective (opportunity for) consumer protection or whether it represents a disproportionate burden for the plaintiff?
d) Which elements should be considered under this respect? (e.g. duration of the ADR mechanism, costs of the procedure, impact on the dispute evolution, e.g. in terms of interim measures or the opportunity to collect/lose evidence of the grounds for the claim)

CJEU joined cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini*:
"Article 34 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal Service and users' rights relating to electronic communications networks and services (Universal Service Directive) must be interpreted as **not precluding legislation of a Member State under which the admissibility before the courts of actions relating to electronic communications services between end-users and providers of those services, concerning the rights conferred by that directive, is conditional upon an attempt to settle the dispute out of court**.
Nor do **the principles of equivalence and effectiveness or the principle of effective judicial protection preclude national legislation** which imposes, in respect of such disputes, **prior implementation of an out-of-court settlement procedure**, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires."

Hypothetical n. 3 – Individual and Collective redress

Note that Level I and II are based on the following options



Level I

Assume that the individual claim follows the collective claim.

a. Can the consumer bring the individual claim under your national procedural rules if a collective claim is pending based on the same ground (same cause of action or causa petendi)?

At this stage we would like to understand, on the one hand, if all the judges know the procedural rules regarding collective claims (i.e. have read the Hypo in advance and prepared for the discussion), and on the other, if there are strong differences among the countries.

b. If the consumer has joined the collective procedure, does he have to opt out from the collective procedure or can the consumer have the two actions together?

i. if the consumer has not joined can he start the individual procedure without joining the collective one?

Compare with:

- In Italy, in the *azioni di classe*, if a consumer does not opt-in in the collective claim, he is able to file a separate individual action.[1] Instead, if the consumer decides to opt-in, he renounces to his right to act individually against the same defendant on the same facts at issue. In addition, after the term established by the court, no further *azione di classe* involving the same parties and concerning the same facts may be filed. However, if the lead plaintiff decides to settle with the defendant, the consumer can refuse to be bound by this settlement and regain his individual power to sue.

[1] See art 140 Cod consumo provides that "*Fatte salve le norme sulla litispendenza, sulla continenza, sulla connessione e sulla riunione dei procedimenti, le disposizioni di cui al presente articolo non precludono il diritto ad azioni individuali dei consumatori che siano danneggiati dalle medesime violazioni*".

c. Are there procedural rules applicable to the opt-out of a consumer from a collective redress action when that consumer initiates individual proceedings in your countries? (see Sales Sinues)

Compare with
- in Portugal, in the Acção popular after the collective procedure is initiated by the entity with standing interested parties are notified within the term fixed by the judge: (a) to intervene in the main proceedings; (b) to declare whether they accept to be represented by the claimant; or (c) to exclude themselves from this representation. In the latter case, the final decision will not be applicable to them. In case the interested parties do not take any of the actions described, the law considers that as an acceptance of the representation.[2]

d. Are there specific procedural rules applicable to claims presented by consumer protection associations? (e.g. as regards standing, representativity, mandatory registration, etc.)

Compare the following cases:
- In France, in the *action d'intéret collective*, the standing is provided to legally constituted associations whose statutory object specifies the protection of consumer interests.
- In the Netherlands, in the collective actions, the standing is provided only to organizations with the statutory aim of promoting the interests concerned.
- In Italy, in the *azioni di classe*, the standing is provided to individual consumers or to associations receiving the mandate of consumers
- In Germany, in the *Verbandsklagen* the standing is provided to associations representing interests of businesses or qualified entities provided that they are listed with the Federal Office of Justice (see Sec. 4 UKlaG) or, in case of foreign entities, with the European Commission (qualified entities comprise established consumer associations which have to fulfil certain criteria as to the seriousness with which they pursue consumer interests) and to Chambers of Industry and Commerce/ Crafts.

If judges do not reply, please present the previous cases as possible examples of different national approaches.

a. Which specific limits are applicable to actions presented by consumer protection associations (see above)?
e. What is the relationship between individual and collective redress in unfair contract terms (art. 7.1 and 7.2) in your country? Are they complementary or alternative? Does individual redress have priority status vis-à-vis the collective one? Which features of national procedural law support this approach? See Sales Sinues.

The reply to this question should be based on the replies to the previous ones. We would like to understand if consumer associations enjoy the same level of protection of individuals and, if not, which type of protection is afforded to each of them.

f. Does the right to effective remedy and the principle of effectiveness influence the relationship between individual and collective claims?
g. Does art. 47 CFREU influence the relationship between individual and collective remedies?
h. What are the effects of the judgement on collective redress for the individual claims for restitution that may be subsequently raised? (for instance, the judgment may bind only the parties

[2] See articles 14 and 15 of Law 83/95, of August 31 1995.

also in case of declaration of invalidity, or the judgement of invalidity may have the effect of res judicata also for other individual actions against the same professional)

i. For the countries that allow also in abstracto scrutiny (e.g. Poland), is it possible to obtain a declaration of invalidity of contractual terms that will apply *erga omnes* to the contracts concluded after the judgement? Please note the CJEU decision in Invitel.

Compare with:

- In Germany, in the *Verbandsklagen*, the judgment binds only the parties to the lawsuit. However, if it has been established that a business violated Sec. 1 UKlaG by using unfair commercial terms, the relevant clause in the business standard terms that gave rise to the litigation is deemed to be invalid in relation to consumers bringing individual actions against this business provided they invoke the injunction of the court.

Level II

Assume that the individual claim precedes collective claim.

a. Which are the procedural rules applicable in Your country as regards the effects of a subsequent action for collective redress seeking injunction (and compensation) on the previous individual one?

Here we would like to verify which are the procedural tools available at national level as regards the guarantee of *res judicata principle* as well as the consistency of decisions on the same *petitum*.

b. Is an individual consumer, who already filed a claim as an individual plaintiff in a previous cause of action, obliged to join the collective action?

Note that usually national system provide for means of communication regarding the existence of the collective claim in order to include the interested parties.

a. Must the consumer withdraw from the previous individual action in order to join the collective action?

b. Must the consumer withdraw the claim of invalidity (but not the one on restitution) in order to join the collective action?

c. To what extent does the right to an effective remedy and the principle of effectiveness influence the relationship between individual and collective claims in these circumstances?

d. To what extent does art. 47 of the Charter influence the relationship between individual and collective remedies in this case?

e. Is the individual claim supposed to be suspended until the collective action has reached its conclusion?

f. If no suspension occurs and the individual cause of action ends before the collective one, to what extent can the judge in charge of the collective claim take into account evidence adduced and conclusions made by the judge adjudicating the individual claim?

Level II.a

Mandatory suspension of individual claims.

Assume that you are the judge of City A deciding the claim of Greens. Suppose that the procedural law imposes the suspension of individual disputes until the collective dispute is solved. The suspension is based on a general procedural provision affirming that:

"*Where, in order to give a ruling on the subject-matter of a dispute, it is necessary to decide an issue which itself constitutes the main subject-matter of other proceedings pending before the same or a different civil court, the court shall order the proceedings to be stayed as they currently stand, until such time as the proceedings concerning the preliminary issue are concluded.*"

a. Would you interpret your national procedural law provision as conflicting with art. 7.1 Directive 93/13 in the light of the principle of effectiveness?
b. Would you interpret your national procedural law provision as conflicting with art. 38 CFREU?
c. Would consider it possible to disapply, in light of a combined reading of arts. 7.1 and 38 CFREU, the national provision and allow the individual claim to remain separated?
d. Would you interpret your national procedural law provision as conflicting with art. 47 CFREU? Upon which ground?
e. Would you consider it useful to file a preliminary reference to the CJEU in order to provide guidance regarding the criteria to consistently apply national and EU law?

Level II.b

Mandatory integration of individual claims in collective claims.

Assume that you are the judge of City A deciding the claim of Greens. Suppose that the national procedural law prohibits separation between individual and collective claims related to the same violation. The procedural provisions affirm that:

"Where, in order to give a ruling on the subject-matter of an individual dispute, it is necessary to decide an issue which itself constitutes the main subject-matter of other collective proceedings pending before the same or a different civil court, the court shall order the two actions to be joined."

a. Would you interpret your national procedural law provision prohibiting claim separation as conflicting with art. 7.1 Directive 93/13 in the light of the principle of effectiveness?
b. Would you consider that your national procedural law provision conflicts with art. 38 CFREU?
c. Would consider it possible to disapply, in light of a combined reading of arts. 7.1 and 38 CFREU, the national provision and allow the individual claim to remain separated?
d. Would you consider your national procedural law provision to conflict with art. 47 CFREU? Upon what grounds?
e. When would you deem it useful to file a preliminary reference to the CJEU?
f. Vis-à-vis the situation under Level II.a would you weigh the options between preliminary ruling and disapplication differently?

Following the decision in Sales Sinues, in this case it is possible to test if the judges would use immediately disapplication, or would still prefer to present a preliminary ruling.

Level II.c

Mandatory joinder.

Assuming the same facts as the previous case. Suppose that the legal system of Country A imposes, *as a general rule*, that in case of individual and collective claims on the same facts, individual and collective claims can remain independent. However, *in case of consumer claims*, the cases are joined and the individual claim is to be included into the collective one.

Here, we present an extreme case where the individual claim is clearly complementary to the collective one. The added element regarding the difference between general and consumer claims is to be used to highlight that the use of Charter provision is to be based on a connecting link (if

the situation was the opposite it could not be possible at least in principle to invoke art 47 CFREU to modify the general rule as it could not fall within the scope of application of EU law – see case Sanchez Morcillo II).

a. Would you consider your national procedural law provision to conflict with art. 7.1 Directive 93/13?
b. Would you consider your national procedural law provision to conflict with the right to fair trial as enshrined in art 47 CFREU providing for a different treatment between consumers and non-consumers? Please note the CJEU decision in Sanchez Morcillo I
a. In the affirmative, would you consider it possible, upon a combined reading of art. 7.1 and art 47 CFREU, to disapply the national provision and allow the individual claim to remain separate, also in consumer cases?

Level III
Assume that in Country B, a Supreme Court judgement has declared that the unfair clause included in the standard contract form provided by ABC Bank across Europe is unfair, and thus declares its invalidity. The judgement in Country B has an *erga omnes* effect and affects all the contracts signed by Country B consumers before and after the judgement.
Suppose that You are a Country A judge deciding the invalidity of the same contract terms upon the claim presented by the HELP consumer protection association as operating in Your country.

Here the questions focus on the possibility for judges to include the comparative reasoning in their analysis. On the one hand we can point to the way in which the CJEU addresses the similarities among cases (see para. 57 in Kusionova, where the CJEU addresses if the case is similar to Aziz, Banco Espanol), on the other we can point to the way in which the national courts already use foreign caselaw – have them think if they have never cited a foreign decision, if the Cassation court have never cited a foreign decision, etc.

a. In the case that the judgment declaring the unfairness of the clause has been officially recognised in the Country A, can you base your finding on a foreign judgment declaring the clause invalid?

This is a kind of rethorical as it is very unlikely that a judge would say yes. However, it is used so as to trigger the discussion regarding the use of foreign judgements

b. In the case that the judgement declaring the unfairness of the clause has not been officially recognised in Country A, based on art 38 and 47 CFREU would you justify the fact that you based on the Country B decision your evaluation of invalidity of a clause? Please note the Preliminary ruling in GIC case

See GIC preliminary ruling :
"Is Article 47 of the Charter of Fundamental Rights of the European Union 2 ('the Charter'), in conjunction with Article 38 thereof, together with Article 6(1) and Article 7(1) of Council Directive 93/13/EEC on unfair terms in consumer contracts, to be interpreted as meaning that, where a court in a dispute on a consumer contract is assessing whether a contract term is unacceptable and a court of **another Member State has already manifestly held, in comparable factual circumstances, that a contract term with a similar or identical content is unacceptable,** the consumer has the right that the court, for the purposes of the assessment of whether the contract term at issue is unacceptable, takes into account that judgment of the court

of the other Member State?
Where the answer to the first question is in the affirmative, does the court infringe the fundamental right of the consumer under Article 47 of the Charter in conjunction with Article 38 thereof where it does not take into account the manifest judgment of the court of the other Member State on the unacceptability of a contract term with a similar or identical content?"

c. In the case that the judgement declaring the unfairness of the clause has not been officially recognised in Country A, can you use the judgment to justify your evaluation of unfairness of the clause through comparative reasoning?

It would be interesting to ask whether they deem useful (or not) to use foreign judgements in case there is a stable jurisprudence of the national Supreme Court they want to modify.

Module 5 - Migration and asylum law

Hypothetical n. 1

Case Study on Asylum Claims based on Homosexuality and Religion
Consider the following issues when giving your legal reasoning
CASE of REZA
a. What is the ground of persecution?

Article 10(1)(d) Recast Qualification Directive contains a list with examples of particular social groups, among which also a group based on a common characteristic of sexual orientation. This is a new provisions compared to the 2004/83.

b. Is criminal punishment an act of persecution? Does criminal punishment need to be enforced in practice to be an act of persecution within the meaning of the Qualification Directive?

In *X, Y, Z (*C-199/12, C-200/12, C-201/12, judgment of 2013), the CJEU considered criminalisation of homosexual acts per se does not constitute an act of persecution, but they need to be enforced in practice. However it was limited by the preliminary questions which asked this question within the ambit of Article 9 (2) (c) QD ('prosecution or punishment, which is disproportionate or discriminatory'). However, one has to look also at Article 9(2)(b) Qualification Directive: 'legal, administrative, police and/or judicial measure which are in themselves discriminatory, or which are implemented in a discriminatory manner'. The CJEU was limited to give an interpretation of the requirements of acts of persecution under Article 9(2)(c) QD, but it did not rule out the possibility of examining circumstances of criminalisation of homosexual acts under Article 9(2)(b) QD.
Article 9 (2) (b) does not require enforcement, but addresses the existence of such measures.
The issue with the 'enforcement of criminal punishment' is that in many third countries, enforcement is not done via the legal routes, but the law enforcement authorities use the criminal law to extort, blackmail, detain and torture, without recourse of due process of law which would require a trial, conviction and sentencing, in accordance with the national law of the country of origin.
In choosing whether enforcement is a necessary criteria for establishing an 'act of persecution', please consider the jurisprudence of the ECtHR:

- Dudgeon v UK, Norris v Ireland and Modinos v Cyprus : 'mere existence of such laws to be an infringement of Article 8'. In Dudgeon, the European Court of Human Rights recognised the "fear, suffering and psychological distress directly caused by the very existence of the laws in question, including fear of harassment and blackmail", and in Norris the Strasbourg Court further noted:

"A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to 'run the risk of being directly affected' by the legislation in question. This conclusion is further supported by … the witnesses' evidence, found, inter alia, that 'One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease."
The *UN Committee Against Torture*, in the 2011 case of *Mondal v Sweden*, also found that the existence of such laws violates Article 3 of the UN Convention Against Torture. The Committee highlighted the fact that even though the Bangladeshi state argued that they did not actively prosecute gay men, the criminal law existed with the attached sanction of life imprisonment. The

Committee found that "not actively prosecuting homosexuals does not rule out that such prosecution can occur.' This finding led them directly to find that the individual would be at risk of torture on return, for amongst other things there existed due to the fact of mere criminalisation a "risk of persecution on the basis of his homosexuality". The decision of the UNCAT could be taken into consideration as it was based also on the Refugee Convention.
For a similar judgment, see the judgment by the Italian Supreme Court which found that (TT v Minister of the Interior) '[t]he penalty for homosexual acts, as provided by Article 319 of the Senegalese Penal Code, constitutes per se a general condition of deprivation of the fundamental right to live one's sexual and affective life freely'. Because this deprivation of fundamental rights ran counter to the Italian Constitution, the European Convention and the EU Charter of Fundamental Rights, it provided an 'objective situation of persecution'.

c. How do you assess the extent of the risk of persecution? (see Case note 21 and 22 of the ACTIONES Module)

An individual cannot be compelled to conceal their sexual identity(X, Y, Z, paras. 62 – 78).
The Court held "to conceal that sexual orientation is incompatible with recognition of a characteristic so fundamental to a person's identity … an applicant for asylum cannot be expected to hide his homosexuality in his country of origin in order to avoid persecution" (paras. 70 and 72). Article 8 of the ECHR and Article 7 of the EU Charter protect the right to the expression of sexual identity in the private and public sphere, subject to a State's justification within a margin of appreciation.

d. What fact finding exercise is the national court required to perform in this case?

According to Article 4 (1) of the Recast Qualification Directive, the public authorities, including national courts, have a duty to assess all the relevant facts of the application. According to Article 4(3)(a) the national court has to assess the existence in Iran of legislation criminalising homosexual acts, including its laws and regulations and the manner in which they are applied. COI can be solicited. The CJEU requires in X, Y, Z (paras. 58-60) that: 'In undertaking that assessment it is, in particular, for those authorities to determine whether, in the applicant's country of origin, the term of imprisonment provided for by such legislation is applied in practice. It is in the light of that information that the national authorities must decide whether it must be held that in fact the applicant has a well-founded fear of being persecuted on return to his country of origin within the meaning of Article 2(c) of the Directive, read together with Article 9(3) thereof.' The UNHCR International Protection Guidelines on Sexual Orientation claims, the UK's Human Dignity Trust.

e. What questions do you raise during the credibility assessment?

Credibility assessment in sexual orientation cases impacts on Articles 3 (right to integrity) and 7 (right to respect to private and family life) of the EU Charter of Fundamental Rights). *A, B and C* (case note 21 and 22 is follow up judgment) again a preliminary reference addressed by the Dutch Council of State (as the previous preliminary reference case of X, Y and Z) provides guidance on prohibited steps in credibility assessment in asylum claims based on sexual identity.
In *A, B and C* the CJEU held that there are certain question which cannot of themselves lead to dismissing the credibility of the asylum seekers in sexual orientation cases:

- The application cannot be rejected based solely on the fact that an applicant is unaware of

certain homosexual organisations or notions of how gay people behave, should not be part of the assessment. Assessment should be based on the individual and personal circumstances [paras 60-63 A, B, C];

- delay in not declaring sexual identity at the outset cannot be found to be an argument against the applicant's credibility, as sexuality is an intimate aspect of sexual identity [paras 67 - 71 A, B, C]. To rely on delay would violate both Article 4 of the Recast Qualification Directive and Article 13 of the Recast Asylum Procedure Directive, due to the vulnerability of gay applicants.

f. What is the black list of questions (clear violations of Charter) when carrying out the credibility assessment?

CJEU in *A, B, and C*: detailed questions regarding sex acts would violate Article 7 CFR; authorities cannot accept videos of sex acts, the performance of sex acts and of medical 'tests' regarding sexual orientation. Aside from the questionable probative value of such evidence, accepting it would violate the applicant's human dignity under Article 1 CFR. Moreover, it would encourage others to submit similar evidence leading to a *de facto* requirement of such evidence

CASE of MATHY

a. What is the ground of persecution?

Religion
Note that the definition of grounds of persecution corresponds to Art 10 CFR and Art 9 ECHR and must be interpreted in light of Art 9 ECHR. (see para 56 judgment in *Y and Z*)
Significant overlap between ground and act of persecution (art 9 and art 10). Freedom of religion as a right contained in Article 10 CFR forms the basis of both the grounds of persecution (ie those rights protected) and of the act of persecution (violation of religious freedom = an act of persecution).
Thus the definition of freedom of religion for the purposes of *grounds* of persecution (all forms of worship, public, private individual etc) informs the courts interpretation of possible *acts* of persecution (ie restrictions on all above forms of worship may constitute a violation of rights and hence and act of persecution) (see judgment para 63)

b. Do you consider the Ahmadiyya community as professing a 'religion'? consider the definition of Recast QD 10(1)(b))

See Article 10(b) Recast Qualification Directive, and in particular the Opinion of AG Bot in *Y and Z*, where two aspects of religious freedom are described:
'One the one hand, freedom of religion is a matter of private conscience, that is to say it concerns the freedom to have a religion, to have none, or to change faith. The concept of religion is interpreted in a broad sense, since, as is shown in Article 10(1)(b) of the Directive, the directive covers theistic, non-theistic and atheistic beliefs, and not only the traditional religions such as Catholicism or Islam, but also more recent or minority religions
This component of the freedom of religion enjoys absolute protection.
On the other hand, freedom of religion includes the freedom to manifest one's faith. This can take many different forms, since faith can be practiced alone or in common in private or in public, by worship, teaching, practice or the performance of rituals.'

Religion entails not only a belief, but also identity groups related by race or nationality. It mixes national and cultural traditions, may involve radical, conservative or reformist readings and embraces a wide range of beliefs, rituals and customs as important to some religions as they are insignificant to others.' (Paras 34-42)

c. When does interference with freedom of religion that is guaranteed by Article 10(1) of the Charter may constitute an 'act of persecution' within the meaning of Article 9 Recast QD?

A separate question to the *grounds* of persecution but there is a clear overlap: 'in the context of applications for asylum based on religion it is easy to see that the material and mental aspects of persecution referred to in Articles 9 and 10 of the Directive respectively overlap.' *Y and Z*, Opinion of AG Bot, para 48

See Acts of Persecution in the Qualification Directive - Art 9(1) and the application of such provision by CJEU in Y and Z :

Restriction on religious freedom must reach a certain threshold of severity in order to constitute persecution

'Interference with the right to religious freedom may be so serious as to be treated in the same way as the cases referred to in Article 15(2) of the ECHR, to which Article 9(1) of the Directive refers, by way of guidance, for the purpose of determining which acts must in particular be regarded as constituting persecution'

Not all interferences amount to persecution

'Acts amounting to limitations on the exercise of the basic right to freedom of religion within the meaning of Article 10(1) CFR which are provided for by law, without any violation of that right arising, are thus automatically excluded as they are covered by Article 52(1) of the Charter

Nor can acts which undoubtedly infringe the right conferred by Article 10(1) of the Charter but whose gravity is not equivalent to that of an infringement of the basic human rights from which no derogation can be made by virtue of Article 15(2) of the ECHR be regarded as constituting persecution…' (paras 57-61)

Severity of acts defined by consequences and repression rather than the nature of the restrictions on religious freedom

But look not to the different acts that are being restricted but rather the consequences faced by the applicant.

'Acts which, on account of their intrinsic severity as well as the severity of their consequences for the person concerned, may be regarded as constituting persecution must be identified, not on the basis of the particular aspect of religious freedom that is being interfered with but on the basis of the nature of the repression inflicted on the individual and its consequences' (para 65)

Accordingly a violation of the right to freedom of religion may constitute persecution within the meaning of Article 9(1)(a) of the Directive, where an applicant for asylum, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhumane or degrading treatment…' (para 67)

Application to case

We are not given details about precise sanctions applied and if they are applied in practice. From *Y and Z* though it appears there are severe criminal sanctions up to and including the death penalty for certain acts (ex proselytizing)

Furthermore, we are given details that the Government appears to refrain from preventing private actors from inflicting violence on the community

d. To what extent can an asylum seeker be expected to 'conceal' or 'restrain' their religious practices in their country of origin so as to avoid persecution?

‘The assessment of the extent of the risk, which must, in all cases, be carried out with vigilance and care will be based solely on a specific evaluation of the facts and circumstances, in accordance with the rules laid down in Article 4 of the Directive
None of those rules states that, in assessing the extent of the risk of actual acts of persecution in particular situation, it is necessary to take account of the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status’ (paras 77-79)

e. How would you deal with the conflicting evidence regarding Mahi’s religious activities in Pakistan?

Would the applicant have a right to challenge the contradictory statements of the authorities?
(i) Article 4 Qualification Directive:
‘…*In cooperation* with the applicant, it is the duty of the Member State to assess the relevant elements of the application’ (emphasis added)
Case C-277/11 *MM*
No right to view and comment on a draft negative decision (ie a legal appraisal rejecting asylum)
‘However, with regard to the scope that should be accorded to the requirement to cooperate with the applicant which Article 49(1)…imposes on the Member State concerned, the Court cannot accept the proposition…that the rule requires the national authority responsible for examining an application for subsidiary protection to supply the applicant, before adoption of a negative decision…with the elements on which it intends to base its decision and to seek the applicant’s observations in that regard’ (para 60)
But is there an obligation to present any *factual elements* to the applicant necessary to establish a claim?
‘As is clear from its title, Article 4 of the Directive relates to the assessment of facts and circumstances…’
In actual fact that ‘assessment takes place in two separate stages. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the applicant, while the second stage relates to the legal appraisal of that evidence…
Under Article 4(1)…although it is generally for the applicant to submit all elements needed to substantiate the application, the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application.
This requirement that the Member State cooperate therefore means, in practical terms, that if for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents
It is thus clear that Article 4(1) of Directive 2004/38 relates only to the first stage…concerning the determination of the facts and circumstances qua evidence which may substantiate the asylum application’ (paras 63-69)
Does this imply that at the first - fact finding - stage the national authority is obliged to allow the applicant to comment on/contest evidence? (**would you consider making a preliminary reference to clarify this aspect of *MM*?**)
(ii) Art 4(5) presumptions.
Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant’s statement are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:

a) the applicant has made a genuine effort to substantiate the application;
b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;
c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
e) the general credibility of the applicant has been established
Note: cumulative conditions. In particular has the final point been met?

f. How would you evaluate the risk of Mahi facing persecution if returned?

Individual assessment based on subjective beliefs and practices of Mahi. Does the fact that he only appears to engage in limited and non-public activities impact this assessment?
Case C-71/11 *Y and Z*
'the subjective circumstances that the observance of a certain religious practice in public, which is subject to the restrictions at issues is of particular importance to the person concerned in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned' (para 70)
But here the converse situation exists; he does not appear to engage in public activities. Does this mean reasoning *a contrario* that he will not face a risk of persecution and hence is not entitled to refugee status? **Would you consider making a preliminary reference?**

g. What impact would the fact that Mahi's religious practices appeared to have changed since arriving in Germany have on the outcome?

'Art 4(3). The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
(a) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country'
But also see Art 5 (2)
'A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.'

Variation of facts Level II – procedural safeguards applies for both Reza and Mathi
Facts: Mathi and Reza arrived in Italy in September 2015 but did not claim asylum on arrival, allegedly due to ignorance of the asylum system. Their arrest in Germany in October 2015, while visiting a friend, and their transfer to the Italian authorities led them to be detained and be subject of administrative removal orders. While in detention, they applied for asylum, on the basis of advice as to the process, and appealed against the removal order.

Their asylum applications were dealt with under the fast-track procedure. The Italian authorities refused the applications due to a lack of clarity in witness statement, and the fact that the supporting documentation was un-translated. The first instance court upheld the decision of administration.
Mathi and Reza complain that their removal would expose them to a risk of treatment contrary to Article 3 ECHR and 4 CFR (inhuman or degrading treatment), and that the application of the fast-track procedure to their asylum claim was a violation of Article 47 CFR and Article 13 ECHR (right to an effective remedy).
How would you decide on Mathi complaint? Mention the precise steps you will follow in your legal reasoning

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Hypothetical n. 2

Case Study on Judicial Control of Detention Order and Transfer Decision under the Dublin III Regulation
The Interplay between EU law, ECHR and National Law[3]

How would you decide this case?
Questions for facilitating a discussion as regards eventual judicial reasoning(s) in the case of this Dublin III transfer decision:

1. An eventually successful claim under the second paragraph of Article 3(2) of the Dublin III Regulation can only relate to systemic flaws as regards a risk of inhuman and degrading treatment within the meaning of Article 4 of the Charter, which is an absolute right, while the claim in the given case relates to a right to judicial control of lawfulness of administrative detention order (Article 5(4) of the ECHR and Article 9(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation), which is not an absolute right. Furthermore, the defendant argues that Mr. X did not provide any substantial proof that there exists systemic flaws in the legal system of judicial control of detention in the Member State "C", so that plaintiff's argument which is based on a second paragraph of Article 3(2) should be rejected as manifestly ill-founded.
→ Which requirement would you apply for limiting/refusing Dublin transfers: CJEU – 'systemic deficiencies' in the asylum procedure and receptions systems (*N.S. and others*, *Puid* and *Abdullahi*); or ECtHR – individual violations of Article 3 ECHR (*Soering v UK* and *Tarakhel v Switzerland*)? See possible solutions and information in Case note 1 of the ACTIONES Module and ZAT case note – limitations to Dublin transfer based on relative human rights (case note 32).

Article 3(2) Dublin III: systemic flaws relate to *a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter* and not to a lack of judicial control of the lawfulness of detention measures (in the meaning of Article 5(4) ECHR). However, the ECtHR in Tarakhel requires an individualised examination of the situation of the individual concerned in the state of destination.

2. Is it possible in your country that a plaintiff could successfully invoke the sovereignty clause under Article 17(1) of the Dublin III Regulation in the court procedure in order to prevent a transfer and to secure that another violation of basic human right would occur to the plaintiff in Member State C due to a lack of access to judicial control of detention in Member State C?

[3] Prepared by Judge Boštjan Zalar and Madalina Moraru.

The clause of sovereignty provided in Article 17(1) Dublin III is a faculty not an obligation for Member States. Failures in access to judicial remedies can be an indication of systemic failures together with the reception conditions, so they can be raised together with the degrading detention conditions which could all together reach the level of systemic deficiencies entailing a violation of Article 4 and require MS A to not transfer under Article 3(2) Dublin III.

3. Which definition of a 'family' would be decisive in a legal dispute before your court: the definition given in the Dublin III Regulation or a broader definition under the case-law of the ECtHR? Would you consider addressing a preliminary reference to the CJEU to clarify the notion of 'family member' under the Dublin III Regulation? *See the Case note on ZAT and others delivered by the UK Upper Tribunal.*

The definition of family according to Dublin III or Dublin IV does not encompass cousins. But further reflexions can be made in the light of the ECHR (Article 8) or possibly the best interest of the Child (Article 24(2) CFR) if considered the reverse dependency (Mr. Y needing Mr. X). Under the sovereignty clause of Article 17 Dublin III Regulation, MS A may decide to accept responsibility for processing the application of Mr X. Article 7 EU Charter and 8 ECHr may require MS s to accept responsibility, given the limited definition of family under the Dublin Regulation and the limited notio of 'dependency' under Article 16. Furthermore, the CJEU concluded in *K.* (C-245/11) that Article 7 EU Charter and Article 8 ECHR entail a qualified obligation to apply the sovereignty clause in order to keep together the applicant and the daugther in law who was dependent on her, although her husband was also present, in cases of dependency situatio escaping Article 16.

4. Would the principle of the best interests of the child be applicable in your country in this case? Why? *See the case notes discussed in under section on Article 24 CFR in the ACTIONES Module*

5. How would your court reconcile any possible difference as regards an individual's, such as Mr X, right to (automatic) suspensive effect of a legal remedy (appeal) under the EU Charter, Dublin III Regulation and national legislation? See section on Article 47 CFR in the ACTIONES Module

Article 27(3)- (4) provides for a three different models of possible appeals procedurs to be incorporated into national law: automatic suspensive effect; ask for suspensive effect and stay on the territory until a court of tribunal has decided whether to suspens the implementation of the transfer or has decided on the suspensive effect. No automatic suspensive effect provided by the Dublin regulation (Article 27(3)) but yet Article 47 CFR read in conjunction with Article 19(2) CFR + CJEU *Abdida*; *M.S.S.; I.M.*

Consider whether you would have formulated differently the complaint of Mr X?

B. FIRST INSTANCE COURT PROCEEDINGS AS REGARDS JUDICIAL CONTROL OF DETENTION ORDER

What could be possible directions of court's reasoning as regards all six basic arguments of the plaintiff and of the defendant (see also the list of legal sources below) in the case of judicial control of the detention order?

Questions for facilitating a discussion as regards eventual judicial reasoning(s) in the case of judicial control of the transfer decision:

1. Can detention of asylum seekers subject to Dublin procedures be taken before the official registration of asylum application?

Detention under Dublin procedure cannot be resorted to before official registration of the applicant (Article 20(2) of Dublin III) – report to be made by authorities

2. Is the lawfulness of detention dependent on whether the interview carried out after the registration of the asylum application and detention of the asylum seekers proves that detention was necessary?

Interview is required pursuant to Article 5(2) Dublin III unless the person has previously absconded (not the case here)

3. Is there a legitimate ground for the detention of Mr X?

No legitimate ground. Risk of absconding should be defined by law (objective criteria) – see case note 6 of ACTIONES Module on asylum and immigration

4. Do you agree with the Supreme Court of Member State A on the definition of the risk of absconding?

Administrative practice is insufficient.

5. Do you find the defendant's justification for refusing alternative measures sufficient to justify detention?

An individual assessment should be conducted to establish whether the general conclusions of the statistics provided by the administration apply to the case of X (there is no reason of absconding, after he seems to have found a relative in the present MS) – Article 28(2) Dublin III Regulation. Plus, placement in asylum home was actually the only place admitted by law. The Centre of Aliens was not part of the options, as this should be done under a different legal regime – Return Directive (so proportionality and balanced assessment do not apply here).

6. What is the legal remedy in case you find detention unlawful?

Immediate release (Article 9(3) RD)

Level II – risk of absconding is defined within the national legislation implementing Dublin III Regulation, however it is so broadly defined that almost any illegal entry or crossing of border qualifies as risk of absconding. In such circumstances, would you consider carrying out an individual assessment checking if there is a concrete risk of absconding? (see case law on the implementation of the risk of absconding in ACTIONES Module under sub-section on Article 6 CFR.

Hypothetical n. 3

National Security Concerns limitation to right to good administration, right to be heard, right to fair trial and effective remedy

There is a possibility to lodge an appeal before the Supreme Court, which, so far, in these cases, has usually upheld the decision of the IS. What would be the main legal arguments in your appeal before the Supreme Court.
In particular consider:

→ which EU legal provisions are applicable;

→ is the Charter applicable to the case?

→ Do you know of any European and national case law establishing the procedural safeguards applicable in this case? (see Case notes Case notes 43, 44, 45, 46 and 38 of ACTIONES Module?)

Consider the following issues:

1. M.N argues that has not been involved in terrorist activities, was never condemned for actions collateral to terrorism in Romania. He added that he was living with his spouse and had made several inquiries for obtaining the right of residence, one of them being still a pending case.

Module 6 - Non-Discrimination

Hypothetical n. 1 (Age – Level I)

You are the judge on the local court. Please answer the following questions:

- Based on the facts before you (undisputed by the parties) have Bjorn and Hans been discriminated?
- What is the relevance of the EU non-discrimination framework for this case?
- What specific case law could be used to support your decision in this case?
- Discuss the concept of reasonable justification in light of recent CJEU case law
- Discuss the horizontal application of the general principle of non-discrimination on grounds of age

Guidelines for discussion/solving the case:

- Discuss the reasoning of the CJEU in *Mangold*: when is the discriminatory effect unlawful and when is it not?
- Discuss what is today's role of article 21 of the Charter for the general principal of non-discrimination on the grounds of age as it was initially developed by the CJEU.
- **Case sheet 1 and 2** of the handbook **-** (Italy) Trib. Milano, 7 January and 22 July 2005; Court of Appeal Firenze, 27 March 2006/ (Italy) Corte d'Appello di Milano – sezione Lavoro e Previdenza RG 1044/13 (Abercrombie case) - served as a basis to draft Hypothetical Case 1. Draw parallels.

Hypothetical n. 2 (People with Disabilities – reasonable accommodation - Level I)

You are the judge on the local court. Please answer the following questions:

- Based on the facts before you (undisputed by the parties) has Pedro been discriminated against?
- What is the relevance of the EU non-discrimination framework for this case?
- What specific case law could be used to support your decision in this case?
- Discuss the concept of "reasonable accommodation" in the context of the relevant EU non-discrimination framework and the United Nations Convention on the Rights of People with Disabilities.

Guidelines for discussion/solving the case:

- Refer to Article 2 of UNCRPD (definition of discrimination on the basis of disability and concept of reasonable accommodation);
- Refer to Article 13(1) of the UNCRPD which requires States Parties to ensure effective access to justice for persons with disabilities;
- Discuss the role of Article 21 and 26 of the Charter, if any;
- **Case sheet 9** of the handbook – (Slovenia) Constitutional Court (Ustavno sodišče RS), U-I-146/07, 13.11.2008 - served as a basis to draft Hypothetical Case 2. Draw parallels.

Hypothetical n. 3 (racist/xenophobic hate crime - Level I)

You are the judge on the local court. Please answer the following questions:

- Has there been a hate crime? Explain what are the bias indicators?
- Is there sufficient evidence to prove the bias motivation?
- What case law (ECJ, ECHR) could be used to support your decision in this case?

Guidelines for discussion/solving the case:

- Refer to Article 4 of **Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Discuss how it has been reflected into criminal codes.**
- Discuss whether citing Article 21 of the Charter can play a role in increasing the protection of hate crime victims irrespectively of the scope of application of the Charter.
- Use Balazs v. Hungary (ECtHR, 2015) to discuss the following issues:
  - mixed motives (lucrative – robbery - and bias);
  - mandatory use of bias indicators to unmask bias motivation;
- Use Skorjanec v. Croatia (ECtHR, 2017) to discuss the following issues:
  - victims by association (who themselves do not possess the protected characteristics of the targeted group) are also protected under the hate crime provisions;

On whether there was a hate crime:

- On bias indicators (murder):
  - Differences btw. attacker and the victim: Simone is black and a foreigner, attacker presumably not;
  - Speech, gestures before, during and after the attack: monkey grunts – commonly used by racists to express perceived animal-like qualities of people of African descent; explicit racial abuse (*nigger*, *nigger-lover*); *Mania for Manians* – while not explicitly racist statement, it expresses exclusion of others, not perceived as Manians, and thus expresses perceived superiority of the speaker; posting on Facebook: in addition to use of derogatory language, expresses pride over the act and willingness to use it to mobilize followers;
  - Type of violence employed: spitting is a an action intended to diminish the target's dignity, expresses perceived superiority
- Bias indicators (assault):
  - Type of violence – brutal and unprovoked;
  - Random selection of the victim – as a representative of the whole group of Roma;
  - Statements – Facebook message;
  - Pattern in actions of perpetrators – same group on the same day attacking targets from different groups – racist motivation connects the two attacks;
- Is there sufficient evidence to prove the bias motivation?
  - Discuss the importance of indirect evidence for proving bias motivation. Obtaining direct admission of bias motivation can be impossible, even when perpetrator admits commission of the base offence; need to assemble, present and assess the totality of available evidence. Circumstantial and other indirect evidence will be crucial.

Hypothetical n. 4 (Sexual orientation – Level II)

You are the judge on the local court. Please answer the following questions:

- Based on the facts before you has Jacek been discriminated on the grounds of sexual orientation?
- What is the relevance of the claim by the hospital that emergency ward visits' are limited to family?
- What specific case law could be used to support your decision in this case?
- What is the relevance of the EU anti-discrimination framework for this case?

Guidelines for discussion/solving the case:

- Discuss the recognition of marital or family status in light of CJEU's *Maruko* and *Romer*.
- Sexual orientation is now recognized in EU law as a ground of discrimination. Refer to Article 19 TFEU, Race Equality Directive, Employment Directive. Discuss the scope of these provisions to assess whether it is a discriminatory practice to refuse Jacek's entry.
- Discuss whether Article 21 can play a role in expanding the scope of these provisions.

On possible hate speech by the nurse *refer to* Vejdeland and Others v. Sweden: *inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner . . . In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour*" *(see, inter alia*, *Smith and Grady v. the United Kingdom"* (para 55).

Hypothetical n. 5 (anti-Semitic hate crime - Level II)

You are the judge on the local court. Please answer the following questions:

- Has there been a hate crime – crime motivated by anti-Semitic bias? Which incidents can be considered as hate crimes? Explain what are the bias indicators in each of them?
- Assess and discuss the arguments put forward by the accused and the defense that this was not an anti-Semitic attack.
- Is there sufficient evidence to prove the bias motivation?
- What case law (ECJ, ECHR) could be used to support your decision in this case?

Guidelines for discussion/solving the case:

- Refer to Article 4 of **Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Discuss how it has been reflected into criminal codes.**

- Discuss whether citing Article 21 of the Charter can play a role in increasing the protection of hate crime victims irrespectively of the scope of application of the Charter.
- Bias indicators:
  - Type of target: Jewish Cultural Center, its publicly known representative and his property – clear association with Jews (despite Daniel not being Jewish);

- Speech, gestures, graffiti:
  - Swastika on the stones;
  - "88" is a numerical expression of the eighth letters in alphabet – "H"; the message thus means "HH" for "Heil Hitler";
  - A's speech (at the demo and in the statement to police) implying responsibility of all Jews for actions of Israel;
- Victim perception: Daniel perceives the arson attack as anti-semitic;
- Pattern of attacks: several anti-Semitic attacks preceding the arson, in the same city, targeting the same person/organization;
- Timing of the arson attack: during the time of July-August 2014 war between Israel and Hamas in the Gaza Strip;
- Background of the suspect:
  - connection with a group (football hooligans) potentially involved in bias violence;
  - affinity with racist, supremacist ideology, documented by findings in A's home;
  - picture of A giving a Hitler salute;
- Explore the criminality of hate speech used during the demonstration – incitement?;
- Discuss the defence of the suspect: Middle-Eastern politics has nothing to do with ethno-religious prejudice (discuss the concept of the "new anti-Semitism" in this context); fan of military history; swastika as a symbol with meanings other than Nazi; pointing towards something instead of Hitler salute;
- Victims by association:
  - Explore the ECtHR judgment in Skorjanec v. Croatia (2017)
  - Discuss (im)practicality or even (im)possibility of proving in court someone's "Jewishness", if this were deemed as required by the law (what criteria should be used for that?)
- Discuss the importance of indirect evidence for proving bias motivation. Obtaining direct admission of bias motivation can be impossible, even when perpetrator admits commission of the base offence; need to assemble, present and assess the totality of available evidence. Circumstantial and other indirect evidence will be crucial.

Hypothetical n. 6 (People with disabilities – Definition – Level II)

You are the judge on the local court. Please answer the following questions:

- Based on the facts before you (undisputed by the parties), has Soren been discriminated on the grounds of his obesity?
- What specific case law could be used to support your decision in this case?
- What is the relevance of the EU anti-discrimination framework for this case?
- What is the relevance of the claim by the defendant (the School) that Soren caused his condition himself, therefore it cannot constitute disability?
- The School claims that they accommodated Soren's special needs, although it was very costly and they were under no obligation to do that. Discuss.

The Directives against discrimination in employment and occupation have been fully transposed into the national law. National law thus bans the discrimination on the basis of disability, but never mentions obesity in the discrimination context.

Guidelines for discussion/solving the case:

- Discuss whether Article 6 TEU and/or Directive 2000/78/EC could serve as sources for obesity to be found as a disability and a discriminatory ground;
- Discuss CJEU's reasoning in *Chacón Navas* when it declined to extend the list of protected grounds to 'sickness';
- Refer to CJEU's definition of disability in *HK Danmark* - as 'a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers';
- Discuss CJEU's *Åkerberg Fransson:* can obesity discrimination fall within the scope of EU law?
- Discuss whether the Charter is applicable. See AG Jääskinen's Opinion:
  - The general non-discrimination clause of Article 10 TFEU and the legal basis of Article 19 TFEU do not refer to obesity;
  - The Equality Directives do not refer to obesity either, and the fact that this case concerns an area falling within the Union's competence (i.e. employment policy) 'is an insufficient foundation for concluding that a Member State (…) is "implementing" EU law.'

- **Case sheet 8** of the handbook - C-354/13 Kaltoft V Municipality of Billund, 16 December, 2014 - served as a basis to draft Hypothetical Case 6. Draw parallels

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Hypothetical n. 7 (Hate crime – People with Disabilities - Level III)

You are the judge on the local court. Please answer the following questions:

- Has there been a hate crime – crime motivated by bias against disabled people? Explain what are the bias indicators?
- The prosecutor invoked the provision which aggravates any crime in which the victims are "vulnerable" due to disability – as opposed to a hate crime provision (which also includes disability); Do you agree with this approach? Respond to this qualification.
- Is there sufficient evidence to prove the bias motivation? If not, what pieces of information are missing and what other investigative steps should have been ordered?
- What case law could be used to support your decision in this case?
- The case attracted lots of media attention and you were asked to prepare a public statement on behalf of your court – what would be the main messages you would like to communicate to public?

Guidelines for discussion:

- Refer to Article 4 of **Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Discuss how it has been reflected into criminal codes.**
- Discuss whether citing Article 21 of the Charter can play a role in increasing the protection of hate crime victims irrespectively of the scope of application of the Charter.
- Bias indicators:
  - Institutional setting: which is a characteristic feature of disability hate crime; possible pattern of ill-treatment – indicated by fear of others to speak out and by the interview of an ex-employee;
  - Differences btw. suspect and the victim;

- Speech, gestures, graffiti: Admission of the suspect after the act – use of derogatory language dehumanizing people with autism;
- Nature of attack: Use of brutal violence with disrespect for the victim's suffering (dehumanization of the victim);

- Discuss the "discriminatory selection model" (as opposed to "hostility model") of construing the bias motivation, whereby mere selection of the target **due to** disability is sufficient manifestation of bias (no proof of hatred or enmity towards the targeted group is needed);
- Discuss the notion of "vulnerability" of people with disabilities:
  - isn't such notion in itself an expression of prejudice (compare the UK CPS Guidance on prosecuting Disability Hate Crime);
  - discuss the "social model" (as opposed to "medical model") of disability, enshrined in the CRPD and its practical consequences (disability is the barriers faced by people with impairment, not the impairment itself);
  - preference for the solution which considers all people with disabilities as vulnerable fails to take account of specific motivation of the perpetrator;
- Discuss the extent to which the notion of "disability hate crime" is prevalent and understood in participants' jurisdiction's discourse; is there a need to raise awareness of this issue – e.g. through giving visibility to a judgment in a disability hate crime case?
- Discuss the implications of the Đorđević v. Croatia (ECtHR, 2012) case.

Hypothetical n. 8 (Gender – level III)

You are the judge on the local court. Please answer the following questions:

- Based on the facts before you has Marie been discriminated on the grounds of her gender?
- What specific EU level case law could be used to support your decision in this case?
- What is the relevance of the EU anti-discrimination framework for this case?
- In case you decided there had been discrimination could you order the employer to attend a course on "Non-discrimination in the workplace"?

Guidelines for discussion:

- Discuss whether Article 21 of the Charter adds to the protection under the Equality Directives.
- Discuss *Dekker* vs *Stichting Vormingscentrum voor Jong Volwassenen*
- **Case law on case sheet 3** of the handbook - (Poland) District Court in Wrocław, Śródmieście, X P 20/16, 3rd August 2016 - served as a basis to draft Hypothetical Case 8. Draw parallels.

Hypothetical n. 9 (Hate speech)

You are the judge on the local court. Please answer the following questions:

- Based on the facts has there been an intentional racially motivated offence designed to incite hatred or discrimination against all black people?
- What is the relevance of the EU anti-discrimination framework for this case?

- What specific EU level case law could be used to support your decision in this case?

Guidelines for discussion/solving the case:

- *Discuss freedom of expression and hate speech in the context of this case.*
- *Do Equality bodies in your MS have locus standi ?*
- *In case the decision had not been overturned was the fine effective, proportionate and dissuasive ?*

Module 7 - Criminal law

The idea is that the hypotheticals below should serve as a basis for reflection and discussion of some of the issues that may arise when fundamental rights are applicable in criminal proceedings partly governed by EU law. You are especially encouraged to study the EU Charter of Fundamental Rights and the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).
Assume that you are a judge in your own country (YC) applying national procedural and criminal law as well as EU law on the scenarios below. Consider especially the following questions:
- Is the Charter of Fundamental Rights applicable?
- Can any of the rights in the Charter be claimed?
- Can any of the rights in the European Convention on Human Rights or in the national constitution be claimed?
- How would you handle a situation where several fundamental rights instruments are applicable?
- How do you think a court in your country would act in this situation?
- Should a request for a preliminary ruling be sent to the CJEU?

Hypothetical n. 1 (Mutual trust and recognition)

The Charter is applicable since the area is governed by secondary EU Law, i.e. the Framework Decision on EAW (the Charter Art 51(1)). The question is if the court in YC should refuse execution in order to protect the right to family life of X, as well as his family. The Framework Decision allows the executing Member States to refuse execution if they take upon themselves to make sure that a sentence in served in their own country, FDEAW Art 4.7 (see the explicit exceptions and guarantees that the law provides in Articles 3 (mandatory non-execution), 4 (optional non-execution), 4a (in absentia) and 5 (guarantees) of the FDEAW). The YC court has, therefore, from the perspective of EU law, discretion to refuse. It is, however, not certain that the national law implementing the Framework Decision allow for this discretion to be exercised. YC remains bound by the Charter when it exercises its discretion (cf for example Joined Cases C-411/10 & C-493/10 *NS & ME* paras 64-69). Thus, when deciding on whether or not to execute the EAW it should consider the right to family life according to Art 7 of the Charter.
The ECHR is also applicable (both as general principles of EU law, TEU Art 6, and in itself since YC is a party to the Convention). Since YC has discretion under EU law regarding whether to surrender X or not, YC cannot rely on the *Bosphorus* presumption in proceedings before the ECtHR (see *Bosphorus v Ireland*, app no 45036/98, paras 155-157).
Lastly, it should be noted that EU law does not prevent YC from applying a higher level of protection of family life if its constitution provides it *in this situation*, i.e. when YC has discretion, since it will not risk the uniform application of EU law (see Art 53 of the Charter, and Case C-617/10 *Åkerberg Fransson* para 29, referring to Case C-399/11 *Melloni* para 60).
Whether the execution of the EAW would violate the right to family life under Art 7 of the Charter or Art 8 of the ECHR, probably depends on how one regards the proportionality of the action (it seems clear that a surrender would at least limit the right to family life). We do not believe that the ECJ or the ECtHR has tried a similar case but the question has been raised in national courts.

Hypothetical n. 2 (Mutual trust and recognition)

The Charter is applicable since the national authorities are applying the Framework Decision on EAW (The Charter Art 51(1)). In this case it can be questioned whether Y has been given a fair trial (the Charter Arts 47 & 48) in Deeland since the evidence against her has been illegally obtained. The problem is that denial of a fair trial is *not* listed in either the mandatory (Art 3 FDEAW) or the non-mandatory (Art 4 FDEAW) clauses regarding non-execution of EAW. Thus, the starting point from the EU law perspective is that execution of the EAW should be granted and that it is the courts in Deeland that should examine potential fundamental rights violations. *Since there is no discretion awarded to the Member States in this situation, the YC courts cannot, from the EU law perspective, apply national constitutional provisions on fair trial rights* (Case C-399/11 *Melloni*, paras 59-64). The CJEU has recently started to open up the possibility for national courts in the executing states to perform rights review concerning systematic violations of the absolute right to not be subjected to inhuman treatment (Joined Cases C-404/15 & C-659/15 PPU *Aranyosi & Caldararu*). In that case, however, the ECJ put a lot of emphasis on the *absolute nature of the right not to be subjected to inhuman treatment* (Art 4 Charter). It is perhaps somewhat unclear whether the right/duty to refuse surrender on fundamental rights grounds can be used in situations where a trial's fairness can be questioned. In contrast to the absolute character of the prohibition of inhuman and degrading treatment as enshrined in Article 3 ECHR and Article 4 Charter, these types of fundamental rights infringes are remediable. Then again, the Charter is primary law and must be respected (see also FDEAW Art 1(3)). The court in YC could ask the CJEU for a preliminary ruling on whether it can refuse execution due to a violation of the right to a fair trial (this would of course only be possible if the using of illegally obtained evidence is seen as a violation of this right in the Charter).
The national court could also perhaps try to invoke the national identity clause in TEU Art 4(2) if its national constitution has a strong protection for trial fairness and prohibitions on using illegally obtained evidence. If that does not work it might (depending on what the YC constitution states), in violation of EU law, refuse execution in order to protect national constitutional law.
The ECHR is also applicable (both as general principles of EU law, TEU Art 6, and in itself since YC is a party to the Convention). As far as we can tell, the ECtHR does not automatically find that the right to a fair trial (ECHR Art 6) has been violated if illegally obtained evidence is used in a trial. Instead it will make an assessment of the whole trial to decide whether it was fair. Two things that point against the trial being regarded as fair are: firstly, that it was the police (that is, the State) that illegally obtained the evidence; and secondly, that the cocaine seems to have been the only evidence used in the trial. Then again, there is little to suggest that Y was innocent or that the evidence was unreliable. If the trial violates Art 6 of the Convention, then it will also violate the corresponding rights in the Charter according to Art 52(3).

Hypothetical n. 3 (Mutual trust and recognition)

The Charter is activated since the Framework Decision on EAW is applied (the Charter Art 51). One can question the proportionality between crime and punishment under Art 49(3) of the Charter, as well as if the limitation of his right to liberty under Art 6 is proportional. Mr D has been detained in two countries and has, at his own expense, been forced to stay in another country; moreover, he risks losing his job. All of this before the trial has even commenced. The proportionality principle as a general principle of EU law can perhaps also be invoked in particular if one regards the detentions as administrative decisions rather than penal sanctions. From what we've understood, the British implementation of the Framework Decision demands that the executing authority makes a proportionality check and the Commission has urged the

issuing authorities not to issue EAW for petty crimes (see also AG Sharpston's opinion in Case C-396/11 *Radu*, paras 60-62). The difference in approach of the Member States could be something interesting to discuss and seems to be much governed by the principles on the basis of which a criminal justice system works including the role of the legality principle in the national legal systems. Poland and Romania, counties both criticized for overusing EAW, seem to be obliged to issue EAWs with reference to the legality principle, whereas countries like Germany seem to apply a proportionality test before executing a request (cf legality as enshrined in the Charter Art 49). The Framework Decision, however, does not include lacking proportionality as a ground for refusing execution so the starting point is that the EAW should be executed. The detention is obviously a limitation on Mr D's right to liberty, but it might very well be regarded as a legitimate limitation under Art 52(1) of the Charter.
The ECHR is also applicable (both as general principles of EU law, TEU Art 6, and in itself since YC is a party to the Convention). The relevant article would be Art 5 on the right to liberty (which corresponds to Art 6 of the Charter). The ECHR allows for detentions awaiting trials (Art 5(1)(c)), but they should not last too long (Art 5(3)). Mr D has not been detained that long but then again the crime he is suspected of is minor. Since YC does not have any discretion under the FDEAW it could probably rely on the *Bosphorus* presumption before the ECtHR (which makes it unlikely, but not impossible that YC would be found to have breached the Convention).
In addition, it is likely that many EU Member States have a protection against un-proportional sanctions and deprivations of liberty in their constitutional laws. Since the FDEAW does not give any discretion to the Member States in this situation, Art 53 of the Charter cannot be relied upon in order to afford a higher level of fundamental rights protection (Case C-399/11 *Melloni*, paras 59-64). Thus, if YC refuses execution due to its constitutional law, it will be in conflict with EU law unless it successfully can invoke TEU Art 4(2) on respect for national identities.

Hypothetical n. 4 (ne bis in idem)

EU law is activated since the revocation decision is based on EU law. It does not matter that the Directive itself probably does not demand that the license is revoked, it is enough that the Directive has minimum rules concerning revocation of weapons licenses (see for example Case C-617/10 *Åkerberg Fransson*, para 28). The main legal question is if the revocation can be regarded as a second punishment for the tax crimes, that is, if the revocation is to be seen as being of a criminal nature (*Åkerberg Fransson* para 35). There are three factors to consider when deciding this: the classification of the offence under national law; the very nature of the offence; and lastly, the nature and the degree of severity of the penalty incurred.
If the revocation is considered as being of a criminal nature, then it will only be acceptable under the *ne bis in idem* rule (the Charter Art 50) if there is a sufficiently close connection between the two sanctions in substance and time. This in turn will probably depend on whether the revocation was a direct and foreseeable consequence of the conviction for tax crimes (see for example *Nilsson v Sweden*, app no 73661/01, which concerned revocation of a driver's license following a conviction for drunk driving).
Another possibility is that the police's decision is not seen as punishment at all but rather a forward-looking examination of the suitability of B owning fire weapons. In that case, the *ne bis in idem* rule will not be activated.
The ECHR (Additional Protocol 7 Art 4) and national constitutional law can be relevant and EU law will probably not stand in the way of the national court affording a higher level of protection than the Charter (see the Charter Art 53 and *Åkerberg Fransson*, para 29) since the Member States retain *discretion* in handling revocations of weapons licenses, and there is probably no

great threat to the primacy and unity of EU law.

Hypothetical n. 5 (ne bis in idem)

Arguably, the Charter becomes applicable in Schengen signatory states through Art 54 of the Schengen Convention.
The main question is if a prosecution in YC would violate Ms C's right to not be tried or punished twice for the same action according to Art 50 of the Charter. The outcome will depend on whether the obtaining of the documents and the publishing of them on her blog can be regarded as the same act. National constitutional laws may be applicable, but the ECHR is not since the *ne bis in idem* prohibition in the Convention only applies in double proceedings in a single state. It should be possible for the national court to apply national constitutional rights offering higher protection, that is, EU law will probably not demand a certain maximum level of protection. EU law will only be activated if the two trials are seen as relating to the same act.

Hypothetical n. 6 (ne bis in idem)

The second trial is probably acceptable according to the ECJ's interpretation of Art 50 of the Charter and Art 54 of the Schengen Convention in the *Spasic* case (Case C-129/14 PPU *Spasic*). Art 4.3 of the FDEAW could perhaps be used to deny execution, but this is an *optional* ground for non-execution. An execution is certainly questionable under Art 50 of the Charter since the person has been tried and acquitted in a later trial. Then again, it would be a bit peculiar if it would be possible to use a second trial in another country to effectively make the original judgment null and void. This situation seems to be a good reason for a preliminary ruling.
The *ne bis in idem* prohibition in the ECHR Additional Protocol 7 Art 4 is not applicable since the proceedings take place in different states. Member States' constitutions might however be violated if the EAW is executed.

Module 8 - Effective Judicial protection

Hypothetical n. 1 (Exemption of public authorities from certain legal costs in proceedings concerning the repayment of improperly levied taxes)

FACTS

Related Module Issue: No. 1 – **Preliminary conditions for the exercise of a judicial action**

Mr Burns is the owner of a vehicle previously registered in Member State A. At the time of the registration of the same vehicle in Member State B, Mr Burns was requested to pay a sum of around EUR 900 pursuant to Law 50/2008 on pollution tax for motor vehicles.

By a judgment became final on November 2013, the competent national court of Member State B ordered the Office of Public Finances of that same Member State to return the sum to Mr Burns, together with the statutory interest relating to it, and to reimburse the costs.

Mr Burns initiated enforcement proceedings, in relation to which a judicial fee of around EUR 170 was set.

The Office of the Public Finances lodged an opposition, asking for a stay of the enforcement proceedings. Relying on the applicable provisions of the national Code of Fiscal Procedure, the Office of Public Finances claimed that it did not have to pay the court fees relating to the opposition nor should it lodge any security in respect of its application for a stay of those enforcement proceedings.

Before the enforcement court, Mr Burns argues that the said national provisions lead to discrimination between persons governed by private law, who are required to pay court costs and to provide a security, and persons governed by public law, who are exempted therefrom. He affirms that this difference of treatment is not compatible with EU law, insofar as it puts private persons in a disadvantageous position as regards to access to justice, whilst facilitating persons governed by public law.

NATIONAL PROVISIONS AT ISSUE

National Code of Fiscal Procedure (1998)

Article 1
1. Actions and applications brought before the courts shall be subject to payment of court stamping fees provided for in this Code.
2. Court stamping fees shall be payable, subject to the conditions laid down in this Emergency Order, by all legal and natural persons, and constitutes payment for the services provided by the courts.
3.Where expressly provided for by this Code or by the law, actions and applications brought before the courts shall be exempt from court stamping fees.

Article 2

Court stamping fees shall be applied on a variable basis, depending on whether or not the subject-matter [of the application] can be assessed in monetary terms, subject to the exceptions provided for by this Code or by the law.

Article 3
1. The following shall be exempt from court stamping fees: actions and applications, whatever the cause of action, including applications for review, brought in accordance with the law by any public institutions, bodies or offices, including the fiscal authorities, in any procedural capacity, where they are concerned with public revenues.
2. For the purposes of this Code, "public revenues" shall include revenues accruing to the State budget, including taxes, duties and other contributions by private persons.

QUESTIONS

Level I - Analysis of the hypothetical case

1) Relevance of EU law (and of the Charter) to the case
If the pollution tax was levied in breach of EU law, the consequence is that Mr Burns has a right - conferred on him by EU law - to the refund of the tax improperly levied. Indeed, according to established case law of the CJEU, the Member States must repay charges levied in breach of EU law, together with interest (see judgment of 14 April 2015, Case C-76/14, Manea, para. 45, and judgment of 6 October 2015, Case C-69/14, Târșia, para. 26). The right to the refund is a legal situation that must be granted effective protection in accordance with Article 47 of the Charter.

a. If you were presented with this case, how would you deal with the reference to EU law made by Mr Burns?
b. If Mr Burns had made no reference to EU law, would you have investigated on your own on the relevance of EU law, and of the EU Charter in particular?
c. The main proceedings concerns the enforcement of a judicial decision ordering the repayment of a pollution tax for motor vehicles improperly levied by public authorities at the time of the vehicle's first registration in the Member State concerned. Do you see any connection between the national provisions at issue and EU law that can trigger the application of the Charter?

2) Compatibility of the national provisions at issue with Article 47 CFR
Let us assume that the pollution tax was levied in breach of EU law. This implies that the national provisions granting an exemption to public authorities from the payment of court fees and the lodging of a security must be tested against Article 47 CFR.
The principle of effective judicial protection enshrined in this provision comprises various elements, amongst which of particular relevance in this case are the principle of equality of arms and the right of access to a court.

a. How would you reconstruct the content of the principle of equality of arms and the right of access to a court, as components of Article 47 CFR?
In particular:
i- is there any additional Charter provisions you would look at in order to clarify the meaning and scope of the right concerned?
ii- is there any previous judgment of the CJEU from which you can infer useful indications to solve the case at issue?
b. In light of the replies to the previous questions, would you consider that national provisions such as those at issue are compatible with EU law? Why yes/Why not?

3) Interaction with the CJEU
a. If you were presented with this case, would you consider the possibility to submit a reference for preliminary ruling to the CJEU?
b. If yes, how would you frame the preliminary question?

4) Application of EU law to the main proceedings
Based on your answer to question 2.b, how would you deal with the case of Mr Burns? Which legal consequences would your answer entail (in terms of application/non-application/interpretation of the national provisions concerned)?

Level II - Discussion of the domestic legal framework in light of the hypothetical case
Please, identify (in advance of the workshop) the national provisions that you should apply, in accordance with the law applicable in your Member State, if a case such as that of Mr Burns were brought before you.
In light of the discussion of the hypothetical case, do you identify any problematic issues with respect to the compatibility with Article 47 CFR of the applicable national provisions?

Hypothetical n. 2 (Submission of a "good conduct guarantee" as a condition for the admissibility of actions against the acts of a contracting authority)

Related Module Issue: No. 1 - *Preliminary conditions for the exercise of a judicial action*

FACTS

In April 2014, a public body of Member State A (hereafter, the 'contracting authority') published in the Electronic Public Procurement System ('EPPS') a notice concerning a call for tenders for the award of a public contract for the development of a cloud computing system. The award criterion for that contract, with an estimated value of around EUR 13 700 000, was that of 'the lowest price'.

Star System Inc., an economic operator interested in the tender procedure, challenged before the competent first instance court some of the explanatory notes regarding the stipulations in the tender documents published in the EPPS.

The first instance court dismissed the challenge as inadmissible, on the ground that Star System Inc. had not provided a "good conduct guarantee", as provided by Article 171 of the Code of Public Tenders.

Star System Inc. therefore seeks the annulment of the decision before the Court of Appeal, arguing that the obligation to provide a good conduct guarantee constitutes an obstacle to access to justice, which is contrary both to the domestic Constitution and to EU law.

NATIONAL PROVISIONS AT ISSUE

Code of Public Tenders

Article 171
"(1) For the purpose of protecting the contracting authority against the risk of any improper conduct, the party challenging the decision shall be required to provide a good conduct guarantee covering the entire period from the date on which the action is lodged to the date on which the judgment of the competent judicial authority has become final.
(2) The action shall be dismissed if the party challenging the decision fails to furnish proof that the guarantee referred to in paragraph 1 has been provided.
(3) The good conduct guarantee shall be provided by means of bank transfer or a guarantee instrument issued in compliance with legal requirements by a banking institution or an insurance company.
(4) The total amount of the good conduct guarantee shall amount to 1% of the estimated value of the contract to be awarded, but cannot be greater than [a threshold fixed in relation to that same value, which is EUR 100 000 for the contract at issue in the case].

According to another provision of the same Code, the "good conduct guarantee" must be refunded to the applicant whatever the outcome of the action.

QUESTIONS

Level I - Analysis of the hypothetical case

1) Relevance of EU law (and of the Charter) to the case

Star System Inc. has raised doubts with respect to the compatibility of the national provisions concerned with EU law. If the situation at issue in the main proceedings falls within the scope of EU law, the Charter is applicable and the national provisions on the "good conduct guarantee" must be tested against Article 47 CFR.

a. *Do you see any connection between the national provisions at issue and EU law that can trigger the application of the Charter?*
b. *If Star System Inc. had made no reference to EU law, would you have investigated* on your own on the relevance of EU law, and of the Charter in particular?

2) Compatibility of the national provisions at issue with Article 47 CFR
If the situation at issue in the main proceedings falls within the scope of EU law, the national provisions that make the admissibility of all actions against the acts of a contracting authority subject to the obligation for the applicant to provide a "good conduct guarantee" must be tested against Article 47 CFR.
In particular, the requirement to provide a "good conduct guarantee" constitutes a limitation on the right to an effective remedy before a tribunal, as enshrined by Article 47 CFR. According to Article 52(1) CFR, limitations on the fundamental rights granted by the Charter can be justified only if they are:
- provided for by law;
- respect the essence of that right;
- meet an objective of general interest;
- are necessary and proportionate in relation to that objective.

a. *Is there any previous judgment of the CJEU from which you can infer useful indications to solve the case at issue?*
b. Do you think that the limitation on the right to an effective remedy introduced by the national provisions concerned is:
- *provided for by law;*
- *respect the essence of that right;*
- *meet an objective of general interest;*
- *are necessary and proportionate in relation to that objective.*

3) Relationship between sources and courts: Charter/CJEU and Constitutions/Constitutional Courts
Star System Inc. has raised doubts with respect to the compatibility of the national provisions concerned with both EU law and the domestic Constitution.

a. *How would you deal with these two claims? Would you give prevalence to one of them? If yes, what about the other?*
b. *Would you consider the possibility to submit a reference for preliminary ruling to the CJEU?*
c. *If yes, how would you frame the preliminary question?*

4) Application of EU law to the main proceedings

Based on your answer to question 2.b, how would you deal with the case of Star System Inc.? Which legal consequences would your answer entail (in terms of application/non-application/interpretation of the national provisions concerned)?

Level II - Discussion of the domestic legal framework in light of the hypothetical case

Please, identify (in advance of the workshop) the national provisions that you should apply, in accordance with the law applicable in your Member State, if a case such as that of Star System Inc. were brought before you.
In light of the discussion of the hypothetical case, do you identify any problematic issues with respect to the compatibility with Article 47 CFR of the applicable national provisions?

Hypothetical n. 3 (Legal aid in proceedings concerning the execution of a European Arrest Warrant)

Related Module Issue: No. 2 – *Legal aid*

FACTS

On 26 October 2016, **Directive (EU) 2016/1919** on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings entered into force. Its Articles 4, 5, 6 and 8 provide as follows:

Article 4 Legal aid in criminal proceedings
1. Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require.
2. Member States may apply a means test, a merits test, or both to determine whether legal aid is to be granted in accordance with paragraph 1.
3. Where a Member State applies a means test, it shall take into account all relevant and objective factors, such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that Member State, in order to determine whether, in accordance with the applicable criteria in that Member State, a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer. (…)

Article 5 Legal aid in European arrest warrant proceedings
1. The executing Member State shall ensure that requested persons have a right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or until the decision not to surrender them becomes final. (…)
3. The right to legal aid referred to in paragraphs 1 and 2 may be subject to a means test in accordance with Article 4(3), which shall apply mutatis mutandis.

Article 6 Decisions regarding the granting of legal aid
1. Decisions on whether or not to grant legal aid and on the assignment of lawyers shall be made, without undue delay, by a competent authority. Member States shall take appropriate measures to ensure that the competent authority takes its decisions diligently, respecting the rights of the defence.
2. Member States shall take necessary measures to ensure that suspects, accused persons and requested persons are informed in writing if their request for legal aid is refused in full or in part.

Article 8 Remedies
Member States shall ensure that suspects, accused persons and requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.

The deadline for the transposition of Directive 2016/1919 is 25 May 2019.

Mr Clyde is arrested in Member State Happyland, following to a EAW issued by the judicial authorities of Member State Sweetland.

Since Mr Clyde does not consent to his surrender, he is entitled to be heard by the executing judicial authority, "in accordance with the law of the executing Member State", as provided by Article 14 of the EAW Framework Decision. Mr Clyde applies for legal aid. He states that, although he has a permanent job and is the owner of a flat, since March 2009, when his relationship with his wife ended, he has been renting a room, in order to let his wife and daughter living together in the family

house. Moreover, from a financial point of view, he is the primary carer of his daughter, given that his wife only holds seasonal contracts.

The request for legal of Mr Clyde is, however, rejected, because the relevant national legislation, which takes into account the family situation of the person concerned, lays down some limits as regards the means of proof, which are limited to documents by a public authority or official. Mr Clyde and his wife has never formalised the end of their marriage. In addition, since he is living with a friend, he is paying his room under-the-table.

Furthermore, according to the national legislation, there is no possibility to appeal against a decision rejecting a request for legal aid.

Mr Clyde claims that the national legislation on legal aid does not comply with the Directive on legal aid in criminal proceedings.

QUESTIONS

Scenario I – The facts of the case take place after the deadline for the transposition of the Directive on legal aid in criminal proceedings has passed

a. *Do you think that the national legislation at issue is compatible with the requirements of the Directive on legal aid in criminal proceedings?*

Please, discuss briefly any incompatibility issues that you deem is at stake.

b. *If you think that there are incompatibility issues, how would you proceed in order to solve them?*

In particular, do you think that Article 47 of the EU Charter has a role to play, or, rather, the incompatibility issues at stake can be addressed by having regard only to the Directive?

c. *Do you have any doubts concerning the applicability of the EU Charter to this case (having regard to Article 51(1) of the Charter, according to which the latter's provisions bind the Member States "only when they are implementing EU law"?*

Please, consider both the following scenario:

i- the national legislation at issue has been enacted specifically in order to implement the Directive on legal aid in criminal proceedings;

ii- the Member State concerned has not enacted *ad hoc* legislation to implement the Directive on legal aid in criminal proceedings, so that the national provisions applicable to the case are the same provisions on legal aid that were already applicable before the entry into force of the Directive.

d. *Do you think that the incompatibility issues at stake should be brought to the attention of the CJEU through the preliminary reference procedure?*

If yes, how would you frame the preliminary question(s)?

Scenario I – The facts of the case take place before the deadline for the transposition of the Directive on legal aid in criminal proceedings has passed

e. *In your opinion, if the facts took place before the deadline for the transposition of the Directive, would the Charter (notably, its Article 47(3) on legal aid) be applicable to the case?*

f. *If yes, how would you deal with the case?*

Hypothetical n. 4 (Mutual recognition in the field of civil law vis-à-vis effective judicial protection)

Related Module Issue: No. 11 – *Mutual trust and recognition in the field of civil law*

FACTS

By order of 9 April 2013, following legal proceedings brought by Gold Ltd., a commercial court of Member State X ordered the freezing of the assets belonging to Mr Copper. The latter was prohibited, in particular, from disposing of his share in Silver Ltd., a company established in Member State Y, either directly or indirectly, notably through the company's director.

The order was issued at a hearing which the defendant was notified of, and he had also been informed of his right to apply to that same commercial court to vary or discharge the contested order. The order itself also made clear that the right to appeal against the measures ordered by that court was granted to anyone notified of the order.

Yet, the order was not notified to Mr Copper, the responsible for the notification being - according to the order itself - the applicant Gold Ltd.

Later on, Gold Ltd. lodged an application with the competent First Instance Court in Member State Y for a declaration that the contested order was enforceable and for enforcement of the order to be ensured by means of *interim* measures. The first instance court granted the declaration, but at the same time dismissed the request for enforcement.

Mr Platinum, who was the manager of Mr Cooper's frozen assets and the director of Silver Ltd., lodged cross-appeals against the decision of the First Instance Court. He argued that, whilst the order affected his property rights, he was not a party to the proceedings in Member State X, which he had not been notified of.

The Appeal Court annulled that decision and declared that the order freezing the assets was enforceable in Member State Y in so far as it prohibited Mr Copper from disposing of the value of his shares in Silver Ltd., whether directly or indirectly through the company's director. The argument raised by Mr Platinum was dismissed, on the grounds that the contested order applied only to Mr Copper and the freezing of his property.

Subsequently, Mr Platinum has lodged a cross-appeal before the Supreme Court of Member State Y, seeking to have the decision of the Appeal Court set aside. According to him, the recognition and enforcement of the contested order is contrary to the public policy exception provided for by Article 34(1) of Regulation No 44/2001, inasmuch as the prohibitions contained therein infringe property rights of third persons not party to the proceedings before the court that issued the contested order. Mr Platinum also argues that the provision whereby any person affected by an order such as that at issue is to have the right at any time to request the court to vary or discharge the judgment cannot represent a sufficient guarantee when it is left to the applicants to notify the decision to the persons concerned.

RELEVANT EU AND NATIONAL PROVISIONS

- **Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1)**

Article 33

'1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

…'

Article 34

'A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.'

Under ***Article 35(2) and (3)*** the court applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction. The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Article 34(1) of that regulation may not be applied to the rules relating to jurisdiction.

Article 36 states that under no circumstances may a foreign judgment be reviewed as to its substance.

Article 38(1)
'A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.'

Article 41
'The judgment shall be declared enforceable immediately on completion of the formalities … The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.'

Article 42(2)
'The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party.'

Article 43
'1. The decision on the application for a declaration of enforceability may be appealed against by either party.
2. The appeal is to be lodged with the court indicated in the list in Annex III.
3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters. (…)
5. An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.'

Article 45
'1. The court with which an appeal is lodged … shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. …
2.Under no circumstances may a foreign judgment be reviewed as to its substance.'

- Code of Civil Procedure of Member State Y

Article 452
'The following shall, in any event, be regarded as an infringement of a provision of procedural law which may result in a wrongful resolution of the dispute:
…

the fact that a judgment confers rights or imposes obligations on a person who is not a party to the proceedings.'

QUESTIONS

Level I – General Discussion
How would you deal with the argument concerning Article 34(1) of Regulation 44/2001 brought by Mr Platinum? Please, consider both the legal background of Member State Y and your legal background, in case they could suggest a different approach.

Level II – The approach of the CJEU to the public policy exception
Consider the case law of the CJEU concerning the interpretation of the public policy exception.

" As regards the concept of 'public policy' referred to in Article 34(1) of Regulation No 44/2001, the Court has held, in paragraph 55 of its judgment of 28 April 2009 in *Apostolides* (C‑420/07), that that provision must be interpreted strictly, inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of that regulation, and may be relied upon only in exceptional cases.
While the Member States remain in principle free, by virtue of the proviso in Article 34(1) of Regulation No 44/2001, to determine, according to their own ideas, what public policy requires, the limits of that concept are a matter of interpretation of that regulation (see *Apostolides*, cit. para. 56 and the case-law cited).
Consequently, while it is not for the Court to define the content of the public policy of a Member State, it is nonetheless required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another Member State (see *Apostolides*, cit., para. 57 and the case-law cited).
In that connection, it must be observed that, by not allowing any review of a foreign judgment as to its substance, Articles 36 and 45(2) of Regulation No 44/2001 prohibit the court of the Member State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seized of the dispute. Similarly, the court of the Member State in which recognition is sought may not review the accuracy of the findings of law or fact made by the court of the Member State of origin (see *Apostolides*, para. 58 and the case-law cited).
Accordingly, recourse to the public policy exception provided for by Article 34(1) of Regulation No 44/2001 can be envisaged only where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the Member State in which enforcement is sought inasmuch as it would infringe a fundamental principle. In order for the prohibition of any review of the substance of a foreign judgment of another Member State to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the Member State in which recognition is sought or of a right recognised as being fundamental within that legal order (see *Apostolides*, para. 59 and the case-law cited)."

a) *In the light of the CJEU's case law on the public policy exception, and of your domestic law, how would you deal with the argument of Mr Platinum if this were raised before you? Would you reach a different conclusion if you were the judge (Supreme Court of Member State Y)?*
b) *Do you think that Article 47 CFR should have a role in the reasoning? If yes, which role?*
c) *If the case were pending before you, would you consider the possibility to raise a reference for preliminary ruling to the CJEU? Do you think that the Supreme Court should refer a question for preliminary ruling?*

d) *How could a question for preliminary ruling be framed?*

Level III – Discussion of the outcome of the case
The trainer explains the outcome of the case and participants share your thoughts on it.

Hypothetical n. 5 (Mutual trust vis-à-vis effective judicial protection of EU fundamental rights in the field of asylum law)

Related Module Issue: No. 10 – Mutual trust and recognition in the field of asylum law

FACTS

M. Rahimi is an Afghan national who fled his country of origin with his wife in the early 2000's. They have lived in Iran for fifteen years and they have five children, all aged between 2 and 16.

On 24 August 2016, after moving from Iran out of a fear of persecution, they landed on the territory of Fantasia (a EU Member State and a Party to the ECHR) on a boat from a third country. They supplied Fantasian authorities with false identities. They were immediately subjected to the EURODAC identification procedure. Ten days later, after their true identity had been established, they were sent to a Reception Centre for Asylum Seekers (ReCAS) in another region. Living conditions in the centre were poor, particularly on account of the lack of appropriate sanitation facilities, the lack of privacy and the climate of violence among the occupants. They did not apply for asylum.

On 16 September 2016 the applicants left the ReCAS without permission and travelled to Utopia (a EU Member State and a Party to the ECHR), where on 20 September 2016 they were again registered in the EURODAC system.

On 1 October 2016 the applicants applied for asylum in Utopia. On 11 October 2016, the criteria set out in Chapter II of the Dublin III Regulation having been duly examined, Utopia submitted to the Fantasian authorities a request, under Articles 13(1) and 21 of the Dublin III Regulation, to take charge of the applicants. In the absence of a reply within the two-month period provided for in Article 22(1) of the Regulation, the request was considered as tacitly accepted, pursuant to paragraph 7 of that provision. At a hearing before the Utopian Commission for Refugees (UCR), the applicants stated that they did not want to return to Fantasia, where living conditions were extremely difficult, especially for the youngest children, and where it was impossible to find a job pending the determination of an asylum application, which could take up to 24 months.

In a decision of 12 December 2016, the UCR rejected as inadmissible applicants' asylum application and ordered their removal to Fantasia, as the Member State responsible for examining the application, in accordance with the Dublin III Regulation. The administrative authority considered that "neither the excessive length and random outcome of asylum procedures, nor the difficult, often very poor, living conditions for asylum seekers in Fantasia – as submitted by the applicants and corroborated by reliable and independent sources –render the removal order unenforceable", that "it is therefore for the Fantasian authorities to provide support to the applicants pending the determination of their status, in accordance with Fantasian obligations under EU law and the ECHR" and that "the Utopian authorities do not have competence to substitute themselves to the Fantasian authorities." On the basis of these considerations it concluded that "despite the patent shortcomings in the asylum procedure and in the reception conditions in Fantasia, the file does not contain any element disclosing that the situation reaches the threshold of a 'general systemic flaw resulting in a risk of inhumane and degrading treatment' in the event of the applicants' return to Fantasia."

On 4 January 2017 the applicants appealed to the Administrative Court. In support of their appeal they submitted that the reception conditions for asylum seekers in Fantasia were in breach of Article 4 CFR and Article 3 ECHR. They stressed their peculiar condition as a family with five minor

children and argued that the administrative authorities had not given sufficient consideration to their complaint in that regard. In particular, they complained that the decision was solely based upon an assessment of the general conditions of reception of asylum seekers in Fantasia and that their individual situation had not been examined in detail.

RELEVANT EU LAW PROVISIONS

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (OJ 2013 L 180, p. 31) ("Dublin III Regulation", in force from July 2013)

Article 3 – Access to the procedure for examining an application for international protection
1. Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.
2. (…) Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.
Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.

Article 6 – Guarantees for minors
1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation. (...)
3. In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:
(a) family reunification possibilities;
(b) the minor's well-being and social development;
(c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
(d) the views of the minor, in accordance with his or her age and maturity."

Article 13 – Entry and/or stay
1. Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of this Regulation, including the data referred to
in Regulation (EU) No 603/2013, that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place.

Article 17 – Discretionary clauses
1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless

person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

Article 31 – Exchange of relevant information before a transfer is carried out

1. The Member State carrying out the transfer of an applicant (…) shall communicate to the Member State responsible such personal data concerning the person to be transferred as is appropriate, relevant and non-excessive for the sole purposes of ensuring that the competent authorities, in accordance with national law in the Member State responsible, are in a position to provide that person with adequate assistance, including the provision of immediate health care required in order to protect his or her vital interests, and to ensure continuity in the protection and rights afforded by this Regulation and by other relevant asylum legal instruments. Those data shall be communicated to the Member State responsible within a reasonable period of time before a transfer is carried out, in order to ensure that its competent authorities in accordance with national law have sufficient time to take the necessary measures.

2. The transferring Member State shall, in so far as such information is available to the competent authority in accordance with national law, transmit to the Member State responsible any information that is essential in order to safeguard the rights and immediate special needs of the person to be transferred, and in particular:

(a) any immediate measures which the Member State responsible is required to take in order to ensure that the special needs of the person to be transferred are adequately addressed, including any immediate health care that may be required;

(b) contact details of family members, relatives or any other family relations in the receiving Member State, where applicable;

(c) in the case of minors, information on their education;

(d) an assessment of the age of an applicant

QUESTIONS

Level I – General discussion

Have you ever been presented with a case similar to that of Mr Rahimi and his family? How did/would you deal with it?

Level II – Relevance of EU law to the case

There is little doubt that the case falls within the scope of EU law (it concerns the application of the Dublin III Regulation). As regards the Charter, a risk of a violation of Article 4 CFR (prohibition of torture and inhumane or degrading treatment) is at issue.

Is there any room, under EU law, to consider that Utopia is legally prevented to transfer the applicants to Fantasia?

Which is the relevant criterion under the Dublin III Regulation that limits *de jure* the applicability of the mandatory criteria for determining the Member State responsible, set out in Chapter III of the said regulation?

> NB: for the sake of this exercise, please consider as established that conditions of reception of asylum seekers in Fantasia, although critical in the light of the reported occurrence of situations incompatible with basic human dignity, do not reach the threshold of "systemic flaws".

Does the Dublin III Regulation provides for other cases in which an application for international protection may be examined by a State different from that responsible for such an examination as determined in accordance with Chapter III of the Dublin III Regulation?

Why these options are fundamentally different from the exception envisaged in Article 3(2) of the said regulation?

Level III – Relevance of the ECHR to the case

Is the conduct of Utopian authorities in compliance with Article 3 ECHR, as interpreted by the ECtHR?

What is the standard to be applied in this kind of cases under the ECHR? Which case-law is the most relevant in this respect?

> NB: for the sake of this exercise, please consider that the ECHR, as interpreted by the ECtHR, has constitutional status and is directly applicable by domestic judges in accordance with the Constitution of Utopia.

Level III – Judicial interaction

In light of the above:

a) W*ould you agree that, as a matter of EU Law, the test of "systemic flaws" in the asylum procedure and in the reception conditions does not exhaust the cases in which a Member State is prevented from transferring an asylum seeker to the Member State responsible under the Dublin III Regulation?*

Please, indicate if yes or no and why (including on the basis of which provisions of the Charter / CJEU case-law)

b) *Would you agree that, as a matter of international law (and consequently of domestic constitutional law by virtue of the constitutional status and direct applicability of the ECHR in the Utopian legal order) Utopia may obliged not to proceed to the transfer of the applicants to Fantasia?*

Please, indicate if yes or no and why (including on the basis of which provisions of the Charter / CJEU case-law)

c) *Would you consider that there is a conflict of obligations (under, respectively, EU law and the ECHR)?*

Please, indicate if yes or no and why. Explain which are the consequences of your conclusion in terms of the reasoning you would adopt in either case.

d) *Do you think that a reference for preliminary ruling to the CJEU would be necessary / useful in the present case*

Do you think that the guidance provided by the CJEU in its existing case-law on this subject is sufficient? Is there any issue on which you would need more (precise) guidance?

In case, how should the question(s) for preliminary reference be framed?

Level IV – Solution of the case

How would you deal with the case of Mr Rahimi?

Hypothetical n. 6 (Mutual trust vis-à-vis effective protection of EU fundamental rights in the field of the European Arrest Warrant)

Related Module Issue: No. 12 – Mutual trust and recognition in the field of criminal law

FACTS

In September 2016, the Prosecutor's Office of Member State Alpha has issued a European Arrest Warrant (EAW) for the purpose of prosecuting Mr Rainbow, a citizen of Member State Alpha, for public indecency. According to the Criminal Code of Member State Alpha, the offence of public indecency is punishable by detention for a maximum period of three years.

On 30 January 2017, during a police control, Mr Rainbow is arrested in the territory of Member State Beta and was heard on the same date by the investigating magistrate of the competent criminal court of Member State Beta. The man denies the offences of which he is accused and declines to consent to the simplified surrender procedure. In fact, he also informs the investigating magistrate about his sexual orientation and says to be actively involved in campaigns for LGBT rights. He also affirms that LGBT people suffer from severe discrimination in Member State Alpha, and that the real reason behind his prosecution is that the Government of Member State Alpha wants to halt his commitment to LGBT rights.

The investigating magistrate of Member State Beta finds that the judicial authority of Member State Alpha had complied with the formal and substantive requirements for the issue of the EAW. Moreover, none of the mandatory or optional grounds of non-execution of a EAW is applicable. Yet, the investigating magistrate doubts whether the requirements of the protection of fundamental rights precludes the surrender of Mr Rainbow.

RELEVANT EU LAW PROVISIONS

Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) (last consolidated version)

Recitals 5 to 8, 10 and 12-13 in the preamble of the Framework Decision are worded as follows:
'(5) … the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. …
(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation.
(7) Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 [EU] and Article 5 [EC]. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.
(8) Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender…
(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [EU, now after

amendment, Article 2 TEU], determined by the Council pursuant to Article 7(1) [EU, now after amendment, Article 7(2) TEU] with the consequences set out in Article [7(2) EU]…
(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [EU] and reflected by the Charter …, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.
(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Article 1 Definition of the European arrest warrant and obligation to execute it
1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.
2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.
3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 2 Scope of the European arrest warrant
1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

Article 3 Grounds for mandatory non-execution of the European arrest warrant
The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:
1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

Article 4 Grounds for optional non-execution of the European arrest warrant
The executing judicial authority may refuse to execute the European arrest warrant:
1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;

2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;
3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;
4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;
5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;
6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;
7. where the European arrest warrant relates to offences which:
(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or
(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

Article 15 Surrender decision
1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.
2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.
3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.

Article 17 Time limits and procedures for the decision to execute the European arrest warrant
1. A European arrest warrant shall be dealt with and executed as a matter of urgency.
2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.
3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.
4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.
5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.…
7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State

which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.

QUESTIONS

Level I – General discussion
Have you ever been presented with a case similar to that of Mr Rainbow? How did/would you deal with it?

Level II – Relevance of EU law to the case
There is little doubt that the case falls within the scope of EU law (it concerns the execution of an EAW, which is governed by the EAW Framework Decision). As regards the Charter, a risk of a violation of Article 21(1) CFR (non-discrimination on grounds of sexual orientation) is at issue).
Yet, as anticipated in the "Facts" section, none of the mandatory or optional grounds of non-execution is applicable to the case. Moreover, the EAW Framework Decision does not contain any general ground of non-execution based on human rights concerns. Consider that the list of non-execution grounds is exhaustive.
Does the lack of a ground for non-execution in a case such as that of Mr Rainbow pose problems with respect to the Constitution of your Member State?
Consider the reasoning of the CJEU in Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (Issue 12, case sheet 14).
Do you think that the approach endorsed by the CJEU in that case may be extended to the case of Mr Rainbow?
Do you see any elements in the EAW Framework Decision that may support such an extension?

Level III – Judicial interaction
Do you think that the investigating magistrate of Member State Beta should send a reference for preliminary ruling to the CJEU?
In case, how should the question(s) for preliminary reference be framed?

Level IV – Solution of the case
Let us assume that a reference for preliminary ruling is raised before the CJEU, which says that its approach in *Aranyosi and Căldăraru* can be estended also to the risk of violation of Article 21(1) CFR.
How would you deal with the case of Mr Rainbow, in light of the Court's guidance in Aranyosi and Căldăraru*?*
Do you think that the guidance provided by the Court is sufficient? Is there any issue on which you would need more (precise) guidance?

Hypothetical n. 7 (Assignment of rights to compensation)

FACTS

In May 2015, the air carrier "*EuropeWings*" – based in Member State A – introduced in its contractual terms a provision prohibiting assignment of rights to compensation under EU Regulation 261/2004 (establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flight).

On 6 July 2015, Mr. X's flight ZZ-66 from Milan to Berlin, due to be operated by *EuropeWings*, was cancelled because of unknown reasons.

In August 2015, Mr. X assigned his right to pursue compensation for the cancellation of flight ZZ-66 to AirAid, a private company in the business of acquiring air passengers' "debts" arising out of the application of Regulation 261/2004.

In September 2015, AirAid initiated proceedings in court against *EuropeWings* in its individual capacity, based on the assignment he had entered into with Mr. X.
AirAid claimed compensation for the amount of Euro 250 pursuant to Article 7 of EU Regulation 261/2004.

EuropeWings asked the rejection of the claim based on its contractual terms prohibiting assignment of rights to compensation.

To the opposite, the claimant argued that the contractual terms of *EuropeWings* breached the national legislation implementing Directive EU Directive 93/13/ECC on unfair terms in consumer contracts and the right to an effective remedy enshrined in Article 47 of the Charter. Accordingly, those terms should be considered void.

PROVISIONS AT ISSUES

- ***EuropeWings contractual terms***

15. "*The assignment of any right to compensation, damages or refund shall only be valid where the right is assigned to natural persons that are registered in your flight booking as additional passengers and/or, if you are a member of a travel group, to other passengers of this travel group and/or, where the customer is a minor or otherwise not legally competent, to their guardians. In all other cases the assignment of any right to compensation, damages or refund against us to third parties shall be invalid. This prohibition of assignment does not apply where assignment or subrogation of the claim is required by law*".

- **The national legislation of Member State A implementing Directive 93/13/EC** contains a list of unfair contractual terms that replicates *verbatim* the (non-exhaustive) list contained in the Annex to that Directive. Accordingly, unfair contractual terms are:

"Terms which have the object or the effect of:
(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or

supplier against any claim which the consumer may have against him;
(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
(f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract. *".*

QUESTIONS

Level I - Analysis of the hypothetical case

1) Relevance of EU law (and of the Charter) to the case

According to AirAid's arguments, the case at issue has a connection with EU law, thus triggering the application of the EU Charter.

a. Do you agree with AirAid that the case has a connection with EU law? Do you think that the application of the EU Charter is triggered in the case at hand?

b. If AirAid had made no reference to EU law, would you have investigated on your own on the relevance of EU law, and of the Charter in particular?

2) Compatibility of the contractual terms with Article 47 CFR

If one admits that the situation at issue has a connection with EU law and triggers the application of the EU Charter, the question arises as to the compatibility of *EuropeWings*'s contractual terms with Article 47 of the EU Charter.

***a**. Do you think that EuropeWings' contractual terms infringe the right to an effective remedy guaranteed by Article 47 CFR? If yes, explain why.*
***b**. Do you think that the prohibition of assignment of rights to compensation constitutes a limitation to the right to an effective remedy before a court? If yes, do you think that the criteria provided for in Article 52(1) of the EU Charter for limitations to fundamental rights are met in the specific case? Explain briefly your reasoning.*
c. Can you think of any judgment of the CJEU that may be provide useful indications with respect to the case at hand?

3) Relationship between sources and courts: Charter/CJEU
If you were confronted with the case:

a. Would you consider the possibility to submit a reference for a preliminary ruling to the CJEU? Or would you think that such a claim would be inadmissible?
b. If yes, how would you frame the preliminary question?

Level II - Discussion of the domestic legal framework in light of the hypothetical case
Please, identify (in advance of the workshop) how would you solve the case at issue if it was presented before you.
In light of the discussion of the hypothetical case, do you identify any problematic issues with respect to the compatibility with Article 47 CFR?

Hypothetical n. 8 (Standing of environmental NGOs to seek judicial review against a decision relating to protected site under EU environmental law)

Related Module Issue: No. 3 – Access to justice in environmental matters

FACTS

"Green Mountain" is an area designated by the Republic of Fantasia, an EU Member State and a party to the Aarhus Convention, as special protection area within the Natura 2000 ecological network.

On 15 January 2015, Alpha Ltd, a corporation owning farms located within "Green Mountain", apply with the competent authority, the Environmental Bureau of Municipality of Utopia (EBU), for the granting of a permit to set up new breeding sites that would allow a 30% increase of its productive capacity.

The requested activity is not subject to EIA under the domestic legislation, in conformity with the EIA Directive.

On 30 March 2015, "Wild Mountain Defenders" (WMD), a public-interest NGO recognised under Fantasian law, becomes aware of the administrative authorisation procedure and submits a request to be admitted to the procedure as a party. In its submission of 15 April 2015, it also argues that compelling ecological reasons oppose the granting of the permit: according to a report released by the National Environmental Protection Agency the previous year, any increase in road traffic through the protected site would pose a threat to the its ecological balance. WMD submits that such an increase would necessarily follow from the enhanced production of the farms owned by Alpha. In support of its submission, WMD invokes Article 6 of the Aarhus Convention and Article 6(3) of the Habitats Directive.

By a decision of 30 June 2015, the EBU denies the requested status to WMD, since domestic law does not allow NGOs to be party to administrative proceeding, unless their right are directly at stake or such status is directly conferred on them by special legislation. The decision states that WMD's submission will nevertheless form part of the procedure's file as "unsolicited relevant information from the public" in accordance with domestic law.

WMD challenges the decision of 30 June 2015 before the Administrative Court of Utopia. By judgment of 30 October 2015, the application for judicial review is rejected as manifestly unfounded.

On 5 November 2015 the requested permit is granted to Alpha.

WMD appeals before the Supreme Administrative Council of Fantasia against the Administrative Court's judgment. The appeal is swiftly rejected as having become moot after the conclusion of the administrative procedure to which the applicant sought to participate.

On 30 January 2016, WMD seeks judicial review of the decision to grant the permit before the Administrative Court of Utopia. Being aware of the fact that, under domestic law, only parties to the proceedings have standing to challenge their outcome, it argues that Article 6 of the Aarhus Convention, as part of EU Law, is directly applicable and is a proper legal basis for recognising its standing. It argues that, otherwise, its fundamental right to an effective judicial remedy under article 47 CFR would be breached.

EU AND INTERNATIONAL LAW AT ISSUE

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

Article 3

1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.
The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.
2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.

Article 6

1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.
2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Aarhus Convention

Article 2 – Definitions

(4) "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;
(5) "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Article 6 – Public Participation in decisions on specific projects

(1) 'Each Party

(a) shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in Annex I[4];
(b) shall, in accordance with its national law, also apply the provisions of this Article to decisions on proposed activities not listed in Annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions.

Article 9 – Access to Justice

(2) Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
(a) Having a sufficient interest or, alternatively,
(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,
have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.
What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

NATIONAL PROVISIONS AT ISSUE

Code of Administrative Procedure of Fantasia

Article 14
(1) Any person whose rights, legitimate interests or obligations are the subject of the administrative procedure concerned or whose rights, legitimate interests or obligations may be directly affected by the decision shall be a party to the proceedings; in addition, any person who claims that the decision may directly affect his rights, legitimate interests or obligations, save proof to the contrary, shall be a party to the proceedings.
(2) Any person granted such status by special law shall also be a party to the proceedings.

QUESTIONS

Level I - Analysis of the hypothetical case

1) Relevance of EU law (and of the Charter) to the case
WMD has raised doubts with respect to the compatibility of the national provisions concerned with EU law. If the situation at issue in the main proceedings falls within the scope of EU law, the Charter is applicable and the national provisions on standing of NGOs in environmental litigation may be tested against Article 47 CFR, provided that there are "rights" under EU law that the NGO can invoke (see *infra*).

a. *Had WMD made no reference to EU law, would you have considered this issue* proprio motu*?*

[4] Annex I does not cover the activiy envisaged in the hypotetical

b. *Do you see any connection between the national provisions at issue and EU law that can trigger the application of the Charter?*

To what extent it is relevant, or even decisive, the fact that the administrative decision against which judicial review is sought may have an adverse environmental effect on a site which is protected under EU law? Which provisions of EU law are at stake here?

2) Applicability and respect of Article 47 CFR

a. *Is article 47 CFR applicable in the present case?*

Does an environmental NGO, such as the applicant in the present case, assert rights or freedoms guaranteed by EU law in a situation such as that at issue in the main proceedings?

Please consider if the following statements are true in the present case and assess the consequences, in terms of the question above, of both a positive and a negative answer:

i) The proposed activity fall within the scope of EU legislation implementing the Aarhus Convention, i.e. the EIA Directive: YES or NO;

ii) The proposed activity fall within the scope of article 6 of the Aarhus Convention: YES or NO.

Are there any previous judgments of the CJEU from which you can infer useful indications to solve the case at issue?

b. *Would article 47 CFR be breached in the present case if WMD is denied standing to challenge the decision on permit?*

If yes, which rights under EU law WMD should be able to assert in the judicial review sought? Would this be limited to its participation entitlements in the administrative procedure? What is the legal basis and rationale for a broad understanding of "EU rights" in this context?

3) Relationship between sources and courts

WMD has raised doubts with respect to the compatibility of the national provisions concerned with both EU law and the Aarhus Convention.

a. *How would you deal with these two claims? If the case did not fall within the scope of EU Law, would you be able to apply directly the Aarhus Convention? Which would be the conditions under the domestic legal system to be considered to this effect?*

b. *Would you consider the possibility to submit a reference for preliminary ruling to the CJEU?*

c. *If yes, how would you frame the preliminary question?*

4) Application of EU law to the main proceedings

Based on your answer to question 2.b above , how would you deal with the case of WFD? Which legal consequences would your answer entail (in terms of application / non-application / interpretation of the national provisions concerned)?

Level II - Discussion of the domestic legal framework in light of the hypothetical case

Please, identify (in advance of the workshop) the national provisions that you should apply, in accordance with the law applicable in your Member State, if a case such as that of WMD were brought before you.

In light of the discussion of the hypothetical case, do you identify any problematic issues with respect to the compatibility with Article 47 CFR of the relevant national provisions?

Hypothetical n. 9 (Terrorism and non-disclosure of evidence on national security grounds)

FACTS

On 2 March 2011, Member State Y adopted Law No. 123/2011, by which it has introduced in its legal system, *inter alia*, the offence of public provocation to commit terrorist offences. Member State Y adopted this piece of legislation in order to comply with the obligation – stemming from Framework Decision 2008/919/JHA (amending Framework Decision 2002/475/JHA on combating terrorism) - to foresee as criminal offences a set of conducts linked to terrorist activities.

On 3 April 2014, Mr. X, a citizen of Member State Y, was charged with the offence of public provocation to commit terrorist offences for having published on the Internet a number of public messages inciting the commission of terrorist offences.

During the proceedings, the accused was prevented from examining part of the material against him due to national security reasons.

This preclusion was based on specific domestic legislation concerning terrorist offences, pursuant to which the disclosure of evidence to the accused for reasons, *inter alia*, of public security concerns may be prevented. According to the applicable legislation, competent judges may examine evidence whose disclosure risks to undermine national security in "closed" hearings without the presence of the accused or of his counsels.

Mr. X complained that the national legislation at issue breached his right to fair trial guarantees, claiming, *inter alia*, its incompatibility with the EU standard of protection of fair trial rights, as enshrined, notably, in Article 47 of the EU Charter.

NATIONAL PROVISIONS AT ISSUE

Terrorist Offences Act

Article 11
"(1) the court may admit evidence, even in the absence of the accused or his legal representative, or not disclose such evidence to him if, after having reviewed the evidence, even in the absence of the accused or his legal representative, it is convinced that disclosure of the evidence to the accused is likely to harm State security or public security".

QUESTIONS

Level I - Analysis of the hypothetical case

1) Relevance of EU law (and of the Charter) to the case
Mr. X has raised doubts with respect to the compatibility of the concerned domestic provisions with EU law and, more specifically, with fair trial guarantees provided for in Article 47 of the EU Charter.
From your point of view, is there any ground triggering the application of the EU Charter?

In the affirmative, please describe briefly the reasons that make EU Charter provisions relevant in the case at stake.

2) Compatibility of the national provisions at issue with Article 47 CFR
If Article 47 CFR applies to the case at hand, the following questions arise:

a. *Which "paragraph" of Article 47 CFR is relevant to the case at hand?*
b*. Provided that Article 47 CFR applies to the case, non-disclosure of evidence based on national security grounds would constitute a limitation to the right to an effective remedy. According to Article 52(1) CFR, limitations on the fundamental rights granted by the Charter can be justified only if they are:*
- provided for by law;
- respect the essence of that right;
- meet an objective of general interest;
- are necessary and proportionate in relation to that objective.
Do you think that the above criteria are met in the case at stake?
Can you think of any CJEU's judgment that may provide useful guidance to solve the issue?
Please, explain briefly your reasoning with respect to each of the listed requirements.
c. *Would you answer differently if national criminal provisions provided for a specific procedure involving the use of special advocates and in camera proceedings?*
Would your answer change if the accused were provided with a summary of information (i.e., gisting)? If yes, explain why.
d. Do you think that the jurisprudence of the ECtHR on disclosure of evidence could be useful in the present case? If yes, please describe briefly why.

3) Relationship between Courts
a. In case you would be confronted with a case such as that at issue, would you consider the possibility to submit a reference for a preliminary ruling to the CJEU?
b. If yes, how would you frame the preliminary question?

Level II - Discussion of the domestic legal framework in light of the hypothetical case
Please, identify (in advance of the workshop) the national provisions that you should apply, in accordance with the law applicable in your Member State, if a similar case arose before your court.
In light of the discussion of the hypothetical case, do you identify any problematic issues with respect to the compatibility with Article 47 CFR of the applicable national provisions?