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

MODULE 2 – Judicial Interaction Techniques

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

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Coordination of the ACTIONES Project:
Prof. Fabrizio Cafaggi (Scientific Coordinator)
Dr. Federica Casarosa (Project Manager)
Dr. Madalina Moraru – Module coordinator
Dr. Nicole Lazzerini

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

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

The module will show how the use of judicial interactions techniques by national courts has helped them to solve issues concerning conflict between national and EU legislation[2], between national and/or European judicial interpretation of particular provisions[3], or between various fundamental rights and/or fundamental freedoms.[4] The cases selected to illustrate the added value of judicial interaction in the implementation of the EU Charter are limited to: *non-discrimination, consumer, criminal, asylum and irregular migration*, since these form the subject areas covered by the ACTIONES Project.

The vertical, horizontal or transnational judicial dialogue(s) have produced concrete changes on the national legislation,[5] on the relation between the domestic judiciaries,[6] on the competences of the courts vis-à-vis the executive,[7] and on domestic judicial doctrines, for the purpose of securing the supremacy and direct effect of EU law and the EU Charter.[8] Ultimately, it is clear that judicial interaction has contributed first to a more coherent application of the EU

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

[2] See, for instance, Case C-61/11 PPU, *El Dridi*, ECLI:EU:C:2011:268.

[3] For example, the Case C-411/10, *N.S. and others*, ECLI:EU:C:2011:865.

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

[5] For instance, following the preliminary references sent by the Italian courts in 2011- *El Dridi* case, in 2012 – *Sagor*, the various provisions of the Italian Alien law have been declared incompatible with EU law and the Italian legislator was forced to intervene in order to remedy the incompatibility with the EU Return Directive. In relation to the right to be heard, see, in particular the right in the Belgian legal order, see the Second European synthesis Report available online at REDIAL.

[6] For example, according to the preliminary rulings of the CJEU in *Cartesio* and *Elchinov*, the review performed by higher national courts may not jeopardise the direct relationship between lower courts and the CJEU, Case C-210/06, *Cartesio Oktató Szoláltató*, ECLI:EU:C:2008:723; In *Elchinov*, the CJEU held that lower courts are not bound by national jurisprudence, even if originating from superior courts if incompatible with EU law and jurisprudence, see Case C-173/09, *Elchinov*, ECLI:EU:C:2010:581. More recently, the CJEU held that Article 267 TFEU precludes the mechanism established by Article 99(3) of the Italian Code of Administrative Procedure, which provides for mandatory referral to the plenary session of the Consiglio di Stato by any chamber of that court if it considers it necessary to disregard a principle of law stated by the plenary session.

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

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

Charter,[9] and secondly to an enhanced fundamental rights protection of the individuals.[10] They may have also offered national judges a cost-effective inspirational legal source for solving the difficult questions concerning the application of the EU Charter raised before them.

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

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

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

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

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

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

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

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

National courts have at their disposal a number of judicial interaction techniques to ensure primacy of the EU law and EU Charter, namely: *duty of consistent interpretation of national*

[9] See also the thematic modules: Modules 4-8.

[10] See, in particular Module 5 on the application of the EU Charter in asylum and irregular migration.

law with EU law; duty to send a preliminary reference for the CJEU, given certain conditions; the principle of proportionality; mutual recognition of foreign judgments; comparative reasoning with national legislation and jurisprudence from another Member State; disapplication of national law due to violation of EU norms.[11] In the following paragraphs each of these judicial interaction techniques will be presented in an attempt to highlight their scope of application, function, and added value for the application of the EU Charter. Each of the following section will include commentaries of landmark national and European cases that will illustrate the use of judicial interaction techniques for the purpose of solving conflicts between norms, judicial interpretations, fundamental freedoms and fundamental rights or different fundamental rights, while at the same time ensuring conformity with the EU Charter. The techniques are presented following the order they would normally be considered in practice. Please use this module together with the *Practical Guidelines on the use of Judicial Interaction Techniques on the application of European Fundamental Rights*.[12]

1. Consistent interpretation

The first judicial interaction technique that can be used by national courts for the purpose of remedying discrepancies between national and EU law/EU Charter is consistent interpretation. When applying national law that falls within the scope of EU law, national courts have a duty to interpret it as far as possible in light with the wording and purpose of the applicable EU law and EU Charter.[13] According to *Marleasing*, national courts have a duty to interpret national law in conformity with EU law, even if the respective EU secondary provision has not yet been transposed by the domestic legislator. In *Marleasing*, the CJEU traced the duty of conform interpretation which required, *in casu*, the Spanish referring court to not take into account a particular interpretation of the Civil Code insofar as it would produce a result not envisaged by the Directive. Unlike the disapplication technique, which will be discussed below, consistent interpretation imposes upon national courts a duty to use this technique even before the deadline of the transposition of the Directive has expired.

Consistent interpretation is also a crucial tool for upholding the autonomous meaning of legal terms in EU law and finding a 'fit' between EU and national law. In the words of the UK High Court of Appeal,[14] the wording of EU rules is prone to "[…] being adapted to the legal systems of all Member States." (para. 89)

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

Functions of the consistent interpretation

Through the use of the consistent interpretation technique, national courts can achieve the result of remedying an apparent conflict between national legislation, judicial doctrine or

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

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

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

[14] *Bucnys and others. v. Lithuanian and Estonian Ministries of Justice* [2012] EWHC 2771 (Admin).

administrative practice and a norm of EU law and/or a provision of the EU Charter. This is perhaps one of the simplest case where consistent interpretation could be useful.

A more complex case is when the CJEU and ECtHR developed tests or interpretations of a fundamental right which, at face value, put national courts in a difficult position of having to choose to apply either the judicial interpretation of the CJEU or of the ECtHR, as a concomitant application is apparently impossible. There have been cases, where national courts are faced with challenging situations of having to ensure consistent interpretation of national law with both EU and ECHR norms which have received diverging interpretation by the CJEU and ECtHR. Recently, the CJEU and the European Court of Human Rights take different views on the interpretation and application of fundamental rights in the field of AFSJ, particularly when challenges to the application of mutual recognition are raised.[15]

For instance, in *M.S.S v Belgium and Greece*,[16] and *Tarakhel*,[17] the ECtHR seems to challenge the scope and operation of the mutual trust principle as conceived by the CJEU in *N.S.*[18] and *Abdullahi*,[19] and favours an approach of safeguarding human rights not just in cases of systematic failure.[20] Unlike the CJEU, the ECtHR requires national courts to carry out individual examinations of violation of human rights, and prohibits expressions of mutual trust such as transfers of asylum seekers in particular Member States, or individuals subject to European Arrest Warrants, if they found a violation of a human right, regardless of the nature of the human right violated and whether these violations qualify as systemic or not.

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

An example of constructive application of consistent interpretation was provided by the UK Supreme Court. In *EM (Eritrea)*,[21] the Court established that the legal test to be followed when determining whether particular violations of human rights amount to legitimate grounds for limiting mutual trust should be the ECtHR *Soering* test coupled with the *M.S.S* and *N.S.* threshold. Thereby, both operational, systemic failures in the national asylum systems and individual risks of being exposed to treatment contrary to Article 3 ECHR and Article 4 EU Charter should be considered as legitimate thresholds for the limitation of the principle of mutual trust. The UK Supreme Court held that an interpretation of the *N.S.* judgment should be that "infringements of fundamental rights provide evidence of the systemic deficiency" rather than that "a systemic deficiency had to be demonstrated before violation of a fundamental right."[22] It thus first provided a creative interpretation of the CJEU *N.S.* judgment that would

[15] See the Opinion 2/13 regarding the Accession of the EU to the European Convention on Human Rights and Fundamental Freedoms, Court of Justice of the European Union, *Opinion 2/13*, EU:C:2014:2454 (2014).
[16] *M.S.S. v Greece and Belgium,* Appl. No. 30696/09, ECtHR, Judgment of 21 January 2011.
[17] *Tarakhel v Switzerland*, Appl. No. 29217/12, ECtHR, 4 November 2014.
[18] See, C-411/10 and C-493/10, *N.S. and others,* EU:C:2011:865, para. 86. See also *Puid* (C-4/11) EU:C:2013:740.
[19] Case C-394/12, *Shamso Abdullahi v Bundesasylamt*, ECLI:EU:C:2013:813. In its preliminary ruling, the CJEU confirmed that "systemic deficiencies in the asylum procedure and reception conditions" is the only condition justifying limitation in the application of the Dublin II Regulation based mutual trust principle.
[20] This principle is now provided by Dublin III Regulation, which refers to 'systemic flaws', see Regulation 604/2013 [2013] OJ L180/31, Article 3(2), however other EU secondary instruments do not refer to this notion.
[21] *R (on the application of EM (Eritrea)) (Appellant) v Secretary of State for the Home Department*, [2014] UKSC 12, Judgment of 24 February 2014.(hereinafter *EM (Eritrea*)).
[22] *Ibid.*, paras. 89 and 44.

then ensure conformity with the ECtHR *Soering* threshold, and avoid placing the national court in a position of choosing loyalties.

In other cases, the ECtHR recognises a certain state discretion, such as in cases like *Schalk and Kopf*.[23] Then national jurisdictions make different use of it (contrast the Italian, French, Portuguese and the Spanish judgments on same-sex marriage).[24] Interestingly, the existence of a margin of appreciation might serve as a defense for a measure that seemingly contradicts the ECHR, and therefore the national court must examine this issue to make a determination about its ECHR-compliance (as did the ……

Casesheet 2.1 - (Austria) Constitutional Court, U466/11 and others

Consistent interpretation of national constitutional standards on fair trial with Art. 47 EU Charter

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

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

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

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

The same does not, however, hold for arguments based on the Charter of Fundamental Rights. In relation to the Charter, the Constitutional Court goes on to cite in detail the CJEU case law building on *Rewe*, in relation to the principles of equivalence and effectiveness of protecting EU law-based rights in domestic legal orders. The Constitutional Court then notes the close connection between the Charter and the ECHR which is, incidentally, directly applicable as a source of constitutional rights in the Austrian legal order. From these two points, the Court concludes, in effect, that the Charter can supply the appropriate standard of review for breaches

[23] See Module 6, Casesheet 6.11.
[24] See Module 6, Casesheet 6.10.

of constitutional rights. The centralisation of such decisions in the hands of the Constitutional Court is turned into an argument in favour of that reading. At least insofar as 'rights' from the Charter are concerned, the overlap of their content with the ECHR means that they should be translated into national constitutional standards; this may not, however, hold for the principles laid down by the EU Charter, requiring thus a case-by-case assessment (para 5.5).
This justifies the Constitutional Court's finding that it will follow the fundamental rights case law of the CJEU which, in turn, follows the case law of the ECtHR. This may require it to submit preliminary references to the CJEU, but only if there is doubt on the proper interpretation of EU law. Interestingly, the Court considers this to be the case when, not just the CJEU, but also the ECtHR, has resolved a certain issue.
Next, the Constitutional Court considers the issue whether the case falls within the scope of EU law as required by the Charter, and finds that it does, due to its subject matter (asylum, regulated extensively by EU measures).
As for the application of Art. 47 of the Charter, the Court notes that it has a broader scope of application than its correspondent right in the ECHR – Art. 6 ECHR. While under Art. 6 ECHR, the right to a hearing only applies in civil law cases, Art. 47 extends that protection to asylum proceedings and thus the applicants can benefit from the particular fair trial safeguards in asylum related proceedings. The Court emphasises that Art. 47 EU Charter does not prescribe an absolute fundamental right, but one which accepts limitations, which must pass the test of the principle of proportionality in order to be found legitimate. Citing the case law of the ECtHR, the Constitutional Court finds that this right can be limited in exceptional circumstances and that the legitimacy of the limitation(s) has to be established on a case-by case basis. *In casu*, in circumstances where it has nothing to contribute to the written record, an oral hearing can thus be dispensed with. On this basis of this argument, the Constitutional Court found no violation of the Charter in the present case.

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

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

Relation between the EU Charter and ECHR: In assessing the application of Art. 47 EU Charter, which is part of the list of EU Charter 'rights', having also correspondent rights in the ECHR, the ACC concluded that they should be translated into national constitutional standards; this may not, however, hold for Charter 'principles', whose application require a case-by-case

assessment (para 5.5). The ACC rightly identified the scope of application of the right to a fair trial enshrined in Art. 47 as being broader than under Art. 6 ECHR, due to the fact that the former can be invoked and applied in asylum related proceedings, while the latter Article cannot, since it is confined to civil and criminal law cases. While Art. 6 ECHR based right to an oral hearing only applies in civil law cases, Art. 47 extends that protection to asylum proceedings and thus applicants can benefit from it. The assessment of a violation will, however, depend on the application of the principle of proportionality. Citing the case law of the ECtHR, the Constitutional Court finds that this right can be limited in exceptional circumstances and that it does not need to be protected according to the same standard regardless of the type of decision being made by a national court. In circumstances where it has nothing to contribute to the written record, an oral hearing can thus be dispensed with.

Use of judicial interaction technique: Through the use of consistent interpretation technique, the Austrian Constitutional Court recognised that Art. 47 of the EU Charter enjoys domestic constitutional status. The Court links the EU Charter with the jurisprudence of the ECtHR and by doing so indirectly strengthens also the horizontal dialogue between the CJEU and the ECtHR. The Austrian Constitutional Court adjudicates Art. 6 ECHR as not directly applicable, but refers to the jurisprudence of the ECtHR on Art. 6 ECHR in order to derive standards for exceptional derogations from the right to fair trial. The Court refers to Art. 13 ECHR in order to clarify that Art. 47 EU Charter has a relatively broader scope.

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

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

Limitations to the use of consistent interpretation

There are cases where the consistent interpretation technique cannot be used to reach the result of bringing the national legal provision at issue in line with EU law/EU Charter. This situations are known as a *contra legem* interpretation. If the national courts is uncertain of whether consistent interpretation is or not possible in the case, it can refer a preliminary reference to the

CJEU. For instance, the French supreme court (Cour de Cassation) asked the CJEU in **Dominguez**,[25] whether certain provisions of the French labour Code could be interpreted in conformity with EU Directive 2003/88 on the organisation of working time, or the French legislation had to be disapplied in favour of a direct applicability of the Directive regarding the right to paid annual leave. The CJEU suggested that referring court should seek to adopt an interpretation of the national provisions at issue that would be compatible with Article 7 of Directive2003/88, making it unnecessary for the national court to disregard national law. The CJEU thus eliminated the case as a *contra legem* limitation on the use of consistent interpretation technique. The Court of Justice required the French supreme court to apply the full set of interpretative methods recognised by domestic law with a view to adopt an interpretation which "would allow the absence of the worker due to an accident on the journey to or from work to be treated as being equivalent to the absence of a worker due to a work-accident."[26]

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

2. Preliminary reference

Relevant EU legislative instruments:

1. *Founding Treaties*
- Art. 19 TEU (*gen. legal basis*)

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

- Art. 267 TFEU (*scope of the PR*)

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

2. *Statute of the CJEU 2010 (Arts. 19, 20, 23, 23bis)*
3. *Rules of procedure CJEU 2012 (Title III – Arts. 93 –118)*
4. *Recommendations for national courts 2012*

The preliminary reference procedure is a direct judicial interaction technique laid down in Art. 19 (3)(b) TEU and Art. 267 TFEU. According to Article 267 TFEU, Member States' courts may – and sometimes must – refer questions on the interpretation or validity of EU legal measures to the Court of Justice of the European Union for a binding preliminary ruling. The preliminary reference technique aims to achieve uniform interpretation of EU law by all domestic courts and to assist in the effective judicial protection of individuals.

[25] Case C-282/10, *Dominguez*, ECLI:EU:C:2012:33.
[26] Ibid, see also L. Pech, 'Between Judicial Minimalism and avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez', *Common Market Law Review* (2012), p. 1–40.

All national courts, whatever their status in the national judicial hierarchy can enter in direct dialogue with the CJEU and send preliminary questions on the correct interpretation or validity of EU law. In recent years there is an increasing number of preliminary references sent by national courts, including supreme courts, among others by the *French Conseil d'Etat* (*Melki and Abdeli*)[27], the *French Constitutional Court* (*Jeremy F v Premier ministre,* discussed below), the *Czech Supreme Administrative Court* (*Landtová case*)[28] the *Spanish Constitutional Court* (*Melloni*, discussed below), and the *German Federal Constitutional Court* (*OMT* case).[29]

When a national court has a question regarding the correct interpretation or application of provision(s) from the EU primary law or secondary EU acts[30] or EU Charter,[31] on which the effective resolution of the dispute before that court depends, it has the option to directly ask questions asking for clarification and guidance from the CJEU (Art. 267(2) TFEU).

It should be noted in that respect that it is up to a national court to determine the factual and legislative context.[32] The accuracy of the legal and factual context is not a matter for the CJEU to determine, and it enjoys a presumption of relevance.[33] The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give an useful answer to the questions submitted to it.[34] Furthermore, the CJEU does not formally have competence to judge the compatibility of national law with EU law, but its jurisdiction is limited to the interpretation of

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[27] C-188/10 and C-189/10, *Melki and Abdeli,* EU:C:2010:363.

[28] Case C-399/09, *Landtová*, ECLI:EU:C:2011:415.

[29] Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400.

[30] The term "acts" covers: regulation, directives, decisions and the international agreements concluded by the European Union (Case C-192/89, *Sevince*, judgment of 20 September 1990, paras. 8-10).

[31] For more details on establishing the scope of application of the EU Charter, please see module 1.

[32] Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, *Stadt Lengerich v. Helmig and Others*, judgment of 15 December 1994, para 8; Case C-186/90, *Durighello v. INP*, judgment of 28 November 1991, para 8. In a case referred by an Italian court, Case C-386/92, *Monin Automobiles* (No. 1) judgment of 26 April 1993, the Court declared the reference inadmissible on the grounds that it was too vague as to the legal and factual situations envisaged by the national court The national court had indicated neither the contents of the provisions of national law to which it referred nor the precise reasons which prompted it to question their compatibility with Union law, and to consider it necessary to refer questions for a preliminary ruling. Similarly in Case C-326/95, *Banco de Fomento* judgment of 13 March 1996, the Court said that the order for reference contained no indication by the national court of the factual and legal situation in the case before it or the reasons why it considered that the answers specified by the defendants in the main proceedings were necessary to settle the dispute.

[33] Case 166/84, *Thomasdunger v.Oberfinanzdirektion Frankfurt am Rhein,* judgment of 17 January 1990..

[34] See, for example, Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* op. cit., para. 22; Case C-420/12 *Pohotovosť s. r. o. v Miroslav Vašuta*, judgment of 27.02.2014, para. 27. Exceptional situations where the CJEU still accepts to give a preliminary ruling in spite of the absence of the national legal and factual context exist, see *Crispoltoni* (Joined Cases C-133/93, C-300/93 and C-362/93, *Crispoltoni (No. 2)* judgment of 5 October 1994) the Court was already aware of the legal and factual context of the case, due to an earlier reference made by the same Italian court and concerning the same producer (Case C-368/89, *Crispoltoni (No. 1)* judgment of 11 July 1991). It was therefore prepared to give a ruling. In other situations, the Court is prepared to give a ruling in cases to which it wants to respond, even where the information provided is deficient in some way. In *Perfili* (Case C-177/94, *Criminal Proceedings against Gianfranco Perfili, civil party: Lloyd's of London* judgment of 1 February 1996) for example, the Court was prepared to answer a reference from the Italian Pretura Circondariale – even though there was an absence of any real explanation in the order for reference of the factual and legislative background to the case and there were also doubts as to whether the national court had misinterpreted its national legislation.

the latter.[35] However, indicative of the cooperation nature of the preliminary reference technique, in certain circumstances, even if the preliminary questions were not correctly formulated by the national courts, the CJEU reformulates them to affirm its competence and thus gives an answer which the national court can apply to the facts before it.[36] It has to be emphasised that the preliminary reference is not limited to cases where one of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of EU law, as the national judge can raise point of EU law of her own motion.

Conditions for the admissibility of preliminary reference:

According to the case law of the CJEU the basic rules to be followed by national courts when raising a preliminary reference to the Luxembourg Court are the following: there must be a pending[37] and genuine dispute[38] between the parties, resulting in an action before a national court or tribunal in which a decision on the question of EU law is "necessary" to enable the national court to give judgment. If that is the case, any court or tribunal "may" make a reference (Art. 267 (2) TFEU) and a "final" court or tribunal "shall" make a reference (Art. 267 TFEU) unless the matter is *acte clair* under the principles laid down in CILFIT.[39] The national courts enjoy a presumption that, in case of a question referred, the interpretation of the EU law is necessary for solving the dispute before them.

Conditions for the admissibility of the preliminary reference:

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

The notion of "national court or tribunal":

Any body who fulfils cumulatively the following criteria:

1. *Established by law;*
2. *Permanent;*
3. *Jurisdiction is compulsory;*
4. *Procedure inter partes;*
5. *Applies the rule of law;*

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

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

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

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

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

6. *Independent;*
7. *Issues decisions of a judicial nature;*

Broekmeulen[40]*:* Appeal Committee, a private body, not recognised by Dutch law as a' court' was considered by the CJEU as a court within Art. 267;
Nordsee[41]: arbitrator appointed by contract between parties, according to German law they decided according to law, their decisions had the force of *res judecata*, but CJEU – not a court: no compulsory jurisdiction (parties can freely choose between an ordinary court and arbitration);
Belov[42]**:** Bulgarian Commission for Protection against Discrimination (equality body) is not a court (does issue judicial decisions, but administrative; questionable independence)

The preliminary reference sent by national courts <u>should</u> contain the following essential information:

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

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

<u>Structure of the preliminary reference:</u>

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

The preliminary reference should have a maximum of 10 pages (in original language)

[40] Case C-246/80, *Broekmeulen*, ECLI:EU:C:1981:218.
[41] Case 102/81, *Nordsee*, ECLI:EU:C:1982:107.
[42] Case C-394/11*, Belov*, ECLI:EU:C:2013:48.

Right/Obligation to refer:

Unlike lower national courts, supreme courts more often have an obligation rather than a right to refer a preliminary ruling, since they are more often courts against whose decisions there are no remedies (Article 267(3) TFEU). The latter means that any national court or tribunal against whose decisions there is no judicial remedy under national law is obliged, as a court of last instance, to refer a question of EU law to the CJEU if it is relevant to the outcome of a pending case.[43] Additionally, if at issue is the validity of the EU law itself, all national courts, whether of first or last instance, are obliged to send a preliminary reference to the CJEU (Art. 267(3) TFEU).

Consequences of non-referal:

The failure of a Member State court to address a preliminary reference to the CJEU in a situation where it was legally obliged to do so may entail the following legal consequences:

1. an infringement of the right to a fair trial as laid down in Article 6(1) of the European Convention of Human Rights. The ECtHR has confirmed that an unreasoned refusal to raise a preliminary question under Art. 267(3) TFEU amounts to a breach of Art. 6 ECHR.[44]

ECtHR – violation of Article 6 ECHR (access to a court)
Ullens de Schooten v. Belgium – arbitratry refusal amounts to violation of Art. 6 ECHR
Dhabi v Italy: unreasoned refusal to address preliminary questions under Art. 267(3) amounts to a breach of Art. 6 ECHR (Appl. No. 17120/09)
According to the ECtHR, national courts have "to state the reasons why they consider the question to be irrelevant or that the relevant EU law has already been interpreted by the CJEU or correct application of EU law is so obvious as to leave no scope for any reasonable doubt."
Schipani v Italy (2015): same court as in Dhabi (Italian supreme court Corte di Cassazione) –had considered the arguments of EU law, but it omitted all references to whether the issue was an acte clair or an acte éclairé (Appl. No. 38369/09)
What is effective remedy against a refusal to send a preliminary reference under the ECHR system?
Köbler state liability is not part of domestic remedies that need to be exhausted, as it was held to not be effective (Schipani v Italy)

2. It may give rise to the liability of the Member State concerned for any damages that resulted to the individual plaintiffs (*Köbler*).[45]
3. It may determine the European Commission to institute infringement proceedings against the Member State in question.
4. Finally, in some situations, a failure to make a preliminary reference may affect the validity of the Member State court's judgment, and there may also be a requirement on Member State

[43] See Case C 99/00 *Lyckeskog*, paras. 14 et seq., Case C-210/06 *Cartesio* [2008], paras. 75 to 79).
[44] ECtHR: *Dhahbi v Italy*, App. No. 17120/09, op. cit.
[45] Case C-224/01, *Köbler,* op. cit..

administrative authorities to reopen the case file if, after the ruling by the Member State court, it becomes apparent that this court erred with regards to EU law.[46]

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

In addition to the ordinary preliminary reference procedure, Art. 267(4) TFEU provides for the obligation of the CJEU to act within the minimum delay when a case concerns a person in custody. There exist two types of procedures that allow the CJEU to deliver its preliminary ruling more quickly than the normal procedural rules would allow[47]:

- the expedited and
- the urgent preliminary ruling procedures.

Expedited Preliminary Reference

According to the new CJEU Rules of Procedure, Article 105(1), a national court may request of its own motion, or the President may decide to apply, the expedited procedure where the nature of the case requires so. The expedited procedure does not substantially differ from the ordinary procedure: the time for the hearing and the period cannot be less than 15 days from the approval of the expedited procedure, however, the total duration of the procedure is shorter, namely between three and six months.[48]

Urgent Preliminary Ruling (PPU)

Article 23a first paragraph of the CJEU Statute and Article 107(1) of the Rules of Procedure provide that for issues related to the Area of Freedom Security and Justice (Title V of Part Three of the TFEU), national courts can request for a preliminary ruling to be delivered under the urgent procedure. The necessary conditions to be fulfilled are that (not exhaustive, see para. 40 of *Recommendations of the CJEU to national courts*):

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

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

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

- Include in clearly identifiable way whether they request expedited or PPU
- Include reference to the relevant article: *Art. 105 for expedited procedure; Art. 107 for PPU*;
- The type of PR must be stated at the beginning of the document;
- Include matters of fact and law which require the urgency
- Include the risks involved in following the ordinary procedure

[46] Case C-453/00 Kühne & Heitz [2004] ECR I-837. See also, M. Broberg, 'National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom', in European Public Law 22, no.2 (2016):243–256.

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

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

Example of expedited PR: Case C-698/15, *Watson*, ECLI:EU:C:2016:70
Example of PPU – Jeremy F from French Conseil d'État

Casesheet 2.2 - Case C-168/13, Jeremy F, judgment of 30 May 2013

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

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

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

Legal issues/preliminary questions: Conformity of the French legislation implementing the EAW FD, which did not provide for an appeal with suspensive effect against the court decision giving consent to an extension of the EAW, with the right to a fair trial and effective judicial remedy as ensured by the French Constitution, Arts. 5 (4) and 13 ECHR and Art. 47 EU Charter. The Bordeaux appeal court decided to expand the arrest warrant. Jeremy F appealed this decision before the French Cour de Cassation, which referred to the Conseil Constitutionnel (FCC) a priority question of constitutionality relating to Arts. 695-46 of the French Code of Criminal Procedure, whereby the judgment of the Bordeaux appellate court was final and not subject to appeal. This raised concerns of incompatibility with the principle of equality before the law and the right to an effective judicial remedy.

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

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

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

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

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

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

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

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

Categories of preliminary references

In its preliminary ruling, the CJEU may either state that the conflict of norms, judicial interpretation, or between various fundamental rights and/or fundamental freedom(s) is non-existent, give guidance for its resolution by way of offering particular interpretation, application of relevant tests, or state clearly the need to disapply the national law whenever it is applied in the context of the EU law. Through the preliminary reference mechanism, the CJEU may also find that a certain legal provision from a secondary EU law is in conflict with the EU Charter and invalidate it.[49]

According to Tridimas[50], there are *three categories of preliminary references*, depending on the margin for manoeuvre it leaves to the referring court:

1. *Outcome preliminary rulings*: they provide the national courts with a ready-made solution to the dispute; (see, for instance, *Melloni* and *Radu* cases, discussed below);
2. *Guidance preliminary rulings*: they may provide the referring court with guidelines as to how to resolve the dispute (see, for instance, the CJEU preliminary ruling in– *G&R* and *Boudjilida* setting out guidelines on the application of the right to be heard which is part of the EU law general principle of rights to defence and the EU Charter right to good administration; or the *Jeremy F* case herein discussed);
3. *Deference preliminary rulings*: they may answer the question in such general terms that, in effect, it defers to the national judiciary on the point in issue (e.g., see eg Case C-341/08 Petersen, judgment of 12 January 2010).

Objectives of the preliminary reference:

The two main objectives and results of the judicial interaction technique of preliminary reference are: ensuring the coherence of the EU legal order and the respect of the fundamental principles of EU law (primacy, direct effect, and effectiveness). For this reason, the CJEU sometimes rephrases the questions formulated by national courts into principled questions of EU law, whose resolution is equally applicable in all Member States. All questions on the interpretation of EU law and on the validity of secondary EU legislation can form the object of an admissible preliminary reference, unless a provision of EU law requires no further interpretation because its meaning is manifestly clear, or when its interpretation or validity has been already clarified by a previous ruling of the CJEU.[51] As alluded to above, the CJEU is entitled only to decide on the interpretation and validity of EU law, however often the ruling of the CJEU has *de facto* the straightforward effect of sanctioning the validity – or the unlawfulness – of domestic law under EU legal obligations. Another outcome of this procedure is to provide the tools to the national judge, helping him/her to find the consistent interpretation of domestic norms with EU law obligations, or determine instead the disapplication of the latter. The CJEU can also shape the application of the proportionality and necessity tests, to provide

[49] C-293/12 and C-594/12, *Digital Ireland*, ECLI:EU:C:2014:238 ; Case C-236/09, *Test Achat,* ECLI:EU:C:2011:100.

[50] T. Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability', in *The Oxford Handbook of European Union law*, A. Arnull and D. Chalmers (eds), (2016) OUP.

[51] See *Da Costa* and *CILFIT* op. cit.

guidance to the referring court with respect to specific factual and legal background of the main proceedings.[52]

Outcomes of the preliminary reference, *inter alia*:

- *Legislative change/amendment in the national legal order* (e.g. the Court of Justice interpreted the Return Directive upon request of Italian courts on three occasions: in 2011 with the *El Dridi* case, in 2012 with *Sagor*[53] and in 2015 with *Celaj*.[54] As a result of the first two preliminary rulings, various provisions of the Italian Alien law[55] have been declared incompatible with EU law and the Italian legislator was forced to intervene in order to remedy this with two legal reforms;
- *Adaptation of national jurisprudence to EU law and CJEU jurisprudence* (e.g. following the CJEU preliminary ruling in *Melloni*, the Spanish courts gave up the judicial doctrine of absolute application of the right to a fair trial in criminal law, accepting as legitimate the limitation established by the Framework Decision establishing the European Arrest Warrant);
- *Extending the scope of competence of national courts in relation to the discretionary powers of the administration* (e.g. Mahdi);[56] or vis-à-vis other national superior courts or judicial forums.[57]

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

Functions of the preliminary reference:

- (*formally*) Help in providing interpretation of EU law;
- (*de facto*) Help on the compatibility of national rules with EU law;
- (*de facto*) Decision on the compatibility of secondary EU law with EU Charter (*Digital Rights Ireland, Test Achats*);
- Eliminating procedural limitations hindering the power of ordinary national courts:
  - *Rheinmühlen*[58]*: national law* binding a national court to points of law by the rulings of superior courts, precluding the exercise of power to refer, was declared incompatible;
  - *Filipiak*[59]: judgment of the Constitutional Court cannot bind national courts to continue applying national law incompatible with EU law (principle of primacy

[52] See in the Digital Ireland.
[53] Court of Justice of the European Union, *Md Sagor*, C-430/11, ECLI:EU:C:2012:777 (2012). The conclusions of the Court in *Sagor* where reiterated in *Mbaye,* C-522/11, ECLI:EU:C:2013:190 (2014).
[54] Court of Justice of the European Union, *Skerdjan Celaj*, C−290/14, ECLI:EU:C:2015:640 (2015).
[55] Legislative Decree No 286/1998 of 25 July 1998 consolidating the provisions regulating immigration and the rules relating to the status of foreign national (Ordinary Supplement to GURI No 191 of 18 August 1998).
[56] Case C-146/14 PPU*, Mahdi*, ECLI:EU:C:2014:1320.
[57] Case C-689/13, *Puligienica Facility Esco SpA (PFE*), ECLI:EU:C:2016:199; *Križan and Others; Cartesio (see more at p.11 and footnote 40).*
[58] Case C-166/73, *Rheinmühlen*, ECLI:EU:C:1974:3.
[59] Case C-314/08, *Filipiak*, ECLI:EU:C:2009:719

of EU law obliges the national court to apply EU law and to refuse to apply conflicting provisions of national law)

- *Palmasi*[60]: national law limiting the power a chamber of a court of final instance to refer questions directly to the CJEU, by requiring to first refer to the plenary session, was declared incompatible. (*Consiglio di giustizia amministrativa per la Regione siciliana*)

National legislation, constitutional or supreme courts cannot limit the power of the national courts to directly interact with the CJEU under Art. 267 TFEU. In cases where provisions of national law have limited the possibility for a national court or tribunal to make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU, the Court has 'ruled systematically in favour of the broadest freedom for national courts or tribunals to refer to it questions on the validity and interpretation of EU law'.[61] In a preliminary ruling referred by Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy), the CJEU held that "Article 267 TFEU must be interpreted as precluding a provision of national law, in so far as that provision is interpreted to the effect that, where a question concerning the interpretation or validity of EU law arises, a chamber of a court of final instance must, if it does not concur with the position adopted by decision of that court sitting in plenary session, refer the question to the plenary session and is thus precluded from itself making a request to the Court of Justice for a preliminary ruling."[62]

National courts' power to raise ex officio EU law issues

As a general principle, Member States are free to set limitations on the power of national courts to consider of their own motion matters of law overlooked by the parties in their pleas. This is usually done to respect the autonomy of the parties to delimit the ambit of the dispute in civil matters, and to ensure the expedient administration of justice. Logically, if national law permits discretion or imposes an obligation on national judges to raise issues of national law *ex officio,* this is extended to substantive EU provisions, as confirmed in *Kraaijeveld* ruling.[63] In the *van der Weerd* case[64] the CJEU stated that a national court is not required to consider the relevant point of the EU law if the parties had had a genuine opportunity to raise the point themselves in the course of proceedings, "*irrespective of the importance of that provision to the Community legal order*."[65] The requirement of a "genuine opportunity" led the Court to authorize the national appeal judge to consider EU law of its own motion, irrespective of limiting procedural

[60] C-261/95, *Palmisani*, EU:C:1997:351.
[61] View of Advocate General Mazák in *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:319, point 62). See also, for the affirmation of that principle by the Court, judgment in *Rheinmühlen-Düsseldorf* (166/73, EU:C:1974:3, para. 3) and, for its continuing confirmation, judgments in *Mecanarte* (C-348/89, EU:C:1991:278, para. 44); *Palmisani* (C-261/95, EU:C:1997:351, para. 20); and *Cartesio* (C-210/06, EU:C:2008:723, paragraph 88); *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, para. 41); *Elchinov* (C-173/09, EU:C:2010:581, para. 26); *Kelly* (C-104/10, EU:C:2011:506, para. 61); *Križan and Others* (C-416/10, EU:C:2013:8, para. 64); *A* (C-112/13, EU:C:2014:2195, para. 35).
[62] Case C-689/13, *Puligienica Facility Esco SpA (PFE)*, ECLI:EU:C:2016:199, para. 36.
[63] Case C-72/95 *Aannemersbedriff PL Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland*, judgment of 24 October 1996.
[64] C-222/05–225/05 *van der Weerd*, op. cit.
[65] Ibid., para. 41.

rules, when the first instance proceedings could not consider EU law and *"it seem[ed] that no other national court or tribunal in subsequent proceedings may of its own motion consider the question of the compatibility of a national measure with [EU] law.*"[66]
Nevertheless, the case law of the CJEU provides the guidelines as to when the principle of equivalence and effectiveness entitle national judges to consider issues related to EU law on their own motion, even when the parties have not raised them. The principles of equivalence and effectiveness ensure that national rules of procedure do not undermine the correct enjoyment of EU law rights making it impossible or more difficult compared to domestic rights. The *Van Schijndel* judgment spells out the circumstances in which consideration of EU law is mandatory:[67]

1. National courts are required to raise the issue of EU law on their own motion where **public policy interests** require it, and there are procedural safeguards allowing judges to consider national rules of public policy *ex officio*.
2. As the rule of thumb, the effectiveness of the EU law requires that the most important substantive constitutional aspects of EU law, in particular those pertaining to the functioning of the internal market must be taken into consideration by national judges at all stages of the proceedings. This is the conclusion that can be drawn from *Eco Swiss China Time*[68] ruling which concerned the compatibility of an arbitration award with matters of public policy, specifically with Art. 101 TFEU on competition. This is not surprising: since **competition provisions are fundamental for the EU law** and **essential for the existence of internal market**, they qualify as rules of national public policy, see point 1 above.
3. Clearly, the CJEU took advantage of this possibility when it determined the desirable manner of implementation of the Directive on unfair terms in consumer contracts.[69] It thus spelled out the domestic courts' power first[70] and later the obligation[71] to examine whether a given term of a contract is unfair. If the national court considers a contractual term unfair, it shall not apply the unfair term irrespective of whether the "unfairness" was raised or not by one of the parties in first or second instance proceedings,[72] unless the consumer insists on its application.[73]

[66] Case C-312/93 *Peterbroeck*, op. cit., para. 19.
[67] Joined cases C-430/93 and C-431/93 *Jeroen van Schijndel,* op. cit., later confirmed in joined cases C-222/05 and C-225/05 *J. Van der Weerd and others v Minister van Landbouw, Natuur en Voedselkwaliteit*, op. cit., at paras. 19-22.
[68] C-126/97, *Eco Swiss China Time v. Benetton* , judgment of 1 June 1999.
[69] Joined Cases 240/98 to 244/98 *Oceano Grupo Editorial SA v Rocio Muciano Quintero and Salvat Editores v. Jose M. Sanchez Alcon Prades and others* , judgment of 27 June 2000; C-473/00 *Cofidis SA v Jean-Luis Fredout*, judgment of 21 November 2002; Case C 488/11, *Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV*, judgment of 30 May 2013; Case C-397/11 *Erika Jőrös v Aegon Magyarország Hitel Zrt,* judgment of 30 May 2013.
[70] Joined Cases 240/98 to 244/98 *Oceano*, op. cit.
[71] Case C-168/05 *Elisa Maria Mostaza Claro v Centro Movil Milenium SL* judgment of 26 October 2006. Case C-243/08 *Pannon GSM Zrt. V. Erzsebet Sustikne Gyofri* judgment of 4 Jue 2009.
[72] Case C 488/11 *Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV*, judgment of 30 May 2013.
[73] See, Case C-243/08 *Pannon,* op. cit.

In the field of fundamental right protection under the Charter or the general principles of EU law, the question regarding the application *ex officio* of EU law is double-fold. As such, EU fundamental rights do not apply directly to the facts[74] of national proceedings or to domestic law in general: their application depends on whether *other rules* of substantive EU law apply (see art. 51(1) of the Charter as interpreted in *Fransson* and *Pfleger*).[75] As a result, the parties that wish to invoke fundamental rights guarantees provided for by EU law carry the *onus* of raising the points of EU law twice: they must point to applicable rules of EU law in the main proceedings and, in addition, to the applicability of EU law fundamental rights guarantees.

However, if they only discharge their burden of pleading with respect to the substantive rules of EU law, application of fundamental rights obligations is not barred, irrespective of domestic procedural law. Because compliance with fundamental rights is a condition of validity of EU norms, it follows that national judges can always raise their relevance *ex officio*, insofar as the application of substantive EU law has been duly raised by the parties under the conditions described above. In other words, once EU law has been introduced in the proceedings according to the national procedural regime, there is no requirement that the application of fundamental rights is specifically included in the parties' pleas. The judge can autonomously consider their application, since it might be relevant to a genuine question on the validity or interpretation of the substantive rules of EU law invoked, and therefore it might give rise to a question to the Court of Justice under Art. 267 TFEU.**Effects of the preliminary rulings:**

- The referring court is bound by the ruling (166/73 *Rheinmühlen*)
- The interpretation binds also other courts (C-8/08 T-Mobile Netherlands)
- The preliminary ruling produces effects *ex tunc* (the day of entry into force of the interpreted rule), unless the CJEU restricts its temporal effects (the Member State has to ask precisely for it – *Tatu*[76])
- Any decision inconsistent with the CJEU interpretation is defective and thus invalid (Polish Supreme Court 8.12.2009, I BU 6/09)

3. Disapplication

According to the *Simmenthal* doctrine,[77] national courts are obliged to disapply any conflicting provisions of national law.[78] This is only necessary if consistent interpretation of internal law proves impossible.[79] EU law obliges judges to look for the "consistent interpretation" of

[74] With the exception of the fundamental rights of non-discrimination provided for in Art. 157 and in the non-discrimination Directives can have direct effect.
[75] Case C-390/12, *Pfleger*,, judgment of 14 November 2013.
[76] Case C-402/09, *Tatu*, ECLI:EU:C:2011:219.
[77] Case C-106/77, *Amminstrazione delle Finanze dello Stato v Simmenthal* op. cit., para. 22.
[78] A more updated judgment of the CJEU restating the disapplication obligation in case of conflict between domestic provisions and rights guaranteed by the Charter can be found in Case C-617/10, *Åkerberg Fransson,* op. cit. para. 45*:* "*As regards, next, the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means*."
[79] Case C-282/10, *Dominguez* , judgment of 24 January 2012, para. 23

domestic law that does not contravene EU law.[80] When such interpretation is not possible and the EU norm satisfies the requirements for direct effect (i.e., it creates an obligation that is clear, precise and unconditional), the judge must set aside the domestic norm and apply the EU one instead, in order to ensure its efficacy.

There may be different approaches to the question of which of these two techniques is preferable in difficult cases. Some national judges might prefer to attempt consistent interpretation to avoid disapplying a national rule, whilst others might prefer to preserve the established interpretation of a national law rule and leave the task of amending it to the legislator. The CJEU encourages the exhaustion of consistent interpretation attempts in order to avoid outright conflict.[81]

Importantly, the duty of disapplication stems directly from EU law and national courts are not obliged to seek the prior opinion or the permission of national higher courts.[82]

A national court which is called upon to apply provisions of European Union law is under a duty to give them full effect, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently. Again, it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.[83]

Note that the direct effect of EU law, which is the precondition for disapplication of domestic norms, is generally attributed to regulations and Treaty provisions, subject to the requirements of *Van Gend en Loos* (a provision creates a right, is specific, and unconditional). Directives have only vertical effect, therefore a non-transposed directive can be invoked and enforced *in lieu* of contrary domestic rules only in disputes against State entities or emanations of the State.[84] This is true regardless of whether the public authority acts as a commercial entity or exercising public powers.[85]As to whether general principles and the provisions of the Charter can have horizontal direct effect, the question is still open, although there is a trend that suggests that the answer is in the positive,[86] provided of course that the single norm satisfies the *Van Gend en Loos* requirements.[87]

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

[80] Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others* , judgment of 5 October 2004, par. 27.
[81] See, for instance, Case C-282/10, *Dominguez,* op. cit, paras. 27-30.
[82] See: Case C-555/07, *Kücükdeveci* op. cit., at para. 55.
[83] Case C-314/08, *Filipiak* , para. 81.
[84] In the area of non-discrimination the case law have given the horizontal direct effect to provisions of the directive. Compare: Case C-144/04, *Mangold,* op. cit. and Case C-555/07, *Kücükdeveci*, op. cit.
[85] Joined Cases C-250/09 and C-268/09 *Georgiev*, judgment of 18 November 2010, para. 70.
[86] See *Mangold* and *Kücükdeveci* op. cit.
[87] See more details on the topic of the horizontal application of the EFRs as provided by the EU Charter, Module 1.

Francovich,[88] the legislator might be asked to amend the legislation, or/and the domestic norm can be subjected to a review of constitutionality).[89]
Especially when the judge from a lower instance expects the appellate level or the supreme court to disagree with her interpretation of EU law, then, making a preliminary reference might be a wise option: the ruling of the CJEU will provide sufficient authoritative power for her subsequent decision to withstand scrutiny (at least on the point of EU law)[90], will provide guidance to the legislator to amend the EU-illegal legislation[91] and will, incidentally, serve as precedent for all EU jurisdictions. When the matter, instead, is not very sensitive, or when there is a CJEU ruling confirming the application of EU law, disapplication can be attempted, but the message to the legislator will be very tenuous: the disapplied norm will stay in force and other domestic courts might well consider it applicable. In the non-discrimination field, the use of preliminary rulings has helped domestic judges to clarify several aspects of EU law: e.g. the possibility of horizontal direct effect, the allocation of burden of proof, the conception of discrimination by association, the possibility of invoking grounds not listed in the Directives.

Casesheet 2.3 Case C-396/11, Radu, judgment of 29 January 2013
Disapplication of national law on the basis of the CJEU preliminary ruling and the EU Charter (in particular Arts. 47 and 53) in the field of criminal law

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

Case C-396/11, Radu, judgment of 29 January 2013
Facts: See Module 7, Casesheet 7.8

Legal issues: First, R.C.V. invoked the exception of unconstitutionality of provisions of the national law implementing the EAW Framework Decision 2002/584/JHA. He argued that these provisions violate Art. 23(5) of the Constitution (preventive arrest during criminal investigations) and Art. 24(1) (the right to a fair trial), as well as Art. 6(3) ECHR concerning the rights of the accused. The reason for this, he claimed, was that the national judge is extremely limited in executing the EAW, since the national judge can assess only the form and content of the warrant. The Court of Appeal of Constanta seized the Constitutional Court and suspended the trial until the completion of the constitutionality review.
The Constitutional Court rejected the exception of unconstitutionality by decision no.1290/14.10.2010. In its reasoning the Constitutional Court held that a contrary decision would breach the principle of mutual recognition of criminal judgments. The constitutional review also found that a provisional custody following the issue of an EAW satisfies the requirements of the right to liberty and right to a fair trial as guaranteed by the Constitution. The case was returned to the Court of Appeal.
Second, R.C.V. requested the Court of Appeal of Constanta to refer a preliminary reference to CJEU. The defendant argued that "the judicial authorities of the executing Member State were

[88] Joined Cases C-6/90 and C-9/90, *Francovich* op. cit.
[89] See for instance Italian Corte Costituzionale, judgment no. 227 of 2010, on the constitutionality of Italian norms that are inconsistent with the European Arrest Warrant Framework Directive (an instrument without direct effect).
[90] See C-416/10 *Križan and Others*, judgment of 15 January 2013.
[91] As in the *Griesmar* case, Close Up 5 in JUDCOOP Final Handbook.

obliged to ascertain whether the fundamental rights guaranteed by the Charter and the ECHR were being observed in the issuing Member State. If that was not the case, those authorities would be justified in refusing to execute the European arrest warrant concerned, even if that ground for non-execution is not expressly provided for by Framework Decision 2002/584."

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

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

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

Conclusions of the CJEU: Unlike the Opinion of the AG, the CJEU reformulated the addressed preliminary question, and considerably limited the scope of questions: the relation between the EU Charter and the ECHR was not addressed, neither the issue of the proportionality assessment of the limitation of fundamental rights based on the automatic execution of the EAWs. The Court considered that the referring Court essentially asked whether the EAW FD, read in the light of Art. 47 and 48 of the Charter and of Art. 6 of the ECHR, must be interpreted as meaning that the executing judicial authorities can refuse to execute a EAW issued for the purposes of conducting a criminal prosecution on the ground that the issuing judicial authorities did not hear the requested person before the arrest warrant was issued.

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

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

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

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

First, the Court reasoned that the principle of mutual recognition and the application of EAW Framework Decision 2002/584/JHA is subject to the limits of Article 6 TEU and the EU Charter. Citing the CJEU preliminary ruling which was interpreted as given precedence to the right to a fair trial and right to liberty as enshrined in the EU Charter and ECHR, the Court held that the judicial authority of the executing state might refuse the surrender and execution of an

EAW in exceptional cases, other than the limited ones provided for by the EAW Framework Decision 2002/584/JHA and the national transposing norm. The respect of fundamental rights was considered such an exceptional case.
Second, the Court held that the surrender would constitute a disproportionate interference with the right to liberty and right to family life, taking into account the long period of time between the offence and prosecution of R.C.V. – 12 years. Also the Court held that the prosecution in Romania would ensure a better exercise of the right to defence.
The decision of the Court of Appeal Constanta was challenged in front of the Supreme Court by the Public Prosecutor's Office.
The Supreme Court admitted entirely the appeal formulated by the Public Prosecutor, and quashed the Court of Appeal's decision (Judgment no. 2372 of 17 July 2013). Similar to the Constitutional Court, the Supreme Court gave priority to the principle of mutual recognition. The Supreme Court found that the decision of the Court of Appeal was unlawful as an incorrect application of the law. Later, the Supreme Court decided that the limitations to fundamental rights were necessary and proportionate, given the gravity of the offences. Based on the above findings, the Supreme Court ordered the execution of three EAWs and the surrender of R.C.V to the German authorities. One EAW's execution was rejected, according to *ne bis in idem* principle. The surrender was authorised under the condition that if found guilty the requested person would be transferred to Romania for serving the sentence.
Reasoning (in particular, role of the Charter): The national courts involved had different interpretations as regards the application of the proportionality principle (Article 51 EU Charter) and the effects of the Articles 47 and 48 in relation to a matter that was exhaustively covered by EU legislation.
At issue was the standard of protection of the right to a fair trial and right to liberty, as well as the right to family life: would the automatic execution of EAW constitute a proportionate interference with these fundamental rights, and secondly can national courts conduct an assessment of the execution of EAW based on fundamental rights other than those exhaustively provided by Article 4 EAW FD?
The referring Court disagreed with the CJEU as regards the role of the EU Charter and the proportionality assessment. Contrary to the strict guidance of the CJEU, the referring Court held that the judicial authority of the executing state might refuse the surrender and execution of an EAW in exceptional cases, other than the limited ones provided for by the EAW Framework Decision 2002/584/JHA and the national transposing norm. The respect of fundamental rights was considered such an exceptional cases. Consequently, the Court held that the surrender would constitute a disproportionate interference with the right to liberty and right to family life, taking into account the long period of time between the offence and prosecution of R.C.V., namely 12 years.
The High Court of Cassation and Justice agreed with the Public Prosecutor that there was no disproportionate interference with the right to a fair trial and effective remedies, or family life, given the gravity of the criminal offences of which Mr Radu was accused.
Relation of the case to the scope of the Charter: All national courts involved in the case found the EU Charter applicable. The connecting factor was the fact that the challenged national legislation was implementing the EAW FD.

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

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

1. *Preliminary reference* for the purpose of recognising fundamental rights as grounds for non-execution of an EAW, in addition to those expressly provided by Art. 4 EAW FD – this proposal was rejected by the CJEU.
2. *Proportionality* interaction technique is used to strike the balance between the fundamental right to fair trial and the principle of mutual recognition.
3. *Disapplication.*
4. *Horizontal judicial interactions* - Domestic constitutional review is followed by a reference to the CJEU, showing a bottom-up strategic use of the techniques of judicial cooperation by the national appellate court. Consistent interpretation with EU fundamental rights law beyond the CJEU judgment. The Court of Appeal goes beyond the ruling issued by the CJEU and finds breaches of fundamental rights as such to constitute grounds for refusal, even when it seems clear from the CJEU judgment that fundamental rights claims, outside those expressly provided in Articles 3 and 3 of the EAW Framework Decision 2002/584/JHA are not permitted as grounds of refusal; postponing the surrender on grounds of fudnamental rights might be legitimate under the EAW if, the national court proves the principle of uniform and effective application of the EAW is not endangered (see the Jeremy F case, commented in the database).
5. *Mutual recognition* (the different understandings of the scope of application of mutual recognition by the national courts and the CJEU).

Casesheet 2.4 Case C-399/11, Melloni, judgment of 26 February 2013

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

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

Facts: See Module 7, Casesheet 7.9

Legal issues: The Constitutional Court decided to stay proceedings and make a reference for a preliminary ruling to the CJEU.[92]

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

The reference included three questions about: 1) the interpretation of Art. 4a(1) the EAW Framework Decision; 2) the validity of the same clause in light of Arts. 47 and 48(2) of the Charter (right to fair trial and right to criminal defence); and 3) the interpretation of Art. 53 of the Charter (constitutional rights with higher levels of protection).
In response to the preliminary reference, the CJEU concluded that:
1) The executing state cannot, according to the EAW Framework Decision, condition the execution of the EAW on the possibility of a retrial.
2) Art. 4a(1) of the Framework Decision is compatible with Articles 47 and 48(2) of the Charter.
3) Art. 53 of the Charter of Fundamental Rights of the European Union does not change these findings.
Conclusions of the CJEU: This was the first time the CJEU was presented with the interpretation of Art 53 Charter. The CJEU held that: "[…] Art 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised" (para. 60). However, in the specific case of *Melloni*, the CJEU held that Art. 53 EU Charter and the national higher standards of protection of the right to a fair trial cannot be used to prevent the application of the EAW FD. The later EU secondary instruments harmonised the situation covered by the preliminary reference, namely the conditions for the execution European arrest warrant issued for the purposes of executing a sentence rendered *in absentia*. Consequently, allowing a Member State to avail itself of Article 53 of the Charter of Fundamental Rights to make the surrender of a person conditional on a requirement not provided for in the framework decision would, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that decision, undermine the principles of mutual trust and recognition which that decision purports to uphold and would therefore compromise its efficacy. Therefore an interpretation of Art. 53 EU Charter that would allow the Member States to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution is precluded on the basis of the principle of primacy of EU law (para.58 of the *Melloni* judgment).
Judgment of the referring court following the preliminary ruling of the CJEU: The resolution of the case by the Spanish Constitutional Tribunal was delivered on 13 February 2014. It decided to revise its previous interpretation of the right to a fair trial, and followed the interpretation given by the CJEU in *Melloni*. As a result, the level of constitutional protection was lowered. At the same time, in an *obiter dicta*, the Constitutional Court recalled its *controlimiti* doctrine.
Interestingly, whilst the Spanish Supreme Court follows to the letter the ruling of the CJEU in *Melloni* (even though it addresses a deeply rooted preference of Spanish legal system that would be problematic for other MSs), in *Radu* the referring displeased court goes beyond what the CJEU decided. It finds breaches of fundamental rights, as such, to constitute grounds for refusal, even when it seems clear from the CJEU judgment that the letter of the EAW FD, in particular Art. 3, 4 and 4a, constitutes the only point of reference. It takes the Romanian High Court of Cassation and Justice to restore the CJEU compliant order. It applies an interpretation in

conformity with EU fundamental rights leading to a technique between disapplication and consistent interpretation, given that the exhaustive nature of the refusal grounds is overridden.

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

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

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

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

Outcome of the judicial interaction techniques: In spite of the fact that both national courts used the same judicial interaction techniques, they reached two different results due to their different interpretation of the CJEU's set requirements in its preliminary rulings. The use of the preliminary reference technique by the Spanish Constitutional Court and the close following of the *Melloni* judgment of the CJEU by the referring court ensured the objective of coherence between the national practice and the EU EAW FD, an obligation directly binding on national courts; however the objective of enhancing the protection of fundamental rights, in this case the right to a fair trial, by giving effect to the higher national standard of protection of fundamental rights could not be ensured at the same time. On the other hand, the Romanian referring court in the *Radu* case chose to give priority to the enhancement objective to the detriment of coherence, and rejected the surrender of the individual based on fundamental rights grounds not expressly provided in the EAW FD: the *ne bis in idem* principle and disproportionate interference with Mr Radu's right to liberty and the right to private and family life.[93]

[93] It seems that the referring court sided with the interpretation given by the European Commission as noted in its 2011 Report on the implementation of the EAW FD and agreed by the AG Sharpston in her Opinion in Case C-

Casesheet 2.5 - Case C 555/07, Kücükdeveci, Judgment of 19 January 2010

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

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

Facts: In *Kücükdeveci* (C-555/07)[94] the ordinary judge needed to assess the legality of a provision from the German Civil Code allowing employees to give a comparatively shorter notice of dismissal to employees who have started working before the age of 25. The plaintiff maintained that this provision was discriminatory, because it arbitrarily affected early-workers. Discrimination in the workplace is regulated by the EU Directive 2000/78, which includes age among the prohibited grounds. However, directives are deprived of direct horizontal effects. That is, individuals cannot derive from them an enforceable right capable of setting aside domestic norms that can be relied upon by another private party, which was the case of the present dispute. On the other hand, the CJEU had previously stated that non-discrimination on grounds of age is a general principle of EU law.[95] In the meantime the EU Charter entered into force and Art. 21 of the Charter of Fundamental Rights provides the principle of non-discrimination: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." Yet, in order to apply the EU Charter based principle of non-discrimination, it first had to be established that the facts of the case fall within the scope of application of EU law.(see Art 51 of the Charter).[96]

Legal issues: The challenged national provision introduced a difference of treatment (different notice periods of dismissal) between persons with the same length of service, depending on the age at which they joined the undertaking. The national court was thus faced with the questions of: 1) with what EU law was the national provision in conflict: Directive 2000/76 or the general principle of non-discrimination on grounds of age, or both; 2) if there was a conflict could it be justified by a legitimate aim; 3) could the national judge disapply the national legislative measure if it was found to be incompatible with EU law in a dispute between private parties when according to the Marshall doctrine EU Directives do not have horizontal application.

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

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

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

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

[96] For a discussion on the need to establish first an EU law provision that covers the facts of the case in order to trigger the application of the EU Charter fundamental rights, please see Module 1, .

Conclusions of the CJEU: The CJEU first confirmed its previous decision taken in *Mangold*, and noted that non-discrimination on grounds of age, as recognized in the EU Charter of Fundamental Rights, and in the Employment Equality Directive 2000/78, is a general principle of EU law, and requires judges to set aside conflicting legislation even in horizontal disputes.
By recognizing the horizontal direct effect of the general principle (a new doctrine) the CJEU strengthened its **alliance with ordinary courts**, and thus granted the opportunity to the national courts to set aside inconsistent national legislation without having first to obtain the constitutional courts' confirmation of the unconstitutionality of the challenged legislation.
Choice and use of Judicial Interaction Techniques: Preliminary reference which offered guidelines on the application of the proportionality test to the discriminatory treatment introduced by the national legislation; and **legitimized its disapplication.** In the present case the CJEU held that although the difference in treatment is justified on the basis of the personnel flexibility which falls under the employment and labour market aims provided by Art. 6(1) of the Employment Equality Directive, it is not necessary and proportionate with the aim, and it therefore permitted the national referring court to disapply the national legislative provision following an application of the proportionality test. It has to be noted that in another case referred by a German court, a measure resulting in discrimination on grounds of age (German law restricted applications to join the fire service to those under the age of 30) was found to be appropriate based on the aim of genuine occupational requirement because it promotes a better level of professionalism by encouraging long-term employment in certain critical positions (e.g., see *Wolf*). [97]
Alternative Use of Judicial Interaction Techniques and Possible Outcomes: The national court could have avoided the preliminary reference to the CJEU and disapplied the national provision based on the *Mangold* judgment. It should be noted that the *Mangold* case presented certain specific circumstances which were not present in *Kücükdeveci* and thus the preliminary reference was the optimal choice before proceeding to disapplication. Consistent interpretation was not possible in this particular context due to the wording of the provisions.

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

Mutual recognition and mutual trust

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

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

recognition of foreign judicial and quasi-judicial acts is required in the fields of asylum,[98] civil,[99] and criminal cooperation.[100]

In short, mutual recognition requires courts to treat foreign judgments and other decisions as a source of law, thus recognizing the legitimacy of other legal orders and demonstrating trust towards the judicial systems of other States. However, the principle of mutual trust in the Member States' legal system's compliance with Fundamental Rights has recently been challenged in light of the failures identified in several Member States to protect the fundamental rights of the people subject to the AFSJ instruments: asylum seekers, individuals subject to the EAW, implementation of the Brussels II bis Regulation.[101] This principle has been contested in light of either the incompatibility of EU secondary legislation with fundamental rights or its application was rejected based on the claim of giving priority to national higher standards of protection of fundamental rights.

Recently, the principles of mutual recognition and trust have been the subject of increasing jurisprudence from the CJEU[102] and the ECtHR usually in cases where the application of these principles was challenged in favour of the application of an enhanced protection of European Fundamental Rights.

The CJEU gives priority to effectiveness and autonomy of EU law and to a quasi-absolute application of mutual trust, with some variations permitted in favour of a higher standards of protection of human rights in specific AFSJ sectors. On the other hand, the ECtHR will not refrain from generally assessing the conformity of the Member States' EU implementing legislation with the ECHR, and furthermore finding a violation of the ECHR, regardless of the

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

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

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

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

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

CJEU previous judgments on the issue.[103] This approach was evident in the 2011 *M.S.S v Belgium and Greece* and 2014 *Tarakhel v Switzerland* judgments. In both cases, the ECtHR found the Member States to be in violation of the ECHR following the application of the EU principle of mutual trust within the field of Dublin transfers of asylum seekers. The CJEU had the opportunity to clarify the scope of application and operation of mutual trust first in *N.S.*, where the Court referred extensively to the *M.S.S.* judgment and followed the ECtHR approach by first, endorsing the existence of systemic deficiencies in Greece and secondly holding that this situation is justifying a limitation to the application of mutual trust. However, the two judgments seemed to be at odds as regards the precise threshold for allowing distrust among the Member States.

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

Given the different objectives pursued by the CJEU and the ECtHR, the individual opinions of the CJEU judges, AGs and reférendaires, who do not look at the Strasbourg Court judgments as legally binding,[104] the divergent judicial opinions of the two Courts on the limitations to mutual trust based on fundamental rights issues will continue to exist, if not increase in the future.[105]

Following the *M.S.S.*, *N.S.* and *Abdullahi* judgments, national courts were not sure how to interpret the scope of application of 'systemic deficiencies' within the migration field, in particular whether mutual trust was to be lifted only in cases where the violation of human rights amounted to systemic deficiencies, or also in individual cases of violation of human rights, and whether only violations of absolute human rights should be taken into account or also of relative human rights, such as the right to family life and fair trial and effective remedies rights. In the absence of a hierarchical relation between the judgments of the ECtHR and CJEU, it is left to the national courts themselves to identify ways of bringing about greater coherence. For instance, the UK courts have followed different approaches to the scope of application of the principle of mutual trust, either sharing the CJEU narrow threshold of 'systemic deficiencies' for the limitation of mutual trust, or a wider limitation approach by way of

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

[104] See J. Krommendijk, 'The use of ECtHR Case law by the CJEU after Lisbon: The view of the Luxembourg insiders', *Maastricht Working Paper* 2015-6.

[105] Opinion 2/13 has not contributed to the jurisprudential coordination. See also T. Lock, 'The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?', *European Constitutional Law Review*, (2015), 239-273.

including also the ECtHR individual violations threshold. The *EM (Eritrea)* case[106] is illustrative of the divided approaches taken by national courts on the precise scope of application of mutual trust and choices of the different thresholds for the limitation of mutual trust established by the two supranational courts. While, the UK Court of Appeal interpreted the trilogy of cases - *KRS v United Kingdom*, *M.S.S. v Belgium and Greece* and *N.S. and Others*- as requiring to follow a threshold where only "systemic" and not also "sporadic violations of international obligations" should be taken into account,[107] the UK Supreme Court adopted the wider threshold of limitation of mutual trust by taking into consideration not only the above mentioned trilogy of cases but also previous jurisprudence of the ECtHR, such as the landmark *Soering* case.[108] The UK Supreme Court held that, should it follow the Court of Appeal's interpretation of *N.S.,* it would give rise "to an inevitable tension with the Home Secretary's obligation to abide by EU law" since under EU law, the Member States have to comply with the ECHR, and also the 1998 Human Rights Act which requires the Home Secretary to conform to the ECHR. In *EM (Eritrea)*, the UK Supreme Court established that the legal test to be followed when determining whether particular violations of human rights amount to legitimate grounds for limiting mutual trust should be the ECtHR *Soering* test coupled with the *M.S.S* and *N.S.* threshold. Thereby, both operational, systemic failures in the national asylum systems and individual risks of being exposed to treatment contrary to Article 3 ECHR and Article 4 EU Charter should be considered as legitimate thresholds for the limitation of the principle of mutual trust.

Other national courts have recently followed a similar approach of refusing transfers under the Dublin Regulation on grounds other than 'systemic flaws in the asylum procedure and reception conditions'. Furthermore, not only risks of being subjected to ill-treatments in the Member State of transfer, but also violations of the human rights of other relatives were held as legitimate grounds for the limitation of the EU principle of mutual trust. For instance, the Prague Regional Court[109] chose to limit the application of mutual trust on grounds of violation of the applicants' right to not be subject to inhuman and degrading treatment[110] and their procedural rights, in particular their right to a personal interview under Dublin III Regulation, without arguing that these violations amounted to systemic deficiencies in the Member State of transfer. The Administrative Court of Nantes quashed a decision of a Dublin transfer to Italy based on the administration's failure to carry out "a full and rigorous examination of the consequences of the applicant's transfer in Italy", and in particular of the existence of the *N.S.* conditions of "substantial grounds for believing that there are systemic flaws in the [Italian] asylum procedure

[106] *R (on the application of EM (Eritrea)) (Appellant) v Secretary of State for the Home Department*, [2014] UKSC 12, Judgment of 24 February 2014.(hereinafter *EM (Eritrea*)).

[107] The UK Court of Appeal held that: "What in the MSS case was held to be a sufficient condition of intervention has been made by the NS case into a necessary one. Without it, proof of individual risk, however grave, and whether or not arising from operational problems in the state's system, cannot prevent return under Dublin II."

[108] ECtHR, *Soering v UK*, Appl. No. 14038/88, Judgment of 7 July 1989.

[109] See, the Prague Regional Court, 1 July 2015, *A. K. A., S. K. K., A. E. and K. B. v Ministry of the Interior*, 49Az 56/2015-41, Judgment of 1st of June 2015.

[110] The Court quashed the administrative decision of returning the asylum seeker to Bulgaria based on the absence of an assessment by the administration of whether the Bulgarian asylum system contained adequate health and other necessary measures, which seemed to be needed in light of a recent UNHCR Report of 2014.

and in the reception conditions".[111] It has to be noticed that the high threshold of systemic deficiencies as defined in the *N.S.* judgment and established in Greece was not fulfilled to the same extent in the present case. However, the French court still required the administration to give solid proof, instead of general indications, of adequate assessment of the situation in Italy, which was required in light of "the delicate and evolving situation in Italy, regarding migrants' reception, every transfer decision under the Dublin Regulation, should be cautiously taken, after a full and rigorous examination of the consequences for the applicant upon transfer."[112]

Within the field of judicial cooperation in criminal matters, the Spanish Constitutional Court strictly followed the ruling of the CJEU in *Melloni*, and gave up its long established doctrine of 'indirect violations' in favour of applying the lower level of protection of the right to a fair trial as ensured at the EU level,[113] with the result of giving full effect to the principles of mutual trust, mutual recognition, primacy, unity and effectiveness of EU law.

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

Other forms of horizontal and transnational judicial interactions

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

In practice, comparative reasoning is used to achieve a number of purposes, *inter alia*: to strengthen the reasoning and distinction of a given case; to find a solution when present legal tools provide none; to operate within the margin of appreciation as casually practiced by the ECtHR.

Casesheet 2.6 Case C-360/10, Sabam v Scarlet, Judgment of 16 February 2012

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

[111] See the Administrative Court of Nantes, case No. 1505089, Judgment of 22th of June 2015.
[112] *Ibid.*
[113] Namely by the EAW Framework Decision.

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

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

Legal issue: On the basis of this claim, in 2010, the Appeal Court decided to stay the proceedings and referred a question for preliminary ruling to the CJEU, asking whether EU law allows the Member States to authorise a national court to order an ISP to install – on a general basis, as a preventive measure, exclusively at its expense and for an unlimited period – a system for filtering all electronic communications in order to identify illegal file downloads.[114]

Before the delivery of the decision by the CJEU, but after the publication of the AG *Cruz Villalón* opinion's on the case, the UK High Court delivered its judgement in the *20th Century Fox v BT* case.[115] This case concerns the legal remedies that can be obtained to combat online copyright infringement. The case solved the dispute between the six applicants, a group of well-known film production companies or studios that carry out business in the production and distribution of films and television programmes, and the British Telecom (BT), UK's the largest ISP. The applicants sought an injunction against BT pursuant to section 97A of the Copyright, Designs and Patents Act 1988,[116] in order to block or at least impede access by BT's subscribers to a website currently located at www.newzbin.com.

[114] The full preliminary ruling read as following:

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

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

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

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

Conclusions of the CJEU: In its decision,[117] the CJEU provided that holders of intellectual-property rights may apply for an injunction against intermediaries, such as ISPs, whose services are being used by a third party to infringe their rights. Though, rules regarding injunctions are a matter for national law, these must respect the limitations arising from European Union law, such as, in particular, the prohibition laid down in the E-Commerce Directive, under which national authorities must not adopt measures which would require an ISP to carry out general monitoring of the information that it transmits on its network.

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

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

The UK courts, after the confirmation of its balancing effort between property right and freedom of expression and the request to identify clearly the content of the injunction, granted several subsequent injunctions blocking access to peer-to-peer file-sharing websites.[118]

German case law[119]

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

The Court held that Rapidshare was not to be deemed a "Täter" (the actual infringer), but only a so called "Störer", i.e. secondarily liable. Therefore, it could only be held responsible if (1) it had a duty to review the content hosted on its servers, and (2) had not exercised this duty. In line with earlier cases, the court explained that host providers generally do not have to check the content of any files uploaded by their users. Although Rapidshare can be used for purposes of unlicensed dissemination of copyrighted works, the court affirmed that there are also a sufficient number of legitimate forms of using the hosting platform. Therefore, Rapidshare

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

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

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

could only become subject to specific duties to check uploads once notified of a clear infringement. The court then addressed whether Rapidshare was under the obligation to delete the specific files from the specific location or if it had to perform searches for further places where the game could be found and monitor their website traffic. According to the Court, Rapidshare had to make all reasonable efforts to prevent other users from uploading "Alone in the Dark". In particular, the court pointed out that it had to do what was *technically and economically* reasonable - to prevent users to provide the game on its servers - without jeopardizing their business model. The court found that, by not filtering user uploads for the phrase "Alone in the Dark", Rapidshare could possibly have breached their duty to inspect user uploads. Moreover, the court also held that Rapidshare was obligated to review a "limited number" of search engines, that by the purpose provide Rapidshare link collections, and to delete files containing the game found through these search engines.

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

ECHR - the limits freedom of expression poses on the State's right to regulate access to the internet in order to preserve public interest.[120]

In *Ahmet Yildirim v. Turkey* judgment,[121] the ECtHR addressed the case of a PhD student which claimed to have been subject to "collateral censorship" when his Google-hosted website was shut down by the Turkish authorities as a result of a judgment by a criminal court ordering to block access to Google Sites in Turkey. The measure stemmed from a decision of the Denizli Criminal Court of First Instance, initially designed as a preventive measure ordered by the court in the context of the criminal proceedings brought against a third-party website, hosted by Google, which included content deemed offensive to the memory of Mustafa Kemal Atatürk, the founder of the Turkish Republic. Due to this order, Yildirim's academically-focused website, which was unrelated to the website with the allegedly insulting content regarding the memory of Atatürk, was effectively blocked by the Turkish Telecommunications and Information Technology Directorate (TIB). According to the TIB, blocking access to Google Sites was the only technical means of blocking the offending site, as its owner was living outside Turkey. Yildirim's subsequent attempts to remedy the situation and to regain access to his website hosted by the Google Sites service were unsuccessful.

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

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

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

weigh up the various interests at stake, in particular by assessing whether it was necessary and proportionate to block all access to Google Sites.

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

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

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

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

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

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

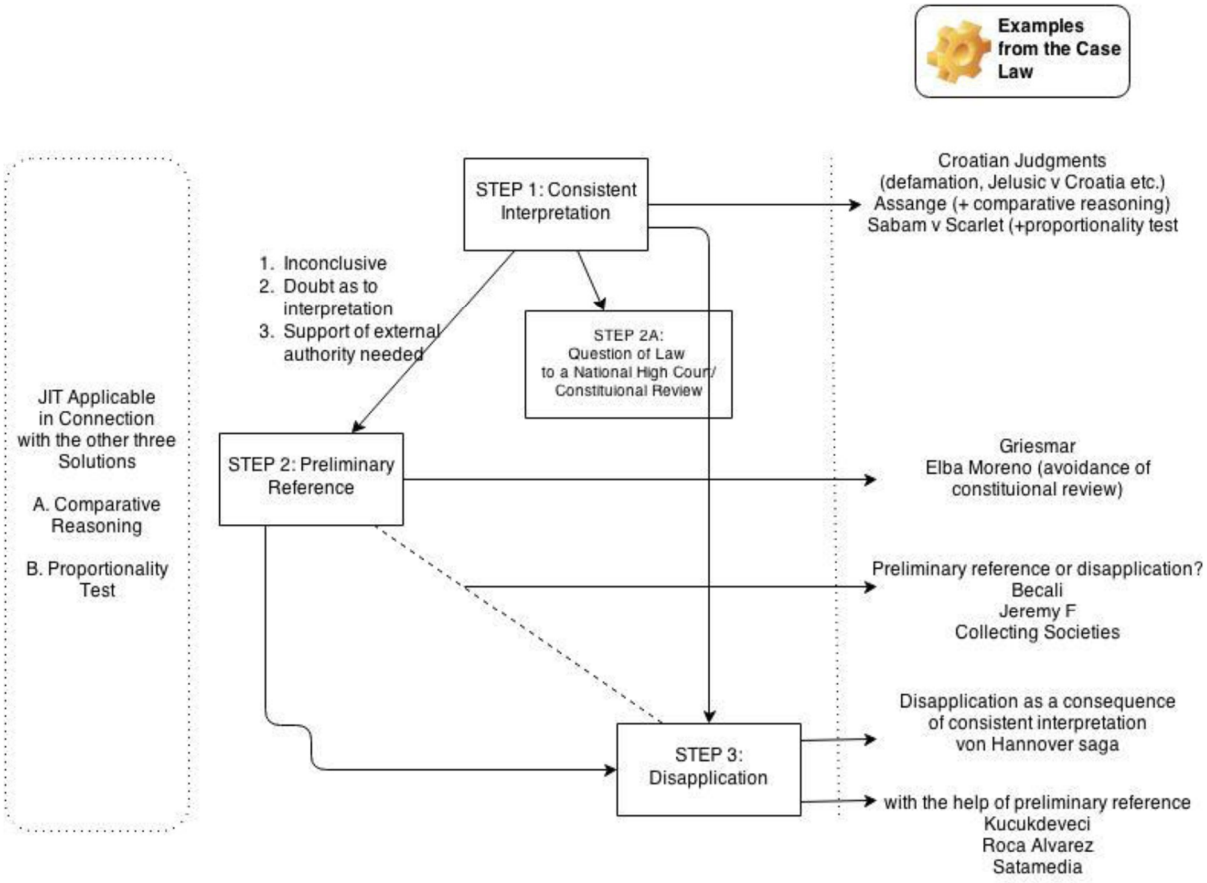
The choice of judicial interaction techniques by national judges is determined by the existence (or not) of an actual conflict between a national provision and a supranational norm. For instance, if the national judge does not doubt the meaning of the applicable EU law provision, s/he will consider whether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

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

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

The graph below offers an overview of the toolbox at the disposal of national judges indicating when each of the tools may be applied and the manner in which conflicts may be resolved with their help. If this is not the case, the national judge might decide to refer a preliminary question to the CJEU (as a rule, national courts of last instance must make a reference).[122]

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



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