e-Booklet on the Use of the Charter of Fundamental Rights of the EU

IN THE FRAMEWORK OF THE PROJECT "E-LEARNING NATIONAL ACTIVE CHARTER TRAINING (E-NACT)"

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Section I
General Rules on the Scope and Application of the EU Charter of Fundamental Rights

1. What is the Charter of Fundamental rights of the European Union?

The Charter of Fundamental Rights of the European Union (hereafter: the "Charter") is the Bill of Rights of the EU. The Charter encompasses a broad range of civil, political, social and economic rights, together with rights peculiar to EU citizens, such as free movement within the EU, the right to vote at elections of the European Parliament and the right to equal consular and diplomatic protection in third countries for unrepresented EU citizens.

2. What is the legal status of the Charter?

Based on Article 6(1) TEU, the Charter has "the same status of the Treaties"; thus, the Charter ranks at the top of EU law sources, as EU primary law.

3. What is the relationship between the Charter and EU secondary law?

All sub-primary provisions of EU law must be interpreted in conformity with the Charter.

When conform interpretation is not available, secondary law which is in conflict with the Charter should be set aside. The Court of Justice is the only jurisdiction competent to hold EU law provisions invalid, in the context of a reference for preliminary ruling (Article 267 TFEU) or a direct action for annulment (Article 263 TFEU).

CJEU judgments declaring invalid provisions of EU legislation or an entire EU secondary act due to being in conflict with the Charter:

- Joined cases C-92/09 and 93/09, *Volker und Markus Schecke*
- Case C-236/09, *Test-Achats ASBL*
- Case C-293/12, *Digital Rights Ireland*

CJEU judgments assessing the invalidity of EU secondary legislation provisions at the request of national courts:

- Case C-601/15, J.N.
- Case C-18/16, K

4. What is the relationship between the Charter and national law?

National provisions that fall within the scope of the Charter must be compatible with the fundamental rights it contains. National authorities shall ensure that those national provisions are interpreted and applied in conformity if the Charter.

Judges are in charge of solving the potential conflict:

- they can interpret national law in the light of the Charter, or
- they can disapply the national law.

In case the relevant EU law provision has direct effect, disapplication can be performed by any national court, without having to request or await the prior setting aside of the conflicting national provision by legislative or constitutional means.

CJEU judgments on disapplication of national law in conflict with the Charter:

- Case C-112/13, A. v. B. and others
- Joined cases C-188/10 and 189/10, Melki
- Case C-176/12, Association de médiation sociale

5. What is the relationship between the Charter and the general principles of EU law?

The general principles of EU law are the sources through which the CJEU secured the protection of fundamental rights in the Union legal order, before the Charter. Article 6(3) TEU confirmed the relevance of the general principles, as a source concurring to the protection together with the Charter. There is a significant overlap between the Charter and the general principles of EU law, however there is no defined hierarchy, nor has the CJEU clarified their relationship: on the one hand, the CJEU takes the Charter as its main reference point, on the other it relies on its pre-Lisbon case law on the general principles to interpret the Charter. The relationship between the Charter and general principles could be seen as one of complementarity. In Boudjlida, the CJEU clarified that the right to be heard as part of the right to good administration (Article 41 Charter) is applicable only against EU institutions, bodies, agencies, and not also against Member States when acting within the scope of EU law (see below at Section III, **n. 8**). However, the right to be heard is applicable against national public authorities, when acting within the scope of EU law, as part of the general principle of EU law of rights of defence. Regardless of whether a certain human right is invoked as a general principle of EU law or on the basis of an Charter provision, it will be applicable only if another provision of EU law is applicable *in casu*.

CJEU judgments

- Case C-249/13, Khaled Boudjlida v Préfet des Pyrénées-Atlantiques, (casesheet)

6. What is the relationship between the Charter and the ECHR?

The ECHR has a twofold relevance under EU law: firstly, as a source of inspiration of the general principles of EU law together with the national Constitutions of Member States (see Article 6(2) TEU); secondly, as a parameter for the interpretation of the Charter, which shall not offer lesser protection than the ECHR, insofar as corresponding rights are concerned (Article 53(2) Charter).

7. What happens when the Charter applies to a case?

If the case at stake satisfies the conditions impose by Article 51 Charter, the national judge have to consider the interpretation, the effects and the level of protection of the fundamental rights granted by the Charter.

8. What happens is the Charter does not apply to the case?

If the case does not satisfy the conditions imposed by Article 51 Charter, the national judge is not under any legal obligation flowing from EU law to address the case within the framework provided by the Charter. However, s/he may decide to take account of the Charter, and of the relevant case law of the CJEU, in the process of interpreting national fundamental rights. In particular, the protection afforded to a fundamental right based on the domestic sources may be extended through the use of the Charter, as for instance in the decision of the Austrian Constitutional court U466/11, U1175/12.

9. What is the scope of application of the Charter?

The scope of application of the Charter is defined by Article 51 Charter:

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

Five main inferences can be drawn from this provision:

i. the scope of application of the Charter is defined on the basis of who issues evaluated measures and what are the areas they are issued in;
ii. the Charter applies to two different sets of acts: EU acts and national acts. However, whilst all EU acts fall within the remit of the Charter, it is applicable only to national acts "implementing EU law";
iii. the Charter cannot be relied on to extend the material competences that the Member States decided to confer on the Union through the Treaties (principle of neutrality of the Charter);
iv. the Charter encompasses both "rights" and "principles", with different effects;
v. individuals are not mentioned amongst the passive addressees of the Charter.

10. What is the meaning of the notion "national act implementing EU law"?

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

> *21 Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.*
> *22 Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction.*

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

This means that in order to trigger the application of EU fundamental rights, it is not sufficient to claim that the national measure involved infringes one or more of them. There must be a rule of EU primary or secondary law, other than the fundamental right allegedly violated, that is applicable to the main dispute. If such a different rule exists, the case falls within the scope of EU fundamental rights and the national measure in question can be checked against them.

11. What is the "trigger rule"?

The CJEU clarified the elements to take into account in identifying the "trigger rule" in the *Siragusa* judgment, pointing out that:

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

The need for a different EU rule applicable to the case is a corollary of the principle of conferral (Article 5 TEU). By their very nature, fundamental rights are cross-sectorial: issues concerning their protection can arise in any substantive area of law; thus, if the Charter's application could be triggered by simply claiming that a national act impinges on it, the principal of conferral would be put at risk.
The reference to "a certain degree of connection" requires to fulfil the following conditions:

- the application of the Charter requires that another rule of EU law is applicable to the situation at issue;
- the EU act can trigger the protection of the Charter only if it lays down rules governing the *specific* situation at issue in the main proceedings.

12. Which are the cases that satisfy the conditions to apply the Charter?

The current state of evolution of the CJEU jurisprudence allows to identify the following taxonomy of cases; however, this list is not exhaustive as the CJEU may identify new connections that can validly trigger the application of the Charter as a reaction to a preliminary reference from a national judge.
The case falls within the scope of application the Charter when it concerns:

A. National measures that give effect to obligations contained in EU law provisions primarily addressed to the domestic legislature.

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

C. Application of EU law rules, or of the national provisions giving them effect, by a national court or a national administrative authority.
D. National measures derogating from Union law rules, based on the grounds for derogation explicitly provided by EU primary or secondary law, or based on the CJEU's case law on mandatory requirements.
E. National provisions that clarify notions contained in EU law measures.

A. National measures that give effect to obligations contained in EU law provisions primarily addressed to the domestic legislature

Both EU primary and secondary law provisions can entail obligations addressed to the Member States' legislators. As regards secondary law, any EU legally binding act (regulations, directives, decisions and even pre-Lisbon framework decisions) can be the source of the said obligations.

In order to avoid disparities in the application of the Charter to its beneficiaries, all national measures that give effect to an EU law obligation can trigger the application of the Charter, whether they are adopted as ad-hoc implementing measure or they are pre-existing complying measures. What matters is whether the EU law rule that eventually triggers the application of the Charter is applicable to the situation in the main proceedings (*ratione materiae*, *personae* and *temporis*).

CJEU and national decisions:

- CJEU, Case C-131/12 Google Spain (casesheet)
- CJEU, Case 426/11, Alemo Herron (casesheet)
- CJEU, Case C-258/14, Florescu (casesheet)
- CJEU, Case C-34/09, Zambrano (casesheet)
- Greece, Council of State, Case 1901/2014 (casesheet)
- Slovenia, Administrative Court, I U 2750/2017-8 (casesheet)

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

Article 19(1), second sentence, TEU, states that "Member States shall provide remedies sufficient to ensure the effective legal protection in the fields covered by Union law".

Accordingly, national procedural provisions that give effect to the EU primary law obligation laid down by Article 19(1), second sentence, TEU, fall within the scope of Union law, hence, of the Charter, regardless of whether those provisions were adopted with the specific purpose to comply with that EU law obligation.

National and CJEU decisions:

- CJEU, Case C-279/09 DEB
- Ireland, Graham Dwyer v. Data Commissioner, The High Court, n. 351/2015 (casesheet)
- C-493/10 NS and others (casesheet)

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

The duty of the Member States to give effect to Union law in compliance with EU fundamental rights is not limited to the domestic legislature. It targets also the national authorities entrusted with the application of the law within the Member States. Therefore, when they apply (or interpret) EU law rules, or the national

National and CJEU decisions:

- CJEU, Case C-329/13,Stefan

provisions giving them effect, national courts and administrative authorities shall apply (or interpret) those provisions, so far as possible, in compliance with EU fundamental rights.

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

In *N.S. and others*, the CJEU confirmed that Member States are obliged to respect the provisions of the Charter even when acting within the limits of allowed derogatory action provided in the case by Article 3(2) Regulation (EC) n. 343/2003 (affirming that "[b]y way of *derogation* (...), each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in th[e] Regulation"), as long as their decisions impact on the application of the relevant EU secondary legislation instrument.

National and CJEU decisions:

- CJEU, Case C-208/09 Sayn-Wittgenstein
- Grand Chamber C-411/10 and C-493/10 NS and others, (casesheet)

E. National provisions that clarify notions contained in EU law measures

Union acts sometimes provide the definition of specific notions and terms used therein. This means that the notion or term has an autonomous and uniform meaning under Union law; thus, the CJEU is competent to clarify any doubts in this respect, providing an interpretation in compliance with the Charter.

In other instances, by contrast, the EU legislature makes an express reference to national law (i.e. the relevant law of each Member State), as regards the definition of the notion or term concerned. However, the lack of an autonomous definition under Union law does not mean that the Member States may undermine the effective achievement of the objectives of the Union act concerned, nor their duty to give effect to this act in compliance with EU fundamental rights. Therefore, the national measures that specify the abovementioned notions fall within the scope of the Charter: their interpretation must therefore comply with it.

National and CJEU decisions:

- CJEU, Case C-571/10 Kamberaj
- CJEU, Case C-528/15, Al Chodor,

13. Is the Charter applicable to national provisions relating to directives that have not yet been implemented

According to the CJEU decision in **Kücükdeveci**, after the expiry of its transposition period, the provisions of a non-implemented Directive may act as trigger for the application of the Charter in any case that falls within the scope *ratione temporis* of the Directive and that involves a national measure (or provisions) dealing precisely with the same subject governed by the Directive.

14. Is the Charter applicable in case of reference to EU law made by a national provision that lacks any other connection with EU law?

The national legislature sometimes decides to include a reference to certain EU (primary or secondary) law provision in a purely domestic measure. According to the CJEU in Cicala judgement, the Court has jurisdiction to give preliminary rulings on questions concerning provisions of EU law

in situations in which the facts of the case in the main proceedings fell beyond the field of application of EU law but in which those provisions of EU law had been rendered applicable by domestic law due to a *reference* made by that law to the content of those provisions. However, the *reference* must be fashioned in way such as to make the EU law provision concerned applicable "directly and unconditionally".
When these conditions are satisfied, a national court may ask the CJEU to interpret the EU law provisions referred in light of the Charter. In this scenario, the Charter can have an impact on national legislation that, as such, does not fall within the scope of Union law.

15. What is the relationship between the Charter and national constitutions?

Article 53 Charter, titled "Level of protection", states:

> *"[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, (…) by the Member States' constitutions".*

Apparently, this provision places a limit on the absolute character of the primacy of EU law over national law, by allowing the Member States, in situations falling within the scope of the Charter, to rely on to the domestic standard of fundamental rights protection, if that standard provides for more extensive protection than the Charter.
However, the Court of Justice, sitting in Grand Chamber,[1] affirmed in **Melloni** that such an interpretation of Article 53 Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution. Thus, it confirmed its well-established case law whereby, by virtue of the principle of primacy of EU law, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State. It must be underlined that these conclusions can be transplanted only in specific context, namely in case of exhaustive regulation of the derogation by the EU secondary legislation. In Melloni, in fact, the EU legislator provided for a fair balance between the protection of the rights of the defence of the addressees of an European Arrest Warrant and the safeguard of the efficiency of the European Arrest Warrant system itself, thus no space was left for the application of Article 24(2) of the Spanish Constitution.
However, the CJEU also added that

> *Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.*

[1] Note that the CJEU decisions sitting in Grand Chamber have a precedential nature towards the decisions of single Chambers.

16. What is the relationship between the Charter and the ECHR?

Article 52(3) Charter lays down a specific rule concerning the relevance of the ECHR within the Charter's scope:

> *"[i]n so far as th[e] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the (...) Convention.*
> *Union law is not prevented from providing more extensive protection".*

According to Article 52(3), the ECHR represents a minimum *standard* of protection insofar as "corresponding rights" are concerned.

The official explanation affirms that Article 52 Charter contains two lists of "corresponding rights", enumerating respectively:

- the Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR, and
- the Articles "meaning is the same as the corresponding Articles of the ECHR, but (...) the scope is wider."

The two lists are not exhaustive: they reflect the current state of evolution of the law and remain open to developments in the law, legislation and the Treaties.

When a national measure that falls within the scope of the Charter seems to be in conflict with a fundamental right of the Charter, the national court shall establish whether a "corresponding right" is at issue. If yes, in order to establish whether there is a violation, account shall be taken of the meaning and the scope of the relevant fundamental right as it results from the ECHR, taking account not only of the text of the Convention but also of the interpretation provided by the Strasbourg Court.

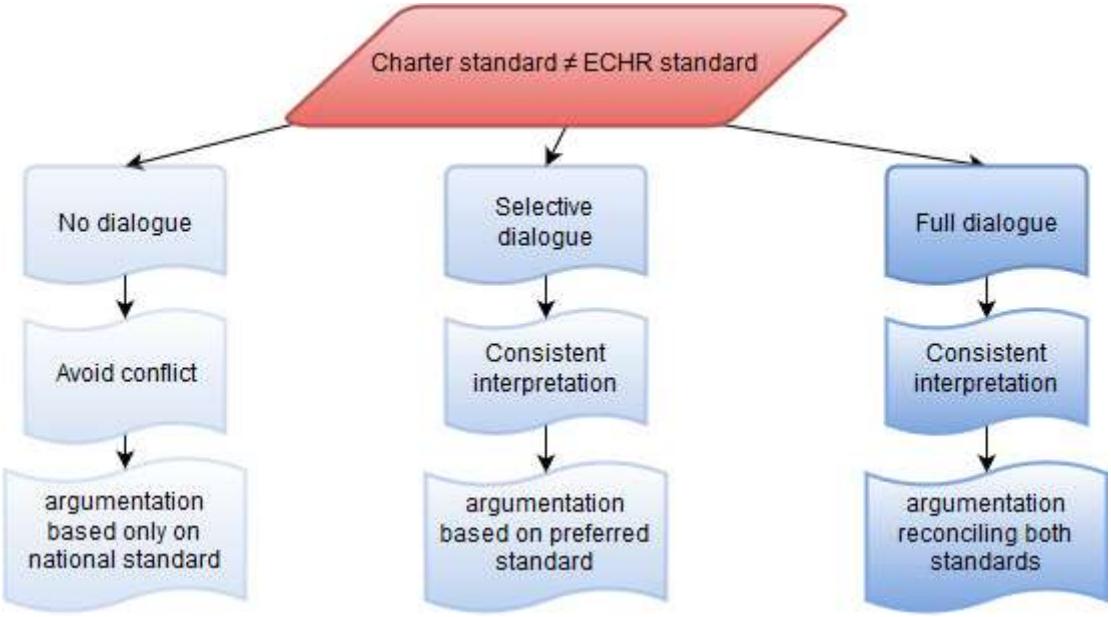
National and CJEU decisions:

- C-578/16, C.K. and others (casesheet)

According to the official explanation to Article 52(3) Charter, the parallelism also extends to the issue of authorised limitations, which must be the same as those laid down by the ECHR. Accordingly, the same grounds for limitations provided under the ECHR apply to the Charter's corresponding rights. Moreover, rights that are absolute under the Convention are equally absolute under the Charter.

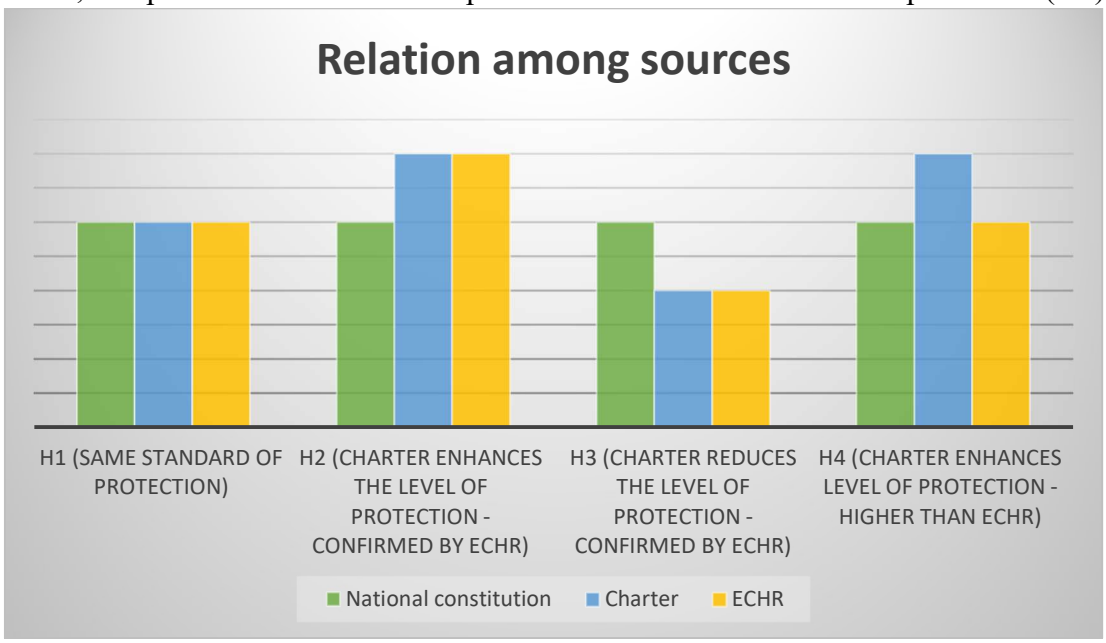
17. What happens when the standard of protection of the same fundamental right are different in the jurisprudence of European courts?

In case of different interpretation by European courts, national courts may face the choice of adhering to one or the other standard, with the consequence of subsequent quash of their decisions in the following instances before higher, or supranational, courts. If, on the one hand, national higher and constitutional courts may have more interest in using consistent interpretation so as to achieve a tentative reconciliation between the different standards; such discrepancy may affect the choice of lower courts which may prefer to avoid the conflict and address only national standards of protection (see graphical representation below).



Moreover, it is possible that EU law does not provide for a higher standard of protection of fundamental rights vis-à-vis the one provided by national constitutions.

Therefore, as described by the graphical representation below, except for the cases where the standards of protection are equal under the perspective of national constitutions, Charter and ECHR (H1), the assumption is that the Charter standard of protection will be always be at least equal (H2 and H3), if not higher than the one defined by the ECHR (H4); but in comparison to national constitutions, it is possible that the Charter provides for even a lower level of protection (H3).



18. Which is the difference between 'rights' and 'principles' in the Charter?

Article 52(5) states:

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

The "principles" contained in the Charter can only act as parameters of interpretation and grounds of validity/compatibility of Union legislation and national measures implementing Union law. In other words, "principles" cannot be relied on directly to disapply conflicting national provisions.

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

National and CJEU decisions:

- C-356/12, *Glatzel,*
- Case C-176/12, *AMS*

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

The case law of the Court of Justice does not provide much guidance as regards the identification of "principles" and their justiciability. More clarity on these issues is needed: national courts can contribute by referring preliminary questions to the Court, in the context of cases involving Charter's provisions that may qualify as "principles".

19. Can the Charter allow to disapply a conflicting national provisions (direct effect)?

It is settled case law of the CJEU that EU Directives have only vertical effect, therefore a Directive can be invoked or enforced in lieu of contrary domestic rules only in disputes against State entities or emanations of the State. This is true regardless of whether the public authority acts as a commercial

entity or exercising public powers. The question is: can Charter rights and principles be invoked in a legal proceeding between two private parties?
In *Association de médiation sociale* and subsequently in *Egenberger* (casesheet), the CJEU confirmed that provisions of the Charter that fulfil the criteria of direct effect can be relied on to disapply a conflicting national measure (that implements Union law within the meaning of Article 51(1) Charter), including in a dispute between private parties. The Charter can thus be used to overcome the restriction of applying EU Directives in proceedings between private parties

Section II
Judicial Interaction techniques

1. What are the Judicial Interaction Techniques?

Judicial interaction techniques refer 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).

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.

The interactions may occur along three dimensions:

1) between national judges and the CJEU (*vertical judicial interaction*);

2) between national judges from the same Member States (*internal horizontal judicial interaction*);

3) between national judges of different Member States (*transnational judicial interaction*).

The use of judicial interactions techniques by national courts can help them to solve issues concerning conflict between national and EU legislation, between national and/or European judicial interpretation of particular provisions, or between various fundamental rights and/or fundamental freedoms.

Moreover, judicial interaction has contributed to a more coherent application of the Charter, and to an enhanced fundamental rights protection of the individuals. They may have also offered national judges a cost-effective inspirational legal source for solving the difficult questions concerning the application of the Charter raised before them.

2. What is the role of Judicial Interactions Techniques in the application of the 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, gives 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 a 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);

(v) if necessary engage in an interaction with courts in other legal systems in order to determine the scope, meaning and level of protection of a relevant supranational fundamental rights.

3. Which are the Judicial Interaction Techniques available?

National courts have at their disposal a number of judicial interaction techniques to attain the legally binding obligation to ensure primacy of the EU law and the Charter, namely:

- duty of consistent interpretation of national law with EU law/Charter;
- duty (under certain conditions) or a possibility to refer a preliminary question for the CJEU;
- 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.

4. Which are the feature of consistent interpretation technique?

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 Charter. 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. Yet, there is a distinction regarding such duty depending on the lapse of the transposition deadline and afterwards. According to Adeneier, the duty of consistent interpretation in the period between adoption of a directive and the lapse of its transposition date impose an obligation not to put into jeopardy the objectives of the EU law. 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. The judicial interaction technique of consistent interpretation prevents and solves direct conflict between legal norms of national and EU/ECHR origin, between EU and ECHR norms, and between divergent judicial interpretations of national norms in light of EU/ECHR law.

A. Functions of consistent interpretation

Through the use of the consistent interpretation technique, national courts can achieve the result of remedying an apparent conflict between national legislation, judicial doctrine or administrative practice and a norm of EU law and/or a provision of the Charter.

Moreover, consistent interpretation proves useful 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. And, 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.

B. 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/Charter. These situations may qualify as *contra legem* interpretation or as legislative gap filling. If the national courts are uncertain of whether consistent interpretation is or not possible in the case, it can refer a preliminary reference to the CJEU.

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. Preliminary references can thus be used by a national court in order to test the validity of its own preferred construction of domestic norms.

5. Which are the features of preliminary reference?

The preliminary reference procedure is a direct judicial interaction technique laid down in Article 19 (3)(b) TEU and Article 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.

Relevant EU legislative instruments:

1. Founding Treaties
   - Article 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;
   - Article 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

Structure of the preliminary reference

. Citation of the Rules of Procedure on the type of PR: ordinary (Article 94), expedited (Article 105), PPU (Article 107)

. Summary of the subject-matter of the dispute and facts

. Summary of the legal framework:

- summary of the relevant national legal provisions;
- summary of the relevant national case law.

. Statement of reasons which prompted the referring court to address PR

- Relevant EU legislative provisions and their relation with national legislation (connecting factor)
- Statement of reasons to refer

. The essence of the parties' argumentation

. Preliminary questions

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

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. 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 or Charter, 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 (Article 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. The accuracy of the legal and factual context is not a matter for the CJEU to determine, and it enjoys a presumption of relevance. 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. Furthermore, the CJEU does not formally have competence to judge the compatibility of national law with EU law, but its jurisdiction is limited to the interpretation of the latter. 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 should apply to the facts before it. It has to be emphasised that the preliminary reference is not limited to cases where one of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of EU law, as the national judge can raise a point of EU law of her own motion.

A. 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 and genuine dispute between the parties,
- the dispute results in an action before a national court or tribunal
- the 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 (Article 267 (2) TFEU) and a "final" court or tribunal "shall" make a reference (Article 267 TFEU) unless the matter is *acte clair* under the principles laid down in CILFIT. 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.

B. Right/Obligation to refer

According to Article 267(3) TFEU, 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. 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 (Article 267(3) TFEU).

National legislation, constitutional or supreme courts cannot limit the power of the national courts to directly interact with the CJEU under Article 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", as in Cartesio and in Elchinov judgements.

C. *Consequences of non-referral:*

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:

- an infringement of the right to a fair trial as laid down in Article 6(1) ECHR. The ECtHR has confirmed that an unreasoned refusal to raise a preliminary question under Article 267(3) TFEU amounts to a breach of Article 6 ECHR, such as in case Dhabi v Italy.
- It may give rise to the liability of the Member State concerned for any damages that resulted to the individual plaintiffs.
- It may determine the European Commission to institute infringement proceedings against the Member State in question.
- 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 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.

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

In addition to the ordinary preliminary reference procedure, Article 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:

- expedited preliminary ruling procedures, and
- urgent preliminary ruling procedures.

Expedited Preliminary Reference

According to the new CJEU Rules of Procedure, Article 105(1), a national court may request or the President of the Court may decide to apply on his own motion, the expedited procedure where the nature of the case requires so. The expedited procedure does not substantially differ from the ordinary procedure aside from the times prescribed. The hearing cannot take place less than 15 days from the approval of the expedited procedure and the total duration of the procedure is shorter, namely between three and six months.

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 question procedure.

E. Objectives of preliminary ruling technique

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.

F. Outcomes of preliminary reference technique

- Shaping legislation (including amendment) of the national legal order
- Adaptation of national jurisprudence to EU law and CJEU jurisprudence
- Extending the scope of competence of national courts in relation to the discretionary powers of the administration or vis-à-vis other national superior courts or judicial forums.

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.

According to Tridimas[2], 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;
2. *Guidance preliminary rulings*: they may provide the referring court with guidelines as to how to resolve the dispute;
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.

In all cases, 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.

G. 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. 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. In the *van der Weerd* case the CJEU stated that a national court is not required to

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

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.

CJEU Jurisprudence on the effects of preliminary rulings:

- C-166/73, Rheinmühlen
- C-8/08, T-Mobile Netherlands
- C-402/09, Tatu

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:

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.

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 of national proceedings or to domestic law in general: their application depends on whether *other rules* of substantive EU law apply. 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 Article 267 TFEU.

H. The effects of the preliminary rulings

- The referring court is bound by the ruling.
- The interpretation binds also other courts.
- The preliminary ruling produces effects *ex tunc* (the day of entry into force of the interpreted rule), unless the CJEU restricts its temporal effects.
- Any decision inconsistent with the CJEU interpretation is defective and thus invalid.

6. Which are the features of disapplication technique?

According to the *Simmenthal* doctrine, national courts are obliged to disapply any conflicting provisions of national law. This is only necessary if consistent interpretation of internal law proves impossible. EU law obliges judges to look for the "consistent interpretation" of domestic law that does not contravene EU law. 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. The CJEU encourages the exhaustion of consistent interpretation attempts in order to avoid outright conflict.

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.

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.

> 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. 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, provided of course that the single norm satisfies the Van Gend en Loos requirements.

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. The requirement to set aside EU-illegal rules empowers a lower level national court to circumvent the national judicial hierarchy. 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.

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), will provide guidance to the legislator to amend the EU-illegal legislation 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.

7. Which are the features of mutual recognition and mutual trust techniques?

The TFEU provides for its own form of judicial interaction - placed under the Area of Freedom, Security and Justice. It takes the form of a principle of mutual recognition based on mutual trust. The

principle of mutual recognition of foreign judicial and quasi-judicial acts is required in the fields of asylum, civil, and criminal cooperation.
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 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. 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 and the ECtHR usually in cases where the application of these principles was challenged in favour of the application of an enhanced protection of European Fundamental Rights.
The CJEU gives priority to effectiveness and autonomy of EU law and to a quasi-absolute application of mutual trust, with some variations permitted in favour of a higher standards of protection of human rights in specific AFSJ sectors. On the other hand, the ECtHR will not refrain from generally assessing the conformity of the Member States' EU implementing legislation with the ECHR, and furthermore finding a violation of the ECHR, regardless of the CJEU previous judgments on the issue as for instance in N.S and others.

8. Comparative reasoning

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.

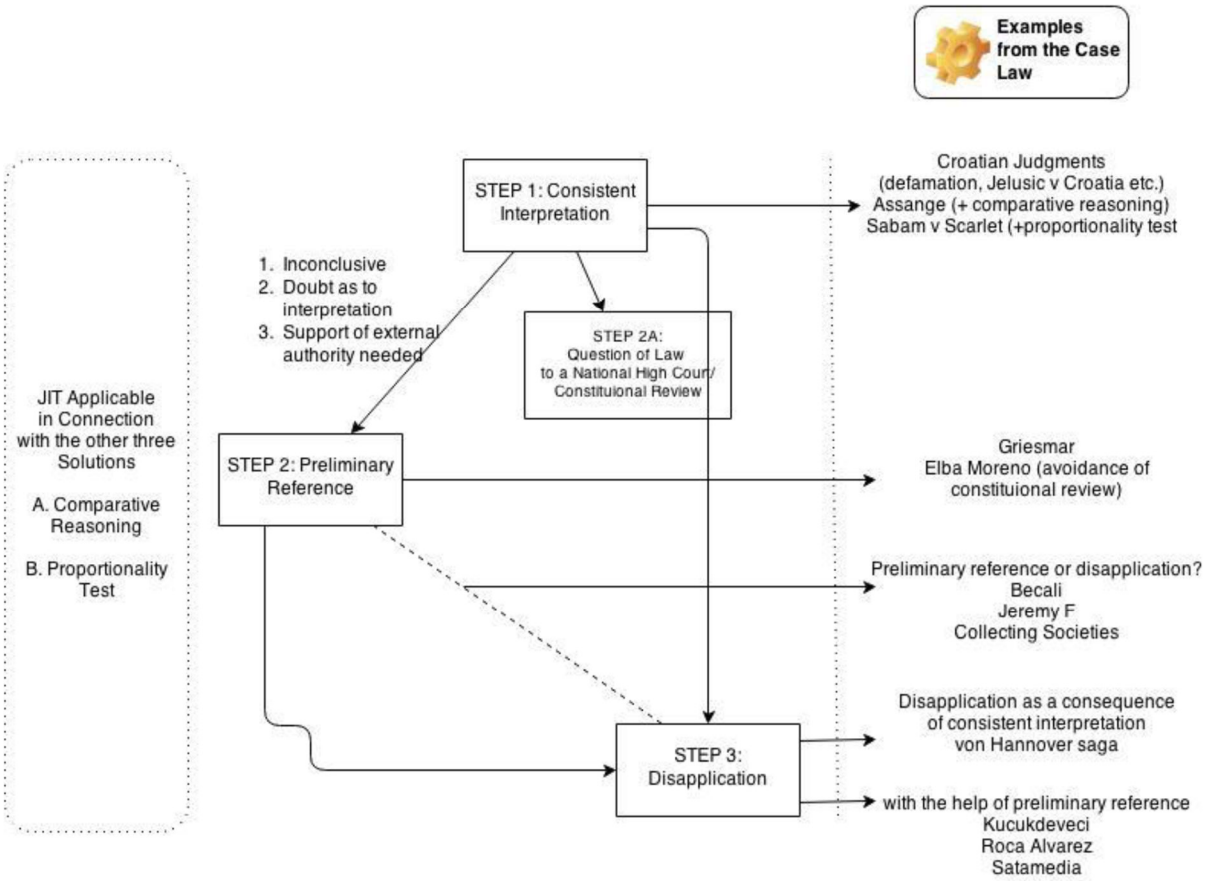
9. Guidelines on using Judicial Interaction Techniques

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).



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.

Section III
Right to an effective remedy

1. What is the right to an effective remedy?

The right to an effective remedy is an obligation of the State to provide a judicial relief when a violation of a right is acknowledged. This right entails a double dimension: on the one hand, the procedural right to an effective access to a fair hearing, and on the other hand, the substantive right to an adequate redress. The right to an effective remedy was firstly characterised as a general principle of EU law, stemming from the constitutional traditions of the Member States by the CJEU (on general principles see Section I, **n. 5**).

Later on, also secondary law started to include the requirement of effective judicial protection, basing the interpretation of such provision on the CJEU case law. Finally, with the entry into force of the Lisbon Treaty, the principle acquired the status of primary law being included as Article 47 Charter, providing for an explicit recognition of the 'right to an effective remedy and to a fair trial'.

However, this shift from general principle to Charter article is not without consequences. Notably, the general principle's nature of an 'umbrella principle', it was interpreted in a flexible manner, and did not suffer for strict limitations of its scope of application, thus it was used by the CJEU in civil, criminal or administrative enforcement proceedings. Article 47 Charter, instead, defines a more structured architecture, codifying only partially the principle of effective judicial protection, whereas other guarantees that are part of the principle are enshrined in Articles 41 and Article 48 Charter, which are applicable respectively to administrative and criminal proceedings. Therefore, the interpretation of Article 47 Charter should consider such correlations, and the boundaries between one and the other.

2. Is there a right to effective remedies?

The right of effective remedies is explicitly defined by Article 47 Charter, which provides:

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

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

1. the right to bring an action
2. right of access to a tribunal
3. the right to be heard by a tribunal
4. the rights of the defence

5. the principle of equality of arms
6. the principle of *audi alteram partem*
7. *the right to an independent and impartial tribunal*.

Article 47 Charter must be interpreted and exercised "*under the conditions and within the limits' defined by relevant Treaty provisions which make provision for it*", pursuant to Article 52(2) Charter. In this sense, the reference is Article 19(1) TFEU, which establishes that national judges are judges of Union law, in that Member States "*shall provide the remedies sufficient to ensure effective legal protection in the fields covered by Union law*".

3. What is the relationship between Article 47 Charter Articles 6 and 13 ECHR?

As mentioned in the Explanations to the Charter, Article 47 is based on the common constitutional traditions of the Member States and on Articles 6 and 13 ECHR.
Article 6 ECHR provides:

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

Article 13 ECHR provides:

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

Although ECHR served as a point of reference in the decisions of CJEU, as well as a source of inspiration in the drafting of Article 47 CFREU, the scope and content of Articles 6 and 13 ECHR do not completely overlap with either the general principle of the right to effective judicial protection or with the right to effective remedies and to fair trial as provided by the Charter.
This different scope of application may result, in relation also to the national constitution norms applicable, in the following situations faced by the national judges:

a) areas where Article 47 Charter, Article 13 and/or 6 ECHR and national constitutional provisions may apply (with similar yet not completely overlapping standards, e.g. Tall case);
b) areas where Article13 and/or 6 ECHR and national constitutional provision may apply, i.e. areas outside the scope of EU law (again with similar yet not completely overlapping standards).

As regards the European provisions, the main differences between the scope of application of Article 47 vis-à-vis Articles 6 and 13 ECHR are the following:
(1) Article 6 ECHR is limited to disputes relating to civil rights and obligations or criminal proceedings whereas Article 47 CFREU is effective both in those cases and in pure administrative law proceedings, as for instance in migration area the entry, stay and deportation of aliens.
(2) Article 47 CFREU may be relied upon by parties where there exists a violation of any right conferred on them by EU law and not only in respect of the rights guaranteed by the Charter, whereas Article 13 ECHR is limited to the right guaranteed by the Convention itself. In this sense, there is a direct relationship between effective judicial protection and rule of law as stated in Union pequenos agricultores, where Court affirmed:

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

This implies that in his/her argumentation of the decision,

- in order to apply Article 47 Charter the judge should clarify only the connecting factor with EU law, as indicated above;
- in order to apply Article13 ECHR, the judge should identify among the rights guaranteed by the ECHR, the one applicable to the specific case at hand.

(3) Article 47 CFREU only guarantees the right to an effective remedy before a "tribunal", whereas Article 13 ECHR refers in general to "*a national authority*". Under the ECHR system the 'authority' does not need necessarily to be a judicial authority, however it does need to be capable of making binding decisions. In particular, the ECtHR and the CJEU differ in the elements a national institution should have are in order to be qualified either as a national authority or as a tribunal:

ECtHR : national authority	**CJEU : tribunal (according to Article 267 TFEU)**
The body is established by law	The body is established by law
It has the power to issue binding decisions	It is a permanent body
It has full jurisdiction over the case	It has compulsory jurisdiction
It is subject to rules of law (in substantive and procedural terms)	Its procedures are inter partes
	It applies rule of law
It is independent and impartial	It is independent

Although the features of a "tribunal" listed above are almost overlapping with those qualifying a "national authority" under Article 13 ECHR, the former seems to be interpreted in a more stringent way by the CJEU. However, similarly to the case-by-case approach adopted by the ECtHR, the jurisprudence of the CJEU shows that it is not excluded, in principle, that the concept of "tribunal" may include also bodies that are not courts.

(4) Article 47 CFREU provides for less procedural limitations compared to Article 6 ECHR, in particular when the application of the Convention is limited by statutory or constitutional provisions.

4. Which is the relationship between national procedural autonomy and the right to an effective remedy?

EU law, while conferring rights to individuals through primary and secondary law provisions, does not provide for specific remedies in each and every legislative intervention adopted. However, the CJEU has unequivocally affirmed that the Treaties "*created a complete system of legal remedies*".
As a matter of fact, the CJEU affirmed that where EU law does not in itself identify specific judicial remedies applicable for violations, or alternatively demands only for general requirement of effective, proportionate and dissuasive remedies, Member States legal systems will provide for them, the latter being required to establish a sufficiently complete system of legal remedies and procedures.
Through this allocation of competence, the Member States retain their competence in procedural matters, including in those cases where Union rights are at stake. However, where there is a case of unjustified interference in the exercise of a right arising from the Union legal order, the national courts and the national procedural system should ensure the existence of a remedy capable of providing for the enforcement of that right. This decentralized enforcement system involving Member States courts is defined as national procedural autonomy.
The notion of national remedies and procedures is perceived as falling under the national procedural autonomy, EU law assuming that national remedies and procedures were both sufficient and adequate. However, litigation involving EU law issues revealed that the national procedures and, in particular, the panoply of domestic remedies were sometimes insufficient or deficient.
The level of autonomy of Member States as regards procedural guarantees is not without caveats. In 1976, the landmark cases of *Rewe* and Comet addressed in a clear manner the test that national procedural law should undergo in order to be deemed sufficient to ensure the exercise of Union rights. The CJEU decision affirmed that:

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

The principles that should guide the evaluation of the CJEU in front of national remedies and procedures have since been termed the principle of equivalence and the principle of effectiveness.
Under the principle of equivalence, the terms of comparison are the remedies provided by national law for non-EU based claims vis-à-vis those available for EU based claims. The judicial or legislative treatment of the former should be 'equivalent' to the one applicable to the

CJEU decision:

- C-181/16, Gnandi v. Etat belge (casesheet)

latter. This applies to procedures including situations and possibilities of class action as well as substantive law. The similarity of a situation is subject to detailed case-by-case analysis, the Court looking at the purpose and effect of a national measure in question and exists '*where the purpose and cause of action are similar*', or where the case concerns '*the same kind of charges or dues*'. It is important to stress that the principle does not imply necessarily that actions based on EU law always should benefit from the most favourable procedural regime in national law; rather, it implies that those claims that are deemed to be comparable should be treated equally, prohibiting straightforward discrimination based on the origin of the claim (whether national or European).
Under the principle of effectiveness, the term of reference is the national conditions that may apply to the EU-based rights, such conditions should not make impossible or extremely difficult to exercise such right. The threshold from mere "*impossibility*" to "*impossible or extremely difficult*" was raised through the jurisprudence of the CJEU. This reframing of the effectiveness test was important in introducing a balancing exercise by the CJEU itself: in order to evaluate if the exercise of EU based right is made "*excessively difficult*" a comprehensive review is needed. Thus, the analysis of the CJEU should not limit itself to the specific national procedural provision applicable, rather it should addressed the procedural system as a whole, taking into to account all the particularities of national legal systems.

5. Can national judges adapt remedies on the basis of effectiveness?

The interpretative effort of the CJEU may have a prominent effect at national level: namely the so-called *hybridisation* of remedies. This process may be triggered by the decision of the CJEU, where the available national remedy is interpreted in the light of the EU standard, and then 'upgraded' via consistent interpretation. Otherwise, the hybridisation may emerge at national level, where the national courts, finding a conflict between EU law and national provisions, are required to adapt the procedural rule and/or the available remedies in order to comply with EU standard of effectiveness.
This could result in the availability of new remedies, which may already be available in the legal system but not for the specific case, or may be previously non-existent; or vice versa, the expected remedies may no longer be available. In these cases, the national courts will have the task to decide which judicial dialogue technique may help in avoiding further conflicts.

CJEU decisions on remedies adaptation in case of violation of EU law:

- Joined cases C-46/93 and C-48/93, Factortame
- Case C-489/07, Pia Messner

Otherwise, the national judge may be bound to disapply national legislation in order to resolve the conflict.

6. Does the Charter allow national judges to create new remedies?

Although the CJEU has always stated that the right to an effective remedy "*was not intended to create new remedies*", in some cases the decisions of the CJEU lead national courts (as well as legislators) to question whether it was necessary to modify the national procedural system so as to include a new remedy in order to comply with EU principles, as interpreted in CJEU judgments.
It is important to note that the need to modify or create a new legal remedy is to be interpreted as a solution to be adopted only in exceptional cases. Under normal circumstances, the evaluation of the

CJEU takes into account the remedies already existing at national level and the possibility to interpret the procedural provisions so as to fill the alleged gap in the enforcement of Union rights.
The more cautious approach adopted by the CJEU is expressed in the *Inuit* case. Here the national court asked whether the limited access to court for individuals under Article 263 was in line with Article 47 Charter. In this case the Court had the opportunity to affirm that

CJEU decision on hybrid remedies:

- Case C-453/99, Courage and Crehan
- Joined Cases C-295/04 to C-298/04, Manfredi
- Joined cases C-46/93 and C-48/93, Factortame

> *neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law*

However, as mentioned above, an exception to this principle may emerge if the domestic legal system does not provide for any direct or indirect remedy capable of ensuring respect for the rights, which individuals derive from European Union law.

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

Another set of additional requirements of remedies emerging from the case law of the CJEU are those that prescribe that the remedies should be effective, dissuasive and proportionate. If on the one hand, the elements of effectiveness and dissuasiveness are based on the principles of equality and effectiveness; the requirement of proportionality, on the other hand, appears as an additional feature to be evaluated by European and national courts, based on the more general principle of Union law applicable to Member States when acting within the scope of application of the Treaty.
It is important to note these specific features of remedies have their basis in EU secondary law provisions. However, the CJEU has never clarified expressly such features, although it has used the principles to evaluate national provisions.
It is difficult to draw a clear boundary between effectiveness, proportionality and dissuasiveness as these three features are unavoidably interrelated. However, a set of guidelines drawn by the CJEU case law may help in their analysis.

A. When is the remedy effective?

Effectiveness refers to the relationship between a particular goal set by the policy maker and the legal remedies available to reach the goal set by the legislator. (e.g. consumer protection or fair market competition). Within this analysis a set of criteria should be taken into account:

- the national remedial system should be able to provide for general deterrence (*ex ante* dissuasion from violation);
- should aim at restoration of harm (if possible *restitutio in integrum*); and
- should aim at prevention of future harm.
- the factual circumstances (i.e. procedural rules) that may hamper the achievement of the aforementioned objective.

It is important to underline that effectiveness test may lead to different outcomes when looking at individual versus collective redress mechanisms. Collective redress may be seen as the response of the legal system to some of the features of individual actions which may hamper access to justice, such as the underreporting of individual claims due to the high economic costs of litigation (usually

higher than the value of the claim), the complexity of the legal provisions applicable, the duration of the judicial proceedings, the imbalance between the individual claimant and the professional counterparty (e.g. consumers vis-à-vis professional, discriminated workers vis-à-vis employer, etc.). Under this perspective, the availability of collective redress is to be interpreted as an effective remedy: for instance, it is not disputable the legal standing of a public body to pursue an action against discrimination even when there is not an identifiable victim of such discrimination.

B. When is the remedy proportionate?

Proportionality refers firstly to the seriousness of the offence and the size and type of remedies applicable to the offender. In the jurisprudence of the CJEU, the seriousness of the offence includes the actual damage both in its material and immaterial manifestation.

When looking at the size and type of remedies, courts may take into account other elements in order to evaluate the concrete sanction such as the financial capacity of the author of the violation, the repetitive nature of the violation and the fact that multiple violations may have occurred.

CJEU decisions of proportionate remedies:

- Case C-34/13, Kusionova
- Joined cases C-65/09 and C-87/09, Weber and Putz

When several remedies are available, the proportionality principle is used to select the best solution available vis-à-vis the seriousness of the violation (and its cost-effectiveness). In this sense, proportionality may take into account the interests of the infringer.

C. When is the remedy dissuasive?

Dissuasiveness refers to the capability to lead potential authors of violation to comply with the law. Thus, it addresses both the author of the violation in the case decided before the court, but also the potential violators that will be refrained from the violation. Under the first perspective, the choice among monetary remedies versus remedies in kind may affect the achievement of the dissuasive effect: damages, restitution, and similar monetary remedies, which are the main option in cases where the violation cannot be solve through the restoring of the status quo antea (e.g. discriminatory speech in public) may be interpreted by violators as "prices" for committing the infringing behaviour, thus may be perceived as not sufficiently dissuasive if their amount is limited to the compensation of the material damages. Instead, remedies in kind, such as injunctions or obligation to repair (defective goods) or to reinstate (discriminated workers) or to inform (asylum seekers) may have a higher deterrent effect.

CJEU decisions of dissuasive remedies:

- Case C-565/12, Credit Lyonnais
- Joined cases C-65/09 and C-87/09, Weber and Putz

It is important to note that the principles of effectiveness, proportionality and dissuasiveness are relevant regardless the area of law where they emerge first. Most importantly, the standards provided in one area of law may be translated into another area not only by the CJEU, but also by national courts.

8. What is the impact of the right to an effective remedy in different enforcement proceedings?

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

As regards the administrative enforcement, an additional reference is Article 41 Charter, which provides for the right to good administration. Article 41 Charter provides that :

> *"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.*
> *2. This right includes:*
> *- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
> *- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
> *- the obligation of the administration to give reasons for its decisions.*
> *3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.".*

This right has a double feature: on the one hand, the explanation to the Charter as well as CJEU jurisprudence clarifies that, as indicated in the Charter, this right binds the EU institutions, bodies, offices and agencies. On the other hand, as a general principle of EU law, this right has a wider scope and also binds the Member States when they act within the scope of EU law.

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

CJEU decisions on art 41 Charter:

- C-166/13, Mukarubega
- C-277/11, M.M.

CJEU decision on the general principle of good administration:

- C-604/12 H.N.
- C-349/07, Sopropé

A partial overlap between Article 41 and Article 47 Charter may emerge, for instance, as regards the right to be heard. On the one side Article 41(2)(a) provides that the right of good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; on the other Article 47 includes the same right within the right to fair trial. Similarly, access to a file, guaranteed under Article 41(2)(b), or the obligation of the administration to give reasons, laid down in Article 41(2)(c), may both overlap with the protection provided under Article 47 and, in so far as concerns the adversarial principle, which is inherent to Article 47, include the right to examine all the documents submitted to the court.

Such an overlap is not uncommon as, for instance, in the migration and asylum proceedings the boundaries between administrative and judicial phase is not always clear cut in the national enforcement systems.

9. Is the Charter applicable also to independent regulatory authorities?

The wording provided by Article 47 Charter is not limited to administrative, civil and criminal judicial courts, as the wording of the article use the term of "tribunal", however the CJEU never provided a specific definition of such term. As mentioned above, the caselaw of the CJEU on the preliminary ruling jurisdiction may provide some features to identify which are the boundaries of the concept of "tribunal".

Although arbitral bodies are excluded from the application of Article 267 TFEU, as they are established on the basis of an agreement between the parties; but the jurisprudence of the CJEU shows that national bar councils or independent authorities may instead be qualified as tribunals, if they comply with the mentioned elements, and in particular those of independence and impartiality.

It is important to note that in some cases, the CJEU clarified the importance of the collaboration between national sectorial authorities and courts in order to provide access to EU system in the perspective of Article 47 Charter. For instance, in Schrems, the CJEU affirmed that

> *"[i]t is incumbent upon the national legislature to provide for legal remedies enabling the national supervisory authority concerned [i.e. Data protection authority] to put forward the objections which it considers well founded before the national courts in order for them, if they share its doubts as to the validity of the Commission decision, to make a reference for a preliminary ruling for the purpose of examination of the decision's validity."*

In another case, only the coordination and collaboration between independent authorities and judicial courts allowed to overcome the problem of access to EU courts by independent authorities. For instance, the *Belov* case was submitted directly by the Bulgarian equality body, which was eventually deemed as inadmissible due to the fact that the referring body could not be defined as a tribunal. Then, the Sofia Administrative Court facing a very similar case, where the same defendant was appealing against the decision of the Bulgarian equality body, refer a preliminary ruling to the CJEU. In *Nikolova*, then, the CJEU addressed the issues that were common to both cases.