LighT

Litigating change Training Lawyers on the EU Rule of Law Acquis

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LITIGATING CHANGE

Training Lawyers on the EU Rule of Law Acquis

TRAINING MATERIAL

Co-funded by the European Union

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LIST OF ABBREVIATIONS	
CFR(EU)	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EJTN	European Judicial Training Network
EPPO	European Public Prosecutor's Office
EU	European Union
FRA	European Union Agency for Fundamental Rights
HRD	Human Rights Defender
ISHR	International Service for Human Rights
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
PPU	Procédure Préliminaire d'Urgence (urgent preliminary ruling procedure)
RoL	Rule of Law
SLAPP	Strategic Lawsuit Against Public Participation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNODC	United Nations Office on Drugs and Crime

Executive Summary

The project. *Litigating change: training lawyers on the EU rule of law acquis* (LighT) is an EU funded action (JUST-2021-JTRA) aiming to strengthen the Rule of Law (RoL) by building the capacity of national lawyers as change agents. The project is implemented in five EU Member States facing notable challenges in this area – Bulgaria, Greece, Hungary, Poland, and Romania – and is expected to train:

- 300 lawyers with introductory level of knowledge on the RoL
- 45 activist lawyers and human rights defenders
- 8 trainers

The training is design to cover key RoL topics, as identified by the European Commission in its RoL reports: access to justice, transparency and anti-corruption, freedom of information and freedom of the media and the press, and civic participation. Additional elements of the RoL, relevant to the consortium countries and identified though the project's Training Needs Analysis, are also addressed. The curriculum is designed to allow for flexibility in the design of each training activity, allowing trainers to place emphasis on the specific topic(s) they deem most relevant, based on the organising country and profile of trainees.

Implementing consortium. The project is implemented by a consortium of Academic Institutions and Civil Society Organisations with extensive experience on the project topics and the organisation of training for legal professionals.

The **Centre for European Constitutional Law – CECL** (EL) is the project coordinator. The CECL is a leading non-profit research institute with extensive experience in legal and judicial reforms and extensive track record in institutional reform and capacity-building. Additionally, CECL is the National Focal Point for the EU Agency for Fundamental Rights (FRA) in Greece and thus is responsible for the systematic collection of data and monitoring of legislative and policy developments in the area of fundamental rights.

The **Kozminski University – ALK** (PL) is a non-public higher education institution offering specialised legal studies in Poland. ALK will participate in all WPs and will be responsible for the development of training materials for trainers and lawyers, as well as organizing training activities in Poland.

The **Centre for the Study of Democracy – CSD** (BG) is a public policy institute fostering the reform process in Europe through impact on policy and civil society and bears CSD significant experience in building the capacity of the judiciary and lawyers on topics related to the Rule of Law. The institute has been instrumental in developing judicial reforms in Bulgaria and in Europe, including by building of Judicial Reform Initiative, cooperating with various monitoring mechanisms and building the capacity of policymakers and practitioners to build a better and more human rights compliant judicial system.

The **Centre for Social Sciences, Hungarian Academy of Sciences Centre of Excellence – CSS** (HU) takes an active part in developing legal scholarship and in organizing professional events and activities for legal scholars in Hungary and is particularly active in scientific publications on the topic of the Rule of Law.

The **Association ProRefugiu** (RO) is a non-governmental organization focused on judicial trainings for lawyers, prosecutors and judges, as well as legal research. The organisation has a sustainable cooperation with judicial training institutions, bars, union of bars and universities in the country.

Document description. This document is project Deliverable 2.3 "Training package". The training package is the result of a collaborative process within the project's Training Committee, building on the findings of the Training Needs Analysis performed in the project countries. To this end, it incorporates and systematises key themes, learning objectives, and effective training methodologies identified through the TNA, translating them into a concrete training offer for lawyers interested in the topic of the Rule of Law.

The training package is structured into two main sections: the training modules – describing units of educational content and expected learning outcomes; and the training material – providing background information and analyses of individual topics, resources, links, and practical exercises, to be used by the LighT trainers in the project's training activities. Moreover, the modules and material reflect the varying levels of knowledge and required skills of the project's target groups, distinguishing between trainers, activist lawyers, and lawyers with an introductory level of knowledge on the project topics.

The training package was produced by the LighT Training Committee, which comprises experts on the Rule of Law, including academics, practicing lawyers, and lawyers working in the civil society. External experts co-authored specific topics (all authors are mentioned in their respective chapters). The final document was reviewed by the consortium before submission.

TRAINING MODULES

Train the Trainers

Total learning hours: 22

Module 1

Module title: Introduction

Total learning hours: 1

Overview/summary

Brief description of the Module

This module aims to start the training with an introduction to the LighT project and the ToT programme, laying the foundation for the next steps. One of the key objectives here is to establish a strong rapport between participants and trainers, fostering a collaborative and supportive learning environment. This will set the stage before moving on to outline the overall structure of the training and the key topics that will be covered. Finally, participants will be introduced to the key principles of adult learning and judicial training methodology, which will then be specialised through practical application.

Learning objectives and expected outcomes

Upon completion of this module, participants should have:

- Become familiarised with the project and the aim of the ToT;
- Understood their role in the project & gained motivation;
- Gained an overview of judicial training methodologies and the principles of peer learning.

Module outline

Component 1 Presentation of the project and its scope; ToT structure and methodology

Component 2 Tour de table and ice breakers

Component 3 Learning objectives and expected outcomes: the role of the trainer in LighT and beyond; principles of adult learning and judicial training methodologies; teaching and learning from your peers.

Indicative training methods

- Icebreakers

- Presentations
- Discussion

Module 2

Module title: RoL and democratic institutions

Total learning hours: 6

Overview/summary

Brief description of the Module

In this training module, we focus on defining the concept of Rule of Law (RoL) and its constituents in the specific context of the LighT project. We will delve into the key challenges that have emerged through the TNA research to identify the areas that require particular attention, with reference to the key systemic and institutional rule of law issues related, in particular to access to justice and the right to a fair trial. Through collaborative discussion and knowledge sharing, participants will have the opportunity to exchange views on the key issues and explore potential solutions through litigation and other avenues.

Learning objectives and expected outcomes

Upon completion of this module, participants should have:

- Understood the definition and approach to the RoL in the context of LighT;
- Gained a clear overview of the key systemic and institutional RoL issues in the participating countries;
- Identified the main practical concerns with reference to the practice of law;
- Gained understanding of the training methods of presentation and case study and key principles of material drafting.

Module outline

Component 1 Judicial independence and separation of powers; freedom of expression in the judiciary

Component 2 Criminal procedural law: addressing arbitrariness and effectiveness of remedies

Component 3 Threats to independent authorities and other checks and balances: the Greek case of abusive surveillance and illegal spyware; types of corruption and effectiveness of anti-corruption frameworks

Component 5 Understanding training methods in practice: developing and delivering an effective presentation (effective delivery and communication on multiple formats) **Component 6** Understanding training methods in practice: the case study (practical exercise in material drafting)

Indicative training methods
- Presentations & case law review - Case studies - Problem solving - Discussion

Module 3

Module title: RoL and the civil society **Total learning hours:** 6

Overview/summary
Brief description of the Module In this training module, we address the multifaceted topic of restrictions on civic space and individual rights, examining it from various perspectives. We begin by exploring how these restrictions manifest as legal matter, considering potential cases that exemplify the challenges faced. We delve into the treatment of vulnerable groups, including the LGBTQ+ community, and the prevalence of institutional discrimination as a pervasive horizontal issue. Additionally, we recognize how these restrictions have a profound impact on lawyers, who play a crucial role within civil society. In addition, we address the topic of SLAPPs and whistleblower protection, and explore ethical and legal approaches to foster a healthy environment for public participation. Lawyers working in Civil Society Organizations (CSOs) and Non-Governmental Organizations (NGOs) as well as those involved in providing legal aid services face unique challenges. By the end of the module, participants will gain a deeper understanding of the potential role of lawyers as agents of change in addressing and mitigating these restrictions on civic space and individual rights, including how to motivate their peers to pursue strategic solutions to these issues.

Learning objectives and expected outcomes

Upon completion of this module, participants should have:

- Gained a clear overview of common and key country-specific issues related to the civil society and civic space; understood their impact on lawyers in the participating countries;
- Discussed systemic biases and ways to tackle them in court; acquired knowledge and skills on sensitive approaches to vulnerable clients;
- Gained a clear understanding of the topics of SLAPPs and whistleblower protection, their importance for the functioning of a healthy democracy and ways in which they can manifest as legal cases;
- Discuss case selection and strategic argumentation to further societal change.

Module outline

Component 1 Challenges faced by lawyers, human rights defenders, and the civil society; the role of Bar Associations

Component 2 Hostile political environment and administrative barriers: the example of the area of asylum and migration;

Component 3 SLAPPs and whistleblower protection

Component 4 Gender and LGBTQ+ issues

Component 5 Case study exercise – group work

Indicative training methods

- Presentations & case law review
- Role play
- Brainstorming
- Debate
- Case studies
- Discussion

Module 4

Module title: RoL and litigation

Total learning hours: 6

Overview/summary

Brief description of the Module

In this module, we prioritise several critical areas of focus. First and foremost, we will explore the intricate relationship between national and EU law, with a particular focus on the Charter of Fundamental Rights, to enable participants to understand the interplay between these legal frameworks. In addition, we will examine EU and Council of Europe judicial procedures, including a detailed examination of the preliminary ruling procedure, to provide participants with a comprehensive understanding of these mechanisms.

A central aim of this module is to address challenges related to practices, perspectives and biases within the judicial system and public administration, with a strong emphasis on promoting a more just and equitable legal environment. Participants will exchange knowledge and share experiences on litigation, emphasising strategic approaches, effective networking and the importance of cross-border cooperation.

Beyond litigation, we will explore alternative avenues for effective action. These include advocacy for change and active participation in the law-making process, empowering participants to be proactive agents of law reform and defenders of fundamental rights.

Learning objectives and expected outcomes

Upon completion of this module, participants should have:

- Gained an in-depth understanding of the general principles of EU law interpretation and procedure before European Courts;
- Honed their skills in strategic case selection and argumentation;
- Exchanged practical knowledge and experience on how to address gaps in judicial and administrative practice;
- Exchange views on alternative avenues of action to improve the RoL landscape.

Module outline

Component 1 General principles of EU law: how to uphold the effectiveness of EU law in cases of ineffective transposition/application

Component 2 Charter of fundamental rights scope of application and specific articles related to the project topics (access to justice and fair trials, freedom of expression and information, freedom of assembly and of association, right to asylum and non-refoulement)

Component 3 Addressing gaps in judicial and administrative practice: non-implementation of CJEU/ECHR case law, apprehension toward EU law, limited use of preliminary ruling procedure; the added value of EU law in litigation – success stories and motivation; active discussion: persuading clients to pursue litigation at the European level

Component 4 European networks and cross-border cooperation

Component 5 Other ways to act: advocacy, collective action, participation in public consultation and law-making processes.

Indicative training methods

- Presentations & case law review
- Brainstorming
- Active discussion

Module 5

Module title: Training organisation and delivery

Total learning hours: 3

Overview/summary

Brief description of the Module

The main focus of this training module is to provide participants with basic practical skills and knowledge necessary to organise and deliver effective training programmes. The module covers several essential aspects of training design and delivery, including how to effectively structure and organise a training programme, curriculum planning and development, selection of training topics, trainers and participants, and training assessment and evaluation.

Learning objectives and expected outcomes

Upon completion of this module, participants should have:

- Gained a clear understanding and basic skills for course design and delivery
- Understood the added value of well-design training evaluation
- Evaluated the LighT ToT.

Module outline

Component 1 Organisation and delivery of training

Component 2 Assessment and evaluation

Component 3 Evaluation of the ToT

Indicative training methods
- Presentations - Discussion - Role playing

Introductory training

Total learning hours: 12

Module 1

Module title: Basic elements and principles of EU law for lawyers

Total learning hours: 3

Overview/summary

Brief description of the Module

The aim of this module is to introduce lawyers with limited knowledge of the application of EU law and the RoL acquis to central principles and norms, as a starting point to understanding the context of the training. During this introductory module, it is also essential to emphasise the added value of EU legal norms overall, and especially in the area in question. This is key in order to address the general apprehension toward EU law, observed across the board in the consortium countries, pique the participants' interest, and motivate them to actively engage and participate in the learning process. The following topics should be included and addressed in this module:

- Core EU values, as established in Art. 2 TEU
- Definition of the RoL & related challenges
- General principles of interpretation and application of EU law (subsidiarity, effectiveness, etc.)
- Scope of application of the Charter of Fundamental Rights and key provisions relevant to the RoL
- EU procedures: scope and application of the preliminary ruling procedure (art. 267 TFEU, 19 TEU).

Learning objectives and expected outcomes

Upon completion of this module, participants are expected to:

- Understand the key components of the RoL and its place within the EU value system and legal order
- Understand key principles of application of EU law (scope of EU law, including the Charter, relationship with national laws and international/regional provisions, etc.)
- Understand what a reference for a preliminary ruling is, when it can be pursued and what could be its added value.

Module outline

Component 1 Overview of EU primary law and general principles of EU law; current trends regarding primacy of EU law; theory and case law

Component 2 Overview of the Charter of Fundamental Rights of the EU; scope of application and provisions relevant to the RoL; invoking the Charter before national courts

Component 3 Subject and scope of the preliminary ruling procedure.

Indicative training methods

- Presentations & case law review
- Case studies
- Discussion

Module 2

Module title: Rule of law and the exercise of fundamental democratic rights

Total learning hours: 6

Overview/summary

Brief description of the Module

In this module, trainees will have the opportunity to explore the relationship between the RoL and fundamental rights, as established in the CFR and the ECHR. This familiar topic is ideal to introduce trainees to the application of the RoL acquis through concrete examples, and showcase relevant argumentation which may be used in addition to the more "traditional" approaches to these cases, usually seen in practice.

Learning objectives and expected outcomes

Upon completion of this module, participants are expected to:

- Understand how fundamental rights cases can be approached and argued as a RoL issue
- Be able to apply basic fundamental rights and RoL notions in concrete cases, and formulate basic RoL legal arguments.

Module outline

Component 1 Fundamental rights protection as a RoL issue

Component 2 Examples of litigation and argumentation in specific RoL-related areas: right to assembly and association; freedom of speech and freedom of information (Whistleblower protection, SLAPPs against journalists); hate speech and hate crime.

Component 3 Application of RoL guarantees on equal treatment to vulnerable persons and groups, including persons in migration (migrants, beneficiaries of international protection, asylum seekers), LGBTQI+ persons, women.

Component 4 Application of criminal procedural safeguards related to access to justice, equality of arms and effective remedies.

Indicative training methods

- Presentations & case law review
- Case studies
- Brainstorming
- Discussion

Module 3

Module title: Resources, networks and communication

Total learning hours: 3

Overview/summary

Brief description of the Module

This module aims at providing participants with practical advice, information, and resources, to support them in their efforts to open up their legal practice to more RoL/EU law case. Specifically, instructors should address the following:

- Present and explain the function of existing databases on European law and Case law (Eur-lex, Curia, Hudoc, Charterpedia, etc.)
- Alternative sources and how to invoke them in court: grey literature, country reports, international guidelines, strategic documents
- Client management and communication: how to convince your client to pursue litigation before European courts – arguments on duration, costs, and effectiveness of proceedings
- Connect and find support: existing networks of lawyers and the role in support of the RoL.

Learning objectives and expected outcomes

Upon completion of this module, participants should have:

- Learned how to stay up to date with developments in EU law and the RoL through online sources and networks
- Gained the skills to build a case based on information from alternative sources
- Acquired basic client management & communication skills
- Identified sources of support and understood the role and added value of networks.

Module outline

Component 1 Presentation of relevant websites and databases

Component 2 Invoking soft law in court and building evidence based on grey literature

Component 3 Development of client management skills & communication skills: convincing your client to pursue European litigation

Component 4 Networking and self-organisation; the role of Bar Associations; European legal networks and their work (CCBE, ELENA, LEAP, and others); defending human rights defenders.

Indicative training methods

- Demonstrations
- Scenarios
- Role playing
- Brainstorming
- Discussion

Advanced training

Total learning hours: 12

Module 1

Module title: The rule of law in the EU – challenges and European approaches

Total learning hours: 2

Overview/summary

Brief description of the Module

This module aims at clarifying the notion of the RoL and its individual constituents in an operational manner that links this abstract concept to concrete topics of litigation. To this end, it reviews current European (and international) approaches as well as relevant, updated case law on RoL topics, in particular as found in CJEU rulings on preliminary references, and the jurisprudence of the ECtHR on human rights violation, viewed through a RoL lens. Trainees will practice submissions for preliminary references to national courts an consider effective argumentation based on successful cases. Participants will be invited to share their experiences on RoL challenges in their own jurisdictions, as well as discuss European issues and strategic priorities.

Learning objectives and expected outcomes

Upon completion of this module, participants should have:

- Understood how the RoL concept relates to concrete litigation topics in practice
- Gained an overview of current jurisprudence and examples of winning strategies before European and domestic courts
- Clarified any obscurities in relation to the preliminary ruling procedure, including how to successfully argue for a reference before domestic courts
- Refined their skills in identifying and arguing RoL cases
- Gained an overview of current RoL concerns, with emphasis on judicial independence and access to justice, freedom of assembly and freedom of association, and human rights violations.

Module outline

Component 1 What is the RoL to a lawyer?; EU values, primary and secondary EU law related to the RoL; RoL constituents, principles and arguments derived from case law

Component 2 RoL argumentation before national courts – what to keep in mind when invoking the EU acquis; successfully arguing for preliminary ruling references – examples from case law

Component 3 Institutional aspects of the RoL: checks and balances, separation of powers and judicial independence; access to justice and equality of arms (access to a lawyer and legal aid, application of procedural safeguards during trial); threats to mutual trust and judicial cooperation – examples from the EAW

Component 4 RoL and the civil society: challenges to freedom of assembly and association; barriers to civic participation and restriction of civic space

Indicative training methods

- Presentations & case law review
- Case studies & scenarios
- Role play
- Brainstorming
- Discussion

Module 2

Module title: RoL argumentation – drawing on specific themes

Total learning hours: 4

Overview/summary

Brief description of the Module

In this module, participants will train in the application of key principles and norms related to the RoL, through the exploration of seminal case law and jurisprudential developments on specific themes. They will identify successful arguments/type of case, consider priorities for strategic litigation, and focus on the effective defence and representation of vulnerable individuals and victims of specific violations. Emphasis will be placed on groups of persons identified as particularly relevant in the context of LighT, such as people in migration (beneficiaries of international protection, asylum seekers, migrants), members of the LGBTQI+ community, women – particularly regarding their reproductive rights, and other marginalized groups, relevant in individual national contexts (e.g., Roma, persons suffering from substance abuse, etc.).

Learning objectives and expected outcomes

Upon completion of this module, participants should have:

- Gained an overview of RoL concerns in relation to specific topics and the ways in which European courts deal with them in their case law
- Learned how to critically approach RoL issues, within national and European contexts
- Put their knowledge and experience into practice through targeted RoL argumentation, focused on preliminary ruling references

Module outline

Component 1 Case law analysis: identification of key themes, jurisprudential trends, and adopted reasoning

Component 2 RoL and rights of vulnerable persons**:** equality before the law; hate speech and hate crime; vulnerable groups under attack – LGBTQI+, people in migration, women

Component 3 Victims of RoL violations: victims of abusive/illegal surveillance and spyware; whistleblowers/witnesses in corruption/maladministration cases; persons targeted by SLAPPs

Component 4 Putting knowledge into practice: developing argumentation for a preliminary ruling reference

Indicative training methods

- Case law review
- Case studies & scenarios
- Brainstorming
- Discussion

Module 3

Module title: Safeguarding the RoL – the role of lawyers

Total learning hours: 4

Overview/summary

Brief description of the Module

This module aims primarily at illustrating the ways in which lawyers can guard and improve the RoL within their countries and, more broadly, in their regions. Participants will discuss the systemic challenges they face in their daily work, share experiences and practical tips on navigating a hostile legal and political

environment, and brainstorm innovative ways of leveraging the options provided by EU law and procedure. The key objective here is motivating participants and boosting their morale through exchanges with their peers, focusing on solutions and good practices. This section will explore both judicial and non-judicial avenues and procedures, including before national and EU bodies and independent authorities such as the European Commission or the EPPO.

Learning objectives and expected outcomes

Upon completion of this module, participants should have:

- Become aware of their different options when addressing RoL concerns at the national and EU levels
- Gained procedural knowledge on how to address different European bodies/institutions
- Comprehended their role in relation to RoL and their potential to create change in their countries and beyond

Module outline

Component 1 How to approach the issue of non-compliance with CJEU/ECHR judgements; monitoring the execution of judgements: intervening at the regional level; legal remedies

Component 2 Addressing RoL issues beyond Courts: the EPPO, the Conditionality Regulation and access to EU funds; infringement proceedings: complaints to the EC and petitions to the EU Parliament; utilising non-legal/soft law resources

Component 3 Influencing public debate: collective or individual participation in law-making and policy consultations; the role of Bars; protecting activist lawyers

Indicative training methods

- Active discussion and brainstorming
- Demonstrations
- Presentations

Module 4

Module title: Practical skills, resources, and cooperation

Total learning hours: 2

Overview/summary

Brief description of the Module

This module aims to provide practical knowledge and resources for lawyers to keep their knowledge on EU law and the RoL acquis updated. Moreover, participants will discuss solutions through cross-border cooperation and networks.

Learning objectives and expected outcomes

Upon completion of this module, participants should have:

- Gained an overview of useful digital resources on EU law and case law, in particular with reference to the project topics
- Gain knowledge of legal networks and how they can capitalize on their collective resources in their litigation and advocacy activities

Module outline

Component 1 Staying updated on developments in EU law and jurisprudence: legal databases and resources

Component 2 Establishing RoL facts**:** available toolkits and assessment tools

Component 3 European legal networks: benefitting from established legal communities**;** working to together for a stronger RoL

Indicative training methods

- Active discussion and brainstorming
- Demonstrations
- Presentations

TRAINING MATERIAL

The concept of Rule of Law – definitions and constituent elements

Author: Zoi Anna Kasapi LL.M., CECL

Executive summary. The European project relies on permanent respect of the rule of law (RoL) in all Member States. [1] In addition to being one of the founding EU values, established in Art. 2 TEU, the RoL is seen as a precondition for the effective application of EU law on the basis of mutual trust between Member States, as well as for the functioning of the area of freedom, security and justice and the EU internal market, where laws apply effectively and uniformly and budgets are spent in accordance with the applicable rules. Threats to the rule of law are, therefore, seen as a challenge to the legal, political and economic basis of how the EU works.

The RoL is also a concept of international law, found in multiple international and regional legal documents and treaties, and is considered to be a principle of universal validity.

Despite its pivotal importance for all functioning democracies, there is an impressive lack of consensus on the definition of the rule of law. Legal theorists, practitioners, states and international organisations are at odds over of the specific function and constituent elements of the concept which they choose to prioritise or, conversely, ignore.

This introductory chapter aims to provide an overview of current approaches to the rule of law at the international and regional level, with a special focus on Europe and the EU in particular. It will highlight the lack of a coherent, universally accepted definition of the term, present the operational approach favoured by the Council of Europe and the European Union, and define its different constituent elements, with the view to aid practitioners link the overly theoretical concept of the RoL with its practical application.

Trainers should use the information contained in this chapter to introduce trainees with different levels of knowledge and experience to the ongoing discussion on the RoL. They should highlight the fact that not one universal definition of the concept exists, and that states are primarily responsible for defining it in the context of their own constitutional and legal traditions, as well as their relevant international obligations, stemming from their membership to international organisations/treaties. Finally, they should emphasise the EU approach, including the RoL Report methodology and the corresponding obligations of the Member States, which can lead to actionable acts and omissions. It is important to underscore that the different RoL constituents identified here are key to understanding how the principle can be used practically in legal argumentation to strengthen a case through reference to primary EU law.

Linked modules:

ToT module 2 – RoL and democratic institutions

Introductory module 2 – RoL and the exercise of fundamental democratic rights

Advanced module 1 – The rule of law in the EU – challenges and European approaches

[1] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and The Committee of the Regions on Strengthening the rule of law within the Union – A blueprint for action, COM(2019) 343 final, Brussels, 17.7.2019.

Chapter content

- International approaches and definitions of the Rule of Law
- The RoL at the regional level
- A closer look at the framework of the Council of Europe
- The Rule of Law in the European Union

International approaches and definitions of the Rule of Law. The rule of law is a concept of universal validity. [2] The UN has unanimously endorsed in 2005 the "need for universal adherence to and implementation of the Rule of Law at both the national and international levels". [3] To this effect, the Rule of Law Indicators were adopted, to monitor and promote the RoL in developing countries. The Indicators are incorporated into an Implementation Guide, containing 135 indicators relevant to three key institutions: the police (41 indicators); the judicial system (51 indicators); and prisons (43 indicators).

The UN recognize the RoL as both a principle of governance and a fundamental aspect of peacebuilding, essential for effective and credible democratic institutions. However, they also acknowledge that there is no single, universally accepted definition of the term. In the frame of the UN, the following definition of the RoL is used:

> ***[The Rule of Law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.***
>
> Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), para. 6.

The RoL at the regional level. At a secondary level, regional bodies and organisations acknowledge the RoL as one of their founding principles and a guiding value safeguarding the democratic operation of their Member States and institutions. The exercise of power in accordance with the rule of law is listed in the Inter-American Democratic Charter as one of the essential elements of a functioning representative democracy, among respect for human rights and fundamental freedoms, the holding of periodic, free, and fair elections, the pluralistic system of political parties and organizations, and the separation of powers (Art. 3). The Member States of the Organization of African Unity (OAU) have stated in the Constitutive Act of the African Union their determination to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and ensure good governance and the rule of law. Their commitment is reaffirmed in the Agenda 2063: The Africa We Want (Aspiration

[2] The Rule of Law Checklist, Venice Commission of the Council of Europe, adopted by the Venice Commission at its 106th Plenary Session in Venice, 11-12 March 2016, available at https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.

[3] United Nations, 2005 Outcome Document of the World Summit (§ 134), available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf.

3), which focuses on the RoL as a necessary pre-condition for a peaceful and conflict-free African continent.

A closer look at the framework of the Council of Europe. The Rule of Law holds a special place in the European democratic and legal traditions, with the Council of Europe (CoE) playing a leading role in upholding and strengthening it across the continent. The Preamble to the Statute of the Council of Europe recognizes the RoL as one of the *"spiritual and moral values which are the common heritage of [European] peoples"* and one of the three principles which form the basis of all genuine democracy, together with individual freedom and political liberty, whereas the signatories to the European Convention on Human Rights (ECHR) reaffirmed in its preamble that they are *"like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law"*.

Within the CoE framework, the competent body providing authoritative guidance on democracy and the RoL is the European Commission for Democracy through Law (commonly referred to as the Venice Commission). The Venice Commission is an independent consultative body which co-operates with CoE member states, as well as interested non-member states and international organisations and bodies, with the view to promote the fundamental values of the rule of law, human rights and democracy.

In its 2011 Report on the Rule of Law, the Venice Commission sought to reach a definition on the Rule of Law by looking at it in the context of positive law and attempting to distinguish it from the similar notions of **Rechtsstaat** (which focuses more on the nature of the state and its definition in opposition the absolutist state) and **État de droit** (which focuses on the law as a guarantor for fundamental rights against the legislator). However, upon reflecting on an appropriate and comprehensive definition, the Commission reached the conclusion that the Rule of Law is **indefinable**. Rather than continuing to pursue an impossible and hardly practical theoretical definition, it therefore took an operational approach, concentrating on identifying the core elements of the RoL.

This effort led to the elaboration of the Rule of Law Checklist, an operational tool for assessing the level of Rule of Law compliance in any given state based on the five core elements:

1. **Legality** — The principle of legality is at the basis of every established and functional democracy. It includes supremacy of the law: State action must be in accordance with and authorised by the law. The law must define the relationship between international law and national law and provide for the cases in which exceptional measures may be adopted in derogation of the normal regime of human rights protection.
2. **Legal certainty** — Legal certainty involves the accessibility of the law. The law must be certain, foreseeable and easy to understand. Basic principles such as nullum crimen sine lege/nulla poena sine lege, or the non-retroactivity of the criminal law are bulwarks of the legal certainty.
3. **Prevention of abuse/misuse of powers** — Preventing the abuses of powers means having in the legal system safeguards against arbitrariness; providing that the discretionary power of the officials is not unlimited, and it is regulated by law.

4.	**Equality before the law and non-discrimination**	Equality before the law is probably the principle that most embodies the concept of Rule of Law. It is paramount that the law guarantees the absence of any discrimination on grounds such as race, colour, sex, language, religion, political opinion, national or social origin, birth etc. Similar situations must be treated equally and different situations differently. Positive measures could be allowed as long as they are proportionate and necessary.
5.	**Access to justice**	Access to justice implicates the presence of an independent and impartial judiciary and the right to have a fair trial. The independence and the impartiality of the judiciary are central to the public perception of the justice and thus to the achievement of the classical formula: "justice must not only be done; it must also be seen to be done".

Source: Venice Commission

In addition to the five indicators identified above, the Checklist also addresses the issues of corruption and conflict of interest, collection of data and surveillance.

- In addition to the Venice Commission and its mandate, the CoE has adopted several issue-specific policies and has set up specialized agencies and groups on specific threats to the RoL (including the GRECO group on corruption and the Committee on Counter-Terrorism). It should be noted that the European Commission has observer status to both the Venice Commission and the GRECO group. The relevant framework may be accessed here.

The Rule of Law in the European Union. The Rule of Law is one of the founding EU values, enshrined in Article 2 of the Treaty on European Union (TEU) and the preamble to the Charter of Fundamental Rights of the European Union (CFR).

> ***The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.***
>
> TEU, Article 2
>
> ***Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.***
>
> Preamble to the CFR

The European Commission (EC) considers these values as *"the bedrock of our societies and common identity"*. [4] The responsibility, however, to uphold the RoL lies primarily on each Member State, both as a matter of internal constitutional responsibility and as a responsibility linked to EU membership, based on the principle of sincere cooperation, established in Art. 4(3) TEU. At the same time, there is also a responsibility on all EU institutions to provide proportionate assistance to Member States in their efforts to ensure respect for the rule of law (shared responsibility).

[4] Ibid., 1.

To defend the RoL against growing concerns and challenges observed in recent years, the EC adopted a Blueprint for Action, aimed at Strengthening the RoL within the Union. Despite considering the core meaning of the RoL to be well-defined and common in all Member States, the Blueprint **does not contain a definition of the term** and instead adopts the same operational approach favoured by the Venice Commission: it identifies key areas of intervention based on three pillars of action – promotion (focused on building knowledge and a common rule of law culture); prevention (focused on cooperation and support to strengthen the rule of law at national level); and response (focused on enforcement at EU level when national mechanisms falter).

Despite failing to clearly define what this "core meaning" of the RoL is, the Blueprint identifies certain key elements of the notion, which outline the EU priorities and relevant indicators in this area. These include the principle of legality and equality before the law; judicial independence and impartiality; respect for the rights of individuals; separation of powers, accountability, and prevention of abuses of power.

The European Rule of Law mechanism was established as a preventive tool to promote the RoL and prevent challenges from emerging or deteriorating, in line with the thematic priorities and pillars of action of the Blueprint. Part of the mechanism is the annual Rule of Law Report, which monitors significant developments, both positive and negative, relating to the rule of law in Member States. According to the Methodology for the preparation of the Annual Rule of Law Report, the Report addresses four distinct topics, further divided into subtopics, as follows:

A. **Justice systems**, including their independence, quality, and efficiency.

B. **The anti-corruption framework**, including the institutional framework and existing preventing and repressive measures.

C. **Media pluralism and media freedom**, including media regulatory authorities and bodies, transparency of media ownership and governmental interference, and the framework for journalists' protection.

D. **Other institutional issues and checks and balances**, including the processes for preparing and enacting laws, the framework on independent authorities, the accessibility and judicial review of administrative decisions, and the existence of an enabling framework for the civil society.

These four topics can be considered as the constituent elements of the RoL within the EU framework, and also represent the broad themes addressed within the LighT project. It is reminded, however, that Member States are also bound by their own constitutional traditions and international obligations, which continue to apply as long as they do not interfere with the achievement of the Union's tasks or jeopardise its objectives. As indicated in the LighT TNA, additional areas of focus were added, based on the feedback received from stakeholders.

Further reading

- The United Nations Rule of Law Indicators – Implementation Guide and Project Tools, available at:

  https://peacekeeping.un.org/sites/default/files/un_rule_of_law_indicators.pdf.

- Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), available at:

https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e

- The rule of law in a free society a report on the International Congress of Jurists, New Delhi, India January 5-10, 1959, available at:

  https://www.icj.org/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf.

- *An International Rule of Law?* Simon Chesterman, *The American Journal of Comparative Law*, Volume 56, Issue 2, Spring 2008, Pages 331–362, https://doi.org/10.5131/ajcl.2007.0009.

- *Operationalizing and Measuring Rule of Law in an Internationalized Transitional Context: The Virtue of Venice Commission's Rule of Law Checklist*, Qerim Qerimi, Law and Development Review 2019, available at:

  https://www.venice.coe.int/files/articles/Qerimi_Rule_of_Law_LDR_2019.pdf

- *Rule of Law: A Fundamental Concept Without a Coherent Meaning – Analysis of the Swedish and Chinese Understandings*, Katia Cejie European Journal of Comparative Law and Governance, 14 Jul 2022, available at:

  https://brill.com/view/journals/ejcl/9/3/article-p287_003.xml?language=en.

- *The rule of law: Approaches of the African Commission on Human and Peoples' Rights and selected African states*, Jamil Ddamulira Mujuzi, (2012) 12 African Human Rights Law Journal, p. 89 et seq., available at: http://www.scielo.org.za/pdf/ahrlj/v12n1/05.pdf.

The hierarchy and general principles of the EU legal order

Authors: Giota Masouridou, Lawyer

Executive Summary. This chapter presents the hierarchy of EU legal norms and the key general principles guiding the application of primary and secondary EU law, with examples derived from cases with a RoL relevance. It is divided into two parts: the first part presents the hierarchy of norms of EU law, with subsections on the EU Treaties, the Charter of Fundamental Rights of the EU, and secondary EU law. The second part sets out the general principles which underpin the development and application of all EU law, as enshrined in primary EU law – the principles of primacy, effectiveness and subsidiarity.

Trainers are urged to explore practice-oriented training methods when dealing with the concepts addressed in this chapter. The applicable principles and norms, as well as the dynamic development of EU law can be illustrated through practical examples and case studies derived from the cited case law. Since the objective of this chapter is to introduce trainees to basic concepts of EU law, it is better suited for persons with an introductory level of knowledge on EU law. However, trainers are encouraged to draw from it any information they deem relevant to their specific target group.

Linked modules:

Introductory module 1 – Basic elements and principles of EU law for lawyers

Chapter content

Hierarchy of EU norms. The European Union is founded on the principle of the rule of law. All EU action is based on treaties democratically agreed by its members. EU law derives from this independent source of law, the Treaties, through their primacy over the laws of the Member States and through the direct effect of a whole series of provisions applicable to their nationals and to the Member States themselves.

In the EU legal system, there is a vertical order of legal acts, with those at lower levels of the hierarchy being subject to those at higher levels.

At the top of the hierarchy of EU law is primary law, which consists of the EU's founding treaties – the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) and their protocols, the Charter of Fundamental Rights of the European Union, and the general principles laid down by the Court of Justice of the European Union.

Next in the hierarchy are international agreements with third countries or international organisations. These agreements are separate from primary and secondary law and form a category of their own.

Below this is secondary law, which comprises all the legislative and non-legislative acts adopted by the EU institutions that enable the EU to exercise its powers.

EU laws must serve to achieve the objectives set out in the EU Treaties and to implement EU policies.

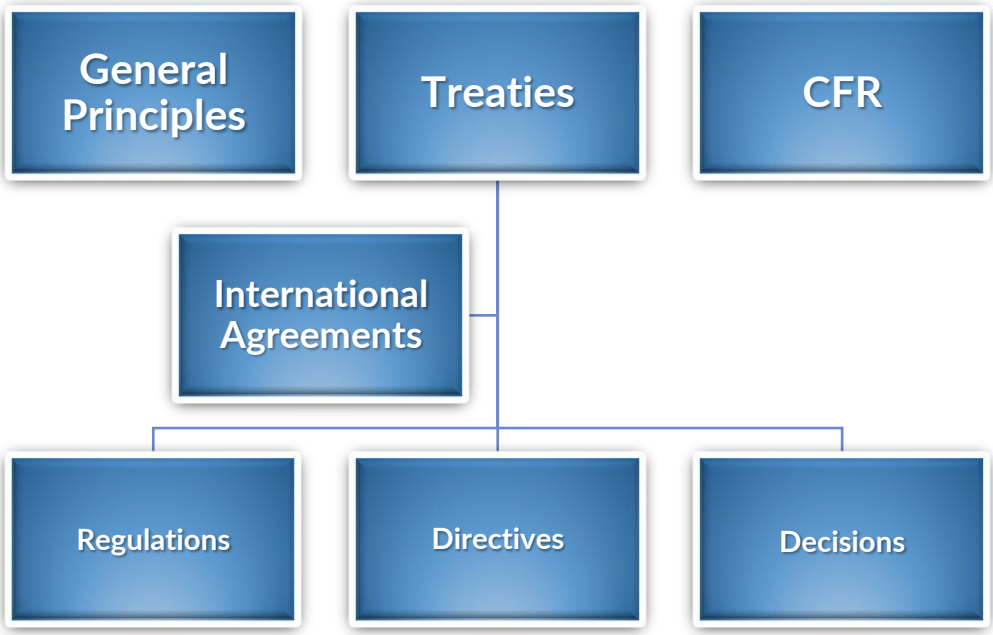

Figure 1 - Hierarchy of EU law, diagram prepared by the author

Primary EU law. Primary EU law is the supreme source of law in the European Union. It derives mainly from the founding treaties, in particular the Treaty of Rome (which became the Treaty on the Functioning of the European Union) and the Treaty of Maastricht (also known as the Treaty on European Union). Since 2009, the Charter of Fundamental Rights of the European Union has been part of primary EU law and has the same legal value as the Treaties.

There are very few references in the Treaties to the general principles of Union law. These principles have mainly been developed in the case law of the ECJ (legal certainty, institutional balance, legitimate expectations, etc.), which is also the basis for the recognition of fundamental rights as general principles of Union law. Today, these principles are enshrined in Article 6(3) TEU, which refers to the fundamental rights guaranteed by the ECHR, by the constitutional traditions common to the Member States and by the Charter of Fundamental Rights of the European Union.

Primary law sets out the distribution of competences between the EU and the EU Member States. Following the entry into force of the Treaty of Lisbon, the competences conferred on the Union have been more precisely demarcated: Part One, Title I, of the Treaty on the Functioning of the European

Union (TFEU) divides the competences of the Union into three categories (exclusive, shared and supporting) and lists the areas covered by the three categories.

All three (Treaties, Charter, General Principles) are therefore considered as primary EU law and are therefore the first source of EU law.

I. The Treaties. The treaties lay down the goals of the European Union, the rules for EU institutions, how decisions are made and the relationship between the EU and its member countries. The EU treaties have from time to time been amended to reform the EU institutions and to give it new areas of responsibility. They have also been amended to allow new EU countries to join the EU. The treaties are negotiated and agreed by all the EU countries and then ratified by their parliaments.

The founding treaties are: The Treaty of Paris establishing the European Coal and Steel Community (1951); The Treaty of Rome establishing the European Economic Community (1957); The Euratom Treaty (1957); The Treaty of Maastricht (1992).

The amending treaties are: The Single European Act (1986); The Amsterdam Treaty (1997); the Treaty of Nice (2001); The Treaty of Lisbon (2007).

The accession treaties concern the following Member States: Denmark, Ireland and the United Kingdom ([1]) (1972); Greece (1979); Spain, Portugal (1985); Austria, Finland, Sweden (1994); Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia (2003); Romania, Bulgaria (2005); Croatia (2012).

The supplementary agreements are: The Treaty of Brussels (Merger Treaty) (1965); The Treaty amending certain budgetary provisions of the Community treaties (1970); The Treaty amending certain financial provisions of the Treaties establishing the European Economic Communities and of the Treaty establishing a single Council and a single Commission of the European Communities (1975); The Act on election of members of the European Parliament by direct universal suffrage (1976).

Unlike ordinary international treaties, the EU treaties created a new autonomous legal order. This is exemplified most eloquently in the CJEU Judgment of 10 December 2018, in the case of Wightman and Others where the Court held, in particular, that

> ***"it must be borne in mind that the founding Treaties, which constitute the basic constitutional charter of the European Union … established, unlike ordinary international treaties, a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals".***
>
> Wightman and Others, C-621/18, par. 44 and 45

According to the settled case-law of the Court of Justice, this autonomy of EU law both from the law of the Member States and from international law is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and to the very nature of that law. EU law is characterised by the fact that it derives from an independent source of law, namely the Treaties, by its primacy over the laws of the Member States and by the direct effect of a whole series of provisions applicable to their nationals and to the Member States themselves. These features have given rise to a structured network of principles, rules and

interdependent legal relationships which bind the European Union and its Member States, as well as the Member States themselves. (judgment of 6 March 2018, Achmea, C-284/16, par. 33 and the case-law cited).

The rule of law is a value shared and cherished by the constitutional traditions common to the Member States. It is one of the founding values of the EU itself, as clearly stated in Article 2 TEU. The rule of law is the only reliable bulwark against the arbitrary exercise of power. It guarantees that those in power cannot oppress those who cannot defend themselves. That is why both EU law and the constitutions of the Member States entrust judges - as independent umpires - with the task of enforcing the rules that protect this individual sphere of self-determination. The role of the Court of Justice of the European Union is, as Article 19 of the Treaty on European Union itself states, 'to ensure that in the interpretation and application of the Treaties the law is observed'.

The CJEU has stressed that, when applying EU law, the EU institutions and its Member States are subject to judicial scrutiny of the compatibility of their acts with the Treaties and with the general principles of EU law, including fundamental rights. In particular, in Kadi and Al Barakaat cases (Joined cases C-402/05 P and C-415/05 P) the Grand Chamber held that "*the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement*". The judicial protection of fundamental rights is also provided for by the EC Treaty.

> ***The Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.***
>
> Kadi and Al Barakaat, Joined cases C-402/05 P and C-415/05 P, par. 5

- **Key reference document:** Treaty of Lisbon (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2016/C 202/01))

II. The Charter of Fundamental Rights of the European Union. The Charter of Fundamental Rights of the European Union (recognized as a binding legal document with equal legal value to the Treaties in Article 6 TEU) protects the fundamental rights that people enjoy in the European Union. It is a modern and comprehensive instrument of EU law that protects and promotes people's rights and freedoms in the light of changes in society, social progress and scientific and technological developments. The Charter serves as an 'internal' control mechanism at EU level, allowing for a preliminary and autonomous judicial review by the CJEU. The Charter is based on the ECHR and other conventions adopted by the Council of Europe, the United Nations (UN), and the International Labour Organization (ILO). Nevertheless, it is also innovative in a number of ways. For example, it establishes disability, age and sexual orientation as prohibited grounds of discrimination and includes access to documents, data protection and good administration among the fundamental rights it affirms.

By contrast, Article 51 of the Charter limits its application to the EU institutions and bodies and, when they act in implementation of EU law, to the Member States. Article 51 of the Charter thus confirms the case-law of the Court of Justice on the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.

Indeed, the Court's settled case-law essentially states that the fundamental rights guaranteed by the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect, the Court has already stated that it is not competent to examine the compatibility with the Charter of national legislation which does not fall within the scope of European Union law. On the other hand, where such legislation falls within the scope of European Union law, the Court, when asked for a preliminary ruling, must provide all the interpretative guidance necessary to enable the national court to determine whether that legislation is compatible with the fundamental rights whose observance the Court ensures.

In the case of ERT C- 260/89 par. 42 following a request for a preliminary ruling from a Greek court of first instance, the Court of Justice ruled that it is not competent to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law and a reference is made to the Court for a preliminary ruling, the Court must provide all the interpretative criteria necessary for the national court to determine whether those rules are compatible with the fundamental rights whose observance the Court ensures and which derive, in particular, from the European Convention on Human Rights.

The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter. 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.

Important case law

- Åklagaren v. Hans Åkerberg Fransson C-617/10 is a seminal case on the applicability of the Charter; par. 19 thereof contains a list of relevant case law.
- In the Google Spain C 131/12 case, the Court interpreted Directive 95/46/EC on the protection of individuals with regard to the processing of personal data in the light of the right to respect for private life and the right to protection of personal data in the Charter (Articles 7 and 8). Although there is no express provision in the Directive, the Court held that the Directive must be interpreted as recognising the "right to be forgotten", i.e. the right of an individual to obtain from the operator of a search engine the removal of information relating to him or her.

- In the Digital Rights Ireland case (Joined Cases C 293/12 and C 594/12), the Court annulled Directive 2006/24/EC on data retention on the grounds that its provisions did not provide sufficient safeguards to ensure that personal data were treated in accordance with Articles 7 and 8 of the Charter.

Online tool for lawyers

Charterpedia provides easy-to-access information about the Charter and its provisions. For each Charter Article, it includes the official explanations of the Charter Articles, related European and national case law, and related provisions in national constitutional law as well as in international law. It also contains references to academic analysis and related FRA publications.

Secondary EU law. Secondary law is the body of law derived from the principles and objectives of the Treaties. It comprises all legislative and non-legislative acts adopted by the EU institutions which enable the EU to exercise its powers.

Legislative acts are regulations, directives and decisions adopted by an ordinary or special legislative procedure (Article 289 TFEU). The EU can only legislate in areas where its members have given it the power to do so through the EU Treaties.

Non-legislative acts include, in particular, delegated and implementing acts; The delegated acts (Article 290 TFEU) enable the European Commission to supplement or amend non-essential parts of EU legislative acts. The Commission adopts the delegated act and if the Parliament and the Council have no objections, it enters into force. Implementing acts (Article 291 TFEU) lay down detailed rules for the uniform application of EU law. Implementing acts are legally binding and allow the Commission, under the supervision of committees of representatives of EU countries, to set conditions to ensure that EU law is applied uniformly.

Regulations. Regulations are legal acts that apply automatically and uniformly to all EU countries as soon as they enter into force, without the need for transposition into national law. They are binding in their entirety on all EU countries. They are designed to ensure the uniform application of Union law in all Member States. They automatically become binding throughout the EU on the day of their application. However, they may require changes to national legislation and implementation by national authorities or regulators. Regulations replace national laws that are incompatible with their substantive provisions.

Directives. Directives are binding, as to the result to be achieved, upon any or all of the Member States to which they are addressed, but leave to the national authorities the choice of form and methods. National legislators must adopt a transposition act or 'national implementing measure' to implement directives and bring national law into line with their objectives. Individual citizens only acquire rights and are bound by the act once the transposition act has been adopted. Member States have some discretion in transposing directives to take account of specific national circumstances. Transposition must take place within the time limit laid down in the directive. When transposing directives, Member States ensure the effectiveness of EU law in accordance with the principle of sincere cooperation laid down in Article 4(3) TEU. National authorities must notify the European Commission of these measures.

The Commission checks whether these national transposition measures are complete and meet the objectives set by the directive. If this is not the case, the Commission opens infringement proceedings for 'non communication'. The Commission may also initiate an infringement procedure in the case of incorrect transposition of directives. In some cases, where the Commission identifies a possible breach of EU law, it may decide to use a pre-infringement process, known as EU Pilot, instead of the infringement procedure. This is a tool that can be used where it is likely to lead to swifter compliance than a formal infringement procedure. It can also prove useful in cases where the Commission wishes to collect factual or legal information needed to carry out its assessment. It is not used where the breach of EU law is well-evidenced, obvious or self-acknowledged, nor is it used for more sensitive issues where discussions at technical level are less likely to lead to a successful outcome.

In principle, directives are not directly applicable at the domestic level. The CJEU, however, has ruled that certain provisions of a directive may, exceptionally, have **direct effects** in a Member State even if the latter has not yet adopted a transposing act in cases where:

(a) the directive has not been transposed into national law or has been transposed incorrectly;

(b) the provisions of the directive are imperative and sufficiently clear and precise; and

(c) the provisions of the directive confer rights on individuals.

If these conditions are met, individuals can invoke the provision in question in their dealings with public authorities and rely directly on EU law. Even if the provision does not confer any rights on the individual and only the first and second conditions are met, Member State authorities must take into account the content of the untransposed directive. The Court based its decision mainly on the principles of effectiveness, prevention of infringement of the Treaties and the need to ensure legal protection.

On the other hand, an individual may not rely on the direct effect of an untransposed directive in their dealings with other individuals, i.e., untransposed directives do not have 'horizontal effect'. In the Faccini Dori case C-91/92 the Court ruled that "*in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court" [par. 25].*

An individual has the right to **seek compensation** from a Member State that fails to comply with Union law. This is possible where a directive has not been transposed or has been transposed inadequately, if:

(a) the directive is intended to confer rights on individuals;
(b) the content of the rights can be identified on the basis of the provisions of the directive; and
(c) there is a causal link between the failure to transpose the directive and the loss and damage suffered by the injured parties.
It is then **not necessary to prove fault on the part of the Member State in order to establish liability.**

Francovich, joined cases C-6/90 and C-9/90

Decisions. Decisions are binding in their entirety. Decisions which specify the parties to whom they are addressed are binding only on those parties. Although they automatically become binding on a set date, amendments to national legislation and implementing measures by national authorities or regulators may be required.

➢ **Online tool for lawyers**

National implementing measures – how to find them on EUR-Lex

Here, lawyers can find measures adopted by the EU Member States to transpose EU acts – mainly directives – into national law.

Further reading

- Stages of an infringement procedure
- Stocktaking report on the Commission working methods for monitoring the application of EU law

General principles of EU law. The applicability of fundamental rights norms across the EU was established before the entry into force of the Charter. The Court of Justice has consistently held that fundamental rights form an integral part of the general principles of EU law, respect for which is ensured by the Court (see, in particular, judgment of 13 December 1979 in Hauer C-44/79).

However, the Court has also held that the obligation to respect the fundamental rights guaranteed by the EU legal order is binding on the Member States **only when they act within the scope of EU law** (Fransson C-617/10, paragraphs 18-19 and case-law cited).

The general principles have the same status as primary EU law.

I. Primacy. The principle of primacy, derives from the Treaties and resolves conflicts between European Union (EU) law and the national law of the Member States. It provides that EU law prevails over national law when the two are incompatible. It is also referred to as 'precedence' or 'supremacy' of European Union (EU) law. If this were not the case, Member States could simply allow their national

laws to take precedence over primary or secondary EU legislation, and the pursuit of EU policies would become unworkable.

The founding Treaties did not contain any provision that regulated the hierarchy between EU and national law. The principle of the primacy of EU law has developed over time by the case law of the CJEU. The Court based the principle of primacy on the objectives of the EU applying a teleological interpretation. At first, in *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* (Case 26/62), the Court declared that the laws adopted by EU institutions were capable of creating legal rights which could be enforced by both natural and legal persons before the courts of the Member States. EU law therefore has direct effect. In *Costa* v *ENEL* (Case 6/64), the Court further built on the principle of direct effect and captured the idea that the aims of the treaties would be undermined if EU law could be made subordinate to national law. As the Member States transferred certain powers to the EU, they limited their sovereign rights, and thus in order for EU norms to be effective they must take precedence over any provision of national law, including subsequent national law. In Internationale Handelsgesellschaft (Case 11/70) the Court acknowledged its own competence in ensuring respect for fundamental rights as 'general principles of law', meaning that national courts were to refrain from ruling on EEC acts on the basis of national sources of protection for fundamental rights.

In these cases, the Court clarified that the primacy of EU law must be applied to all national acts, whether they were adopted before or after the EU act in question. Where EU law takes precedence over conflicting national law, the national provisions are not automatically annulled or invalidated but national authorities and courts must disapply it immediately.

In Declaration no. 17 to the Treaty of Lisbon concerning primacy the Member States recognise the principle as a cornerstone of Community law. “At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice”.

In Ince C-336/2014 case the CJEU ruled that in a de facto state monopoly which is contrary to EU law, the consequences of such an incompatibility, require that Member States may not apply a national criminal penalty. Such a prohibition, which stems from the principle of the primacy of EU law and from the principle of sincere cooperation laid down in Article 4(3) TEU, is binding, within the sphere of their areas of competence, on every organ of the Member State concerned, including the criminal prosecution authorities (see, to that effect, judgment in Wells, C-201/02, EU:C:2004:12, paragraph 64 and the case-law cited).

II. Effectiveness

The principle of effectiveness of EU law is closely related to the principle of effective judicial protection, the right to an effective remedy under Article 47 CFR, EU secondary procedural safeguards, and, more recently, the Member States’ duty to ensure effective legal protection, established in Article 19 TEU.

The principle of effectiveness has been the basis for a number of judicial developments and has been recognised by the CJEU as a general principle of EU law. Its purpose is to ensure that rights conferred by EU law are actually protected and that EU law is actually enforced by national courts. The principle of effectiveness derives from the specific characteristics of EU law, in particular its primacy and direct effect. In other words, together with the principle of equivalence, it is part of the "national procedural

autonomy test" and is applied to ensure that EU-derived rights are effectively enforced at national level.

On the other hand, the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 CFR (see, to that effect, judgments of 13 March 2007, Unibet, C-432/05, par. 37, DEB, C-279/09, paras 29-33).

Article 19(1) TEU assigns to the Member States the responsibility for providing "remedies sufficient to ensure effective legal protection in the fields covered by Union law", through the status of their courts as "Union courts".

Article 47 of the Charter guarantees further the right to an effective remedy. The first paragraph is based on Article 13 of the ECHR. However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice established that right as a general principle of Union law in its judgment of 15 May 1986 in Johnston Case 222/84 [see also Case 222/86 Heylens, Case C-97/91 Borelli].

According to the Court, the principle of effectiveness also applies to the Member States when they are implementing Union law. The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The European Convention has considered the Union's system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected in Articles 251 to 281 of the Treaty on the Functioning of the European Union, and in particular in the fourth paragraph of Article 263. Article 47 of the Charter applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.

Following the above legal developments, the principle of effectiveness retains its original value and is applied in parallel with the obligations arising from EU primary law. In the absence of EU law rules governing a certain matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (Steffensen Case C-276/01, paragraph 60, see, *inter alia*, Courage and Crehan C-453/99 [2001] ECR I-6297, paragraph 29, and Grundig Italiana C-255/00 [2002] ECR I-8003, paragraph 33).

The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law (see, Associação Sindical dos Juízes Portugueses C-64/16 par. 36, Rosneft C-72/15, par. 73 and the case-law cited). `

III. Subsidiarity. The principle of subsidiarity is defined in Article 5(3) of the Treaty on European Union. It applies only to areas in which competence is shared between the Union and the Member States. It aims to ensure that decisions are taken at the closest possible level to the citizen and that constant

checks are made to verify that action at the European Union (EU) level is justified in light of the possibilities available at the national, regional or local level.

It is closely linked to the principle of proportionality, which requires that any action taken by the EU not go beyond what is necessary to achieve the aims of the treaties. Another related principle, the principle of conferral, states that any policy areas not explicitly agreed in the treaties by all EU Member States remain in their domain.

Under **Article 5(3) TEU**, there are three preconditions for intervention by Union institutions in accordance with the principle of subsidiarity:

(a) the area concerned does not fall within the Union's exclusive competence (non-exclusive competence);

(b) the objectives of the proposed action cannot be sufficiently achieved by the Member States (necessity);

(c) the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (added value).

There are two relevant protocols annexed to the Treaty of Lisbon:

Protocol No 1 on the role of national parliaments encourages national parliaments' involvement in EU activities, and requires EU documents and proposals to be forwarded promptly to them so they can examine them before the Council of the European Union makes a decision.

Protocol No 2 requires the European Commission to take into account the regional and local dimension of all draft legislative acts and to make a detailed statement on how the principle of subsidiarity is respected. This protocol allows national parliaments to object to a proposal on the grounds that it breaches the principle, as a result of which the proposal must be reviewed and may be maintained, amended or withdrawn by the Commission or blocked by the European Parliament or the Council.

The general aim of the principle of subsidiarity is to guarantee a degree of independence of an authority lower in the hierarchy from a higher authority, or of a local authority from central government. It therefore implies a division of powers between several levels of authority, a principle which is the institutional basis of federal states. It excludes Union intervention when an issue can be dealt with effectively by the Member States themselves at central, regional or local level. The Union is justified in exercising its powers only if the Member States are unable to achieve satisfactorily the objectives of a proposed action and if there is an added value in carrying out the action at Union level.

The principle of subsidiarity applies to all the EU institutions and has practical significance for legislative procedures in particular. The Lisbon Treaty has strengthened the role of both the national parliaments and the Court of Justice in monitoring compliance with the principle of subsidiarity. It not only introduced an explicit reference to the subnational dimension of the subsidiarity principle, but also strengthened the role of the European Committee of the Regions and made it possible, at the discretion of national parliaments, for regional parliaments with legislative powers to be involved in the *ex ante* 'early warning' mechanism.

In keeping with the second subparagraph of Article 5(3) and Article 12(b) of the TEU, national parliaments monitor compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol No 2. Under the *ex ante* 'early warning' mechanism any national parliament or any chamber of a national parliament has eight weeks from the date of forwarding of a draft legislative act to send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. To date, such procedures have been triggered three times.

> ***The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. A fortiori the rule must be observed when domestic proceedings are pending, as in the case of Interhandel, and when the two actions, that of the Swiss Company in the United States courts and that of the Swiss Government in this Court, in its principal Submission, are designed to obtain the same result: the restitution of the assets of Interhandel vested in the United States.***
>
> Interhandel (Switzerland v. United States of America), para. 27

The **Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC)** serves as a useful platform for national parliaments to share information related to subsidiarity control. In addition, the **Subsidiarity Monitoring Network (SMN)** maintained by the European Committee of the Regions facilitates the exchange of information between local and regional authorities and the EU institutions. SMN members include regional parliaments and governments with legislative powers, local and regional authorities without legislative powers and local government associations in the EU. It is also open to national delegations of the European Committee of the Regions and chambers of national parliaments.

Member States may, on behalf of their national parliament or a chamber thereof, bring an action before the CJEU for the annulment of a legislative act on grounds of infringement of the principle of subsidiarity, in accordance with their legal system. The European Committee of the Regions may also bring such actions against legislative acts where the TFEU requires it to be consulted.

Application of the principle of subsidiarity in fundamental rights cases. The principle of subsidiarity in its procedural limb is identified as the rule of exhaustion of domestic remedies before appealing to international courts.

In the case Interhandel (Switzerland v. United States of America), the International Court of Justice determined that the rule of exhaustion of local remedies is a well-established rule of customary international law. Specifically, in accordance with the relevant passage,

The principle of subsidiarity is specifically regulated in art. 35 par. 1 ECHR. "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law [..]

Nevertheless, individuals enjoy the right to an effective remedy under Article 13 of ECHR. Remedies must be both available and effective.

Summary of relevant case law

- In Nada v. Switzerland the applicant sought to have his name removed from the list of Taliban under the Swiss "Taliban" ordinance. The applicant could have sought redress before the domestic courts in respect of his Convention complaints. However, those authorities had not examined the merits of his complaints. In particular, the Federal Court had held that, while it was entitled to verify whether Switzerland was bound by Security Council resolutions, it could not itself, on human rights grounds, lift the sanctions imposed on the applicant. Moreover, the Federal Court had expressly recognised that the procedure for requesting the United Nations to remove a name from the list could not be regarded as an effective remedy under Article 13 (§§ 209-214). Therefore, there was no effective remedy and Article 13 in conjunction with Article 8 ECHR had been violated.
- In D.P. and J.C. v. the United Kingdom, the Court found a violation of Article 13 in the light of Articles 3 or 8 ECHR on account of the lack of an effective remedy by which to examine the alleged failure of the social services to protect children from sexual abuse by their stepfather (§§ 136-138).
- In respect to family law, the Court found a violation of Article 13 due to lack of an effective remedy in the light of Article 8 in the cases of Sabou and Pircalab v. Romania (§§ 53-56), and Iordache v. Romania (§§ 57-67) in respect of the automatic application of a total and absolute prohibition of the exercise of parental rights, as a collateral sanction by operation of law, imposed on anyone serving a prison sentence, without any examination by the courts of the nature of the offence committed by the imprisoned father or of the interests of the minor children.
- In the same vein, violations of Article 13 in the light of Article 8 were found in the case of Panteleyenko v. Ukraine §§ 78-81, on account of the lack of an effective remedy following a search of a notary's office after the case against him was terminated at the pre-trial stage; and in the case of Peev v. Bulgaria § 70, where there had been no effective remedy following an unlawful search of the office of a civil servant following the publication in the press of a letter in which he criticised the prosecutor general.
- In the case of Rutkowski and Others v. Poland (§§ 211-222) the Court found a violation of Article 13 in conjunction with Article 6 § 1, concerning the lack of remedies in domestic law to complain about the length of civil proceedings, and called on the respondent State to take new measures to ensure an end to the principle of "fragmentation of proceedings" and to provide "sufficient and appropriate remedies".
- In terms of EU case law, the Court of Justice ruled in the landmark case of P v S and Cornwall County Council C-13/94 ruled against discrimination against transgender persons, despite the fact that the founding treaties did not grant the EU the necessary powers to act in this area (introduced later, in 1997, by the Treaty of Amsterdam).

The relationship between the EU and the ECHR

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Executive Summary. This chapter addresses the relationship between the EU and the European Convention on Human Rights (ECHR). The first part of the chapter presents the content, scope, and key interpretative principles underpinning the Convention's application, as elaborated by the European Court of Human Rights (ECtHR). The second part focuses on the interplay between the ECHR and EU law, particularly the CFR, in terms of their scope and content.

Trainers are urged to explore practice-oriented training methods and address the issue in question through practical examples and case studies. The present chapter aims to impart basic knowledge on the topic in question. However, since the relationship between EU law and the ECHR, in particular their respective scope of application, continues to confuse practitioners, elements from this chapter may be used for the training of legal professionals with different levels of knowledge on the issue.

Linked modules:

ToT module 4 – RoL and litigation

Introductory module 3 – Resources, networks and communication

Advanced module 4 – Practical skills, resources, and cooperation

Chapter content

The European Convention on Human Rights. The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is an international treaty drafted and adopted by the Council of Europe (CoE) in 1950. It was based on the United Nation's Universal Declaration of Human Rights proclaimed in 1948. The ECHR secures basic human rights for everyone within the jurisdiction of the CoE's member states. ECHR imposes negative and positive obligations upon the Contracting states. Negative obligations require a state to refrain from interference with ECHR rights and freedoms. Positive obligations require States to act in order to safeguard ECHR rights and freedoms. The Convention has

been amended by several Protocols, which are binding for the states that have ratified them. The ECHR establishes a different human rights protection system to the one established by the EU. The European Court of Human Rights (ECtHR) provides for ex-post control over domestic acts and measures. The ECtHR is the body tasked with interpreting the ECHR and assessing the compliance of states' actions with the Convention. Its judgments are binding.

Further reading

- Christoffersen, J., Madsen, M. (2011), The Birth of the European Convention on Humna Rights – and the European Court of Human Rights, Oxford Scholarship Online, June 2011.
- For positive and negative obligations see:
- Stoyanova V. (2023), Positive Obligations Under the European Convention on Human Rights, Oxford University Press, January 2023.
- Wibye J. (2022), Beyond Acts and Omission – Distinguishing Positive and Negative Duties at the European Court of Human Rights, Human Rights Review, Springer, 15 August 2022.
- Council of Europe (2007) Positive Obligation Under the European Convention on Human Rights, Human Rights Handbook No. 7, 2007.
- European Court of Human Rights, Rules of Court, 30 October 2023.

I. Principles. The ECHR's object and purpose as an instrument for the protection of individual human beings require that its provisions be interpreted and applied in a way that ensures its safeguards are practical and effective and not theoretical or illusory (Chassagnou and others v. France). The ECHR must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions (Margus v.Croatia). It is also a living instrument, which means that the rights and freedoms enshrined therein must be interpreted in light of present-day conditions.(see Austin and others v.UK).

The primary responsibility for safeguarding the ECHR's rights and freedoms lies with national authorities. States are allowed a certain discretion when they implement the ECHR. The **principle of subsidiarity** is one of the main principles on which the ECHR system is based. This principle was formalised in Protocol n. 15 to the Convention. The ECtHR only accepts cases when all available domestic remedies for the protection of human rights have been exhausted. The exhaustion rule is prescribed in Art.35 of the Convention.

Further reading

- Gerards, J. (2023), General Principles of the European Convention on Human Rights, Universiteit Utrecht, The Netherlands, Cambridge University Press, 13 July 2023.
- For more information on the admissibility criteria, see: European Court of Human Rights (2023), Practical Guide on Admissibility Criteria, 31 August 2023.

II. Resources. The HUDOC database provides access to the case law of the ECtHR. The portal is complemented by the ECHR Knowledge Sharing Platform (ECHR-KS) which provides case law knowledge through a particular Article/Transversal Theme, including a Factsheet on case-law concerning European Union. The Human Rights Education for Legal Professionals (HELP) is the CoE online platform for legal education.

Additionally, the ECtHR website hosts a variety of resources designed to streamline the application process for filling a case before the Court.

The European Convention on Human Rights and EU law

I. History. Before the CFR, the EU legal framework lacked a normative foundation to guarantee the alignment of EU law with human rights standards. Consequently, there was a notable absence of mechanisms within the EU to rectify cases where EU law diverged from human rights standards. Within this context, the jurisprudence of the CJEU has significantly contributed to the advancement of human rights as a fundamental principle that the EU aligns with. This process of judicial evolution has unfolded over the years and can be traced through some pivotal court decisions.

The cases Frontini and Solange I hold significant importance in defining the constitutional jurisdictions of Italy (Frontini) and Germany (Solange I). In Frontini (183/1973), the Italian Constitutional Court "refused" to uphold the principle of primacy when conflicts arose between Community law and fundamental constitutional principles, particularly essential constitutional rights. Following this, in its Solange I decision, the German Constitutional Court asserted its continual power to assess the conformity of Community law with constitutional rights. Both judgments posed formidable challenges to the principle of primacy, particularly concerning fundamental rights, thereby presenting a considerable impediment to the effective functioning of the European Union at that time.

The CJEU navigated this situation by ruling that human rights would find protection as general legal principles within the established procedural framework, drawing on the authority vested in Article 19 TEU and Article 340(2) TFEU. (Stauder C-29/69). However, within this context, the delineation of exactly which rights are safeguarded as general principles within EU law has posed considerable challenges. Over time, the Court has gradually dealt with and clarified this complexity through its case law. The CJEU has pointed out that general constitutional traditions are also crucial in determining and establishing human rights protected as general legal principles within the EU framework (International Handelgeselschaft C- 11/70).

In its ruling in Nold (C-4/73), the CJEU acknowledged human rights as fundamental principles within Community Law, emphasizing the Court's responsibility to derive guidance from them. Additionally, the Court recognized that international treaties designed to protect human rights, in which the Member states have cooperated or to which they have become signatories, offer valuable benchmarks that should be observed within the scope of community law.

Subsequently, in the Rutilli judgment (C-36/75 p. 32) the Court of Justice referred to the ECHR for the first time, elevating it to a privileged source of reference. This marked a significant acknowledgement by the Court of the ECHR's relevance and authority in shaping its jurisprudence.

In 1978 the European Commission on Human Rights declared inadmissible an application against the European Communities or against the MSs because it lacked competence ratione personae (Stork v High Authority, C 1/58).

In this context, the EU has implemented several measures in light of the prevailing human rights protection framework within its jurisdiction. Notably, in 1992, through the Maastricht Treaty's Article F.2, the EU committed to upholding fundamental rights as enshrined in the ECHR. Additionally, the Copenhagen Criteria stipulate that a state seeking EU membership must already be a member of the Council of Europe. Subsequently, in 1996, the Court of Justice issued Opinion 2/94, examining the

feasibility of the EU becoming a party to the ECHR. Following this, a Draft Accession Treaty was formulated in 2013. However, in its Opinion 2/13 from 2014, the CJEU concluded that the drafted treaty was not compatible with the existing treaties of the European Union. The Negotiation process is still ongoing.

More about the Negotiation process see the webpage of the EU accession to the ECHR.

II. The interplay between the ECHR and the Charter. Following the entry into force of the CFR, significant changes have occurred, solidifying the EU integration system with robust assurances for safeguarding fundamental rights. The Charter differs from the ECHR in its inclusion of fundamental rights stemming from various sources. These encompass rights associated with the Internal Market, rights linked to EU citizenship, and what are commonly regarded as "traditional" human rights derived from the collective constitutional traditions of the Member states, the ECHR, and other international instruments.

Currently the Convention establishes the minimum standards for the protection of rights shared between the two documents, a principle delineated in Article 52 (3) of the Charter.

This provision, dedicated to defining the Charter's scope and application, ensures alignment with the Convention. It stipulates that rights in the Charter corresponding to those in the Convention must carry the same meaning and scope, including authorized limitations, as outlined in the ECHR. Importantly, this does not preclude EU law from offering broader protection. However, where limitations exist on Convention rights, they must be respected in interpreting the Charter, and where there are no limitations on Convention rights, none should be imposed under the Charter.

Article 52(3) serves to maintain consistency between the Charter and the ECHR by mandating that limitations to corresponding rights in the Charter adhere to the standards set by the ECHR. This ensures that legislators must comply with ECHR-established limitations when constraining these rights under the Charter, thus preserving the autonomy of Union law and the European Court of Justice.

In essence, the ECHR sets a baseline for protection concerning corresponding rights. Consequently, all EU acts and national laws implementing EU law must ensure a level of protection consistent with the ECHR for such rights. Should uncertainty arise, the option exists to refer matters for a preliminary ruling on the validity or interpretation of EU law provisions.

The official elucidation of Article 52(3) aids in identifying corresponding rights by presenting two groups of articles: one indicating Articles of the Charter with identical meaning and scope to corresponding Convention Articles, and another showing Charter Articles with a broader scope than their Convention counterparts.

Additional corresponding rights may emerge over time. For example, Article 49(1) of the Charter, corresponding to Article 7(1) of the ECHR, has been interpreted by the ECtHR to encompass the principle of retroactivity of national law, based on the Charter's provision.

Further reading

Brittain, S., (2015), The Relationship between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an Originalist Analysis, European Constitutional Law Review, 1 December 2015.

ECHR	Domestic Bill of Rights	CFR
Must be adhered to **at all times**	Must be consistently upheld and applied. The national judiciary bears the responsibility of guaranteeing that the national human rights system aligns with the ECHR, which sets forth fundamental **minimum standards**	Must be adhered to **only when applying EU law**

Figure 2 - Interrelation between the ECHR, domestic bills of rights (constitutional), and the CFR

For further details, refer to the "Clothes Metaphor" within the HELP Course on the Interplay between the ECHR and the EU Charter. In this metaphor, the authors compare the ECHR to a shirt, the National Bill of Rights to a jacket, and the EU Charter to a raincoat. Each layer of protection overlaps the other, illustrating that the raincoat (EU Charter) applies selectively in certain situations, while the other two consistently provide coverage.

> ***State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides [...]. By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued [...]. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.***
>
> Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, 45036/98, Judgment of 30.6.2005, par.155

III. Monitoring of states applying EU law when Convention rights are invoked

Considering that the EU has not acceded to the ECHR, it cannot be held responsible for a violation of the Convention in its procedures or decisions (Confederation Francaise du travail v. CEE).

Actions undertaken by the EU cannot be contested directly before the European Court of Human Rights. Even if there is an ECHR violation due to the dismissal of public servants by a European institution, the ECtHR cannot review this matter because neither EU, nor member states of the Council of Europe can be held responsible for such actions (Connolly v. Fifteen member states of the EU, C-274/99 or Andreasen v. United Kingdom and 26 other member states of the EU).

IV. Control over the application of EU treaties by member states. States could be held liable for breaches of the Convention rights even when they transferred their powers to the EU. (Matthews v. the UK). However, such occurrences are uncommon in the everyday proceedings of courts. In Matthews v. the UK, the ECtHR held that Art.3 of Prot. 1 of the ECHR had been violated by an Act concerning elections to the European Parliament, which had the status of a treaty. According to the ECtHR, the issue did not concern a lack of jurisdiction ratione personae, as the matter involved the implementation of the treaty by the respondent state. Consequently, the UK was found accountable for the violation.

V. Reduced intensity of supervision over national institutions when applying EU law: the equivalent protection presumption. The Bosphorus presumption refers to a doctrine in the case law of the ECtHR

that goes back to the 2005 judgment in Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland. In that judgment, the ECtHR first stated, in line with previous case law, that member states of an international organisation (such as the EU) are still liable under the ECHR for *"all acts and omissions of its organs regardless of whether the act or omission in question was a consequence [...] of the necessity to comply with international legal obligations"* (par. 153). It also recognized *"the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organisations"* (par. 150). In an attempt to reconcile these two positions, the ECtHR established what is now known as the **Bosphorus presumption** or **the presumption of equivalent protection** of ECHR rights by the EU, even though the EU is not a party to the ECHR.

The application of the Bosphorus presumption hinges on two essential conditions:

a) **Absence of discretionary margin under EU Law.** This condition is met when national authorities have no room for manoeuvring within the framework of EU law, as established in the M.S.S. v Belgium and Greece case. If EU law allows for a certain level of discretion for member states, the Bosphorus presumption does not apply.

b) **Full deployment of protection mechanisms under EU Law.** As emphasized in the Avontis v. Latvia case, this condition demands the comprehensive utilization of protective measures outlined in EU law. Particularly, it requires the utilization of procedures like the preliminary ruling procedure when relevant, as one of the fundamental mechanisms ensuring the safeguarding of human rights within EU law. This assessment must be conducted on a case-by-case basis.

Revising the presumption involves the possibility of challenging it if there's a "manifestly deficient" protection of human rights in a specific case. Even if the ECtHR acknowledges that both EU Law and national authorities, within their jurisdiction, offer human rights protection similar to the ECHR, a violation will be found if a significant failure to safeguard human rights is evident. The ECtHR analysed the revising of presumption in the case of Bivolaru and Moldovan v France.

Further reading

Rizcallah, C., (2023), The Sytemic Equivalence Test and the Presumption of Equivalent Protection in European Human Rights Law – A Critical Appraisal, Cambridge University Press on Behalf of the German Law Journal, 29 September 2023.

European courts and procedures

Authors: Silvia Antoaneta Berbec, Lawyer in the Bucharest Bar;

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Executive summary. This chapter deals with European courts and procedures. Picking up from the previous chapters, which provides an overview of the substantive provisions of EU law, here we will have the chance to look into the structure, competences, procedures, and legal remedies available before the two main regional courts dealing with questions relevant to the RoL at the European level. Accordingly, the chapter is divided into two main sections (further divided into subsections, as illustrated below), the first one focusing on the Court of Justice of the European Union (CJEU), and the second one on the European Court of Human Rights (ECtHR). The chapter offers a step-by-step overview of key procedural requirements, practical guidance, including costs and language requirements, as well as useful links. Finally, the chapter examines the non-implementation/compliance with judgements and the options available in this respect.

The aim of this chapter is to give practitioners the tools to look beyond the standard avenues for litigation before domestic courts and to use the options provided at the European level. The added value of recourse to the CJEU and ECtHR is highlighted and should be read in conjunction with the hierarchy of norms applicable in European countries, as presented in the two previous chapters.

Trainers should use the information contained in this chapter for step-by-step guidance on litigation before European Courts. Proposed training methods include but are not limited to case studies with procedural questions, scenarios, as well as role playing exercises. As lawyers considering litigation before these courts are usually more experienced and specialised on the issues of their case, this module is better suited for trainees with an advanced level of knowledge on European law and procedures. However, trainees with introductory knowledge should also be able to follow key principles and concepts.

Linked modules:

ToT module 4 – RoL and litigation

Introductory module 1 – Basic elements and principles of EU law for lawyers

Advanced module 3 – Safeguarding RoL – the role of lawyers

Chapter content

I. The Court of Justice of the European Union

General information. Since the establishment of the Court of Justice of the European Union in 1952, its mission has been to ensure that "the law is observed" "in the interpretation and application" of the Treaties. The Court of Justice of the European Union (CJEU) is divided into two courts:

1. **The Court of Justice** deals with requests for preliminary rulings from national courts, certain actions for annulment, and appeals.
2. **The General Court** rules on actions for annulment brought by individuals, companies and, in some cases, EU governments. In practice, this means that this court deals mainly with competition law, state aid, trade, agriculture, trademarks.

The Court of Justice

A. Court composition

The Court of Justice is composed of 27 Judges and 11 Advocates General. The Judges and Advocates General are appointed by common accord of the governments of the Member States after consultation of a panel responsible for giving an opinion on prospective candidates' suitability to perform the duties concerned. They are appointed for a term of six years, which is renewable. They are chosen among individuals whose independence is beyond doubt and who possess the qualifications required for appointment, in their respective countries, to the highest judicial offices, or who are of recognised competence. The Judges of the Court of Justice elect among themselves a President and a Vice-President for a renewable term of three years.

- The **President** directs the work of the Court and presides at hearings and deliberations of the full Court or the Grand Chamber. The Vice-President assists the President in the exercise of his duties and takes his place when necessary.
- The **Advocates General** assist the Court. They are responsible for presenting, with complete impartiality and independence, an Opinion on the cases assigned to them.
- The **Registrar** is the institution's secretary general and manages its departments under the authority of the President of the Court.

The Court may sit as a Full Court, in a Grand Chamber of 15 Judges or in Chambers of three or five Judges.

The Court sits as a **Full Court** in the particular cases prescribed by the Statute of the Court (including proceedings to dismiss the European Ombudsman or a Member of the European Commission who has failed to fulfil his or her obligations) and where the Court considers that a case is of exceptional importance.

The Court in a **Grand Chamber** when a Member State or an institution which is a party to the proceedings so requests, and in particularly complex or important cases.

Other cases are heard by **Chambers** of three or five Judges. The Presidents of the Chambers of five Judges are elected for three years, and those of the Chambers of three Judges for one year.

B. Jurisdiction

To enable it to properly fulfil its task, the Court has been given clearly defined jurisdiction, which it exercises on references for preliminary rulings and in various categories of proceedings.

- **References for preliminary rulings**

The Court of Justice cooperates with all the courts of the Member States, which are the ordinary courts in matters of European Union law. To ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. A reference for a preliminary ruling may also seek the review of the validity of an act of EU law.

It is thus through references for preliminary rulings that any European citizen can seek clarification of the European Union rules which affect him. Although such a reference can be made only by a national court, all the parties to the proceedings before that court, the Member States and the institutions of the European Union may take part in the proceedings before the Court of Justice. In that way, several important principles of EU law have been laid down by preliminary rulings, sometimes in reply to questions referred by national courts of first instance.

The Court's reply is not merely an opinion, but takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court's judgment likewise binds other national courts before which the same problem is raised.

- **Actions for failure to fulfil obligations**

These actions enable the Court of Justice to determine whether a Member State has fulfilled its obligations under European Union law. Before bringing the case before the Court of Justice, the Commission conducts a preliminary procedure in which the Member State concerned is given the opportunity to reply to the complaints addressed to it. If that procedure does not result in the Member State terminating the failure, an action for infringement of EU law may be brought before the Court of Justice.

The action may be brought by the European Commission – as is usually the case in practice – or by a Member State. If the Court finds that an obligation has not been fulfilled, the State must remedy the situation without delay. If, after a further action is brought by the Commission, the Court of Justice finds that the Member State concerned has not complied with its judgment, it may impose on it a fixed or periodic financial penalty. However, if measures transposing a directive are not notified to the Commission, it may propose that the Court impose a pecuniary penalty on the Member State concerned, once the initial judgment establishing a failure to fulfil obligations has been delivered.

- **Actions for annulment**

By an action for annulment, the applicant seeks the annulment of a measure (in particular a Regulation, Directive or Decision) adopted by an institution, body, office or agency of the European Union. The Court of Justice has exclusive jurisdiction over actions brought by a Member State against the European Parliament and/or against the Council (apart from Council measures in respect of State aid, dumping, and implementing powers) or brought by one European Union institution against another. The General Court has jurisdiction, at first instance, in all other actions of this type and particularly in actions brought by individuals.

- **Actions for failure to act**

These actions allow the lawfulness of a failure to act by a European Union institution, body, office or agency to be reviewed. However, such an action may be brought only after the institution concerned has been called on to act. Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures. Jurisdiction to hear actions for failure to act is shared between the Court of Justice and the General Court according to the same criteria as for actions for annulment.

- **Appeals**

Appeals on points of law may only be brought before the Court of Justice against judgments and orders of the General Court. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself decide the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

C. Procedure before the Court

Whatever the type of case, there is always a written stage and, if appropriate, an oral stage, which is public. However, a distinction must be drawn between, first, references for preliminary rulings and, second, other actions (direct actions and appeals).

Commencement of proceedings before the Court and the written procedure

- **In references for preliminary rulings**

The national court submits questions to the Court of Justice about the interpretation or validity of a provision of European Union law, generally in the form of a judicial decision in accordance with national procedural rules. When that request has been translated into all the European Union languages by the Court's translation service, the Registry notifies it to the parties to the national proceedings, and also to all the Member States and the institutions of the European Union. A notice is published in the Official Journal of the European Union stating, inter alia, the names of the parties to the proceedings and the content of the questions. The parties, the Member States and the institutions have two months within which to submit written observations to the Court of Justice.

- **In direct actions and appeals**

An action before the Court must be brought by application addressed to the Registry. The Registrar publishes a notice of the action in the Official Journal of the European Union, setting out the applicant's claims and arguments. The application is served on the other parties, who have two months within which to lodge a defence or a response. If appropriate, the applicant may lodge a reply and the defendant a rejoinder. The time limits for lodging these documents must be complied with.

In both types of action, a Judge-Rapporteur and an Advocate General, responsible for monitoring the progress of the case, are appointed by the President and the First Advocate General respectively.

- **The public hearing and the Advocate General's opinion**

When it has been decided that an oral hearing will be held, the case is argued at a public hearing, before the bench and the Advocate General. The Judges and the Advocate General may put to the parties any questions they consider appropriate. Some weeks later, the Advocate General delivers his or her Opinion before the Court of Justice, again in open court. He or she analyses in detail the legal aspects of the case and suggests completely independently to the Court of Justice the response which he or she considers should be given to the problem raised. This marks the end of the oral stage of the proceedings. If it is decided that the case raises no new question of law, the Court may decide, after hearing the Advocate General, to give judgment without an Opinion.

- **Judgements**

The Judges deliberate on the basis of a draft judgment drawn up by the Judge-Rapporteur. Each Judge of the formation concerned may propose changes. Decisions of the Court of Justice are taken by majority and no record is made public of any dissenting opinions. Only the Judges present during the oral deliberations in the course of which the judgment is adopted sign the judgment, without prejudice to the rule that the most junior judge in the formation does not sign the judgment if that formation is even in number. Judgments are pronounced in open court. Judgments and the Opinions of the Advocate General are available on the CURIA internet site on the day they are delivered. They are, in most cases, subsequently published in the European Court Reports.

Special forms of procedure

- **The simplified procedure**

Where a question referred for a preliminary ruling is identical to a question on which the Court has already been called on to rule, or where the answer to the question admits of no reasonable doubt or may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, give its decision by reasoned order, citing in particular a previous judgment relating to that question or the relevant case-law.

- **The expedited procedure**

The expedited procedure enables the Court to give its rulings quickly in very urgent cases by reducing the time-limits as far as possible and giving such cases absolute priority. On application by one of the parties, the President of the Court may decide, on a proposal from the Judge-Rapporteur, and after hearing the Advocate General and the other parties, whether the particular urgency of the case requires the use of the expedited procedure. Such a procedure can also be used for references for preliminary rulings. In that case, the application is made by the national court seeking the preliminary ruling and must set out in the application the circumstances establishing that a ruling on the question put to the Court is a matter of exceptional urgency.

- **The urgent preliminary ruling procedure (PPU)**

This procedure enables the Court of Justice to deal in a much shorter timeframe with the most sensitive issues relating to the area of freedom, security and justice (police and judicial cooperation in civil and criminal matters, as well as visas, asylum, immigration and other policies related to free movement of persons). Cases dealt with under the PPU are referred to a Chamber of five specially designated Judges and the written part of the procedure is, in practice, essentially conducted electronically and is very much curtailed, both in terms of duration and in the number of those authorised to submit written observations, the majority of them intervening in the oral part of the procedure, which is mandatory.

- **Applications for interim measures**

Applications for interim measures seek suspension of the operation of measures which an institution has adopted and which form the subject-matter of an action, or any other interim order necessary to prevent serious and irreparable damage to a party.

The cost of the proceedings

There are no court fees for proceedings before the Court of Justice. On the other hand, the Court does not meet the fees and expenses of the lawyer entitled to practice before a court of a Member State by whom the parties must be represented. However, a party unable to cover all or part of the costs of the proceedings may, without having to instruct a lawyer, apply for legal aid. The application must be accompanied by all necessary evidence establishing the need for legal aid.

For more information about costs of proceedings and legal aid, see Articles 115, 116, 117, and 118 of the Rules of Procedure of the Court of Justice.

Language arrangements

In direct actions, the language used in the application (which may be one of the official languages of the European Union) will, in principle, be the "language of the case", that is to say the language in which

the proceedings will be conducted. In appeals, the language of the case is that of the judgment or order of the General Court which is under appeal. With references for preliminary rulings, the language of the case is that of the national court which made the reference to the Court of Justice. Oral proceedings at hearings are simultaneously interpreted into as many official languages of the European Union as needed. The Judges deliberate, without interpreters, in a common language which, traditionally, is French.

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Words in bold indicate a public document.

General Court

A. Composition

The General Court is composed of two judges from each Member State. The judges are appointed by common accord of the governments of the Member States after consultation of a committee responsible for giving an opinion on the suitability of candidates to perform the duties of judges of the General Court. Their term of office is six years and is renewable. The Judges appoint the President from among their number for a term of three years. They also appoint a Registrar for a term of six years. The judges perform their duties with complete impartiality and independence. Unlike the Court of Justice, the General Court does not have a permanent Advocate General. However, in exceptional circumstances, this function may be exercised by a judge. Cases before the General Court are heard by Chambers of five or three Judges or, in some cases, by a single Judge. It may also sit as a Grand Chamber (fifteen judges) where the legal complexity or importance of the case so warrants. The Presidents of the chambers of five judges are elected from among the judges for a period of three years. The Court has its own registry but uses the administrative and linguistic services of the institution for its other needs.

B. Jurisdiction

The General Court has jurisdiction to hear and determine:

- **Actions brought by natural or legal persons against acts of the institutions, bodies, offices or agencies of the European Union** (which are addressed to them or are of direct and individual concern to them) and against regulatory acts (which concern them directly and which do not entail implementing measures) or against a failure to act on the part of those institutions, bodies, offices or agencies; for example, a case brought by a company against a Commission decision imposing a fine on that company.
- **Actions brought by the Member States against the Commission**.
- **Actions brought by the Member States against the Council** relating to acts adopted in the field of State aid, trade protection measures (dumping) and acts by which it exercises implementing powers.
- **Actions seeking compensation for damage** caused by the institutions or the bodies, offices or agencies of the European Union or their staff;
- **Actions based on contracts made by the European Union** which expressly give jurisdiction to the General Court;
- **Actions relating to intellectual property** brought against the European Union Intellectual Property Office and against the Community Plant Variety Office;
- **Disputes between the institutions of the European Union and their staff** concerning employment relations and the social security system.

The decisions of the General Court may, within two months, be subject to an appeal before the Court of Justice, limited to points of law.

C. Procedure

The General Court has its own Rules of Procedure. In principle, the proceedings include a written phase and an oral phase.

An application, drawn up by a lawyer or agent and sent to the Registry, initiates the proceedings. The main points of the case are published in a notice, in all official languages, in the Official Journal of the European Union. The Registrar sends the application to the other party to the case, which then has a period of two months within which to file a defence. In direct actions, in principle, the applicant may file a reply, within a certain time-limit, to which the defendant may respond with a rejoinder.

Any person who can prove an interest in the outcome of a case before the General Court, as well as the Member States and the institutions of the European Union, may intervene in the proceedings. The intervener submits a statement in intervention, supporting or opposing the claims of one of the parties, to which the parties may then respond.

If there is an oral part of the proceedings, a public hearing is held. When the lawyers are heard, the judges may put questions to the representatives of the parties. The Judge-Rapporteur summarises in a report for the hearing the facts relied on and the arguments put forward by each party and, if applicable, by interveners. This document is available to the public in the language of the case.

The Judges then deliberate on the basis of a draft judgment prepared by the Judge-Rapporteur and the judgment is delivered at a public hearing.

The procedure before the General Court is free of court fees. However, the costs of the lawyer entitled to appear before a court in a Member State, by whom the parties must be represented, are not paid by the General Court. Even so, any person who is not able to meet the costs of the case may apply for **legal aid**.

Interim proceedings. An action brought before the General Court does not suspend the operation of the contested act. The Court may, however, order its suspension or other interim measures. The President of the General Court or, if necessary, the Vice President, rules on the application for interim measures in a reasoned order.

Interim measures are granted only if three conditions are met:

1. The action in the main proceedings must not appear, at first sight, to be without reasonable substance;
2. The applicant must show that the measures are urgent and that it would suffer serious and irreparable harm without them;
3. The interim measures must take account of the balancing of the parties' interests and of the public interest.

The order is provisional in nature and in no way prejudges the decision of the General Court in the main proceedings. In addition, an appeal against it may be brought before the Vice President of the Court of Justice.

Expedited procedure. This procedure allows the General Court to rule quickly on the substance of the dispute in cases considered to be particularly urgent. The expedited procedure may be requested by the applicant or by the defendant. It may also be adopted of the General Court's own motion.

For more information on the procedures before the Court of Justice and the General Court, see the CJEU's website.

D. The Preliminary Ruling procedure

Foundation. The basis for the preliminary ruling procedure before the CJEU can be found Article 267 TFEU, which stipulates the following:

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.
>
> Art. 267 TFEU

Competence. Prior to the Nice Treaty only the Court of Justice could hear preliminary rulings. The Nice Treaty gave the General Court some power over preliminary rulings and the schema has been taken over in the Lisbon Treaty. The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute (Article 256 (3) TFEU). Preliminary rulings given by the General Court can, exceptionally, be subject to review by the CJEU, under the conditions laid down in the Statute, where there is a serious risk of the unity or consistency of EU law being affected (Article 256 (3) TFEU; Articles 62, 62b of the Statute of the Court of Justice of the European Union).

Participation in the proceedings. Articles 93 to 118 of the CJEU Rules of Procedure contain provisions regulating the preliminary ruling proceedings (e.g. general provisions about the content of the reference, participation and parties, urgent preliminary ruling procedure, written and oral phases, legal aid). According to Art. 96 of the Rules of Procedure, which regulates participation in preliminary ruling proceedings, the following are authorised to submit observations to the court:

A) The parties to the main proceedings;

B) The EU Member States;

C) The European Commission;

D) The institution which adopted the act the validity or interpretation of which is in dispute;

E) States parties to the EEA Agreement and the EFTA Surveillance Authority, where a question concerning on the fields of application of the Agreement is referred to the Court for a preliminary ruling;

F) Non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement.

Non-participation in the written part of the procedure does not preclude participation in the oral part of the procedure.

For more information, see the Treaty on the Functioning of the European Union, the Statute of the Court of Justice of the European Union, the Rules of Procedure of the Court of Justice.

E. Practical guidance for lawyers. To enhance the efficiency of the preliminary reference procedure, the Permanent Delegation to the Court of Justice of the Council of Bars and Law Societies of Europe (CCBE) has developed a Practical Guide for lawyers arguing references for preliminary rulings before the Court of Justice (as well as one on arguing appeals). This practical guidance is addressed principally to those appearing for the first time in the Court of Justice of the European Union or who appear infrequently before the court. It contains practical guidance and suggestions about the most appropriate approaches that should be taken in consideration in connection with the written and oral pleadings (e.g. drafting style, structure and content of the written pleadings, what to expect during oral pleadings, logistics when arriving at the court). Another useful resource developed by CCBE is the Practical Guidance for Advocates appearing before the Court of Justice in appeal proceedings.

The CCBE practical guides for lawyers can be accessed in the following links:

- **Practical guidance for advocates before the Court of Justice in preliminary reference cases**
- **Practical Guidance for Advocates appearing before the Court of Justice in appeal proceedings**

The general rule is that a national court has discretion as to whether or not to refer a question to CJEU. Parties in proceedings before a national court do not themselves submit references directly to the CJEU. The decision whether to make a reference to the CJEU rests solely with the national court. National courts and tribunals enjoy a discretion to make a reference to the CJEU, and a superior court cannot prevent a lower court from making a reference. See, for instance, the judgment of the CJEU in Case C-564/19 IS, 23 November 2021.

Lawyers have a key role in invoking EU law in domestic proceedings, and, where a genuine question of EU law arises, asking the court to make a reference to the CJEU. Success in obtaining a reference request from a national court very much depends on judges and of course a specific set of facts in a case.

Arguing a reference for a preliminary ruling – Practical tips for lawyers

1. **Assist the national court in drafting the preliminary reference request, by raising fundamental rights arguments based on the Charter.** Article 6(1) TEU recognises the CFR as having the same legal value as the Treaties when EU law is applied. The starting point for a methodical argument invoking the Charter could be Article 6(1) and (3) TEU confirming that the Charter has the status of "primary law", explicitly recognising as general principles of EU law "fundamental rights", as guaranteed also by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States.

2. **In your litigation, make sure to invoke the following general principles (where possible), keeping in mind the Member States' obligation to respect fundamental rights, in particular the minimum standards of protection established in EU law:**

   - **Principle of proportionality.** Measures implemented on the basis of EU law should be appropriate to achieve the objective pursued and must not go beyond what is necessary to achieve it).
   - **Effectiveness.** Although Member States enjoy procedural autonomy, domestic procedural rules cannot make it excessively difficult or impossible to exercise the rights conferred by EU law in practice).
   - **Effective judicial protection.** Further defining the principle of effectiveness, Member States must establish effective legal remedies for violations of EU law, and national courts must ensure that domestic remedies do not render pursuing claims under EU law impossible in practice or excessively difficult to enforce by performing effective judicial review to ensure compliance with EU law.
   - **Equality of arms.** The principle of equality of arms is an aspect of the right to a fair trial, enshrined in Article 47 of the Charter, and has the purpose of ensuring a balance in the procedural treatment of the parties to the proceedings.
   - **Equivalence.** It is for the national legal system of each Member State to establish detailed rules in judicial proceedings (procedural autonomy), provided however that these rules are not less favourable than those governing similar situations regulated by national law.
   - **Non-discrimination.** Non-discrimination is a general principle of EU law, enshrined as a fundamental EU value in Article 2 TEU, as well as in Title III CFR on Equality (Articles 20-26). You may invoke the principle of non-discrimination in all situations within the scope of EU law.

Content of the reference

According to Article 94 of the Rules of Procedure of the Court of Justice, references for a preliminary ruling should contain:

1. **A summary of the subject matter** of the dispute and the referring court's factual findings. This is important to enable the CJEU to understand how the case raises an issue falling within the scope of EU law. Without this background, the Court is unlikely to provide a useful answer.
2. **The tenor of the provisions of national law applicable in the case.** Where appropriate this should include references to case-law explaining how these provisions are interpreted.
3. **The reasons which prompted the national court** to inquire about the interpretation of the provisions of EU law, and the relationship between those provisions and the applicable national legislation. Essentially, the court must explain how the question being referred to the Court arises in a specific case.

Art. 94, Rules of Procedure of the Court of Justice

Questions that can be referred. Only two types of questions can be referred to the CJEU for a preliminary ruling:

1. **Interpretation of the Treaties (Article 267 TFEU).** The Court of Justice does not rule on the validity of national law. It interprets the EU Treaties and determines the true meaning of the applicable EU law in their light. The result of this review may be that a national law, as interpreted by national courts, is incompatible with the applicable provisions of EU law. The supremacy of EU law therefore obliges the national court to set aside the provision in question or to interpret it in the light of the CJEU's interpretation of the Treaties.
2. **The validity and interpretation of acts of institutions, bodies, offices, or agencies of the EU.** Preliminary references cover cases where an individual argues that, for example, an EU regulation gives rise to rights that can be enforced in national courts. References may also be made in relation to non-binding acts such as recommendations and certain agreements with non-Member States. See, for instance, the judgment of the CJEU in Case C-258/14 Florescu v Casa Judeteana de Pensii Sibiu, 13 June 2027.

Courts and Tribunals that can refer a question. Article 267 refers to the courts or tribunals of a Member State. It is for the CJEU to decide whether a body is a court or tribunal for these purposes, and the national categorization is not conclusive. The CJEU will take a number of factors into account: whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rule of law, and whether it is independent.

Courts and Tribunals that must refer a question. Article 267 TFEU draws a distinction between courts or tribunals with a discretion to refer a question to the CJEU, and those which must refer a question:

- A court of tribunal *may request* the Court to give a ruling, if it considers that a decision on the question is necessary to enable it to give a judgment.
- A court or tribunal "*shall bring* the matter before the Court", if the question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law. The rationale for the obligation to refer is to prevent a body

of national case law that is not in accordance with EU law from being established in any Member State.

The existence of a question: development of precedent. It is for the national court to decide whether to make a reference. **The mere fact that a party before the national court contends that the dispute gives rise to a question concerning EU law does not mean that the court is compelled to consider that a question has been raised within the meaning of Article 267 TFEU.** The national court may conclude that a reference is not required because the CJEU has already resolved the issue, because there is no doubt as to the validity of the EU measure, or because a decision on the question is not necessary for the case before the national court.

Article 267 TFEU is designed to be used only if there is a question to be answered, which falls into one of the categories of Article 267. The national court can still refer a matter to the CJEU, even where it has ruled on the issue in question before. However, in this case the court must raise some new consideration or argument. If it does not do so, then the Court will be strongly inclined to reiterate its previous judgement. A decision of the CJEU will have a precedential impact for all national courts within the EU. National courts may not rule on the validity of EU norms themselves, as made clear by the CJEU in Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost*.

The decision to refer: the national court's perspective. It is necessary to consider the general factors that a national court may take into account when making the decision whether to refer. Two criteria must be satisfied before a reference may be made:

- The question must be raised before the court or tribunal of the Member State. However, as demonstrated in Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, national courts may raise a question of EU law of their own motion, even if the parties have not done so.
- The national court must consider that a decision on the question is necessary to enable it to reach a judgment.

The decision to accept the reference: the CJEU's perspective.

The CJEU asserts authority over cases referred to it: the CJEU regards itself as having the ultimate authority to decide whether a reference is warranted or not. The seminal case in this respect is C-104/79 Pasquale Foglia v Mariella Novello.

The CJEU refrains from responding to references for preliminary rulings in certain cases. Indicatively, the CJEU has refused to issue a ruling in:

- **Hypothetical cases.** There are a number of reasons for refusing to give such rulings: it would be a waste of judicial resources, because the issue in question may never in fact arise; moreover, if a case really is hypothetical, it may also be unclear who the actual parties to the proceedings should be.
- **Cases where the questions raised are not relevant to the resolution of the dispute.** The Court has also refused to give a ruling in cases where the questions raised are not relevant to the substance of the case pending before the national court. Thus in the Case C-83/91 Wienand Meilicke v ADV/ORGA, the case was brought by a German lawyer who challenged a theoretical

construction on non-cash contributions developed by the German courts, on the grounds that it was incompatible with the Second Banking Directive. In this case, the CJEU declined to give a ruling because it had not been shown that the issue of non-cash contributions was actually at stake in the main action.

- **Cases where the referred questions are not articulated sufficiency clearly** for the CJEU to give any meaningful legal response. The CJEU will not alter the substance of the questions referred to it. The parties concerned, as well as Member States' Governments, are allowed to submit observations under Article 23 of the Statute of the Court of Justice of the European Union.
- **Cases whose facts are not sufficiently clear** for the Court to be able to apply the relevant legal rules. The CJEU will usually only be able to determine the nature of the legal question if the reference has a sufficient factual basis.

Recommendations to national courts. The CJEU has incorporated the results of its case law in Recommendations to national courts. The order for reference should contain a statement of reasons which is succinct but sufficiently complete to give the Court a clear understanding of the factual and legal context of the main action. It should include, in particular, a statement setting out the subject matter of the dispute and the essential facts; the relevant national law; identify as accurately as possible the EU provisions relevant to the case; the reasons why the national court referred the matter and the relationship between the provisions of EU law and national provisions applicable to the action; and a summary of the parties' arguments where appropriate.

For more information, see the Court of Justice of the European Union, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, Official Journal of the European Union 2019/C 380/01.

The duration of the procedure. Lodging a request for a preliminary ruling requires national proceedings to be stayed until the CJEU gives judgment. The average length for the delivery of a ruling is 18 months. However, crucially for criminal law practitioners, expedited and urgent procedures are available, and used especially in cases where an individual is in custody (Articles 105 and 107 of the Rules of Procedure).

The CJEU has had in place an urgent procedure for preliminary rulings, called the **PPU** (*procédure préjudicielle d'urgence*). For criminal law practitioners, the urgent preliminary ruling procedure is particularly relevant. Under this procedure, cases are typically decided within a few months of the national court's request.

The PPU is regulated in Articles 107-114 of the Rules of Procedure of the CJEU and follow a streamlined procedure. The number of parties authorised to lodge written observations can be limited, the length of the written submissions and the deadline to submit them can be shortened, and the written procedure is generally conducted by electronic means. In extremely urgent cases, the written procedure may be omitted entirely, although this is uncommon. In practice, the PPU process can run very quickly from the point at which an EU law issue is raised. See, for instance, the judgment of the CJEU in Case C-216/18 PPU (the High Court of Ireland determined on 12 March 2018 that a preliminary reference was necessary and invited submissions of the parties on the questions to be

asked. The CJEU delivered its ruling on the questions on the 25 July 2018, just over four months later, despite hearing the case as the full "Grand Chamber" of fifteen judges).

E. Direct actions (Art. 263 TFEU)

Direct complaints to the CJEU are possible, but are strictly regulated in the TFEU (Art. 263 et seq.). There are restrictions as to who, against whom and on what subject a direct action may be brought before the Court. In direct actions, a party may only be represented by its agent or lawyer (Article 119 of the Rules of Procedure of the CJEU). The lawyer acting for a party must also lodge at the Registry a certificate that he is authorised to practise before a court of a Member State or of another State which is a party to the EEA Agreement. Further details of the direct-action procedure are set out in Title IV of the Rules of Procedure of the Court of Justice (representation of the parties, written part of the procedure, pleas in law and evidence, intervention, expedited procedure, costs, settlement, discontinuance, cases not proceeding to judgment, preliminary issues, and judgments by default).

Privileged applicants (Article 263 (2) – (3) TFEU). Article 263 (2) states that the action may be brought by a Member State, the European Parliament, the Council, or the European Commission. These applicants are always allowed to bring an action, even where the decision is addressed to another person or body. EU law does not, however, oblige a Member State to bring an action under Articles 263 or 265 TFEU on behalf of one of its citizens, although EU law does not preclude national law from containing such an obligation. The Court of Auditors, the European Central Bank and the Committee of the Regions are covered by Article 263 (3) TFEU, so that they have standing only to defend their own prerogatives.

Non-privileged applicants (Article 263 (4) TFEU). Article 263 (4) allows a natural or legal person to bring an action in 3 types of cases. The first is straightforward: the addressee of a decision can challenge it before the Court. The second is where the act is of direct or individual concern to the natural or legal person or persons, the assumption being that the person or persons are not the immediate addressees of the act. The third type of case is where there is a regulatory act, which does not entail implementing measures, in which case the claimant must show direct concern, but does not need to demonstrate individual concern.

- **Direct concern.** The general principle is that a measure will be of direct concern where it directly affects the legal situation of the applicant and leaves no discretion to the addressees of the measure, who are entrusted with its implementation. This implementation must be automatic and result from EU rules without the application of other intermediate rules.
- **Individual concern.** Applicants must prove individual concern under Article 263 (4) in relation to acts addressed to another person, unless the act is a regulatory act that does not entail implementing measures. The issue can arise either where the legal act takes the form of a decision addressed to another person, or where it assumes the form of a Regulation or Directive. In both instances the applicant must prove that the relevant act was of direct and individual concern. See, for instance, the judgment of the CJEU in Case 25/62 Plaumann & Co. v Commission of the European Economic Community, where the applicant sought relief against a decision addressed to another individual.

F. Non-compliance with CJEU rulings

National courts cannot override CJEU judgments. As the Court of Justice has explained repeatedly since its landmark judgement in Case 6/64 Flaminio Costa v E.N.E.L., if national courts could override the Court of Justice, EU law would not be applied equally or effectively across all Member States and the entire legal basis of the EU would be called into question. The CJEU issues its decision to the referring court (preliminary reference procedure), which is then obligated to implement the ruling.

CJEU preliminary rulings are binding to the referring national court. CJEU decision have a declaratory effect – they declare the pre-existing meaning of the law. National Authorities are obligated to change national legislation, if necessary, to ensure the effectiveness of rights conferred by EU Law. National judges are obligated to respect CJEU judgments, which are binding on them. See, for instance, the CJEU judgment in Case 61/79 Amministrazione delle finanze dello Stato v Denkavit italiana Srl, 27 March 1980; Case C-212/04 Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG), 4 July 2006.

However, there is no general obligation to reopen definitive judgments of national courts where they contradict subsequent CJEU case law. The Court's case law acknowledges that both general statutes of limitation and limits concerning national remedies might prevent reopening cases of a certain vintage. See, for instance, the judgment of the CJEU in Case C-234/04 Rosmarie Kapferer v Schlank & Schick GmbH, 16 March 2006.

The refusal to make a reference for a preliminary ruling, when it is mandatory to do so, is in itself an infringement of EU law imputable to the Member State concerned.

The CJEU's case law has constantly underlined that a Member State's liability can be joint, *inter alia*, with:

- National, regional, local public institutions (Case C-77/69 – Commission v. Belgia)
- Bodies which are subject to public authority (Case C-199/85 – Commission v. Italia)
- Private entities in which the state exercises considerable influence (Case C-325/00 – Commission v. Germania)
- National courts (Case C-129/00 – Commission v. Italia)

Non-compliance with CJEU judgments may give rise to at least two forms of liability for the State: infringement proceedings before the CJEU and liability proceedings before national courts.

G. Infringement procedure

According to Article 17 (1) TEU, the Commission *shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them*. The infringement procedure provided for in Articles 258 to 260 of the TFEU is the most important legal instrument used to achieve this objective. For more information, see the European Commission website, the Infringement procedure.

The subject matter of the infringement procedure is the failure on the part of a member state to comply with European Union law. Infringements by private parties are only of interest if the member state has failed to sufficiently enforce European Union law.

There are four main groups of cases which may give rise to an infringement proceeding:

a) **failure to notify:** a Member State does not notify the Commission on time of its measures to turn a directive into national law;

b) **non-conformity:** the Commission considers that a Member State's laws are not in line with the requirements of EU directives;

c) **infringement of the treaties, regulations or decisions:** the Commission considers that a Member State's laws are not in line with the requirements of the treaties, EU regulations or decisions;

d) **incorrect application:** EU law is not applied correctly, or not applied at all, by national authorities.

The Commission identifies possible infringements of EU law on the basis of its own investigations or following complaints from citizens, businesses or other stakeholders.

It is for the Commission alone to decide whether it is appropriate to initiate proceedings against a Member State and, if so, for what acts or omissions. The Commission therefore has a discretionary power which excludes the right of individuals to require it to adopt a particular position. See, for instance, the judgments of the CJEU in Case 247/87 Star Fruit Company SA v Commission of the European Communities, 14 February 1989, paragraph 11; Case 445/06 Danske Slagterier v Bundesrepublik Deutschland, 24 March 2009, paragraph 44.

Formal procedure. If the EU Member State concerned fails to notify measures fully transposing the provisions of the Directives or does not remedy the alleged breach of EU law, the Commission may open a formal infringement procedure. The procedure follows a series of steps laid down in the EU Treaties, each of which culminates in a formal decision:

The Commission sends a letter of formal notice requesting further information from the Member State concerned, which must provide a detailed response within a specified period, usually two months.

If the Commission concludes that the country is not fulfilling its obligations under EU law, it may send a reasoned opinion: a formal request to comply with EU law. It explains why the Commission considers that the country is in breach of EU law and asks the country to inform the Commission of the measures taken within a specified period, usually 2 months.

If the country still fails to comply, the Commission may decide to refer the matter to the Court of Justice. If an EU Member State fails to notify the Commission of the measures it has taken to implement the provisions of a Directive, the Commission can ask the Court to impose penalties.

The Court may not widen the scope of the case beyond the letter of formal notice and the reasoned opinion.

See, for instance, the judgment of the CJEU in Case C-350/02 Commission v Netherlands [2004] ECR I-6213, paragraph 21). The case is decided on the basis of the factual situation at the end of the period laid down in the reasoned opinion (see Case C-221/04 Commission v Spain [2006] ECR I-4515, paragraph 23).

Non-compliance with a court decision. If the Court finds that a country has infringed EU law, the national authorities must take measures to comply with the Court's judgment (Article 260(1) TFEU). If the Member State still fails to comply, the Commission may again refer the matter to the CJEU under Article 260(2) TFEU. The CJEU may impose on the Member State a lump sum for past non-compliance and/or a periodic penalty payment to be paid until compliance is achieved.

See, for instance, the judgment of the CJEU in Case C-304/02 Commission of the European Communities v French Republic, 12 July 2005.

These penalties shall be calculated taking into account:

A. the importance of the rules infringed and the impact of the infringement on general and particular interests

B. the length of time during which EU law has not been applied

C. the country's ability to pay, in order to ensure that the fines have a deterrent effect.

The Commission proposes an amount based on these factors, but the Court decides on the final amount to be paid by the MS.

The Commission also publishes an annual report reviewing key aspects of the application of EU law and presenting infringement cases by policy area and by MS.

Case study

Case C-83/19 (Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19

Case background – The reform of Romania's justice system

In summary, Romanian judicial reforms included, among other things, the establishment of a special prosecutorial section tasked with looking into crimes committed by magistrates and the reduction of the prosecutorial section's authority to deal with corruption, magistrates' personal liability for judicial errors, and the state's patrimonial liability for miscarriages of justice. Additionally, the Government has immediately revised the legal procedures for the appointment of the chief prosecutor of the newly established special section intended to investigate crimes committed by magistrates after Parliament approved them, allowing for the designation of a specific individual.

Romania's extensive reforms in the areas of justice and anti-corruption efforts have been overseen by the EU since 2007 as part of the collaboration and verification framework set up by Decision 2006/928 1 on the occasion of Romania's entry into the European Union (also known as "the CVM").

The request for a preliminary ruling

In the context of the amendments to the justice laws of 2018, six Romanian courts, having to solve various proceedings regarding the Judicial Inspection, the establishment of a section within the Public Prosecutor's Office for the investigation of offences committed within the judicial system and the personal liability of magistrates for judicial errors found possible contradictions between domestic law and EU law. As a result, they decided to stay the proceedings and ask for clarification from the CJEU.

The Court's judgment

1. The legal nature and effects of the CVM Decision and Reports

The Court finds that Decision 2006/928 and the reports drawn up by the Commission on the basis of that decision constitute acts of an EU institution, which are amenable to interpretation under Article 267 TFEU. The clarification was necessary because by decisions no. 33/2018 (para 125 and following) and no. 547/2020 (para. 51 and following) the Romanian Constitutional Court decided that the CVM recommendations are not mandatory. The Court has established that no State may amend its legislation in such a way as to regress the rule of law; for example, the laws of justice cannot be changed by rules that affect the independence of judges (para. 162).

2. Interim appointments to management positions within the Judicial Inspectorate

The Court points out that the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the value of the rule of law, which is protected by the Treaty on European Union.

Given the fact that European citizens have rights to be protected by the courts (para. 190, 191); judges must be independent from the legislative and executive powers (para. 195) and the rules which enshrine this must eliminate the doubts of the litigants about the possibility of the judges being influenced (para 197), the Court stated that such doubts cannot exist with regard to the body which provides for the disciplinary investigation of magistrates (para. 199).

In the light of those general considerations, the Court holds that national legislation is likely to give rise to such doubts where, even temporarily, it has the effect of allowing the government of the Member State concerned to make appointments to the management positions of the body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, by disregarding the ordinary appointment procedure laid down by national law) (para. 205, 207).

3. Establishment of a section within the Public Prosecutor's Office for the investigation of offences committed within the judicial system

The CJEU decided that: such a section can be established only if there are objective and verifiable justifications related to the proper administration of justice (para. 213) – or, the explanatory memorandum accompanying the draft law establishing the SIOJ does not contain an argument (para. 215); the existence of SIOJ is likely to undermine the trust that justice should inspire in litigants (para 216); it is allowed to formulate abusive complaints against magistrates, especially in complex cases and corruption, in order to transfer the file from the prosecutors office to SIIJ (para 218); the CVM Report of 2019 found that the institution acts as a tool of political pressure and intervened to change the course of criminal investigations, including high corruption (para. 219); has a small number of non-specialised prosecutors (para. 222).

However, the Court states that it is for the national court to ascertain that the reform which resulted, in Romania, in the creation of a specialised section of the Public Prosecutor's Office responsible for investigating judges and prosecutors and the rules relating to the appointment of prosecutors assigned to that section are not such as to make the section open to external influences.

4. The State's financial liability and the personal liability of judges for a judicial error

The Court defined the notion of "judicial error" and held that the personal liability of judges for damages resulting from a judicial error contributes to the accountability and efficiency of the judicial system (para. 229). However, some conditions must be fulfilled in order to eliminate the risk of affecting the independence of judges. The Court names the following conditions: the personal liability of judges must be limited to exceptional cases: the existence of a court decision containing a judicial error is not sufficient, but the conduct which may entail liability must be clearly and precisely defined (para. 234) and the body which verifies the conditions of liability must itself be impartial (para. 236).

5. The principle of the primacy of EU law

The Court reminded the fact that national courts are required, to the greatest extent possible, to interpret national law in conformity with the requirements of EU law, or to disapply of their own motion any conflicting provision of national law which could not be interpreted in conformity with EU law. This means that even if a law is validated by the Constitutional Court, if it is contrary to EU law, the judge must ignore the decision of the Constitutional Court, having the obligation to apply directly the European text (para. 247).

The effect of the judgement

The effect of the Court's judgment is substantial because it consists of a guide for national judges on how to respect the primacy of EU law, even if the Constitutional Court validates a certain national law. Thus, the judgment is of extreme importance to the conceptualization of the rule of law principle and judicial independence.

However, the effect of the Court's judgment before the Constitutional Court was different. In principle, advancing the argument of the supremacy of the Constitution, national constitutional identity and the impermeability of one's own jurisdictions in relation to that of the CJEU, in Decision No 390 of 8 June 2021, the Constitutional Court of Romania ignores the interpretations offered by the CJEU and disagrees with all the findings of the CJEU.

II. The European Court of Human Rights

The European Convention on Human Rights is an international treaty under which the member States of the Council of Europe aim to secure fundamental civil and political rights, not only for their own citizens, but also for everyone within their jurisdiction. The Convention was signed on 4th November 1950 in Rome and entered into force in 1953.

A. The functioning of the Court

The Court is divided into five sections. A Section is an administrative unit and a Chamber is a judicial formation of the Court within a given Section. Each Section has a president, a vice-president and a number of other judges.

The Court also has a Registry, the task of which is to provide legal and administrative assistance to the Court in the exercise of its judicial functions (Article 24 of the European Convention on Human Rights). The Registry is composed of lawyers, administrative and technical staff and translators. There are currently some 640 Registry staff, who are employees of the Council of Europe, the Court's parent organisation.

The judges are elected by the Parliamentary Assembly of the Council of Europe from lists of three candidates proposed by each State. They are elected for a non-renewable term of nine years. Although judges are elected in respect of a State, they hear cases as individuals and do not represent that State. They are completely independent and may not engage in any activity incompatible with their duty of independence and impartiality.

B. Complaints and procedure before ECtHR

The applications are assigned to judicial formations of the Court, that is to say a single judge, a committee or a Chamber. Some cases may also be referred to the Grand Chamber (formed of 17 judges). The Filtering Section of the Court is responsible for sorting applications in order to direct them to the appropriate judicial formation.

Who can bring a case to the Court. The Convention makes a distinction between two types of application: individual applications lodged by any person, group of individuals, company or NGO having a complaint about a violation of their rights, and inter-State applications brought by one State against another.

Cases can only be brought against one or more States that have ratified the Convention. Any applications against third States or individuals, will be declared inadmissible.

Stages and proceedings before the Court. There are two main stages in the consideration of cases brought before the Court: the admissibility stage and the merits stage (the examination of the complaints). The processing of an application also goes through different phases. A single-judge formation will declare an application inadmissible where inadmissibility is clear from the outset; its decisions cannot be appealed against. Manifestly inadmissible applications are examined by a single judge. A three-judge Committee may rule by a unanimous vote on the admissibility and merits of cases that are already covered by well-established case-law of the Court. An application may also be assigned to a seven-judge Chamber which rules by a majority vote, on the admissibility and merits of a case. Exceptionally, the Grand Chamber of 17 judges hears cases referred to it either after relinquishment of jurisdiction by a Chamber or when a request for referral has been accepted

A Chamber is composed of the President of the Section to which the case was assigned, the "national judge" (the judge elected in respect of the State against which the application was lodged) and five other judges designated by the Section President in rotation. The Grand Chamber is made up of the Court's President and Vice-Presidents, the Section Presidents and the national judge, together with other judges selected by drawing of lots. When it hears a case on referral, it does not include any judges who previously sat in the Chamber which first examined the case. The Chamber (ordinary formation of the Court, usually issuing judgements on the merits of the case) will give notice of the case to the respondent Government for their observations. Written observations are submitted by both parties. The Court then decides if it is appropriate to hold a public hearing in the case, but this remains exceptional in relation to the number of applications examined (usually, hearings are granted for cases heard by the Grand Chamber). Ultimately, the Chamber delivers a judgment that will become final only after the expiry of a three-month period during which the applicant or Government may request the referral of the case to the Grand Chamber for new consideration.

As such, the initiation of proceedings before the Grand Chamber takes two different forms: referral and relinquishment. After a Chamber judgment has been delivered, the parties may request referral of the case to the Grand Chamber and such requests are accepted on an exceptional basis. A panel of judges of the Grand Chamber decides whether or not the case should be referred to the Grand Chamber for fresh consideration. Cases are also sent to the Grand Chamber when relinquished by a Chamber, although this is also exceptional. The Chamber to which a case is assigned can relinquish it to the Grand Chamber if the case raises a serious question affecting the interpretation of the Convention or if there is a risk of inconsistency with a previous judgment of the Court. The Grand Chamber judgement is final.

"National judges" cannot sit in a single-judge formation. In exceptional cases, they may be invited to sit in a Committee. However, the composition of the Court always includes the "national judge" when it hears cases as a seven-judge Chamber or a seventeen-judge Grand Chamber.

The Court takes into consideration the importance and urgency of the issues raised when deciding the order in which cases are to be dealt with. It established seven categories ranging from urgent cases concerning vulnerable applicants to clearly inadmissible cases dealt with by a Single Judge.

Admissibility conditions. Applications must meet certain requirements if they are to be declared admissible by the Court; Cases can only be brought to the Court after domestic remedies have been exhausted; in other words, individuals complaining of violations of their rights must first have taken their case through the courts of the country concerned, up to the highest possible level of jurisdiction (the possibility to exhaust local remedies must be effective).

An applicant's allegations must concern one or more of the rights defined in the Convention. The Court cannot examine complaints concerning violations of any other rights. Applications must also be lodged with the Court within four months following the last judicial decision in the case, which will usually be a judgment by the highest court in the country concerned. The applicant must be, personally and directly, a victim of a violation of the Convention, and must have suffered a significant disadvantage.

Possibility of appeals against judgements. Inadmissibility decisions, and also judgments delivered by Committees or the Grand Chamber, are final and cannot be appealed against. However, the parties have three months following the delivery of a Chamber judgment to request referral of the case to the

Grand Chamber for fresh consideration. Requests for referral to the Grand Chamber, as previously mentioned, are examined by a panel of judges which decides whether or not referral is appropriate.

Possibility of friendly settlement and unilateral declaration from the respondent Government. A friendly settlement is an agreement between the parties to put an end to proceedings initiated by an application. When the parties concerned agree to settle their dispute in this way, the outcome is usually that the State pays the applicant a sum of money. After examining the terms of the friendly settlement, and unless it considers that respect for human rights requires continuation, the Court will strike out the application. If no agreement is reached the Court will proceed to examine the merits of the application.

A respondent Government may make a declaration acknowledging the violation of the Convention and undertaking to provide the applicant with redress. A unilateral declaration constitutes in principle an extension of the friendly-settlement stage provided for by Article 39 of the Convention. If on conclusion of that stage the applicant refuses without justification to accept a reasonable proposal made by the respondent State, the latter may file a unilateral declaration accompanied by a request for the application to be struck out of the list of cases (Van Houten v. the Netherlands, 2005, § 37). Unlike friendly settlements, which are expressly referred to in the Convention, unilateral declarations originated in a practice based on Article 37 § 1 (c) of the Convention, which allows the Court to strike an application out of the list for "any other reason". In order to promote more systematic recourse to this practice, the Court introduced a new compulsory stage in the procedure in January 2019, namely a non-contentious phase designed to encourage the parties in most cases to resolve the dispute by means of a friendly settlement or a unilateral declaration.

Strike-out decisions by the Court following the acceptance of a unilateral declaration are not transmitted to the Committee of Ministers for supervision, unlike those taking note of a friendly settlement. Consequently, where the State fails to comply with its undertakings in the context of the execution of a unilateral declaration the Court may in "exceptional circumstances" decide to restore the case to the list and resume its examination in contentious proceedings. See, for instance, the judgment of the ECtHR in Case of Jeronovičs v. Latvia, 5 July2016, §§ 69-70 and 116.

C. Execution of judgments and monitoring

One of the most significant features of the Convention system is that it includes a mechanism for reviewing compliance with its provisions. Thus, the Convention not only requires the Contracting States to observe the rights and obligations deriving from it (Article 1), but also establishes a judicial body, the Court (Article 19), which is empowered to find violations of the Convention, through judgments which the Contracting States have undertaken to abide by (Article 46 § 1). In addition, it sets up a mechanism for supervising the execution of judgments, entrusted to the Committee of Ministers (Article 46 § 2).

As such, primary responsibility for carrying out the Court's judgments lies with the member state concerned, which undertakes to abide by a decision when it becomes part of the **European Convention on Human Rights**. The task of supervising pertains to the **Committee of Ministers**, aided by the **Department for the Execution of Judgments**.

Article 46 applies to every judgment in which the Court has found a breach of the Convention. Article 46 means that the Court's finding imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences (Papamichalopoulos and Others v. Greece

(Article 50), 1995, § 34). The Contracting State in question will be under an obligation not only to pay the applicant the sums awarded by way of just satisfaction but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress its effects (Ilgar Mammadov v. Azerbaijan [GC], 2019, § 147). The State party to the case is, in principle, free to choose the means by which to comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Papamichalopoulos and Others v. Greece (Article 50), 1995, § 34).

For more information, see European Court of Human Rights Blog, Execution of the European Court of Human Rights' Judgments – Major Advances and Challenges**, April 2022.**

States may, for example, be required to ensure that:

- impugned decisions/judgments can be re-opened (e.g. in cases concerning unfair or otherwise unjust proceedings, in particular in criminal matters);
- the matter can otherwise be re-examined (frequently in family cases where res judicata is weak);
- compensation can be awarded (e.g. for loss of opportunity if the re-opening of civil or administrative proceedings is not possible);
- expulsion orders violating the Convention are annulled, possibly combined with other measures such as the granting of a residence permit;
- criminal investigations are engaged/reopened/resumed in cases involving violations of Articles 2 and 3 of the Convention;
- personal information gathered by the State in violation of the Convention is destroyed;
- non-executed domestic judgments are executed;
- persons kept in inhuman detention are transferred to proper detention facilities.
- reinstate a judge to the Supreme Court.

Judicial independence

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Executive summary. Judicial independence has emerged as a major rule of law issue in recent years. All consortium countries have had infringement proceedings brought against them before the Court of Justice for various instances of violations of EU law related to access to justice, procedural safeguards, and judicial independence. Furthermore, the EC RoL Report [5] has highlighted concerns in terms of the appointment, independence, and impartiality of individual members of the judiciary and justice systems.

Where can lawyers turn when their country's courts do not fulfil the requirements enshrined in Art. 6 ECHR and Art. 47 CFR?

This chapter explores the issue of judicial independence, through a practical lens. It relies on European case law issued on the topic in question, highlighting successful argumentation, and illustrates the different avenues available to legal practitioners when their national frameworks prove inadequate to guarantee fundamental rights through the administration of justice.

Trainers are expected to benefit from the practical approach of this chapter and the multitude of real or imaginary case studies and scenarios which can be used to develop targeted, relevant and current training material on access to justice and judicial independence. The examined cases can be used to enrich presentations, as well as to develop interactive material of the trainers' choosing. As the chapter deals with advanced issues of compliance with EU law, it is best suited for advanced training.

Linked modules:

ToT modules 2 – RoL and democratic institutions and **4** – RoL and litigation

Advanced module 1 – The rule of law in the EU – challenges and European approaches

Chapter content

[5] For more information on the RoL Report, see Chapter 1.

I. Introduction – theoretical background and definitions

The Council of Europe Recommendation on Judges' Independence, Efficiency and Responsibilities (CM/Rec(2010)12),[6] the Magna Carta of European Judges,[7] the UN Basic Principles,[8] and the Venice Commission's Rule of Law Checklist[9] provide formal and substantial guidance on how to understand judicial independence at an abstract and general level. Comparative law scholars generally agree that courts should not be subject to improper influence from other government branches or private or partisan interests.[10] However, judicial independence is still considered an essentially contested concept or a complex constitutional idea rooted in specific constitutional history, provisions, conventions, traditions, and experience. As such, it must always be interpreted in socio-legal contexts by lawyers. The definitions, typologies, and criteria of judicial independence vary from country to country. Scholars worldwide use different typologies to distinguish between various types of judicial independence.[11] These typologies are based on the legal order or court's developments and include the following distinctions:

- **De iure and de facto independence**

The distinction is based on the source of recognition of judicial independence. De jure independence refers to formal rules, such as legal provisions, that can influence judges through other entities. For example, provisions that give the Minister of Justice arbitrary power to delegate judges from court to court. In contrast, de facto independence refers to the actual behaviour of judges or towards judges. For example, actions taken by politicians to exert pressure. It allows the recognition of a legal order that may seem to protect judicial independence on the surface, but in practice, the system limits judicial independence. According to the newest ECtHR landmark case, independence refers to:

> *(…) to the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties (Guðmundur Andri Ástráðsson v. Iceland, para 234).*

- **External and internal independence**

The distinction is based on how judicial appointments look in books and actions, which is called external independence, or how judges are assigned to panels, which is called internal independence. According to Recommendation CM/Rec(2010)12 external independence is understood as:

[6] See: https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d
[7] See: https://www.coe.int/en/web/ccje/magna-carta
[8] See: https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary
[9] For more information on the Venice Commission and the Rule of Law Checklist, see Chapter one.
[10] For more see: Swart, (2019) Independence of the Judiciary, in Max Planck Encyclopaedia of Comparative Constitutional Law (https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e339).
[11] Swart, (2019) Independence of the Judiciary, in Max Planck Encyclopaedia of Comparative Constitutional Law.

11. The external independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. Judges' impartiality and independence are essential to guarantee the equality of parties before the courts.

12. Without prejudice to their independence, judges and the judiciary should maintain constructive working relations with institutions and public authorities involved in the management and administration of the courts, as well as professionals whose tasks are related to the work of judges in order to facilitate an effective and efficient administration of justice.

14. The law should provide for sanctions against persons seeking to influence judges in an improper manner.

15. Judgments should be reasoned and pronounced publicly. Judges should not otherwise be obliged to justify the reasons for their judgments.

16. Decisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law.

17. With the exception of decisions on amnesty, pardon or similar measures, the executive and legislative powers should not take decisions which invalidate judicial decisions.

18. If commenting on judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal.

19. Judicial proceedings and matters concerning the administration of justice are of public interest. The right to information about judicial matters should, however, be exercised having regard to the limits imposed by judicial independence. The establishment of courts' spokespersons or press and communication services under the responsibility of the courts or under councils for the judiciary or other independent authorities is encouraged. Judges should exercise restraint in their relations with the media.

20. Judges, who are part of the society they serve, cannot effectively administer justice without public confidence. They should inform themselves of society's expectations of the judicial system and of complaints about its functioning. Permanent mechanisms to obtain such feedback set up by councils for the judiciary or other independent authorities would contribute to this.

21. Judges may engage in activities outside their official functions. To avoid actual or perceived conflicts of interest, their participation should be restricted to activities compatible with their impartiality and independence.

According to Recommendation CM/Rec(2010)12 internal independence is understood as:

22. The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision-making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence.

23. Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law.

24. The allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge. It should not be influenced by the wishes of a party to the case or anyone otherwise interested in the outcome of the case.

25. Judges should be free to form and join professional organisations whose objectives are to safeguard their independence, protect their interests and promote the rule of law.

(c) formal and substantive independence;

Sometimes, internal independence is understood by scholars as the internal neutrality of the judge's mind. Neutrality is sometimes conceptualized under substantive independence, whereas formal independence refers to judges acting within a panel of a court.

(d) independence of a judge and independence of the judiciary.

The Venice Commission Rule of Law Checklist provides the following check understanding and conditions for the independence of the judiciary:

74. The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.

75. The European Court of Human Rights highlights four elements of judicial independence: manner of appointment, term of office, the existence of guarantees against outside pressure - including in budgetary matters - and whether the judiciary appears as independent and impartial.

76. Limited or renewable terms in office may make judges dependent on the authority which appointed them or has the power to re-appoint them.

77. Legislation on dismissal may encourage disguised sanctions.

78. Offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s)

79. It is important that the appointment and promotion of judges is not based upon political or personal considerations, and the system should be constantly monitored to ensure that this is so.

80. Though the non-consensual transfer of judges to another court may in some cases be lawfully applied as a sanction, it could also be used as a kind of a politically-motivated tool under the disguise of a sanction. Such transfer is however justified in principle in cases of legitimate institutional reorganisation.

According to Recommendation CM/Rec(2010)12:

4. The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law.

5. Judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts.

6. Judges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court. All persons connected with a case, including public bodies or their representatives, should be subject to the authority of the judge.

7. The independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level.

8. Where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy.

9. A case should not be withdrawn from a particular judge without valid reasons. A decision to withdraw a case from a judge should be taken on the basis of objective, pre-established criteria and following a transparent procedure by an authority within the judiciary.

10. Only judges themselves should decide on their own competence in individual cases as defined by law.

The Venice Commission Rule of Law Checklist provides the following check understanding and conditions for the independence of individual judges:

86. The independence of individual judges must be ensured, as also must the independence of the judiciary from the legislative and, especially, executive branches of government.

87. The possibility of appealing judgments to a higher court is a common element in judicial systems and must be the only way of review of judges when applying the law. Judges should not be subject to supervision by their colleague-judges, and a fortiori to any executive hierarchical power, exercised for example by civil servants. Such supervision would contravene their individual independence, and consequently violate the Rule of Law84.

88. "The guarantee can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. … It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance. That the order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential".

(e) independence v. impartiality

Depending on the normative approach and language of the constitutional provision, independence may be in a different relationship with impartiality.[12] Some provisions and scholars refer to judicial independence as a characteristic of the judiciary and its structures, such as courts and councils, whereas impartiality is a feature of individual judges.

The Venice Commission Rule of Law Checklist provides the following check understanding and conditions for the impartiality:

[12] For more see: Mikuli, (2017) Impartiality of the Judiciary in Max Planck Encyclopedia of Comparative Constitutional Law (https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e338?prd=MPECCOL).

89. Impartiality of the judiciary must be ensured in practice as well as in the law. The classical formula, as expressed for example by the case-law of the European Court of Human Rights, is that "justice must not only be done, it must also be seen to be done".89 This implies objective as well as subjective impartiality. The public's perception can assist in assessing whether the judiciary is impartial in practice.

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It is possible to create more categories due to variations in language and concepts used by different courts. Therefore, one of the best ways to talk about standards for judicial independence is to examine specific examples from the current case law of the CJEU or ECtHR. This approach is both practical and effective.

Section 1: selected case law

I. European Court of Human Rights [13]

The European Court of Human Rights has developed standards related to judicial independence for two types of cases. The first type concerns the rights of individuals who are parties to proceedings. These individuals may complain that their case was heard by a non-independent court, which violates their rights guaranteed under Article 6 of the European Convention on Human Rights. The second type of case concerns the rights of judges who may complain that certain violations of their judicial independence breach the rights guaranteed by the Convention. Judges who have suffered damage or threats to their independence may rely on various provisions of the ECHR, such as Article 6, Article 8, and Article 10. In all these cases, judges' complaints do not directly concern the issue of judicial independence. Instead, judges must demonstrate how the sanction given to them violated the rights guaranteed under the Convention. Individuals may have concerns about issues such as adjudication by judges who were unlawfully appointed or elected or restrictions on access to abortion due to an unlawful judgment by the Constitutional Court. On the other hand, judges may face unjustified and unlawful disciplinary measures and other forms of sanctions imposed for political reasons.

Judgement of 1 December 2020 (Grand Chamber) *Guðmundur Andri Ástráðsson v. Iceland*

The case in question pertained to the accusation made by the applicant that the new Icelandic Court of Appeal did not qualify as a tribunal established by law due to the irregularities in the appointment of one of the judges who presided over his case.

The ECtHR ruled that Article 6 § 1 of the Convention had been violated because the applicant was denied the right to a tribunal established by law. This was due to the participation of a judge in the trial whose appointment had been undermined by severe irregularities that had impaired the essence of the right. The ECtHR considered the potential consequences of finding a violation and the significant interests at stake. As a result, the right to a tribunal established by law should not be construed too broadly to avoid compromising the right. Therefore, the ECtHR formulated a three-step test to

[13] See: ECtHR Press UNIT, Factsheet – Independence of the justice system, August 2023 (https://r.search.yahoo.com/_ylt=AwrLNAmokq9lsB8H9BL0X4pQ;_ylu=Y29sbwNpcjIEcG9zAzIEdnRpZAMEc2VjA3Ny/RV=2/RE=1706033961/RO=10/RU=https%3a%2f%2fprd-echr.coe.int%2fweb%2fechr%2fd%2ffs_independence_justice_eng/RK=2/RS=otaXjQM8pbUz3.Uc43V23ZVj5xc-).

determine whether judicial appointment irregularities were severe enough to result in a tribunal established by law violation.

Iceland has changed its legal system to limit the power of ministers in appointing judges. These changes were aimed at strengthening the independence of the judiciary. However, the Icelandic Supreme Court found that the Minister of Justice had breached these changes in appointing four judges to the newly established Court of Appeal. While the Minister had the authority to depart from the Evaluation Committee's proposal, she failed to follow a fundamental procedural rule that required her to conduct sufficient investigation and assessment. This rule was meant to prevent the Minister from acting out of political or other undue motives that would undermine the independence and legitimacy of the Court of Appeal. By disregarding this rule, the Minister had effectively restored the discretionary powers. This neutralised the crucial gains and guarantees of the legislative reforms. Legal safeguards were in place, such as the parliamentary procedure and the ultimate safeguard of judicial review before domestic courts. Still, they proved ineffective in remedying the breach committed by the Minister.

Judgement of 7 May 2021 *Xero Flor w Polsce sp. z o.o. v. Poland*

This case concerns a company claiming compensation for damage to its property and complaining about the appointment of one judge to the Constitutional Court who had examined its case. The company was dissatisfied with the domestic courts' refusal to refer legal questions to the Constitutional Court. The company also alleged that the bench of five judges of the Constitutional Court that examined its case did not comply with the Constitution. Specifically, one judge was elected by the Sejm (the lower house of the Parliament), even though another judge elected by the preceding Sejm had already filled that position.

The ECtHR has ruled that Article 6 § 1 of the Convention, which guarantees the right to a fair and the right to tribunal established by law, was violated in the case. The court has found that despite the applicant company's repeated arguments, the domestic courts failed to provide reasoned decisions and did not address the matter that the law applied was incompatible with the Constitution. Additionally, the ECtHR determined the authorities' actions in appointing one of the judges on the bench in the applicant company's case and ignoring the past Constitutional Court's judgments. The panel that had tried the case was not a tribunal established by law.

Judgement of 22 July 2021 *Reczkowicz v. Poland*

A barrister suspended for three years after representing a client submitted that the Disciplinary Chamber of the Polish Supreme Court, which had decided on her case, lacked impartiality and independence and was not a tribunal established by law.

The ECtHR held that there had been a violation of Article 6 § 1 of the Convention. It found that the Disciplinary Chamber of the Supreme Court, which had examined the applicant's case, was not a tribunal established by law. The Court noted that the legislative and executive powers had unduly influenced the procedure for appointing judges to the Disciplinary Chamber. This amounted to a fundamental irregularity that adversely affected the entire process and compromised the legitimacy of the Disciplinary Chamber.

Judgement of 3 February 2022 *Advance Pharma Sp. z o.o. v. Poland*

This case relates to a complaint presented by a company regarding the lack of impartiality and independence of the Civil Chamber of the Supreme Court, which had decided concerning the

company's case. The complainant pointed out that the composition of the Civil Chamber of the Supreme Court was problematic, as the President of Poland appointed its judges based on the recommendation of the National Council of the Judiciary (NCJ). The NCJ is a constitutional body responsible for safeguarding the independence of judges and courts, which has been controversial due to the introduction of new legislation. The legislation stipulates that the judicial members of the NCJ are no longer elected by judges but by the Sejm (the lower house of Parliament).

The ECtHR has determined that there was a violation of Article 6 § 1 of the Convention. It found that The Civil Chamber of the Supreme Court was not an "independent and impartial tribunal established by law" as required by the Convention. The Court observed that the legislative and executive powers had undue influence on appointing judges to the Civil Chamber of the Supreme Court. This constituted a serious irregularity that compromised the legitimacy of the Civil Chamber of the Supreme Court, which reviewed the applicant's case.

Moreover, under Article 46 (binding force and execution of judgments) of the Convention, the ECtHR concluded that amendments to Polish legislation caused the violation of the applicant company's rights. These amendments deprived the Polish judiciary of the right to elect judicial members of the National Council of the Judiciary. They gave the executive and the legislature direct or indirect control over the judicial appointment procedure. This systematic interference with the appointment of judges compromised the court's legitimacy as a whole.

The continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuated the systemic dysfunction identified by the Court. This could further exacerbate the rule of law crisis in Poland. As a result, the Polish State was called to act quickly to remedy the problems at the heart of the violations found by the ECtHR. It has been up to Poland to draw the necessary conclusions from this judgment and take appropriate measures to prevent similar violations from occurring in the future.

Judgement of 15 March 2022 (Grand Chamber) *Grzęda v. Poland*

This case involves the removal of a judge who was a member of the National Council of the Judiciary (NCJ) before the completion of his term. The judge could not get a judicial review of the decision to remove him from the council. This action happened amid judicial reforms in Poland. The judge's complaint was primarily about being denied access to a court.

The ECtHR found that the lack of judicial review in this case had violated Article 6 § 1 of the Convention by impairing the applicant's right to access a court. The ECtHR highlighted that it was fully aware of the context of the case, which is the weakening of judicial independence and adherence to rule-of-law standards caused by the Government's reforms. The successive judicial reforms aimed to weaken judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015. Moreover, the remodelling of the NCJ and the establishment of new chambers of the Supreme Court further extended the Minister of Justice's control over the courts. They increased his role in matters of judicial discipline. The Court also referred to its judgments related to the reorganisation of the Polish judicial system and the cases decided by the Court of Justice of the European Union, the relevant rulings of the Supreme Court, and the Supreme Administrative Court of Poland. It held that the judiciary had been exposed to interference by the executive and legislature and its independence had been significantly weakened due to these successive reforms. The applicant's case was one example of this general trend.

Judgement of 16 June 2022 *Żurek v. Poland*

The individual in question is a judge who also served as a National Council of the Judiciary (NCJ) member. The NCJ is a constitutional body in Poland that ensures the independence of courts and judges. As part of his role, the judge has been a vocal critic of the changes made to the judiciary by the legislative and executive branches of the new Government, which took power in 2015. The case pertains to his removal from the NCJ. He claims that he was not given access to a tribunal and that there was no judicial or other procedure to challenge the premature termination of his mandate. Furthermore, he alleges that his dismissal as a spokesperson for the regional court, along with the authorities' decisions to audit his financial declarations and inspect his judicial work, was meant to punish him for criticising the Government's legislative changes and to discourage other judges from doing the same.

The ECtHR has held that there was a violation of Article 6 § 1 and Article 10 (freedom of expression) of the Convention. The same reasoning as in the *Grzęda v. Poland* case was followed, and it was found that the applicant's removal from the NCJ without judicial review had breached his right to access a court. Additionally, the ECtHR found that the measures taken against the applicant, such as his dismissal as a spokesperson of a regional court, the inspection of his judicial work, and the audit of his financial declarations, were all aimed at intimidating him because of his views in defence of the rule of law and judicial independence. The ECtHR emphasised the overall context of successive judicial reforms, which had weakened judicial independence and led to what is widely known as the rule-of-law crisis in Poland.

Judgement 6 July 2023 *Tuleya v. Poland*

This case is related to the new disciplinary system for judges in Poland. A well-known judge filed a complaint regarding five sets of preliminary inquiries initiated against him in 2018 on the grounds of disciplinary misconduct. He mainly complained that one of these inquiries, which was about his alleged disclosure of sensitive information from an investigation file, resulted in lifting his immunity from prosecution and his suspension from official duty for more than two years by the Disciplinary Chamber of the Supreme Court.

The ECtHR has ruled that in the present case, there has been a violation of Article 6 § 1, Article 8 (right to respect for private life), and Article 10 (freedom of expression) of the Convention. It was noted that the Disciplinary Chamber, which had decided to lift the applicant's immunity, was not an "independent and impartial tribunal established by law" for the Convention, as stated in one of its previous rulings (*Reczkowicz v. Poland*). The ECtHR has concluded that there was no lawful basis for the measures taken against the applicant, which significantly impacted their right to private life and could be characterised as a strategy aimed at intimidating or silencing them for their views. Lastly, the ECtHR has emphasised that the applicant's case should be viewed in context, notably that they were one of Poland's most outspoken critics of judicial reform.

Judgement of 23 November 2023 *Wałęsa v. Poland*

This case relates to a legal dispute filed by the former President of Poland and leader of the Solidarność (“Solidarity”) trade union against a former associate. The former associate had publicly accused the applicant of working with the secret services during the communist regime. Although the applicant had initially won the case, the Chamber of Extraordinary Review and Public Affairs of the Supreme Court was to overturn the judgment in his favour following an extraordinary appeal by the Prosecutor

General. In his complaint before the ECtHR, the applicant argued that the Chamber of Extraordinary Review and Public Affairs was not an independent and impartial tribunal established by law, that one of the judges was partial, and that the extraordinary appeal violated legal certainty.

The ECtHR found that the Chamber of Extraordinary Review and Public Affairs, which reviewed an extraordinary appeal, was not an independent and impartial tribunal established by law. This has been the case in previous instances as well. As a result, the ECtHR held that Mr Wałęsa's right to a fair hearing had been violated. The ECtHR examined whether the extraordinary appeal had violated the principle of legal certainty, which Mr Wałęsa had alleged. It noted that entrusting the Prosecutor General, a member of the executive branch with considerable authority over the courts and a strong influence on the National Council of the Judiciary, with the unlimited power to challenge virtually any final judicial decision was contrary to the principles of judicial independence and separation of powers. This posed a risk that extraordinary appeals could become a political tool used by the executive. The ECtHR concluded that the extraordinary appeal procedure was incompatible with the principles of legal certainty and res judicata, which states that a case resolved by a final judgment cannot be brought back to court for a new appeal. The extended time limits for lodging an extraordinary appeal allowed to the Prosecutor General, which operated retrospectively, were not only in breach of those principles but also failed to satisfy the requirement of foreseeability of the law for Convention purposes.

The ECtHR also found indications that the public authorities had abused the extraordinary appeal procedure to further their political views and motives. The ECtHR observed that Mr Wałęsa's case could not be separated from its political background and the political context in Poland at the time. There was a long-lasting and public conflict between Mr Wałęsa and the leadership of the Law and Justice (PiS) party Government.

The ECtHR applied the pilot-judgment procedure in this case. The Court has determined that there has been a double violation of the right to a fair hearing under Article 6 § 1 due to systemic problems connected with domestic legislation and practice malfunctioning. These problems are interrelated and can be traced back to the judicial reform in Poland that was initiated in 2017, which has resulted in issues with the functioning of the country's legal system. These problems are caused by (a) a defective procedure for judicial appointments involving the National Council of the Judiciary as established under the 2017 Amending Act; (b) the resulting lack of independence on the part of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court; (c) the exclusive competence of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court in matters involving a plea of lack of independence on the part of a judge or a court; (d) the defects of the extraordinary appeal procedure as established in this judgment; (e) the exclusive competence of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court to deal with extraordinary appeals.

Judgement of 14 December 2023 *M.L. v. Poland*

The case concerned restrictions on abortion rights. The ECtHR held, by five votes to two, that there had been a violation of Article 8 (right to respect for private and family life) of the Convention. The applicant alleged, in particular, that she had been banned from having access to a legal abortion in the case of foetal abnormalities following a 2020 Constitutional Court judgment. She had become pregnant, and the foetus was diagnosed with trisomy. A scheduled hospital abortion had been cancelled when the legislative amendments resulting from the Constitutional Court ruling had come into force. Unable to have an abortion in Poland, she ultimately had to travel to a private clinic abroad for the procedure.

In the case of M.L. v. Poland, the issue was whether the Constitutional Court's action was legal. Although the Constitutional Court's action did not directly cause the violation of an applicant's human rights, it was still necessary to assess its legality. An arbitrary medical procedure caused the violation and the application of the Act on Termination of Pregnancy, as interpreted by the Constitutional Court. The ECtHR argued that the rule of law is crucial for the protection of human rights and that it requires access to a tribunal established by the law. This requirement applies not only to the right to a court but also to all the rights guaranteed by the Convention. When the action of the constitutional court interferes with individual rights, it must meet the criteria of a court established by law within the meaning of the Convention. The ECtHR found that an interference with the right to protect private life resulted from a national judicial authority's judgment deciding *in the abstract* on an applicant's rights. Therefore, it required an assessment of whether such an authority met the criteria of a court established by law within the meaning of the Convention. The ECtHR assessed the legality of the appointment of the Constitutional Court and concluded that there had been an interference with the right to the protection of private life due to a violation of the rule of law. This violation consisted of violating the rules for the appointment of the Constitutional Court. In other words, according to the ECtHR, limiting the right to the protection of private life (i.e. limiting access to abortion) could not be considered legal (i.e. free from arbitrariness) because it was an indirect consequence of the Constitutional Court's action.

II. Court of Justice of the European Union [14]

The Court of Justice of the EU has developed standards related to judicial independence for two types of cases under the following provisions of the Treaties: Article 2 TEU (rule of law as one of the founding values of the EU); Article 19 TEU (duty of the Member States to provide remedies sufficient to ensure adequate legal protection in the fields covered by Union law) and Article 47 of the Charter of Fundamental Rights of the EU (Right to an effective remedy and a fair trial). The first type of case concerns the preliminary questions concerning (in the majority) different elements of the judiciary reform in Poland. The European Commission initiated the second and more general type of cases under infringement proceedings (Article 258 TFEU).

The recent case law of the CJEU aligns with the standards of judicial independence set by the ECtHR. However, it also includes some suggestions for addressing the following questions. (a) how to use the three-stage CJEU test of appearance of judicial independence; (b) how to adequately apply the CJEU's doctrine of appearance of independence to non-judiciary authority (i.e., national administrative bodies or regulators – President of the Office of Personal Data Protection or the President of the Office of Competition and Consumer Protection); (c) how to recognise and deal with the argument based on national or constitutional identities before the CJEU and national constitutional court; (d) how to build links between Article 2 or 19 TEU and the Charter.

Judgment of the Court (Grand Chamber) of 27 February 2018, *C-64/16 Associação Sindical dos Juízes Portuguese v Tribunal de Contas*

[14] See also Mańko (2023), ECJ case law on judicial independence A chronological overview, EPRS | European Parliamentary Research Service (https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)753955).

A trade union representing judges in Portugal had argued that reducing the salaries of members of the Portuguese Court of Auditors undermined the principle of judicial independence. They based their argument on Article 19 TEU and Article 47 Charter.

The CJEU found that if a member state's pressing economic needs require a reduction in judges' salaries, it does not violate EU law. However, the CJEU also used this case to provide a new interpretation of Article 19 TEU and the concept of practical judicial independence, which was read in light of Article 4(3) TEU. The latter enshrines the principle of sincere cooperation as the basis. The CJEU's interpretation aimed to clarify the meaning of effective judicial protection and how it interacts with the principle of sincere cooperation. This ruling has significant implications for the concept of judicial independence and the relationship between member states and the EU.

Judgment of the Court (Grand Chamber) of 25 July 2018, *C-216/18 PPU L.M.*

In 2012 and 2013, Ireland received three European arrest warrants (EAW) for a Polish national. The procedure of surrendering persons under the EAW is based on mutual trust between the EU Member States. In 2016, the CJEU recognised in the Aranyosi and Căldăraru case that trust has its limits if the surrendered person's fundamental rights are at risk. The case involved two Romanian nationals who were arrested in Hungary and were facing extradition to Romania, where they alleged that the prison conditions would violate their right to a fair trial and expose them to inhuman or degrading treatment.

In the case of the Polish national, the Irish court brought a preliminary reference to the CJEU, asking whether it could execute the EAW in the case of a 'systemic breach of the rule of law' by the referring court. The Irish court was referring to the fact that there were concerns about the independence of the judiciary in Poland, which had led the European Commission to initiate Article 7 proceedings against Poland in December 2017.

In its judgment, the CJEU acknowledged the existence of systemic deficiencies in judicial independence in Poland but mandated the requested court to analyse whether there was a risk that the requested person's right to a fair trial might be compromised in the specific case. This means that the Irish court had to examine whether the Polish national would face a real risk of not receiving a fair trial if he were extradited to Poland.

Judgment of the Court (Grand Chamber) of 24 June 2019, *C-619/18 Commission v Poland*

In Poland, there was a compulsory lowering of the retirement age of Supreme Court judges from 70 to 65. This decision caused a significant number of judges to retire. The European Commission brought a case to the CJEU claiming that Poland had violated Article 19(1) TEU and another unspecified Article. The Commission argued that, even though the retirement age had been lowered, the Polish President had received the discretionary power to extend the term of office of judges twice, for a total of 6 years, after consulting with the National Judiciary Council. This meant that if the President decided to extend the term of office of a judge beyond retirement age, they could still serve for up to 6 more years.

The CJEU ruled that the above situation was in breach of Article 19(1) TEU. The court pointed out that while the organisation of justice in the Member States falls within their competence; however, they must comply with their obligations under EU law when exercising that competence. The CJEU also noted that Article 19(1) TEU requires all Member States to ensure that their national courts that come

within its judicial system in the areas covered by EU law meet the requirements of effective judicial protection.

The Polish government referred to Protocol No. 30 on applying the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom. However, the CJEU noted that the protocol did not reference Article 19(1) TEU and did not exempt Poland from the obligation to comply with the CFR. The CJEU further argued that lowering the retirement age of Supreme Court judges had targeted a particular group of judges to sideline them. This was in violation of Article 19(1) TEU and the requirements of effective judicial protection.

Judgment of the Court (Grand Chamber) of 5 November 2019, *C-192/18 Commission v Poland*

The Polish Parliament passed legislation that lowered the retirement age of ordinary judges. Under this legislation, men must retire at the age of 65, while women must retire at the age of 60. However, a provision allows the minister of justice to extend the term of office of a judge up to the age of 70 in individual cases. The European Commission took Poland to the CJEU, alleging that this legislation violates Article 19(1) TEU and the Equal Treatment Directive.

The CJEU agreed with the Commission and found that Poland has indeed violated Article 19(1) of the TEU and the Equal Treatment Directive. The CJEU highlighted that the principle of irremovability of judges is of 'cardinal importance' and judges must be allowed to carry on their duties until they reach the obligatory retirement age or until the expiry of their mandate for a fixed term. According to the CJEU, judges can only be dismissed if they are deemed unfit to carry out their duties due to incapacity or a severe breach of their obligations, provided the appropriate procedures are followed. However, the legislation that lowers the retirement age of all ordinary judges, with the possibility for the minister of justice to make exceptions for selected judges based on 'vague and unverifiable' criteria, could create doubts in the minds of individuals that the new system might actually have been intended to remove certain groups of judges serving in the ordinary Polish courts while retaining others of those judges in post.

Judgment of the Court (Grand Chamber) of 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*

As a part of a package of judicial reforms, the Polish legislature established a new Disciplinary Chamber within the Supreme Court. The Chamber was responsible for handling disciplinary cases of judges, prosecutors, and lawyers. It also decided whether to lift judicial and prosecutorial immunity. Additionally, the chamber handled cases related to employment, social security, and compulsory retirement of the Supreme Court and Supreme Administrative Court judges. All the judges appointed to the Chamber had been selected from new candidates.

At the same time, the legislature adopted an act amending the Act on the National Judiciary Council. This act effectively ended the term of office of all existing NJC members and laid down new rules for selecting its members. Previously, most NJC members (15 out of 25) were elected by judges (with judges from higher courts receiving preferential treatment). However, now it would be the Sejm (lower house of parliament) that would be electing the NJC judicial members. As a result, the parliament would now select 21 out of the total number of members.

In response to these changes, one Supreme Administrative Court judge challenged the NJC's negative opinion that barred him from remaining in service after reaching the age of 65. Additionally, two

Supreme Court judges refused to undergo the new procedure and challenged the president's declaration pronouncing them retired. All three applicants brought their cases to the Labour Chamber of the Supreme Court, which retained jurisdiction until the new Disciplinary Chamber would become operational.

The questions submitted to CJEU focused on whether, once the Disciplinary Chamber becomes operational, the Labour Chamber should transfer all three cases to it or not. The Labour Chamber needs to consider whether the Disciplinary Chamber provides sufficient guarantees of its judicial independence. If it does not, the Labour Chamber should refuse to apply the new legislation (which transfers jurisdiction to the Disciplinary Chamber) and handle the cases.

The CJEU examined the role of the NJC in judicial appointments and focused on the recent reform that allowed the parliament to appoint the majority of the NJC members. Although the CJEU did not directly evaluate the independence of the Supreme Court Disciplinary Chamber and the legitimacy of the reformed NJC, it provided specific instructions to the referring court on how to conduct the evaluation. According to the CJEU, the national court should consider several criteria in the following order. Firstly, they should look into any possible irregularities in the appointment of KRS members. Secondly, they should examine how the KRS exercises its constitutional responsibilities of ensuring the independence of the courts and the judiciary. Thirdly, they should assess whether the NJC is independent of the legislature and the executive. Fourthly, they should look into the circumstances under which the new judges of the IDSN were being appointed and the role of the NJC in that regard. Fifthly, they should consider the new powers of the Disciplinary Chamber regarding the employment, social security, and retirement of Supreme Court judges, coupled with the simultaneous lowering of the retirement age of judges. Sixthly, they should take into account the requirement for the Disciplinary Chamber to be staffed solely by newly appointed judges, effectively disqualifying existing Supreme Court judges from being selected. Finally, they should examine the autonomy of the Disciplinary Chamber within the Supreme Court.

The courts in Poland need to determine the independence of the new Disciplinary Chamber. This is important for deciding whether the chamber has jurisdiction to rule on cases where retired judges of the Supreme Court are involved. If the chamber is not independent, then another court should handle those cases. Independence and impartiality are essential values in the legal system, but they are difficult to define concretely. Instead, they should be seen as general principles of law. We can use the three-step test to test whether the judiciary is independent. First, imagine an external observer who is interested in judiciary independence but not involved in politics. Second, ask whether this observer would have a "reasonable doubt" about the independence of the judiciary in a specific case. This doubt should be based on the powers and activity of a particular judge or court. Third, we need to consider our doubts in the context of the binding provisions on the judiciary organisation, including arguments regarding the context of judicial appointments as well as the powers and activity of a judge.

Judgment of the Court (Third Chamber) of 9 July 2020, *C-272/19 VQ v Land Hessen*

A German court referred a data protection case to the European Court of Justice (ECJ) to determine whether it was an independent court under Article 47 CFR and Article 267 TFEU. The referring court raised concerns about the influence exerted on it by the regional minister of justice. It stated that the minister's control over judges' appointment, appraisal, and promotion could compromise the court's independence and impartiality.

The CJEU pointed out that there was no evidence to suggest that the executive had used its powers in a way that would cast doubt on the impartiality of the judges. Therefore, the ECJ concluded that these factors alone were insufficient to conclude that the court was not independent.

Judgment of the Court (Grand Chamber) of 20 April 2021, *C-896/19 Repubblika v Il-Prim Ministru*

An NGO challenged a judicial reform in Malta, arguing that the prime minister's powers to appoint judiciary members raised concerns about the independence of those appointees. The Maltese Constitutional Court referred the matter to the CJEU.

The CJEU ruled that the reform actually strengthened judicial independence by creating a Judicial Appointments Committee. Furthermore, the CJEU established the principle of non-regression with respect to the rule of law. This means that a Member State cannot amend its laws in a way that would reduce the protection of the rule of law. The state must also ensure that it does not adopt rules that would undermine the independence of the judiciary.

Judgment of the Court (Grand Chamber), 18 May 2021, *Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 Asociația 'Forumul Judecătorilor din România' and Others*

An association of Romanian judges filed a lawsuit challenging specific rules regarding the organisation of the judiciary. They claimed that these rules did not comply with the EU rule of law standards and violated the guarantees of Article 47-48 of the Charter, specifically the right to defence and a fair trial. The lawsuit focused on the disciplinary responsibility of judges and the appointment of management positions at the Judicial Inspectorate.

The CJEU found that the current system allowed the executive to make interim appointments to management positions at the Judicial Inspectorate, which could potentially exert political control over the activity of judges. The CJEU ruled that appointment procedures must eliminate any reasonable doubt that the powers and functions of that body would not be used as an instrument to exert pressure on or political control over the judicial activity.

Additionally, the CJEU evaluated the creation of a specialised section of the Prosecution Service, exclusively tasked with investigating judges and prosecutors. They found that it violated EU law unless it was justified by objective and verifiable requirements concerning the sound administration of justice, accompanied by specific guarantees preventing any risk of it being used as an instrument of political control over the activity of judges and prosecutors that could undermine their independence. The CJEU concluded that any judges or prosecutors targeted by the section must enjoy the rights under Articles 47-48 of the CFR.

The CJEU examined a Romanian law that made judges financially liable for committing judicial errors. The law defined these errors as situations where there was a clear violation of substantive or procedural law and where a final judgment had been delivered that was contrary to the law or inconsistent with the facts established by the evidence taken during the proceedings. This type of error would cause serious harm to the rights, freedoms, or legitimate interests of an individual, which could not be remedied through ordinary or extraordinary appeals. The CJEU noted that the law's definition of "judicial error" was very general and abstract. It distinguished between state financial liability for judicial errors, which is in line with Articles 2 and 19 TEU, and personal liability of judges for damages caused by a judicial error. The latter is problematic from the perspective of judicial independence since it could be used to pressure judges into making certain decisions.

Judgment of the Court (Grand Chamber) of 21 December 2021, *Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 PM and Others*

Article 147(4) of the Romanian Constitution states that ordinary courts must obey decisions made by the Romanian Constitutional Court (RCC). Additionally, Law 303/2004 on the status of judges and prosecutors makes it a disciplinary offence to not comply with RCC rulings.

The CJEU received a group of preliminary references from Romanian ordinary courts regarding the relationship between these requirements and EU standards of judicial independence. One of the references pertained to RCC Decision No 104 of 6 March 2018, which stated that EU law did not take precedence over the Romanian constitution and that Commission Decision 2006/928/EC could not be used as a benchmark in a constitutionality review under Article 148 of the Romanian Constitution. The CJEU responded by ruling that national rules or practices that require ordinary courts to follow the decisions of a national constitutional court are acceptable as long as the constitutional court remains independent of the legislature and executive. However, suppose a national judge must follow constitutional court case law that the CJEU has found incompatible with EU law. In that case, it violates the principle of primacy of EU law.

Judgment of the Court (Grand Chamber) of 22 February 2022, *C-430/21 RS*

In Decision No. 390, dated 8 June 2021, the RCC (Romanian Constitutional Court) ruled that an ordinary Romanian court cannot invalidate provisions of Romanian law that it deems incompatible with EU law. The RCC also found that part of the ECJ's judgment in Romanian Judges I is inconsistent with the Romanian Constitution. In light of Law 303/2004, a Romanian court asked two questions in this scenario. Firstly, whether the principle of judicial independence precludes an interpretation of the Romanian Constitution, as provided for by the RCC, under which national courts cannot review the compliance with EU law of a provision of Romanian law that has been deemed constitutional by the RCC. Secondly, whether the principle of judicial independence precludes the application of a rule of Law 303/2004, which provides for disciplinary action against judges who do not adhere to RCC case law, even if a national judge chooses to give precedence to ECJ case law if it is incompatible with RCC case law.

In its verdict, the CJEU, following its earlier case law (Euro Box Promotion), ruled that Article 19(1) TEU, in conjunction with Articles 2 and 4(2) TEU and 267 TFEU, and the principle of primacy, must be interpreted as precluding national law or practices that provide for disciplinary action against a judge who departs from the national constitutional court's case law, if that case law is incompatible with the principle of primacy of EU law.

Judgment of the Court (Grand Chamber) of 29 March 2022, *C-132/20 BN and Others v Getin Noble Bank S.A.*

A judge appointed to the Civil Chamber of the Supreme Court has questioned the independence and impartiality of judges appointed during the socialist era and by the KRS from 1989 to 2018. The judge has submitted a reference to the CJEU inquiring whether these judges can guarantee their independence and impartiality as required by EU law. The reference described the Council of State as a 'political body within the executive branch of a State characterised by a totalitarian, undemocratic and communist system of power'. Similarly, the reference pointed out that the procedures applied between 1989 and 2018 by the KRS did not fulfil the criteria of open and transparent rules, citing a

judgment of the Polish Constitutional Court that declared some provisions of the KRS Act unconstitutional.

The Polish Ombudsman intervened in the case, requesting the CJEU to dismiss the request as inadmissible because the referring court did not fulfil the criteria of independence, impartiality and establishment by law, given the circumstances of the judge's appointment. However, the CJEU decided to accept the reference, stating that the standards of judicial independence applicable with regard to the admissibility of references under Article 267 TFEU must be distinguished from the standards of independence for the purposes of asserting whether the right to a fair trial (Article 47 Charter) and effective judicial remedy (Article 19 TEU) are at stake.

Regarding the merits of the reference, the CJEU ruled that the mere fact that a judge was appointed 'by a body of an undemocratic regime' is not capable per se of giving rise to legitimate and serious doubts in the minds of individuals as to the independence and impartiality of that judge or, consequently, of calling into question the status as an independent and impartial tribunal previously established by the law of a court formation which includes that judge'. As for the statement about judges appointed by the pre-2018 NJC in a procedure lacking transparency, openness and judicial remedies, the CJEU stated that if the body was composed correctly, but the procedure 'was neither transparent nor public nor open to challenge before the courts', then, the judges thus appointed could still be considered independent and impartial. The CJEU clarified that such irregularities should not be of such a kind and gravity as to create a real risk that other branches of the State, especially the executive, could exercise undue discretion, undermining the integrity of the outcome of the appointment process.

Judgment of the Court (First Chamber) of 7 September 2023, C-216/21 Asociația "Forumul Judecătorilor din România"

A judicial association in Romania has contested a new set of rules on judicial promotions introduced by the Supreme Magistracy Council. The new rules require a judge who wishes to be promoted to a higher court to be evaluated by a board consisting of the president of the court of appeal and four judges of that court. The board will assess the judge based on their legal reasoning and drafting skills, as well as their ability to meet deadlines. The applicants in the case argued that the new procedure relies on subjective assessments and giving more power to the presidents of the courts of appeal creates a hierarchical subordination that impairs judicial independence.

The CJEU has stated that rules on judicial promotions must comply with EU standards on judicial independence. However, the EU law does not prohibit a promotion scheme based on the assessment by a board of judges from a higher court to which the applicant seeks promotion. The substantive conditions and procedural rules governing the adoption of decisions relating to effective promotion should ensure that there is no doubt in the minds of individuals about the imperviousness of the judges concerned with external factors and their neutrality with respect to the interests before them once they have been promoted.

List of other relevant case law

- ECtHR judgement of 14 April 2015 (Grand Chamber) Mustafa Tunç and Fecire Tunç v. Turkey (Objective and subjective criteria for independence)

- ECtHR judgement of 20 May 2021 Beg S.p.a. v. Italy (Non-intervention of the executive or the legislature in a case pending before the courts)
- ECtHR judgement of 6 October 2011 Agrokompleks v. Ukraine (No influence from within the justice system)
- ECtHR judgement of 9 November 2006 Sacilor-Lormines v. France (Judges' appointments or dismissals)
- ECtHR judgement of 22 June 2004 Pabla Ky v. Finland (Freedom of judges in their adjudicatory duties)
- ECtHR judgement of 23 June 2016 (Grand Chamber), Baka v. Hungary (Security of judicial tenure)
- ECtHR judgement of 5 February 2015 Zubarev v. Russia (No civil or criminal liability of judges except in cases of malicious intent)
- ECtHR judgement of 25 February 1997 Findlay v. The United Kingdom (appearance of independence)
- ECtHR judgement of 7 June 2001 (Grand Chamber) Kress v. France (Concurrent judicial functions in the same case)
- ECtHR judgement of 23 November 2010 Moulin v. France (Judicial or administrative role of public prosecutors)
- ECtHR judgement of 6 November 2018 (Grand Chamber) Ramos Nunes de Carvalho e Sà v. Portugal (Principle of impartiality)
- ECtHR judgement of January 2008 Albayrak v. Turkey (Freedom of expression for members of the judiciary)
- ECtHR judgement of 19 October 2021 Miroslava Todorova v. Bulgaria (Freedom of expression for members of the judiciary)
- ECtHR judgement of 23 April 2015 (Grand Chamber) Morice v. France (Criticism of judges and reputation of the judiciary)
- CJEU judgement of 26.3.2020, C-558 & 563/18, Miasto Łowicz (Admissibility of preliminary question in judicial independence matters)
- CJEU judgement of 17.12.2020, C-354 & 412/20 PPU, L. and P (European Arrest Warrant)
- CJEU judgement of 2.3.2021, C-824/18, A.B. (Effective national remedies for judges)
- CJEU judgement of 15.7.2021, C-791/19, Commission v Poland (Disciplinary responsibility of judges)
- CJEU judgement of 6.10.2021, C-487/19, W.Ż. v KRS (Disciplinary responsibility of judges)
- CJEU judgement of 16.11.2021, C-748 & 754/19, W.B. et al. (Disciplinary responsibility of judges)
- CJEU judgement of 22.3.2022, C-508/19, M.F. v J.M. (Employment relationship with the Supreme Court)
- CJEU judgement of 13.10.2022, C-698/20, Gmina Wieliszew (Court within the meaning of Article 267 TFEU)

- CJEU judgement of 5.6.2023, C-204/21, Commission v Poland (Judiciary reform in toto)
- CJEU judgement of C-718/21 (Chamber of Extraordinary Control of the Supreme Court)

Section 2: case studies

Hypothetical Case No. 1

The company filed a lawsuit in a national court. The lawsuit concerned fines for violation of the national competition law. The case ended with a final dismissal of the lawsuit, so the company lodged a constitutional complaint with the Constitutional Court [CC], alleging that the provision based on which the lawsuit was dismissed was inconsistent with the national Constitution. The CC dismissed the complaint, but in the 5-member panel, a person was appointed to the judicial position in violation of the national law.

Questions and tasks:

1. Is there a Rule of Law problem in the case under the Venice Commission's Rule of Law checklist or the European Commission's Rule of Law Report?
2. How could a national CC panel composition be considered a relevant Rule of Law problem for the Court of Justice?
3. What if the CC panel consisted of lawfully elected judges, but the President of the CC assigned them to the case in violation of law?
4. What if there were no such violations, but in light of commonly known information concerning, for example, the CC jurisprudence (very favourable to the government), alleged meetings of the CC authorities with politicians from the ruling party, the fact that some of the CC judges were prominent politicians of the ruling party before their appointment, there would be serious doubts about the independence of the CC?

Hypothetical Case No. 2

X. was appointed as a judge of the district court in 2012 and in 2017 – as a judge of the circuit court. From the moment of appointment, he consistently adjudicated in the criminal division. Judge X. has repeatedly expressed critical opinions (e.g., in the press, on television, and social media) about government actions that, in his view, threaten the independence of the judiciary. He also participated in public assemblies dedicated to defending the rule of law. In 2023, by order of the president of the circuit court, he was transferred from the criminal division to the civil division (but he remained in the same court). The law does not clearly state whether such an order is subject to judicial review. The court's president was appointed to his position by the Minister of Justice (who introduced reforms criticised by Judge X.).

Questions and tasks:

1. Is there a problem with the Rule of Law in the case, according to the ECHR judgements?

2. Does a judge have freedom of expression regarding the reforms of the judiciary (protected by the ECHR or the EU Charter)?

3. What are the formal limits of judges' freedom of expression in matters regarding the reforms of the judiciary (i.e., symbolic speech, press interviews, video blogs or social media forms)?

4. What are the substantial limitations of judges' freedom of expression in matters regarding the reforms of the judiciary (i.e., may a judge criticise all aspects of reforms or only select ones)?

5. May (according to ECtHR judgements) judges actively participate in public assemblies dedicated to the defence of the rule of law?

Hypothetical Case No. 3

Immediately after Election Day in one of the EU Member States, the new Parliament invalidated the choice of three judges of the Constitutional Court, who had been selected by the old Parliament just before Election Day. The choice was formally lawful. Nevertheless, the new parliamentary majority strongly disagreed with the old majority regarding the selected judges' moral assets and legal knowledge. Thus, the new Parliament created a new and unique legal basis in the Standing Orders for invalidation of previously done choice of judges and used it for the first time. Due to the invalidation, the President of the Republic restrained herself from appointing the judges. The President publicly declared that she would not appoint judges whose election was invalidated by the new Parliament, regardless of legal scholars' public opinion or opinions. After such a statement, the new Parliament decided to elect three new persons to the Constitutional Court. They were intended to replace those judges who had not been appointed. The President immediately appointed the three newly elected persons.

Questions and tasks:

1. Is there a problem with the Rule of Law in the case, according to the Venice Commission or European Commission standards?
2. Do the judges whose election was invalidated have a fundamental right (i.e., suitable to be a judge) that could be enforced under the ECHR or the Charter?
3. Do the persons (who were elected after the invalidation of the previous election elections to the Constitutional Court)) have a fundamental right (i.e., the right to be a judge) that could be enforced under the ECHR or the Charter?
4. May the persons (elected after the invalidation of the previous elections to the Constitutional Court) be considered as giving an appearance of judicial independence, according to Court of Justice case law?
5. May the Constitutional Court, sitting in a panel composed of the persons (who were elected after the invalidation of the previous elections to the Constitutional Court), be considered a court established by law, according to ECtHR case law?

Hypothetical Case No. 4

In one of the EU Member States, the Parliament enforced the fundamental reform of judicial appointments. The reform was enforced on the statutory level since the political majority had not achieved enough electoral support to amend a constitution. Some scholars recommended a constitutional amendment because the constitutional provisions provided the legal status and terms of the National Council of the Judiciary. Nevertheless, the political majority was able to frame the judicial reform under the 2/3 majority laws. It is a type of sub-constitutional law which can be adopted,

changed, or derogated only by the 2/3 majority in the Parliament. The new law dissolved the National Council of the Judiciary and dismissed the Council members before the end of their terms. The new law introduced a new system of election the National Council of the Judiciary members. It replaced the election by judges among judges with the ultimate power of the Parliament to elect all members. The new National Council of the Judiciary started to act and positively appraised 100 candidates for newly created positions in the judiciary. The President of the Republic appointed those judges. At the same time, the new National Council of the Judiciary appraised negatively all the candidates for judges, who were proceeded by the terminated council (before the new law entered into force). The new law directly excluded any judicial review or legal remedy in case of such a negative appraisal.

Questions and tasks:

1. Is there a problem with the Rule of Law in the case, according to the Venice Commission or European Commission standards? Is the fact that the judicial reform was adopted by a 2/3 majority law important?
2. Does the ECtHR or Court of Justice require Member States to have a National Council of the Judiciary composed of judges elected from among their peers?
3. Is it mandatory for Member States to follow the higher standard established by EU law for national councils of judiciary?
4. Suppose the new law provided the Parliament ultimate power to elect members of the National Council of the Judiciary but also provided the ultimate power to select candidates for judicial associations. How does such a twist affect the reasoning and solution of the case regarding the Rule of Law problem?
5. Suppose the new law provided the President of the Republic to double-check the candidates for judges proposed by the new National Council of the Judiciary before the appointment. How does such a twist affect the reasoning and solution of the case regarding the Rule of Law problem?
6. According to the Court of Justice case law, must the National Council of Judiciary give an appearance of judicial independence? Is the test of appearance of judicial independence applicable to the authorities like national councils of the judiciary?
7. Is the test of a court established by law (provided by the Court of Justice or ECtHR case law) applicable to the assessment of the authorities like national judiciary councils?
8. Do the old National Council of the Judiciary members, dismissed before the end of their terms, have a fundamental right that could be enforced under the ECHR or the Charter?
9. Do judges who received negative appraisals from the new National Council of the Judiciary have enforceable rights under the ECHR or Charter?
10. Can judges be considered independent if they received positive appraisals from the National Council of the Judiciary based only on circumstances regarding their appointments?

Hypothetical Case No. 5

According to the well-established national law, the Parliament has the power to elect the majority of the National Council of the Judiciary members. Judges elect the rest. The Parliament exercises its

power in a secret and non-transparent proceeding. The newly and lawfully elected by the Parliament members dominated the Council and changed the course of the Council's actions. As a result, the Council urged national judges not to follow the Court of Justice case law under Article 19 TEU as ultra vires. Moreover, the Council has prevented national judges from applying new standards of judicial independence under Article 19 and Article 47 of the Charter. The Council recognises the Court of Justice case law as violating national constitutional standards. The Council pointed out that following the Court of Justice would violate the national judicial code of conduct. Finally, the Council started to give positive appraisals only for candidates for judges who (during secret hearings before the Council) declared their hostility or resistance towards the Court of Justice case law under Article 19 TEU. As a result, candidates with divergent opinions on Court of Justice case law faced negative evaluations and were excluded from judicial appointments.

Questions and tasks:

1. Is there a problem with the Rule of Law in the case?
2. Are the case circumstances sufficient to declare the National Council of Judiciaries as lacking judicial independence?
3. How did the National Council of Judiciary's practice, which was openly hostile towards the Court of Justice, affect judicial appointments and judicial independence of newly appointed judges?
4. Do judges who received negative appraisals from the new National Council of the Judiciary have enforceable rights under the ECHR or Charter?
5. How could the principle of equality be applied to candidates who received negative evaluations?
6. Suppose the judge (who received positive appraisal from the new National Council of the Judiciary and became appointed) was in a panel of your case in the regional court. The case concerned violating the national authorities' protection of your data. Do you have a right to question the court's judicial independence based on circumstances regarding the judicial appointment of the judge?

Hypothetical Case No. 6

In one of the EU Member States, the Parliament acknowledged that the Court of Justice had developed case law beyond its powers under Article 19 TEU. In response, the Parliament passed a new law restricting national judges from making preliminary references to the Court of Justice in cases where the new developments under Article 19 TEU are being applied until the Treaties are reformed. Additionally, the new law forbids judges from questioning the independence of other judges concerning the Court of Justice's new developments. Finally, the new law provides disciplinary fines for judges referring to the Court of Justice or applying the new judicial developments. The disciplinary fines were enforced by most national disciplinary courts and accepted by the national Supreme Court. The new law and practice have been declared constitutional by the national constitutional court.

Questions and tasks:

1. Is there a problem with the Rule of Law in the case?

2. Is there a link between the protection of the Rule of Law and the ban regarding preliminary references?
3. Do the judges fined for preliminary reference or direct application of the Court of Justice developments have enforceable rights under the ECHR or Charter?
4. How might the statutory limitation of preliminary references in matters under Article 19 TEU affect the parties' rights before the court?
5. Suppose the judge in your case refused your motion for a need of preliminary reference to the Court of Justice. The independent judge justified her refusal by the reference to the new law. The case concerned national quotas in the fish market, and one of the judicial panel members may be challenged as a non-independent pursuit of Article 19 TEU. Do you have the right to question the judicial independence of a judge who refused your motion or only a judge whose appointment may not follow the standards of Article 19 TEU?
6. How might the statutory limitation of preliminary references in matters under Article 19 TEU affect your right to a fair trial under Article 6 ECHR? How do we build the link between the limitation of the EU law application in such a context and the application of Article 6 ECHR?

Hypothetical Case No. 7

In one of the European Union member states, the Parliament made a law that reduced the retirement age of the Supreme Court judges from 70 to 65. This law had an immediate effect, and the judges were not given the power to decide whether they wanted to stay in their position. Moreover, the law prevented judges from questioning the constitutionality of this effect. However, the judges were given a unique and very high statutory compensation for the termination of their terms. As a result, almost half of the Supreme Court judges retired before the end of their terms.

Questions and tasks:

1. Is there a problem with the Rule of Law in the case, according to Venice Commission Reports or ECtHR and CJEU case law?
2. What are the minimum standards developed by the ECtHR and the CJEU applicable to the retirement of the Supreme Court judges?
3. How might the new retirement law affect the assessment of the independence of the newly composed Supreme Court? Might the Supreme Court be considered established by law (according to ECtHR case law)?
4. Suppose the new judicial appointment proceedings were stated after the statutory termination of old judges' terms. The appointments itself did not raise any doubt regarding the rule of law. In such a case, how does the retirement of judges impact the assessment of the independence of the newly composed Supreme Court?
5. The newly composed Supreme Court ruled your case after the new law entered into force. The case concerned state liability for damages caused by the administrative authority within the scope of national tax law. Thus, it has had no direct link with the EU law. May you, as a party, question such a decision before the ECtHR or the Court of Justice on the grounds of lack of judicial independence?

Hypothetical Case No. 8

The new law decreased the retirement age for judges of the Supreme Court from seventy to sixty-five. It applied directly to acting judges, leaving them with no choice but to decide whether to retire at a lower age. The new law also obliged acting judges aged sixty-five or above to seek the President of the Republic's approval to continue their service. The President gave a positive appraisal of only half of the judges. One-fourth part of the judges of the Supreme Court were retired.

Questions and tasks:

1. Compare it with Hypothetical case No. 7 and discuss how the different content of the law and different results of the law impact the application of either EU or ECHR standards.

Hypothetical Case No. 9

In one of the member states of the European Union, the Constitutional Court ruled that abortion due to the foetus abnormality is unconstitutional. The judgement was adopted in an unlawful panel due to violating internal court's rules. The term of one of the judges ended, but they continued to stay in office because the Parliament had not elected a new judge. The other panel member was not recognised as an independent judge by the national courts, international tribunals, or public opinion. After the judgement, the Parliament did not change the law. The judgment itself limited the right to abortion. Abortion became allowed only in case of severe threat to the mother's life. As a result, doctors across the country started to refuse the termination of pregnancy.

Questions and tasks:

1. Is there a problem with the Rule of Law in the case?
2. Suppose your client was a party before the Constitutional Court when deciding on the unconstitutionality of the abortion case. Immediately after the case, she was refused the termination of pregnancy after the judgment. How may the composition of the Constitutional Court support her standing and claims before the ECtHR?
3. Now, suppose your client was not a party to the proceeding before the Constitutional Court when it decided on the unconstitutionality of the abortion law. How would you build a legal link between the judgment and de facto refusal of the termination of pregnancy?
4. Would it be possible to argue that there was a violation of Article 8 ECtHR?

Hypothetical Case No. 10

In an EU Member State, a new law was introduced giving the Minister of Justice the power to appoint new presidents of all country courts and dismiss the current ones before their terms ended. In addition, the law changed the principles of disciplinary proceedings for judges, barristers, and prosecutors, allowing the Minister of Justice to initiate and intervene in disciplinary proceedings. The Minister was also given the power to appoint disciplinary officers and issue them with binding instructions. The new first-instance disciplinary courts comprised judges appointed individually by the Minister of Justice. The Minister then filed disciplinary charges against the old and terminated presidents. Moreover, the Minister publicly stated that the termination of their terms and change within the judiciary was needed to fight corruption within the judiciary. However, no corruption cases against those presidents had been pending. The Constitutional Court ruled that the new law was constitutional.

Questions and tasks:

1. Is there a problem with the Rule of Law in the case?
2. Is there a minimum standard for EU members regarding the powers of the Minister of Justice in disciplinary cases against judges?
3. Suppose you are representing one of the old presidents of the courts, who was terminated before the end of his term. Do they have enforceable rights under the ECHR or Charter regarding only the fact of termination?
4. Suppose you were representing a former president in a disciplinary proceeding launched by the Minister of Justice. Would you argue that the disciplinary court does not meet the ECtHR's "court established by law" test requirements? Or would you argue that the disciplinary court does not meet the Court of Justice's requirements regarding the appearance of judicial independence?
5. How would you convince the disciplinary court to preliminary refer to the Court of Justice in the disciplinary proceeding launched by the Minister of Justice? Bear in mind that the court is composed of at least one nominee of the Minister.
6. Suppose the Constitutional Court was not packed and not curbed. How does such information influence your reasoning and argumentation?

Hypothetical Case No. 11

The Supreme Court's decision applied the European standards of impartiality and independence of the judiciary. The Court of Justice suggested that the new judicial authorities, including the National Council of Judiciary, do not satisfy judicial independence. Following the CJEU judgment, the Supreme Court ruled on the National Council of Judiciary's lack of independence. Moreover, the Supreme Court pointed out that the newly appointed judges in the country may not appear independent since their appointments were proceeded by the non-independent National Council of Judiciary. Nevertheless, the captured and curbed Constitutional Court ruled on the unconstitutionality of the decision of the Supreme Court. The Constitutional Court ruled the Supreme Court decision was unconstitutional because the 'EU-friendly' interpretation became a law-making. The Constitutional Court underlined the absolute importance of the Constitution over the EU law. Moreover, the Constitutional Court called itself a 'guardian of the Constitution'. The Constitutional Court also pointed out that there could be fundamental contradictions between the CJEU's interpretation of the Treaties and the Constitutional Court's interpretation of the Constitution. In such cases, the Constitutional Court reserved the 'court of the last word' role. Finally, the Constitutional Court portrayed the judicial appointments as a fundamental and historically rooted institutional arrangement on a constitutional level.

Questions and tasks:

1. Is this case a problem with the rule of law?
2. Can the principle of priority be linked to the rule of law?
3. What is the process to challenge the decision of the Constitutional Court before international tribunals?

4. If you were a regional court judge, how would you behave in a situation where there is a division between the Supreme Court and the Constitutional Court?
5. How would you respond to the Constitutional Court's argument regarding constitutional identity?
6. How would you argue for a preliminary reference if you have a case before the regional court?

Hypothetical Case No. 12

The Parliament of a member state of the European Union has passed a law that significantly limits the independence of the Ombudsperson. Under the new law, the Speaker of the Parliament will regulate the internal structure of the Ombudsperson's Bureau and appoint Deputy Ombudspersons. The Speaker of the Parliament will also determine the scope of tasks for the Deputy Ombudspersons. Additionally, the Parliament can now dismiss the Ombudsperson with a simple majority vote, as opposed to the previous requirement of a 3/5 majority. The Parliament has dismissed the Ombudsperson, but the resolution for the dismissal did not provide clear reasons. MPs during the parliamentary debate indicated that the dismissal was due to the Ombudsperson's actions aimed at protecting the rights of LGBT persons. It is important to note that such a resolution by the Parliament cannot be challenged before the Constitutional Court.

Questions and tasks:

1. What minimum standards developed by the ECtHR and the CJEU apply to Ombudspersons?
2. How may the dismissed Ombudsperson challenge the parliamentary resolution before the national courts based on violation of the Treaties or Charter?
3. How may the dismissed Ombudsperson challenge the parliamentary resolution before the national courts based on violation of the ECHR?

Hypothetical Case No. 13

In an EU Member State, a new Ombudsperson was appointed in a non-transparent manner after a secret parliamentary hearing. After being elected, the Ombudsperson decided to withdraw all the cases related to consumer protection in foreign currency bank loans, which were previously submitted and litigated in favour of consumers by the previous Ombudsperson, from the courts. Moreover, the Ombudsperson pointed out that they will not proceed with motions or petitions submitted by consumers with bank loans in a foreign currency. The Ombudsperson publicly acknowledged that the Court of Justice had developed case law regarding currency bank loans beyond the respect for equality principle and with the violation of the political question doctrine.

Questions and tasks:

1. According to Venice Commission or European Commission reports, Is there a problem with the Rule of Law in the case?
2. Shall the Ombudsperson appear independent according to the EU law? Might the standards provided by the Court of Justice under Article 19 TEU be applied to the non-judiciary authority like Ombudsperson?
3. Suppose the Ombudsperson has joined your case before the Supreme Court and presented an opinion that the court should not apply the recent Court of Justice development. How would

you convince the Supreme Court to refer the matter to the Court of Justice to take a stance regarding the Ombudsperson's interpretation of EU law?

Hypothetical Case No. 14

In an EU Member State, a new President of the Personal Data Protection Office was appointed transparently after a publicly open parliamentary hearing. Immediately after the appointment, the new President publicly pointed out that the Office's priority is to follow the constitutional majority in data protection cases, so it will not intervene in data protection cases against the church. The new President's declaration followed the general provisions of the newly adopted law on the protection of the religious aspects of the constitutional identity of the member state. As a result, the President dismissed all pending data protection cases lodged against the church. One of the NGOs accused the President of a lack of independence and pointed out that according to the binding, the President of the Personal Data Protection Office can be removed for violating public morality. The decision is in the hands of the Prime Minister.

Questions and tasks:

1. Is there a problem with the Rule of Law in the case (use the Venice Commission checklist and European Commission Report)?
2. What minimum standards developed by the ECtHR and the CJEU apply to the President of the Personal Data Protection Office?
3. Shall the President of the Personal Data Protection Office give an appearance of independence according to the EU law? Might the standards provided by the Court of Justice under Article 19 TEU be applied to the non-judiciary authority like the President of the Personal Data Protection Office?
6. Suppose you file a data protection case against the church, and the President of the Personal Data Protection Office dismisses it. Can you challenge the decision in national courts, claiming that the President lacked independence? Can you also raise the issue of the lack of independence of the President before the Court of Justice or the ECtHR as a party?

Hypothetical Case No. 15

In an EU Member State, a new National Officer of Competition and Consumer Protection was appointed in a non-transparent manner after a secret hearing. According to the binding law, the Officer may be discretionarily appointed by the Prime Minister. Still, they may be removed from office before the end of the term only in several situations directly described by the law. One of the situations is the violation of the severe interests of the state, including acting to the detriment of companies where the state is a significant stakeholder. Immediately after the appointment, the new officer started an investigation and lodged several cases against two foreign oil distributing companies, the primary market rivals of the national petrol company. The Officer fined one foreign company. At the same time, one of the newspapers leaked recordings from regular meetings between the new officer and the Prime Minister, where the latter presented foreign oil-distributing companies as a real threat to national interests.

Questions and tasks:

1. Is there a problem with the Rule of Law in the case?

2. What minimum standards the ECtHR and the CJEU developed apply to the National Officer of Competition and Consumer Protection?
3. Shall the National Officer of Competition and Consumer Protection appear independent according to the EU law? Might the standards provided by the Court of Justice under Article 19 TEU be applied to the non-judiciary authority like the National Officer of Competition and Consumer Protection?
4. Suppose your company was fined by the National Officer of Competition and Consumer Protection for joining the cartel. Can you challenge the decision in national courts, claiming that the Officer lacked independence? Can you also raise the issue of the lack of independence of the Officer before the Court of Justice or the ECtHR as a party?

Hypothetical Case No. 16

In an EU Member State, the Prime Minister publicly suggested a desperate need for change in the local media market. According to the Prime Minister, local media (including newspapers) had not sufficiently informed the audience about the threats caused by the growing influence of foreign companies on the national market. The government proposed a new bill, which got stuck in the parliamentary debate on the conformity of the bill with the EU law. In the meantime, the Prime Minister publicly expressed the opinion that the most substantial companies, where the state is the primary stakeholder, should not avoid supporting the most important public interest. According to the Prime Minister, the companies may also care for the local media market. After the statement, the two companies bought most local newspapers in the country. The newly appointed National Officer of Competition and Consumer Protection dismissed charges against the companies, stating that it was not a case of concentration.

Questions and tasks:

1. Is there a problem with the Rule of Law in the case?
2. Should the National Officer of Competition and Consumer Protection consider the protection of freedom of expression and media pluralism when assessing the case? What are the ECHR and Court of Justice standards regarding non-judicial authorities in protecting freedom of expression?
3. Suppose the new Officer was appointed in the same circumstances as in case No. 11. How might it impact the independence assessment?
4. Suppose your company challenges the decision of the new officer in court. How would you convince the Court to refer the case to the Court of Justice for a preliminary ruling?

Hypothetical Case No. 17

The authorities of country X issued a European arrest warrant. However, the country's judiciary system has recently undergone reforms that have raised concerns about the independence of the judiciary. The Venice Commission expressed deep concern over the reforms and suggested that there may have been a violation of judicial independence. Additionally, the reforms justified the logging proceedings under Article 7 TEU. The Court of Justice had just decided the case concerning European arrest warrant and judicial independence. The court has established two criteria that must be met for a warrant to be denied. Firstly, if there are systemic deficiencies in the country's judicial system issuing the warrant, known as the general test. Secondly, if there are specific threats or violations to the right

to a fair trial about the person being surrendered to the issuing member state, known as the individual test, in this case, the authorities of country Y are hesitant to transfer the concerned individuals due to doubts about the potential violation of judicial independence.

Questions and tasks:

1. Is the Venice Commission report and Article 7 TEU proceedings enough to fulfil the general test for denying the warrant (existence of systemic deficiencies)?
2. What could be the relevance of the definition of systemic deficiencies in the conditionality mechanism for the general test denying the warrant?
3. Should the EAW system be suspended entirely concerning countries (like X) having systemic problems with the independence of the judiciary?
4. Is the presumption of mutual trust reversed?
5. Is the two-step test workable? What if the authorities of country Y have evidence that the authorities requesting EAW are not independent, and at the same time, it is hard to provide evidence for systemic deficiencies?
6. Should we recognise judgments from Member States with systemic deficiencies to the independence of the judiciary?

Hypothetical Case No. 18

Country A is one of the poorest Member States of the European Union and country B is one of the wealthiest. Company Invest Inc. is an investment fund with its seat in country B. Its business model is to acquire companies across EU which have financial and other difficulties, to impose certain emergency measures (including cutting costs), and then to sell it on to final investors interested in managing the acquired entity. Company Cars S.A. is a case producer. It was established in 1921 and for many years was considered a crown jewel in the economy of country A. It is partially (30%) owned by the State A and partially by private companies from state A (other 70%). After the 2008 financial crisis, the situation of the Cars S.A. importantly deteriorated. Cars S.A. was unsuccessfully looking for a strategic investor for a number of years. In 2015 the offer from Invest Inc. was accepted and the state A gave its consent to sell Cars S.A. to Invest Inc. The fund bought 95% of shares in the company Cars S.A, while the remaining 5% was retained by the State Investment Fund, a state agency controlling some of the A's crucial economical assets. Invest Inc. promised, inter alia, that after corrective measures are implemented, it will find a strategic investor from the car industry for Cars S.A. Invest Inc. operated Cars S.A. for three years. During that time 90% of the employees of Cars S.A. were laid off and the production of the cars was limited by 80%. In 2018 a preliminary agreement for sale of all the 100% of shares in Cars S.A. was made with company Z, a car producer from Member State C. For many years Z was a direct competitor of Cars S.A. The lay-offs and other actions imposed by Invest Inc created a public outcry in state A. Moreover, it was feared, that unlike hoped, the sale of Cars S.A. to Z was planned only in order to cease entirely operations of Cars S.A. in state A. The public in state A demanded action from the government, arguing that a national treasure is about to be lost.

Meanwhile, in 2016 the elections in state A were won by People's Party, which acquired a large majority in the parliament. The new government immediately embarked on a profound reform of the judicial system. To that effect, the Parliament passed the necessary statutory changes. This included

creating a new Extraordinary Chamber of the Supreme Court. All the 9 judges of the new chamber were nominated by the Prime Minister from the candidates presented by the judges. The only criterion for presenting a given person as a candidate to the Chamber was to have university law degree and 10 supporting votes from judges, advocates or university professors. From 180 candidates 9 were chosen, almost all of them having close ties to the People's Party. The Chamber was vested with various competences, including an extraordinary power to overturn any final decision of the court which was not older than 30 years (an Extraordinary Cassation procedure).

In the second half of 2018, before the final transaction with Z was completed, the State Investment Fund (controlling 5% of the shares in Cars S.A and a party to the preliminary agreement) introduced an action before the common court in State A against Z and Invest Inc to declare the preliminary agreement invalid. The State Investment Fund also asked for a preliminary injunction that the final transaction is stopped. The injunction was granted by the court of first instance and upheld by the Court of Appeals ("the 2019 Injunction"). The preliminary agreement was later found invalid with a final decision rendered by the Civil Chamber of the Supreme Court in 2021 ("the 2021 Declaration of Invalidity").

Furthermore, an action was brought in 2018 by State A and other original owners of the Cars S.A. before a common court in State A claiming damages from Invest Inc for violating the terms of the 2015 agreement. It was argued, inter alia, that Invest Inc misrepresented its intentions and defrauded the sellers and the general public by effectively shutting down production of cars (instead of recovering Cars S.A. from difficulties). The courts in State A (including the Civil Chamber of the Supreme Court) denied the claim. However, in 2021, the General Prosecutor (being the Ministry of Justice) filed the Extraordinary Cassation with the Extraordinary Chamber of the Supreme Court. The Chamber overturned the earlier decision and in 2022 awarded 80million Euros of damages from Invest Inc ("the 2022 Damages Judgment").

State A and other sellers attempt to enforce the 2022 Damages Judgment of the Extraordinary Chamber against Invest Inc in state B under Brussels I bis Regulation (Regulation 1215/2012). Invest Inc filed a motion with a court in state B to oppose the enforcement.

Questions and tasks:

1. Should the 2022 Damages Judgment be recognized in state B? Does the principle of mutual trust and mutual recognition enshrined in the Brussels I bis Regulation warrant free movement of a decision such as the 2022 Damages Judgment of the Extraordinary Chamber? Should Invest Inc be allowed to rely on the public policy exception contained in the Brussels I bis Regulation to oppose the enforcement?
2. Should the two-prong test from the judgment of the Court of Justice of Judgment of 25 July 2018 in LM case be applied to the recognition and enforcement of judgments in civil and commercial matters? How would it be applied here? Are there systemic deficiencies in the judicial system of state A? Was the Invest Inc right to fair trial violated? What do you think the outcome should be?
3. Given the composition of the Extraordinary Chamber and the circumstances under which it was created should its decisions (such as the 2022 Damages Judgment) be considered a "judgment" for the purposes of Article 2(a) and 39 of the Brussels I bis Regulation? Does the

recent jurisprudence of the Court of Justice of the European Union regarding notion of the court under Article 267 TFEU (preliminary questions) affect the analysis?

4. Assume also that the State Investment Fund would attempt to confirm – before the courts in State B – that the 2019 Injunction should be recognized in that State. Should this decision be recognized by courts in State B? Is such an injunction a "judgment" under Article 2(a) of the Brussels I bis Regulation? May the court in State B verify this? Should the circumstances surrounding its issuance (the public pressure on the courts, the changes to judicial system in State A in general) preclude recognition of the 2019 Injunction in State B and other Member States?
5. What about the 2021 Declaration of Invalidity?

Hypothetical Case No. 19

Mario is a LGBTQ activist and a leader. He is a national and resident of State X, one of the new Member States of the EU, where pools show a very skim support for LGBTQ rights, such as partnerships, marriages etc. In the 2018 elections the Parliament was won by a populist and conservative coalition of political parties. The coalition came to power inter alia by launching a heavy media campaign against the LGBTQ people and in particular – the activists. This continued after the elections.

The Public Prosecutor in state X is a constitutional body appointed by the Prime Minister for a 7 years term. However, immediately after the new government was formed in 2018, the law was passed, which shortened the constitutional term of the Public Prosecutor (somewhat half-way through). The constitutional review case is pending in front of the Constitutional Tribunal in that regard but got stuck for procedural reasons. Mr Draco was appointed as the new Public Prosecutor in the late 2018.

Mr Draco publicly declared that "he will not rest until he wipes out all the gay criminals that profanate this saint land of heroes" (meaning State X). He also publicly declared that he directed all the prosecutors to treat crimes committed by LGBTQ activists (such as organizing illegal protests, causing public distress, illegally blocking streets, harassing members of the parliament and profanating religious symbols) with strict vigilance. This led to numerous criminal investigations, some of them ending with criminal punishments being imposed. In a reaction to this strict policy, Marco and the Association for LGBT Rights, of which he is a leader, organized a public campaign against the actions of the Public Prosecutor's office. The campaign involved inter alia making public (Internet, press publications and billboards) the information about Mr Draco's past who started his career as a prison guard. It was alleged that Mr Draco committed degrading treatment of "numerous" detainees. Apparently, Mr Draco was indeed sentenced to a monetary fine in 1993 for abuse of power when serving as a guard in a prison. No other violations, however, were reported or proved. Marco's campaign about Mr Draco conclude with calling the latter "the dirtiest pig in the barn".

In 2020 Mr Draco filed a civil defamation suit against Marco and the Association for LGBT Rights. The court of first instance dismissed the claim but the Court of Appeals overturned the decision in 2023 awarding Mr Draco 1.8 mln Euros in damages to be paid by Marco and the Association for LGBT Rights (jointly and severally liable). While the case was pending before the Court of Appeals the panel of judges deciding the case was changed because two of the judges were disciplinarily transferred by the Ministry of Justice to another court (Ministry has such extraordinary powers under the laws of state

X). The two judges who stepped in as replacement were recently promoted to the Court of Appeals (under the laws of state X such promotion requires a positive opinion of the Ministry of Justice). Marco did not appeal this decision before the Supreme Court.

Meanwhile, in 2022, Marco sold his apartment and other assets in state X and transferred his habitual residence to state Y where he went to live with his long-time partner. The Association that he led was dissolved. Mr Draco attempts to enforce the damages judgement in State Y.

Questions and tasks:

1. Should the damages judgment be recognized in state Y? Should Marco be allowed to rely on the public policy exception contained in the Brussels I bis Regulation to oppose the enforcement? Is it relevant that Marco did not appeal the decision of the Court of Appeals to the Supreme Court in state X.
2. Does the two-prong test from the judgment of the Court of Justice of 25 July 2018 in LM case aids the analysis whether the public policy exception under the Brussels I bis Regulation should be applied?
3. Does the fact that the panel of judges was changed during proceedings – as under circumstances of the case – suggest that there are systemic deficiencies in the judicial system in state X?
4. Should the fact that the Public Prosecutor's constitutional term was interrupted have any bearing on the case where Draco - the new Public Prosecutor – is the plaintiff in a civil case? What should be the influence of the very fact that the plaintiff serves as a public officer?
5. Does the damages judgement against Marco and his Association fall with the notion of SLAPPs?
6. Consider the EU's draft proposal for an Anti-SLAPP directive: would the adoption of the directive affect the enforcement of the damages judgment against Marco?

Civic participation

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Executive summary. The existence of an enabling framework for civil society is one of the key prerequisites for well-functioning, vibrant democracies. Civil society organisations (CSOs) and human rights' defenders (HRDs) are essential to bring life to and protect the values and rights enshrined in the Treaty on European Union and the Charter of Fundamental Rights. [15] The essential role of the civil society in fostering the rule of law, democracy and fundamental rights is universally recognised. However, the EC has noted with worry that CSOs and HRDs in many Member States have increasingly faced challenges linked to the narrowing of civic space, in particular in specific fields of action (activities related to persons in migration, LGBTIQ+ activism, environmental activism). Noted restrictions include the placement of administrative burdens, such as excessive registration requirements, limitations to the rights of peaceful assembly and association, and barriers to public participation such as defective public consultation procedures and SLAPPs.

A separate but related issue is the protection of whistleblowers, which plays an essential role in the detection and prevention of corruption but also to the reporting of fundamental rights violations and other illegal acts perpetrated by public authorities. The transposition of the EU Directive on whistleblower protection has resulted in revised or new legislation in many Member States. However, despite the fact that the transposition period envisaged in Art. 26 of the Directive has elapsed, some member states have not yet transposed it.

Trainers should use this chapter to exemplify both the potential of civil society matters and the rights of its individual members to constitute important subject matter for legal cases, as well as the practical challenges faced by lawyers, as members of the civil society themselves, by virtue of their capacity as members of Bar Associations, their personal *pro bono* work, or their work within CSOs (for example in strategic litigation/legal aid teams).

Linked modules

ToT module 3 – RoL and the civil society

Introductory module 2 – Rule of law and the exercise of fundamental democratic rights

Advanced modules 1 – The rule of law in the EU – challenges and European approaches and **2** – RoL argumentation – drawing on specific themes

Chapter content

- Strategic Lawsuits Against Public Participation (SLAPPs)
- Human rights defenders
- Whistleblower protection

[15] Ibid., 1.

I. Strategic Lawsuits Against Public Participation (SLAPPs)

Over the years, techniques to limit public participation and freedom of expression have been refined, in innovative ways, often taking advantage of legal voids or grey zones between legal norms. One of these techniques became known as 'SLAPPs' (strategic lawsuits against public participation). The term implies an abusive or meritless lawsuit filed against someone solely because they have exercised their political rights or freedom of expression, usually in relation to matters of public interest. The goal of SLAPPs is not to seek justice, but to intimidate, silence and drain the financial and physical resources of the targeted victims. Eventually, SLAPPs dissuade individuals to voice their concerns, reducing pluralistic views and discouraging active civic participation.

Theory has identified five elements that define what constitutes a SLAPP:

a) The person(s) filling the lawsuit and the person(s) targeted by the lawsuit (ratione personae);
b) The subject matter of the lawsuit (ratione materiae);
c) The lack of merit to the lawsuit;
d) The (presumed) intent of the plaintiff; and
e) The (intended) effect/impact of the lawsuit on the victim.

SLAPPs can potentially affect any citizen who speaks out on matters of social relevance. In this sense, SLAPP actions are seen as an instrumentalization of the law that cannot be accepted in democratic states governed by the rule of law. People have to be aware of their fundamental rights and often need help to receive effective judicial protection in case these are breached. Such protection includes, among others, strategic litigation involving rights enshrined in the Charter, such as the right to freedom of expression protected under Article 10 of the ECHR and Article 11 of the CFR, and the right to a fair trial, protected by Article 6 of the ECHR and Article 47 of the CFR. This understanding contributes to a more consistent implementation and application of EU law and to the enforcement of individuals' rights.

SLAPPs pose a direct threat to the interdependent values of democracy, fundamental rights, and the rule of law, the fundamental EU values enshrined in Article 2 TEU. Public understanding of policies and their impact, along with the legitimacy of legislative outcomes, hinges on open, deliberative processes that allow for meaningful public input. Preventing individuals from expressing opinions on public matters, or stifling dissenting views disliked by powerful entities, directly undermines healthy public discourse.

Ensuring a robust exchange of ideas about public issues is crucial in guaranteeing compliance with the law – an essential component of the rule of law. Judicial independence plays a significant role in identifying and potentially stopping SLAPP suits early on. However, distinguishing between justified legal actions and SLAPP suits, which mask themselves under the guise of seeking legal recourse, remains challenging.

European Union Law. Currently, EU law does not provide explicit and specific protection against SLAPPs. Still, there are several important documents adopted by different institutions that frame the EU policy in this area.

In 2020, the European Democracy Action Plan announced a series of concrete initiatives to support and safeguard media freedom and pluralism. One of the initiatives announced was a measure to protect journalists and civil society organisations against SLAPPs. The use of SLAPPs was increasing in the EU, with targets often facing multiple lawsuits simultaneously and in multiple jurisdictions.

On 27 April 2022, the European Commission presented a legislative package consisting of Recommendation (EU) 2022/758 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation') and a Proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation').

The European co-legislators are currently in ongoing negotiations regarding the content of the Directive. However, the Directive proposal is facing some criticism.

The Draft Directive raises significant concerns on various fronts. Firstly, the reduction of the term "cross-border" to a basic definition limits its application, nullifying the Commission's initial emphasis on cross-border importance. The definition of "manifestly unfounded" poses challenges as it sets a low standard, making the main remedy of early dismissal impractical for professionally built cases. The burden of proof in Article 12 appears to have eased, requiring the Claimant only to substantiate the claim, potentially hindering early dismissals. The limitation on appealing early dismissal decisions and the subordination of third-party intervention rights, especially for NGOs, restrict the involvement of external entities in private litigations. Additionally, the shift of cost awards and damages compensation to national standards diminishes the proposed protections. Overall, the last Draft lacks a common minimum standard and relies on member states to adopt a set of procedural principles, raising concerns about consistency and effectiveness

On another note, despite efforts within the EU to regulate cross-border civil and commercial disputes through the Brussels Ia Regulation, criticisms have surfaced regarding the potential exploitation of defamation cases in private international law. While the regulation aimed to discourage 'forum shopping' by granting jurisdiction based on the defendant's domicile, it inadvertently permits plaintiffs in tort, delict, or quasi-delict cases to unilaterally select the forum – either the defendant's domicile or 'the place where the harmful event occurred or may occur' (Article 7(2)).

The Court of Justice of the EU has interpreted this second option broadly, particularly in defamation cases related to online publications. This interpretation allows plaintiffs to initiate legal actions in multiple jurisdictions the published content has reached, seeking damages in various courts, including those where the publisher operates or where the plaintiff holds significant interests (see: C-251/20; C-509/09). This broad interpretation, especially in the digital media era, provides plaintiffs with extensive opportunities to strategically pursue litigation tactics and target defendants in multiple jurisdictions, sometimes different from the defendant's residence, potentially exhausting them through SLAPPs.

Additionally, the absence of defamation cases from the scope of the Rome II Regulation, which governs conflicts of laws in non-contractual obligations within civil and commercial matters, places significant importance on the choice of jurisdiction. This choice not only determines where the case will be heard but also dictates the substantive law applied to it.

The exclusion of defamation from the Rome II Regulation, coupled with the extensive options provided by the Brussels Ia Regulation for selecting the forum in cross-border defamation cases, can foster an environment conducive to forum shopping and libel tourism. This situation enables plaintiffs to opt for jurisdictions with lower standards concerning freedom of the press or freedom of expression. This issue has been highlighted in the staff working document accompanying the Commission's proposal for an anti-SLAPP directive. It emphasizes the exacerbation of the SLAPP problem due to the element of forum shopping, particularly because certain jurisdictions within the EU are perceived to be more favorable to plaintiffs than others.

Consequently, some experts and stakeholders advocate for reforms in both the Rome II and Brussels I a Regulations as a complementary and necessary measure to combat SLAPPs effectively. The European Commission, in its European Democracy Action Plan, has committed to scrutinizing the cross-border dimensions of SLAPPs concerning the 2022 evaluation of Rome II and Brussels Ia.

Further reading

- European Parliament (2023), Strategic lawsuits against public participation (SLAPPs), Strasbourg 2023
- Coalition Against SLAPPs in Europe (2022), CASE: Expert Brief on the European Commission's EU anti-SLAPP Proposal.
- Dr Justin Borg-Barthet (2020), Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union, Center for Private International Law

Other Instruments

The ECtHR has established certain principles in its jurisprudence on defamation cases that are closely related to SLAPPs and could provide guidance on how these cases can be argued:

- **The public interest principle:** publications which contribute to a debate on a matter of public interest or general concern enjoy a higher threshold of protection.

  See: Jersild v. Denmark, Appl. No. 15890/89, judgment of 23 September 1994; Sunday Times v. the United Kingdom, Appl. No. 6538/74, judgment of 26 April 1979; Thorgeir Thorgeirson v. Iceland, Appl. No. 13778/88, judgment of 25 June 1992.; Goodwin v. UK, Appl. No. 17488/90, judgment of 27 March 1996.

- **The higher tolerance for public officials principle:** the limits of acceptable criticism are broader for public figures, especially politicians, state officials and employees.

  See: Lingens v. Austria, Appl. No. 9815/82, judgment of 08 July 1986.

- **The principle of good faith:** when reporting on a matter of public concern, journalists are expected to act in good faith and provide accurate and reliable information in accordance with the ethics of journalism; should these requirements be fulfilled, they should not be subject to disproportionate expectations regarding their journalistic duties:

  See: Bladet Tromsø v. Norway, Appl. No. 21980/93, judgment of 09 July 1998; Thoma v. Luxembourg, Appl. No. 38432/97, judgment of 29 March 2001.

- **The principle of examining statements in context**.

See: Morice v. France, Appl.No. 29369/10, judgment of 24 April 2015; Roland Dumas v. France, Appl.No. 34875/07, judgment of 15 July 2010.

The case of Steel and Morris v. UK [Appl.No. 68416/01, judgment of 15 February 2005] can be classified as a typical SLAPP case where more specific principles were laid down:

- NGOs and activists enjoy similar protection to the members of the press;
- The state has a positive obligation to provide the option of legal aid to defendants who cannot cover the cost of the proceedings, in order to ensure equality of arms;
- Excessive damages can be grounds to consider an interference disproportionate.

The concept of "abuse of process/right" can also be a relevant when it comes to SLAPPs.

Further reading

- Bayer J., Bard P. and Chun Luk N., (2021), Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study, EU-CITIZEN, Academic Network on European Rights, 30 June 2021, p. 28-36, p.36-41.

Case-law

In the absence of anti-SLAPP legislation at European level and the relatively underdeveloped legal framework at national level, the CJEU has yet to deliver relevant case-law.

The absence of clear-cut SLAPP cases does not imply that the problem does not exist. A chilling effect is often created through informal methods, such as corporate lawyers and politicians threatening journalists or civil society with legal action. Not all SLAPP targets dare to face court proceedings; some prefer to settle out of court, avoiding the judicial system and media scrutiny.

A notable example is the Steel and Morris case, referred to above. The case concerned action by McDonald's against two NGO activists. McDonald's, known for its pattern of offering favorable settlements, made similar offers to critical journalists in the past. In this instance, the activists chose to pursue their case to the ECtHR, resulting in a legal battle spanning from 1986 to 2005.

The first time the ECtHR referred to the notion of SLAPP was in 15 March 2022 in its judgement OOO Memo V. Russia.

The case concerned a civil defamation suit brought by a Russian regional state body against a media company. The media company was ordered to publish on its website a retraction to the effect that it had published false statements, tarnishing the plaintiff's business reputation. The ECtHR found that although civil defamation proceedings were open to private or public companies to protect their reputation, this could not be the case for a large, taxpayer-funded, executive body like the plaintiff in this case. It decided that the interference with the media company's right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights was not justified by a

"legitimate aim", as the Russian regional state body could not rely on the "protection of reputation and rights of others" as listed in Article 10 § 2 ECHR.

The ECtHR found that allowing executive bodies to bring defamation proceedings against members of the media places an excessive and disproportionate burden on the media and could have an inevitable chilling effect on the media in the performance of their task of purveyor of information and public watchdog.

OOO Memo V. Russia, Appl. No. 2840/10, judgment of 15 March 2022, para. 45

Studies

Accurate and up to date information about SLAPPs can be found on the website of Coalition against SLAPPs In Europe (CASE). CASE is a coalition of non-governmental organizations from Europe united in recognition of the threat posed to public watchdogs by SLAPPs. The coalition often publishes works and studies on SAPPS across Europe and expert opinions on policy and legal actions against SLAPPs.

Other stakeholders also conducted studies on the effect of SLAPPs in Europe, including the JURI Committee's study where can be found an analysis of legal definitions of SLAPPs, human rights considerations and compatibility with EU legislation.

Most studies demonstrate that SLAPPs are a growing concern in Europe and that they have a significant impact on the functioning of democratic institutions; there is lack of awareness and training among the judiciary on how to prevent and address SLAPPs.

Indicative reading

- (2023) SLAPPs: A Threat to Democracy Continues to Grow. A 2023 Report Update, Coalition Against SLAPPs in Europe, July 2023.
- (2022) Shutting Out Criticism: How SLAPPs Threaten European Democracy. A Report by CASE, Coalition Against SLAPPs in Europe, arch 2022.
- (2022) SLAPPs Against Journalists Against Europe. Media Freedom Rapid Response, Article 19, March 2022.
- Borg-Barthed J., et. al. (2021), The Use of SLAPPs to Silence Journalists, NGOs and Civil Society, European Parliament, June 2021.

From an academic perspective, one of the most comprehensive studies on SLAPPs is *Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A Comparative Study*. This study analyses which legal provisions (civil, criminal, administrative or other) are prone to be misused to initiate SLAPPs, as well as under which conditions such vexatious litigations can have a chilling effect on freedom of expression. The study provides a list of evidence-based recommendations, including on how the EU legislators could address SLAPPs within the European Union's competences.

Further reading

- Bayer J., Bard P. and Chun Luk N., (2021), Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study, EU-CITIZEN, Academic Network on European Rights, 30 June 2021
- Bayer J., Bard P., Chun Luk N, Vosyliute L. (2020), Ad-hoc Request. SLAPP in the EU Context, Academic Network on European Rights, May 2020.

II. Human Rights Defenders

Human rights defenders (HRDs) are those individuals, groups and organs of society who promote and protect universally recognised human rights and fundamental freedoms. HRDs seek the promotion and protection of civil and political rights as well as the promotion, protection and realisation of economic, social and cultural rights. HRDs also promote and protect the rights of members of groups such as indigenous communities. The definition does not include those individuals or groups who commit or propagate violence.

According to the European Commission, HRDs along with civil society organisations are essential in constitutional democratic societies to bring life to and protect the values enshrined in Article 2 of the Treaty on European Union and in the Charter. However, despite the measures taken by some Member States and the EU to protect, support and empower HRDs, they are increasingly facing challenges to various legal, administrative and political barriers.

The European Parliament has also consistently expressed apprehension regarding assaults and threats targeting HRDs and their families globally, condemning the rise in attacks on HRDs' families, communities and lawyers and calling for both the EU and the Member States to integrate violence against HRDs into their crises management policies, provide effective protection responses to HRDs when in need, and step up the provision of temporary protection and shelter for HRDs at risk and their families.

Similarly, the Council of the European Union has suggested actions to foster a safe and enabling environment and to support and protect HRDs, including through the provision of support in Visa procedures and the strengthening of temporary relocation mechanisms.

Currently, EU law does not provide special legal protection to HRDs. Still, many Member States have taken measures to protect such persons when they are at risk. These measures range from comprehensive programmes to receive and accommodate HRDs to more specific measures targeting particular categories of HRDs.

European Union Law

Currently, EU law does not provide explicit and specific protection to HRDs. Still, there are several important documents adopted by different institutions that frame the EU policy in this area.

Support to HRDs is one of the major priorities of the EU's external human rights policy. The EU Guidelines on Human Rights Defenders, adopted in 2008, have confirmed that HRDs are natural and indispensable "allies" in the promotion of human rights and democratisation in their respective countries. Assistance to human rights activists is probably the most visible of the EU's human rights activities, having a direct impact on individuals. Since the adoption of the guidelines, a growing number

of common initiatives within the EU to protect and support HRDs is being reported and HRDs and civil society organisations are increasingly being recognised as key interlocutors of EU missions.

The purpose of the guidelines is to provide practical suggestions to enhance EU action on this issue. The guidelines can be used in contacts with third countries at all levels as well as in multilateral human rights fora, in order to support and strengthen ongoing efforts by the Union to promote and encourage respect for the right to defend human rights. The guidelines also provide for interventions by the Union for HRDs at risk and suggest practical means of supporting and assisting human rights defenders.

In parallel, the European Parliament has also positioned itself as an important actor as regards support to HRDs. The European Parliament's Subcommittee on Human Rights regularly organises hearings and discussions with HRDs in view of adopting reports and resolutions. The 2010 Report on EU policies in favour of human rights defenders ("Hautala Report") took stock of the hitherto implementation of the guidelines and tabled several proposals for a more effective policy towards HRDs.

Other International Instruments

In addition to the EU, several major international organisations have made the protection of HRDs their key priority issuing their own guidelines and/or establishing special monitoring mechanisms to support the work of HRDs.

The **United Nations** has adopted in 1998 a Declaration on Human Rights Defenders. The declaration is based on, consolidates and reflects international law relevant to the promotion, protection and defence of human rights. It sets out the rights and responsibilities of states, HRDs and all actors in society in ensuring a safe and enabling environment for the promotion and protection of human rights and fundamental freedoms. To promote the effective implementation of the declaration, the United Nations Commission on Human Rights has established the mandate of the Special Rapporteur on the situation of HRDs. In addition to promoting the declaration, the Special Rapporteur is mandated to study trends, developments and challenges on the right to promote and protect human rights, recommend effective strategies to better protect HRDs and follow up on these recommendations, seek, receive, examine and respond to information on the situation of HRDs, integrate a gender perspective with particular focus on women HRDs, coordinate with other relevant UN entities, and report annually to the Human Rights Council and the General Assembly. The Special Rapporteur submits two thematic reports each year investigating particular topics or trends in more detail and providing guidance and recommendations to UN Member States, businesses, civil society organisations and other stakeholders. The most recent thematic reports are focused on women HRDs, HRDs working on corruption and migration, death threats and killings of HRDs, long-term detention of HRDs, etc. The Special Rapporteur also conducts country visits and sends communications (formal letters) to governments and other actors raising concerns about alleged violations.

Further reading

- United Nations Special Rapporteur on the Situation of HRDs (2021), Final Warning: Death Threats and Killings of Human Rights Defenders, New York, United Nations, 22 February 2021.
- United Nations Special Rapporteur on the Situation of HRDs (2022), States in Denial: The Long-Term Detention of Human Rights Defenders, New York, United Nations, 14 October 2021.

- United Nations Special Rapporteur on the Situation of HRDs (2022), At the Heart of the Struggle: Human Rights Defenders Working against Corruption, New York, United Nations, 11 March 2022.
- United Nations Special Rapporteur on the Situation of HRDs (2022), Refusing To Turn Away: Human Rights Defenders Working on the Rights of Refugees, Migrant and Asylum-Seekers, New York, United Nations, 13 October 2022.
- United Nations Special Rapporteur on the Situation of HRDs (2023), Pathways to Peace: Women Human Rights Defenders in Conflict, Post-Conflict and Crisis-Affected Settings, New York, United Nations, 12 October 2023.

The **Council of Europe** adopted in 2008 its own Declaration on Council of Europe Action to Improve the Protection of Human Rights Defenders and Promote Their Activities. Support for the work of HRDs, their protection and the development of an enabling environment for their activities lie at the core of the mandate of the Commissioner for Human Rights of the Council of Europe. The Commissioner assists member states in fulfilling their obligations in this regard by providing advice and recommendations. The Commissioner and their Office raise issues related to the working environment of human rights defenders and cases of those who are at risk through dialogue with authorities and publicly, including through the media. They have intervened before the European Court of Human Rights in a number of cases concerning human rights defenders. The Commissioner and their Office maintain regular contact and exchanges with a wide range of human rights defenders, considering them natural partners of the Council of Europe, including in the form of round-tables. After each event, the Commissioner publishes a round-table report highlighting the main issues raised by the participants followed by recommendations on how to overcome the identified challenges.

Further reading

- Council of Europe (2019), Human Rights Defenders in the Council of Europe Area: Current Challenges and Possible Solutions, Strasbourg, Council of Europe, 29 March 2019.
- Council of Europe (2021), European countries should lift the taboo on Afrophobia and start addressing this phenomenon, Strasbourg, Council of Europe, 19 March 2021.
- Council of Europe (2021), Environmental Rights Activism and Advocacy in Europe: Issues, Threats, Opportunities, Strasbourg, Council of Europe, 31 March 2021.
- Council of Europe (2021), Human rights of LGBTI people in Europe: current threats to equal rights, challenges faced by defenders, and the way forward, Strasbourg, Council of Europe, 8 December 2021.
- Council of Europe (2023), Human Rights Defenders in the Council of Europe Area in Times of Crises, Strasbourg, Council of Europe, 23 March 2023.

The **Organisation for Security and Cooperation in Europe** (OSCE) published in 2014 its own Guidelines on the Protection of Human Rights Defenders. The guidelines are based on OSCE commitments and universally recognised human rights standards that participating states have undertaken to adhere to, and are informed by key international instruments relevant to the protection of HRDs. The guidelines do not set new standards or seek to create "special" rights for HRDs but concentrate on the protection of the human rights of those who are at risk as a result of their human rights work. The document defines the general principles that underpin the protection of HRDs and offer specific

recommendations on how to protect the physical integrity, liberty, security, and dignity of HRDs (including protection from threats, attacks and other abuses, protection from judicial harassment, criminalisation, arbitrary arrest and detention, and confronting stigmatisation and marginalisation) and create a safe and enabling environment, conducive to human rights work (freedom of opinion and expression and of information, freedom of peaceful assembly, freedom of association and the right to form, join and participate effectively in NGOs, right to participate in public affairs, freedom of movement and human rights work within and across borders, right to private life, right to access and communicate with international bodies, etc.). The implementation of the guidelines in the first two years following their publication has been assessed by the OSCE Office for Democratic Institutions and Human Rights (ODIHR). The guidelines implementation assessment report provides an overview and analysis of the general trends, challenges and good practices pertaining to the protection of HRDs in the OSCE region, and offers recommendations on how to address identified protection gaps. ODIHR is also monitoring the implementation of the guidelines by conducting country-specific assessments. In 2018 and 2019, as part of the first country-specific assessment cycle, ODIHR visited the Czech Republic, Georgia, Italy, Mongolia and Montenegro to examine the situation of HRDs and identify gaps, challenges and good practices in their protection.

Further reading

- Organisation for Security and Cooperation in Europe (2017), "The Responsibility of States": Protection of Human Rights Defenders in the OSCE Region (2014-2016), Warsaw, OSCE Office for Democratic Institutions and Human Rights, 14 September 2017.
- Organisation for Security and Cooperation in Europe (2021), The Situation of Human Rights Defenders in Selected OSCE Participating States, Warsaw, OSCE Office for Democratic Institutions and Human Rights, 28 July 2021.

Legal Studies

A major research project on the legal recognition and protection of HRDs in national law was implemented in 2014 by the International Service for Human Rights (ISHR). It covered more than forty jurisdictions from all regions and a wide range of legal traditions. The report is divided into four main sections. The first section gives a general overview and presents the key findings regarding the nature and extent of the legal recognition and protection of HRDs at the national level. The second section summarises a range of findings regarding laws of general application which promote and protect the work of HRDs. The third section identifies the types of national laws and policies that operate to hinder or restrict the work of HRDs and which should be reviewed and amended or repealed to ensure that defenders can operate in a safe and enabling environment. The final section sets out key findings and recommendations as to the development, enactment and reform of national laws to ensure that human rights defenders are able to operate in a safe, enabling and conducive legal environment. Based on this research, the ISHR has produced a model law for the recognition and protection of human rights defenders and an interactive map showing the countries where there have been developments in legal instruments (laws, policies, protection mechanisms and guidelines) regarding HRDs.

Further reading

- Lynch, P., Sinclair, M., Kolasińska, M. and Ineichen, M. (2014), From Restriction to Protection: Research Report on the Legal Environment for Human Rights Defenders and the Need for

National Laws to Protect and Promote Their Work, Geneva, International Service for Human Rights, 20 November 2014.

- International Service for Human Rights (2023), Model Law for the Recognition and Protection of Human Rights Defenders, Geneva, International Service for Human Rights, January 2017.
- International Service for Human Rights (2023), Map of States with National Legal Protection for HRDs, Geneva, International Service for Human Rights.

A database of national public policies for the protection of HRDs has been developed and is regularly updated by the international non-profit organisation Protection International. The FOCUS Observatory on Public Policies for the Protection of Human Rights Defenders is an online platform aimed at monitoring, analysing and promoting good practice in policy developments that governments and other state authorities adopt for protecting HRDs and their right to defend human rights on a global level.

Several studies explore the EU's policies intended to facilitate the mobility of HRDs to and within the EU. In 2021, the CEELI Institute published a paper examining the legal and practical barriers that HRDs face when applying for visas to enter the EU. The paper draws on legal research, survey responses from self-identified HRDs, and in-depth interviews with HRDs on their travel and visa application experiences. It provides an overview of the EU visa regime and the challenges faced by HRDs, as well as recommendations for changes that could improve this process in a way that would better meet the needs of these individuals as they fight for human rights in their respective countries. Parallel to the publication of the paper, the CEELI institute released a documentary featuring the real case of a human rights lawyer and his travels to Europe and a selection of case studies describing specific challenges faced by HRDs applying for visas.

Further reading

- Meloni, A., Gaspar, J. and Feruz, A. (2021), Human Rights Defenders in EU Visa Policy: Recommendations for Reform, Prague, CEELI Institute, 25 May 2021
- CEELI Institute (2021), Human Rights Defenders: Advocacy Video, Prague, CEELI Institute, 25 May 2021
- CEELI Institute (2021), HRD Stories: The Challenge of the Schengen Information System: Lack of Transparency, Prague, CEELI Institute, 13 September 2020
- CEELI Institute (2021), HRD Stories: The Challenge of Stigma: Passport Stamped with Refusal Without Explanation, Prague, CEELI Institute, 13 September 2020
- CEELI Institute (2021), HRD Stories: The Challenge of Applying via Visa Centre, Prague, CEELI Institute, 19 October 2020
- CEELI Institute (2021), HRD Stories: The Challenge of Single-Entry Visas for HRDs, Prague, CEELI Institute, 11 November 2020
- CEELI Institute (2021), HRD Stories: The Challenge of Applications Reviewed by Proxy Consulate, Prague, CEELI Institute, 19 December 2020

At the request of the European Parliament, the EU Fundamental Rights Agency (FRA) published a Report on protecting HRDs at risk, outlining how HRDs can enter and stay in the EU when they need

protection. The report explains who human rights defenders are, what rights and responsibilities they have, what risks they face and therefore what kind of relocation needs they may have. It then introduces the role of the EU and EU law regarding human rights defenders and describes existing options facilitating human rights defenders' entry and stay in the EU. It also lists existing practices of human rights defender mobility and relocation in EU Member States and beyond. Finally, it points to concrete ways on how the EU and its Member States could facilitate the entry and stay in the EU of human rights defenders so that they can continue their human rights work in their own countries and communities in the long term.

Further reading

- For a country-by-country overview of the possibilities for human rights defenders to enter EU territory see the country studies commissioned by FRA as background material for comparative analysis for the project 'Update on developments regarding civic space in the EU'.

Protection and Support Mechanisms. At EU level, the main support and protection mechanism for HRDs is ProtectDefenders.eu. The mechanism is led by a consortium of 12 NGOs active in the field of human rights and provides various support services to HRDs, including a permanent and rapid response mechanism to provide urgent assistance and practical support to HRDs in danger, their families, and their work, a programme of temporary relocation for HRDs at risk to relocate inside their country, within their region, or abroad in case of an urgent threat, support for the creation of shelters for HRDs at risk, exchange platform for stakeholders working on temporary relocation for HDRs, training, financial support, accompaniment, and capacity-building to HRDs and local organisations, and others. ProtectDefenders.eu also maintains an index of alerts: a monitoring tool contributing to the mapping of violations committed towards HRDs to illustrate the scale of the crackdown and pressure that they face worldwide.

Further reading

- ProtectDefenders.eu (2023), Practical Support for Defenders at Risk: Urgent Helpdesk.
- ProtectDefenders.eu (2023), The Temporary Relocation Programme.
- ProtectDefenders.eu (2023), Index of Alerts.

Case-law

In the absence of explicit legal provisions for the support and protection of HRDs at EU level, and the relatively underdeveloped legal framework at national level, there is no relevant case-law from the EU Court of Justice.

There was, however, one case in which the protection of human rights defenders was raised as an argument in an independent legal analysis intended to inform the pending proceedings before the Court, although it was not subsequently considered in rendering the judgment. In Case C-821/19 European Commission v. Hungary, the CJEU declared that Hungary had failed to fulfil its obligations under EU law by, inter alia, criminalising in its national law the actions of any person who, in connection with an organising activity, provides assistance in respect of the making or lodging of an application for asylum in its territory, where it can be proved beyond all reasonable doubt that that person was aware that that application could not be accepted under that law.

Neither the European Commission in its application, nor the Advocate General in their opinion made explicit reference to the protection of human rights defenders. This was done by an independent legal analysis, prepared pro bono by leading international law firm Freshfield Bruckhaus Deringer LLP and Robert Kirkness of Thorndon Chambers on behalf of the International Service for Human Rights (Switzerland) and the Legal-Informational Centre for NGOs (Slovenia). Although the two organisations were not officially entitled to intervene in the proceedings and the analysis was, therefore, only recording their position in respect of the case, it includes a detailed analysis concluding that Hungary's legislation criminalising assistance to asylum seekers and "illegal" migrants violates the country's obligation to establish and maintain an enabling environment for human rights defenders. The analysis makes a direct link between the establishment and maintenance of an effective legal framework for asylum seekers and the legal protection of human rights defenders:

> ***The CJEU should therefore be guided by these instruments [the United Nations Declaration on Human Rights Defenders and the EU Guidelines on Human Rights Defenders] in its understanding and interpretation of Member States' obligations under the Asylum Procedures Directive and Reception Conditions Directive, including by making explicit the obligations of Member States to protect and facilitate the work of persons who qualify as "human rights defenders" as a necessary part of a legal framework that relies on the ability of those persons to make certain services available to asylum seekers. A failure to recognise the interrelationship between establishing and maintaining a real and effective legal framework for asylum seekers within the EU and the need to afford legal protection to persons who qualify as human rights defenders would create the risk of some Member States seeking to discharge their obligations through superficial measures that do not make the relevant rights effective in practice. Worse still, in the present case Hungary has introduced domestic laws targeting such persons and their work in an attempt to undermine the effective operation of the legal framework for asylum that they are obliged to establish and maintain as a matter of EU law.***
>
> Observations relating to Case C-821/19 European Commission v. Hungary, International Service for Human Rights and Legal-Informational Centre for NGOs, 25 August 2020

Further, the analysis sets out detailed arguments as to why certain provisions of the law constitute an illegal restriction on human rights defenders' rights to freedom of association, freedom of expression and freedom of movement, concluding that

> *"by imposing limits on and criminalising the activities of NGOs and human rights defenders engaged in asylum support work, Hungary's Asylum Legislation also infringes the rights of asylum seekers"* and that *"by criminalising the activities of defenders, Hungary renders and seeks to render the rights of those defended"*

On the contrary, the ECtHR has dealt with several cases concerning human rights defenders. In some of these cases, the CoE Commissioner for Human Rights has intervened before the Court in execution of its mandate to support the work of HRDs, their protection and the development of an enabling environment.

In the case of Kavala v. Turkey, the applicant, a Turkish businessman and human rights defender, alleged that his arrest and pre-trial detention had not been justified and had been carried out in bad faith, that he was specifically targeted because of his activities as a human rights defender, and that his pre-trial detention and its extension had pursued an ulterior purpose, namely to silence him as an

NGO activist and human-rights defender, to dissuade others from taking part in such activities and to paralyse Turkey's civil society. In its third-party intervention, the Commissioner for Human Rights noted that *"the applicant's arrest, as well as his initial and continued detention, without an indictment for more than 400 days as of the time of writing of the present submission, should be seen against a backdrop of continuously increasing pressure on civil society and human rights defenders in Turkey in recent years"* and that *"the apparent arbitrariness of his continued detention, with no evidence being made public of criminal wrongdoing and no indictment and given the applicant's extensive human rights work and exclusively peaceful activities, had fostered a sense of insecurity and the feeling that the same might happen to any human rights defender"*. In its judgement, the Court held that the applicant's detention constituted violation of Article 18 of the European Convention of Human Rights and that the respondent state was to take all necessary measures to put an end to the applicant's detention and to secure his immediate release. In its reasoning, the Court explicitly noted that it had been *"established beyond reasonable doubt that the measures complained of in the present case pursued an ulterior purpose, contrary to Article 18 of the Convention, namely that of reducing the applicant to silence"* and that *"in view of the charges that were brought against the applicant, it considers that the contested measures were likely to have a dissuasive effect on the work of human-rights defenders"*.

Further reading

- Council of Europe Commissioner for Human Rights (2018), Third party intervention by the Council of Europe Commissioner for Human Rights in the case of Mehmet Osman Kavala v. Turkey (Application No 28749/18), Strasbourg, Council of Europe Commissioner for Human Rights, 20 December 2018

In the case of Huseynov v. Azerbaijan, the applicant, an independent journalist from Azerbaijan and chairman of a local NGO specialising in the protection of journalists' rights, alleged that he had been deprived of his citizenship by way of forced renunciation that had rendered him a stateless person. In its third-party intervention, the Commissioner for Human Rights noted that *"given the background of the applicant as a prominent media freedom activist and the fact that charges were brought against him in 2014 at the same time as against a number of Azerbaijani human rights defenders in relation to their NGO work, the Commissioner considers that the applicant's case provides an important illustration of the shortcomings existing in the area of freedom of expression as well as of the challenges faced by human rights defenders in that country"*. The Commissioner further noted that *"the deprivation of nationality of the applicant should not be viewed in isolation but as part of a broader pattern of intimidation of human rights defenders in Azerbaijan and reprisals against those who cooperate with international institutions"*. In its judgement, the Court held that the applicant's deprivation of nationality constituted violation of Article 8 of the European Convention of Human Rights, and for that the respondent state had to pay him a compensation for non-pecuniary damage.

Further reading

- Council of Europe Commissioner for Human Rights (2018), Third party intervention by the Council of Europe Commissioner for Human Rights in the case of Emin Huseynov v. Azerbaijan (Application No 1/16), Strasbourg, Council of Europe Commissioner for Human Rights, 28 September 2018.

In several cases, including the cases of Jafarov v. Azerbaijan, Mammadli v. Azerbaijan, Aliyev v. Azerbaijan, and Yunusova and Yunusov v. Azerbaijan, the applicants, human rights defenders and civil society activists from Azerbaijan, alleged that their arrest and pre-trial detention had not been based

on a reasonable suspicion and had been carried out for purposes other than those prescribed in the European Convention of Human Rights. In all of these cases, the Commissioner for Human Rights made an intervention as a third party noting that there was *"a clear pattern of repression in Azerbaijan against those expressing dissent or criticism of the authorities"*, which concerns *"particularly human rights defenders, but also journalists, bloggers and other activists, who may face a variety of criminal charges which defy credibility"*. Such charges, according to the Commissioner, are *"largely seen as an attempt to silence the persons concerned and are closely linked to the legitimate exercise by them of their right to freedom of expression"*. In all of the cases, the Court held that the applicants' arrest and detention constituted violation of Article 5 and Article 18 (and in some cases also Article 3, Article 6, Article 8 and Article 13) of the European Convention of Human Rights, and for that the respondent state had to pay them compensation for pecuniary and non-pecuniary damages. In its reasoning, the Court noted that applicants' situations should be viewed against the backdrop of arrests of other notable civil society activists and human-rights defenders who had been detained and charged to a large extent with similar criminal offences, revealing *"reflected a pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of the criminal law in breach of Article 18"*. In some of the cases, the Court also noted that *"the applicants' arrest was accompanied by stigmatising statements made by public officials against the local NGOs and their leaders"*, which *"did not simply concern an alleged breach of domestic legislation on NGOs and grants, but rather had the purpose of delegitimising their work"*.

Case law and further reading

- European Court of Human Rights (2023), Yunusova and Yunusov v. Azerbaijan, No. 68817/14, 16 July 2020.
- Council of Europe Commissioner for Human Rights (2018), Third party intervention by the Council of Europe Commissioner for Human Rights in the case of Leyla Yunusova and Arif Yunusov v. Azerbaijan (Application No 68817/14), Strasbourg, Council of Europe Commissioner for Human Rights, 16 April 2015.
- European Court of Human Rights (2023), Aliyev v. Azerbaijan, No. 68762/14 and No. 71200/14, 20 September 2018.
- Council of Europe Commissioner for Human Rights (2018), Third party intervention by the Council of Europe Commissioner for Human Rights in the case of Intigam Aliyev v. Azerbaijan (Application No 68762/14), Strasbourg, Council of Europe Commissioner for Human Rights, 16 March 2015.
- European Court of Human Rights (2023), Mammadli v. Azerbaijan, No. 47145/14, 19 April 2018.
- Council of Europe Commissioner for Human Rights (2018), Third party intervention by the Council of Europe Commissioner for Human Rights in the case of Anar Mammadli v. Azerbaijan (Application No 47145/14), Strasbourg, Council of Europe Commissioner for Human Rights, 30 March 2015.
- European Court of Human Rights (2023), Jafarov v. Azerbaijan, No. 69981/14, 17 March 2016.
- Council of Europe Commissioner for Human Rights (2018), Third party intervention by the Council of Europe Commissioner for Human Rights in the case of Rasul Jafarov v. Azerbaijan (Application No 69981/14), Strasbourg, Council of Europe Commissioner for Human Rights, 30 March 2015.

In the case of Ecodefence and others v. Russia, 73 Russian NGOs and their directors lodged a total of 61 complaints concerning restrictions on their rights to freedom of expression and association as a

result of their categorisation as "foreign agents" funded by "foreign sources" and engaging in "political activity" according to the Russian Foreign Agents Act adopted in 2012. The act required Russian NGOs, which were deemed to engage in "political activity" and to have been in receipt of "foreign funding", to seek registration as "foreign agents", under the threat of administrative and criminal sanctions, to label their publications as originating from a "foreign agent" organisation, to post information on their activities on the Internet, and to submit to more extensive accounting and reporting requirements. The Russian Ministry of Justice was given the power to put organisations on the register of foreign agents at its own discretion. The application of the Foreign Agents Act has resulted in the imposition of administrative fines, financial expenditure and restrictions on activities, as a result of which many organisations were liquidated for violating the requirements or had to take decisions on self-liquidation because they were unable to pay the fines or in order to avoid new sanctions. In its third-party intervention, the Commissioner for Human Rights noted that it was *"striking that human rights defenders constituted the largest single category of non-commercial organisations registered as foreign agents (44, or 30%)"* and that the *"negative effects of the Foreign Agents Act upon human rights defenders and non-commercial organisations raise questions about the legitimacy of the state's restrictive measures in light of Article 18 of the Convention"*. In its judgement, the Court held that the applicants' rights to freedom of expression and association were restricted in violation of Article 11 of the European Convention of Human Rights, and for that the respondent state had to pay them compensations for non-pecuniary damage. In its reasoning, the Court refers to several legal assessments of the Foreign Agents Act, including vis-à-vis the United Nations Declaration on Human Rights Defenders and the United Nations Human Rights Council's Resolution 22/6 on protecting human rights defenders (21 March 2013).

Further reading

- Council of Europe Commissioner for Human Rights (2017), Third party intervention by the Council of Europe Commissioner for Human Rights in the case of Ecodefence and others v. Russia (Application No 9988/13 and 48 other applications), Strasbourg, Council of Europe Commissioner for Human Rights, 5 July 2017.

In the case of Estemirova v. Russia, the applicant lodged a complaint concerning the abduction and murder of her sister, a well-known Russian human rights activist and board member of a local NGO, and the effectiveness of the ensuing investigation. In its third-party intervention, the Commissioner for Human Rights noted that *"the murder of Natalia Estemirova should not be viewed in isolation but as part of a broader pattern of killings and intimidation of human rights defenders in the North Caucasus and, in particular, the Chechen Republic"*. The Commissioner also noted that *"the Russian authorities have failed to prevent and to react appropriately to the most serious human rights violations against human rights defenders in the North Caucasus region"*, and that *"the spiral of violence against human rights defenders and the stigmatisation of their work have had a serious chilling effect on independent human rights work and have considerably weakened human rights defenders' capacity to act, thereby exerting a broader negative impact on the protection of human rights in the region"*. In its judgement, the Court held that the failure of the Russian authorities to conduct an effective investigation constituted violation of Article 2 of the European Convention of Human Rights, and for that the respondent state had to pay her a compensation for non-pecuniary damage. Although the Court could not discern sufficient elements to establish the presumption of state agents' involvement in the incident, it explicitly acknowledged that

"the circumstances of the case should not be seen in isolation from Natalia Estemirova's professional activity as a human rights defender".

Further reading

- Council of Europe Commissioner for Human Rights (2017), Third party intervention by the Council of Europe Commissioner for Human Rights in the case of Svetlana Khusainovna Estemirova against the Russian Federation (Application No 42705/11), Strasbourg, Council of Europe Commissioner for Human Rights, 14 March 2016.

III. Whistleblower protection

The effectiveness of whistleblowing as an important tool for preventing and exposing abuse, as well as improving transparency in society has long been recognised in many parts of the world. However, many people do not blow the whistle because they do not feel protected and fear retaliation, legal liability and other adverse consequences for themselves and other persons close to or associated with them. A number of recent studies and a range of established good practices have shown that whistleblower protection can encourage reporting and thus facilitate the prevention and detection of wrongdoing, such as corrupt practices, fraud and various violations of the law.

In recent years, a growing number of targeted **policy initiatives** at the international and EU level have called for stronger whistleblower protection.

The **United Nations (UN)** has consistently advocated for the protection of whistleblowers' rights, taking into account the diverse global experience in this area. Article 33 of the UN Convention against Corruption (UNCAC), adopted in 2003, calls on UNCAC signatories to consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment of any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with the Convention.

In its Recommendation CM/Rec(2014)7 on the protection of whistleblowers, the **Council of Europe** encourages member states to have in place a normative, institutional and judicial framework that protects the rights and interests of individuals who, in the context of their work, report or disclose information on threats or harm to the public interest.

In 2016, in its report titled Committing to Effective Whistleblower Protection the Organisation for Economic Co-operation and Development **(OECD)** highlights the importance of whistleblower protection for safeguarding the public interest, to promote a culture of accountability and integrity in both public and private institutions, and to encourage the reporting of wrongdoing, fraud and corruption wherever it occurs. The report analyses the legal frameworks for whistleblower protection in OECD countries and proposes next steps to strengthen effective and comprehensive whistleblower protection laws.

In 2017, the **European Commission** published the report Estimating the economic benefits of whistleblower protection in public procurement. The study estimates the losses in public procurement due to lack of whistleblower protections across the EU as well as the actual potential of a well-functioning whistleblower protection system to prevent misuse of public funds in public procurement that greatly exceeds the costs.

Corruption in the EU is estimated to cost EUR 120 billion per year, which represents approximately 1 percentage of the EU's total GDP. Specifically, in the area of public procurement, the risk of corruption is estimated to cost EUR 5.3 billion annually to the EU. The protection of whistleblowers, who report or disclose information on threats to the public interest that they witnessed during their work, is can contribute to the fight against corruption and to the safeguarding of fundamental rights in the EU.

Estimating the economic benefits of whistleblower protection in public procurement, European Commission, Milieu Ltd., 2017.

In its 2018 Communication for Strengthening Whistleblower Protection at EU level, the European Commission recognises that exposing instances of wrongdoing, e.g., corruption, inside both the public and private sector, is a necessary practice in order to shed light on systemic malfunctions that seriously harm the public interest, erode democracy and citizens' wellbeing. It notes that elements of whistleblower protection have already been introduced in specific EU instruments in some areas, but points out that the whistleblower protection currently available in the EU is fragmented across Member States and uneven across policy areas. The Communication calls for the provision and strengthening the protection of those who speak out since they often risk their career, their livelihood and, in some cases, suffer severe and long-lasting financial, health, reputational and personal repercussions.

In this context, the European Commission has set out a **policy framework** to strengthen whistleblower protection at EU level by proposing a Whistleblower Protection Directive.

Further reading

- Council of Europe (2014), Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers, 30 April 2014.
- Council of Europe (2022), Evaluation report on Recommendation CM/Rec(2014)7 on the protection of whistleblowers. Protection of Whistleblowers, June 2022.
- Council of Europe (2019), Report, The protection of whistleblowers Challenges and opportunities for local and regional government, 3 April 2019.
- International Labor Organization (2020), The Protection of Whistle-blowers in the Public Service Sector, September 2020.
- OECD (201), Report, Committing to Effective Whistleblower Protection, 16 March 2016.
- Office of the Whistleblower Ombuds, Whistleblower Support Organizations and Legal Resources.
- List of academic literature on the topic.

European Union Law. EU law currently provides explicit and specific protection for whistleblowers. The EU Directive on the protection of persons who report breaches of Union law 2019/1937 (Whistleblowing Directive or Directive), effective as of 16 December 2019, institutionalises the protection of whistleblowers within the EU, which can have an important impact for preventing fraud and corruption, countering serious crime, including environmental crime, and promoting sustainable development.

It focuses on the creation of effective, legally protected channels for information handling and introduces minimum standards for the protection from retaliation and legal remedies for persons who report on breaches of EU law and corresponding national legislation in a wide range of key policy areas.

A number of infringements of Union law are included in the **material scope** of the Directive.

(a) breaches that concern the **following areas** (defined by a reference to a list of Union acts set out in the Annex to the Directive):

(i) public procurement;

(ii) financial services, products and markets, and prevention of money laundering and terrorist financing; (iii) product safety and compliance;

(iv) transport safety;

(v) protection of the environment;

(vi) radiation protection and nuclear safety;

(vii) food and feed safety, animal health and welfare; (viii) public health;

(ix) consumer protection

(b) **breaches affecting the financial interests of the Union**;

(c) **breaches relating to the internal market**, including breaches of Union competition and State aid rules, as well as breaches relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.

In parallel, Member States are empowered to extend the scope of protection under national law to areas or actions not covered by the Directive. A number of countries, including Bulgaria, make use of this right.

The Directive requires protection should be granted to **the broadest possible range of categories of persons**, who, irrespective of whether they are Union citizens or third-country nationals, by virtue of their work-related activities, irrespective of the nature of those activities, have privileged access to information on breaches that would be in the public interest to report and who may suffer retaliation if they report them. Its personal scope encompasses at least persons having the status of worker, including civil servants or having self-employed status, shareholders and persons belonging to the administrative, management or supervisory body of an undertaking, including non-executive members, as well as volunteers and paid or unpaid trainees, any persons working under the supervision and direction of contractors, subcontractors and suppliers. It provides that whistleblower protection measures also apply, where appropriate, to: facilitators; third persons who are connected with the reporting persons and who could suffer retaliation in a work-related con- text, such as colleagues or

relatives of the reporting persons; and legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context.

To ensure effective detection and prevention of serious harm to the public interest, the Directive provides **clear definitions** of breaches and information on breaches, internal and external reporting, public disclosure, reporting person, facilitator, work-related context, person concerned, retaliation, follow-up, feedback, competent authority.

For the effective detection and prevention of breaches of Union law, it is vital that the relevant information reaches swiftly those closest to the source of the problem, most able to investigate and with powers to remedy it, where possible.

The Directive obliges the Member States to establish **internal** and **external** reporting channels for whistleblowers working in the public and private sectors, as well as to maintain the confidentiality of the reporting person. It requires many public and private entities to introduce their own internal channels via which potential whistleblowers can report.

Reporting persons are encouraged to first use internal reporting channels and report to their employer, if such channels are available to them and can reasonably be expected to work. For legal entities in the private sector, the obligation to establish internal reporting channels should be commensurate with their size and the level of risk their activities pose to the public interest. **All enterprises having 50 or more workers should be subject to the obligation to establish internal reporting channels, irrespective of the nature of their activities, based on their obligation to collect VAT.** Following an appropriate risk assessment, Member States could also require other enterprises to establish internal reporting channels in specific cases, for instance due to the significant risks that may result from their activities.

The Directive also urges Member States to establish a comprehensive regulatory framework and recommends that all three types of channels (internal, external, and the mechanisms for public disclosure) are interrelated and interactive.

The effective implementation of the EU Whistleblowing Directive relies on the existence of an effective national legal framework and a strong institutional and organisational infrastructure, as well as on a deeper understanding of the fundamental values of the rule of law and democracy, including the right to freedom of expression and information enshrined in Article 11 of the EU Charter of Fundamental Rights.

Further reading

- National Wistleblower Center, The European Union Whistleblower Directive.
- Deloitte, The EU Whistleblower Directive; what does it mean for you? Highlighting legal requirements in a practical manner.
- Abazi V., The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?, Industrial Law Journal, Vol.49(4), p. 640-656, 2020
- European Commission (2022), July Infringements Package: Key Decisions, 15 July 2022.

The transposition process. The Directive has set 17 December 2021 as the deadline for Member States to transpose its provisions into their national legal and institutional systems, i.e., to bring into

force the laws, regulations and administrative provisions necessary to comply with it. However, the majority of Member States (with the exception of Denmark and Sweden) were late in adopting the relevant transposition laws. Many countries, among them Bulgaria and Romania transposed the Directive under the pressure of infringement proceedings initiated by the European Commission in 2022.

The delays in transposition and the incomplete transposition process are indicative of the fact that the practice of whistleblowing has yet to be established and applied by more people when they witness violations in an employment context. Although prior to the Directive, many Member States had a number of legal provisions on this issue, scattered in a number of legal acts or collected in one act, the standards introduced by the Directive set new higher requirements.

Irrespective of the specific date of adoption (most often in 2022 and early 2023), almost all transposing laws have only recently entered into force. Consequently, in a number of Member States, the secondary legislation, internal rules, institutional and organisational infrastructure for reporting and follow-up, as well as protection systems and support measures for whistleblowers are still developing. In addition, many Member States, even among those with previous legislation in this area, lack experience in implementing the standards of the Whistleblowing Directive.

According to the EU Whistleblowing Monitor created by WIN in 2018 to track the transposition of the EU Directive on Whistleblowing across all 27 Member States, and other available sources of information, by August/September 2023, 25 EU Member States have transposed the Whistleblower Directive. Transposition is still pending in only in Estonia and Poland. Some examples on the state of play:

Bulgaria has passed the whistleblowing legislation on 27 January 2023. The law is effective since 4 May 2023, but in respect of private sector employers who have between 50 and 249 workers or employees, it applies from 17 December 2023. The Commission for Personal Data Protection (CPDP) was designated as an external mechanism for receiving and processing reports of violations. The CPDP is authorised to forward the received reports to the competent authority depending on the subject matter of the alert. The competent authorities are listed exhaustively in the law. The Ombudsman is tasked with carrying out periodic audits of CPDP's activities.

Poland has not transposed the Directive yet. In February 2023, the European Commission has decided to refer Poland together with other Member States to the European Court of Justice for failure to transpose and notify national measures for transposing the EU Directive on Whistleblowing.

Romania adopted a new whistleblowing law on 13 December 2022, effective from 22 December 2022 (the previous Public Servants Disclosure Protection Act was adopted in 2004). On 28 March 2023 a new law to amend Romania's whistleblowing framework has been promulgated and entered into force. The law amends the provisions concerning anonymous reporting, which were considered to be too strict. The competent authorities to receive reports on violations of the law include public authorities and institutions, which have been mandated to receive and resolve reports relating to violations of the law, according to their field of competence, as well as the National Integrity Agency or other authorities and public institutions to which the Agency forwards reports for resolution.

The main **objective** after transposing the Directive is to support the correct and adequate implementation of the existing or newly adopted national legislation transposing the Whistleblower Directive and contribute to the creation of an enabling environment for reporting and informing on

breaches of the Union law by: a) awareness raising among public and private actors, legal practitioners and the general public about the reporting channels and the remedies and protection measures against retaliation, b) building the capacity of CSOs, public authorities, legal practitioners and private companies to effectively implement the whistleblower protection rules and procedures, c) conducting analyses and surveys, developing training tools and programmes, and enhancing cooperation between institutions and CSOs, and d) recommending improvements and amendments to the legislative framework.

Further reading

- Integrity Line (2023), WHITE PAPER, Expert Guide: Whistleblowing Laws in the European Union, July 2023.
- Southeast Europe Coalition on Whistleblower Protection (2023), Transposition of the EU 2019/1937 Directive on Whistleblower protection in Southeast Europe: Challenges and lessons learned, 15 July 2023.

State of Play: Challenges and Achievements. With the adoption and transposition of the Directive, the EU and the Member States face a new situation, in which a single legal act at the EU level, transposed into the national legal and institutional systems, is replacing the fragmented and often inconsistent whistleblower protection applied so far. To meet the demands of this new environment, innovative actions are necessary that complement the previous efforts invested in preventing misconduct and violations of laws and encouraging individuals to report their concerns without being afraid of possible retaliation.

In a recent overview Focus areas - Whistleblower protection UNODC states that approximately 70 % of countries that have completed the first cycle of the UNCAC Implementation Review Mechanism have received a recommendation to consider strengthening the implementation of Article 33 of the Convention related to the protection of reporting persons. It summarises that in a large number of countries regardless of the legal frameworks (often inexistent or insufficient), it is the ineffective implementation of whistleblower protection regimes that poses a challenge for all involved stakeholders.

Among the challenges identified, the following are most relevant for EU Member States:

a) **appropriate training and development of guidelines** to ensure that the whistleblower's identity is protected,

b) **collaboration or coordination between relevant agencies**, in particular regulators and law enforcement agencies investigating administrative and criminal offences,

c) **dialogue with other stakeholders** such as businesses, lawyers and civil society organisations.

Along with the common needs and challenges outlined so far in some Member States there is a persisting high level of corruption and rule of law issues. The 2022 Corruption Perceptions Index (CPI) shows that most countries are failing to stop corruption while anti-corruption efforts have stagnated in more than half of countries for more than a decade. The worst performing EU Member States were Bulgaria (43 points), Romania (46 points), Croatia (50 points), Malta (51 points), and Poland (55 points),

especially compared to the scores of most Western European countries ranging between 70 and 90. Transparency International's 2021 study Institutional arrangements for whistleblowing: Challenges and best practices highlights several lessons based on collected evidence. One of the important conclusions is that **protection of whistleblowers against retaliation should not be left to the courts alone, especially where whistleblowers do not have access to legal and financial support**. The report also notes that individual advice to whistleblowers can be provided by CSOs, but the issue of resources needs to be addressed.

The Rule of Law Report 2022 reveal deficiencies in many countries, closely related to the role and protection of whistleblowers.

In order to promote whistleblowing and its potential to prevent or detect wrongdoing, and to contribute to a better and adequate implementation of whistleblower protection measures, the need to strengthen the institutional infrastructure for internal and external reporting, based on public-private partnership and using the capacity of the civil sector at national and EU level is particularly important.

Useful resources may be found at:

- National Whistleblower Center (NWC)
- European Center for Whistleblower Rights (ECWR)
- Advocacy and Legal Advice Centres (ALACs)
- Whistleblowing International Network (WIN)
- The international coalition of anti-corruption groups and whistleblower advocates

Case-law. The ECtHR has established case law on the protection of whistleblowers under Article 10 ECHR. In one of the relevant cases concerning the time prior to the introduction of the EU Directive, the *Guja v Moldova* (2008) case, the Court developed six criteria to establish under which conditions protection under Article 10 ECHR (freedom of expression) is granted to whistle-blowers. The 'Guja criteria' are:

a) whether the whistle-blower had **alternative channels** to report before going public;

b) whether the disclosed information was in the **public interest**;

c) whether a preliminary check about the **authenticity of the disclosed information** was made;

d) what **damage** was caused to the employer as a result of the disclosure;

e) whether the whistle-blower acted in **good faith**;

f) whether the penalty imposed was **proportional**.

On another, more recent case, Halet v. Luxembourg [14 February 2023], the Grand Chamber stated that Halet should indeed be protected under Article 10 of the ECHR because he reported on facts (i.e. tax matters) that were of public interest. In particular, the Court clarified how to strike a balance between the public interest in the disclosed information and the detrimental effects deriving from the disclosure. This ruling significantly deviated from previous judgements of both the Luxembourg Court ECtHR's Third Chamber.

Further reading

- E.R. Boot, The feasibility of a public interest defence for whistleblowing, Law and Philosophy, May 2019.

Case law

- Gawlik v Liechtenstein (2021) and Bucur and Toma v Romania (2013) (, Heinisch v Germany (2011) (employee in the private sector), Wojczuk v Poland (2021).

The EU Directive and the ECtHR case law. The Whistleblower Directive refers to the fact that whistleblowers make use of their right to freedom of expression, which is recognised in both Article 11 of the EU Charter of Fundamental Rights and Article 10 of the Council of Europe Convention on Human Rights and Fundamental Freedom (ECHR).

There are, however, a number of clear differences between the Directive and the ECtHR case law. First and foremost, **the EU Directive only protects those reporting breaches of EU law**. According to the ECtHR, the whistleblower is usually expected to report first within the organisation (while the directive refrains from requiring a preferential use of internal reporting). Moreover, the Court applies the 'good faith' and 'public interest' tests, none of which is required by the directive. The ECtHR also establishes a link between the protection of whistleblowers and the harm caused to the employer, while no such link is foreseen in the directive.

The Directive does not offer protection to whistleblowers reporting on issues related to national security. These whistleblowers can only be protected under Article 10 ECHR. Some experts argue that ECtHR case law is applicable to any type of grievance suffered by the whistleblower, as long as there is a public interest in revealing the information, meaning that the key criterion here is that the information must be of concern to the public. By contrast, the Directive is not consistent with the element of public interest.

It remains to be seen whether and to what extent the jurisprudence of the ECtHR will develop in a direction that will take into account the EU directive or not.

Further reading

- Kafteranis D., Brockhaus R. (2020), Time to Reconsider Strsbourg's Whistleblower Case Law, 21 September 2020.
- Vandekerckhove W. (2016), Freedom of Expression as the "Broken Promise" of Whistleblower Protection, Revue des droits de l'homme, June 2016.

Rule of law elements in EU anti-discrimination legislation

Author: Giota Masouridou, Lawyer

Executive summary. The aim of this section is to increase knowledge of the rule of law standards derived from various sources, in particular in the field of EU and international law aimed at combating discrimination. A successful example of the progressive development of protection against discrimination for all persons can be seen in the interplay between international, regional and supranational forms of cooperation between States, international organisations and the EU and international Courts and the CJEU.

The aim is to explain the interplay between rule of law and fundamental individual rights and how lawyers can enrich their plight for safeguarding human rights as a rule of law issue. In particular, the principles of equality and non-discrimination are part of the foundations of the rule of law. Human rights, the rule of law and democracy are interlinked and mutually reinforcing and belong to the universal and indivisible core values and principles of the Member States of the European Union. The advancement of the rule of law at the national, EU and international levels is essential for sustained and inclusive economic growth, sustainable development and the full realization of all human rights and fundamental freedoms, all of which in turn reinforce the rule of law.

Lawyers from different countries are further exposed to a variety of examples and areas of law in order to become aware of the available EU and international law provisions and mechanisms to prevent, correct and sanction abuses of the rule of law in their struggle for justice.

Trainers should approach this chapter as an opportunity to illustrate how fundamental rights, non-discrimination and equality before the law may be argued on a RoL basis, based on concrete examples from jurisprudence on the relevant EU legislation. This provides the opportunity to explore these principles in a practical manner, instead of an overly theoretical, declaratory way. The topics at hand are suitable for all levels of knowledge. Material prepared based on the content of this chapter should focuses on cases related to the groups identified as most vulnerable in the consortium countries (migrants and refugees, women, LGBTIQ+ persons).

Linked modules

ToT module 3 – RoL and the civil society

Introductory module 2 – Rule of law and the exercise of fundamental democratic rights

Advanced modules 1 – The rule of law in the EU – challenges and European approaches and **2** – RoL argumentation – drawing on specific themes

Chapter content

I. The Council of Europe anti-discrimination framework

The principle of non-discrimination is enshrined in a number of Council of Europe treaties.

The prohibition of discrimination is established in Article 14 of the ECHR, which guarantees equal treatment in the enjoyment of the other rights set out in the Convention.

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 2000 and came into force since 01/04/2005 after 10 Ratifications. The Protocol is yet to be ratified by all EU Member States. Its innovation is that it expands the scope of the prohibition of discrimination to equal treatment in the enjoyment of any right, including rights under national law.

The European Social Charter contains in its Article E, an explicit prohibition of discrimination, introducing a horizontal clause covering grounds such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health association with a national minority, birth or 'other status'. The Additional Protocol to the ESC provides for a system of collective complaints. It enables non-governmental organisations (NGOs) that enjoy participatory status with the Council of Europe to lodge collective complaints against a state that ratified it for non-compliance with the ESC.

Protection against discrimination is also provided in the following conventions; In the Framework Convention for the Protection of National Minorities, the Convention on Action against Trafficking in Human Beings and the Convention on Access to Official Documents. The Protocol to the Convention on Cybercrime also calls for protection against discrimination. Furthermore, the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) condemns all forms of discrimination against women. The Convention on Human Rights and Biomedicine prohibits any form of discrimination against a person on the grounds of his or her genetic heritage.

The European Commission against Racism and Intolerance (ECRI), a human rights body of the Council of Europe, monitors problems of racism, xenophobia, antisemitism, intolerance and racial discrimination.

II. The EU anti-discrimination framework

The prohibition of discrimination on the basis of nationality is a fundamental principle laid out in the Treaty on the Functioning of the EU (Articles 18 and 45 of the TFEU) and the CFR. In accordance with the latter, discrimination on grounds of nationality shall be prohibited within the scope of application of the Treaties and without prejudice to any of their specific provisions. Special EU anti-discrimination legislation was originally limited to a provision prohibiting discrimination based on sex in employment. With subsequent revisions of the treaties, human dignity, freedom, democracy, equality, the rule of law and respect for human rights became the Union's founding values, embedded in its treaties and mainstreamed into all its policies and programmes.

According to Article 2 of the TEU, the non-discrimination principle is one of the fundamental values of the Union. Article 10 of the TFEU requires the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, when defining and implementing its policies and activities.

When the Amsterdam Treaty entered into force in 1999, the EU gained the ability to take action to combat discrimination on a wide range of grounds. This competence led to the introduction of new equality directives, as well as the revision of the existing provisions on sex equality. There is now a considerable body of anti-discrimination law in the EU. Directive 2000/43/EC against discrimination on grounds of race and ethnic origin; Diretive 2000/78/EC against discrimination at work on grounds of religion or belief, disability, age or sexual orientation; Directive 2006/54/EC equal treatment for men and women in matters of employment and occupation; Directive 2004/113/EC equal treatment for men and women in the access to and supply of goods and services; Directive Proposal (COM(2008)462) against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace.

Chapter 3 of the EU Charter of fundamental rights is dedicated to equality. The Charter bans "*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*" (art. 21). This chapter also contains provisions on Equality before the law (Article 20); Cultural, religious and linguistic diversity (Article 22), Equality between women and men (Article 23); The rights of the child (Article 24); The rights of the elderly (Article 25); Integration of persons with disabilities (Article 26).

III. The relationship between EU and International law

All EU Member States are party to the following UN human rights treaties, all of which contain a prohibition of discrimination: The International Covenant on Civil and Political Rights (ICCPR); The International Covenant on Economic, Social and Cultural Rights (ICESCR); The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); The Convention against Torture and the Convention on the Rights of the Child (CRC).

EU legislation, including the Equality Directives, refers to various international treaties, including CEDAW, ICCPR, ICESCR, ICERD. References to UN treaties can also be found in the jurisprudence of the ECtHR. The ECtHR has emphasised that the ECHR cannot be interpreted in a vacuum, but must be interpreted in accordance with the general principles of international law. Account must be taken of all the relevant rules of international law applicable to the relations between the parties, in particular those relating to the international protection of human rights. [Harroudj v. France, no. 43631/09, para. 42, Khamtokhu and Aksenchik v. Russia, nos. 60367/08 and 961/11, concerning CEDAW; Nachova and Others v. Bulgaria, nos. 43577/98 and 43579/98, concerning ICERD].

The 2006 Convention on the Rights of Persons with Disabilities (CRPD) is the first UN-level human rights treaty open to regional integration organisations and was ratified by the EU in December 2010. In 2015, the Committee on the Rights of Persons with Disabilities conducted its first review of how the EU has implemented its obligations. In its Concluding Observations, the Committee expressed concern that EU directives, the Racial Equality Directive (2000/43), the Goods and Services Directive (2004/113) and the Gender Equality Directive (Recast) (2006/54), failed to explicitly prohibit discrimination on the basis of disability and to provide reasonable accommodation for persons with disabilities in the areas of social protection, health care, rehabilitation, education and the provision of goods and services, such as housing, transport and insurance. It recommended that the EU extend

protection against discrimination to people with disabilities by adopting the proposed horizontal directive on equal treatment.

The CRPD contains an extensive list of rights for persons with disabilities, aimed at ensuring equality in the enjoyment of their rights, and imposes a number of obligations on the State to take positive measures. According to Article 216(2) TFEU, international agreements concluded by the EU are binding on the Union and the Member States and form part of Union law. As the EU is a party to the CRPD, EU institutions and Member States must comply with the Convention when applying EU law. In addition, individual Member States have acceded to the CRPD in their own right, which directly imposes obligations on them. The CRPD has become a point of reference for the interpretation of both EU and ECtHR law relating to discrimination on the grounds of disability [CJEU, C-312/11, European Commission v. Italian Republic; CJEU, C-363/12, Z. v. Italian Republic]. A Government Department and The Board of Management of a Community School; C-356/12, Wolfgang Glatzel v. Freistaat Bayern; C-395/15, Mohamed Daouidi v. Bootes Plus SL and others; C-406/15, Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol].

In 2013, the CJEU applied the definition in line with the concept of 'disability' used in the United Nations Convention on the Rights of Persons with Disabilities. The ECJ stated that "Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with the Convention". [CJEU, Joined Cases C-335/11 and C-337/11, HK Danmark on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening on behalf of Pro Display A/S].

The principles of equality and non-discrimination are part of the foundations of the rule of law.

The UN General Assembly in its resolution A/RES/66/102 recognised that:

- the rule of law equally applies to all States, and international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions (par. 2);
- all persons, institutions and entities, public and private, including the States themselves, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law (par. 2);
- human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations) (par. 5);
- the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law [..]" (par. 7);
- States and international organizations, including the United Nations and its principal organs, commit to the principle of good governance and an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid (par. 12);

- the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice (par. 13);
- the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights is essential to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid (par. 14).

It follows that the international human rights legal framework includes international instruments to combat specific forms of discrimination, including discrimination against indigenous peoples, migrants, minorities, persons with disabilities, women, racial and religious discrimination or discrimination based on sexual orientation and gender identity. Member States also recognised the importance of ensuring that women enjoy the full benefits of the rule of law on the basis of equality between men and women. Member States committed to using the law to uphold their equal rights and ensure their full and equal participation, including in institutions of governance and the judiciary, and recommitted themselves to establishing appropriate legal and legislative frameworks to prevent and address all forms of discrimination and violence against women and to ensure their empowerment and full access to justice. UN Women is committed to advancing these issues by assisting the UN system in formulating policies, global standards and norms, providing technical and financial support to Member States, and forging effective partnerships with civil society. The Declaration notes the importance of the rule of law for the protection of children's rights, including legal protection from discrimination, violence, abuse and exploitation, ensuring the best interests of the child in all actions, and reaffirms its commitment to the full implementation of children's rights.

In parallel, UN committees issue general recommendations on combating discrimination and seek to contribute to the strengthening of democracy, the rule of law, and peace and security among communities, peoples and States. One such example is the General recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials published by the UN Committee on the Elimination of Racial Discrimination.

Further reading

- For a comprehensive flow chart on the procedures for redress in the event of a breach of the principle of non-discrimination see, European Commission EU CHARTER OF FUNDAMENTAL RIGHTS When does it apply and where to go in case of violation?
- UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the European Union
- UN Committee on the Elimination of Racial Discrimination General recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials
- EU Fundamentar Rights Agency Handbook on European non-discrimination law.

Comparative review of the application of the EU Charter in the consortium MS

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Executive summary. This chapter picks up from the previous one and offers a variety of resources and concrete examples on the application of fundamental rights, as enshrined in the CFR, in the consortium countries. The resources provide access to the results of previous research regarding this issue and enable a quick evaluation of the state of play in the selected countries.

Trainers can use the resources available in this chapter to:

- indicate the general climate in the respective Member States towards the application of the Charter;
- compare national experiences with the application of the Charter;
- highlight opportunities to be explored and exploited in the application of the Charter;
- reinforce the utility of the EU Charter in domestic litigation;
- highlight challenges with the application of the Charter;
- indicate conflict areas between national law and the requirements of the EU Charter.

The different extracts can be inserted into .ppt slides, used directly from the handbook on a shared screen, or be handed out in advance to training participants.

Linked modules

ToT module 3 – RoL and the civil society

Introductory module 2 – Rule of law and the exercise of fundamental democratic rights

Advanced modules 1 – The rule of law in the EU – challenges and European approaches and **2** – RoL argumentation – drawing on specific themes

Chapter content

Application of the CFR in Bulgaria

General

[There is an ongoing ambiguity of the constitutional status, from a national perspective, of EU law and of the Charter. The Bulgarian Constitution does not contain explicit rules governing the hierarchy between the Constitution and EU law, including the Charter. According to the KS, the acts of primary EU law constitute international treaties in the meaning of Article 5(4) of the Constitution. Pursuant to the latter provision, the international treaties that are ratified, promulgated and entered into force in Bulgaria are part of the domestic law of the land. Any such treaty takes precedence over any conflicting 'domestic legislation',[16] but not over the Constitution.]

Published in: Kornezov, A.: Bulgaria: Rays of Light in a Cloudy Sky. In: Michal, Bobek; Jeremias, Adams-Prassl (eds.) *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing (2020).

Scope of Application

[… [T]here still seems to be widespread confusion or disregard for the scope of application of the Charter. It is unclear whether this is due to a deliberate choice to apply the Charter regardless of Article 51, in order to achieve a given outcome, or simply to unawareness of the limits to its scope of application. Lately, however, national courts might have finally started to take notice more frequently of Article 51, which seems to be due mostly to the several decisions of the Court of Justice dismissing a number of Bulgarian preliminary references for lack of a link with EU law, which have highlighted the problem and have thus drawn the attention to Article 51. Other than that, however, there is no trace in the case-law of in-depth analyses or controversies concerning the exact meaning of 'implementing Union law' within the meaning of Article 51.]

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[In a decision of 1 June 2016 (Case No. 8412/2015), the Supreme Administrative Court declared: "The determination and proclamation of affiliations of a person to state security bodies and the intelligence services of the Bulgarian National Army does not fall under any of the powers of the Union, determined by the TFEU. In this case the Bulgarian state and courts should not apply the provisions of the Charter, because EU law does not apply to those societal relations."]

Published in: The EU Charter of Fundamental Rights in Bulgaria. FRA – European Union Agency for Fundamental Rights, 2019. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-charter-in-bulgaria_en.pdf.

[There is no trace in the case-law of Article 53 of the Charter ever having been applied or discussed in the jurisprudence. The only occurrence that has been identified is a preliminary reference in the area of asylum law.[17] By contrast, legal scholarship has made an attempt to identify a list of rights whose level of protection under the Charter and the Constitution may be different,[18] but the matter has not

[16] Judgment no 3 of 5 July 2004 in Case no 3/2004 and no 3 of 21 March 2012 in Case no 12/2011.
[17] Case C-528/11 Halaf EU:C:2013:342. The Court of Justice did not deal with Art 53 in its judgment.
[18] A Kornezov, 'Protection of Fundamental Rights Post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights and National Constitutions – National Report

yet been discussed in the case-law. There is also no differentiation in the case-law, constitutional or otherwise, between the status of the Charter and other EU primary law.]

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[… [W]hile in quantitative terms, citations of the Charter appear ever more frequently in the case-law, these are often formal, declaratory and an adjunct to other human rights instruments, rather than a free-standing legal consideration. The complexity surrounding its scope of application and the judges' longer experience and better acquaintance with the ECHR seem to make the latter more present in the case-law. Nevertheless, some important structural changes with lasting effect have been achieved through the case-law, relying, in particular, on the Charter. Sensitive cases with high social resonance have also been addressed, and some solved, on the basis of the Charter.]

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[Among the other articles of the Charter which have been cited numerous times, Article 45 of the Charter should be mentioned. A national provision making it possible to impose a ban on Bulgarian citizens from leaving the country on the ground, for instance, of a failure to reimburse a privately owned debt, of a criminal conviction handed down in another country or of failure to pay a tax liability, generated an important amount of case-law, in which Article 45 was cited in order to assess the proportionality of the bans. The matter was ultimately brought to the Court of Justice in three separate preliminary references,[19] and to the KS.[20] Consequently, the law was amended. It is also noteworthy that national courts have on numerous occasions relied on Article 41 in order to impose on the national administrative authority the obligations stemming from that article. The national courts would generally justify their reliance on Article 41 of the Charter by reference to Article 51 thereof. In other words, they would argue that, since the measure at issue falls within the scope of EU law, Article 41 could therefore be applied vis-a-vis the national administrative body in question.[21] On many occasions, the challenged act was annulled on the basis (alone or in conjunction with other provisions) of a breach of the obligation to give reasons or the right to be heard enshrined in Article 41 of the Charter. National courts have paid no attention to the actual wording of Article 41, which mentions only the 'institutions, bodies, offices and agencies of the Union'. The explanation for this, intuitively, could be that the standards of sound administration laid down in Article 41 of the Charter and the case-law of the Union courts are considered to be higher or more visible than those stemming from national law. In any event, this line of case-law seems to have ushered in higher requirements for the national administrative bodies.]

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for the Republic of Bulgaria (August 1, 2012)' in J Laffranque (ed), Reports of the XXV FIDE Congress Tallinn 2012 (Talinn, Tartu University Press 2012).

[19] Judgments of Sofia City Administrative Court after preliminary references in Cases C-430/10 Gaydarov EU:C:2011:749; C-434/10 Aladzhov EU:C:2011:750; C-249/11 Byankov EU:C:2012:608.

[20] Case no 2/2011 (n 20).

[21] Case no 8386/2017 (n 54); Case no 1078/14 (56); Case no 630/2011.

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[The Bulgarian Constitutional Court used the Charter's provision on the freedom to choose an occupation in a case in 2011, and argued that disproportionate restrictions on the freedom to exercise a profession are inadmissible. This ruling was again referenced in a debate of the National Assembly concerning the employment status of former collaborators of state security services. In 2014, the Bulgarian Commission for Protection against Discrimination also referred to Article 15. The case concerned a former police officer's complaint, alleging discrimination on the ground of age. The commission found that Ministry of Interior employees in a particular age group (over 41 years old) were disproportionately affected; and declared the order that terminated the complainant's contract an act of indirect discrimination on the ground of "age".]

Published in: Kornezov, A.: Bulgaria: Rays of Light in a Cloudy Sky. In: Michal, Bobek; Jeremias, Adams-Prassl (eds.) *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing (2020).

[In 2017, the Supreme Administrative Court (Case 10383/2015) was the last-instance court in litigation concerning a teacher who had refused to allow a pupil with a disability to join a school excursion – an alleged violation of the Protection against Discrimination Act. The Supreme Administrative Court confirmed the lower court's decision and rejected the teacher's appeal. To reinforce its argument, the court referred to various Charter rights, including Article 1 (human dignity), Article 24 (rights of the child) and Article 26 (integration of persons with disabilities).]

Published in: Kornezov, A.: Bulgaria: Rays of Light in a Cloudy Sky. In: Michal, Bobek; Jeremias, Adams-Prassl (eds.) *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing (2020).

Application of the CFR in Greece

General

[The Greek constitution does not include a direct reference to the EU Charter or to the European Convention on Human Rights. … However, pursuant to its Article 28 (1), when ratified, international treaties have an effect superior to ordinary legislation, but not to the constitution itself.]

Published in: The EU Charter of Fundamental Rights in Romania. FRA – European Union Agency for Fundamental Rights, 2019

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-charter-in-greece_en.pdf

[The Greek Constitution does not include any direct reference to the Charter of Fundamental Rights (henceforth: «the Charter») or to any other international law instrument protecting fundamental rights. It does however include a provision (Article 28 par. 1) on the legal effect and force of international treaties within the Greek legal order: When ratified, such treaties have effect superior to ordinary legislation, but not superior to the Constitution. The same Article governs the relationship of the Greek legal order with EU law. In particular, paragraphs 2 and 3 of Article 28 allow for limitations on the exercise of state sovereignty and for the delegation of Greek state mandates to supranational

organizations, after a decision by a special majority of the Greek Parliament, on condition that this serves an important national interest and that it does not run contrary to human rights, to the democratic foundations of the Constitution and to the principles of equality and mutuality. Besides, the interpretative declaration under Article 28 stipulates that this Article shall be the constitutional foundation for the participation of Greece in the EU1. However, an explicit reference to the relationship of the Constitution with the EU law…is lacking…]

Published in: Stratilatis & Papastylianos: The Charter of Fundamental Rights as Apprehended by Judges in Europe: Greece. In L. Burgorgue-Larsen (dir.), La Charte des Droits Fondamentaux saisie par les juges en Europe / The Charter of Fundamental Rights as apprehended by judges in Europe, Cahiers Européens No 10, Pedone, Paris, 2017, p. 381-423.

Scope of application

[…Greek courts seem to be generally aware of the existence of the applicability threshold of Article 51 par. 1 of the Charter. Even in cases in which the examination of a complaint under the substantial provisions of the Charter is not combined with a direct reference to Article 51 par. 1 itself, the phrasing of the relevant part of the judgment and/or references to earlier case-law, in which a reference to Article 51 par. 1 has been made, and/or references to the relevant case-law of the CJEU reveal that such awareness exists.[22] Nevertheless, it is not at all certain whether Greek courts take in all cases seriously the aforementioned interpretative intricacies and different applicability scenarios under Article 51 par. 1 of the Charter. One may also retain doubts as to whether Greek courts have adequate knowledge of the evolving jurisprudence of the CJEU in this respect. The characteristic brevity of judicial reasoning in the judgments of Greek courts does not allow us to reach perfectly sound conclusions with regard to the background understanding of Greek judges.]

Published in: Stratilatis & Papastylianos: The Charter of Fundamental Rights as Apprehended by Judges in Europe: Greece. In L. Burgorgue-Larsen (dir.), La Charte des Droits Fondamentaux saisie par les juges en Europe / The Charter of Fundamental Rights as apprehended by judges in Europe, Cahiers Européens No 10, Pedone, Paris, 2017, p. 381-423.

[… [E]xample of a case in which the examination of the applicability issue under Article 51 par. 1 could have been more thorough is StE (4th Section) 2004/2012, which concerned a legislative provision (Article 1 par. 4 of Law 1963/1991) providing for the revocation of the license of pharmacists who have reached the age of seventy years –thus, this provision forced seventy years old pharmacists into retirement. The applicant appealed to Article 21 par. 1 of the Charter, which prohibits discrimination based on age, but the Court dismissed such appeal to the Charter, first by noticing that the relevant administrative act, which revoked the license of the applicant, had been issued on 10.9.2009, hence two and a half months before the entry into force of the Lisbon Treaty (such reasoning can be taken as a sign of excessive formalism on part of the Court when using the Charter); then by mentioning that neither the Directive 2005/36/EC on the recognition of personal qualifications (to which the applicant had appealed) nor the general principles of EU law, such as the prohibition of discrimination and freedom of establishment under Articles 45 and 49 TFEU respectively, are applicable to the case at hand, the latter on the grounds that the case does not include the appropriate connecting factor with EU law…]

[22] See e.g. StE (Plenary) 238/2015, §§3ι-39; 239/2015, §§ 26, 31; 3007/2015, §§1ι-18; 3177/2014, §11; ACA Piraeus 33332/2013, §10.

Published in: Stratilatis & Papastylianos: The Charter of Fundamental Rights as Apprehended by Judges in Europe: Greece. In L. Burgorgue-Larsen (dir.), La Charte des Droits Fondamentaux saisie par les juges en Europe / The Charter of Fundamental Rights as apprehended by judges in Europe, Cahiers Européens No 10, Pedone, Paris, 2017, p. 381-423.

[A conclusion which may be derived from the above analysis is that the Charter, having easily been integrated into the formal processes of judicial review in Greece, but not having developed its full potential as a substantial point of reference in all cases falling within the scope of application of EU law, has since now played a significant role in the field of cross-border application of the ne bis in idem principle, and it has also been developing as an important point of reference in cases which relate to certain aspects of EU social law. As we saw above, the Charter has also been used in certain high profile cases before StE in relevance with measures which were taken in the context of the financial crisis and of the adjustment programme that the Greek state had to follow under Memoranda of Understanding (MoU) which were concluded in accordance with EU Council Decisions and in consultation with EU institutions. A reversal of the Pringle and of the Sindicato dos Bancários do Norte jurisprudence of the CJEU, refusing to trace an appropriate applicability link with EU law under Article 51(1) of the Charter in cases concerning legislative measures which were taken in the context of adjustment programme MoUs, could of course dramatically increase the role of the Charter in countries such as Greece, whose social and economic policies has been –and will most probably continue for a long time to be– determined by MoU stipulations rather than by the political choices of the national government and legislature.]

Published in: Stratilatis & Papastylianos: The Charter of Fundamental Rights as Apprehended by Judges in Europe: Greece. In L. Burgorgue-Larsen (dir.), La Charte des Droits Fondamentaux saisie par les juges en Europe / The Charter of Fundamental Rights as apprehended by judges in Europe, Cahiers Européens No 10, Pedone, Paris, 2017, p. 381-423.

Rights guaranteed by the Charter

[In a case (1741/2015) decided in 2015, the Council of State annulled a decision of the Administrative Court, stating that an administrative fine imposed for smuggling petrol does not violate the right not to be tried or punished twice in criminal proceedings for the same criminal offence if the accused company was acquitted by the penal courts. The court held that Article 50 of the Charter does not preclude a Member State from imposing a combination of tax penalties and criminal penalties for the same acts of noncompliance with declaration obligations relating to VAT rules.]

Published in: The EU Charter of Fundamental Rights in Romania. FRA – European Union Agency for Fundamental Rights, 2019. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-charter-in-greece_en.pdf

Application of the CFR in Hungary

General

[The Hungarian Constitution, called the Fundamental Law of Hungary ('the Fundamental Law'), was adopted on 25 April 2011 and entered into force on 1 January 2012.[23] It does not include any direct reference to the Charter of Fundamental Rights ('the Charter') or to any other international law instrument protecting fundamental rights. However, the Fundamental Law contains two separate articles on the law of the European Union (Article E), on the one hand, and on international law, on the other hand (Article Q). While Article E is of primary relevance in assessing the Charter's legal status in the Hungarian constitutional order, Article Q might theoretically also have a role to play.]

Published in: Berkes & Jakab & Sonnevend: Hungary: A Half-Hearted Look at the Charter. In: Michal, Bobek; Jeremias, Adams-Prassl (eds.) *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing (2020).

[Annex n° 2 of the Act n° CLXVIII of 2007 on the promulgation of the Lisbon Treaty modifying the Treaty on the European Union and the Treaty establishing the European Community contains the official Hungarian version of the Charter of Fundamental Rights and the Explanation attached thereto. In accordance with the provisions of Article 6, Paragraph 2 of the Lisbon Treaty, the above Act – published in the Hungarian Official Journal on the 22nd of December 2007 – defined the date of its entry into force via reference to the entry into effect of the Lisbon Treaty. Thus, the provisions of the Charter of Fundamental Rights entered into force on the 1st of December 2009 and became applicable from that date in Hungary. Due to the full and integrated transposition of the Charter into our national law, Hungarian public authorities and courts are directly bound by its regulation.]

Published in: Osztovits: '*Questionnaire on the Charter of Fundamental Rights. Hungarian Legal Report*', www.aca-europe.eu/colloquia/2012/Hungary.pdf, question no 14.

Scope of Application

[Hungarian courts are not willing to examine of their own motion whether or not the criteria of Article 51 are fulfilled, and where there is uncertainty that is not clarified by the party invoking the Charter, they prefer to find that it does not apply. It is submitted that this case-law might exclude the application of the Charter even in cases where, through a creative analysis of whether there exists a sufficient link between the national measures at hand and EU law for the purposes of Article 51(1), the criteria for the application of the Charter would be fulfilled.]

Published in: Berkes & Jakab & Sonnevend: Hungary: A Half-Hearted Look at the Charter. In: Michal, Bobek; Jeremias, Adams-Prassl (eds.) *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing (2020).

[In the early case-law in 2010–2012, court decisions showed relative uncertainty as to the mate-rial scope of the Charter, and especially as to the notion of 'implementation of EU law'. In some cases, the courts held the Charter applicable, without duly examining its scope. For example, the regional court of Nyíregyháza presumed that the Charter applied in case no 6.K.21.583/2010/6 (2010), related to fraud under Law no CXXVII of 2003 on excise taxes and special regulations on the marketing of excise

[23] The Fundamental Law of Hungary, Magyar Közlöny (Official Journal of Hungary) 25 April 2011, no 43, 10656–682. For an evaluation of the Fundamental Law, see P Sonnevend, A Jakab and L Csink, 'The Constitution as an Instrument of Everyday Party Politics – The Basic Law of Hungary' in A von Bogdandy and P Sonnevend (eds), Constitutional Crisis in the European Constitutional Area; Theory, Law and Politics in Hungary and Romania (München, CH Beck, 2015) 33 et seq.

products.[24] Without addressing the question of the Charter's applicability, the court engaged in an analysis on the merits of the proportionality of the objective criminal liability provided for by that law under Articles 17 and 52 of the Charter, concluding finally that the right to property and the proportionality of its limitations do not apply to sanctions for fraud related to excise taxes since they do not deprive the sanctioned person of lawfully acquired property. The court should have at least pointed out in respect of the Charter, as recognised at the end of the judgment in respect of the Convention on a common transit procedure,[25] that Member States have kept their competence to regulate sanctions for crimes and infractions of the excise tax regime. Thus, it could have spared the analysis of the Charter's substantive provisions by concluding that the domestic provisions at issue did not implement any EU act.]

Published in: Berkes & Jakab & Sonnevend: Hungary: A Half-Hearted Look at the Charter. In: Michal, Bobek; Jeremias, Adams-Prassl (eds.) *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing (2020).

[… [S]ome other courts did meticulously examine the applicability of the Charter and adopted a very broad interpretation of Article 51. The administrative and labour court of Szeged held in cases nos 2.M.393/2012/4 (2012), 2.M.394/2012/4 (2012) and 2.M.391/2012/13 (2013) that domestic laws regulating labour and specific labour relations such as the civil service do implement EU law to the extent that they implement anti-discrimination directives such as Council Directive 2000/78/ EC establishing a general framework for equal treatment in employment and occupation.[26] Consequently, the court held that the Charter was applicable and considered the unjustified dismissal of civil servants to be contrary to Article 30 of the Charter. Citing the Court of Justice's Simmenthal and Factortame cases[27] and the principle of effet utile, the court set aside the domestic provision concerned in favour of the primacy of EU law. However, as pioneering as it may be, the reasoning of the court did not further specify in what sense the regulation of unjustified dismissal of civil servants concerned anti-discrimination and what prohibited ground of discrimination was at stake in the case. On appeal against those three judgments, the regional court of Szeged confirmed in 2013 the first-instance judgments, establishing the violation of the Charter, without examining the Charter's scope, and referring merely to the direct effect of the European Union's primary norms.[28] Compared to the developed reasoning of the first-instance court, the regional court should have devoted at least a short examination to this question.

On the subject of the unjustified dismissal of civil servants, the administrative and labour court of Budapest-Capital has developed case-law that is contrary to the above-mentioned broad interpretation of the Szeged courts: in its decision no 36.M.5367/2010/13 (2011), it held that the challenged act, the law governing the terms and conditions of civil servants, did not implement EU law.[29] The court accepted the respondent's argument that while the European Union has competence in the area of social policy under Articles 151 and 153 TFEU, it has not adopted any act on minimum

[24] Szabolcs-Szatmár-Bereg Megyei Bíróság, 6.K.21.583/2010/6, 16 November 2010.
[25] Convention on a Common transit procedure [1987] OJ L226/2.
[26] Szegedi Munkaügyi Bíróság, 2.M.393/2012/4, 25 October 2012; 2.M.394/2012/4, 25 October 2012; 2.M.391/2012/13, 4 April 2013.
[27] Case C-106/77 Simmenthal EU:C:1978:49; Case C-213/89 Factortame and Others EU:C:1990:257.
[28] Szegedi Törvényszék, 2.Mf.22.377/2012/2, 5 March 2013; 2.Mf.22.378/2012/4, 5 March 2013; 2.Mf.20.729/2013/3, 11 June 2013.
[29] Fővárosi Munkaügyi Bíróság, 36.M.5367/2010/13, 27 May 2011.

requirements in the matter of the protection of employees in the case of dismissal. Without any concrete and binding EU act, Article 30 of the Charter cannot be directly invoked in itself by individuals before the domestic courts. The court cited the European Commission's 2010 Report on the Application of the EU Charter of Fundamental Rights, according to which Member States implement EU law 'when they are applying EU regulations or decisions or implementing EU directives'.[30] This decision was confirmed by the regional court of Budapest-Capital in later judgments.[31] The conclusion corresponds to the narrow, Wachauf-type construction of the term 'implement', as opposed to the broader, 'within the scope' interpretation of the same term in the Court of Justice's Åkerberg Fransson-type jurisprudence. However, more dangerous wording was used in a judgment where the administrative and labour court of Budapest-Capital concluded, while quoting only Article 52(2) and not Article 51 of the Charter, that 'the Charter is not a community act which could be directly invoked before courts of Member States'.[32] This superficial conclusion, which other courts fortunately did not follow, could have led to inconsistent case-law.]

Published in: Berkes & Jakab & Sonnevend: Hungary: A Half-Hearted Look at the Charter. In: Michal, Bobek; Jeremias, Adams-Prassl (eds.) *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing (2020).

[… [T]he Constitutional Court … considers the Charter as domestic law and not as international law, and because of its lack of competence in that regard, it consistently refuses to examine the compatibility of any domestic law with EU law and thus with the Charter.[33] It follows that the Constitutional Court has rarely examined the Charter's scope of application ratione materiae. In some exceptional cases, the Constitutional Court either confirmed the wording of Article 51(1) of the Charter regarding the obligation of Member States to apply it while implementing EU law[34] or went further, and confirmed that a judicial act, namely the Supreme Court's interpretative statement on the lapse of the enforceability of criminal sanctions of community service or penalty, did not fall 'within the scope of European Union law' in the sense of the Åkerberg Fransson judgment.[35] Given the limitation on the EU's competence in the area of the approximation of criminal laws of the Member States, the Constitutional Court's ruling was quite clear. In other cases, the appeal of the petitioner to the Charter was obviously groundless and this may be the reason why the Constitutional Court did not analyse the notion of 'implementation': for example, the Constitutional Court held that the Charter did not apply in a case that was clearly unrelated to EU law, which concerned the registration of land conversion in relation to a property.[36] However, it is submitted that because of the importance of the Constitutional Court's case-law for the uniform application of domestic law, the examination of Article 51(1) of the Charter could at least be more thorough in cases where the petitioner invokes one or more provisions of the Charter. To sum up, the only difference between the Constitutional Court and ordinary courts is that, unlike ordinary courts, the Constitutional Court does not examine the compatibility of any domestic law with the Charter, but on the merits, a single decision indicates that

[30] European Commission, 2010 Report on the Application of the EU Charter of Fundamental Rights COM(2011) 160/7.
[31] Fővárosi Törvényszék, 51.Mf.634735/2012/4, 12 September 2012.
[32] Fővárosi Munkaügyi Bíróság, 24. M. 1858/ 2011/ 18, 19 June 2012.
[33] eg CC decisions no 368/D/2010, 25 October 2011, dispositive part; 29/2011 (IV 7), 5 April 2011, part III/5; 571/D/2010, 4 October 2011, dispositive part; 8/2011 (II 18), 15 February 2011, dispositive part.
[34] CC decision no 143/2010 (VII 14), 12 July 2010, part IV/2.5.
[35] CC decision no 16/2014 (V 22), part V/2.2.2.
[36] CC decision no 3140/2013 (VII 2), part 5.

there is no divergence from the broad interpretation of Article 51(1) of the Charter in the Åkerberg Fransson judgment.]

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Rights guaranteed

[Articles 47 (right to an effective remedy and to a fair trial) and 17 (right to property) were the most often invoked, mainly in the above-mentioned consumer loan contract cases, followed by Article 30 (protection in the event of unjustified dismissal) in the civil servants' unjustified dismissal cases. Similarly, in these two enormous categories of action, Articles 21 (non-discrimination) and 38 (consumer protection) were equally invoked by the petitioners, but have not been applied by the courts.

In conclusion, ordinary courts used the Charter as a principal legal basis for assessing the compatibility of domestic acts with EU law in the two types of recurring cases, the unjustified dismissal cases of civil servants and the consumer loan contract cases. In other cases, courts used the Charter as a point of reference for the interpretation of provisions of national legislation not necessarily falling within the scope of application of EU law. Further, claimants have sometimes tried to rely on the Charter in order to seek protection where national constitutional guarantees failed. The courts have not been completely reluctant to engage in this, but have exercised significant self-restraint in the most contentious cases.]

Published in: Berkes & Jakab & Sonnevend: Hungary: A Half-Hearted Look at the Charter. In: Michal, Bobek; Jeremias, Adams-Prassl (eds.) *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing (2020).

[In 2016, the Constitutional Court (3143/2015 (VII. 24.) AB) of Hungary concluded – in line with its earlier case law – that it does not have a mandate to review whether legislation has, in terms of form and content, been adopted in line with the law of the European Union. The petitioner in the case – a bank – had argued that Act No. XXXVIII of 2014 violated the right to property (Article 17) and the right to a fair trial (Article 47) as laid down in the EU Charter. The Act repealed the exchange rate gap clauses and set a fixed rate. It introduced a statutory presumption of unfairness for unilateral amendment option clauses, which allow financial institutions to increase their interest rates, costs, and fees; and prescribed the procedure through which financial institutions could rebut the presumption. The Constitutional Court did not use the Charter when assessing the legality of Act No. XXXVIII. Instead, it concluded on the basis of national constitutional law protecting property that the Act does not lead to a direct violation of the right to property.

In a 2017 case (17.Pf.21.307/2016/6), a Regional Court of Appeal dealt with the question of whether the alleged violation of the right to a fair procedure and the right to good administration in itself can constitute a violation of personality rights, if this led to the plaintiff not receiving the disability pension to which he was entitled. If this were the case, the question remained whether the authorities were violating the applicant's rights by not delivering a decision within a reasonable time. The court stated that the right to a fair administrative procedure, as enshrined in the Fundamental Law of Hungary, is modelled on the equivalent Charter right (Article 41). It found that this right was not violated by the

delay and also held that the mere violation of procedural rights does not amount to the violation of personality rights.]

Published in: The EU Charter of Fundamental Rights in Hungary. FRA – European Union Agency for Fundamental Rights, 2019. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-charter-in-hungary_en.pdf

[In Hungary, the application of Article 47 of the EU Charter is expected to gain further importance as it may represent the final guarantee of judicial protection under law. The majority of the relevant Hungarian case law falls within the domain of administrative law. This can be explained by the fact that EU law's coverage is wider in administrative law than in criminal law, and in this area Hungarian courts, especially individual administrative judges, generally seem more prepared to apply EU legal provisions than in other judicial divisions. Hungarian courts, which in general have been comparatively active users of the preliminary ruling procedure, submitted references regarding the interpretation of Article 47 in legal areas where they had been heavily invested in the application of substantive EU law (e.g., VAT fraud), and/or were confronted with evident incompatibilities between domestic legislation and legal practice and the applicable EU legal requirements (e.g., asylum law). The Constitutional Court has never relied on Article 47. Instead, it applies its Hungarian counterpart, Article XXVIII of the Fundamental Law, which regulates essentially identical fundamental rights.]

Published in: M. Varju & M. Papp, 'The Application of Article 47 of the EU Charter by Hungarian Courts' REALaw.blog, https://realaw.blog/?p=2538

Application of the CFR in Poland

General

[The general pattern as to how the Charter is referred to is somewhat analogous to the way in which the ECHR appears as a text of reference in the case-law.[37] A reference to the Charter might appear in a judgment in one (or more) of the following ways: (1) as an argument of the parties with no reaction from the court; (2) as an argument of the parties dismissed by the court; (3) as an argument of the parties resulting in the court applying the Charter; or (4) ex officio, ie where the courts apply the Charter of their own motion. If the Charter is applied, there are several ways in which it might be used. The Charter might serve as an ornament – a decoration and not an operative argument – or it might serve as an additional argument in order to interpret[38] or disregard, as the case may be, the relevant provisions of Polish law. The identified references to the Charter by the Constitutional Tribunal vary significantly when compared with those of the administrative and common courts. It seems, however, that the Supreme Court was even less active in using the Charter until three years ago. That position appears to have reversed during the years 2015–2018. While the Constitutional Tribunal's interest in

[37] cf A Paprocka, 'Wpływ orzecznictwa ETPCz na rozumienie konstytucyjnych praw i wolności w Polce – kilka uwag
na marginesie orzecznictwa Trybunału Konstytucyjnego' in M Zubik (ed), XV lat obowiązywania Konstytucji z 1997
r. Księga jubileuszowa dedykowana Zdzisławowi Jaroszowi (Wydawnictwo Sejmowe, 2012) 87.

[38] eg judgment of Sąd Rejonowy Wrocław Śródmieście of 18 December 2017, X P 489/17, or judgment of the Supreme Court of 12 July 2017, II PK 199/16.

the Charter has diminished, the Supreme Court has started to perceive it as a separate and important instrument to ensure that Poland complies with its international obligations.]

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[The Charter is, according to Article 6(1) TEU, part of EU primary law (Article 6(1) states that the Charter 'shall have the same legal value as the Treaties'). Because of this provision, the Charter should be regarded as a piece of international law.[39] According to Article 87 of the Constitution,[40] international agreements ratified by the Sejm (the lower chamber of the Polish parliament) are a binding source of law. According to Article 91 of the Constitution, such agreements form part of the internal legal order and prevail over statutes. If a statute cannot be reconciled with an international agreement, that agreement enjoys priority over it. According to the same article of the Constitution, international agreements ratified by the Sejm are directly applicable.[41] By virtue of the reference to the Charter in an international agreement (the Treaty on the European Union), the Charter itself is usually treated as an inter-national agreement. There are, however, some examples of opportunistic arguments excluding such an interpretation.[42]]

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[…[I]t should be noted that the scope of protection guaranteed by the Charter is generally consistent with that provided for in the Constitution. Some rights are not explicitly provided, for example the right to human integrity (Article 3 of the Charter) or the prohibition of slavery (Article 5 of the Charter). However, they are still applicable in Poland, because they have been interpreted from the Constitution by the Constitutional Court, or as standards binding under international agreements.[43] An interesting example of the law provided for in the Charter and not included in the Constitution is the right to good

[39] Wróbel 'Wprowadzenie' in Wróbel (n 7) 6; A Wyrozumska 'Znaczenie prawne zmiany statusu Karty Praw Podstawowych Unii Europejskiej w Traktacie Lizbońskim oraz Protokołu Polsko-Brytyjskiego' (2008) 2 Przegląd Sejmowy 34.

[40] Constitution of the Republic of Poland of 2 April 1997 (Dz U 2001, No 78, Item 483; Dz U 2006, No 28, Item 319; Dz U 2009, No 200, Item 1471 and No 114, Item 946).

[41] The provisions of the Charter should therefore be directly applicable, if they fulfil the technical requirements of such applicability. They can always, like all other provisions of EU law, be a source of inspiration for interpretation of the Polish provisions: E Łętowska 'Między Scyllą a Charybdą – sędzia polski między Strasburgiem i Luksemburgiem' (2005) 1 Europejski Przegląd Sądowy 5, citing the judgment of the Constitutional Tribunal of 18 October 2004, P 8/04.

[42] cf for instance the position of Sejm in the proceedings in front of the Constitutional Tribunal in Case P 19/14, where the Sejm claimed that the Charter is not an international agreement.

[43] WRÓBLEWSKI, M.: The legal value and implementation of the Charter of Fundamental Rights in Poland. In PALMISANO, G. (ed.): Making the EU Charter of Fundamental Rights a Living Instrument, Rome: Brill Publisher, 2014, pp. 324–325; BODNAR, A.: The Charter of Fundamental Rights: the diverse legal nature of the Charter's provisions and its effect on individuals, courts and legislators, In BARCZ, J. (ed.): Fundamental Rights Protection in the European Union, Warszawa: C.H. Beck, 2009, p. 164. More about relations between the Charter and Polish Constitution: WIERUSZEWSKI, R.: Provisions of the Charter of Fundamental Rights in the light of the 1997 Constitution of RP and international agreements which are binding upon Poland. In BARCZ J. (ed.), Fundamental Rights Protection …, pp. 145–167.

administration (Article 41 of the Charter).[44] The Constitution in Article 7 provides that public authority bodies operate on the basis and within the limits of the law, however, such an approach is interpreted rather as a principle (of legalism) and not a subjective right, which significantly limits the possibility of reference to Article 7 by individuals.[45] Probably this lack of right to good administration in the Constitution contributes to the fact that Article 41 is one of the Charter's provisions most frequently referred to in Polish courts.]

Published in: Kastelik-Smaza: The application of the Charter of Fundamental Rights of the EU in Poland, January 2019 AUC IURIDICA 2018(4):101-112.

Scope of application

[It is apparent from Article 1 of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom that that protocol does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), the Charter must be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in Article 1 of the protocol. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.

In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to its field of application and is not intended to exempt the Republic of Poland or the United Kingdom from the duty to comply with the provisions of the Charter, or to prevent a court of one of those Member States from ensuring compliance with those provisions.]

Joined cases C-411/10 and C-493/10. N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform. ECLI:EU:C:2011:865

[The courts rarely discuss the question whether or not, in the situation at hand, Poland is 'implementing Union law' within the meaning of Article 51(1) of the Charter and the case is therefore within the scope of EU law. One such discussion appears in a judgment of the Supreme Court of 2016[46] where that court excluded the possibility of directly applying the provisions of the Charter in cases having a purely internal character.[47] It explained that in order for the Charter provisions to be applicable, the case must involve the application of other provisions of EU law than just the provisions of the Charter itself. The Court stated that the applicant should have explained, at least to some extent, why rationae materiae the Charter should be applied. For this, the assessment of the scope of application of Article 51(1) of

[44] PYZIAK-SZFNICKA, M.: Karta Praw Podstawowych UE w orzecznictwie Trybunału Konstytucyjnego. "Europejski Przegląd Sądowy". Warszawa: Wolters Kluwer, 2016, nr 8, pp. 21–22.
[45] According to CC case law, the principle expressed in Article 7 of the Constitution is not the basis of freedom or subjective rights, which excludes the indication of this provision as a standard for a constitutional complaint, see e.g. judgment of CC of 8 July 2002, SK 41/01, OTK-A 2002/4/51.
[46] Judgment of the Supreme Court of 16 March 2016, IV CSK 270/15. The applicant invoked for the first time before the Supreme Court Art 21(1), 25 and 26 of the Charter.
[47] That notion itself is not clear, cf S Iglesias Sánchez 'Purely Internal Situations and the Limits of EU law: A Consolidated Case Law or a Notion to Be Abandoned?' (2018) 14(1) European Constitutional Law Review 7.

the Charter is necessary. The Supreme Court referred to cases C-617/10 Akerberg Fransson[48] and C-206/13 Siragusa,[49] stating that the provisions of the Charter are not to be applied autono-mously. Their application is always conditional upon the application of other provisions of EU law (different from the Charter). Those provisions are applied only if there is a link with EU law, which means that the matter in question involves the application of EU law. If the facts of the case are such that there is no EU law element, the case is a purely internal situation and the Charter cannot be applied. The Charter can, however, always serve as an interpretative aid for the interpretation of provisions of Polish national law, even in purely internal situations. According to the Supreme Court, in the case in question, there was no link with EU law, but the principle of non-discrimination based on age enshrined in the Charter should nonetheless provide interpretative inspiration as a general principle of law. The Supreme Court[50] has also taken into account the Polish–British Protocol and its possible impact on the interpretation of Article 51(1) of the Charter, stating that since the judgment of 21 December 2011, the potential limitation to the application of the Charter in Poland has been undermined, and because of this Article 30 of the Charter should at least serve as an interpretative aid for the interpretation of both Polish and European law. It is interesting to note that this article falls within Title IV of the protocol, which, due to the position of the United Kingdom, was not to have any direct effect in the UK (and in Poland as a country that joined the protocol). But Poland has also stated in parallel, in Declaration no 62,[51] that

> having regard to the tradition of the social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter.]

Published in: Kowalik-Bańczyk: Poland – The Charter of Fundamental Rights as a Last Resort? In: Michal, Bobek; Jeremias, Adams-Prassl (eds.) *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing (2020).

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[In a case from September 2018, the Supreme Court[52] invoked Article 15 of the Charter in order to develop a broader interpretation of the notion of the freedom to work. The Supreme Court stated that this provision contains a definition of the freedom to work that differs slightly from the definitions contained in provisions of Polish law, so an overall general definition should be drawn from all those provisions. Thus, the freedom to work should consist of a free choice of employer, the freedom to resign from being employed and the freedom to undertake additional employment. It also implies a prohibition on forcing anyone to under-take work. The reasons of an employee who has resigned from his position do not affect the freedom to resign from employment.[53] The Supreme Court was of the

[48] Case C-617/10 Åkerberg Fransson EU:2013:105.
[49] Case C-206/13 Siracusa EU:C:2014:126.
[50] Judgment of the Supreme Court of 12 July 2017, II PK 199/16.
[51] Declaration no 62 by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom.
[52] Judgment of Supreme Court of 13 September 2018, II PK 141/17; similarly also earlier, judgment of the Supreme Court of 23 May 2014, II PK 273/13.
[53] This reasoning as far as the interpretation of the freedom to work in Art 15 is concerned was taken from an earlier judgment of the Supreme Court of 2014 in which reference was made to Art 15 of the Charter – judgment of Supreme Court of 23 May 2014, II PK 273/13

opinion that the fact of introducing, even with the consent of the employee, an additional sanction in the form of a pecuniary penalty for breach of a non-compete clause after the end of the employment conflicts with the principle of labour law that is the freedom to choose work, which under EU law also means the freedom to resign from work.]

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[In April 2017, the court decided on a case concerning search results on Google relating to a businessman. An article with the inflammatory title 'Very poor criminal' was behind a pay wall, so the content – which verified the actual role of the businessman, namely in breaking up a criminal group – was available only to subscribers. Building on the case law of the CJEU – and thereby indirectly also the Charter – the judgment included a 'right to be delisted' from the search results of a search engine, if a particular search result violates, for example, a person's privacy. The court ordered Google to pay PLN 10,000 (EUR 2,500) compensation to the individual. The case is pending before the Supreme Court.]

Published in: The EU Charter of Fundamental Rights in Poland. FRA – European Union Agency for Fundamental Rights, 2019. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-charter-in-poland_en.pdf

[The most recent preliminary ruling given by the Court of Justice in response to a Polish question, which concerned the freedom to conduct a business contained in Article 16 of the Charter, is the judgment of 20 December 2017 in Polkomtel.[54] The Supreme Court expressed doubts as to the powers of a regulatory authority to impose price controls on a telecoms opera-tor having significant market power in order to ensure the cost orientation of prices. The Court of Justice referred to Article 16 of the Charter to interpret this type of obligation. It stated that Articles 8(4) and 13(3) of Directive 2002/19/EC, read in conjunction with Article 16 of the Charter, must be interpreted as meaning that a national regulatory authority may require an operator, designated as having significant market power on a specific market and under an obligation in regard to cost orientation of prices, to set its prices annually on the basis of the most up-to-date data and to submit those prices to it for verification together with justification before they become applicable, provided that such obligations are based on the nature of the problem identified, are proportionate and are justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), which is for the referring court to verify.]

Published in: Kowalik-Bańczyk: Poland – The Charter of Fundamental Rights as a Last Resort? In: Michal, Bobek; Jeremias, Adams-Prassl (eds.) *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing (2020).

[A provision that is particularly prominent in the jurisprudence of the administrative courts is Article 41 of the Charter, in proceedings where the parties claim that Polish administrative authorities are in breach of that provision.[55] In a sense, by this attempt to apply Article 41, the Polish courts disregard

[54] Case C-277/16 Polkomtel EU:C:2017:989.
[55] Judgment of the Warsaw Administrative Court of 9 September 2014, VII SA/Wa 694/14; judgment of Gdańsk Administrative Court of 3 September 2014, I SA/Gd 229/14; judgment of Lublin Administrative Court of 21

the letter of that provision, which provides that the right to good administration should be applied to EU authorities, and not to the national authorities.[56] Use is made of Article 41 of the Charter with reference to general principles: either the rule-of-law principle or the principle to act within a reasonable time. The principle of the rule of law, and the related right to good administration, was invoked by the Supreme Administrative Court in 2013,[57] where it was used to address a problem of administrative decisions not being delivered on time to their addressees. The Supreme Administrative Court referred to Article 41 in concluding that the delivery of decisions within a reasonable time and by deadlines forms part of the basic procedural standards without which the rule of law cannot be protected.[58] Some courts refer to Article 41 as a subsidiary argument to demonstrate an infringement of the obligation to act within a reasonable time. The Supreme Administrative Court has stated that the fact of forcing an applicant to continue administrative proceedings that began in 1994 breached any confidence in the actions of public authorities and constituted a violation of, inter alia, Article 41 of the Charter.[59]]

Published in: Kowalik-Bańczyk: Poland – The Charter of Fundamental Rights as a Last Resort? In: Michal, Bobek; Jeremias, Adams-Prassl (eds.) *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing (2020).

[Reference in the case C-403/16 El Hassani, made by the Polish Supreme Administrative Court, concerned interpretation of Article 32(3) of the Visa Code, read together with Article 47 of the Charter, particularly, if it requires the Member States to guarantee an effective remedy (appeal) before a court of law against a decision refusing the issue of a visa. The CJEU confirmed the existence of such obligation on the basis of the invoked provision of the Charter.[60] Following the CJEU judgment, the Supreme Administrative Court refused to apply Article 5 (4) of the Polish Law on proceedings before administrative courts, which excluded the possibility of examination of an appeal by an administrative court in this case.[61] The consequence of such a decision should be the recognition of appeal against the decision refusing the issue of a visa.]

Published in: Kastelik-Smaza: The application of the Charter of Fundamental Rights of the EU in Poland, January 2019 AUC IURIDICA 2018(4):101-112.

August 2014, II SA/Lu 709/13; judgment of Gorzów Wielkopolski Administrative Court of 3 July 2014, II SA/Go 373/14; judgment of Warsaw Administrative Court of 6 June 2014, I SA/Wa 1233/14; judgment of the Supreme Administrative Court of 17 April 2014, II OSK 1899/13; Order of Warsaw Administrative Court of 18 March 2014, VI SAB/Wa 176/13.

[56] Explaining it sometimes by reference to general principles of law, cf judgment of the Supreme Administrative Court of 15 March 2018, I OSK 2305/17.

[57] Judgments of the Supreme Administrative Court of 20 November 2013 in Cases I FSK 1313/12; I FSK 1314/12; I FSK 1334/12; I FSK 1547/12. Similarly, judgment of Wrocław Administrative Court of 19 July 2011, IV SA/Wr 216/11.

[58] The Supreme Administrative Court also referred to Art 20 of the European Code of Good Administrative Behaviour.

[59] Judgment of the Supreme Administrative Court of 26 June 2014, II OSK 185/13; similarly, judgment of Wrocław Administrative Court of 19 July 2011, IV SA/Wr 216/11; judgment of Rzeszów Administrative Court of 10 July 2014, II SAB/Rz 29/14; judgment of Wrocław Administrative Court I of 28 August 2014, SAB/Wr 5/14.

[60] C-403/15 El Hassani, ECLI:EU:C:2017:960.

[61] Order of the Supreme Administrative Court of 19 February 2018, II OSK 1346/16, CBOSA.

Application of the CFR in Romania

General

[One of the eight titles of the Romanian constitution is dedicated to fundamental rights, namely Title II, Fundamental rights, freedoms and duties. Under this title, there are four chapters, spanning from Article 15 to Article 60 and also including provisions on socio-economic rights enshrined in Articles 22 to 53. … The constitution does not include an explicit reference to the EU Charter or to the European Convention of Human Rights. However, EU primary law is referred to by establishing that "the provisions of the constituent treaties of the European Union […] shall take precedence over conflicting provisions of the national laws" (Article 148 (2))].

Published in: The EU Charter of Fundamental Rights in Romania. FRA – European Union Agency for Fundamental Rights, 2019. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-charter-in-romania_en.pdf

[Invoking the provisions of the Charter in the constitutional review in Romania must be done in relation to Article 148 of the Constitution and not in relation to Article 20 of the Constitution which refer to international human rights treaties. The main objective of the paper is to analyze the manner in which the provisions of the European Union Charter of Fundamental Rights are applied to the Romanian national legal framework in direct connection with the constitutionality review.]

Published in: Popescu: Application of the Charter of Fundamental Rights of the European Union in Constitutionality Review. Romanian Journal of Public Affairs. Issue 1/2017, 37, http://rjpa.ro/sites/default/files/Popescu.pdf

Scope of Application

[In this case, the appellants in the main proceedings were Romanian judges who also held, in parallel, university teaching positions. After more than 30 years' service as judges, they had claimed their pension entitlements which, in accordance with the national law in force, they were able to combine with the income derived from their university teaching activity. However, against the background of the economic crisis, a new law prohibiting such a combination had then been adopted and declared consistent with the Constitution by the Curtea Constituțională (Constitutional Court, Romania). The appellants therefore brought an action against the suspension of their retirement pensions, claiming that that new law ran counter to EU law, particularly to the provisions of the EU Treaty and of the Charter. Since that action was dismissed at first instance, then on appeal, the appellants then brought an application before the referring court for revision of that judgment. In that context, that court asked the Court of Justice in particular whether Article 6 TEU and Article 17 ('Right to property') of the Charter precluded national legislation which prohibits the combining of the net retirement pension with income from activities carried out in public institutions if the amount of the pension exceeds the amount of the national gross average salary on the basis of which the State social security budget was drawn up. Before addressing the substance of the referring court's question, the Court first examined whether such national legislation could be regarded as implementing EU law, in order to determine whether the Charter did indeed apply to the dispute in the main proceedings. In that regard, it noted that, as the referring court explained, the law at issue was adopted to enable Romania to meet the undertakings which it gave to the European Union on an economic programme allowing it to benefit from a facility providing financial assistance for balances of payments which are set out in a Memorandum of Understanding. Among the conditions laid down in that Memorandum of

Understanding are the reduction of the public sector wage bill and, in order to improve the long-term sustainability of public finances, the reform of key parameters of the pension system. Accordingly, the Court held that the purpose of the aggregation measure at issue in the main proceedings, which simultaneously pursues the two objectives referred to above, is to implement the undertakings given by Romania in the Memorandum of Understanding, which is part of EU law. The memorandum is based in law on Article 143 TFEU, which gives the European Union the power to grant mutual assistance to a Member State whose currency is not the euro and which faces difficulties or is seriously threatened with difficulties as regards its balance of payments (paragraphs 31, 45 and 47). The Court added that it is true that the Memorandum of Understanding leaves Romania some discretion in deciding what measures are most likely to lead to performance of those undertakings. However, on the one hand, where a Member State adopts measures in the exercise of the discretion conferred upon it by an act of EU law, it must be regarded as implementing that law, within the meaning of Article 51(1) of the Charter. On the other hand, the objectives set out in Article 3(5) of Decision 2009/459, 20 as well as those set out in the Memorandum of Understanding, are sufficiently detailed and precise to permit the inference hat the purpose of the prohibition on combining a public-sector retirement pension with income from activities carried out in public institutions, stemming from Law No 329/2009, is to implement both the memorandum and that decision, and thus EU law, within the meaning of Article 51(1) of the Charter. Consequently, the latter is applicable to the dispute in the main proceedings (paragraph 48).]

C-258/14, Florescu and Others, EU:C:2017:448. Published in: Field of Application of the Charter of Fundamental Rights of the European Union – Fact sheet. Court of Justice of the European Union, March 2021. https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/fiche_thematique_-_charte_-_en.pdf

Rights guaranteed

[… It should be added that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter, it being the task of the Court to ensure that those rights are respected (see, by analogy, judgment of 13 September 2016, Rendón Marín, C-165/14, EU:C:2016:675, paragraph 66). … As regards the term 'spouse' in Article 2(2)(a) of Directive 2004/38, the right to respect for private and family life guaranteed by the Charter is a fundamental right. … In that regard, as is apparent from the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), in accordance with Article 52(3) of the Charter, the rights guaranteed by Article 7 thereof have the same meaning and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. … It is apparent from the case-law of the European Court of Human Rights that the relationship of a homosexual couple may fall within the notion of 'private life' and that of 'family life' in the same way as the relationship of a heterosexual couple in the same situation (ECtHR, 7 November 2013, Vallianatos and Others v. Greece, CE:ECHR:2013:1107JUD002938109, § 73, and ECtHR, 14 December 2017, Orlandi and Others v. Italy, CE:ECHR:2017:1214JUD002643112, § 143). (Recitals 47–50]

C-673/16. Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne, ECLI:EU:C:2018:385.

[In 2017, a court of appeal found that the eviction of a Roma community was discriminatory. The decision also refers to the principle of equality as laid down in EU law: "The EU Charter of Fundamental Rights also reaffirms the rights stemming mainly from the constitutional traditions and international obligations common to the Member States, the ECHR, the Social Charters adopted by the EU and the CoE, and in the context of the CJEU jurisprudence, the need to respect human dignity which must be protected, the prohibition of discrimination of any kind, based on race, color, ethnic or social origin, genetic characteristics, language, religion or beliefs, belonging to a national minority according to Art. 20 of the Charter, as the Union respects cultural, religious and linguistic diversity."]

Published in: The EU Charter of Fundamental Rights in Romania. FRA – European Union Agency for Fundamental Rights, 2019. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-charter-in-romania_en.pdf

Examples of successful RoL litigation before national and European courts

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Executive summary. This chapter provides a number of examples from the Central and Eastern Europe (CEE) region for the application of the EU rule of law *acquis* before national courts and for the involvement of the EU Court of Justice (CJEU) in these cases through the preliminary ruling procedure. The short reports include information about the legal dispute and how the element of EU law was introduced into them, how the CJEU interpreted and applied the relevant provisions of the EU rule of law *acquis*, and, when the information was available, about the reception of the judgment from the CJEU in the national judicial system.

Trainers can use the information contained in this chapter to:

- highlight the different legal scenarios and the different areas of national law in which the application of the EU rule of law *acquis* may emerge;
- distinguish between crisis scenarios and the application of the EU rule of law *acquis* in more orderly legal circumstances;
- analyse the different legal circumstances in which the EU Charter or other parts of the EU rule of law *acquis* may be invoked;
- highlight how national courts may react to claims based on EU law and what their role is in the application of EU legal provisions;
- anchor the message that the CJEU may indeed be a crucial partner in achieving legal protection on the basis of EU law;
- highlight the benefits as well as the limitations of the preliminary ruling procedure;
- examine critically how useful the CJEU's judgment was in the particular case and whether it helped developing clear and consistent national judicial practice;
- indicate that the national reception of the CJEU's judgment is crucial for the legal protection aimed to be achieved with the application of EU law.

The reports contain different types of material: easily accessible overview text, academic analyses, and extracts from judicial decisions. The different types of materials require different reading strategies and should be used differently in a training scenario. For example, the trainer can organise analytical and/or evaluative discussions in regards the academic texts or the judicial extracts. The overview texts only provide necessary background information.

Linked modules
ToT module 4 – RoL and litigation
Introductory module 3 – Resources and litigation skills
Advanced modules 2 – RoL argumentation – drawing on specific themes and **3** - Safeguarding the RoL – the role of lawyers

Case C-556/17, *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal*, EU:C:2019:626

Case description

[[A. Torubarov] was originally a teacher, became a businessman after capitalism arrived to Russia. After he was threatened by criminal groups, and wanted to take steps against corruption and local mafia, he joined Boris Nemtsov's Pravoye Delo (Right Cause) party. Investigations, unlawful trials, illegal arrests and jails in Austria and the Czech Republic, and systematic and continuous persecution for his political views followed. After three years of carousel, in 2013 he decided to flee to Hungary seeking political asylum.

Despite all obvious evidence he did not receive asylum from the Hungarian asylum authority. He appealed against the rejection, the court ruled in his favour, but the authorities again rejected him. In 2015 the two-third government majority deprived the courts of the decades-long practice to grant protection themselves. For four years they only had the right to state if the authorities had made an unlawful decision, but they could not change it. As a consequence, the asylum authority could even literally make the same negative decisions, which were once again challenged by the applicants and repeatedly found to be unlawful by the courts, but the situation of the applicant was not resolved at all. These inconclusive and unproductive "ping pong games" were played for years by the asylum authority.

Torubarov, who has been living in Hungary since December 2013, happened to go through these games many times. Seeing his endless case, a judge from the Pécs Administrative and Labor Court became tired of the authority's defiance for a third time and, following the suggestion of the Hungarian Helsinki Committee, turned to the CJEU in September 2017. The Hungarian judge asked whether the legislation since 2015, which deprived the courts of the substantive decision on granting asylum, complied with EU law.]

Published in: https://helsinki.hu/en/the-man-who-defeated-the-hungarian-asylum-system/ **(30 September 2019).**

The CJEU's ruling

The Hungarian court asked from the CJEU whether Article 46(3) of the EU Asylum Procedures Directive (Directive 2013/32/EU), as interpretated together with Article 47 of the EU Charter of Fundamental Rights on the right to an effective legal remedy and to a fair trial, requires that Hungarian courts assume jurisdiction to vary the administrative decision of the competent asylum authority that repeatedly refused international protection, despite judicial rulings to the contrary, and also whether they have the power to grant such protection. The CJEU ruled that the Hungarian court must establish its jurisdiction to vary the asylum authority's decision, substitute the administrative decision with its own, and disapply – as necessary – the Hungarian legal provision that would prohibit it from proceeding that way.

[In the judgment in Torubarov (C-556/17) of 29 July 2019 the Court, sitting as the Grand Chamber, was required to interpret the provision of Directive 2013/32[62] which defines the scope of right to an effective remedy which applicants for international protection (refugee status or subsidiary protection)

[62] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180 p. 60).

must have, inter alia, against decisions rejecting their applications.[63] The Court held that, where a court has found, following a full and *ex nunc* examination of all the relevant matters of fact and law submitted by the applicant for international protection, that, in accordance with the criteria laid down in Directive 2011/95/EU,[64] that applicant must be granted such protection on the ground upon which he relies in support of his application, but an administrative or quasi-judicial body subsequently adopts a contrary decision, without establishing, for that purpose, that new elements have arisen that justify a new assessment of the applicant's international protection needs, that court must vary that decision which does not comply with its previous judgment and substitute it with its own decision on the application for international protection, disapplying as necessary the national law that would prohibit it from doing so.

In the present case, an action was brought before the referring court for the third time in the same case by a Russian national prosecuted in his country of origin, who made an application for international protection in Hungary on the ground that he feared persecution or serious harm in Russia for his political opinions. The Hungarian authority responsible for examining that application rejected it on three occasions, despite the fact that, on two occasions, the referring court annulled its decisions rejecting that application and that, in the context of the person concerned's second action, it concluded, after an assessment of all the elements of the file, that his application for international protection was well founded. In those circumstances, the person concerned, in his third action, asked the national court to substitute its own decision, as to the international protection from which he should benefit, for the contested decisions. However, a law dating from 2015, aimed at managing mass immigration, abolished the power of courts to reform administrative decisions relating to the granting of international protection.

On the basis of the judgment in *Alheto*[65] the Court first recalled that the purpose of Directive 2013/32 is not to render uniform the procedural rules to be applied within Member States when adopting a new decision on an application for international protection after the annulment of the original administrative decision rejecting such an application. However, it follows from the purpose of that directive, which is to ensure the fastest possible processing of applications of that nature, from the obligation to ensure that the provision cited above of that directive is effective, and from the need, arising from Article 47 of the Charter of Fundamental Rights of the European Union, to ensure an effective remedy, that each Member State must order its national law in such a way that, following annulment of that initial decision and in the event of referral of the file to the quasi-judicial or administrative body responsible for examining that request, a new decision is adopted within a short period of time and that it complies with the assessment contained in the judgment annulling the initial decision.

The Court emphasised in particular that, by providing that the court or tribunal with jurisdiction to rule on an appeal against a decision rejecting an application for international protection is required to examine, where applicable, the 'international protection needs' of the applicant, the EU legislature intended to confer on that court or tribunal, where it considers that it has available to it all the elements

[63] Article 46 (3).
[64] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).
[65] Judgment of 25 July 2018, Alheto (C-585/16, EU: C: 2018:584).

of fact and law necessary in that regard, the power to give a binding ruling following a full and *ex nunc*, that is to say exhaustive and up-to-date, examination of those elements, as to whether the applicant concerned satisfies the conditions laid down in Directive 2011/95 to be granted international protection. In such an event, where that court or tribunal reaches the conclusion that the application for international protection should be granted and annuls the decision of the competent national authority rejecting the said application before returning the file to it, that authority shall, subject factual or legal factors arising that objectively require a new updated assessment, no longer have discretion as to whether or not to grant the protection requested in the light of the same grounds as those which have been submitted to the court concerned.

Therefore, a national law that results in a situation in which the national court is deprived of any means of enforcing its judgment could in practice deprive the applicant for international protection of an effective remedy, since a final and binding judicial decision concerning him could remain ineffective.]

Published in: https://curia.europa.eu/juris/document/document.jsf?text=&docid=220524&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=8303195**.**

National impact

[[The CJEU judgment] meant in Torubarov's case that […] the Pécs court had one thing to do: it states that a Russian man persecuted in his country is granted protection in Hungary. This is exactly what happened: the client of the Hungarian Helsinki Committee was recognised as a refugee after six years. The judgment also took into account that the Russian man was attacked by a hired, professional murderer in Austria and that he was illegally returned from the Czech Republic to Russia.

"We are all very pleased that Alexei has finally been granted asylum. This should have happened at the very first time. Because who else is a refugee if not him who had the courage to say no to the powers that want to rob him, and to step up against those who then imprisoned, plundered and expelled him. He had to endure a lot of things here, living under extreme pressure for the last six years," said Tamás Fazekas, attorney of the Hungarian Helsinki Committee after the judgment in Pécs.]

Published in: https://helsinki.hu/en/the-man-who-defeated-the-hungarian-asylum-system/ **(30 September 2019).**

Further sources

Watch the video: The Refugee Who Gave Hope to other Victims, https://vimeo.com/398835671

HelsinKINO presents: The Refugee Who Gave Hope to other Victims, https://helsinki.hu/en/helsinkino-presents-the-refugee-who-gave-hope-to-other-victims/

EDAL – European Database for Asylum Law CJEU Ruling in Torubarov: Courts have power to grant protection, https://www.asylumlawdatabase.eu/en/content/cjeu-ruling-torubarov-courts-have-power-grant-protection.

Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others*, EU:C:2019:982

Case description

In 2015, the new Polish government introduced a reform of the Constitutional Court, later followed by the reforms of the Supreme Court and the National Council of the Judiciary (NCJ). The measures gave rise to a number of EU procedures, including the EU rule of law mechanism, infringement procedures and procedures for a preliminary ruling before the CJEU.

(Further information on the EU procedures: Pech, L., Wachowiec, P. & Mazur, D. (2021). Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action. *Hague J Rule Law* 13, 1–43.)

As part of the reform, a new law on the Supreme Court was introduced. The measure lowered the retirement age for judges from 70 to 65. More than 20 judges – about a third of the total – were forced to retire from the Supreme Court. The references for a preliminary ruling came from cases that were initiated by judges subjected to the new retirement rules. A.K. was a judge of the Supreme Administrative Court. Upon reaching the age of 65, he submitted a request to keep his position. The NCJ issued an unfavourable opinion, which was then challenged before the Supreme Court. A.K. claimed that his retirement violated Article 19(1) TEU and Article 47 of the EU Charter of Fundamental Rights on the right to an effective remedy and a fair trial. C.P. and D.O. were Supreme Court judges. They did not request the keeping of their position and the Polish President declared their retirement. They brought actions before the Supreme Court for a declaration that their employment relationship was still that of a judge in active service.

The questions referred to the CJEU focused on the independence of the new Disciplinary Chamber of the Polish Supreme Court to rule on cases concerning the retirement of Supreme Court judges under the new provisions. The CJEU first assessed whether the disciplinary chamber was independent in the meaning of Articles 2 and 19 TEU, Article 267 TFEU and Article 47 of the EU Charter of Fundamental rights, in light of the circumstances leading to its creation and the nomination of its members. It then examined whether, in case the independence of the chamber is found compromised, the primacy of EU law required the referring judge to disapply the Polish provisions that reserve jurisdiction on the retirement cases to the chamber.

(Further information on the independence issue: https://europeanlawblog.eu/2019/12/02/the-independence-of-the-disciplinary-chamber-of-the-polish-supreme-court-or-how-to-forget-about-discipline/ (Zinonos, P. (2 December 2019), The independence of the disciplinary chamber of the Polish Supreme Court or how to forget about discipline. European Law Blog).

The CJEU's ruling

In short, the CJEU decided that the referring Polish court must ignore the domestic legal provision which instructs it to transfer the case before it to a judicial body having exclusive jurisdiction on the matter which is not impartial or independent (the Disciplinary Chamber).

[In the judgment in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18), delivered on 19 November 2019 in an expedited procedure, the Grand Chamber of the Court of Justice held that the right to an effective remedy, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and reaffirmed, in a specific field, by Directive 2000/78,[66] precludes cases concerning the application of EU law from falling within the

[66] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

exclusive jurisdiction of a court which is not an independent and impartial tribunal.[67] The Court considers that that is the case where the objective circumstances in which such a court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it. Those factors may thus lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that does in fact apply to the new Disciplinary Chamber of the Polish Supreme Court. If that is the case, the principle of the primacy of EU law thus requires it to disapply the provision of national law which reserves exclusive jurisdiction to the Disciplinary Chamber to hear and rule on cases of the retiring of judges of the Supreme Court, so that those cases may be examined by a court which meets the requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field.

In the cases pending before the referring court, three Polish judges (of the Supreme Administrative Court and of the Supreme Court) relied on, inter alia, infringements of the prohibition on discrimination on the ground of age in employment, on account of their early retirement pursuant to the New Law of 8 December 2017 on the Supreme Court. Despite the fact that, following a recent amendment, that law no longer concerns judges who, like the applicants in the main proceedings, were already serving members of the Supreme Court when that law entered into force and that therefore those applicants in the main proceedings were kept in their posts or reinstated, the referring court considered that it was still faced with a problem of a procedural nature. Although such cases would ordinarily fall within the jurisdiction of the Disciplinary Chamber, as newly created within the Supreme Court, the referring court asked whether, on account of concerns relating to the independence of that chamber, it was required to disapply national rules on the distribution of jurisdiction and, if necessary, rule itself on the substance of those cases.

In the first place, having confirmed that, in the present cases, both Article 47 of the Charter of Fundamental Rights and the second subparagraph of Article 19(1) TEU were applicable, the Court stated that the requirement that courts be independent forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, rights which are of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. Next, it set out, in detail, its case-law on the scope of the requirement that courts must be independent and held, in particular, that, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive.

In the second place, the Court noted the specific factors which must be examined by the referring court in order to allow it to ascertain whether the Disciplinary Chamber of the Supreme Court offers sufficient guarantees of independence.

[67] "Article 47 of the Charter and Article 9(1) of Directive 2000/78 must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provision" (Case C-585/18, para. 154).

First, the Court stated that the mere fact that the judges of the Disciplinary Chamber were appointed by the President of the Republic does not give rise to a relationship of subordination to the political authorities or to doubts as to the former's impartiality, if, once appointed, they are free from influence or pressure when carrying out their role. Furthermore, the prior participation of the National Council of the Judiciary, which is responsible for proposing judicial appointments, is objectively capable of circumscribing the President of the Republic's discretion, provided, however, that that body is itself sufficiently independent of the legislature, the executive and the President of the Republic. In that regard, the Court added that regard must be had to relevant points of law and fact relating both to the circumstances in which the members of the new Polish National Council of the Judiciary are appointed and the way in which that body actually exercises its role of ensuring the independence of the courts and of the judiciary. The Court also stated that it would be necessary to ascertain the scope for the judicial review of propositions of the National Court of the Judiciary in so far as the President of the Republic's appointment decisions are not per se amenable to such judicial review.

Second, the Court referred to other factors that more directly characterise the Disciplinary Chamber. For example, it stated that, in the specific circumstances resulting from the — highly contentious — adoption of the provisions of the New Law on the Supreme Court which the Court declared to be contrary to EU law in its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C 619/18, EU:C:2019:531), it was relevant to note that the Disciplinary Chamber had been granted exclusive jurisdiction to rule on cases of the retiring of judges of the Supreme Court resulting from that law, that that chamber must be constituted solely of newly appointed judges and that that chamber appears to enjoy a particularly high degree of autonomy within the Supreme Court. As a general point, the Court reiterated on several occasions that, although each of the factors examined, taken in isolation, is not necessarily capable of calling into question the independence of that chamber, that may, however, not be true once they are taken together.]

Published in:

https://curia.europa.eu/juris/document/document.jsf?text=&docid=220774&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=8383148.

National impact

[[The] referring court (the Labour and Social Security Chamber of the Supreme Court) subsequently established on 5 December 2019 [Case III PO 7/18.] that the neo-NCJ does not offer a sufficient guarantee of independence from the legislative and executive authorities before ruling that the DC [Disciplinary Chamber] does not constitute a "court" within the meaning of EU law and therefore not a court within the meaning of Polish law as well. Polish authorities have however refused to obey this judgment and subsequent judgments, including a solemn resolution adopted on 23 January 2020 by the (then still independent) chambers of Poland's Supreme Court. [...] this *deliberate* policy of violating any judgment which would force them to respect the principle of judicial independence culminated in the de facto followed by the de jure nullification of the ECJ judgment in *AK* respectively in April and September 2020 by two captured bodies masquerading as courts.

Considering the pattern of non-compliance with ECJ/national judgments Polish authorities do not approve of, not to forget the systemic harassment of judges who seek to uphold Polish and EU judicial independence requirements, one may argue that the ECJ should have answered the questions it received from the (under siege) referring judges more explicitly. Indeed, while judicial self-restraint can

be a virtue in fair weather conditions, it is not one when the mere action of asking question to the ECJ and/or applying EU law can quickly result in a judge being the subject of (unlawful) disciplinary investigations and proceedings following by (unlawful) sanctions such as a pay cut and an indefinite suspension. By not directly and more explicitly addressing the questions raised by the referring court, the ECJ offered Polish authorities a pretext to disregard national judgments seeking to apply *AK* by claiming that they were not doing so correctly while offering captured bodies such as the ECPAC the opportunity to apply AK in bad faith and holding that the DC satisfies EU judicial independence requirements.[68]

In the end, as previously noted, the DC decided to formally neutralise the application of *AK* in Poland in September 2020 on the basis of ludicrous procedural arguments leading it to absurdly conclude that the referring court acted unlawfully when it referred questions to the ECJ.]

Published in: Pech, L., Wachowiec, P. & Mazur, D. (2021). Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action. *Hague J Rule Law* 13, 1–43.

Further sources

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Verfassungsblog, 26/11/2019: The Power of 'Appearances'

Case C-824/18, *A.B. and Others v Krajowa Rada Sądownictwa*, EU:C:2021:153

Case description

The case concerned the procedure regulated in Poland for the appointment of Supreme Court judges. The Polish measure requires that candidates are approved by the National Council of the Judiciary (KRS). The decisions of the KRS were open to judicial challenge (appeal) before the Supreme Administrative Court (NSA). The powers of the NSA proceeding in appeal were subject to restrictions. A legislative amendment removed this possibility of judicial protection and also regulated the ex lege closure of pending appeal cases.

The legislative amendment was preceded by a ruling from the Constitutional Tribunal that declared the original legislative provisions unconstitutional and ordered the closure of appeal cases initiated on the basis of those provisions. The legislative amendment was introduced to implement this ruling.

The reference for the preliminary ruling came from one of the appeal cases closed under the new rules. Originally, it concerned the old judicial appointment provisions. After the legislative modification, it was extended to cover also the rules of the legislative amendment.

The CJEU's ruling

[68] Resolution of 8 January 2020 in Case I NOZP 3/19, https://ruleoflaw.pl/wp-content/uploads/2020/02/I-NOZP-3-19-2_English.pdf

The CJEU accepted that the amended provisions regulating the procedure for appointing judges to the Polish Supreme Court violated EU law. They removed effective judicial oversight of KRS decisions in breach of EU requirements of effective judicial protection. The CJEU also considered the violation of EU standards of judicial independence. On this matter, the decision was deferred back to the referring Polish court. However, the CJEU noted that in case the violation of the EU standards is established, the Polish court, observing the primacy of EU law, will have to disregard the amended rules.

Regarding the original provisions, which regulated the appeal powers of the NSA in cases against KRS decisions, the CJEU came to a similar decision. It held that the violation of EU standards of judicial independence is not excluded. However, this needs to be determined by the referring Polish court having regard to the features of the national judicial system and its regulation. It must examine in particular whether the rules on appeal prejudice the trust of citizens in the independence and impartiality of Polish courts.

[The Court of Justice's judgment in *AB* is both rich and significant which makes a brief presentation of this case challenging. That caveat aside, the *AB* judgment's most important contribution to the defence of the rule of law in the EU is the confirmation that EU Member States must respect EU requirements relating to judicial independence when they decide to change the rules governing the process of appointing judges and connected rules governing judicial review of judicial appointment decisions.

National authorities cannot therefore seek to hide behind the national constitution, which Polish authorities continue to routinely violate with impunity following their unconstitutional takeover of Poland's Constitutional Tribunal, to adopt arbitrary substantive conditions or procedural rules in respect of judicial appointments; deprive a national court of its previous jurisdiction; to force the discontinuation of ongoing appeals and/or prevent national courts from referring questions on judicial appointments to the Court of Justice.

Another important aspect of the Court's judgment is its finding – implying a manifest breach of the EU principle of sincere cooperation – that Polish legislature adopted the amendments in dispute with the deliberate aim of systemically preventing the Court from ruling on the questions referred to it by Poland's Supreme Administrative Court. Also unprecedented is the Court's more general denunciation, albeit in diplomatic terms, of Polish authorities' bad faith and lawless behaviour as they have repeatedly sought to curb preliminary ruling requests from Polish courts and prevent any effective judicial review of the (unlawful) judicial appointment resolutions adopted by the (unconstitutionally established and unlawfully composed) new KRS.

In this context, and for the first time, the Court of Justice denounced the "retrograde impact" of the legislative amendments in dispute and the unlawful behaviour of the Polish President who blatantly ignored a freezing order of Poland's Supreme Administrative Court to (unlawfully) appoint eight "usurpers" to Poland's Supreme Court. Another noteworthy aspect of *AB* is the mention of the possibility for the referring court to consider inter alia the existence of special relationships between the members of the KRS thus established and the Polish executive when assessing the independence (or rather lack thereof) of the individuals appointed to the Supreme Court in open violation of the Supreme Administrative Court's freezing order. The existence of this "special relationship" has already been solidly established.

The inescapable conclusion from the Court's judgment – but one to be confirmed by the referring court assuming it will not be prevented from doing so – is that Polish authorities have organised the

systemic violation of EU (rule of) law and deliberately presided over the manifestly unlawful appointment of multiple individuals (who cannot therefore be called "judges") to the Supreme Court.

The Court's *AB* judgment does arguably suffer from two key weaknesses: It does not tackle the issue of these manifestly unlawful judicial appointments by directly relying on the right to a tribunal established by law, which would arguably make it even clearer that we are not dealing with judges here rather than judges lacking independence; it fails to make clear that Poland's Constitutional Tribunal is no longer a court as it is unlawfully composed (the former president of the German FCC accurately described it as a "puppet") while the Court of Justice also fails to explicitly address the violation and nullification of its own judgment in *AK*.

Notwithstanding these weaknesses, *AB* is a welcome and important judgment regarding EU law and national judicial appointment procedures. Unfortunately, *AB* will not in and of itself halt the deliberate annihilation of judicial independence organised by current Polish authorities for two main reasons: The limitations inherent in the preliminary ruling jurisdiction of the ECJ which require independent judges to subsequently apply its preliminary rulings and eventually set aside national law if a violation of EU law is confirmed; the Commission's repeated failure to do the job.]

Published in: Pech, L. (2021). Polish ruling party's "fake judges" before the European Court of Justice. http://eulawanalysis.blogspot.com/2021/03/polish-ruling-partys-fake-judges-before.html**.**

National implementation

[117. Following the CJEU's judgment of 2 March 2021 (see paragraphs 155-56 below), on 6 May 2021 the Supreme Administrative Court gave judgments in five cases (nos. II GOK 2/18; II GOK 3/18; II GOK 5/18; II GOK 6/18 and II GOK 7/18) concerning appeals against resolutions of the NCJ by which the latter had decided not to propose to the President of the Republic the appointment of the appellants to positions as judges of the Civil and Criminal Chambers at the Supreme Court and to propose the appointment of other candidates to those positions. The Supreme Administrative Court quashed the impugned NCJ resolutions both in the part concerning the recommendation of other candidates for appointment to the Supreme Court and in the part concerning the refusal to propose the appointment of the appellants. All the judgments contain similar reasoning.

118. In particular, in its judgment of 6 May 2021, no. II GOK 2/18 the Supreme Administrative Court considered that the current NCJ did not offer sufficient guarantees of independence from the legislative and executive powers in carrying out the functions entrusted to it. In making that assessment, the Supreme Administrative Court relied on the factors set out by the CJEU in its judgments of 2 March 2021 (paragraphs 131-32 therein) and of 19 November 2019 (paragraphs 143-44 therein), namely that: (1) the current NCJ was constituted as a result of the premature termination of the four-year terms of office of former members of the NCJ; (2) in contrast to the former legislation under which fifteen judicial members of the NCJ had been elected by their peers directly, they were currently elected by a branch of the legislature; (3) the potential for irregularities which could adversely affect the process of appointment of certain members of the new NCJ; (4) the manner in which the current NCJ exercised its constitutional responsibility to safeguard the independence of courts and judges. The Supreme Administrative Court accepted – as did the CJEU in the above-mentioned judgments – that while each element taken in isolation might not necessarily lead to that conclusion, their combination in conjunction with the circumstances in which the current NCJ had been constituted could raise doubts as to its independence.

119. The relevant extracts from the Supreme Administrative Court's judgment no. II GOK 2/18 read as follows:

"7.6. ... Since the CJEU's judgments of 2 March 2021 and 19 November 2019 were given in an identical legal framework ..., so the assessment of the significance of the criteria relevant for the independence of the NCJ had to take into account the commonly known circumstances and facts relating to the creation of the NCJ in its new composition and its activities, including the sources of knowledge of those circumstances and facts which formed the basis of the findings in case no. III PO 7/18 decided by the Supreme Court in its judgment of 5 December 2019. The Supreme Administrative Court accepts these findings in their entirety as its own (see paragraphs 40-60 of the Supreme Court's judgment).

The Supreme Administrative Court also fully and unreservedly shares the assessment of the significance of these circumstances and facts for the independence of the NCJ ... It [the assessment] warrants the assertion that the current NCJ does not provide sufficient guarantees of independence from the legislative and executive powers in the procedure for appointment of judges.

In this regard, it is also important to emphasise the significance of the fact that the composition of the NCJ currently includes fourteen representatives of judges of ordinary courts and does not include judges of the Supreme Court and judges of administrative courts, as categorically required by Article 187 § 2 of the Constitution, which cannot be complied with only in so far as possible, as provided for in section 9a of the Act on the NCJ.

Moreover, among the [judicial] members of the [current] NCJ, i.e. among judges of ordinary courts ..., there are (and certainly there were on the date when the resolution subject to the review in the present case was adopted) presidents and vice-presidents of ordinary courts appointed by the executive in place of those dismissed earlier by that power. This leads to the conclusion that those members of the Council are strictly functionally subordinated to the executive, which is represented in the Council by the Minister of Justice, thus also making that subordination of an institutional nature. ...

A part of the executive, but also of the legislative power – given the peculiar fusion of these powers resulting from the logic of the system of government adopted – and thus powers that are political by nature, therefore significantly gain in importance and influence in a body whose primary role is to safeguard the independence of the courts and judges.

This can and should also be inferred from the fact that twenty-three of the twenty-five members of the NCJ are nominated to its composition by powers other than the judiciary. At the same time, the rules governing election of fifteen judges to the NCJ by the Sejm have to be regarded as far removed from respecting the principle of representativeness, since their election is not only made by the first chamber of Parliament (the Sejm), but may also be made – quite apart from the fact that they are nominated from among candidates put forward by a group of 2,000 citizens ... – from among candidates put forward by a group of twenty-five judges, with the exception of retired judges. Such a quantitative criterion of successful candidature does not constitute a reliable criterion for assessing the representativeness of a candidate, especially when compared with the number of judges in service and, moreover, when compared with the practice of assessing its fulfilment. The latter allowed for support for one's own candidature, mutual support between candidates or even, in an extreme case, the use, as support given, of support that was (effectively) withdrawn by the judges originally supporting ... the candidature.

The rules and procedure for determining the personal composition of the NCJ were thus clearly motivated by an intention to subject it to a kind of supervision of the executive power, and hence of the parliamentary majority, which, in the context of the procedure for selecting members of the NCJ and the majority required to do so, as well as in relation to the functional and institutional subordination of the Council, also emphasises the significance of the factor of (political) loyalty of the candidates to the entity conducting the election. This is confirmed by the ... content of the statement [of the Minister of Justice] recorded in the transcript of the 3rd session of the Senate of the 10th term of 15 January 2020 – 'each group could propose judges they are accountable for. We have proposed judges who we thought were willing to co-operate with the judicial reform'.

The so determined composition of the NCJ thus nullifies the possibility of it effectively carrying out its basic function, namely safeguarding the independence of the courts and judges.

... There is also no position ... of the NCJ which could indicate that it, a constitutional body appointed to uphold the independence of the courts and judges, respects the positions of national and European institutions and bodies stressing the importance of the principle of independence of the courts and judges in relation to situations directly indicating that they suffer a significant damage, or that it opposes such situations, including in particular actions disregarding the legal consequences of the order of the Court of Justice of 8 April 2020 in case C-791/19 R. Evidence of its abdication in this respect – for the Council's attitude remains in clear opposition to the duties and functions conferred on it by the Constitution – is undoubtedly also the fact that the NCJ was suspended from membership of the ENCJ in September 2018. ...

In the light of the foregoing arguments, it is therefore reasonable to conclude that the current NCJ does not provide sufficient guarantees of independence from the executive and the legislative powers in the procedure for appointing judges. The degree of its dependence on the legislative and executive powers in the performance of the tasks entrusted to it is, in turn, so high that it cannot be without significance for the assessment as to whether the judges selected by it meet the objective requirements ... of independence and impartiality under Article 47 of the Charter of Fundamental Rights."]

Case of GRZĘDA v. POLAND, 43572/18, CE:ECHR:2022:0315JUD00

Case C-419/14, *WebMindLicences Kft.*, EU:C:2015:832.

Case description

WebMindLicences Kft. was a Hungarian company that provided web-based interactive erotic audiovisual services. The know-how for the services came from a Portugese company, which was then transferred further by WebMindLicences by a licensing agreement to another Portugese firm. The Hungarian tax authorities took the view that the latter transaction constituted an abusive exercise of rights aiming to circumvent Hungarian tax jurisdiction. They imposed unpaid VAT in the region of 10 billion HUF, together with a fine around 8 billion HUF and a penalty close to 3 billion HUF. The evidence used in the tax case came from a parallel criminal procedure. In the criminal case, the evidence was collected by secret means.

Since the case involved the application of the EU VAT Directive, the Hungarian court proceeding in judicial review against the tax decision found that it had to take into account the requirements of the

EU Charter of Fundamental Rights. Following the position held by the applicant, the Hungarian court asked from the CJEU in a reference for a preliminary ruling whether Article 47 of the Charter excludes the use in parallel tax proceedings of evidence that had been obtained in a criminal procedure without the knowledge of the person concerned. It also asked whether the administrative court should review the legality of that evidence and annul the administrative decision, considering that in the criminal proceedings the applicant had not been provided similar opportunities.

The CJEU's ruling

[The law on VAT is one of the domains where Hungarian (administrative) courts have been regularly applying EU law – both legislation (the VAT directive)[69] and the relevant CJEU case law – in their own jurisdiction, and have made a considerable number of preliminary references to the CJEU.[70] The references usually concern substantive VAT law (e.g., the right to VAT deduction); however, in the particular circumstances of the *WebMindLicences* case the questions put forward concerned procedure and the applicable requirements of Article 47 EUCFR. In its judgment, the CJEU held that in the event parallel criminal and tax administration procedures are initiated for suspected VAT fraud by the same taxpayer, and the evidence collected in the first procedure using clandestine means is used in the administrative procedure, Article 47 demands that the court acting in judicial review is able to verify whether the evidence used to support the administrative decision challenged 'has been obtained and used in breach of the rights' guaranteed by EU law and the EUCFR.[71] It should be able to examine whether the evidence was obtained lawfully, or it should be able to rely on the review carried out by the criminal court in an *inter partes* procedure that that is the case.[72]

The preliminary ruling was introduced into Hungarian law by the judgment of the Kúria proceeding at the last instance in the case.[73] The Kúria made it explicit that it was committed to implementing the CJEU's interpretation of Article 47.[74] It then reasoned – primarily based on the relevant rules and principles of national law which seemed to correspond with the CJEU's interpretation – that the obtaining of evidence in a parallel criminal procedure using clandestine means, and its subsequent use in the tax administration procedure, must meet certain conditions, in particular that such evidence and its use must be subject to a review of lawfulness by a court of law.[75] However, the Kúria made clear that, in the context of the given case and of the applicable Hungarian rules, the review demanded under Article 47 can only be exercised by the court seized in the criminal case, and the court acting in judicial review against the tax authority's decision – lacking the necessary competences – is unable to provide that review without a national legal basis.[76] The Kúria explicitly rejected that other forms of review by a court, as suggested by the parties, would be sufficient, as they do not satisfy the conditions

[69] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1.
[70] Until 1 August 2021, 37 VAT cases have been referred to the CJEU.
[71] Case C–419/14 *WebMindLicences Kft.* [EU:C:2015:832], para. 87.
[72] ibid para. 88.
[73] For the judgment of the first instance referring court, see Budapest Administrative and Labour Court: 11.K.30.197/2016/19.
[74] Kúria: Kfv.35.594/2016/24 (also published as former authoritative decision: EBH.2018.K.1), para. 74.
[75] ibid paras 80–83.
[76] ibid. Practically, the evidence in question is inadmissible in the procedure before the tax authority until its lawfulness is examined by the criminal court in *inter partes* proceedings.

laid down in the CJEU's judgment, in particular the requirement that the review of evidence must take place in an *inter partes* procedure.[77]

In *Glencore*, which concerned evidence of VAT fraud committed in a chain transaction involving multiple business partners, the issue raised was whether the taxpayer is entitled to access the evidence collected in the parallel tax administration procedures against the other business partners involved in the fraudulent transactions, and whether the lack of access to that evidence, which was used to establish the responsibility of the taxpayer for the tax fraud, constituted a violation of EU law, in particular of Article 47. The preliminary ruling first established that under Article 47 the parties have a right to challenge in an *inter partes* procedure matters of fact and of law which are decisive in their case. The CJEU then held – referring to the judgment in *WebMindLicenses* – that the national court acting in judicial review must have the power to examine in an *inter partes* procedure whether the evidence obtained in a parallel administrative procedure and its use are compatible with the rights guaranteed by EU law and the EUCFR.[78] Although we were unable to identify the decision of the referring court which directly implemented the CJEU's ruling, later in this chapter we present ample evidence that the CJEU judgment has been integrated into the subsequent case law of the Hungarian courts.[79]]

Published in: Varju, M. & Papp M. (2023). An Opportunity Seized or Lost? The Application of Article 47 of the Charter by Hungarian Courts. In: Bonelli, M. et al. (eds.), *Article 47 of the EU Charter and Effective Judicial Protection. Volume 2*. Hart Publishing.

National implementation

[The earlier analysed judgments in *WebMindLicences* and *Glencore* offered under Article 47 EUCFR new means for individuals to challenge tax authority decisions. The resulting litigation before Hungarian courts was helped further by authoritative domestic rulings implementing the principles developed in the CJEU judgments.[80] As revealed by the case law emerging from these cases, first instance courts and the Kúria recognise – as demanded by the CJEU – that evidence collected in parallel (criminal) procedures may only be used in the tax administration procedure subject to the condition that the rights of the defence are adequately safeguarded.[81]

In Kfv.I.35.706/2019/9,[82] which dealt with the same issue addressed in *WebMindLicences*, the Kúria delivered its judgment following a detailed examination of the state of the law, and it also scrutinised the powers available to courts when proceeding in the judicial review of administrative action to

[77] ibid paras 84 and 86.
[78] Case C–189/18 *Glencore Agriculture Hungary Kft.* [EU:C:2019:861], paras 61–62 and 65.
[79] See also the judgment in a customs procedure case: Kúria: Kfv.35.710/2018/7.
[80] EBH.2018.K.1, above n 29.
[81] VAT fraud in cross-border chain transactions involving sugar: Miskolc Administrative and Labour Court: 100.K.27.936/2018/29 and Kúria: Kfv.I.35.706/2019/9, and Miskolc Administrative and Labour Court: 101.K.27.900/2018/37 and Kúria: Kfv.I.35.662/2019/10; VAT fraud in chain transactions involving domestic goods: Szeged Administrative and Labour Court: 6.K.27.762/2015/29 and Kúria: Kfv.I.35.364/2017/; VAT fraud in the context of renting workers: Budapest Administrative and Labour Court: 44.K.32.717/2018/38 and Kúria: Kfv.I.35.677/2019/7; VAT fraud in an IP context: Miskolc Administrative and Labour Court: 10.K.27.283/2019/38 and Kúria: Kfv.I.35.105/2020/9 (and Kúria: Kfv.I.35.061/2020/9 and Kfv.I.35.013/2020/9 delivered in analogous cases); VAT fraud in the context of fruit and vegetable retail: Budapest-Capital Regional Court: 54.K.701.401/2020/13 and Kúria: Kfv.I.35.087/2021/6; in a GDPR case: Kúria: Kf.VI.39.029/2020/14; in a cartel case: Kúria: Kf.IV.37.468/2019/17.
[82] See also Kúria: Kfv.I.35.662/2019/10 delivered in an analogous case.

remedy the unlawfulness of the administrative process, including those affecting the collection of evidence and its communication to the taxpayer affected.[83] The Kúria then held that its review powers cover the question of whether the procedural irregularities claimed by the applicant constituted a violation of the relevant constitutional principles, in particular the right to a fair trial.[84] When determining the requirements which may arise under the latter fundamental right, the Kúria considered the detailed requirements of the Fundamental Law, of Article 6 ECHR as developed in the case law of the ECtHR, and of Article 47 as spelt out in the judgment in *Glencore*.[85] On that basis, it concluded that allowing the taxpayer to access the evidence collected does not imply that – as requested by EU law – the parties were afforded an adequate opportunity to contest that evidence in the parallel criminal trial.[86]

In Kfv.I.35.364/2017/3,[87] the Kúria had to apply the CJEU's interpretation in different factual settings. The judicial review procedure was launched to contest the use of evidence in the administrative process by the tax authority. The evidence in question was obtained by clandestine means in a parallel penal process, but it was not included in the file of the case and it was not used to support the tax authority's decision.[88] The Kúria repeated its earlier position that the collection of evidence using such methods might prevent effective judicial redress. Moreover, only the review of the lawfulness of that evidence by the criminal court in the criminal process may guarantee that the relevant fundamental rights standards are adequately met.[89] It pointed out that – as provided by Hungarian legislation – review by the court proceeding in the administrative case, which lacks the necessary powers as determined in the CJEU's case law, cannot replace the review of evidence in an *inter partes* process by the criminal court seized in the parallel case.[90]

The interpretation of Article 47 established in *WebMindLicences* was also applied in a recent public procurement cartel case. The cartel investigation had both a criminal and an administrative limb, and the applicant contested on the basis of EU, ECHR and Hungarian constitutional law the use in the latter procedure of evidence which had been collected in the former process using clandestine means. The application of the CJEU's decision was not straightforward because the criminal procedure, where the evidence in question was collected and subjected to review by a court of law, was conducted against the natural persons involved. However, the cartel investigation examined the conduct of these natural persons as well as of the companies which took part in the alleged cartel. The companies were not parties to the criminal procedure where they could have challenged before the criminal court the evidence, which the competition authority used against them when it established their responsibility in the cartel. The first instance judgment[91] concluded that the case did not fall under the scope of EU law. Nevertheless, it argued that the standard of protection applied cannot be lower than that in cases where the EUCFR is appliable, and it thus went on to apply the CJEU's relevant case law. It found that

[83] Kúria: Kfv.I.35.706/2019/9, para. 33.
[84] ibid para. 34.
[85] ibid paras 35–36.
[86] ibid para. 41. See further Kúria: Kfv.I.35.442/2020/6 where the Kúria established the violation of the right to fair trial on the basis of the judgment in *Glencore*, the Fundamental Law and the ECHR.
[87] See also Kúria: Kfv.I.35.310/2017/5, Kfv.V.35.349/2017/3, Kfv.VI.35.285/2017/5 and Kfv.VI.35.311/2017/6 delivered in analogous cases.
[88] See also Kúria: Kfv.I.35.244/2017/8.
[89] Kúria: Kfv.I.35.364/2017/3, para. 43.
[90] ibid para. 45.
[91] Budapest-Capital Regional Court: 13.K.700.024/2018/43.

the use of evidence by the competition authority was lawful and it was compatible with the principles established by the CJEU.

The Kúria's final judgment, which accepted in contrast to the first instance court that the case fell under the scope of EU law and of the EUCFR,[92] gave a careful analysis of the right to a fair trial and the rights of the defence as interpreted by the CJEU in *WebMindLicences*. However, it also paid close attention to the relevant practice of the Hungarian Constitutional Court, which led to the Kúria making the controversial distinction – supposedly based on Hungarian constitutional case law – that companies and other legal persons may enjoy the right to a fair trial, the rights of the defence and the right to be heard, but they cannot be regarded as subjects of the right to private life and other privacy rights.[93] This latter point provided to be crucial as the Kúria relied on it in its final interpretation of the applicable requirements under Article 47.[94]

The Kúria first established that the collection of evidence had taken place according to the applicable legal rules, and noted that the criminal court had reviewed in an *inter partes* process the lawfulness of that evidence as required by the CJEU's judgment.[95] However, regarding the question of whether the companies investigated for the cartel should have been allowed to participate in the review of evidence before the criminal court, the Kúria – relying on its abovementioned distinction between the privacy rights of natural and legal persons – held that the right to challenge the evidence collected does not have to be provided for every person in the case.[96] In particular, there is no need to secure a right for the companies involved in the cartel a right to challenge in the criminal trial the evidence collected in the criminal process launched in parallel with the cartel investigation. The review of evidence before the court seized in the criminal process ensured the protection of the right to private life, and since companies and other legal persons do not have a private sphere and privacy rights, there was no requirement by law to allow them to challenge the evidence in the criminal trial.[97]

The Kúria's judgment is controversial. Although it aimed to follow CJEU case law as closely as possible, its reasoning provided in the specific circumstances of the case seems to depart from the requirements of the EUCFR on the right to a fair trial and the right to a private life as interpreted by the CJEU. The decisive distinction between the privacy rights of natural and legal persons, which the Kúria is thought to have introduced because giving full effect to *WebMindLicenses* was impossible in the context of parallel criminal and administrative investigations into an alleged cartel, is not sanctioned by the CJEU's prevailing interpretation. The generally cooperative Kúria should have referred the case the CJEU for guidance.]

Published in: Varju, M. & Papp M. (2023). An Opportunity Seized or Lost? The Application of Article 47 of the Charter by Hungarian Courts. In: Bonelli, M. et al. (eds.), *Article 47 of the EU Charter and Effective Judicial Protection. Volume 2*. Hart Publishing.

Case C-147/22, *Központi Nyomozó Főügyészség* (*Terhelt 5)*, EU:C:2023:790

[92] Kfv.IV.37.468/2019/17, above n 60, paras 59–60 (despite the fact that the Hungarian Competition Authority argued in its submissions that the case did not raise the application of Article 101 TFEU).
[93] ibid paras 55–57.
[94] See ibid paras 65–67.
[95] ibid.
[96] ibid para. 70.
[97] ibid paras 67–72.

Case description

The criminal proceedings were brought against the accused (*terhelt no. 5*), who is of Austrian nationality, by the Hungarian prosecution authorities for corruption offences, in respect of which he had already been subject of criminal proceedings in Austria. The Austrian proceedings were discontinued by an order of the financial crime and corruption prosecution authority.

In the Austrian proceedings, the accused was not interviewed as a suspect because the investigative measures taken to locate him proved unsuccessful. The Austrian prosecution authority decided to discontinue the pre-trial investigation on the ground that, based on the results of the investigations carried out up to that point by the Austrian, United Kingdom and Hungarian authorities, the continuation of the criminal proceedings was unjustified.

The discontinuation decision was reviewed on several occasions. However, the conditions for continuing the proceedings were never met. In particular, the corruption alleged against the accused had been time-barred under Austrian law.

The Hungarian prosecution authorities brought an indictment against the accused before the first instance Hungarian court. However, the court decided bring the proceedings to an end. It held that since the corruption crimes in question were identical to those already investigated in Austria, the ne bis in idem principle excluded criminal proceedings in Hungary.

The appeal court overturned the decision and sent the case back to the first instance court. The appeal court reasoned that the Austrian discontinuation decision cannot be regarded as a final decision within the meaning of the ne bis in idem principle as recognised in Article 50 of the EU Charter of Fundamental Rights and the related Article 54 of the Convention implementing the Schengen Agreement. In particular, it cannot be established that the Austrian decision was based on a sufficiently detailed and complete assessment of evidence, noting that only two suspects were interviewed by the Austrian authorities and the accused was not among them.

In the new proceedings, the first instance Hungarian court turned to the CJEU with a reference for a preliminary ruling asking for the interpretation of the ne bis in idem principle. It wanted to know whether the principle applied in circumstances when the decision to acquit taken for the same criminal act in another EU Member State came from the prosecution authority and not a court of law, and was based on the finding that there was no evidence to show that the accused had actually committed the offence. It also asked whether a discontinuation decision, which can be reversed by the prosecution authority in its discretion subject to meeting the statutory conditions, can be regarded as a final decision in a criminal case, also taking into account that the evidence collected in the case was incomplete.

The CJEU's ruling

The CJEU decided to assist the first instance national court with the following interpretation of the ne bis in idem principle, in particular its component that there needs to be a prior final decision for its application.

The final criminal decision requirement was interpreted as including two conditions: further prosecution is "definitively barred" in the case and the decision was given following a "determination of the merits of the case".

Regarding the first condition ("definitively barred"), the CJEU held

29 In the present case, in the first place, as regards the requirement that further prosecution must be definitively barred, it must be borne in mind, in the light of the circumstances referred to in the first two indents referred to in paragraph 25 above, that, according to the Court's case-law, first, Article 54 of the CISA is also applicable to decisions of an authority responsible for administering criminal justice in the national legal system concerned, such as a public prosecutor's office, definitively discontinuing criminal proceedings in a Member State without the imposition of a penalty, and although such decisions are adopted without the involvement of a court and do not take the form of a judgment. Secondly, that requirement must be assessed on the basis of the law of the Contracting State which made the criminal decision in question and must ensure that the decision in question gives rise, in that State, to the protection conferred by the principle ne bis in idem (see, to that effect, judgments of 22 December 2008, Turanský, C-491/07, EU:C:2008:768, paragraphs 35 and 36, and of 29 June 2016, Kossowski, C-486/14, EU:C:2016:483, paragraphs 35 and 39 and the case-law cited).

30 In that context, it is also apparent from the Court's case-law that the fact that, under the applicable national law, criminal proceedings closed by an acquittal may be reopened in the event of 'new or newly discovered facts', such as new evidence, cannot call into question the definitive nature of that decision since it does not definitively bar further prosecution, provided that that possibility of reopening, if it does not constitute an 'extraordinary remedy', nevertheless involves the exceptional bringing of separate proceedings based on different evidence, rather than the mere continuation of proceedings which have already been closed (see, to that effect, judgment of 5 June 2014, M, C-398/12, EU:C:2014:1057, paragraphs 37 to 40).

31 In the present case, in the light of that case-law, the fact that Austrian law provides, first, in Paragraph 193(2), point 2, of the StPO, for the continuance of proceedings closed following the adoption of an acquittal decision under strict conditions, that is to say, where 'new facts or evidence arise or appear, alone or in combination with other results of the proceedings, appear to justify the conviction of the accused', cannot call into question the definitive nature of that decision.

32 The same applies, secondly, to the other possibility for continuing the procedure provided for by Austrian law, which is also strictly circumscribed, namely where, in accordance with Paragraph 193(2), point 1, of the StPO, 'the accused person was not questioned in respect of this offence … and no restriction was imposed on him or her in that regard'.

33 That possibility, if it does not constitute an 'extraordinary remedy', involves, in the light of the twofold condition to which it is subject, the exceptional bringing of separate proceedings, rather than the mere continuation of proceedings which have already been closed, with a view to reviewing the acquittal decision in the light of the statements made by the accused person in the event that he or she might subsequently be questioned. Furthermore, it should be noted that, in the case in the main proceedings, that possibility was not open to the public prosecutor's office after the adoption of the acquittal decision, since it is common ground that, even though the accused was not questioned, a 'constraint' was nevertheless brought against him in the form of a measure of investigation aimed at locating him, which proved to be unsuccessful.

34 The strictly circumscribed and exceptional nature of those possibilities of continuing a procedure which had already been closed is further reinforced by the fact that, in accordance with Paragraph 193(2) of the StPO, a reopening of the procedure is not, in any event, possible if, in the meantime, the offence is time-barred. That was the case here, since it is common ground that, at least since 2015, the limitation period for the offence took effect, that is to say, only a few months after the adoption of the acquittal decision, in November 2014.

35 In addition, the mere fact, to which the national court refers in its second question, that, under the applicable national law, there are possibilities to reopen previously closed proceedings to the extent that the offence is not yet time-barred but that, in the present case, the public prosecutor's office did not make use of them before that limitation period took effect is not such as to call into question the definitive nature of a decision to close the proceedings where further prosecution is not definitively time-barred.

36 Since those exceptional possibilities for proceedings to be continued which have previously been discontinued, as strictly defined by Paragraph 193(2) of the StPO, are not capable of affecting the definitive nature of a decision to discontinue the proceedings taken on the basis of Paragraph 190 of the StPO, the decision taken by the public prosecutor's office not to make use of one or other of those possibilities on the ground that the conditions for doing so were not met also cannot call into question the definitive nature of that decision.

37 Furthermore, in its written observations, the Austrian Government, referring to the case-law of the Oberster Gerichtshof (Supreme Court, Austria) and to Austrian academic writings, argued that, under Austrian law, since the decision of the public prosecutor's office to discontinue proceedings in accordance with Paragraph 190 of the StPO 'cannot be challenged by means of an ordinary appeal, it produces from the time of its adoption the effects of a decision which is final, both from a substantive and a procedural point of view'. Among its effects, that government refers to the so-called blocking ('Sperrwirkung') effect resulting from such a decision, in accordance with the principle ne bis in idem, in respect of all the authorities of the other Member States, provided that that decision was taken following a prior examination of the merits and an assessment of the substance of the offence which the accused person is suspected of having committed.

38 It follows that the circumstances referred to in the first two indents referred to in paragraph 25 above are not such as to cast doubt on the fact that, in the present case, the requirement, referred to in paragraph 28 above, that further prosecution must have been 'definitively barred' is satisfied.

Regarding the second condition ("determination of the merits of the case"), the CJEU held that in the particular circumstances of the case (the justice authorities of one Member State doubted that the authorities in another Member States had done their job properly) the principles of mutual trust between the member States and the principle of mutual recognition must be applied. The mutual trust principle entails that the authorities in one Member State accept at face value the final decision made in the other Member State. The principle may only be overridden in exceptional circumstances, for example when the criminal decision was not preceded by actual investigation or assessment of criminal liability.

In the CJEU's assessment, the circumstances of the Austrian discontinuation decision made it clear that a detailed investigation had been carried out. The failure to interview the accused cannot, in itself, justify the conclusion that there was no detailed investigation. Having regard to the principle of mutual trust, the options for the Hungarian prosecution authorities are limited:

55 By contrast, that objective and those principles preclude the public prosecutor's office of the second Member State, when it intends to prosecute a person who has already been prosecuted and who has been the subject, following an investigation, of a final acquittal in respect of the same acts in one Member State, from carrying out a detailed examination of that investigation in order to determine, unilaterally, whether it is sufficiently detailed in the light of the law of the first Member State.

56 Furthermore, where the public prosecutor's office of the second Member State has serious and specific doubts as to the thoroughness or sufficiently detailed nature of the investigation carried out by the public

prosecutor's office of the first Member State in the light of the facts and evidence which were available to that public prosecutor's office at the time of the investigation or which could actually have been available to it by taking the measures of investigation reasonably required in the light of the circumstances of the case, that public prosecutor's office will have to approach the public prosecutor's office of the first Member State in order to request its assistance, in particular on the applicable national law and the reasons for the decision to acquit taken following that investigation, by having recourse, for example, to the cooperation mechanism provided for that purpose in Article 57 of the CISA.

The first instance Hungarian court proceeding in the case can consider the following options:

58 However, although the facts recalled in paragraphs 47 to 50 of the present judgment, in so far as they are established, tend to confirm that the investigation carried out in the first Member State is not manifestly lacking in detail, the fact remains that, as the Advocate General also observed, in essence, in point 66 of his Opinion, it is ultimately for the referring court which has to decide in the present case whether the principle ne bis in idem is applicable to assess the detailed nature of the investigation in the light of all the relevant evidence in that regard.

59 In the context of that overall assessment, as has already been pointed out in paragraph 51 of the present judgment, the referring court may, in certain circumstances, take into account, among any other relevant evidence indicating that the investigation conducted in the first Member State was not detailed, the fact that the accused person was not questioned as a suspect.

Principles of judicial training methodology

Author(s): Iliana Boycheva, legal analyst, CSD

Executive summary. The training of justice professionals on EU law stands as a cornerstone for the accurate and consistent application of EU legislation by the Member States. Following remarkable advancements since the inception of the European judicial training strategy for 2011-2020, the European Commission has initiated an all-encompassing judicial training package. This comprehensive package, geared towards modernizing justice and adopted on 2 December 2020, incorporates a new European judicial training strategy spanning from 2021 to 2024. Against this backdrop, the delivery of current, targeted and relevant training to European trainers for legal professionals stands out as an imperative for high-quality litigation on EU law more broadly.

This chapter presents the state of the art in judicial training methodology, emphasising modern, learner-centred training methods and linking them to the appropriate expected learning outcomes. It aims to help you choose the best type of material for your training topic!

Trainers can use the information contained in this chapter to help them decide how to effectively deliver knowledge to their trainees, based on guidance from leading European judicial training providers. Due to its topic, it is exclusively addressed to trainers.

Linked modules

ToT module 5 – Training organisation and delivery

Chapter content

Sources

Numerous sources present varying ideas on training methods for lawyers. Among the most comprehensive tools is the EJTN Handbook on Judicial Training Methodology, acknowledged by the EU Commission and translated into all EU languages. The Handbook serves to aid current and future judicial training organizers and managers, offering a solid conceptual planning framework for comprehensive training programs and a deep understanding of contemporary judicial training methodologies.

Other sources that might be useful for training providers are: The good judicial training practices on the European e-Justice Portal, the EJTN Distance Learning Handbook 2020 and the EJTN Guidelines for Evaluation on Judicial Training Practices.

Participatory training method

Various training methods exist, and trainers must select suitable ones for specific formats (seminars, conferences, webinars), content (law-related topics, ethics), and target groups (initial, advanced training).

The participatory training method is preferable since its architecture fosters personal growth and discovery, emphasizing the application of judicial knowledge rather than mere accumulation. It leverages critical thinking, challenges ingrained values, and prompts a reassessment of professional orientations and behaviours.

This methodology, characterized by its learner-centred, experience-based, and often open-ended nature, operates within specific historical and socio-political contexts. Hence, effective practices might differ across countries, favouring particular training methods in one context over others elsewhere.

The core concept is that adults learn most effectively when actively engaged. Attending a training event isn't synonymous with participating in it. True participation means active involvement. Key principles in delivering adult training involve justifying the learning's relevance, utilizing personal experiences, framing learning as problem-solving, emphasizing immediate value, and engaging learners in active reflection and discussion.

Further reading

Training of Justice Professionals and Training Practices.

Training methods suitable for judicial training

1. **Brainstorming.**

Brainstorming is a method used by groups of professionals to generate ideas within a specific interest area. Its key benefit lies in active participant involvement right from the start of the session. By employing rules that encourage uninhibited thinking, individuals can freely explore new thoughts and concepts.

How it works: Participants are encouraged to propose ideas or solutions to challenging problems. The trainer records all suggestions on a flipchart without any criticism. Only after all ideas are listed does analysis, categorization, and a discussion regarding their suitability take place.

2. **Snowballing (Pyramiding)**

The method is used to reinforce learning and foster collaboration for new ideas. It promotes creativity, facilitates knowledge sharing, and energizes participants. All that's needed is a spacious room for small group work and materials (like flipcharts, whiteboards, or paper) for capturing ideas. A skilled facilitator can encourage collaborative group work effectively.

How it works: The participants should work alone, then in pairs, then in groups of four, then in groups of eight. The tasks for the participants might be to: answer a specific question, list keywords related to a topic, and agree or disagree with a certain idea. The trainer invites a representative from each group to present the outcomes of their debates to the other groups by presenting their findings on flipchart sheets. Trainees need clear instructions. This technique requires a plenary feedback session.

3. Icebreakers

Icebreakers are brief exercises employed at the start of a training event to help participants familiarize themselves before the main session begins. These activities not only facilitate introductions but also allow the trainer to evaluate group dynamics. Certain icebreakers are designed to break up existing groups and encourage interaction among participants.

Examples

Who Is It?: Participants write something about themselves they believe others don't know. The leader reads these slips, and others guess who wrote each one, leading to surprising revelations.

Common Ground: In small groups, participants identify six common things among themselves and then share these findings with the larger group.

4. Presentations

Combining presentations with group work constitutes effective training methods in judicial education, fostering the acquisition of new knowledge. To enhance learning outcomes, it's crucial to allocate ample time for group or individual discussions immediately following presentations. This allows for clarifying uncertainties or confusion and prevents the risk of solely didactic teaching, ensuring a more engaging and participatory learning experience.

Checklist for a good presenter: Could the speaker be heard from the back of the room? Was eye contact continually used to involve the audience? Were audio-visual aids used appropriately? Was any material written on blackboards, whiteboards or on the video projectors visible from all parts of the room? Did the trainer make appropriate use of any hand-outs?

5. Debate

Debates in judicial training prompt participants to derive conclusions through their reasoning when presented with hypothetical questions. The primary goals are to stimulate critical thinking and reasoning. There's no predefined correct answer from the trainer's perspective. Instead, the hypothetical question serves as a mechanism for trainees to process ideas and arrive at a conclusion independently. Following a successful debating session, each participant will adopt a standpoint on the issue, either voluntarily or as guided by the process.

How it works: Participants in a training program, whether at the outset or for ongoing education, are encouraged to assume the roles of judges, advocates, or prosecutors. Engaging in debates from these perspectives allows for discussions on crucial issues.

Debates serve a dual purpose: beyond fostering disciplined arguments and sound reasoning in initial training, they also help refine the framing of concepts and logical motivation in the reasoning process. Splitting participants into two groups, each presenting arguments for and against a particular topic, ensures logical consistency and factual accuracy in forming standpoints. The didactic significance of these debates lies in the trainer's focus on the development of conceptual framing and logical reasoning.

6. Simulated hearing and role-play exercises

Role-play assigns specific roles to a group or sub-group (e.g., prosecutor, defence, court; or police officer, offender, witness, victim) to perform tasks, like a moot problem, from diverse perspectives. This method, utilizing role-play or mooting, injects practical application into courses, either demonstrating theory or enabling trainees to implement what they've learned to test its efficacy. This technique offers several advantages, fostering cooperative group work, strategy formulation, realistic scenario enactment, and vivid conceptualization.

Tips: Individual tasks should be specific. Careful debriefing is essential. Realistic time limits are needed, and the division of tasks should be fair. The role of the trainer should be clarified.

7. Practical demonstrations

This method is highly effective in multidisciplinary training, allowing lawyers to significantly expand their knowledge and skills in non-legal or non-judicial subjects in an efficient and lasting manner.

In skill-based training when using the demonstration method, the trainer shows the logical step-by-step procedures for doing the job, the principles that apply, and any related information.

8. Problem-solving: the seven steps of problem analysis

Problem-solving aims to pinpoint, analyse, and address problems effectively. The approach to problem-solving may differ depending on the specific issue and can be applied within working groups or through informal discussions.

An organized seven step approach significantly facilitates the process of analysing a problem or case, enhancing learning benefits: 1. **Thorough Reading**: Understand the case by careful reading and note-taking. 2. **Central Issue Definition**: Identify and separate major problems from less significant ones., 3. **Functional Areas Review**: Examine related problems in various functional areas (e.g., marketing, finance) to identify underlying issues, 4. **Judicial Context**: Define the significant legal frameworks and regulations., 5. **Constraints Identification**: Identify limitations that may restrict available solutions., 6. **Alternative Generation**: Compile all relevant alternatives to address identified problems. 7. **Best Alternative Selection**: Evaluate each alternative based on available information to reach a suitable solution.

Following these steps should lead to a well-considered solution for the case!

For more information see: For more information, see European Judicial Training Network, EJTN Handbook on Judicial Training Methodology in Europe, 2016.

Bloom's taxonomy for effective learning

Bloom's Taxonomy is a classification of the different outcomes and skills that educators set for their students (learning outcomes). The taxonomy was proposed in 1956 by Benjamin Bloom, an educational psychologist at the University of Chicago and is still widely used today.

According to Bloom's original taxonomy, educational goals can be categorized as follows:

- **Knowledge** involves the recall of specifics and universals, the recall of methods and processes, or the recall of a pattern, structure, or setting.
- **Comprehension** refers to a type of understanding or apprehension such that the individual knows what is being communicated and can make use of the material or idea being communicated without necessarily relating it to other material or seeing its fullest implications.
- **Application** refers to the use of abstractions in particular and concrete situations.
- **Analysis** represents the breakdown of a communication into its constituent elements or parts such that the relative hierarchy of ideas is made clear and/or the relations between ideas expressed are made explicit.
- **Synthesis** involves the putting together of elements and parts so as to form a whole.
- **Evaluation** engenders judgments about the value of material and methods for given purposes.

Figure 2 Bloom's original taxonomy

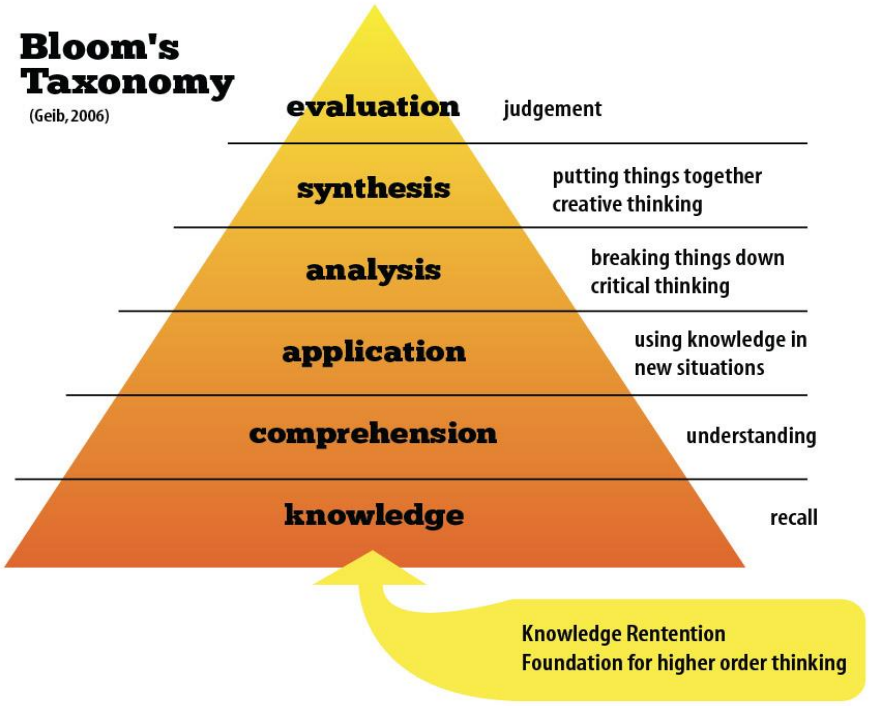

Figure 3 -Bloom's taxonomy

Bloom's taxonomy was revised in 2001. The revised taxonomy focuses on "action words" to emphasise the six cognitive processes of learning by which thinkers encounter and work with knowledge. These include:

- **Remembering** (recognizing, recalling);
- **Understanding** (interpreting, exemplifying, classifying, summarizing, inferring, comparing, explaining);
- **Applying** (executing, implementing);
- **Analysing** (differentiating, organizing, attributing);
- **Evaluating** (checking, critiquing);
- **Creating** (generating, planning, producing).

In the revised taxonomy, knowledge is at the basis of these six cognitive processes. However, according to its authors, knowledge itself is classified into different types, as follows:

- **Factual Knowledge** (knowledge of terminology, knowledge of specific details and elements);
- **Conceptual Knowledge** (knowledge of classifications and categories, knowledge of principles and generalizations, knowledge of theories, models, and structures);
- **Procedural Knowledge** (knowledge of subject-specific skills and algorithms, knowledge of subject-specific techniques and methods, knowledge of criteria for determining when to use appropriate procedures);
- **Metacognitive Knowledge** (strategic knowledge, knowledge about cognitive tasks, including appropriate contextual and conditional knowledge, self-knowledge).

Further reading

Mary Forehand, Bloom's taxonomy – Emerging Perspectives on Learning, Teaching and Technology, University of Georgia, 2010.

Table 1 - Matching learning objectives to training methods

Learning objective	Adult learning processes	Training method
Knowledge	Multiple perspectives	Brainstorming; Interactive lecture; Individual study; Group work; small groups and pairs; E-learning
Understanding	Using previous knowledge to integrate new knowledge	Exercises; Snowballing; Group work: small groups and pairs;

		Discussions/debates; Questioning; Blended learning
Application	Problem solving	Case study; Role play; moot courts; Problem solving experiential exercises
Analysis	Organizing ideas in new contexts	Case analyses; Simulations; Debates
Synthesis	Critical reflection to generate new ideas	Work group; Individual or group projects
Evaluation	Self-orientation	Self-assessment; Work; Independent study projects