European Judicial Cooperation and Fundamental Rights: Practical Guidelines*

"[I]t is important, for each existing protection system, while maintaining its independence, to seek to understand how the other systems interpret and develop those same fundamental rights in order not only to minimise the risk of conflicts, but also to begin a process of informal construction of a European area of protection of fundamental rights. The European area thus created will, largely, be the product of the various individual contributions from the different protection systems existing at European level."

AG Poiares Maduro, Opinion on Case C-465/07 *Elgafaji* [2008] ECR I-921, para. 22

Summary

I. Introduction

These guidelines refer to "judicial interaction"[1] as a set of techniques that *are* and *can* be used by European courts and judges in order to promote coherence and coordination (or at least minimize the risk of conflicts) in the field of fundamental rights protection. They constitute an integral part of the Final Handbook prepared in the framework of the Project "European Judicial Cooperation in Fundamental Rights Practice of National Courts", but are also meant to be a standing-alone, ready-to-be-used document.

Judicial interaction techniques are particularly important when a case must be adjudicated by taking into account not only national law, but also one or more of the supranational sources. This is often the case when issues concerning the protection of fundamental rights arise before a court of an EU Member State. The existence of multiple supranational systems providing fundamental rights protection (ECHR and EU law), with partially overlapping spheres of application and different rules on normative interpretation and hierarchy, places a complex mandate on national judges. These are assigned the role of natural judges (*juges naturels*) of both EU law and the ECHR. Therefore, whenever they are called to adjudicate on fundamental rights, they need to: (i) understand whether supranational sources of fundamental rights protection apply to the case pending before them and, if so, which ones; (ii) determine the precise scope, meaning and level of protection of the relevant supranational fundamental right(s), taking into account the case law of at least one relevant supranational court (CJEU/ECtHR); (iii) ensure the effective application of the relevant supranational norm(s), which might require addressing conflicts between the European rule(s) and national law; (iv) carry out an operation of balancing between different fundamental rights and/or general interests. If the case falls under the scope of both EU law and the ECHR, the previous analysis is multiplied, and national judges must also engage with the complex issue of the relationships between the two systems (and their courts).

Through the use of judicial interaction techniques, national courts therefore seek to ensure a more effective and coherent level of protection of fundamental rights in Europe, while possibly reducing the length of judicial proceedings. If no supranational source applies, the case has to be solved under domestic law, but judicial interaction might still occur at the national level, with similar beneficial outputs.[2]

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

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[1] For the purpose of this Handbook, we have preferred the more neutral and wider concept "judicial interaction" to "judicial dialogue". "Judicial interaction" embraces *all episodes of contacts (either intentional or casual)* between courts, whereas "judicial dialogue" mostly refers to episodes of intentional, formal contacts between courts. The single instances of interaction may differ in intensity, outcome, and typology. In a broader sense, "judicial interaction" can be understood as *a set of techniques used by courts and judges to promote coherence and coordination (or, at least, minimize the risk of conflicts) among different legal and judicial systems in the safeguard of some constitutional goods* – such as human rights – that are protected at different levels of governance (the national, international and supranational normative layers).

[2] On interaction between domestic courts, see *amplius* section 4.a of Part II of the Final Handbook. Note also that, according to established case law, the CJEU has jurisdiction to give preliminary rulings also in a limited set of situations falling outside the scope of Union law, notably when national law refers to the content of certain provisions of EU law, making them directly and unconditionally applicable to purely internal situations: cf., for instance, Case C-482/10 *Cicala* [2011] nyr., and Case C-313/12 *Romeo* [2013], nyr.

As regards the first factor (*number of applicable sources of law*), the present guidelines provide the logical path which a national judge would usually need to follow when adjudicating on fundamental rights cases, when at least one supranational source is applicable. In line with the general structure of the Final Handbook, they consider two supranational sources: the EU Charter of Fundamental Rights (CFR or Charter), and the European Convention on Human Rights and Fundamental Freedoms (ECHR). The sequence then bifurcates depending on whether the case falls within the scope of Union law (***Scenario 1***) or not (***Scenario 2***). Since the Charter only applies to cases falling within the scope of EU law,[3] Scenario 2 concerns situations where the ECHR applies, but the Charter does not.[4] By contrast, both the Charter and the ECHR might apply to situations of Scenario 1. This is because the High Contracting Parties to the ECHR "shall secure to everyone within their jurisdiction the rights and freedoms defined [in the Convention]" (Article 1 ECHR). In other words, the Convention does not suffer from the limitations *ratione materiae* that apply to the Charter.[5]

The decision to focus on cases where the Charter and/or the ECHR are applicable in addition to national law implies that the following Judicial Interaction Techniques will be usually available to national judges: **consistent interpretation, preliminary reference (only when EU law is applicable), the proportionality test, margin of appreciation, comparative reasoning, mutual recognition, disapplication, and deference**.[6] As anticipated, their order of use is mostly conditioned by the *existence (or not) of a veritable conflict between a national provision and a supranational norm*). For instance, if the national judge does not doubt the meaning of the applicable EU law provision, s/he will consider whether the national provision is clearly compatible, or, in any event, there is room for consistent interpretation. If this were not the case, she might decide to refer a preliminary question to the CJEU (as a rule, national courts of last instance must make a reference)[7]. Conversely, a preliminary question will be the first option when the meaning of the EU law provision is unclear, thus making it difficult to assess the EU-lawfulness of the national provision. Accordingly, these guidelines single out alternative available courses of action (A, B, C, etc.) depending on whether: the domestic provision is clearly compatible with the supranational norm(s) involved, clearly incompatible therewith, or there exist doubts on its compatibility. A further distinction is made, where appropriate, depending on the nature of the national judge's doubts.

The guidelines consist of two parts. Section 1 provides an outline of the process of adjudicating fundamental rights in national courts, which takes into account the two scenarios referred to above. Section 2 discusses the two scenarios in greater depth, providing additional insights and indications that should assist national judges when dealing with cases involving European fundamental rights.

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[3] See the blue-box "When do EU fundamental rights apply to national law?" in Section 1 below.

[4] More precisely, the Charter does not apply as a matter of EU law. The Member States may nonetheless decide to extend the scope of application of the Charter, under domestic law, to situations that would in principle escape from its scope: see footnote 2 above; cf. also the judgment by the Austrian Constitutional Court in Cases U 466/1 and U 1836/11, 14 March 2012, where the Charter was regarded as a parameter in the context of the judicial review of constitutionality of domestic legislation.

[5] Additionally, there are also some fundamental right-specific limitations. For more details on the specific scope of application of the ECHR compared to the EU and national law regarding the fundamental rights addressed by the Project, see the Final Handbook, Part I, b. i. "Overlapping fundamental rights sources", at p.9 and ff.

[6] For a discussion on the legal bases of these techniques, their function, strategic use and consequences of it see the Final Handbook, section 2 of Part II, "List of existent judicial interaction techniques as tool(s) for solving conflicts concerning FRs", which also provides concrete examples of their application in the fields of non-discrimination, fair trial and freedom of expression.

[7] Art. 267(3) TFEU.

II. The logical path of adjudication in fundamental rights cases before national courts: an outline

A. Does the case fall within the scope of EU law?

This question must be answered in the affirmative if there is a provision of EU law (primary or secondary) other than the Charter that applies to the facts of the case: cf. box below.

NO → The case might nonetheless fall within the scope of the ECHR. If so, see below, part C. Otherwise, the case must be solved under national law.

YES → The Charter is applicable to the case. In addition, the ECHR might also apply. See below, part B.

When do EU fundamental rights apply to national law?

According to Article 51, par. 1, of the EU Charter of fundamental rights, titled "Field of application", the rights and principles therein are binding on the Member States "only when they are implementing Union law". In its judgement of 26 February 2013 on Case C-617/10 *Åkerberg Fransson*, nyr., the CJEU interpreted this provision as meaning that "the fundamental rights granted by the Charter must (…) be complied with *where national legislation falls within the scope of European Union law*" (para. 21, emphasis added). In two more recent judgments (respectively, 6 March 2014, Case C-206/13, *Cruciano Siragusa* [2014], nyr., and 27 March 2014, Case C-265/13, *Emiliano Torralbo Marcos*, nyr.), the CJEU pointed out that "the concept of «implementation» in Article 51 of the Charter requires a certain degree of connection [with EU law]" (para. 24), and that, "[w]here a legal situation does not fall within the scope of Union law, the Court has no jurisdiction to rule on it and any Charter provisions relied upon cannot, of themselves, form the basis for such jurisdiction" (para. 30). It follows that the Charter applies *where a EU rule other than the Charter provision allegedly violated applies to the case* pending before the national judge. In the words of Allan Rosas,

"*The Charter is only applicable if the case concerns not only a Charter provision but also another norm of Union law. There must be a provision or a principle of Union primary or secondary law that is directly relevant to the case. This, in fact, is the first conclusion to draw: the problem does not primarily concern the applicability of the Charter in its own right but rather the relevance of other Union law norms*".[8]

Below is a list of situations, drawn from the case law of the CJEU, where the Charter is applicable, because the case involves the application of a different EU rule (trigger):

- cases concerning national measures adopted in order to enforce a EU Regulation (e.g. Case

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

C-5/88 *Wachauf* [1989] ECR 2609; Case C-292/97 *Kjell Karlsson* [2000] ECR I-2737) or EU primary law (TEU/TEFU provisions);

- cases concerning national measures adopted in order to implement a Directive (e.g. Joined Cases C-20/00 and 64/00, *Booker Aquacultur and Hydro Seafood* [2003] ECR I-7411; Case C-176/12 *Association de médiation sociale* [2014], nyr, Case C-385/11, *Elbal Moreno*, [2012], nyr.), or national measures which substantially act as implementing measures, though not specifically adopted on that purpose (Member States do not need to pass specific measures in order to implement a Directive if the domestic legal order is already in conformity with that Directive), or national measures which in any event have the effect to implement an obligation of the Member States under EU law, even if adopted before the EU provision that places the specific obligation on Member States (e.g. the obligation to adopt sanctions aimed to ensure the effective collection of VAT: *Åkerberg Fransson*, cit.);

- cases concerning national measures falling within the scope *ratione materiae* and *personae* of a Directive, before the expiry of the transposition period (but note that this is not yet an established case law: cf. Case C-1444/04 Mangold);

- cases concerning national measures which derogate from EU law provided by EU primary or secondary law based on reasons of public interest (e.g., Article 36 TFEU/mandatory requirements, Article 45(3) TFEU, Article 4 of the EAW Framework Decision, limits to free movement of EU citizens and their familiars laid down by Directive 2004/38/EC; cf. C-260/89 *Elliniki Tiléorassi AE* (*ERT*) [1991], ECR I-2925; Case C-208/09 *Sayn-Wittgenstein* [2010], ECR I-13693); when the national measure seeks to derogate from EU law in order to protect a fundamental right, then one needs to strike the balance between the EU fundamental freedom affected and the fundamental right in question (cf. Case C-112/00 *Schmidberger* [2003] ECR I-5659; Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609);

- cases concerning national provisions of procedural law that affect or govern the exercise of (ordinary) rights granted by EU law (such as the right to have the Member State making good damages caused to legal or natural person by not having implemented in time a Directive: see Case C-279/09 *DEB* [2010] ECR I-13849.

Note also that, according to established case law, the CJEU has jurisdiction to give preliminary rulings also in a limited set of situations falling outside the scope of Union law, notably when national law refers to the content of certain provisions of EU law, making them directly and

unconditionally applicable to purely internal situations: cf., for instance, Case C-482/10 *Cicala* [2011] nyr., and Case C-313/12 *Romeo* [2013], nyr.

B. Situations falling within the scope of EU law

This corresponds to Scenario 1 of Section 2 of these guidelines.

In order to answer Question 1(***Is the domestic provision compatible with EU law?***) below, the national judge must take into account that:

- there are specific techniques for the interpretation of EU law, and the Charter in particular;
- If the Charter provision allegedly violated corresponds to a fundamental right granted by the ECHR, attention must be paid to Article 52, par. 3, CFR (duty of parallel interpretation with the ECHR/case law of the ECtHR);[9]
- The requirements for compatibility vary depending on the relationship between the domestic provision and the provision of EU law that brings the situation within the scope of EU law.

Some guidelines on how to address these points are provided in the first blue-box in Section 2 "Interpretation of the Charter and requirements for compatibility of the domestic provision with the Charter".

Question 1: Is the domestic provision compatible with EU law?

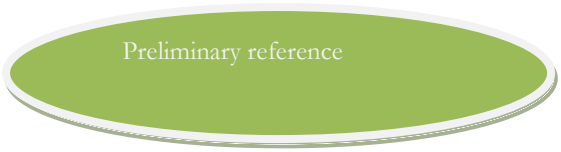
YES: the judge can apply domestic law.

UNCLEAR:

i –Where the interpretation of the relevant *EU law provision is unclear*

The national judge may (last instance courts must – Art. 267(3) TFEU) refer a preliminary question to the CJEU, and ask for the interpretation of the EU law provision whose meaning is unclear. Preliminary reference is unnecessary when the CJEU already clarified the meaning of the provision.[10]

[9] Art. 52(3) EU Charter reads as follows: "*Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*"



Once established the correct interpretation of the EU law provision, the national judge must verify whether the national provision is clearly compatible or, in any event, there exists the possibility to interpret it in conformity with EU law (see point ii below).

ii –Wherethe *national provision is open to different meanings*

Unlike what happens under i), here the judge has no doubts as regards the meaning of the applicable EU law provision. If there is a construction of the domestic provision that makes it compatible with EU law, also in light of the case law of the CJEU, this must be adopted.

If there is no such construction available, there is a conflict: see Question 2.

iii- Wherethe *domestic measure restricts a fundamental right* granted by the Charter

The domestic provision is compatible with EU law if the test of proportionality is satisfied. The domestic restriction must be: *provided for by law*, *respect the essence of the fundamental right restricted*, *pursue a legitimate aim*; *be suitable and necessary to achieve it*.

In order to assess the proportionality of the measure, it might be useful to take a look to:

- The case law of the CJEU

- The case law of other national courts

[10] For more details on how to establish whether a certain EU legal provision has been clarified by the CJEU, the steps to be followed as established by the CJEU in *CILFIT* (Case 283/81 *Srl CILFIT and Lanificio di Gavardo* v. *Ministry of Health* [1982] ECR 3415), please see the Final Handbook, Part II, section 2, "Exemption from the obligation to raise a preliminary reference".

However, if the national judge cannot solve his/her doubt, he/she may refer a preliminary question to the CJEU, asking whether the relevant provision of the Charter does admit a restriction such as that at issue. A duty to make the reference only exists for national courts of last instance and only if the issue has not yet been clarified by the CJEU.

Preliminary reference

The CJEU might either provide the national judges with precise guidelines, or rather accord them a significant margin of manoeuvre in conducting the proportionality assessment.

Precise guidelines v Deference

NO: There is a clear conflict, see below Question 2.

***Question 2:* Is it possible to disapply the domestic provision conflicting with EU law?**

The affirmative answer requires that the relevant provision of EU law has direct effect, i.e. the EU provision is clear, precise and unconditional

Disapplication

YES: The judge must apply EU law and set aside the domestic norm.

N.B: when the conflict is with an EU directive, disapplication is possible only if the case is brought against a public authority; (*for more info on horizontal effect of EU Fundamental Rights please see the second blue-box of Section 2 ("Direct effect of the provisions of EU law and of the provisions of the Charter in particular").*

NO: under EU law, there might be room for an action for responsibility of the Member State for breach of EU law (according to the *Francovich* case law of the CJEU). However, if the case falls also within the scope of the ECHR, it might be necessary to consider the effects of the Convention under domestic law. If the domestic legal order admits the disapplication of national provision in conflict with the ECtHR, then the national norm can be set aside. See *amplius* under Question 2 of part C.

C. Situations falling outside the scope of EU law but within the scope of ECHR

This corresponds to Scenario 2 of Section 2 of these guidelines.

<u>Question 1:</u> Is the domestic provision compatible with the relevant provision of the ECHR, also in light of the case law of the ECtHR?

YES: the national judge can apply it.

NO: there is a conflict. See Question 2 below.

UNCLEAR:

i- <u>Where the *domestic provision restricts a fundamental right* granted by the ECHR</u>

If the fundamental right in question is among those that admit limitations, the domestic provision is compatible if it satisfies the test of proportionality, as shaped by the ECtHR. The domestic provision must: **be prescribed by law, pursue a legitimate aim, be necessary in a democratic society, be proportionate in the narrow sense**.

In order to assess the proportionality of the measure, it is particularly useful to take a look to the case law of the ECtHR. This because the room of manoeuvre that national courts might enjoy in conducting the proportionality test varies depends on whether there is a European consensus on the matter of the limitation of the fundamental right, on the basis of which the ECtHR determines the space for manoeuvre that it is willing to leave to the High Contracting Parties and their courts (for more details on proportionality, margin of appreciation and vertical cooperation between national courts and the ECtHR, see Scenario 2 in Section 2).

ii- <u>Where the *domestic provision is open to different meanings*</u>

The national judge must opt for the construction(s) of national law ensuring conformity with the ECHR, also in light of the case law of the ECtHR, if there is any.

<u>Question 2:</u> Is it possible to disapply the national norm conflicting with the ECHR?

The national judge needs to verify whether his/her legal order admits the disapplication of national provisions conflicting with the ECHR.

YES: The national judge can set aside the domestic provision.

NO: Maybe it is possible to raise a question of constitutionality which will revolve around the breach of the ECHR (either directly, with the ECHR serving as standard of review or indirectly, with the Convention being used to interpret the relevant constitutional provision).

III. The process of adjudicating fundamental rights in national courts: a discussion

A. First Scenario

The case pending before a national court falls within the scope of Union law and involves a fundamental right granted by the Charter. In some cases, the dispute may also involve the application of the ECHR.

In order to understand whether the national measure is compatible with the Charter, a national judge needs to take into account two elements. Firstly, s/he has to determine the meaning of the Charter provision in question.[11] In order to do so, s/he should proceed in accordance with the rules of interpretation applicable to EU law (for instance, *effet utile* principle) and the Charter in particular (see Article 52 CFR). If the meaning of a provision of EU law (including the provisions of the Charter) is ambiguous, a national judge can ask the CJEU to clarify it through a **preliminary reference** (last instance courts must refer the question, unless the CJEU has already decided on the point, under Art. 267(3) TFEU). Secondly, the requirements for compatibility of national law with the Charter vary depending on the relationship between national law and EU law at stake. These two points, which are functional to establishing whether the national provision is compatible with EU law, are addressed in the following box, respectively under **a)** and **b)**.

[11] The national judge may have doubts on the interpretation of a provision of the Charter, but also on the meaning of another provision of EU law in light of the Charter. In both cases, the interpretation requested to the CJEU is functional to establishing the compatibility of the domestic provision with EU law. For instance, in Case C-279/09, *DEB* [2010] ECR I-13849, the national judge asked (in essence) an interpretation of Article 47 of the Charter. He/she doubted the compatibility with Article 47 of a domestic provision under which the pursuit of a *Francovich*-type action for responsibility of the Member State was subject to the making of an advance payment of the costs of the proceedings, and legal persons were excluded from legal aid. By contrast, in Case C-149/10, *Chatzi* [2010], ECR I-8489, the national judge asked the CJEU to clarify the interpretation of Article 2(2) of the Framework Agreement on Parental Leave (set out in an annex to Directive 96/34/EC), in light of Article 24 of the Charter on the rights of the child. The referring court doubted the compatibility with the Framework Agreement of the national implementing legislation, which granted to mothers of twins a single period of parental leave. Since the Charter has the same status as the Treaties (Article 6(1) TEU), EU legislation must be compatible with the fundamental rights therein. This implies that, insofar as is possible, EU legislation must be interpreted in compliance with the Charter.

Interpretation of the Charter (a) and requirements for compatibility of the domestic provision with the Charter (b)

(a) In order to determine the content of the provisions of the Charter, account must also be taken of the Explanations to the Charter,[12] and of the case law of the CJEU on the interpretation of that provision.

According to Article 52, par. 3, CFR, the meaning and scope of the fundamental rights of the Charter that correspond to rights granted by the Convention shall be the same as those of the latter. A national judge should therefore also establish whether the relevant provision of the Charter corresponds to a fundamental right granted by the ECHR. If so, he/she should take into account also the case law of the ECtHR concerning the interpretation of the corresponding provision of the ECHR. However, Article 52, par. 3, CFR also adds that the rule of parallel interpretation with the ECHR "*shall not prevent Union law providing more extensive protection*". Accordingly, a national judge should not follow the case law of the ECtHR when it affords a lower protection than granted by the CJEU.

The explanation of Article 52, par. 3, of the Charter provides a list of provisions of the Charter that correspond (totally or in part) to fundamental rights granted by the ECHR.

(b) The Charter applies if a domestic measure falls under the scope of EU law.[13] Depending on the relationship between the facts of the case and EU law, one can list three scenarios:

i) **The action of the Member States is "entirely determined by EU law" (*Melloni*, *N.S.*):** in this scenario, the national measure implements EU measures (or a provision therein) that already determine the exact level of protection that must be granted to the fundamental right(s) involved. In other words, the EU legislator took care of balancing – through the EU measure or provision in question – two conflicting fundamental rights, or a fundamental right and an objective of general interest (e.g. the right of the accused v the efficiency of the European Arrest Warrant system [*Melloni*][14]; the right of the asylum-seeker v burden-sharing between the EU Member States (the interest of the requested State to defer requests to the State of entry) [*N.S.*][15]). Clearly, the EU measure must comply with the Charter. Therefore, if the national judge considers that the standard of protection endorsed by the EU measure does not comply with the Charter, it can question the validity of the EU measure through the preliminary reference. In

[12] The Explanations can be seen at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF
[13] Cf. the blue-box "When do EU fundamental rights apply to national law?" at p. 5.
[14] Case C-399/11, *Melloni* [2013], nyr., para. 59.
[15] Case C-411/10, *N.S.* [2011], ECR I-13905.

particular, a national judge that doubt the validity of the EU measure/provision cannot set it aside without preliminary asking the CJEU, even when the judge *a quo* is not a last instance court. By contrast, if the validity of the EU measure is not in question, the national judge must ensure that the domestic provision is in line with the level of protection established by the EU measure/provision. If it lowers that level, the domestic measure is not compatible with the Charter (*N.S.*). Similarly, the domestic provision is not EU-legal if it provides the fundamental right(s) involved with a higher level of protection than that endorsed by the EU measure and as a consequence it undermines the effective application of the EU measure (*Melloni*).

ii) **The action of the Member States is "not entirely determined by EU law" (*DEB*, *Fransson*, *ACCEPT*):** in this scenario, the domestic provision is connected with a EU measure that leaves to the Member States to determine the level of fundamental rights protection (e.g., national provisions of procedural law governing the exercise of (ordinary) rights conferred by EU law before domestic courts [*DEB*],[16] or national provisions laying down sanctions aimed to ensure that the objectives pursued/rights conferred by a EU measure are adequately achieved/protected [*Fransson*, *ACCEPT*][17]). In these cases, the Member States (including judges) must ensure that the domestic measure complies with the Charter or, which is the same, provides for restriction to the fundamental rights therein that satisfy the test of proportionality laid down by Article 52, par. 1, CFR. Unlike in the previous scenario, Member States can decide to enhance the level of protection established by the Charter (for instance, because the domestic Constitution grants broader protection to the fundamental right(s) involved). However, the EU measure must still be complied with[18] and, in case, competing fundamental rights must not be unjustifiably restricted. Furthermore, in the case of national sanctions for violation of EU rights (*ACCEPT*, *Fransson*), the former need to respect two fundamental principles of EU law: equivalence and effectiveness. The principles of equivalence requires national judges to set aside national procedural rules which establish more disadvantageous conditions for the exercise of rights derived from EU law as compared to equivalent rights granted by national law; under the principle of effectiveness, national procedural provisions must not make it impossible or excessively difficult to protect (also ordinary) rights granted by EU law.[19] The impossible or

[16] Cit. fn. 10.
[17] Case C-81/12 *ACCEPT* [2013], nyr.; *Fransson*, first blue-box.
[18] At para. 29 of *Fransson*, the CJEU pointed out that "where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or a measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised".
[19] Case C- 199/82 *Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] ECR 353595.

excessively difficult character of a national procedural rules is established "by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances."[20]

iii) **Member States seek to implement a legitimate derogation from EU law (*ERT*, *Sayn Wittgenstein*)**: domestic measures implementing derogations provided by EU primary or secondary law (cf. the first blue-box for examples) must be proportionate: they must strike a fair balance between their (legitimate) purpose pursued and the non-application of the EU law rule. All national measures derogating from EU law must respect the Charter. Therefore, any restriction to the fundamental rights granted therein in view of a legitimate interest must satisfy the test of proportionality (Article 52, par. 1, CFR).

***Question 1:* Is the domestic provision compatible with EU law?**

A) If **the domestic provision is compatible** with EU law (within the meaning under points i), ii), or iii) of box 1 above), the national judge can apply it.

Note that a national provision that is compatible with EU law might be incompatible with the ECHR, or with the obligations flowing from other international treaties that bind the Member State considered. Although the CJEU and the ECtHR have been increasingly referring to each other over the last years, divergences might nonetheless exist or emerge.[21] In this case, the national judge might be obliged to choose between compliance with EU law and compliance with other international obligations.

B) It is unclear whether the domestic provision is compatible with the relevant EU law provision(s). For instance, the national judge may have doubts concerning the meaning of the applicable provisions of EU law.[22] In this case, s/he may ask the CJEU to interpret the relevant provision of the Charter (or the EU law provision/measure that brings the situation within the scope of EU law) through a preliminary question (Article 267 TFEU).[23] If the case is pending before a

[20] Joined cases C-43430-431431431/93 *Van Schijndel* [1995] ECR I-4736, para 19, Case C-312312312/93 *Peterbroeck* [1995] ECR I-454599, para 1414, Case C-276/01 *Joachim Steffensen* [2003] ECR I-373535, para 66, Case C-125125125/01 *Peter Pflücke and Bundesanstalt für Arbeit* [2003] ECR I-9375, para 3333, C-63/01 *Samuel Sidney Evans and The Secretary of State for the Environment, Transport and the Regions, and The Motor Insurers' Bureau* [2003] ECR I-1417, para 46.

[21] On this point, see the examples on the conflict of interpretation between the CJEU and ECtHR in relation to the principle of non-discrimination, right to a fair trial and freedom of expression at pp.20-22 and section 4.b in Part II of this Final Handbook.

[22] Or with another provision of EU law, that must be interpreted in light of the Charter: see fn. 5.

[23] Think, for instance, of the case where the relevant EU law provision is open to different meanings, and the viability of consistent interpretation depends on which interpretation of the EU law provision must be embraced. Since the CJEU is the

national court (a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law) there is a duty to refer a preliminary question (**preliminary reference**). By contrast, it is not necessary to refer a preliminary question is the CJEU already clarified the meaning of the provision(s) in question. Thus, before making the reference, it is worth taking a look to the previous case law of the CJEU (**vertical cooperation**). Once established the meaning of the EU law provision(s), the national judge will assess whether the national provision is compatible, or in any event there is room for **consistent interpretation.** If this is not the case, there is a conflict, and Question 2 below must be addressed.

The national judge may doubt the compatibility of EU law with a national provision that restricts a fundamental right granted by the Charter. Note that a measure that restricts a right of the Charter can nevertheless be compatible with it (see points ii) and iii) of box 1, at the end of this Scenario), subject to the requirements of Article 52, par. 1, CFR which lays down the **test of proportionality**. The following questions need to be answered:

- Is the limitation provided for by law?
- Does the domestic provision safeguard the essence of the EU fundamental right whose exercise is limited?
- If so, does the measure envision an objective of general interest recognised by the Union, or is it necessary to protect the rights and freedoms of others? (*legitimate interest*)
- If so, is the domestic provision suitable to achieve the aim pursued? (*suitability*)
- If so, is the domestic provision the least restrictive available to achieve that aim (with respect to the EU Charter right restricted)? (*necessity*)
- If so, the restriction to the fundamental right must be justified by the importance of satisfying the competing interest (*proportionality in the narrow sense*)

If any of the strands of the test of proportionality are not satisfied, the domestic provision is not compatible with EU law: see section **D)**.[24]

ultimate interpreter of EU law (cf. Article 19(1) TEU), the national judge cannot opt, on its own motion, for the interpretation of EU law that ensures the conformity of the domestic legal order.

[24] For a recent decision of the CJEU applying Article 52, par. 1, CFR see Joined Cases C-293/12 and C-594/12, *Digital Rights* [2014], nyr.

In order to determine the proportionality of the domestic provision, it is useful to look at the interpretation of the same EU fundamental right in previous decisions of the CJEU (**vertical cooperation**), or of other national courts (**comparative reasoning**).

If the national judge cannot solve his/her doubts by looking at the case law of other courts, he/she may refer a question to the CJEU ((a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law must), asking whether the relevant provision of the Charter admits a limitation such as that at in question (**preliminary reference**). Although the final decision on the proportionality of the domestic measure is always left to the national judge, the case law shows that the degree of the scrutiny exercised by the CJEU varies. On some occasions, the CJEU provides very precise guidelines, and basically indicates whether the domestic provision was proportionate or not. By contrast, on other occasions it leaves significant room for manoeuvre to the national court in conducting the proportionality test (**deference**).[25]

C) The national judge has no doubts as regards the meaning of the applicable EU law provision(s), but **the domestic provision is open to different meanings**. When available, the national judge must adopt the interpretation that makes the domestic provision compatible with EU law, also in light of the case law of the CJEU (**consistent interpretation**). If consistent interpretation is not viable, there is a conflict (see Question 2 below).

D) If **the domestic measure is clearly not compatible with EU law**: see Question 2 below.

[25] Cf., for instance, ECtHR, App. no. 30141/04, *Schalk and Kopf v Austria* [2010]. For more insights and examples on the test of proportionality and the doctrine of the margin of appreciation: http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp.

If the national judge cannot solve the conflict by way of interpretation, she needs to establish whether the relevant EU law provision has direct effect, thus allowing disapplication of the conflicting national provision.

Direct effect of EU law and of the provisions of the Charter in particular

The provisions of EU law that are clear, precise and not subject to conditions can be relied on by legal and natural persons before domestic courts, in order to obtain the disapplication of conflicting national provisions. We speak of, respectively, *vertical* and *horizontal* direct effect depending on whether the direct effect of a EU law provision is relied upon in the context of proceedings opposing a natural or legal person to a Member State (*rectius*, one of its entities), or in disputes between private parties. Note that the CJEU endorsed a broad notion of "State" for the purpose of vertical direct effect: as stated in case C-282/10 *Dominguez* [2012], para. 39, "*the entities against which the provisions of a directive that are capable of having direct effect may be relied upon include a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.*"

As regards horizontal effect, there exist some limitations. In particular, provisions of EU directives (and EU decisions) cannot be relied on in the context of disputes between privates in order to set aside conflicting national legislation (e.g., *Dominguez*, cit., para, 37). By contrast, the technique of consistent interpretation can be relied on also in order to ensure, in the context of a dispute between private parties, the conformity of national law with a Directive. However, "*the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law contra legem*" (e.g., Case C-268/06 *Impact* [2008] ECR I-2483).

When consistent interpretation cannot be relied on in a dispute involving private parties in order to solve a conflict between a Directive and national law, the only remedy available to individuals under EU law individuals is an action for liability of the State in accordance with the *Francovich* jurisprudence (Case C-479/93 *Francovich* [1995] ECR I-3843). Some requirements need to be satisfied: the aim of the provision of EU law that was not implemented under domestic law must be that to confer a right on an individual, the content of the right must be clear, and there must be a causal link between the State's violation and the damaged suffered by

the applicant. The violation must also be sufficiently serious, but this requirement is always satisfied when the violation of a Directive is at stake.

As regards the Charter, Article 52, par. 5, CFR substantially excludes the direct effect of the provisions of the Charter that enshrine 'principles'. However, neither the Charter nor the Explanations provide an exhaustive list of provisions laying down "principles". Only for illustrative purposes, the explanation of Article 52, par. 5, CFR, refers to Articles 25, 26, and 37 as *examples* of Charter "principles". The same explanation also adds that "in some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. 23, 33 and 34". It might therefore be useful to ask the CJEU (through a preliminary question) to clarify the nature of the provision of the Charter that is relevant in the case.

Note that, in the recent judgment of 15 January 2014 in Case C-176/12 *Association de médiation sociale*, the CJEU confirmed that at least some provisions of the Charter can have direct effect, including in disputes between private parties (provided that the case falls within the scope of EU law).[26] In order to have direct effect, the provision of the Charter must be *"sufficient in itself to confer on individuals an individual right which they may invoke as such*". The CJEU also affirmed that the prohibition of age-discrimination in Article 21, par. 1, CFR, satisfies this test, whereas Article 27 on the right of workers to information and consultation within the undertaking does not. If the pending case involves a different provision of the Charter, it might be useful to ask the CJEU to clarify whether it has direct effect or not through the preliminary reference.

Question 2: Is it possible to disapply the domestic provision conflicting with EU law?

A) If **the relevant provision of EU law has direct effect**, a national judge must apply it and set aside the conflicting domestic norm (**disapplication**).

B) If **it is unclear whether the relevant provision of EU law has direct effect**, it might be worth referring the issue to the CJEU through a preliminary question.

C) If **the relevant provision of EU law has no direct effect** and consistent interpretation is not viable, under EU law the only remedy abstractly available to individuals is an action for liability of the State in accordance with the *Francovich* jurisprudence.[27] However, if the case falls also under the scope of the ECHR, it might be necessary to consider the effect of the ECHR within the domestic legal

[26] See the first blue-box "When do EU Fundamental rights apply?".
[27] See the blue-box on direct effect above. Case C-479/93 *Francovich* [1995] ECR I-3843.

order. If the domestic legal order admits the disapplication of national provision in conflict with the ECtHR, then the national norm can be set aside (see below, Q2 of Scenario 2).

Note that the EU rule might be in contrast with the domestic Constitution. From the EU-side, it is established case law of the CJEU that, "*by virtue of the principle of primacy of EU law, (…) rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State*".[28]

[28] *Melloni*, cit. fn. 8, para. 59.

B. Second Scenario

The case pending before the national court does not fall within the scope of Union law and involves a fundamental right granted by the ECHR or a Protocol binding the Member State of the judge *a quo*.[29]

***Question 1:* Is the domestic measure compatible with the relevant provision of the ECHR (or of a Protocol to it)?**

In order to answer this question, the national judge has to establish the meaning of the provision of the ECHR (or of a Protocol to it) that is relevant in his/her case. In order to do so, he/she must take into account also the case law of the ECtHR.

A) If **the domestic measure complies with the ECHR**, it can be applied/upheld.

Note that a domestic measure that entails a limitation to a fundamental right granted by the ECHR is compatible with the latter if two conditions are satisfied: the fundamental right in question admits limitations, and the test developed by the ECtHR to check the admissibility limitations is satisfied. This test requires that the restriction:

- is prescribed by law;
- pursues a legitimate aim (note that, unlike what happens under the Charter, the provisions of the ECHR enshrining fundamental rights that admit limitations establish themselves which aims can be regarded as legitimate; those aims therefore form an exhaustive list);
- is necessary in a democratic society, i.e., there exists a pressing social need for the interference;
- is proportionate, in particular, **proportionality** requires that: 1) the domestic measure it is appropriate to achieve its stated aim; 2) no less intrusive measures exist; 3) the essence of the fundamental right affected is safeguarded.

In order to assess the proportionality of the national measure, it might be useful to take a look to the case law of the ECtHR in similar cases (**vertical cooperation**). This because, under the ECHR system, the primary responsibility for applying the Convention is assigned to national public authorities, including national courts. Furthermore, the ECtHR sometimes leaves to the High Contracting Parties a certain **margin of appreciation** as regards the identification of the proper balance to be struck between a fundamental right and an objective of public interest/a competing fundamental right. In these cases,

[29] The status of ratifications of the Protocols to the ECHR can be monitored at http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG

national public authorities must identify the most appropriate solution to satisfy the fundamental right whose protection takes priority in a specific case, while not unreasonably restricting the conflicting interest/fundamental right. The extent, if not the very existence, of the margin of appreciation varies depending on whether there exists a consensus in the law and practice of the High Contracting Parties as regards the protection that must be afforded to a Convention fundamental right with regard to specific issues ("European Consensus"). A corollary of the doctrine of margin of appreciation is that the application of the ECHR is not necessarily uniform across all the High Contracting Parties. This marks the distance with the Charter and EU law in general, whose application is less concerned with local peculiarities, in light of the principle of EU primacy. At the same time, it must be pointed out that the margin of appreciation is a mechanism of deference of the ECtHR to the national legal systems and/or practices, but it does not guarantee immunity from the Convention. The acknowledgment of a margin of appreciation to the Member States does not exclude the supervision of the ECtHR [30]

B) If **the meaning of the domestic provision remains open to different interpretations**, the national judge must opt for the interpretation (when available) that ensures compliance with the ECHR, also in light of the case law of the ECtHR (**consistent interpretation**).

C) If **the domestic provision is not compatible with the ECHR**, and there is no room for consistent interpretation, there is a conflict and the national judge must address question 2.

Question 2: Is it possible to disapply the national norm conflicting with the ECHR?

Note that the answer to this question varies from State to State, as it depends on the formal rank and effects assigned to the ECHR under national law.

A) If **the domestic legal order allows disapplication of a domestic provision conflicting with the ECHR**, the domestic provision must be set aside (**disapplication**).

B) If **the domestic legal order does not allow disapplication of a domestic provision conflicting with the ECHR**, maybe it is possible to raise a question of constitutionality. This will revolve around the

[30] This was clarified by the ECtHR many times. For instance, in the case of *Attila Vajnai v Hungary*, judg. of 8 July 2008, app. no. 33629/06, the Court considered the following: "The test of «necessity in a democratic society» requires the Court to determine whether the interference complained of corresponded to a «pressing social need». The High Contracting Parties have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a «restriction» is reconcilable with freedom of expression as protected by Article 10 of the Convention. […] In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were «relevant and sufficient», and whether the measure taken was «proportionate to the legitimate aims pursued». In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10".

breach of the ECHR, either directly (with the ECHR serving as standard of review) or indirectly (with the Convention being used to interpret the relevant constitutional provision) (**consistent interpretation**).