HELSINKI FOUNDATION FOR HUMAN RIGHTS

TO LUXEMBOURG

INSTEAD

OF STRASBOURG?

A report on the role of the Court of Justice of the European Union in the protection of human rights

Piotr Kładoczny
Marcin Szwed
Katarzyna Wiśniewska

The report was published thanks to financial support of the Clifford Chance Foundation

CLIFFORD CHANCE

TO LUXEMBOURG

INSTEAD

OF STRASBOURG?

A report on the role
of the Court of Justice
of the European Union
in the protection
of human rights

Warszawa, September 2018

Graphic design and layout: Marta Borucka

Translation: Iga and Piotr Mleczko

Verification: Benjamin Borek - Coxen

Photos:
p. 1: (top): Gwenael Piaser, flickr.com, CC BY-NC-SA 2.0
p. 1 (bottom), p. 25, p. 92: © Marta Borucka
p. 13: Katarina Dzurekova, flickr.com, CC BY 2.0
p. 19, 59, 78, 81: Pixabay, CC0

Publisher

HELSINKI FOUNDATION FOR HUMAN RIGHTS

The Helsinki Foundation for Human Rights
ul. Zgoda 11
00-018 Warszawa, Poland

First edition
Warszawa, September 2018

ISBN 978-83-62245-72-7

The report was created as part of the project *Thinking out of the ECtHR's box' – the Court of Justice of the European Union as an alternative international legal instrument of human rights protection*, implemented by the HFHR thanks to financial support of the Clifford Chance Foundation

CLIFFORD
CHANCE

This publication reflects only the views of the authors. The Clifford Chance Foundation, the sponsor of the project, is not responsible for its substantive content

Helsinki Foundation for Human Rights

The Helsinki Foundation for Human Rights ("HFHR") is a non-governmental organisation established in 1989 by members of the Helsinki Committee in Poland. Its mission is to develop standards and the culture of human rights in Poland and abroad. Since 2007, the HFHR has had consultative status with the UN Economic and Social Council (ECOSOC). The HFHR promotes the development of human rights through educational activities, legal programmes and its participation in the development of international research projects.

Since 2004 the HFHR has been operating the **Strategic Litigation Programme**. As part of this Programme, the Helsinki Foundation for Human Rights joins or initiates court and administrative proceedings of strategic importance. International human rights bodies are a key focus of the Programme's activities. Through its participation in strategic litigation cases, the Programme aims to obtain ground-breaking judgments, which change practices or laws on specific legal issues that raise serious human rights concerns.

The Programme's activities include the following:

- submitting amicus curiae briefs on behalf of the HFHR, in which we present specific human rights issues that are relevant from the perspective of constitutional and comparative law but do not directly refer to the facts of a case;
- taking part in court proceedings as a third party intervener, which means that representatives of the Foundation have the right to express their opinions and submit motions and statements during a trial;
- representing victims of human rights violations in proceedings before international bodies;
- working with law firms and individual lawyers to procure their pro bono representation and legal assistance for the HFHR's clients.

The main area of the Programme's operations is proceedings before the European Court of Human Rights. Recently, one of the objectives pursued by the Programme has been to encourage national courts to refer questions for a preliminary ruling to the Court of Justice of the European Union.

We would like to thank the **Clifford Chance Foundation**, whose financial and professional support enabled us to successfully implement this project.

Clifford Chance

Clifford Chance is one of the world's leading law firms, with 32 offices in 21 countries. The firm opened its Warsaw office in 1992. Today, it has a team of more than 85 lawyers, including nine partners.

The concept of Responsible Business lies at the core of Clifford Chance's strategy. Clifford Chance is committed to supporting local communities where it does business by increasing access to justice, education and funding. The firm works with clients, non-governmental organisations and charities, providing information and pro bono services to representatives of these communities. Clifford Chance staff also devote their time and engage in a range of community activities to provide financial support to charities through the Clifford Chance Foundation.

The authors of the Report

Dr Piotr Kładoczny
Secretary of the Board and Head of the Legal Department of the Helsinki Foundation for Human Rights, responsible for supervising the Foundation's legal and intervention programmes. A lecturer at the Institute of Criminal Law of the University of Warsaw, author and a co-author of dozens of publications on substantive criminal law and criminal procedure, criminal enforcement law, human rights and drug policy; a frequent speaker at conferences and expert seminars. Dr Kładoczny has been involved in many EU projects in the field of criminal law and human rights. He is a member of the Legal Experts Team at the Batory Foundation.

Marcin Szwed LLM
A lawyer for the Strategic Litigation Programme of the Helsinki Foundation for Human Rights. Mr Szwed obtained a degree in law from the Faculty of Law and Administration of the University of Warsaw, and completed a programme in American law at the Center for American Law Studies, a joint undertaking of the Faculty of Law and the University of Florida Levin College of Law. He also finished an LLM programme in comparative constitutional law at the Central European University in Budapest. Mr Szwed is a PhD student at the Department of Constitutional Law of the Faculty of Law at the University of Warsaw. He has written many publications on human rights and constitutional law and was many times a prizewinner and finalist in national contests for law students. He is an expert in constitutional law and international mechanisms for human rights protection.

Katarzyna Wiśniewska
An attorney-at-law (*adwokat*) and the Coordinator of the Strategic Litigation Programme of the Helsinki Foundation for Human Rights. A graduate of the Faculty of Law and Administration of the Jagiellonian University of Kraków, Ms Wiśniewska has extensive experience in managing European and international projects. She is the author and a co-author of a wide range of publications on substantive criminal law, criminal enforcement law and human rights. She sits on the Legal Experts Advisory Panel, the lawyers' forum at Fair Trials International. In 2015, she was listed in the Risings Stars – Leaders of Tomorrow ranking, compiled by national daily newspaper Dziennik Gazeta Prawna. Ms Wiśniewska was appointed by the Ombudsman to the Committee of Experts of the National Mechanism for the Prevention of Torture. She is an expert on EU procedural rights and proceedings before the European Court of Human Rights, as well as on human rights strategic litigation.

Consultants

Dr Piotr Bogdanowicz
A counsel at Clifford Chance and an assistant professor at the Department of European Law of the Faculty of Law and Administration, University of Warsaw. He also teaches at the Warsaw School of Economics and educates future attorneys attending vocational Bar training. Dr Bogdanowicz is a board member of the Public Procurement Law Association, the Polish Research Centre for Law and Economy of China, as well as being a member of the Polish Society of European Law and the European Procurement Law Group. His academic interests extend to issues related to the rule of law in the European Union, EU public procurement law, EU energy law, public-private partnerships and state aid. Dr Bogdanowicz is currently working on his post-doctoral dissertation on contractual amendments in EU public procurement law.

Dr hab. Agnieszka Frąckowiak-Adamska
Assistant professor at the Faculty of International and European Law at the Faculty of Law, Administration and Economics of the University of Wrocław. Dr Frąckowiak-Adamska's areas of expertise include the application of EU law by national courts, the European Judicial Area, EU citizenship and the law of the internal market.

Dr hab. Ireneusz Cezary Kamiński, prof. INP PAN
A lawyer, a Habilitated Doctor of Legal Sciences, academic teacher, associate professor at the Institute of Legal Sciences of the Polish Academy of Sciences, expert in public international law and European law, as well as ad hoc judge at the European Court of Human Rights in Strasbourg from 2014 to 2016.

Table of contents

Foreword by Danuta Przywara

Non-governmental organisations have always used international instruments to protect individual rights and freedoms. European organisations, including the Helsinki Foundation for Human Rights, have relied most heavily on the European Court of Human Rights. Today, the Strasbourg Court still plays an enormous role. It remains the key court to which victims of human rights abuses, their attorneys and NGO lawyers turn to. In recent years, the ECtHR case law has contributed to the creation of many important standards that enhance the level of human rights protection in Poland and across Europe. The litigation initiatives undertaken by the HFHR have made an impact in that process.

However, in view of the current challenges faced by European countries, it is necessary to seek new ways of protecting individual rights and freedoms. Often, not only individuals, but also judges, who must adjudicate a particular case, need the support of international courts. Nowadays, the Court of Justice of the European Union is increasingly becoming the "court of human rights", while references for a preliminary ruling are becoming the instrument that safeguards the standards of fundamental rights.

The CJEU preliminary ruling procedure undoubtedly has many advantages. These proceedings usually take less time than cases before the ECtHR, which may drag on for years. The preliminary ruling proceedings ensure that an individual will obtain a judgment consistent with EU law, including EU human rights standards, before a national court, without the need to submit individual complaints to a separate international court.

On the other hand, Polish courts still submit relatively few requests for a preliminary ruling to the CJEU. This may also be due to a lack of adequate knowledge of how and when to use this instrument in a way that enhances the protection of human rights. For this reason, it is very important to take initiatives aimed at disseminating knowledge on the preliminary ruling procedure among Polish judges, attorneys and the general public.

Legal and educational activities have been and still are the principal elements of the work of the Helsinki Foundation for Human Rights. The project "Not only Strasbourg", which gave birth to this Report, combines these two elements: on the one hand, its aim was to educate lawyers on the Charter of Fundamental Rights and the procedure before the Court of Justice of the European Union, and on the other hand, the project was designed to present the case law of the Court of Justice as a benchmark for fundamental rights protection standards in the European Union.

We hope that thanks to this Report you will be able to perceive references for a preliminary ruling as an effective mechanism of human rights protection.

Have an informative read!

Danuta Przywara

President of the Board,
the Helsinki Foundation for Human Rights

Foreword by Sylwia Gregorczyk-Abram and Marcin Ciemiński

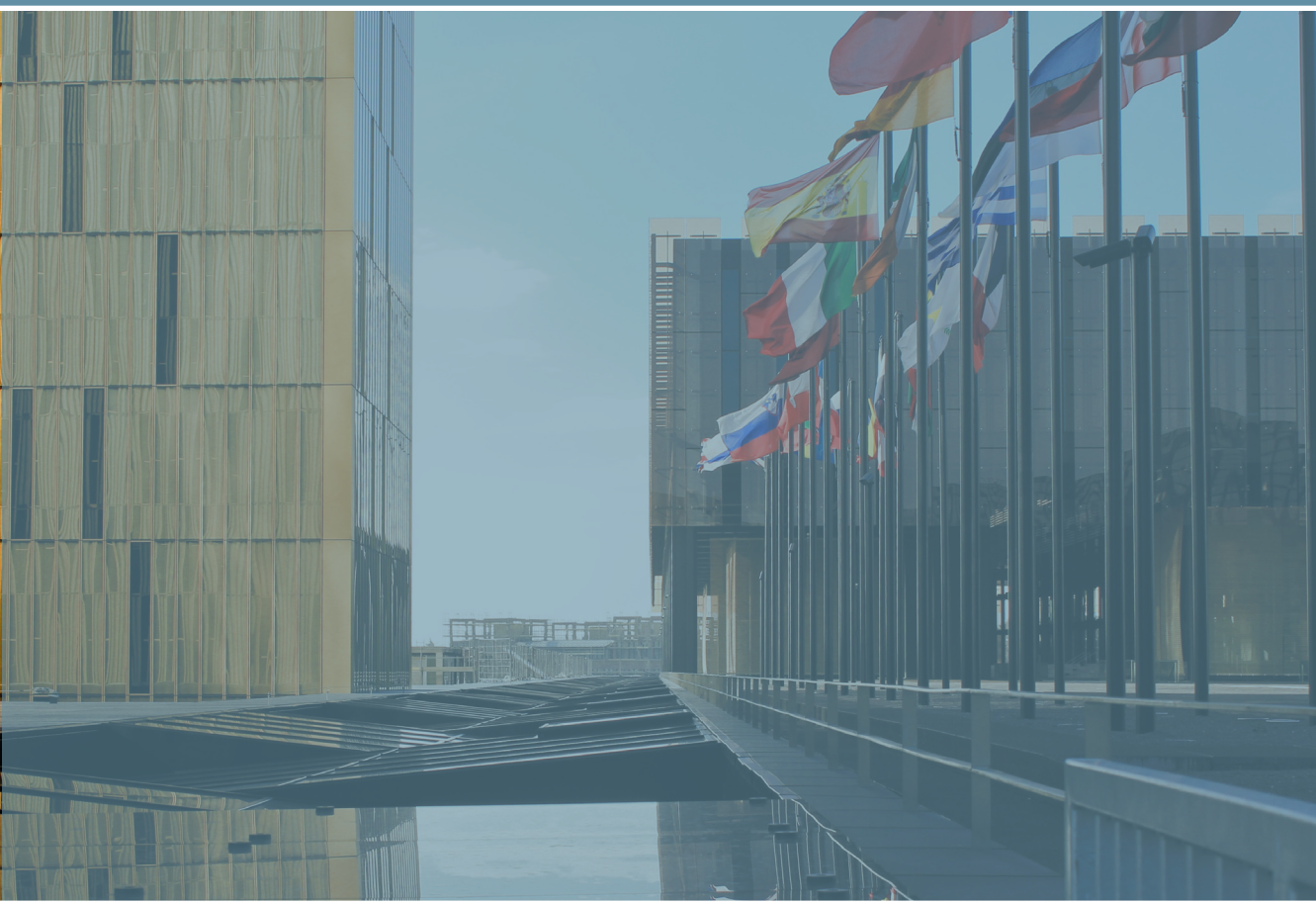
The European Union is a community of law, which means that both the Member States and their institutions, including the courts, are subject to checks on the conformity of their acts or decisions with the basic Constitutional Charter, which is the Treaty. Each year, more and more references for a preliminary ruling are submitted to the Court. The preliminary ruling procedure is a key instrument consolidating EU law and is crucial for the functioning of the entire justice system in the European Union. This is an important mechanism that ensures the uniform application of European Union law throughout the EU. This procedure also plays an important role in European integration, influencing national laws, judicial practice and the creation of basic legal principles.

The reference for a preliminary ruling is also a measure that plays an important role in Polish judicial practice. Without doubt, preliminary references have a significant impact on the case law of Polish courts, adapting it to the requirements of EU law. Although Polish courts use preliminary questions, an analysis of the questions asked by the courts shows that in Poland the number of these questions is proportionally lower than in other EU countries. Moreover, when resorting to the preliminary ruling procedure, the Polish courts focus primarily on issues related to indirect taxation, business activity or the free movement of persons. Meanwhile, as the authors of the Report rightly point out, human rights issues are very often invoked in court disputes in all areas of law, that is, civil, criminal and administrative law. This publication from the Helsinki Foundation for Human Rights shows many examples of the CJEU's activism in creating standards of human rights protection, a trend that Polish courts are yet to sufficiently embrace.

The purpose of the Report is to explain the nature and meaning of preliminary references, and the purpose and stages of the preliminary ruling procedure, as well as the effects of preliminary rulings delivered by the Court of Justice of the European Union. We hope that the Report will contribute to an increase in both the number and the quality of requests for a preliminary ruling from courts in Poland. We also hope that these requests will explore new areas, including legal and human rights issues.

Adw. Sylwia Gregorczyk-Abram
Dr Marcin Ciemiński

Clifford Chance, Janicka, Krużewski, Namiotkiewicz i wspólnicy sp.k.



Summary

Introduction

The current trends in Europe that affect the status and methods of human rights protection

- Human rights have been losing their public appeal for some time. Arguably, this began symbolically on 11 September 2001.
- There has been a significant decline in support for the notion of human rights protection across European societies. It is claimed these rights can be "sacrificed" for the sake of security (including social security).
- A legal system based on the foundations of human rights and courts that, inevitably, represent and guarantee the existing legal order remains the cornerstone of the vision of democracy.
- In the most extreme cases, the judiciary must defend the legal order, which is based on respect for fundamental rights, against excursions of the other branches (the legislature and the executive), which, with the consent of the people and invoking a democratic mandate, try to violate the law and restrict civil liberties.
- As a result of these trends, there is a growing need among those individuals, institutions and non-governmental organisations who recognise the need to defend fundamental human rights and freedoms and to respect the rule of law for these values to be reaffirmed and strengthened by international bodies, among which the European courts are clearly at the forefront.
- The rulings of European Courts in which state bodies are found to have violated human rights or freedoms have a greater impact than the rulings of national courts and are capable of mobilising a democratic society to defend these values

European Court of Human Rights – current challenges

- The position of the CJEU vis-à-vis the ECtHR has been strengthened by the long-standing crisis affecting the Strasbourg Court, which at some point became a "victim of its own success".
- The crisis manifests itself, in particular, in the backlog of cases waiting to be heard by the ECtHR; indeed, there are applications that are only dealt with a decade after they have been lodged.

- Another problematic element of the ECtHR practice is the general tendency to agree to proposals made in states' unilateral declarations affirming a violation of a right enshrined in the ECHR.
- The lack of an effective mechanism to ensure states' implementation of ECtHR judgments at a systemic level is another shortcoming of the Strasbourg system.
- Moreover, it is increasingly easier to relativise the significance of the ECtHR's judgments against Poland by referring to the human rights situation in countries which no longer are perceived to be democratic and respect human rights (e.g. Russia, Turkey), which are also covered by the Court's jurisdiction.
- In any case, according to the statistics for the end of 2017[1], more than 50,000 applications, of which nearly 24,000 come from EU countries, are still awaiting to be heard by the ECtHR.

Case law review

The statistics of the preliminary ruling procedure

- In recent years, rulings given in response to requests for a preliminary ruling from national courts account for by far the largest part of the CJEU's case-law (approx. 65%)[2].
- The number of questions referred to the CJEU for a preliminary ruling has been steadily increasing (from 428 in 2014 to 533 in 2017, for example).
- The greatest number of preliminary ruling proceedings are initiated by German courts, while the lowest number of such proceedings are brought by Maltese and Cypriot courts. This is obviously mainly due to the smaller population of the latter two countries.
- In 2017, Polish courts made 19 references for a preliminary ruling (this comprises 3.6% of the total number of such references). In the same year, courts from most of the countries that joined the EU with Poland in 2004 asked fewer questions than Polish courts (e.g. Czech Republic – 4, Slovakia – 6, Slovenia – 3); this is probably due to their considerably smaller populations. On the other hand, it should be noted that the Hungarian courts made as many as 22 preliminary references, despite Hungary's population being approximately 4 times smaller than that of Poland.
- In total, from the date of Poland's accession to the EU until the end of 2017, Polish courts submitted 127 references for a preliminary ruling to the CJEU. This is a relatively modest figure given that within the same time frame Hungarian courts made

1 European Court of Human Rights, *Annual report – 2017*, Council of Europe 2018, s. 163-164, https://www.echr.coe.int/Documents/Annual_report_2017_ENG.pdf (last accessed on: 2 August 2018).

2 All statistics on the activities of the CJEU referred to in this report are based on the CJEU's 2017 annual report on its judicial activity, https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/ra_2017_pl_web.pdf (last accessed on: 2 August 2018).

158 references. What is more, courts from Romania, a country which joined the EU 2.5 years after Poland and has a population approximately half the size of Poland, also asked more questions (139).

Preliminary references and the Charter of Fundamental Rights

- The Charter of Fundamental Rights was invoked in the operative part of 22 CJEU preliminary rulings in 2017. In previous years, the number of such invocations was lower (17 in 2016, 11 in 2015 and 17 in 2014).[3]
- The Charter was invoked 50 times in requests for a preliminary ruling submitted in 2017[4], a result similar to that of 2016 (48 times)[5]. Courts from Italy (10), Germany (8), Austria (6) and the Netherlands (5) submitted the majority of questions concerning the Charter.[6]
- Article 47, which provides for the right to an effective remedy and to a fair trial, is the most frequently cited provision of the Charter of Fundamental Rights in the operative part of CJEU preliminary rulings. This provision was also most frequently cited in new requests for a preliminary ruling (19 times).[7]
- Requests for a preliminary ruling submitted by Polish courts very rarely concern the interpretation of provisions of the Charter of Fundamental Rights.
- The CFR has only been mentioned in the operative part of four judgments issued by the CJEU following Polish requests for a preliminary ruling.
- The above conclusions, however, support the assertion that in recent years the CJEU has issued a number of judgments in response to preliminary questions from courts in Europe on matters relevant to the protection of the freedoms and rights of individuals.

Relationships between European Courts

- Although the EU is not a party to the ECHR, there are far-reaching interactions between the case law of the ECtHR and that of the CJEU.
- The CJEU emphasises that the Union is not formally bound by the ECHR, but refers on several occasions to the case law of the ECtHR when interpreting the provisions

3 Information on the CJEU's references to the provisions of the Charter of Fundamental Rights was obtained through an analysis of the Court's case law, accessible via the InfoCuria database.

4 European Union Agency for Fundamental Rights, *Fundamental Rights Report 2018*, Luxembourg 2018, p. 37, http://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-fundamental-rights-report-2018_en.pdf (last accessed on: 10 September 2018).

5 European Union Agency for Fundamental Rights, *Fundamental Rights Report 2017*, Luxembourg 2017, p. 40, http://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-fundamental-rights-report-2017_en.pdf (last accessed on: 10 September 2018).

6 *Fundamental Rights Report 2018*, p. 39.

7 Ibid., p. 37-38.

of the Charter. These references are, in fact, based on the language of the Charter (Article 52(3)).

- The ECtHR also refers in many of its judgments to the case law of the CJEU.
- In the period from 1 January 2016 to 1 July 2018, the ECtHR referred to CJEU rulings in judgments concerning, e.g., the ne bis in idem principle, asylum law, the dismissal of the President of the Hungarian Supreme Court, the protection of privacy in the context of the right of access to public information and the mass interception of electronic signals in the context of the right to privacy.

Non-governmental organisations in proceedings before European Courts

- The ECtHR Rules of Court explicitly state that third parties (including non-governmental organisations), may submit, with the leave of the President of the Section, written comments on a case or, in exceptional cases, take part in a hearing before the Court.
- There are no such measures provided for in EU law, and therefore non-governmental organisations have a significantly limited capacity to act before the CJEU in proceedings initiated by requests for a preliminary ruling.
- A non-governmental organisation may submit its written statement to the CJEU in a specific case where it is a party to national proceedings in the course of which a question has been referred for a preliminary ruling.

Surveys

Surveys – the role of the Charter of Fundamental Rights and the case law of the CJEU in proceedings before national courts

- Almost half (46.1%) of the attorneys (adwokaci and radcowie prawni) practising law in Poland indicated that they did not refer to the provisions of the EU Charter of Fundamental Rights in their pleadings.
- 66.2% of the Polish judges who took part in the survey said they did not refer to the Charter in their rulings.

Surveys – the preliminary ruling procedure

- The vast majority of attorneys acknowledge that the preliminary ruling procedure can be an effective mechanism for the protection of human rights, and they recognise the practical importance of this instrument.
- The human rights protection potential of the preliminary ruling procedure was positively assessed by 95% of the surveyed Polish attorneys and 85% of lawyers from other EU countries.
- The main reasons Polish judges cite for their reluctance to refer questions for a preliminary ruling to the CJEU in their practice so far are: the absence of a request from a party to the proceedings, the absence of a need to do so in cases before them, the lack of an EU element, and difficulties in formulating a question.
- However, 74% of the Polish judges who took part in the survey thought that national courts might use the institution more frequently in the near future.
- The judges justified this opinion by referring to changes in the lawmaking system, the destabilisation of the system of separation of powers, and the development of EU substantive laws.
- Also, lawyers practising in both Poland and Europe have noted that the CJEU may play an increasingly important role in many types of cases and that the CJEU may contribute to the strengthening of the protection of fundamental rights and freedoms in practice.
- In their view, particular attention should be paid to cases concerning migration law and policy, criminal law and cases of discrimination.
- Speaking of human rights protection, representatives of European non-governmental organisations still mainly put their faith in the ECtHR, but note the potential of procedures before the CJEU.
- The lawyers argued that the fact that the CJEU is not perceived as a fully effective mechanism for the protection of human rights was a consequence of such factors as the absence of an individual complaint procedure and the fact that NGOs are not allowed to intervene as third parties in CJEU proceedings.
- 40% of the Polish judges who took part in the survey said that the introduction of coordinators for international cooperation and human rights had contributed to positive developments in the application of European law. Exactly the same number of respondents said, however, that they did not see any changes in this respect.

Access to education on EU law

- Both lawyers practising in Poland and those working in other EU countries consider there to be insufficient access to education on EU law and the preliminary ruling procedure.

Part I

The current social and political trends in Europe that affect the status and methods of human rights protection

1 Human rights have been losing their public appeal for some time. Arguably, this began symbolically on 11 September 2001. This process manifests itself, in particular, in the election results in those European Union countries where populist and nationalist parties are gaining increasing support, bandying about slogans of defence against real or exaggerated/imaginary threats such as terrorism or immigrants. It is no longer freedom, but security (including social security) that is becoming an overarching value; one which is not fostered by, it is commonly believed, excessively developed human rights. This trend is most evident in the "new" Member States of the EU, where the standards of the rule of law, freedom and human rights have had insufficient time to become firmly entrenched. To a lesser extent, though in a similar way, this trend can be seen in countries of the "old Union". This is exemplified by the relative successes of the National Front in France, the Austrian Free Party FPÖ or Alternative for Germany AfD, etc. Decreasing public support for political groups whose ideologies and policy agendas promote the freedoms of individuals and the triple division of power, leads to a situation in which a legal system based on the foundations of human rights and courts that, inevitably, represent and guarantee the existing legal order becomes the foundation of the vision of democracy. In the most extreme cases, the judiciary must defend the legal order, which is based on respect for fundamental rights, against excursions of the other branches (the legislature and the executive), which, with the consent of the people and invoking a democratic mandate, try to violate the law and restrict civil liberties.

Not surprisingly, in European countries (especially the "new" EU member states), there is a growing need among those individuals, institutions and non-governmental organisations who recognise the need to defend fundamental human rights and freedoms and to respect the rule of law for these values to be reaffirmed and strengthened by international bodies, among which the European courts are clearly at the forefront. Recourse to these institutions seems all the more appropriate given that membership of international organisations, such as the Council of Europe or the European Union, is quite commonly perceived by societies as an intrinsic value and achievement of civilisation, and often also as a reason for pride. Here, Brexit seems only to be an exception that proves the rule. Consequently, the rulings of European Courts, in which state bodies are found to have violated human rights or freedoms, create a greater impression and have a greater impact than the rulings of national courts and are capable of mobilising a democratic society to defend these values. A recent example of such an impact is the judgment of the Court of Justice of the European Union of 17 April 2018 in the case of the felling of trees in the Białowieża Forest (C-441/17), which significantly strengthened the defence of the Forest against destructive actions. This is because those defending the forest can now effectively oppose the actions of state bodies based on national law by invoking the ruling of the CJEU. Moreover, the mere fact of a complaint being lodged with the CJEU, and an opinion subsequently being issued by the Advocate General, has led to a strengthening of civil society and an increase in the power of protests.

Another important decision is the judgment of the CJEU of 25 July 2018 in the case of Celmer (C- 216/18 *Minister for Justice and Equality v. LM*), which points to the absence of systemic independence in the Polish justice system. This judgment could encourage more frequent recourse to European Courts as it expresses further concerns about the possibility of the fair national adjudication on a matter, following the removal of legal safeguards such as the independent Constitutional Tribunal and Supreme Court. In Poland's current legal and political situation, it is the European Courts that will be considered guarantors of the protection of fundamental rights.

2 The aforementioned rulings were issued by the Court of Justice of the European Union. So far, however, Poles have relied much more on the European Court of Human Rights than on the CJEU. Suffice it to say that in 2017 Polish courts submitted 19 requests for a preliminary ruling to the CJEU, while in the same period 87 ECtHR applications were communicated to the Polish government, 2066 applications were assigned for examination by a Section, the Court handed down 20 judgments, and Poland submitted 171 unilateral declarations and 346 friendly settlements to the ECtHR[8].

Such large numbers on the part of the ECtHR may be attributable to a number of reasons.

Firstly, Poles have been able to lodge applications with the ECtHR since 1993, i.e., for 25 years, whereas references for a preliminary ruling to the CJEU have only been possible since 2004, i.e., for 14 years. This means that for 11 years the ECtHR has enjoyed a monopoly in international human rights protection and, consequently, the knowledge of the procedure for filing applications and the matters covered by the ECtHR jurisdiction has become significantly more widespread. A similar situation occurs in other "new" EU Member States. Moreover, the Charter of Fundamental Rights of the EU, which entered into force in 2009, has been applied by national courts only since that date. Therefore, it has only been since 2009 that the two Courts may be said to be competing with each other as far as the adjudication of human rights issues is concerned. It should be remembered, however, that the CJEU is still considered a court dealing primarily with cases concerning the free movement of persons, goods, capital and services, rather than cases concerning fundamental rights.

Secondly, the number of cases submitted to the Courts is, of course, affected by the extent of a relevant *locus standi*. Any individual whose right under the ECHR has been violated can apply to the ECtHR (without even being required to file a case through a professional representative), whereas only a court can refer a question to the CJEU for a preliminary ruling. Moreover, the courts are, in principle, more accustomed to resolving disputes than to asking questions. They treat the preliminary ruling procedure as a measure of last resort and ask questions when they find that it is absolutely necessary to resolve a legal problem. Such restraint is also visible with regard to referring questions of law to the Supreme Court and the Constitutional Tribunal. The courts are all the more cautious about asking questions to the Court of Justice of the European Union, which is compounded by the complicated, or

8 Statistics quoted from European Court of Human Rights, *Analysis of statistics 2017*, https://www.echr.coe.int/Documents/Stats_analysis_2017_ENG.pdf (last accessed on: 2 August 2018) and Ministerstwo Spraw Zagranicznych, *Polska w systemie Europejskiej Konwencji Praw Człowieka*, https://www.msz.gov.pl/resource/64a2dc36-e2ea-4b3b-9c45-7360f27b826b:JCR (last accessed on: 2 August 2018).

perhaps rather insufficiently practised, procedure for submitting requests for a preliminary ruling. In this respect, attorneys and defence lawyers are also of not much help to the courts, as they rarely apply for a request for a preliminary ruling to be made.

Thirdly, the jurisdiction of the CJEU is very limited compared to that of the ECtHR. While the ECtHR may hear applications concerning violations of individuals' freedoms and rights guaranteed by the ECHR arising, in principle, from any act or omission by a state authority, the jurisdiction of the CJEU extends only to cases falling within the scope of EU law. The Charter of Fundamental Rights also applies to Member States "only when they are implementing Union law" (Article 51(1) CFR). Although quite liberally interpreted in the recent case law of the CJEU, this requirement is correctly perceived as substantially limiting the importance of the Charter in national proceedings.

3 However, it seems that we can observe a gradual increase in the significance of the CJEU as compared to the ECtHR. This trend is due to a number of factors, both political and legal. The key political factor is the difference in perception of the prestige of the two organisations. With a notable exception of Brexit, it seems obvious that, as far as the views of the general population are concerned, a country's EU membership tends to be valued more than the membership of the Council of Europe. They treat this membership as proof of belonging to an elite "club" to which admission is strictly regulated and subject to requirements, the fulfilment of which is proof of high economic, social and political development. Membership of the Council of Europe, on the other hand, is treated, at most, as one of the conditions for membership of the Union. Therefore, the potential threat of being removed from this "club" is seen by members of the general public, especially those of the "new" EU Member States, as particularly unpleasant and humiliating. Many people remember well (regardless of today's assessment of the condition of the EU) how keen they were to be admitted to the organisation and how they celebrated accession.

The conviction of societies that the European Union is more prestigious than the Council of Europe is strengthened by the fact that the latter has countries who are believed to be undemocratic and fail to respect human rights as members (e.g. Russia, Turkey) or are even held accountable for acts of international aggression (Russia). Hence, it is easier to relativise a judgment of the ECtHR issued in a case against Poland by referring to the human rights situation in, for instance, Russia. The outcome of such reasoning is easily predictable: "Maybe it's not perfect with us, but still better than there. And nobody is removing them from the Council of Europe". Such reasoning substantially weakens the significance of each subsequent judgment pointing to violations of human rights in Poland.

Another political issue – loosely related to the one indicated above but impacting the growth of importance of the CJEU's judgments, relates to the consequences faced by an EU Member State that fails to enforce the Court's judgments. In addition to the rather hypothetical possibility of exclusion from the Community, possible sanctions of a financial (based on Article 260 TFEU) or economic nature, e.g. a real reduction in EU subsidies, come to the fore. It is also possible to "punish" a defiant member of the Union, e.g. by excluding them from taking decisions

of a purely political nature. Such actions have a serious impact on a country's prestige, which may in turn have an impact on the results of the country's parliamentary elections.

Moving on to a brief analysis of legal and organisational reasons that allow us to think about the growing importance of the case law of the CJEU, we should first of all point to the growing scope of jurisdiction of the Court. This results from the legislative offensive launched by the European Union. Besides the above-mentioned adoption of the Charter of Fundamental Rights, an issue of note is the rapid development of EU law related to, among other things, the adoption of the Stockholm Programme (which sets out the EU's priorities in the area of justice, freedom and security) leading to the issuing of a number of directives in the areas of, inter alia, criminal matters and discrimination. The improper implementation of such directives may result in the growth in the number of requests for a preliminary ruling sent to the Court. The scope of the ECtHR jurisdiction remains broadly unchanged. While the jurisprudence develops systematically, the thematic scope of the ECHR and Additional Protocols has not changed. This is mostly due to the number and diversity of countries bound by these legal acts, while a striving for integration between EU countries forces the development of EU legislation and thus heralds a further increase in the importance of the CJEU case-law.

The fact that the Strasbourg Court appears to be suffering a crisis is a factor that enhances the position of the CJEU vis-a-vis the ECtHR. This crisis manifests itself, in particular, in the backlog of cases waiting to be heard by the ECtHR. Considering the fact that an application is received by the ECtHR usually after all domestic legal avenues have been exhausted (which in many countries can take several years), it is highly discouraging to wait several more (even 10 or more) years for a case to be heard. On the other hand, a reply to a question referred for a preliminary ruling is provided, on average, 15 months after its referral, which of course slows down the examination of the case by domestic courts, but since the preliminary ruling procedure is part of the domestic procedure, the delay resulting from it, in public perception, seems to be more comprehensible and easier to accept (as is waiting for an expert's opinion, for example).

Another dissuasive element of the ECtHR practice is the general tendency to agree to proposals made in states' unilateral declarations affirming a violation of a right enshrined in the ECHR. This mechanism was meant to accelerate the course of proceedings pending before the Strasbourg Court but results, as do all plea-bargaining measures, in lower amounts of compensation being awarded to victims than the sums awarded in the ECtHR's judgements. The frequent use of this mechanism (for example, in 2017 there were 754 cases concluded by unilateral declaration, with 1068 substantive judgments) directly affects the credibility of the Court as the guarantor of the respect for human rights and does not motivate the state to carry out systemic changes.

The lack of an effective mechanism to ensure states' implementation of ECtHR judgments at a systemic level is another shortcoming of the Strasbourg system. For many years there have been no such changes in some cases, despite repeated rulings by the Court pointing to the need to correct domestic law. The adaptation of domestic laws mainly depends on the good will of a State-Party to the Convention, but it must be noted that the Council of Europe's system is devoid of effective methods of 'encouraging' domestic courts to make

systemic changes in line with the ECtHR case law. As indicated above, the European Union, on the other hand, has such political 'incentives' at its disposal.

The abovementioned shortcomings of the functioning of the Strasbourg system of human rights protection have also been noted within the ECtHR itself. One of the elements intended to improve the situation (important from the point of view of this study), was the adoption of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force on 1 August 2018 after ratification by 10 countries - including 5 EU countries (Estonia, Finland, France, Lithuania, Slovenia). The primary objective of this instrument is to improve collaboration between the ECtHR and national authorities by introducing the possibility for the highest national judicial authorities to ask the Strasbourg Court for an advisory opinion on questions relating to the interpretation or practical application of the rights and freedoms set out in the Convention and its Additional Protocols in cases pending before those courts. Although an advisory opinion is not binding, it seems that the ECtHR's authority can make it significantly more difficult for a national court to give a ruling contrary to that opinion. It should be added here that, with the consent of the ECtHR's President, other entities, including NGOs, may join the proceedings before the ECtHR commenced following a request for an advisory opinion. This solution, which is in line with the Court's practice to date, could be a good example for the CJEU, which until now has not even allowed the submission of "amicus curiae" briefs in its procedure.

The institution adopted in Additional Protocol No 16 seems to be somewhat similar to the request for a preliminary ruling. However, as compared to the preliminary ruling procedure before the CJEU, the amicus curiae procedure allows only the highest judicial authorities, and not every court, to address the ECtHR, which will certainly have a negative impact on the number of requests. It must also be mentioned that a number of states, including EU members such as Poland, have not ratified the Protocol.

4 Although the relative weaknesses of the Council of Europe's system for the protection of human rights appear to make the European Union's similar system superior, it is, of course, true that the Court of Justice cannot replace the Strasbourg Court, as the functions of the two courts are different. The same applies to the use of the institution of a request for a preliminary ruling in the area guaranteed by the Charter of Fundamental Rights, despite the fact that the scope of regulation partly coincides with the European Convention on Human Rights. The ECtHR will first and foremost remain the ultimate guarantor of respect for human rights, and the CJEU a court interpreting EU law. With the increase in the volume of EU law and the complexity of its system, there will inevitably be a growing need for such interpretation. This will undoubtedly be fostered by an increase in the awareness of the polycentricity of the law among the judges of the EU Member States and by their drawing the right conclusions from this awareness – i.e., the knowledge of EU law and the sense of being a European judge with the accompanying authority of the Court of Justice of the European Union. This authority may even (or, perhaps, especially) be invoked by a judge if the law or national authorities show a lack of understanding, for example, of human rights and freedoms or the rule of law.

Part II

Case law review

1. The CJEU in general (statistics)

In recent years, rulings given in response to references for a preliminary ruling from national courts account for by far the largest part of the CJEU's case-law. In 2014, as many as 66.2% of all completed proceedings were initiated with a reference for a preliminary ruling; in 2015 66.6%; in 2016 64.3%; and in 2017 63.9%.

At the same time, the number of references for a preliminary ruling made to the CJEU has been steadily increasing. (from 428 in 2014; through 436 in 2015; 470 in 2016 and up to as many as 533 in 2017). From 1 January to 26 June 2018 the CJEU registered 292 new references for a preliminary ruling, which may suggest that in 2018 as a whole there will be even more of them than in the previous year. [Chart 1].

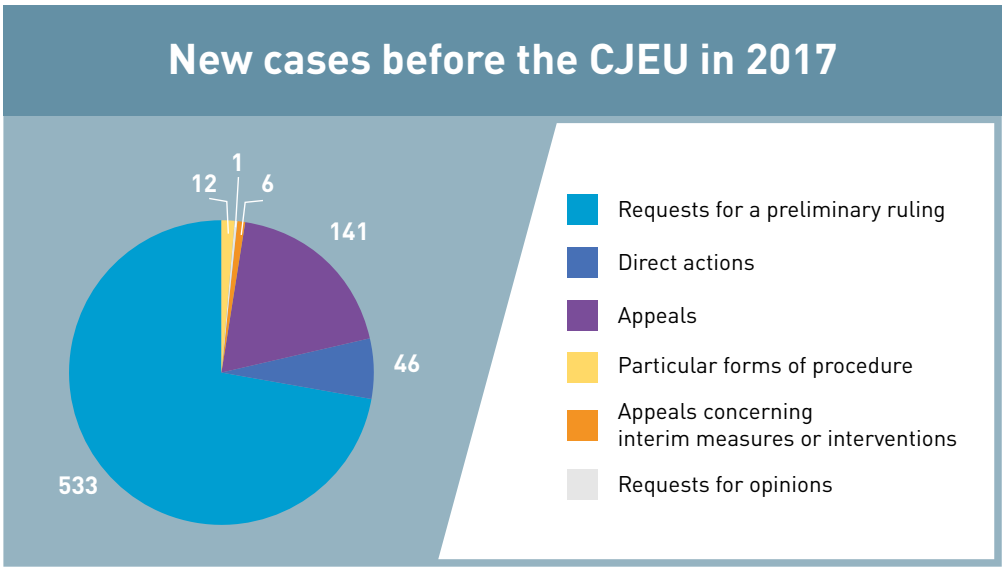


Chart 1. New cases before the CJEU

Most requests for a preliminary ruling to the CJEU are made by German courts. In 2017, as many as 27.9% of newly registered questions came from Germany. In previous years the statistics were similar (in 2014 20.3%; in 2015 18.1%; in 2016 17.9%). Italy came second in terms of the number of requests made in 2017 (10.7%), while third place was taken by the Netherlands (7.1%). [Chart 2]

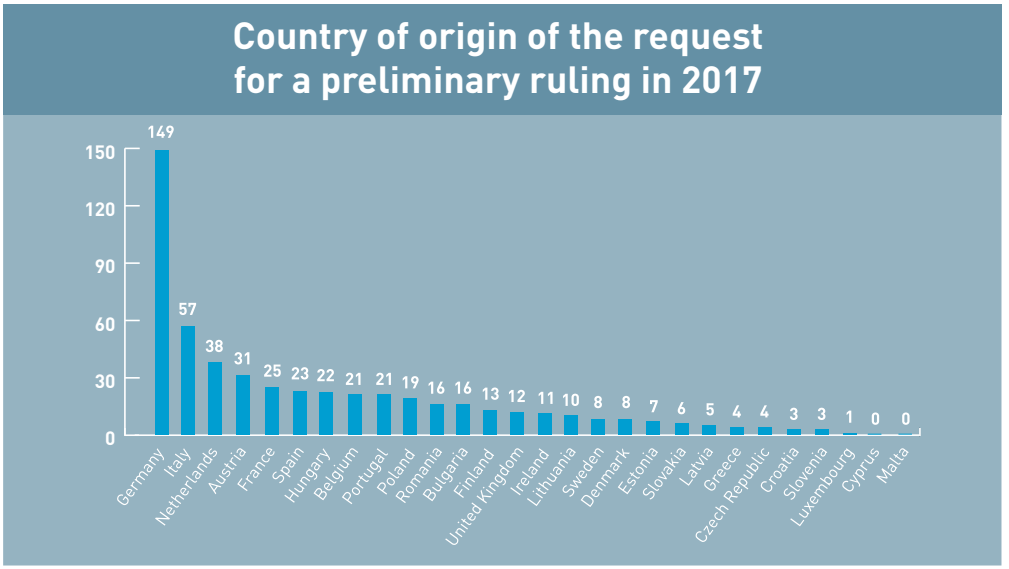


Chart 2. Country of origin of the request for a preliminary ruling in 2017

Requests for a preliminary ruling made to the CJEU in 2017 focused on issues such as the area of freedom, security and justice (90 requests), transport (78 requests), taxation (53 requests) and social policy (43 requests).

The average duration of proceedings before the CJEU initiated by a question for a preliminary ruling has remained stable for several years at around 15 months.

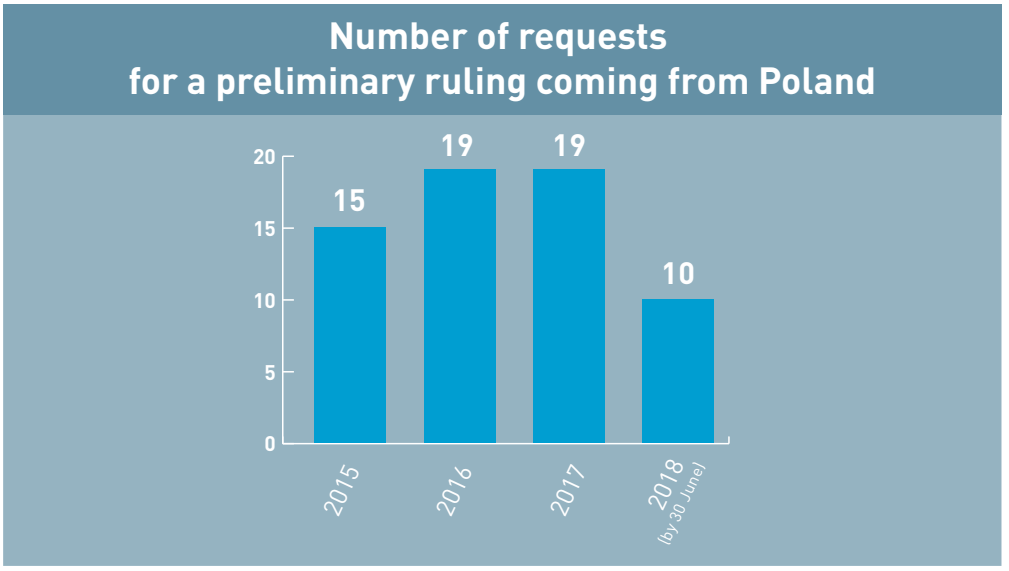


Chart 3. Number of requests for a preliminary ruling coming from Poland

In 2017, Polish courts made 19 references for a preliminary ruling (this comprises 3.6% of the total number). In 2016, the statistics looked identical, but even in the previous years there were fewer requests for preliminary ruling from Poland (11 in 2013; 14 in 2014; and 15 in 2015). In total, from the date of Poland's accession to the EU until the end of 2017, Polish courts submitted 127 references for a preliminary ruling to the CJEU. Forty-four of them were made by the Supreme Administrative Court, 18 by the Supreme Court, and one by the Constitutional Tribunal. In 2018, so far (i.e., by the end of June) Polish courts have made 10 requests for a preliminary ruling (the Supreme Administrative Court – 3; provincial administrative courts – 1; regional courts – 3; district courts – 3; district courts – 3). [Chart 3]

So far, only in seven cases has the CJEU ruled that a request made by the Polish court was inadmissible in its entirety (once in 2007 in relation to a request of the Provincial Administrative Court; once in 2012 in respect of a request of a district court; four times in 2014 with regard to requests from district courts, a regional court and an administrative court; once in 2016 for a request made by a district court)[9].

References for a preliminary ruling made by Polish courts in 2017 concerned issues such as VAT (four references), jurisdiction, recognition and enforcement of judicial decisions (four references), consumer protection (two references), unfair commercial practices (one reference), protection of competition (one reference), a European enforcement order for uncontested claims (one reference), public procurement (one reference), excise duty (one reference), structural funds (one reference), restrictions on the location of wind turbines (one reference), postal services (one reference), compensation for air passengers (one reference), compensation for aircraft passengers (one reference). Requests made in 2018 (until 30 June) refer to issues related to free movement of goods, consumer protection, judicial cooperation in criminal matters and VAT[10].

2. Statistics of preliminary references and the Charter of Fundamental Rights[11]

The Charter of Fundamental Rights was invoked in the operative part of 22 CJEU preliminary rulings in 2017. In previous years, the number of such invocations was lower (17 in 2016; 11 in 2015; 17 in 2014), which speaks of the growing importance of the Charter of Fundamental Rights. This trend is likely to continue in 2018, as from 1 January to 30 June, the CJEU has already issued 11 judgments, which contain reference to the Charter in their operative parts. Even more frequently, the Charter of Fundamental Rights is invoked

9 Data obtained through analysis of the Court's case law, accessible via the InfoCuria database.

10 As above.

11 Data cited in this part were obtained through analysis of the Court's case law, accessible via the InfoCuria database.

in the statements of grounds for judgments - in 2016 such invocations were included in 58, and in 2017 in 56 statements of grounds for judgments based on preliminary references. In 2018. (until 30 June 2018), the Charter of Fundamental Rights was invoked in the statements of grounds for 28 judgments.

Among the provisions of the Charter of Fundamental Rights most frequently cited in the operative part of CJEU rulings based on preliminary references, Article 47, which provides for the right to an effective remedy and access to an impartial tribunal, stands out. In 2017, the Article was invoked in operative parts of 11 of the CJEU rulings, and in 2016 in operative parts of 7 rulings. In 2018, it has so far (until 30 June) been cited in operative parts of 4 rulings. The CJEU also invoked, inter alia, Article 4 (prohibition of torture and inhuman or degrading treatment or punishment); Article 16 (freedom of economic activity); Article 17 (right to property); Article 21 (prohibition of discrimination); and Article 50 (prohibition of double criminality) of the Charter.

3. Preliminary references and the Charter of Fundamental Rights[12]

Requests for a preliminary ruling submitted by Polish courts very rarely concern the interpretation of provisions of the Charter of Fundamental Rights. References to the CFR have appeared only in the operative parts of four judgments handed down by the CJEU on the basis of questions referred by Polish courts for a preliminary ruling (twice in 2016 and once in 2017). Interestingly, in as many as three cases the CJEU based its rulings on the Charter's Article 47.

Chronologically, the first ruling of the CJEU issued in response to a request for a preliminary ruling coming from Poland, whose operative part referred to the Charter of Fundamental Rights, was the judgment of 13 October 2016 in the case of the *Prezes Urzędu Komunikacji Elektronicznej) and Petrotel sp. z o.o. w Płocku v. Polkomtel sp. z o.o.* (C-231/15). The request for a preliminary ruling in this case was made by the Supreme Court. It involved the issue of whether, in the light 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 and Article 47 of the Charter of Fundamental Rights, a national court hearing an appeal against a decision of a national regulatory authority should be able to revoke it retroactively if it finds that this is necessary to provide effective protection of the rights of the undertaking which has lodged the appeal. Doubts in this respect stemmed from the fact that, according to the President of the Office of Electronic Communications and Petrotel (parties to the proceedings), court judgments revoking decisions of the President of the OEC have only *ex nunc* effect on the general principles shaped in the case law of administrative

12 As above.

courts. Responding to a preliminary reference from the SC, the CJEU held that Article 47 of the Charter requires that the national court must be able to revoke the regulatory authority's decision retroactively.

The second ruling of this kind was the judgment of the CJEU of 21 December 2016 in the case of *Biuro podróży "Partner" sp. z o.o. sp.k. in Dąbrowa Górnicza v. Urząd Ochrony Konkurencji i Konsumentów* (C-119/15). The request for a preliminary ruling in this case was made by the Court of Appeal in Warsaw and concerned the problem of what is known as the "extended effect of abusive clauses", i.e., the possibility of penalising businesses for the use of contract terms identical to those in the national register of unlawful standard contract terms deemed unlawful based on other proceedings involving other businesses. The CJEU ruled that EU law does not prevent *erga omnes* principle from being extended to a register of unlawful standard contract terms, provided a business that is to be penalised for the use of identical contract terms has an effective judicial remedy within the meaning of Article 47 of the Charter. This remedy should be available both against a decision recognising the identity of the terms compared and against a decision specifying the amount of a fine.

Another ruling of the CJEU issued in response to a preliminary reference made by a Polish court that invoked provisions of the Charter of Fundamental Rights in its operative part is the judgment of 13 December 2017 in the case of *Soufiane El Hassani v. the Minister of Foreign Affairs* (C-403/16). A reference for a preliminary ruling was made there by the Supreme Administrative Court. It involved the question of whether the Visa Code and the Charter of Fundamental Rights require States to ensure that a consul's decision not to issue a visa can be challenged in court. In considering the case, the CJEU pointed out that the Charter of Fundamental Rights applies to the issue of a State's decision to refuse a visa. In particular, Article 47 of the Charter, which guarantees the right to effective judicial protection, is crucial in this respect: "Compliance with that right assumes that a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body". Such body should be independent from an entity that issued a decision. The CJEU therefore replied that each Member State could itself, in accordance with the principles of equivalence and effectiveness, provide for an appeal procedure against decisions to refuse visas. However, such a procedure must, at a certain stage of the proceedings, guarantee a judicial appeal.

The most recent ruling of the CJEU based on the Charter, issued in a Polish preliminary ruling case, is the judgment of 20 December 2017, *Polkomtel sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej* (C-277/16). The Supreme Court referred three questions for a preliminary ruling. Those questions concerned the powers of a regulatory authority over a telecommunications operator. One of them involved the issue of whether, in the light 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 and Article 16 of the Charter of Fundamental Rights, the national regulatory authority may impose on an operator an obligation to update prices annually and submit them to it for verification. The CJEU replied that such a solution certainly interfered with the freedom to conduct a business guaranteed in the Charter, however, this freedom is not absolute in nature and should

be considered in the light of its social function. The CJEU took into consideration the fact that such a requirement does not affect the essence of the freedom to conduct a business and, furthermore, it serves the public interest of protecting competition and consumers and replied that its application was admissible under Article 16 of the Charter.

It is worth noting that in five successive judgments of the CJEU issued in response to requests for a preliminary ruling made by Polish courts, the provisions of the Charter, although not invoked in the operative part, are nevertheless mentioned in the statements of grounds. For example, in the judgment of 28 July 2016, *JZ v. Prokuratura Rejonowa Łódź-Śródmieście* (C-294/16), the CJEU invoked Article 6 of the Charter (the right to liberty and security of person) in order to answer a question as to whether a night-time curfew, in conjunction with electronic tagging, an obligation to report to a police station at fixed times on a daily basis or several times a week, and a ban on applying for foreign travel documents, may be classified as "detention" under the EAW (deciding that, in principle, it may not be so classified). In the majority of the remaining four judgments, references to the Charter were only perfunctory.

On four occasions, the requests of a Polish court for a preliminary ruling on the interpretation of the provisions of the Charter of Fundamental Rights have been declared inadmissible by the CJEU. This was the case with the following cases: *Halina Grodecka v Józef Konieczka and Others* (C-50/16 – the request concerned the compatibility of the principles of inheritance of agricultural holdings with Article 17 of the Charter), *Stylinart Sp. z o.o. v. Skarb Państwa* (C-282/14 - compatibility of the provisions governing the determination of the amount of compensation for expropriated real estates with Articles 16 and 17 of the Charter), *Ryszard Pańczyk v. Dyrektor Zakładu Emerytalno-Rentowego Ministerstwa Spraw Wewnętrznych i Administracji w Warszawie* (C-28/14 – compliance with Articles 17, 20, 21 and 47 of the Charter with the regulations limiting the amount of pensions of former officers of the security authorities of Communist Poland) and *Urszula Leśniak-Jaworska, Małgorzata Głuchowska-Szmulewicz v. Prokuratura Okręgowa w Płocku* (C-520/13 – compliance of the provisions differentiating the amount of prosecutors' remuneration with Article 21 of the Charter). As regards the first three cases, the reason for the inadmissibility of the request was the lack of a link between the national case and EU law. In the last case, the CJEU's decision was determined by the ambiguity of the question and the lack of a proper demonstration that the interpretation of EU law requested by the court is necessary to give a ruling in the main proceedings.

4. Selected rulings of the CJEU involving fundamental rights issued under the preliminary ruling procedure in the years 2016-2018

In recent years the CJEU has issued a number of judgments in response to requests for a preliminary ruling from courts in Europe on matters relevant to the protection of the freedoms and rights of individuals, and in particular:

a. freedom of religion
b. the right to the protection of family life
c. protection of dignity
d. the right to property
e. prohibition of double criminality
f. the right to a court
g. rights of defendants in criminal proceedings
h. the right to privacy
i. protection of personal data
j. prohibition of discrimination.

A. Freedom of religion

One of the most important judgments of the CJEU involving the issue of religious freedom was the judgement of 14 March 2017 in the case of *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* (C-157/15). It concerned the existence of an employer's right to prohibit employees from wearing any visible symbol of political, philosophical or religious beliefs in the workplace. The party to the proceedings was a Muslim woman working as a receptionist. She informed her employer that she intended to wear an Islamic headscarf at work. In response, the company's management informed her that the wearing of a headscarf would not be tolerated because it was contrary to the adopted policy of neutrality. Subsequently, the company approved an amendment to the workplace regulations that prohibited employees 'from wearing any visible signs of their political, philosophical or religious beliefs and/or from engaging in any observance of such beliefs'. As Ms Achbita continued to wear the Islamic headscarf at work, she was dismissed. She turned to a court which made a request for a preliminary ruling to the Court of Justice, asking whether the workplace regulations that prohibit employees from wearing any visible signs of their religious beliefs constitute direct discrimination in the meaning of Directive 2000/78/EC. In its examination of the question, the Court pointed out that the reviewed provision of the workplace regulations did not lead to direct discrimination on grounds of religion, since it applied equally to all employees and to all forms of the manifestation of religious, political or philosophical beliefs. However, it cannot be ruled out that there was indirect discrimination. In such a situation, it should be determined whether the unequal

treatment was justified by a legitimate aim, and that the means of achieving this aim were appropriate and necessary. With regard to the first issue, the CJEU found that the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality constituted a legitimate aim. It is grounded in Article 16 of the Charter that guarantees the freedom to conduct a business. The prohibition of wearing any visible signs of political, philosophical or religious beliefs may be an appropriate means of achieving such an aim, provided that the policy of neutrality is genuinely pursued by a company in a consistent and systematic manner. However, in order for the prohibition to be considered necessary, it should be limited only to those employees who interact with customers. In considering whether in this particular case any provisions of the Directive had been violated, the referring court had to ascertain whether it would have been possible for the company to, instead of dismissing Ms Achbita, offer her a post not involving any visual contact with customers.

In interpreting the provisions of Directive 2000/78/EC for the purposes of the case described above, the CJEU referred to the case law of the ECtHR, namely the judgment of 15 January 2013 in the case of *Eweida and others v. the United Kingdom* (applications no. 48420/10, 59842/10, 51671/10 and 36516/10). It is worth noting, however, that the ECtHR ruled here that the national courts infringed Article 9 ECHR by refusing the applicant the right to compensation for the period of time she had been prevented from work by her employer (British Airways) for wearing a cross expressing her faith, which was contrary to the workplace regulations. The ECtHR, like the CJEU, pointed out that a business undertaking's right to protect the interests of the company, its image, etc., should be taken into account, but cannot be absolute. It is important to remember that democratic societies should tolerate and sustain pluralism and diversity. Moreover, there was no evidence that the display of religious symbols by employees did indeed damage the company's image. Interestingly, the ECtHR ruled that there had been a violation of Article 9 ECHR despite the fact that the applicant had been offered work without customer contact so that she could continue wearing religious symbols. It therefore appears that, despite the reference contained in the CJEU ruling, the reasoning presented by the two Courts is not entirely convergent. It will therefore be interesting to observe the dialogue between these authorities in the future.

A relatively similar factual situation constituted the basis of the CJEU's judgment of 14 March 2017 in the case of *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v. Micropole SA* (C-188/15). Asma Bougnaoui was a Muslim and wore an Islamic headscarf in the workplace. Her employer asked her not to wear any visible signs of her religious beliefs while in contact with customers. One day Ms Bougnaoui performed an assignment at a customer's site. The customer told her that the veil she was wearing had upset some of his employees and asked her not to wear it next time. Since Ms Bougnaoui did not change her attitude and continued to refuse to remove her veil, the employer terminated her contact of employment, claiming she was at fault. The employee brought an appeal to a court which asked the CJEU whether a customer's wish that the provision of IT services by a company should not be carried out by an employee wearing an Islamic scarf could constitute a 'genuine and determining occupational requirement' within the meaning of Directive 2000/78, which could justify a difference in treatment. In responding to such a question, the CJEU

pointed out that "it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement". Moreover, the notion of a "genuine and determining occupational requirement … refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out", and not subjective considerations. Consequently, the CJEU ruled that "the willingness of an employer to take account of the wishes of a customer … cannot be considered a genuine and determining occupational requirement".

B. The right to the protection of family life

The CJEU addressed the issue of LGBT rights, inter alia, in its judgment of 5 June 2018 in the case of *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Others* (C-673/16).

The case involved two men, a Romanian and an American citizen, who were married in Brussels in 2010 and intended to move to Romania two years later. However, the Romanian authorities refused to treat the American as a member of family of the Romanian citizen and refused to allow him to stay for more than three months, arguing that national law did not provide for same-sex marriages. In the course of the proceedings, the Romanian Constitutional Court asked the CJEU questions on points of law concerning the interpretation of the concept of "spouse" under Directive 2004/38/EC and the related right of the spouse of the same sex to reside in the territory of an EU country of which the spouse is a national for a period exceeding three months.

In responding to the questions, the CJEU first indicated that the cited Directive had no direct application to the case at issue. This is because the Directive governs only the conditions determining whether Union citizens (or their families) can enter and reside in Member States other than those of which they are nationals. Hence, it does not confer a derived right of residence on third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national. Nevertheless, sometimes in such a situation the right of residence can be deduced from Article 21(1) TFEU. The effectiveness of the freedom of movement guaranteed by this provision would be limited if an EU citizen, by establishing or developing family relationships in an EU Member State, could not continue them after returning to the Member State of which he or she is a national. Such a situation could discourage EU citizens from exercising their right of residence in another Member State. In the present case, the derived right of residence can therefore be derived from Article 21(1) TFEU and the provisions of Directive 2004/38/EC should apply by analogy to the conditions for obtaining it. The Directive grants a right of residence to the spouse of an EU citizen. The term "spouse" used therein is gender-neutral and may therefore cover a same-sex spouse. The Directive does not expressly allow refusal to recognise a marriage contracted in another Member State on the grounds that it is contrary to the law of the host State (this possibility exists in the case of civil partnerships). If such a possibility was secured, the freedom of

movement by EU law would vary from one Member State to another, depending on whether such provisions of national law exist. Restricting the freedom of movement in these circumstances would also not meet the requirements resulting from the principle of proportionality. In particular, it cannot be justified on grounds of public policy or the need to protect the national identity of the State. The obligation for a Member State to recognise a marriage concluded abroad between persons of the same sex applies solely to the right of residence and does not imply a need to redefine the institution of marriage in the law of that state. Member States are thus free to decide whether or not to allow marriage for persons of the same sex. Therefore, the CJEU in its response to the question of the Romanian Constitutional Court noted that in a situation in which a Union citizen has moved to another Member State, and, whilst there, has created or strengthened a family life with a third-country national of the same sex with whom he lawfully concluded a marriage, the competent authorities of the Member State of which the Union citizen is a national are precluded from refusing to grant his or her spouse the right of residence in the territory of that Member State on the grounds that the law of that Member State does not recognise marriage between persons of the same sex. With its second question, the referring court sought to ascertain whether, in the circumstances described in the said case, a same-sex spouse of a Union citizen who is a third country national has the right to reside in the territory of the Member State of which his or her spouse is a national for more than three months. The CJEU responded in the affirmative, given that it is necessary to ensure the effectiveness of the freedom of movement of EU citizens resulting from Article 21(1) TFEU. The exercise of this right cannot be made subject to stricter conditions than those laid down in Directive 2004/38.

As with many other fundamental rights judgments, the CJEU has referred to ECtHR case law, including in the recent judgment of 14 December 2017 in *Orlandi and Others v Italy* (applications nos. 26431/12; 26742/12; 44057/12 and 60088/12). In that ruling, the ECtHR stated for the first time that the absence of any legal protection for same-sex couples violated Article 8 ECHR. Still, neither of the two international courts obliges states to introduce the institution of same-sex marriage, but there is consensus that homosexual relationships should be protected under the right to the protection of family life.

C. Protection of dignity

The CJEU has referred to the protection of human dignity and the prohibition of torture and inhuman or degrading treatment in its several judgements concerning the execution of EAWs and the rights of refugees.

A key ruling in this area is the judgment of 5 April 2016 in *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* (C-404/15). The central legal problem in *Pál Aranyosi* was whether a court could lawfully refuse to surrender a person on the basis of an EAW where there were serious grounds for believing that detention conditions in the issuing state infringe both the fundamental rights of the person concerned and the general principles enshrined in Article 6 TEU. In this particular case, the reports of the European Committee for the

Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) showed, *inter alia*, that the Romanian and Hungarian penitentiary systems had systemic problems in ensuring the fundamental rights of persons deprived of their liberty (these were primarily a consequence of overcrowding).

In response to the question from a German court, the CJEU reiterated that the EAW mechanism is based on a high level of mutual trust between Member States. The CJEU noted that "the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of the Member States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law". However, in exceptional circumstances, "limitations of the principles of mutual recognition and mutual trust between Member States can be made". These exceptions can be justified in particular by the need to protect a person against torture and inhuman treatment (Article 4 of the Charter). This obligation, which is closely linked to respect for human dignity (Article 1 of the Charter), is absolute. Therefore, as the CJEU emphasised, the execution of an EAW must not lead to a person suffering inhuman or degrading treatment. Accordingly, if there is any objective, reliable, specific and properly updated information on systemic deficiencies which may affect certain groups of people or certain places of detention, the court executing an EAW should specifically and precisely assess "whether there are substantial grounds to believe" that a person named in an European Arrest Warrant will be exposed to "a real risk of inhuman or degrading treatment by virtue of general conditions of detention … in the event that he is surrendered to the authorities of that Member State". According to the CJEU, that risk can be assessed with "supplementary information" that can be requested from the issuing judicial authority. The actual decision to surrender an individual should be suspended until the relevant information is provided. As the CJEU stated, "[i]f the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end".

The CJEU also referred to the definition of the concept of "inhuman or degrading treatment" used in Article 4 of the Charter. In the judgment of 16 February 2017 in *C.K., H.F., A.S. v. Republic of Slovenia* (C-578/16), the Court ruled that inhuman and degrading treatment would be the consequence of the transfer of an asylum seeker with a particularly serious mental or physical illness that results in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned. The authorities of the executing state must therefore take the necessary measures to ensure that such a transfer takes place in conditions which afford sufficient protection to the health of the person concerned. However, even after such measures are taken, if it is not possible to ensure that the surrender of an individual will not result in a real risk of a significant and permanent worsening of their state of health, the authorities of the executing Member State should suspend the execution of that person's transfer until their health sufficiently improves. If, on the other hand, it is established that an asylum seeker's state of health "is not expected to improve in the short term, or that the suspension of the procedure for a long period would risk worsening the condition of the person concerned, the requesting Member State may choose to conduct its own examination of [the asylum seeker's] application by making use of the 'discretionary clause' laid down in Article 17(1)" of Regulation no 604/2013".

D. The right to property

CJEU rulings issued in the preliminary ruling procedure may also affect the scope of permissible restrictions on the right to property. From this perspective, the judgment of 6 March 2018 in the joined cases *"SEGRO" Kft. v. Vas Megyei Kormányhivatal Sárvári Járási Földhivatala* (C-52/16) and *Günther Horváth v. Vas Megyei Kormányhivatal* (C-113/16) seems to be particularly interesting. Although in *Segro* the CJEU formally referred to the free movement of capital rather than Article 17 of the Charter, it is clear that this decision is also relevant from the point of view of the protection of property.

The case concerned regulations introduced in Hungary in 2013, which aimed to prevent speculation on agricultural land by foreigners. Until 2002, Hungary had applied no restrictions on the acquisition of the right to use agricultural land by foreigners. The abolition of the possibility of such acquisition, introduced in 2002, was followed by an additional restriction legislated in 2013, whereby a right of usufruct over agricultural land can only be validly created by contract if granted to a "close member of the same family". Furthermore, the new law provided that all agreements of usufruct concluded between persons who are not close members of the same family were to be "extinguished by operation of law". Initially, the contracts were set to be extinguished at 1 January 2033, but the period of their validity was shortened to 1 May 2014 as a result of subsequent legislative changes.

Questions on the compatibility of these measures with EU law (freedom of establishment, free movement of capital, right to property, right to an effective remedy) were referred for a preliminary ruling by two Hungarian courts, which heard the cases of an Austrian national and a company set up by nationals of other EU Member States resident in Germany.

When considering the question referred by a Hungarian court, the CJEU recalled that although Article 345 TFEU "expresses the principle that the Treaties are neutral in relation to the rules in Member States governing the system of property ownership, that article does not, however, mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty". Given the above, the CJEU argued, states may establish special legal frameworks for the acquisition of agricultural and forestry land, but such frameworks remain subject to the review of their compliance with EU law, in particular with the rules of non-discrimination, freedom of establishment and free movement of capital. The Court decided to adjudicate on the case in question solely on the basis of the latter principle.

The CJEU explicitly found that the examined regulation restricted the free movement of capital, as it deprived the persons concerned of the possibility of further using the object of usufruct (land), in which they had invested their capital, as well as of the possibility of disposing of that right. Although the requirement of a close family relationship between the landowner and the usufructuary does not constitute direct discrimination, it can be regarded as indirect discrimination. This is due to the fact that in practice it will be very rare for foreigners to satisfy this requirement: after all, the acquisition of agricultural property by foreigners has been subject to numerous restrictions for years, only to be subsequently prohibited

altogether. Moreover, considering the fact that the only possibility for a foreigner to acquire a right in rem in real property was to conclude a usufruct contract, the discussed regulation is more unfavourable for foreigners than for Hungarian nationals.

In examining whether such a measure is permissible under EU law, the CJEU first considered whether there were "overriding reasons in the public interest" capable of justifying a restriction on the free movement of capital. Hungary submitted that such overriding reasons were the need to restrict speculation, limit the ownership of land to the persons who work it, facilitate the creation of estates of an economically viable size as well as to prevent the fragmentation of agricultural land and depopulation of the countryside. However, the CJEU found the adopted regulation to be of no use in achieving these objectives. The existence of family ties does not guarantee that a usufructuary will not use the land for speculative purposes and, conversely, the absence of such ties does not automatically mean that the usufructuary will speculate on the land. Similarly, in the CJEU's opinion, the legislation in question did not address the objective of avoiding rural depopulation and land fragmentation. Moreover, the restrictions in question went beyond what is necessary to achieve the objectives invoked by the Hungarian Government. In this respect, the CJEU noted that the law did not provide for compensation for persons whose right of usufruct would be extinguished, and for whom the application of general principles of civil law may not be sufficiently effective. In addition, the Hungarian legislator could have attained its objectives by requiring that the land be efficiently used directly by the usufructuary and on conditions appropriate to ensuring the stability of such use.

The CJEU also did not accept Hungary's argument that the discussed restriction on the free movement of capital could be justified by the need to combat practices aimed at circumventing the law. As the Court reiterated, the legislator cannot rely on a general presumption of abusive practices. It is therefore unacceptable to assume that any person acquiring a right of usufruct of land from an owner with whom that person is not related acts with the intent of circumventing (abusing) the right. More lenient measures, such as an action for declaring an act in law invalid, may be used to combat such negative practices. Moreover, the CJEU did not accept the argument that the extinguishing of usufruct could be justified by the desire to combat violations of law that may occur when contracts are concluded.

The Court therefore ruled that Article 63 TFEU prohibited the application of national legislation that would automatically extinguish the rights of usufruct that had previously been created over agricultural land and are enjoyed by persons who are not close relatives of the owner of that land, as it would cause such rights to be deleted from the property registers.

E. Prohibition of double criminality

The prohibition on double criminality is enshrined in Article 50 of the Charter: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance

with the law." This provision, although similar in substance to Article 4 of Protocol No 7 to the ECHR, provides more extensive protection than that afforded by Article 4. The ECHR prohibits double criminality only within a single Member State (see, for example, the ECtHR decision of 20 February 2018 in the case of *Krombach v. France*, application no. 67521/14), while the Charter extends this prohibition to situations in different Member States.

Article 50 of the Charter has been extensively interpreted in the case law of the CJEU. One of the key rulings in this area was the judgment of 26 February 2013 in *Åklagaren v. Hans Åkerberg Fransson* (C-617/10), in which the Court not only interpreted the content of the *ne bis in idem* principle, but also referred to the scope of application of the Charter of Fundamental Rights.

Among the more recent judgements of the CJEU relating to the prohibition of double criminality, it is worth noting three judgements delivered on 20 March 2018.

In the judgment issued in the case of the *criminal proceedings against Luca Menci, intervening party: Procura della Repubblica* (C-524/15), the CJEU referred to the possibility of conducting criminal proceedings against a person who had previously been punished by an unchallengeable administrative penalty. Due to his failure to pay a tax, Luca Menci was ordered to pay an administrative penalty, which amounted to 30% of his tax arrears (ca. (EUR 85,000). Subsequently, criminal proceedings were initiated against Mr Menci in respect of the same act. The CJEU began its assessment of whether such a situation violates Article 50 of the Charter by determining the nature of the proceedings conducted and imposed penalties. In this respect, the Court pointed out that such an assessment should be guided by three criteria: "The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur", the CJEU argued. Although the national law classified the financial penalty imposed on Mr Menci as an administrative sanction, the CJEU found that this sanction pursued a punitive purpose, even if it was also used as a preventive measure. The measure would not be punitive if it was limited to redressing the damage caused by the offence in question. In addition, the CJEU held that the severity of the penalty in question also supported the view that it should be considered a criminal sanction. The CJEU then proceeded to assess the characteristics of the offence for which Mr Menci was allegedly punished twice: "According to the Court's case law, the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked, and which resulted in the final acquittal or conviction of the person concerned". Applying this criterion, the Court considered that in the case at hand there would have been a double punishment for the same offence. However, the CJEU underlined that the Charter allowed for restrictions on the prohibition of double criminality based on the general principles set out in Article 52(1) (the proportionality principle). Referring these principles to the case under examination, the Court noted that the Italian legislation pursued the legitimate aim of combating tax offences, providing for clear and precise rules to that effect. These rules do not go beyond what is strictly necessary to achieve the desired objective: the duplication of criminal and administrative liability is only permitted in cases of serious tax fraud, and

the rules of criminal procedure introduce appropriate mitigating factors (e.g. the possibility of leniency in the event of a voluntary payment of tax arrears and administrative penalty). The CJEU therefore ruled that it is legal to conduct criminal proceedings against a person previously punished with an administrative penalty for the same offence of failing to pay VAT, provided that the relevant legislation

- *"pursues an objective of general interest which is sufficient to justify a duplication of proceedings and penalties, namely combating VAT offences, and it being necessary for those proceedings and penalties to pursue additional objectives;*
- *contains rules ensuring coordination that limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and;*
- *provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned."*

Also, the national court must ensure that the duplication of proceedings does not result in the imposition on the person concerned of a burden that is excessive in relation to the seriousness of the offence committed.

Another judgment of this type, issued in the case of *Garlsson Real Estate SA, in liquidation, Stefano Ricucci, Magiste International SA v. Commissione Nazionale per le Società e la Borsa (Consob)* (C-537/16), concerned a somewhat reversed situation, namely the admissibility of imposing an administrative penalty for an offence of insider trading, for which a person has been previously sentenced to imprisonment by a criminal court. In *Garlsson*, the CJEU applied a similar reasoning as in *Menci*, examining successively the nature of the penalty, the characteristics of the offence and then the admissibility of a derogation from the *ne bis in idem* principle. The Court held that Article 50 of the Charter excluded "the possibility of bringing administrative proceedings against a person in respect of unlawful conduct consisting in market manipulation for which the same person has already been finally convicted, in so far as that conviction is, given the harm caused to the company by the offence committed, such as to punish that offence in an effective, proportionate and dissuasive manner". Otherwise, the person would be exposed to an excessive burden, going beyond what is necessary to achieve the aim of the penalty. Notably, in this judgment the CJEU also ruled that the Charter's Article 50 confers on individuals a directly applicable right", which they may exercise in proceedings before national authorities.

An entirely different aspect of the ne bis in idem principle was discussed in the joined cases of *Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (Consob)* (C-596/16) and *Commissione Nazionale per le Società e la Borsa (Consob) v. Antoni Zecce* (C-597/16). Enzo Di Puma and Antonio Zecca were finally acquitted by a court of charges of insider dealing. The court unequivocally stated that the allegations made against the two individuals were groundless because of the "the lack of an offence". Despite the above, in 2012 Mr Puma and Mr Zecca received an administrative penalty for the same offence. In the course of the proceedings, a national court inquired as to whether, in that situation, the administrative

penalty should be annulled, and the proceedings discontinued on account of the principle of *ne bis in idem* and the binding effect of the findings of the criminal court, or whether such a resolution would constitute an infringement of Article 14(1) of Directive 2003/6. Article 14(1) obliges Member States to apply "effective, proportionate and dissuasive" administrative penalties in cases of violations of the prohibition on insider dealing. Replying to the question referred by the national court for a preliminary ruling, the CJEU designated that Article 14(1) did not preclude a national regulation that would require an administrative body to follow the findings of fact made by a criminal court. Moreover, the conducting of new proceedings after a final acquittal could violate Article 50 of the Charter, since "the protection conferred by the *ne bis in idem* principle is not limited to situations in which the person concerned has been subject to a criminal conviction, but also extends to those in which that person is finally acquitted." In view of the clear finding of the criminal court that the acts of the accused did not constitute a criminal offence, the conduct of administrative penalty proceedings would be manifestly unfounded in the light of the purpose of Directive 2003/6.

F. The right to a court

As already indicated, the fundamental right most often featured in the CJEU's judgments is undoubtedly the right to a court and effective remedies (Article 47 of the CJEU). More recent judgments include the already cited *El Hassani* case, as well as the judgment of 20 December 2017 in *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd* (C-664/15) relating to the right to a court of NGOs in cases concerning environmental protection.

However, the most important judgement, in view of the current situation in Poland, is that of the CJEU of 27 February 2018 in the case of *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* (C-64/16). The case involved the Portuguese law of 2014 which introduced a temporary reduction in the amount of public sector remuneration. This law resulted from the need to eliminate an excessive budget deficit in connection with the EU financial assistance programme. A number of administrative measures were adopted on the basis of the law to reduce the remuneration of the judges of the Court of Auditors. The ASJP, a union of judges, brought an action before the Supreme Administrative Court seeking the annulment of those measures as they infringed 'the principle of judicial independence' enshrined in EU law, (Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights).

The Court referred the following question on a point of law to the CJEU: "In view of the mandatory requirements of eliminating the excessive budget deficit and of financial assistance regulated by … rules [of EU law], must the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, in Article 47 of the [Charter] and in the case-law of the Court of Justice, be interpreted as meaning that it precludes measures to reduce remuneration that are applied to the judiciary in Portugal where they are imposed unilaterally and on an ongoing basis by other constitutional authorities and bodies…?".

In its reply, the CJEU pointed out that the basis of the EU is mutual trust between the Member States and, in particular, their courts and tribunal, which is based on the fundamental premise that Member States share a set of common values on which the European Union is founded. These values include justice and the rule of law. It follows from them that individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application of an EU act to themselves. Such a judicial review can be exercised not only by the CJEU, but also by national courts. As provided for by the second subparagraph of Article 19(1) TEU, it is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields. The principle of the effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, Articles 6 and 13 of the ECHR and Article 47 of the Charter.

For the right to effective judicial protection to be exercised, States should ensure that individuals have access to a "court", understood as a body meeting certain criteria – and the following factors are especially important: the fact that the body is established by law; its permanent nature; the compulsory nature of its jurisdiction; the application by it of an inter partes procedure and rules of law; and its independence. If, therefore, a specific 'national court' (in this case – the Court of Auditors) – may rule on questions concerning the application or interpretation of EU law, the Member State concerned must ensure that that court meets the requirements mentioned above. As stated above, one of the key requirements is independence, presupposing, among other things, that: "the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions".

Apart from the protection against removal from office, the receipt of an adequate level of remuneration is also a guarantee essential to judicial independence. However, there was no violation of judicial independence in the discussed case. The Portuguese measures were adopted because of mandatory requirements linked to eliminating the Portuguese State's excessive budget deficit. They were not targeted exclusively at judges of the Court of Auditors, but covered a large number of public officials. Furthermore, the salary reduction was only temporary and was abolished in 2016. For this reason, the CJEU replied that "the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Court of Auditors".

The importance of the judgment stems from the fact that, for the first time, the CJEU so clearly emphasised the requirements of EU law in terms of institutional guarantees of judicial independence and considered that Article 19 TEU could be an independent model of judicial review in this respect.

An exceptionally important ruling concerning standards of the right to a court is the judgment of the CJEU of 25 July 2018 in the case of *Minister for Justice and Equality v. LM* (C-216/18 PPU). It concerned the possibility for a court to refuse to surrender a person affected by an EAW to a State where there is a risk of an infringement of the right to a court. The question was referred by the Irish Higher Court of Appeal, which doubted whether the Polish judicial system, in view of the legislative action taken during the current parliamentary term, was able to provide a person to be surrendered with a fair and impartial trial.

The CJEU replied that the EAW-executing state court should carry out a two-step test. Above all, it must be examined whether, in the light of objective, reliable, accurate and up-to-date information, there is an actual risk of undermining the right to a fair trial due to systemic irregularities in respect of judicial independence. In making this assessment, the information contained in the Commission's reasoned request to the Council under Article 7(1) TEU is particularly relevant. The CJEU pointed to the key (in its opinion) components of the principle of judicial independence. The concept of independence has two aspects: an external one, meaning that a judge exercises their functions wholly autonomously, without being subject to any other factors; and an internal one, assuming objectivity and equal treatment of all parties in a dispute. It is important that there are guarantees of independence, such as guarantees against removal from office, adequate remuneration and the proper organisation of disciplinary proceedings. However, a mere finding that there are systemic violations of judicial independence in a state is not sufficient to refuse to execute an EAW. A general suspension of the EAW mechanism in relation to a Member State would only be possible on the basis of the European Council under the Article 7 TEU procedure. Without this, it is also necessary to further examine whether there are serious and verified grounds to consider that, in a specific case, a person covered by an EAW, if transferred to the issuing State, would be exposed to a breach of the essential content of the right to a fair trial. Such an analysis should take into account the personal situation of a person covered by an EAW, the nature of an alleged offence and the factual context. The court executing an EAW should also ask the court of the issuing State for any additional information necessary to assess the feasibility of executing the EAW. If, having completed the entire test, the court concludes that the individual concerned would be exposed to the risk of a breach of his right to a fair trial, the court should refuse to surrender this person.

G. Rights of defendants in criminal proceedings

EU law has extended the scope of its regulation of criminal proceedings. This is accompanied by an increase in the number of requests for a preliminary ruling and judgments of the CJEU in this area. In the judgment of 5 June 2018 in the case of *the criminal proceedings against Nikolay Kolev, Milk Hristov, Stefan Kostadinov* (C-612/15), the CJEU discussed, among others questions, the procedure governing parties' access to materials of criminal proceedings and the possibility for the same attorney to represent two defendants in a situation where their interests are in conflict.

The case concerned a request for a preliminary ruling made by a Bulgarian criminal court in the course of proceedings against customs officials accused of involvement in an organised criminal group. The first question asked was whether Article 6(3) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings must be interpreted as meaning that the right of an individual to be informed of the charges against him that is laid down in that provision is respected in the event that detailed information on the charges is disclosed to the defence only after the indictment that initiates proceedings is lodged before the court, but before the court begins to examine the merits of the charges and before the commencement of any hearing when argument is submitted to the court. The referring court also asked whether the right of access to the case materials that is laid down in the directive is safeguarded when the competent authorities have given to the defence the opportunity to consult those materials during the pre-trial stage of the criminal proceedings, even if the defence has not been in a position to avail itself of that opportunity.

The CJEU pointed out that the directive did not preclude the disclosure of detailed information on the charges to the defence after the indictment that initiates the trial stage of proceedings is lodged before the court, but before the court begins to examine the merits of the charges and before the commencement of the hearing of arguments before the court, and after the commencement of that hearing but before the stage of deliberation, in a situation where the information thus disclosed is the subject of subsequent amendments, "provided that all necessary measures are taken by the court in order to ensure respect for the rights of the defence and the fairness of the proceedings". The same rules apply to enabling the defence to effectively access the case materials. When deciding on the above issues, the CJEU observed that thanks to the provision of this information and access to the case materials, the accused and his defence lawyer are informed in detail about the charges brought against the defendant and their legal classification, as well as the evidence on which the charges are based. The opportunity to become acquainted with that information and the materials of the case, which should be given at the latest upon the commencement of the hearing of argument, is essential for enabling the accused, or their lawyer, to participate properly in that argument "with due regard for the adversarial principle and equality of arms, so that they are able to state their position effectively". In the event of any failure to meet that requirement, the CJEU argued, there is nothing in the Right to Information Directive that precludes a national court from "taking the measures necessary to correct that failure, provided that the rights of the defence and the right to a fair trial are duly protected".

The Bulgarian court also inquired whether Article 3(1) of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty precludes national legislation that requires a national court to dismiss the lawyer instructed by the two accused persons, against their wishes, on the grounds that there is a conflict of interest between the accused individuals, and allowing those persons to instruct a new lawyer or enabling the court, when necessary, to appoint ex officio a defence lawyer. The CJEU ruled that Directive 2013/48/EU did not

preclude such a measure. The Court noted that "a lawyer cannot fully and effectively defend two accused persons within the same proceedings if there is a conflict of interest between those persons, for example if one of them has made statements that could be used to incriminate the other, when the latter has not confirmed such statements".

H. The right to privacy

The right to privacy was addressed by the CJEU in, for instance, the judgment of 25 January 2018 in the case *F v. Bevándorlási és Állampolgársági Hivatal* (C-473/16) concerning admissible means of verifying asylum applications of persons who claim to be at risk of persecution on the grounds of sexual orientation in their country of origin.

F. submitted an application for asylum to the Hungarian authorities. In support of his application he claimed that he had a well-founded fear of being persecuted in his country of origin on account of his homosexuality. The application was rejected. The Hungarian authorities indicated that although F's statements were not fundamentally contradictory, it was not possible to confirm F's assertion relating to his sexual orientation based on the results of psychological tests (the Rorschach and Szondi tests and the "Draw-A-Person-In-The-Rain" test) carried out by experts. The applicant brought an action against the unfavourable decision to the court that decided to stay the proceedings and to refer two questions to the Court for a preliminary ruling. The first one concerned the admissibility of seeking and evaluating psychological projection tests for LGBT asylum seekers during the asylum procedure. With its second question, the referring court asks whether when the asylum application is based on persecution on grounds of sexual orientation, neither the national administrative authorities nor the courts have any possibility of examining, by expert methods, the truthfulness of the claims of the applicant for asylum.

First, the CJEU answered the second question. It pointed out that applications for international protection justified by a fear of being persecuted are examined by the national authorities, just like other applications. Directive 2011/95 does not contain a closed list of measures to verify the statements of applicants for asylum. It cannot be ruled out that certain forms of expert report can be made admissible in order to determine more accurately the applicant's actual need for international protection. Nevertheless, the procedures, should recourse be had, in that context, to an expert's report, must be consistent with other relevant EU law provisions, and in particular with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, and the right to respect for private and family life. Moreover, the determining authority cannot base its decision solely on the conclusions of an expert's report. The expert's report cannot be absolutely binding; it may only supplement the evidence.

With regard to the first question, the CJEU stated that even if the performance of the psychological tests is conditional upon the consent of the person concerned, it still constitutes interference with that person's right to privacy. This is because that consent is not necessarily

given freely, as refusal could result in the rejection of an application by the authorities. The admissibility of the performance such tests should therefore be considered in the light of the principle of proportionality. An important circumstance to be taken into account in this respect is whether the test is based on sufficiently scientifically reliable methods. The CJEU noted that although the assessment of such reliability is a matter within the national court's jurisdiction, it has been vigorously contested by the governments of France and the Netherlands, as well as by the Commission. In any event, the impact of an expert's report, such as that at issue in the main proceedings, seems disproportionate to the aim pursued. The fact is that psychological tests relate to intimate aspects of the applicant's life. International standards expressed in the Yogyakarta principles explicitly provide that no person may be forced to undergo any form of psychological test on account of his sexual orientation or gender identity. In this context, such an expert's report cannot be considered essential for the purpose of confirming the reliability of the applicant's statements. First, the applicant may undergo a personal interview. Second, it follows from the Directive that if the applicant's statements are consistent and plausible, there is no need for an expert's report to confirm them. Third, the conclusions of such an expert's report are only capable of giving an indication of a sexual orientation, and being approximate in nature they are of only limited interest for the purpose of assessing whether statements of an applicant for international protection are coherent and plausible. The CJEU replied that Article 4 of Directive 2011/95, read in the light of Article 7 of the Charter, must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant.

I. Protection of personal data

The EU framework for the protection of personal data goes beyond the recent and high-profile Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (the "GDPR"), and also encompasses a substantial body of CJEU decisions that clarify relevant provisions of the secondary law and of the Charter of Fundamental Rights. In the last few years, the protection of personal data and the right to online privacy has posed a particularly important challenge, especially in the context of the growing importance of social media. The CJEU has repeatedly referred to these issues in rulings based on questions referred for a preliminary ruling by the courts of Member States. It is enough to mention here the famous CJEU judgment of 13 May 2014, *Google Spain SL and Google Inc v. Agencia Española de Protección de Datos and Mario Costeja González* (C-131/12), in which the Court indirectly approved what is now known as the "right to be forgotten".

Recent CJEU rulings related to personal data protection include the judgment of 5 June 2018, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie*

Schleswig-Holstein GmbH, interveners: Facebook Ireland Ltd, Vertreter des Bundesinteresses beim Bundesverwaltungsgericht (C-210/16). The case concerned several questions, referred to the CJEU by a German court, relating to the obligations of the administrator of a Facebook fan page of a private educational establishment with regard to the processing of personal data and the powers of the national data protection authorities. These questions were based on a case concerning the decision of the German data protection authority to deactivate the fan page on the grounds that its administrator (and Facebook itself) had failed to inform users about the collection of "cookies", their function and the processing of personal data obtained thanks to the use of the "cookies". The first problem the CJEU needed to address was whether a fan page administrator could be considered a data controller within the meaning of Directive 95/46/EC of the European Parliament and of the Council of 24October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and thus be held liable for irregularities in the processing of personal data. The above uncertainty was due to the fact that a fan page administrator has no direct influence on Facebook's processing of personal data: it is Facebook who decides if and how such data are processed.

Yet according to the CJEU, a fan page administrator is a data controller within the meaning of EU law. As the Court emphasised, "any person wishing to create a fan page on Facebook concludes a specific contract with Facebook Ireland for the opening of such a page, and thereby subscribes to the conditions of use of the page, including the policy on cookies". Also, "the administrator of a fan page hosted on Facebook, by creating such a page, gives Facebook the opportunity to place cookies on the computer or other device of a person visiting its fan page, whether or not that person has a Facebook account". A fan page administrator can also define the criteria for preparing statistics on the number of visits to their website. "In particular, the administrator of the fan page can ask for — and thereby request the processing of — demographic data relating to its target audience, including trends in terms of age, sex, relationship and occupation, information on the lifestyles and centres of interest of the target audience and information on the purchases and online purchasing habits of visitors to its page, the categories of goods and services that appeal the most to users, and geographical data which tell the fan page administrator where to make special offers and where to organise events, and more generally enable it to target best the information it offers." While this information is transmitted to the administrator in anonymised form, it is obtained by means of cookies installed by Facebook on the computers or other devices of visitors to the fan page. The CJEU has therefore ruled that a fan page administrator is a "data controller" within the meaning of Directive 95/46/EC and, as such, is responsible for personal data processing within the European Union, jointly with Facebook Ireland. The above does not necessarily imply that the administrator and Facebook bear an equal level of responsibility; indeed, the degree to which each of them is responsible must be assessed with regard to all the relevant circumstances of a particular case.

Another issue that the Court needed to adjudicate on was whether, in a situation where an undertaking established outside the EU has several establishments in different Member States, the supervisory authority of a Member State is entitled to exercise its powers with respect to an establishment situated in the territory of that Member State even if that

establishment is responsible solely for marketing activities whereas the exclusive responsibility for the collection and processing of personal data across the entire territory of the European Union belongs to an establishment situated in another Member State. The above issue was a consequence of the fact that, on the facts of the case, Facebook Germany was solely responsible for marketing and Facebook Ireland was responsible for data processing. Nevertheless, the Court found that the marketing activities of Facebook's German subsidiary were inextricably linked to the processing of personal data, since those data were collected and processed principally in order to target advertising in an appropriate manner. Accordingly, the CJEU argued, the supervisory authority may exercise its powers over such a subsidiary. The Court also ruled that, where a national supervisory authority wishes to exercise one of its powers under the directive (e.g. by ordering the blocking, erasure or destruction of data, or imposing a temporary or definitive ban on data processing) against an entity established on the territory of that country (in this case, the fan page administrator), but, due to the fact that infringements of personal data protection laws are committed by the data controller established in another Member State (here, Facebook Ireland), the national authority can independently assess the lawfulness of the processing of data and "exercise its powers of intervention with respect to the entity established in its territory without first calling on the supervisory authority of the other Member State to intervene". This means that, in cases such as the one described in the question referred for a preliminary ruling, the German data protection authority can lawfully take action against a German-based Facebook fan page's administrator, without the need to cooperate with the authority's Irish counterpart.

J. Prohibition of discrimination

The prohibition of discrimination is one of the general principles of the EU and is expressed both in the Charter of Fundamental Rights and in a number of secondary EU laws. This prohibition has been extensively interpreted in the case law of the CJEU.

In one of its more recent rulings on discrimination, the judgment of 18 October 2017, *Ypourgos Esoterikon, Ypourgos Ethnikis paideias kai Thriskevmaton v. Maria-Eleni Kallir* (C-409/16), the Court considered the discriminatory nature of the minimum height criterion as a condition for applying for admission to a police school. The facts of the case were the following: Greek authorities published a competition notice for enrolment in a police school. According to the notice, the candidates were required to be of a height of at least 170 cm. Based on this requirement, Maria-Eleni Kalliri was refused admission to the competition because she was only 168 cm tall. The woman complained against the refusal to the court, which asked the CJEU about the compatibility of the above criterion with the prohibition of discrimination enshrined in Directives 76/207, 2002/73 and 2006/54. The CJEU responded that the application of the height criterion led to indirect discrimination against women, since "a much larger number of women than men are of a height of less than 1.70m", which means that "by the application of that law, women are very clearly at a disadvantage compared with men as regards admission to the competition". The Greek Government argued that the criterion served the legitimate purpose of ensuring the efficient operation of police services, which

requires the officers to have specific physical characteristics. However, the CJEU did not accept this argument. The Court held that, first, not all roles within a police force require special physical strength, giving the example of officers responsible for traffic control. Moreover, argued the CJEU, it is not true that a small height always results in inadequate physical aptitude. The Court also noted that the criterion of a minimum height could be effectively replaced by non-discriminatory requirements, such as an obligatory fitness test.

The CJEU also referred to the principle of equality in its judgment of 26 June 2018 in *MB v. Secretary of State for Work and Pensions* (C-451/16). In 1995, MB underwent gender reassignment surgery (from male to female). However, under the law in force in the United Kingdom at the time, in order to obtain a full certificate of recognition of her change of gender, she would have had to annul her marriage (UK law had not recognised same-sex marriages up until 2014). However, MB did not want to annul her marriage for religious reasons. Without the certificate, she was not treated by law as a woman, and thus could not retire at a lower age. The UK Supreme Court referred the following question to the CJEU for a preliminary ruling: "Does Council Directive 79/7/EEC preclude the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a State retirement pension?"

The CJEU noted that "although EU law does not detract from the competence of the Member States in matters of civil status and legal recognition of the change of a person's gender, Member States must, when exercising that competence, comply with EU law and, in particular, with the provisions relating to the principle of non-discrimination". This principle also applies in the context of social security legislation. As the Court ruled, "for the purposes of the application of Directive 79/7, persons who have lived for a significant period as persons of a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender", irrespective of whether or not they have a gender recognition certificate. The UK law applicable in this case is less favourable to persons who have changed their gender after marriage than to persons who have married and have retained their biological gender. Such unequal treatment is based on gender and constitutes direct discrimination.

According to the Court, in the context of pension legislation, married persons who have changed their gender and those who are married and have not changed their gender find themselves in a similar situation. The aim of preventing same-sex marriages is not relevant in the context of pension legislation, the main function of which is to ensure protection "against the risks of old age by conferring on the person concerned the right to a retirement pension acquired in relation to the contributions paid by that person during his or her working life, irrespective of marital status". Consequently, the CJEU ruled that Council Directive 79/7/EEC prohibited the introduction of such measures.

5. Relations between the CJEU and constitutional courts of Member States

The preliminary ruling procedure also allows for a specific dialogue between the CJEU and the constitutional courts of individual Member States. This dialogue makes it possible to harmonise human rights protection standards at EU and national levels.

On the other hand, constitutional courts rarely decide to submit requests to the CJEU for a preliminary ruling. For example, by the end of 2017, the German Federal Constitutional Court had submitted only two such requests; a single request had been made by the French Constitutional Council; and the number of requests made by Italian and Spanish Constitutional Courts was, respectively, three and one. The Polish Constitutional Tribunal has so far submitted a single request for a preliminary ruling. The Tribunal's request was submitted in the course of the constitutional review proceedings initiated on the motion of the Polish Ombudsman, Commissioner for Human Rights, which concerned the legislation that provided for a reduced VAT rate for books and printed publications as opposed to e-books delivered by electronic means. The provisions in question transposed Council Directive 2006/112/EC. The Constitutional Tribunal first asked whether an annex to this directive, which was relevant to the case at hand, was invalid due to the infringement of an essential requirement of the legislative procedure, namely the mandatory consultation with the European Parliament. The CJEU answered this question by pointing out that the annex was not invalid, as the European Parliament was consulted on its draft version, which in all relevant respects did not differ substantially from the final version. The Council was therefore not obliged to repeat consultations.

The Constitutional Tribunal also asked whether the provision of Directive 2006/112 that excluded the application of a reduced rate of VAT to the electronic supply of digital books and other e-publications was invalid as infringing the principle of equal treatment. In this respect, the CJEU pointed out that the application of different tax rates to digital publications supplied by electronic means and to those supplied through a physical medium constitutes the different treatment of similar situations. Speaking about the aim of this differentiation, the CJEU referred to subjecting electronically supplied services "to clear, simple and uniform rules in order that the VAT rate applicable to those services may be established with certainty". According the Court, the exclusion of electronically supplied e-books from the reduced VAT rate should have been considered useful for achieving this aim because it facilitated "the administration of VAT by taxable persons and national tax authorities". This solution was also proportionate. Accordingly, in the Court's view, the examined provision of the annex to Directive 2006/112 was valid.

One of the most interesting examples of dialogue between the CJEU and a constitutional court of a Member State in recent years can be seen in the proceedings in two Italian cases known as *Taricco I* and *Taricco II*. The *Taricco* cases show that the CJEU recognises the legitimate concerns expressed by national courts as to the consistency of its own case law

with the fundamental constitutional principles for the protection of individual rights in the Member States.

On 8 September 2015 The CJEU handed down a judgment in the case of *the criminal proceedings against Ivo Taricco, Ezio Filippi, Isabella Leonetti, Nicola Spagnolo, Davide Salvoni, Flavio Spaccavento, Goranco Anakiev* (C-105/14; *Taricco I*). The case was heard following a request for a preliminary ruling submitted by an Italian court in the course of criminal proceedings against persons accused of forming and organising a criminal group involved in the conspiracy to commit VAT fraud in 2005-2009. Under Italian law at that time, the limitation period for these offences was seven years for leaders of a criminal group and six years for rank-and-file members. Additionally, the limitation period was subject to an extension upon the committal of the case for trial. However, the maximum duration of the extension was one quarter of the length of the original limitation period. Thus, a situation arose in which the case had not been time-barred at the beginning of the trial, but the period of limitation would certainly have elapsed before a final judgment in the case was passed. National regulations therefore led to a situation in which those accused of tax fraud worth many millions of euros would have avoided liability. As the Italian court put it, referring to the relevant provisions of national law and the substantial length of tax offence proceedings, "in Italy, in that type of case, de facto impunity is a normal, rather than exceptional, occurrence". The court therefore asked the CJEU about the compatibility of the national law with Italy's obligation to combat VAT fraud effectively imposed by EU law.

Responding to this question, the Court noted that "it follows from Directive 2006/112, read in conjunction with Article 4(3) TEU, that Member States are not only under a general obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory, but must also fight against tax evasion". Such a duty is established, inter alia, in Article 325 TFEU, which "obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests". The ECJ went on to argue that EU law does not prescribe the specific measures that Member States should take to combat tax fraud, which does not change the fact that criminal sanctions may prove to be necessary to tackle certain types of major fraud. The Court was certain that offences such as those prosecuted in the national proceedings seriously jeopardise the interests of the Union. Member States are therefore obliged to take sufficiently effective and dissuasive measures to combat tax fraud.

Referring to the relevant Italian legislation, the CJEU ruled that it would be incompatible with EU law if its application had "the effect that, in a considerable number of case, the commission of serious fraud will escape criminal punishment, since the offences will usually be time-barred before the criminal penalty laid down by law can be imposed by a final judicial decision" or if the national legislation provided for "longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union". It is for the national court to determine the above, the CJEU held. If this court concludes that national rules are not

sufficiently effective and dissuasive, it is obliged to ensure that EU law is given full effect, "if need be by disapplying those provisions ... without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure". In so doing, the national court must ensure that the fundamental rights of the persons concerned are not infringed. In this respect, as the CJEU pointed out, Article 49 of the Charter of Fundamental Rights enshrines two fundamental principles of criminal law, expressed by the Latin mottoes *nullum crimen sine lege* and *lex retro non agit*. However, this provision would not be violated if the national court refused to apply the general limitation period in the context of the pending criminal proceedings. If this was the case, the accused would not be convicted "for an act or omission which did not constitute a criminal offence under national law at the time when it was committed" and no penalty which, at that time, was not laid down by national law would be applied. This is because, the CJEU ruled, at the time when they were committed, the acts of the defendants were considered criminal offences under national law and were subject to the same punishment. At this point, the CJEU referred to the case law of the ECtHR, which suggested that Article 7 ECHR did not prohibit the extension of limitation periods for criminal offences that have already been committed but are not yet time-barred.

The *Taricco I* judgment triggered much controversy in Italy. The Court of Appeal of Milan and Supreme Court asked the Constitutional Court about whether it was lawful to apply the provisions on the limitation period for tax offences. The Constitutional Court found that a refusal to apply these provisions might lead to an infringement of fundamental constitutional principles of the Italian Republic, in particular the principle according to which all criminal offences and penalties must be determined by law ("the principle of determination"). According to the Constitutional Court, as under Italian law the rules on limitation in criminal matters are substantive in character, the principle of legality requires that it must be governed by precise norms that are in force at the time when a given offence was committed. Given the above, it needs to be ascertained whether the perpetrator was aware that at the time of the commission of the offence that EU law required national courts to disapply the disputed provisions of criminal law. The Constitutional Court also pointed out that the *Taricco I* judgment was unclear as it did not formulate criteria to be taken into account in the assessment of whether the application of national legislation would prevent the imposition of criminal penalties for tax fraud "in a significant number of cases". Nor did the CJEU consider the point of law that was referred for its examination from the perspective of the principle of determination enshrined in Article 49 of the Charter. The Constitutional Court therefore asked the CJEU whether the obligation to disapply a national provision, which arises from the *Taricco I* judgment, also exists where there is no sufficient legal basis in the national law, and even where in the legal system of the Member State concerned, limitation periods form part of substantive criminal law and are subject to the principle of the legality of criminal proceedings.

The CJEU answered these questions in the judgment of 5 December 2017 issued in *the criminal proceedings against M.A.S., M.B. intervener: Presidente del Consiglio dei Ministri* (C-42/17; *Taricco II*). The Court recalled that "Member States are in breach of their obligations under Article 325(1) and (2) TFEU if the criminal penalties adopted to punish serious VAT fraud do not enable the collection in full of VAT to be guaranteed effectively". Consequently, the

limitation rules laid down by national law should be designed in such a way as not to prevent the effective prosecution of tax offences. Equally, such rules must not lead to a situation in which it would be more difficult to punish an offence detrimental to the financial interests of the Union than an offence detrimental to the interests of a Member State.

The CJEU pointed out that, first of all, it is the national legislator who is responsible for the appropriate development of limitation rules. The Court reiterated that, according to the case law of the ECtHR, a statutory extension of the limitation period for offences which are not yet time-barred does not contravene the ECHR. Protecting the Union's financial interests by means of criminal sanctions is a shared competence of Member States and the EU. The system of limitation rules applicable to VAT offences had not been harmonised until July 2017; prior to that date the Member States were free to regulate these matters as they saw fit. The Italian Republic was thus able to establish that limitation is a measure of substantive criminal law and that, as such, it should be governed by the principle of determination. The CJEU also recalled that national courts should ensure that the fundamental rights of the accused are not violated. In doing so, the courts "remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised".

Apart from being embedded in the constitutional traditions common to all Member States, the principle of determination is enshrined in Article 49 of the Charter. According to this principle, "provisions of criminal law must comply with certain requirements of accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty" so that an "individual is in a position, on the basis of the wording of the relevant provision and if necessary with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable". The principle of determination is also binding in respect of provisions designed to ensure "the effective collection of the Union's own resources". With this in mind, the national courts should examine whether the application of the rule formulated in *Taricco I* would in fact infringe the principle of determination by introducing uncertainty in the legal system as to the designation of a set of limitation rules applicable to the case at hand. If such an infringement is found, a national court should not disapply the disputed provision of national legislation. Nor may the court refuse to apply those provisions in proceedings relating to offences preceding the *Taricco I* judgment. Otherwise, the accused would retroactively incur stricter liability than that existing at the time the offence was committed. The CJEU therefore modified the rule formulated in *Taricco I*, indicating that it does not oblige a Member State to disapply a national provision if this would result in "a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed".

6. The preliminary ruling procedure and the ECtHR

Although the EU is not a party to the ECHR, there are far-reaching interactions between the case law of the ECtHR and that of the CJEU. As can already be seen from the above descriptions of the CJEU rulings, the Court of Justice has referred on several occasions to the case law of the ECtHR when interpreting the provisions of the Charter. In any case, these references are based on the Charter itself with Article 52(3) providing that: "[I]n so far 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...". The relationship between the provisions of the Charter and the ECHR is illustrated below:

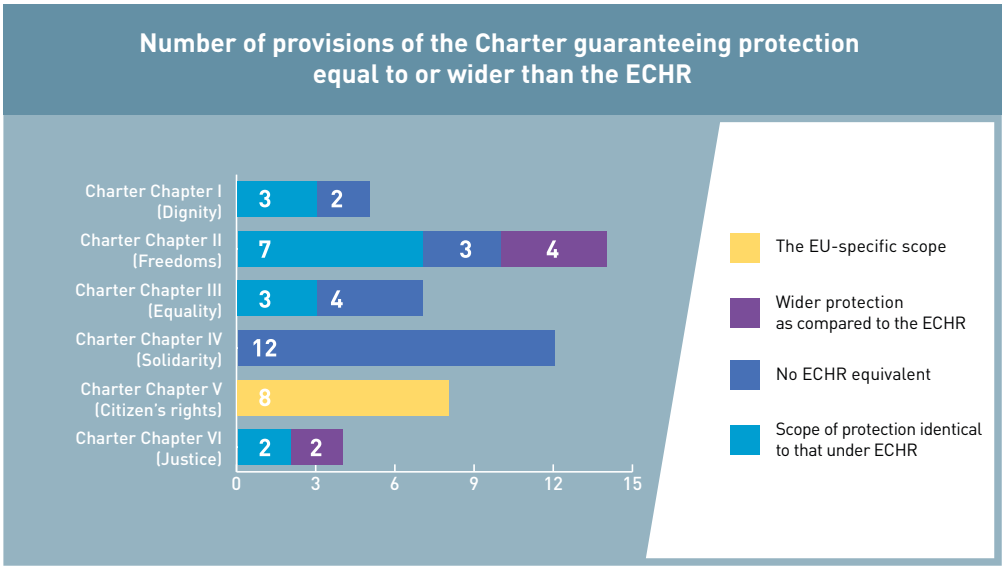


Chart 4. Number of provisions of the Charter guaranteeing protection equal to or wider than the ECHR[13]

However, the ECtHR also repeatedly refers in its judgments to the case law of the CJEU. In the period from 1 January 2016 to 1 July 2018, the ECtHR referred to CJEU rulings in judgments concerning, e.g., the *ne bis in idem* principle (see judgment of the ECtHR Grand Chamber of 15 November 2016 in the case of *A. and B. v Norway*, application No 24130/11 29758/11, §§51-52, 118), asylum law (see judgment of the ECtHR Grand Chamber of 23 March 2016 in the case of *F.G. v Sweden*, application No 43611/11, §§50-51), the dismissal of the President of the Hungarian Supreme Court (see judgment of the ECtHR Grand Chamber of 23 June 2016 in the case of *Baka v. Hungary*, application No 20261/12, §§69-70, 172), the protection of privacy in the context of the right of access to public information (see judgment of the ECtHR Grand Chamber of 8 November 2016 in the case of *Magyar Helsinki Bizottság v Hungary*, application No 18030/11, §§58-59), the mass interception of electronic signals in

13 Based on: *Fundamental Rights Report 2018*, p. 36.

the context of the right to privacy (see judgment of the ECtHR of 19 June 2018 in the case of *Centrum för Rättvis v. Sweden*, application No 35252/08, §§79-80).

However, particular attention should be paid to the case law of the ECtHR concerning the impact of the national court's failure to make a request for a preliminary ruling to the CJEU on the fairness of proceedings under Article 6 of the ECHR. The most recent judgment in this respect was delivered on 24 April 2018 in the case of *Baydar v. Netherlands* (Application no 55385/14). The applicant was convicted at first instance for transporting drugs and facilitating illegal entry into the Netherlands, and the appeal court upheld the judgment. He therefore lodged an appeal in cassation with the Supreme Court. In his written grounds of appeal, the applicant questioned, among other things, the findings of criminal courts alleging that he had facilitated the unauthorised residence of Iraqi migrants in the Netherlands. In that regard, the applicant argued that criminal law provisions applied in his case implemented Council Directive 2002/90/EG of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence and Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. The terms used in them should therefore be understood consistently with similar terms under EU law. However, the applicant's grounds of appeal in cassation did not include a request that the Supreme Court put a question to the CJEU for the purpose of obtaining a preliminary ruling. It was only in response to the advisory opinion of the Advocate General to the Supreme Court concluding that the applicant's appeal was, to a large extent, groundless (he recommended only a reduction in sentence) that the applicant made a tentative request for questions to be referred to the CJEU for a preliminary ruling about the interpretation of "residence", "entry" and "transit" within the context of the Directive. Finally, the Supreme Court, as advised by the Advocate General, reduced the prison sentence and dismissed the remainder of the appeal. In the reasons for its judgment, the Supreme Court did not refer to the request for questions to be referred to the CJEU for a preliminary ruling and only made a general remark that as the remaining grievances raised in appeal in cassation did not allow the judgment to be dismissed and since they did not refer to case law inconsistencies or important legal issues, there was no need for further reasoning in this regard (which was permitted by Section 81 of the Dutch Judiciary Act). Consequently, the applicant appealed to the ECtHR, arguing a breach of Article 6 of the Convention by the Supreme Court who had refused to admit his request to refer a question to the CJEU for a preliminary ruling without providing adequate reasons for its refusal.

Considering the application, the ECtHR noted that the Convention did not guarantee the right to have a case referred by a domestic court to the CJEU for a preliminary ruling. It is for the national courts to interpret domestic and EU law and to decide on whether it is necessary to seek a preliminary ruling from the CJEU. On the other hand, this issue is not completely "unconnected to Article 6 of the Convention since a domestic court's refusal to grant a referral may, in certain circumstances, infringe the fairness of proceedings where the refusal proves to have been arbitrary". Such a refusal may be deemed arbitrary in cases where the granting of a referral would be obligatory or where the refusal is based on reasons other than those provided for by law, or where the refusal was not duly reasoned. The Court stressed that the right to a reasoned decision serves the general rule enshrined in the

Convention which protects the individual from arbitrariness by demonstrating to the parties that they have been heard and obliges the courts to base their decision on objective reasons. However, it does not mean that a detailed answer to every argument is required. The extent to which the duty to provide reasons applies may vary depending on a number of factors, such as the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Member States with regard to statutory provisions, customary rules, and the presentation and drafting of judgments. That is why the question of whether or not a court has failed to fulfil the obligation to provide reasons can only be determined in the light of the circumstances of the case.

The Court reiterated that, according to its case law, where a request to obtain a preliminary ruling was insufficiently pleaded or where such a request was only formulated in broad or general terms, it is acceptable under Article 6 of the Convention for national superior courts to dismiss the complaint by mere reference to the relevant legal provisions governing such complaints, if the matter raises no fundamentally important legal issue or due to the lack of prospect of success, without dealing explicitly with the request. Furthermore, the Court found that the summary reasoning used to refuse a request for a preliminary ruling was sufficient, where it was based on a previous judgment from which it followed that making a request to the CJEU for a preliminary ruling in a similar case was redundant. In another case, the ECtHR found it convincing that the request for a preliminary ruling was rejected by the court of last instance on the grounds that the party had lodged an appeal in breach of national procedural rules. The ECtHR most extensively addressed the issue in its judgment of 8 April 2014 in the case of *Dhahbi v. Italy* (application No 17120/09). The Court pointed out that national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU, are required to give reasons for such a refusal in the light of the exceptions provided for by the case law of the CJEU. They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

In transposing these principles of jurisprudence into the case in question, the ECtHR pointed out that the Dutch Supreme Court had partially dismissed the applicant's appeal in cassation, also with regard to the request for a preliminary ruling, with a brief statement of reasons referring only to Article 81 of the Law on the Judiciary. According to the ECtHR, this was not a violation of Article 6 of the ECtHR. It has already held in its previous case law that national supreme courts may dismiss complaints by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue or for lack of a prospect of success without dealing explicitly with the request. In such cases the ECtHR may only examine whether courts' decisions are not arbitrary or manifestly ill-founded. The Court assessed that rules such as those applicable in the present case serve to prevent protracted proceedings and allow the courts of cassation to focus on their core tasks, such as ensuring a uniform and correct interpretation of the rules. The ECtHR indicated that it had followed from the statement of grounds for the Supreme Court's judgment in the case in question that the applicant had requested a question to be referred for a preliminary

ruling to the CJEU, which, in the court's opinion, did not concern a matter relevant to the outcome of the case. Any judgement issued by the CJEU would be of no consequence for the content of ruling. It also follows from the case law of the CJEU that in such a situation the court is not obliged to submit a question for a preliminary ruling. Nor did the ECtHR find arbitrariness in the actions of the Supreme Court: the appeal in cassation was dealt with by three judges and the rejection of the request for a preliminary ruling was based on Article 81 of the Judiciary Act and was preceded by a review by the court of the arguments of the applicant and the opinion of the Advocate General. In such a situation, it is not possible to speak of unreliability of proceedings before the Supreme Court, and thus, of an infringement of Article 6 ECHR.

7. The CJEU and non-governmental organisations

Non-governmental organisations have a limited capacity to act before the CJEU in proceedings initiated by requests for a preliminary ruling. Differently from the ECtHR Rules of Court, which explicitly grant third parties (including non-governmental organisations) the right to submit, with the leave of the President of the Section, written comments on a case or, in exceptional cases, to take part in a hearing before the Court, EU law provides for no such NGO-friendly measures. Quite the opposite, Article 23 of the Statute of the CJEU and Article 96 of the Rules of Procedure of the CJEU contain an exhaustive list of entities which may submit statements of case and written observations in proceedings before the Court initiated by a request for a preliminary ruling. These are: parties to the main proceedings, Member States, the European Commission, the institution that adopted the act the validity or interpretation of which is in dispute, the States other than the Member States which are parties to the EEA Agreement, EFTA Surveillance Authority – where a question concerning one of the fields of application of that Agreement is referred to the Court for a preliminary ruling, non-Member States which are parties to an agreement relating to a specific subject matter which is concluded with the Council and where the agreement so provides and also 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.

The above means that in order to be able to submit its written statement to the CJEU in a specific case, a non-governmental organisation must be a party to national proceedings in the course of which a question has been referred for a preliminary ruling. However, an NGO that is a party to these national proceedings has no standing to submit an amicus curiae brief, an instrument known from proceedings before the ECtHR or national courts, in which it would be able to present its views on the legal problems central to a case pending before the Court.

Arguably, such a restrictive approach should be considered inappropriate: as the ECtHR's practice shows, amicus curiae briefs from NGOs can provide much-needed assistance to

the Court in the process of case adjudication, for example by presenting information on the practical application of national laws, the case law of national courts, statistics, etc. It would therefore be advisable to amend the relevant provisions of EU law so as to allow the President of the Court to grant leave for the submission of amicus curiae briefs to non-governmental organisations which are not parties to national proceedings before the CJEU. This would require, first and foremost, an amendment of the Statute of the Court, as set out in Protocol No 3 annexed to the TFEU.

Despite the above limitations, in practice NGOs have often played an important role in proceedings before the CJEU. For example, it was the non-governmental organisation Digital Rights Ireland that initiated national proceedings leading to an Irish court making a request for a preliminary ruling that triggered the invalidation of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC. Non-governmental organisations may also provide the parties to domestic proceedings with professional attorneys who can successfully petition a national court to submit a request for a preliminary ruling; this happened, for example, in the aforementioned case of *El Hassani*, in which Jacek Białas, an attorney affiliated with the Helsinki Foundation for Human Rights, represented a man applying for a visa. NGOs can also join national proceedings as interveners and thus obtain a *locus standi* before the CJEU. This possibility was seized by, among others, the international non-governmental organisation Article 19, which in November 2017 submitted an amicus curiae brief in the proceedings before the French Council of State that led to the submission to the CJEU of the request for a preliminary question on "the right to be forgotten". Another NGO, *The AIRE Centre (Advice on Individual Rights in Europe)* participated in the national proceedings and, later, in the proceedings before the CJEU which resulted in the judgment of 6 June 2013 in the case *MA, BT, DA v. Secretary of State for the Home Department* (C-648/11) concerning the treatment of unaccompanied minors applying for asylum.

Part III

Surveys

1. Introduction

The purpose of empirical research

In the light of the above described processes taking place in the legal, political and social spheres at the national level and also within the framework of the Council of Europe and the European Union, the Helsinki Foundation for Human Rights has decided that it is vital to determine the practical role of the Court of Justice of the European Union and the direct application of EU law by national courts in the regional human rights protection system.

The purpose of the survey conducted among judges, attorneys and representatives of non-governmental organisations was to learn about the experiences these professional groups have had so far with the basic legal instruments of the European Union in the substantive and procedural dimension.

We focused our research on the procedure for submitting requests for a preliminary ruling and the application of the Charter of Fundamental Rights of the European Union in national proceedings.

Research methodology

The survey was based on structured questionnaires with closed and open questions. Answers were collected anonymously. Respondents could participate in the survey online or by filling in a printed, anonymous questionnaire that was later delivered to the Foundation.

The questionnaire was divided into three parts:

- The first part concerned the application of EU law by judges at national level and the reliance on EU law by counsels in proceedings;
- The second part focused on the procedure for references for a preliminary ruling and the respondents' past experiences in this area;
- The third part was devoted to the availability of materials and education that provide insights into and knowledge of EU law.

Sample characteristics

In the course of the project, we received **141 answers** to our questionnaire on the application of EU law by national courts and the preliminary ruling procedure.

In our opinion, the research sample obtained allows for the formulation of reliable conclusions. However, the survey is a qualitative, not quantitative, study. Due to the fact that lawyers from Poland constituted a large percentage of the respondents, some of the conclusions were presented as relevant in particular for that jurisdiction.

The professional profile of survey respondents

Our goal was to reach out to lawyers representing different legal professions and practising in different European countries. This methodological approach resulted from a desire to learn about different perspectives and opinions, which can often be linked to the procedural role of a given professional and their native legal tradition.

The invitation to participate in the survey was accepted by Polish judges as well as attorneys and representatives of non-governmental organisations from Poland and other EU countries.

The largest group of respondents were judges (53%), followed by legal advisers/solicitors (19%) and attorneys-at-law/barristers (17%).

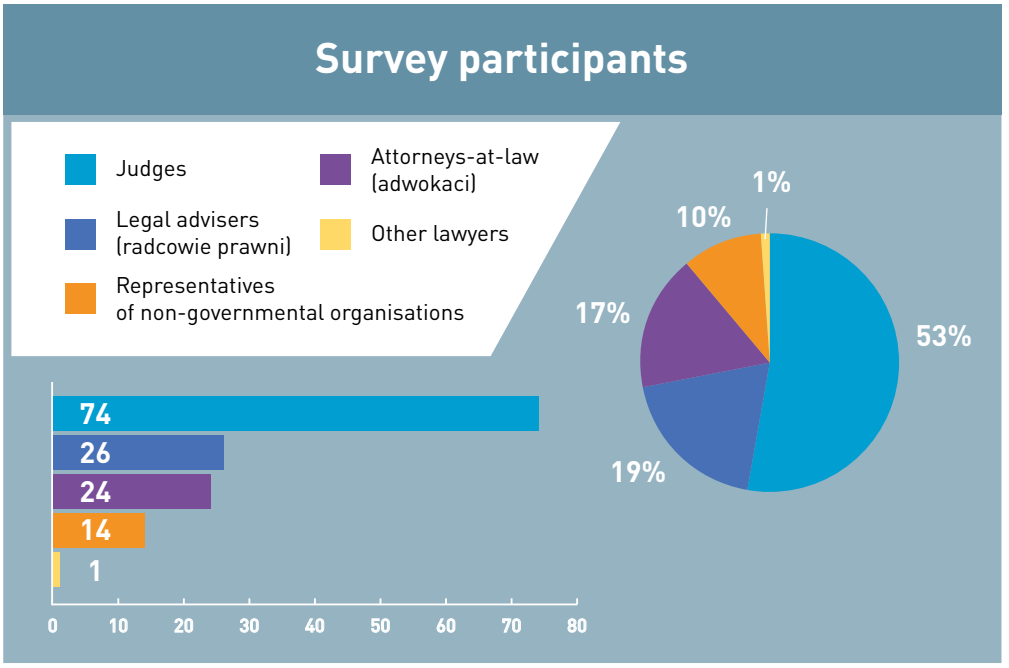


Chart 5. Survey participants

We would like to express our special thanks to the Judges' Association Iustitia, the Human Rights Committee of the Polish Bar Council, the Human Rights Committee of the Polish Society of Legal Advisers and the Modern Bar initiative for promoting our project and encouraging respondents to take part.

The country of respondents' professional practice

The researchers assumed the collection of at least one survey from each Member State. We wanted to know the opinions of lawyers from countries that have joined the EU at different times and therefore may have different experiences with the application of EU law and the measures provided by EU law.

Ultimately, we received responses from **141 persons from 17 Member States** (83% of the surveyed were lawyers from Poland).

The respondents' location of professional practice	Lawyers
Poland	117
United Kingdom	5
Belgium	2
Greece	2
Italy	2
Portugal	2
Bulgaria	1
Croatia	1
Czech Republic	1
France	1
Germany	1
Hungary	1
Lithuania	1
Netherlands	1
Romania	1
Slovakia	1
Slovenia	1

Table 1. The respondents' location of professional practice

In the course of the project, we managed to obtain answers from attorneys from Poland, the United Kingdom, Portugal, Germany, Italy, Czech Republic, the Netherlands, Slovakia, Greece and France.

Our questionnaires were completed by representatives of non-governmental organisations that mainly operate in Poland, the United Kingdom, Romania, Belgium, Bulgaria, Croatia, Greece, Slovenia, Italy, Lithuania and Hungary.

An insight into the judicial perspective was obtained thanks to opinions presented by judges from Poland.

The field of respondents' professional practice

The surveyed judges sit on courts of different instances. The largest group among the survey participants (52.7%) were judges from district courts, 20% of the surveyed were judges sitting on regional courts, 14.86% were judges from provincial administrative courts, 10.4% were judges from courts of appeal and 1.35% were judges of the Supreme Administrative Court.

The largest percentage of the respondents were judges from criminal divisions (27.02%). Judges from civil divisions made up 25.67% of the surveyed judges. 8.1% were judges from commercial divisions. Judges from employment and social security divisions constituted 6.76% of the respondents, and that same percentage represents the surveyed judges from civil appeals divisions.

The attorneys from Poland who expressed their opinions during the survey practiced in different legal fields. The largest groups were professionals specialising in civil (41.46%), criminal (19.51%) and administrative matters (17.07%).

The surveyed attorneys from other EU Member States focused their professional activities on criminal and human rights cases.

Among the representatives of European NGOs who shared their opinion with us were persons generally specialising in human rights, as well as those with expertise in criminal law (including EU criminal law), anti-discrimination law, migrant and refugee law, freedom of expression, the right to privacy and personal data protection and administrative law.

2. EU law in proceedings before national courts

Poland

75,6% of the attorneys practising law in Poland indicated that they referred to the case law of the CJEU in their pleadings. 51.61% of this group said they most frequently cited CJEU case law in civil cases, 22.58% – in administrative cases. 12.9% said they most frequently cited CJEU case law in criminal cases, and 12.9% – in employment law cases.

Those attorneys who indicated that they did not refer to the decisions of the Luxembourg Court in their work explained this by:

- the absence of cases involving EU law in their practice (30%);
- the reluctance of courts to submit requests for a preliminary ruling (30%);
- the fear of excessive length of proceedings (20%);
- difficulties in the formulation of a question to be referred for a preliminary ruling (10%);
- the lack of faith in the effectiveness of the preliminary ruling procedure (10%).

Nearly half (43.9%) of attorneys said that they did not invoke provisions of the Charter of Fundamental Rights in their pleadings. 19.51% of the respondents said that they most commonly invoked these provisions in criminal cases, 14.63% – in civil cases, 9.75% – in cases concerning employment and social security law, while 9.75% of the surveyed pointed to administrative proceedings.

Also, the judges recognised that the preliminary ruling procedure is not a legal reasoning measure that is most frequently used by professionals in national proceedings (see chart 6).

Similar conclusions may be drawn from the answers about the references to the Charter of Fundamental Rights and the CJEU case law that appear in court rulings. According to attorneys, such references are absent from 56.1% of statements of grounds included in court decisions. The respondents claimed that the courts invoke the CFR and CJEU case law mainly in criminal and administrative matters.

The judges had a similar perception of the application of the Charter of Fundamental Rights: 66.2% of the surveyed judges said they did not refer to the Charter in their rulings.

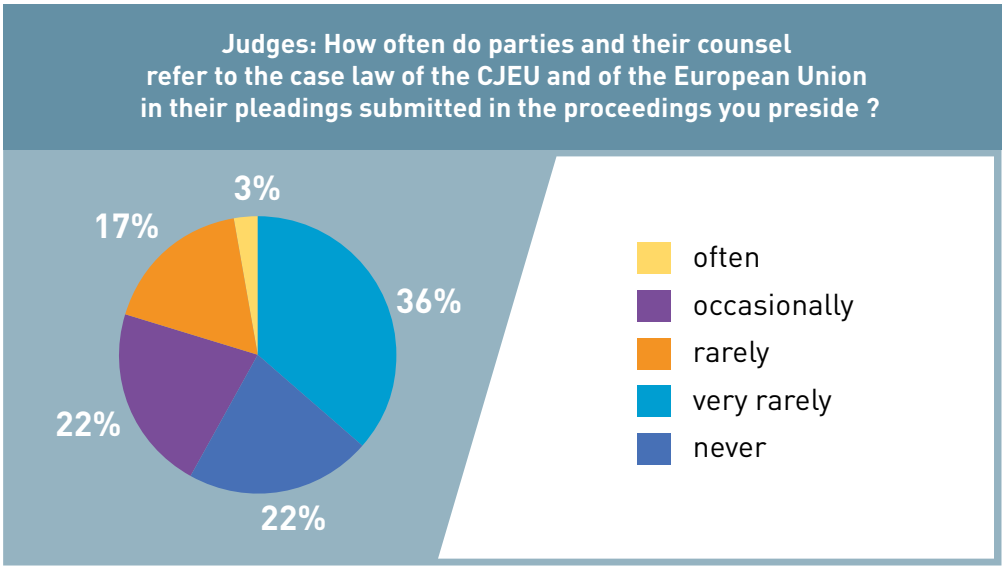


Chart 6. Judges: How often do parties and their counsel refer to the case law of the CJEU and of the European Union in their pleadings submitted in the proceedings you preside?

The European perspective

The surveyed attorneys practising elsewhere in the EU presented different opinions. This discrepancy in the answers obtained may be a consequence of the fact that this group of respondents comprised predominantly criminal lawyers.

More than a half of the attorneys from other EU Member States indicated that they often invoked the case law of the CJEU in their pleadings.

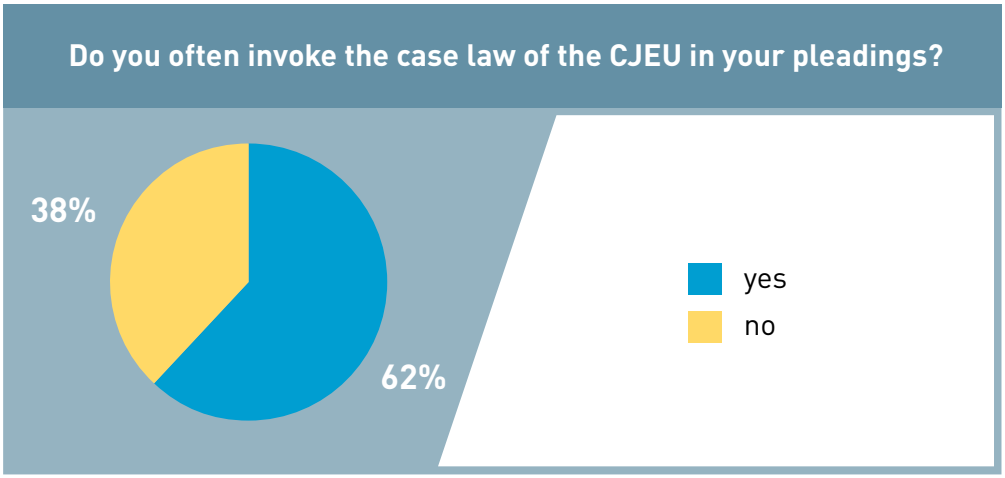


Chart 7. European attorneys: Do you often invoke the case law of the CJEU in your pleadings?

These respondents expressed a different approach to the practical use of the Charter of Fundamental Rights: 92% stated that they invoked provisions of the CFR in their pleadings.

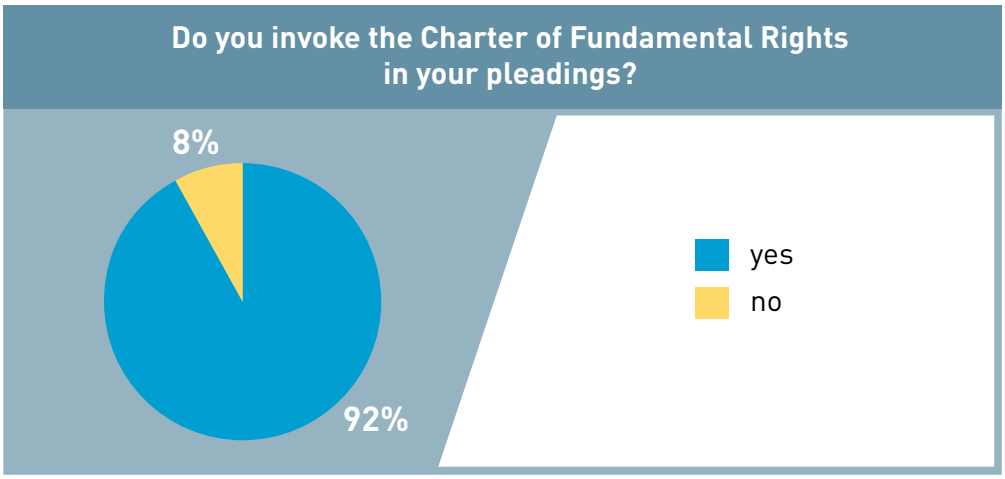


Chart 8. European attorneys: Do you invoke the Charter of Fundamental Rights in your pleadings?

3. The preliminary ruling procedure in practice

Past experiences with the preliminary ruling procedure

Poland

Only five Polish judges who took part in the survey (6.75% of all judges who responded) had submitted a request for a preliminary ruling to the CJEU. These requests were related to issues of administrative and criminal law.

The remaining judges gave the following reasons for not submitting requests for a preliminary ruling:

- no motion of a party to the proceedings;
- no such need in the cases they adjudicated or the absence of an EU element in those cases;
- difficulties in the formulation of a question.

The judges also raised concerns that it was inappropriate to submit a request for a preliminary ruling due to the risk of protracting the proceedings, or said that they were inadequately trained to do so or did not believe in the CJEU as an institution (see chart 9).

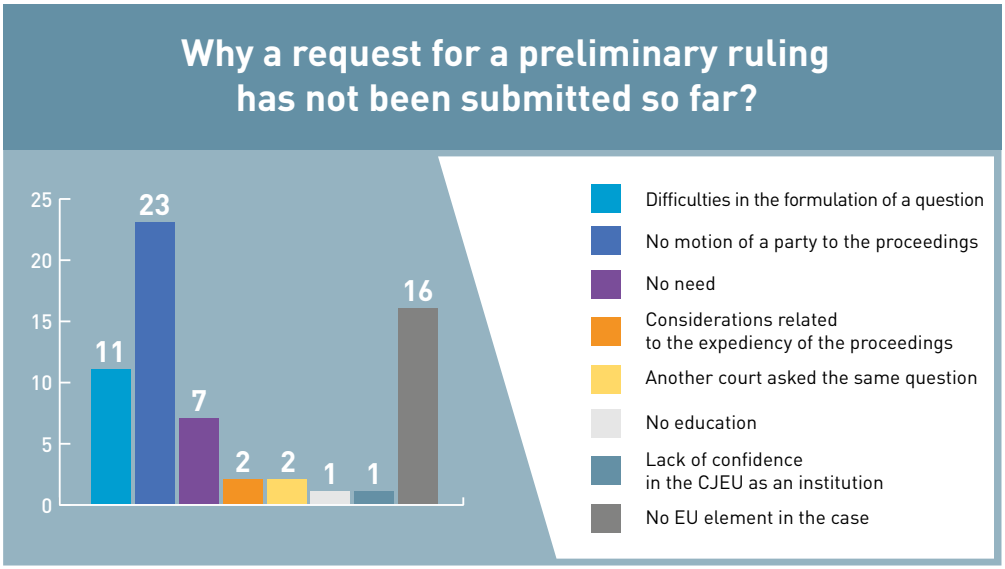


Chart 9. Why a request for a preliminary ruling has not been submitted so far?

Only 11 attorneys had used or attempted to use the preliminary ruling procedure in proceedings conducted in Poland.

The preliminary ruling procedure as a mechanism for human rights protection

In an era marked by a crisis of many national guarantees of human rights protection across Europe, and in view of the much-publicised ineffectiveness of the procedure before the European Court of Human Rights, it seems justified to seek new measures for the protection of individual rights.

An assessment of each such measure must always take into account a number of factors, including:

- the formal availability of a procedure in question,
- its subject matter,
- expediency of the procedure,
- the nature of issued decisions,
- the enforceability of such decisions at the national level, and
- responsibility for a failure to enforce a decision.

Poland

The survey conducted among attorneys in Poland shows that as many as 95 % of the respondents perceived the procedure before the CJEU as an effective mechanism for the protection of rights and freedoms.

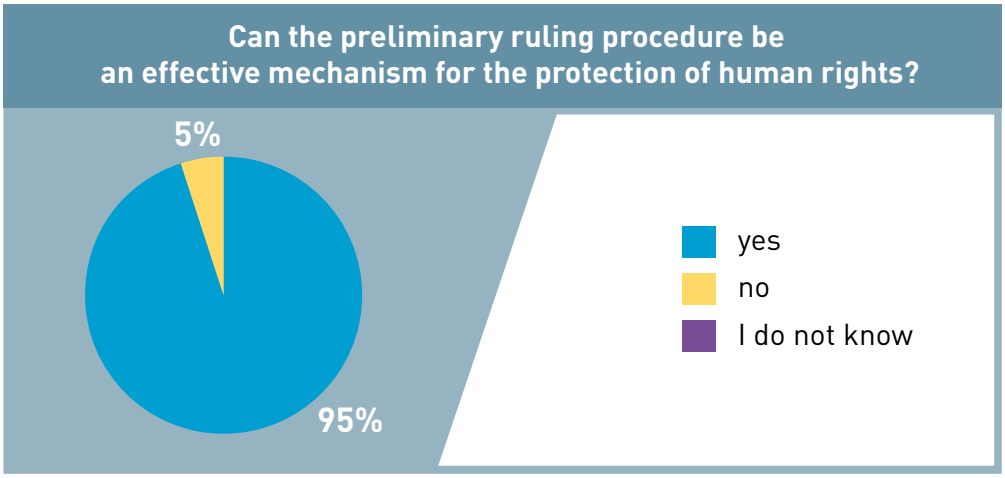


Chart 10. Can the preliminary ruling procedure be an effective mechanism for the protection of human rights?

A pan-European perspective

Similarly, an overwhelming majority of lawyers practising in other Member States considered the preliminary ruling procedure an effective instrument of fundamental rights protection. However, 15% of the respondents did not subscribe to this statement.

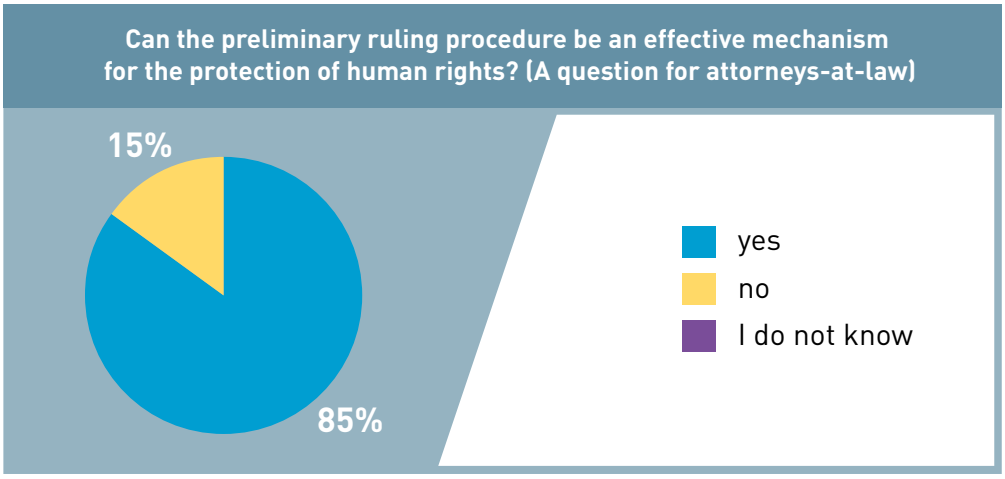


Chart 11. Can the preliminary ruling procedure be an effective mechanism for the protection of human rights? (A question for attorneys-at-law)

A similar sentiment was presented by representatives of European non-governmental organisations.

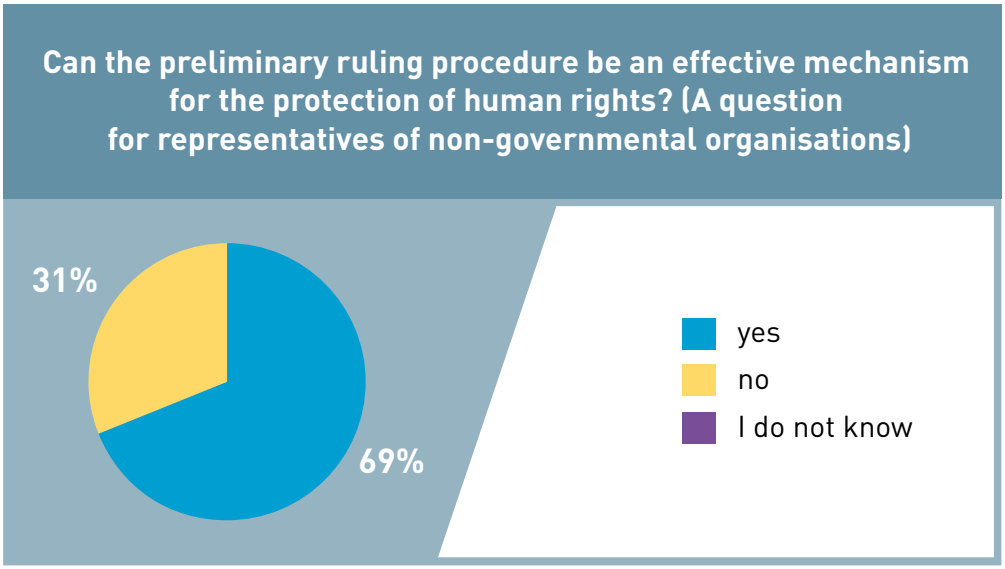


Chart 12. Can the preliminary ruling procedure be an effective mechanism for the protection of human rights? (A question for representatives of non-governmental organisations)

Staff of some European NGOs stressed that the Court of Justice of the European Union could not be treated as a full alternative to the Strasbourg Court. They also pointed out that the preliminary ruling procedure posed a challenge to national human rights defenders who are not yet very experienced in this process.

The respondents more sceptical towards the claim that the Court of Justice of the European Union is an effective mechanism for the protection of human rights cited the following reasons for their views:

- no general complaint procedure before the CJEU;
- the requirement for a court's decision to apply to the CJEU;
- judges' unwillingness to take part in international proceedings (including those before the CJEU);
- the length of proceedings before the CJEU;
- no remedy to challenge a national court's refusal to apply to the CJEU;
- no capacity to act in CJEU proceedings granted to non-governmental organisations.

Lawyers from Poland and other EU countries indicated, for their part, that the preliminary ruling procedure may be particularly relevant in:

- the cases of migrants and refugees;
- criminal cases (and especially with regard to the implementation of EU directives on procedural rights of accused and suspects and the transfer procedure under the European Arrest Warrant);
- cases involving anti-discrimination law;
- family cases;
- tax cases;
- freedom of speech;
- cases involving the right to privacy and protection of personal data;
- cases related to the protection of property rights;
- cases concerning the right to a court;
- employee cases;
- freedom of movement cases.

Some of the respondents did not point to any distinctive areas of the relevance of the preliminary ruling procedure. As they explained, a European element, which is crucial for triggering the preliminary ruling procedure, can appear, and be a useful instrument in all cases and across all areas of law.

4. The future of proceedings before the CJEU

Recognising that the main actors in the EU legal system that determine the development of the preliminary ruling procedure are judges, we asked them whether they believed that the popularity of this instrument will grow in the coming years.

Poland

74% of the Polish judges who took part in the survey thought that national courts might use the institution more frequently in the near future.

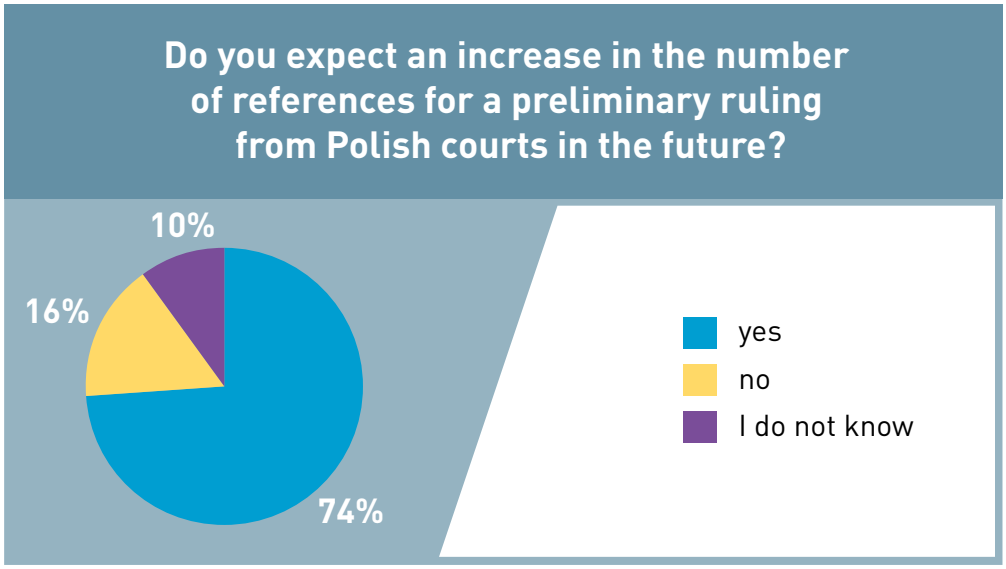


Chart 13. Do you expect an increase in the number of references for a preliminary ruling from Polish courts in the future?

Among the reasons for such an increase, they most often mentioned the following:

- changes in the law making system;
- destabilisation of the triple division of power;
- dynamic development of EU regulations.

5. Access to training on European Union law and the preliminary ruling procedure

One of the elements that may contribute to the growing popularity of certain legal instruments is the availability of training and workshops that enable people to become acquainted with the institution and to improve their practical skills in this area.

Poland

Judges

The decisive majority of Polish judges (74%) believed that there is insufficient access to training courses on European Union law and, in particular, on the preliminary ruling procedure. 22% considered that the possibility of acquiring knowledge in this field is sufficiently ensured.

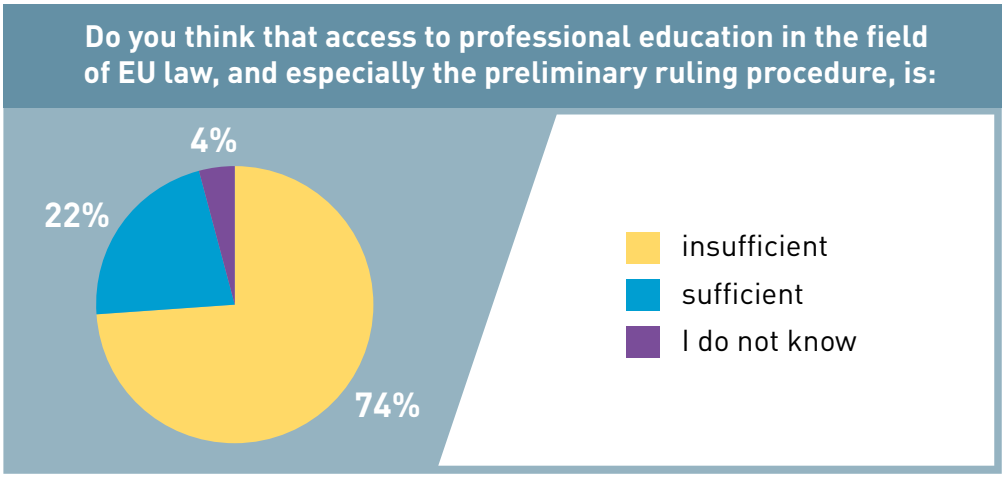


Chart 14. Judges: access to professional education in the field of EU law, and especially the preliminary ruling procedure

Attorneys

Attorneys (*adwokaci* and *radcowie prawni*) who operate mostly in Poland had a less favourable opinion of training courses on EU law than the judges. In the opinion of 81% of practitioners, the educational offer in this regard is insufficient (see chart 15).

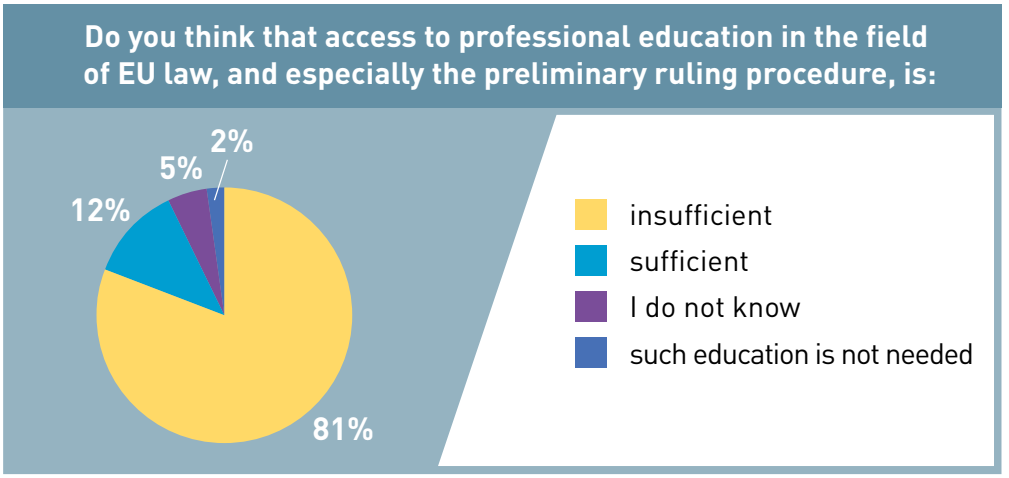


Chart 15. Attorneys: access to professional education in the field of EU law, and especially the preliminary ruling procedure

A pan-European perspective

Attorneys

Lawyers practising in other European countries also spoke of the need to improve the availability of training courses on EU law and, in particular, the preliminary ruling procedure. Only 8% of them considered the current offer to be satisfactory.

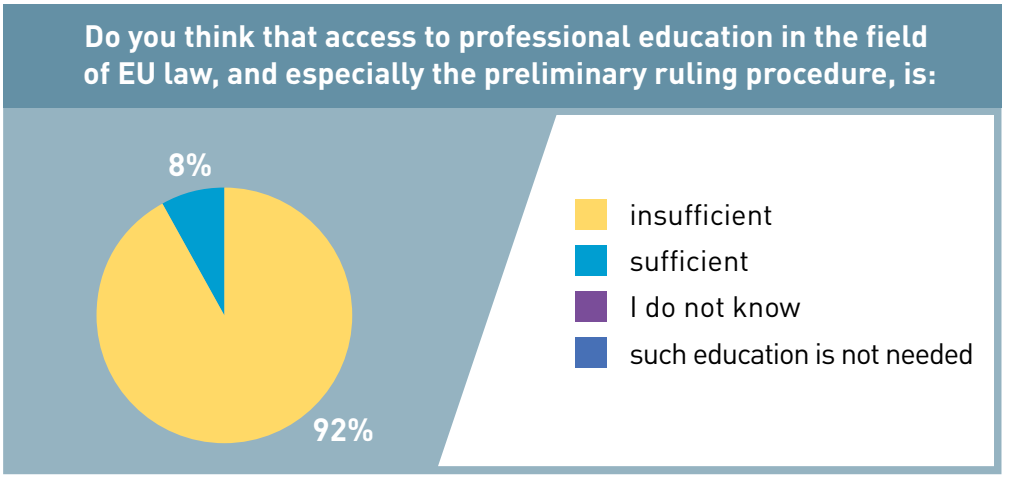


Chart 16. European attorneys: access to professional education in the field of EU law, and especially the preliminary ruling procedure

Representative of non-governmental organisations

The representatives of NGOs that operate in Europe clearly assessed access to training courses on EU law and the preliminary ruling procedure as insufficient.

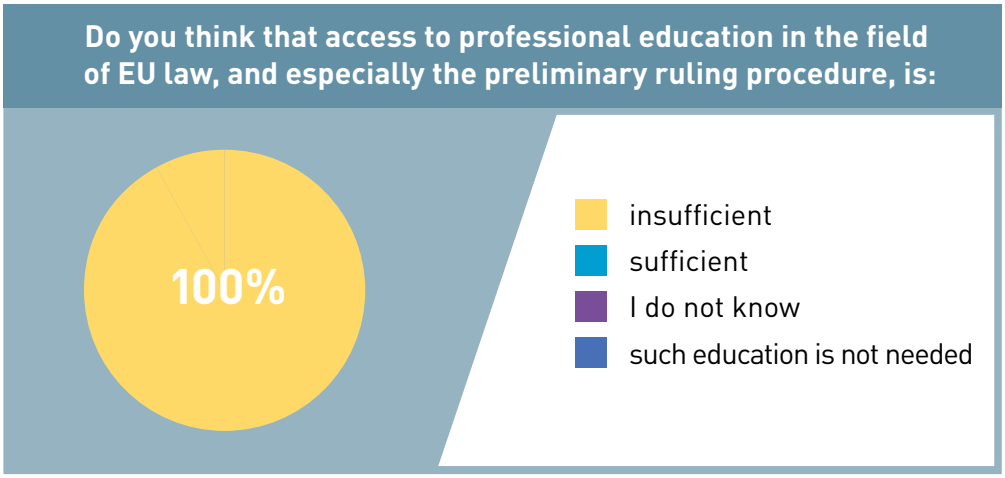


Chart 17. Representative of non-governmental organisations: access to professional education in the field of EU law, and especially the preliminary ruling procedure

6. Access to information on EU law and procedure before the CJEU

Poland

Judges

Polish judges were divided on the availability of material on EU law and the procedure before the Court of Justice. 55% of them considered that information on this subject was easy to obtain and 45% highlighted the inadequate database of such materials (see chart 18).

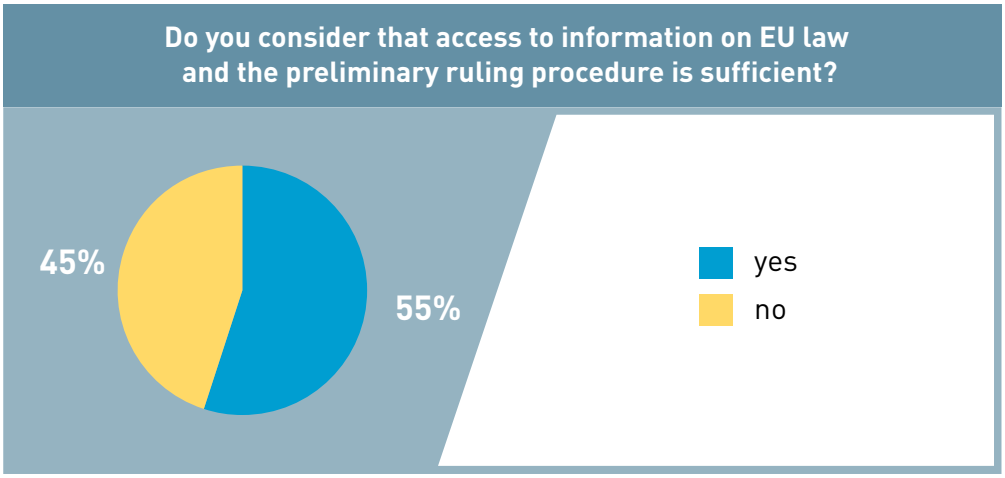


Chart 18. Judges: do you consider that access to information on EU law and the preliminary ruling procedure is sufficient?

Attorneys

In the case of attorneys-at-law and legal advisers, the above proportions were the other way round. Only 39% of respondents considered that access to information on this subject was sufficient and 56% saw a need to increase the availability of materials addressing the issue.

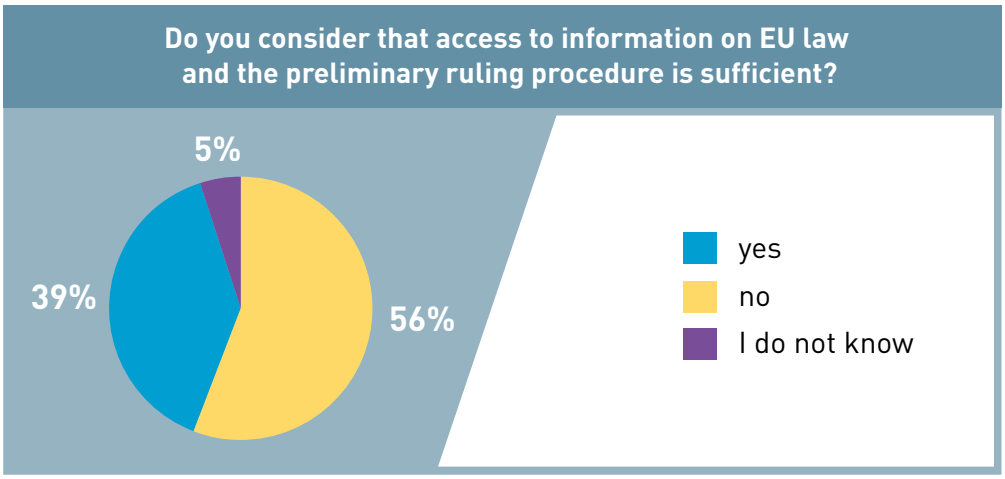


Chart 19. Attorneys: do you consider that access to information on EU law and the preliminary ruling procedure is sufficient?

A pan-European perspective

Attorneys

A similar opinion was expressed by lawyers practising in other countries. 54% of them considered access to information in this area to be insufficient.

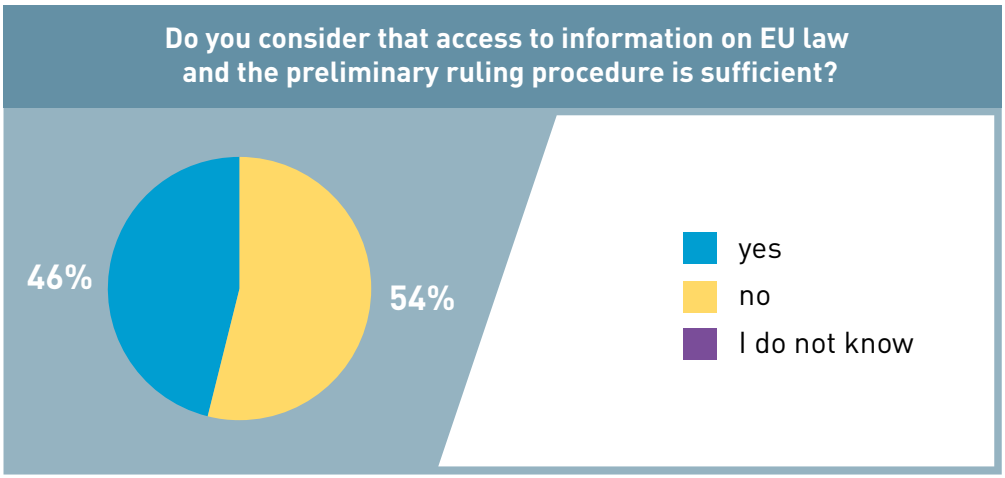


Chart 20. European attorneys: do you consider that access to information on EU law and the preliminary ruling procedure is sufficient?

Representatives of non-governmental organisations

In the opinion of representatives of European NGOs, access to information on European law, including the preliminary ruling procedure, needs to be improved. According to 67% of them, it is difficult to obtain reliable information on the subject.

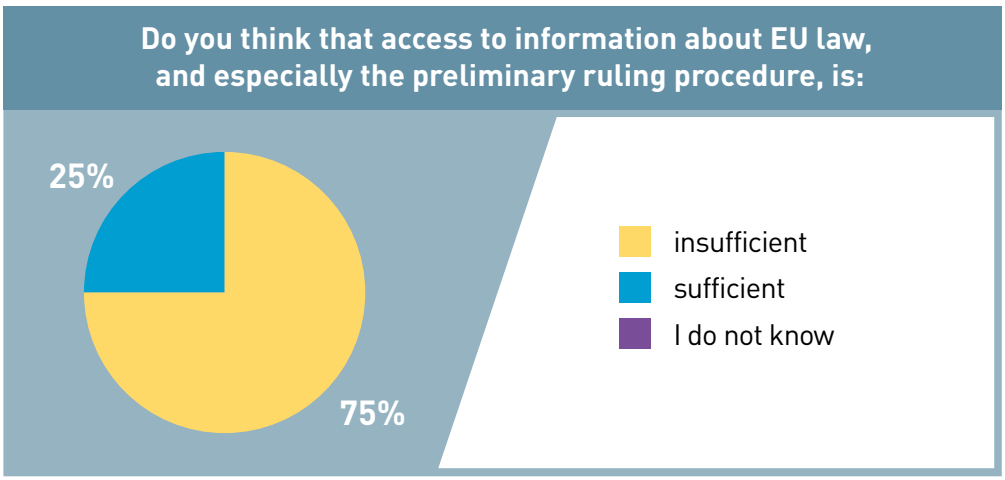


Chart 21. Representatives of European non-governmental organisations: access to information on EU law and the preliminary ruling procedure

7. The role of coordinators for international cooperation and human rights

Under the Act of 12 July 2017 amending the Courts Act and some other acts (Journal of Laws of 2017, item 1452), the positions of coordinators for international cooperation and human rights in civil cases and criminal cases were created in judicial circuits. The coordinators are appointed by presidents of regional courts from among judges, associate judges or court referendaries in that judicial circuit, or by district courts in the area of a regional court's jurisdiction that are distinguished by their knowledge of international cooperation, European law and human rights. The coordinators are primarily responsible for advising judges, associate judges, court referendaries and judges' clerks in the field of foreign law, international and European law and assisting them in obtaining further information on this subject.

40% of the judges who took part in the study stated that the introduction of the position of coordinator for international cooperation and human rights had contributed to positive developments in the area of application of European law. Exactly the same number of respondents said, however, that they did not see any changes in this respect.

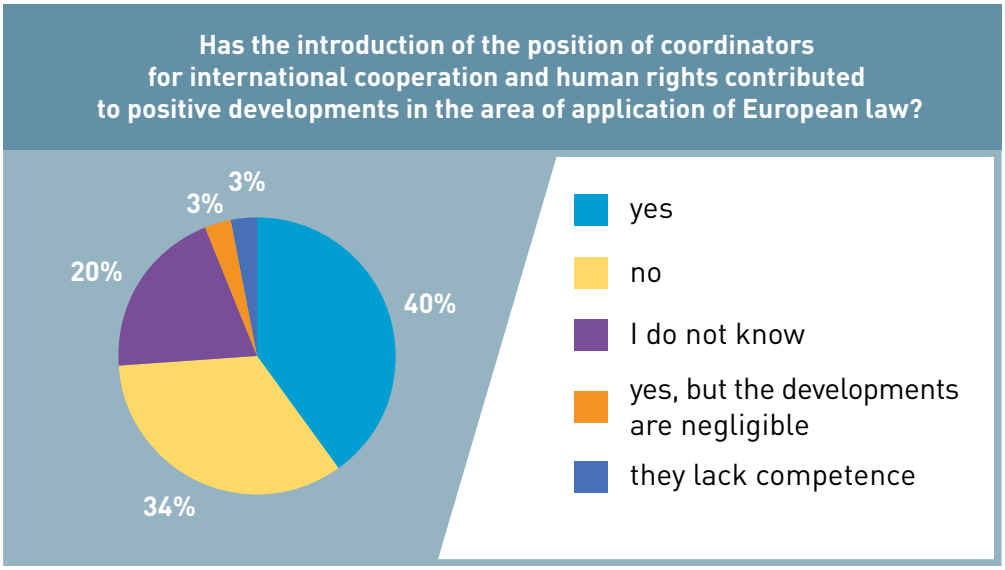


Chart 22. Has the introduction of the position of coordinators for international cooperation and human rights contributed to positive developments in the area of application of European law?

Part IV

Recommendations

Recommendations

For judges

- The CJEU case law and the preliminary ruling procedure should be used in cases that include elements of EU law.
- The coordinators for international cooperation and human rights should become more active in disseminating information about the case law of international courts among judges and other judicial officers.

For attorneys

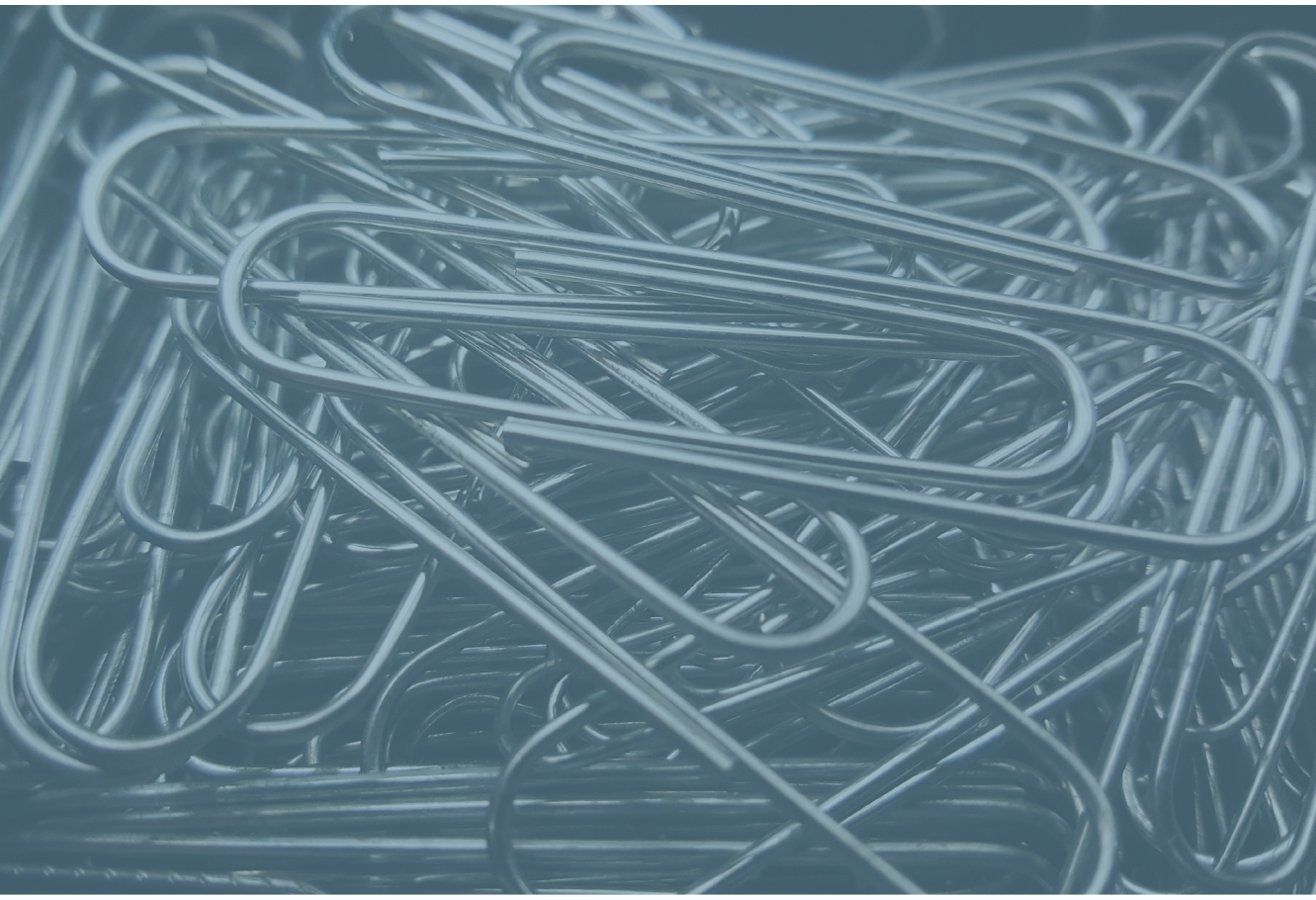
- The CJEU case law and the preliminary ruling procedure should be used in cases that include elements of EU law.

For the Polish National School of Judiciary and Public Prosecution and the Polish Bar

- It is necessary to increase the availability of education on the preliminary ruling procedure and EU law for judges and attorneys.
- In the era of eroding principles of the rule of law and problems with the implementation of standards developed in the case law of the European Court of Human Rights, particular attention should be paid to issues related to the application of the Charter of Fundamental Rights.
- It is crucial to increase the possibility of exchanging experience between practitioners of different legal professions on the possible practical use of the CFR in national judicial practice.
- Particular attention should be given to the education of judges-coordinators in terms of international cooperation and human rights.
- Human rights committees and sections within professional bodies should be more attentive to promoting the case law of international courts.

For EU member states

- As the ECtHR's practice shows, amicus curiae briefs submitted by non-governmental organisations can provide much-needed assistance to international bodies in the process of adjudicating cases, for example by presenting information on the practical application of national laws, the case law of national courts, statistics, etc. It is therefore appropriate to allow non-governmental organisations to participate in proceedings before the CJEU and to amend the Statute to that effect.
- Member States should appoint judges-coordinators for international cooperation and human rights.



Part V

Appendices

Questionnaire – version for judges

1. **How many requests to CJEU for preliminary rulings have you referred?**
   Select only one answer.

   - ☐ none
   - ☐ 1
   - ☐ 2-3
   - ☐ 4-5
   - ☐ more than 5

2. **In the context of what category of cases have you referred requests for preliminary rulings?**
   Select all the right answers.

   - ☐ civil law
   - ☐ family law
   - ☐ labour/social security law
   - ☐ administrative law
   - ☐ criminal law

3. **If you have never referred a request for preliminary ruling, what was the reason for it?**
   Select all the right answers.

   - ☐ do not adjudicate cases involving EU law
   - ☐ difficulty with formulation of preliminary reference
   - ☐ I do not believe in effectiveness of preliminary reference procedure
   - ☐ lack of motion of the parties
   - ☐ other: .....

4. **Do you expect that in the future domestic courts in your country would refer more requests for preliminary rulings?**

   .....

5. **Do you often adjudicate cases involving EU law?**

   .....

6. **In the context of what category of cases do you apply the EU law the most often?**
Select only one answer.

- ☐ civil law
- ☐ family law
- ☐ labour/social security law
- ☐ criminal law
- ☐ administrative law
- ☐ I do not adjudicate cases involving EU law at all

7. **Do you invoke the CJEU judgments in your case law?**
Select only one answer.

- ☐ yes
- ☐ no

8. **In the context of what category of cases do you invoke the CJEU judgments the most often?**
Select only one answer..

- ☐ civil law
- ☐ family law
- ☐ labour/social security law
- ☐ criminal law
- ☐ administrative law
- ☐ I do not invoke the CJEU judgments at all

9. **If you do not invoke the CJEU judgments, what is the reason for it?**
Select only one answer.

- ☐ I do not adjudicate cases involving EU law
- ☐ case law of the CJEU is irrelevant for the interpretation of the domestic law
- ☐ lack of access to the case law of the CJEU
- ☐ other: .....

10. **Do you refer to the EU Charter of Fundamental Rights in your case law? If so, in the context of what category of cases you do it the most often?**
Select only one answer.

- ☐ civil law
- ☐ family law
- ☐ labour/social security law
- ☐ criminal law
- ☐ administrative law
- ☐ I do not refer to the Charter of Fundamental Rights at all

11. **How often, in the pleadings submitted in the course of cases adjudicated by you, do the parties and their representatives invoke the CJEU judgments or provisions of the EU Charter of Fundamental Rights?**
Select only one answer.

- ☐ never
- ☐ very rarely
- ☐ rarely
- ☐ from time to time
- ☐ often

12. **In the context of what category of cases adjudicated by you do the parties and their representatives invoke the CJEU judgments or provisions of the EU Charter of Fundamental Rights the most often?**
Select only one answer..

- ☐ civil law
- ☐ family law
- ☐ labour/social security law
- ☐ criminal law
- ☐ administrative law
- ☐ never

13. **Do you think that the access to trainings on the EU law in your country, especially with regards to preliminary reference procedure, is sufficient?**

.....

14. **Do you think that the access to information on the EU law and the preliminary reference procedure is easy enough?**

.....

Personal information

15. I am judge in (15. rank of the court)

.....

16. I work in (department of the court)

.....

17. I was appointed as a judge:
Select only one answer.

- ☐ up to 5 years ago
- ☐ 5-10 years ago
- ☐ 10-15 years ago
- ☐ 15 years ago and more

17. What country do you work in?

.....

Questionnaire – version for attorneys

1 **Have you ever asked the court to refer a request for preliminary ruling to CJEU?**

.....

2. **Do you often work on the cases involving EU law?**

.....

3. **In the context of what category of cases do you apply the EU law the most often?**
Select only one answer.

- ☐ civil law
- ☐ family law
- ☐ labour/social security law
- ☐ criminal law
- ☐ administrative law
- ☐ I do not work on the cases involving EU law at all

4. **Do you often invoke the CJEU judgments in your pleadings?**
Select only one answer.

- ☐ yes
- ☐ no

5. **In the context of what category cases do you invoke the CJEU judgments the most often?**
Select only one answer.

- ☐ civil law
- ☐ family law
- ☐ labour/social security law
- ☐ criminal law
- ☐ administrative law
- ☐ I do not invoke the CJEU judgments at all

6. **If you do not invoke CJEU case law in your pleadings, what is the reason for it?**
Select only one answer.

- ☐ I do not work on cases involving EU law
- ☐ I am afraid of the length of the proceedings before the CJEU
- ☐ difficulty with formulation of request for preliminary ruling
- ☐ reluctance of the domestic courts to refer requests for preliminary rulings
- ☐ I do not believe in effectiveness of preliminary reference procedure

7. **Did the courts willingly accepted your suggestions to refer a request for preliminary ruling?**

.....

8. **Do you refer to the provisions of the EU Charter of Fundamental Rights in your pleadings? If so, in the context of what category of cases?**
Select only one answer.

- ☐ civil law
- ☐ family law
- ☐ labour/social security law
- ☐ criminal law
- ☐ administrative law
- ☐ I do not refer to the provisions of the EU Charter of Fundamental Rights

9. **How often, in the context of cases that you work on, do the courts invoke the judgments of the CJEU or the provisions of the EU Charter of Fundamental Rights? In the context of what category of cases do they do it the most often?**
Select only one answer.

- ☐ civil law
- ☐ family law
- ☐ labour/social security law
- ☐ criminal law
- ☐ administrative law
- ☐ the courts do not invoke the CJEU judgments or the provisions of the EU Charter of Fundamental Rights at all

10. **Do you believe that the preliminary reference procedure may be an effective mechanism of human rights protection?**
Select only one answer.

- ☐ yes
- ☐ no

11. **In the context of what kind of cases concerning human rights this procedure may be particularly effective?**

.....

12. **If you do not believe in effectiveness of preliminary reference procedure in human rights protection, please explain why.**
Select only one answer.

- ☐ reluctance of the courts to refer requests for preliminary rulings
- ☐ length of proceedings before the CJEU
- ☐ EU law does not affect human rights
- ☐ other: .....

13. **Do you think that the access to information on the EU law and preliminary reference procedure in your country is easy enough?**

.....

14. **Do you think that the access to trainings on the EU law in your country, especially with regards to preliminary reference procedure, is sufficient?**

.....

Personal information

15. **I am...**
Select only one answer.

- ☐ advocate
- ☐ legal advisor
- ☐ NGO employee
- ☐ other: .....

16. **Professional experience**
Select only one answer.

- ☐ less than 5 years
- ☐ 5–10 years
- ☐ 10–15 years
- ☐ more than 15 years

17. I specialize in...

Select only one answer.

- ☐ criminal law
- ☐ civil law
- ☐ commercial law
- ☐ administrative law
- ☐ family law
- ☐ constitutional law
- ☐ other: .....

14. What country do you work in?

.....

Notes

The report was created as part of the project *Thinking out of the ECtHR's box' – the Court of Justice of the European Union as an alternative international legal instrument of human rights protection*, implemented by the HFHR thanks to financial support of the Clifford Chance Foundation

CLIFFORD
CHANCE

HELSINKI FOUNDATION FOR HUMAN RIGHTS

@hfhrpl
@hfhrpl
@TheHFHR

Helsinki Foundation
for Human Rights
Zgoda 11 Street
00-018 Warsaw
tel.: (+48 22) 556-44-40
fax: (+48 22) 556-44-50
hfhr@hfhr.org.pl
www.hfhr.pl/en