Fundamental Rights In Courts and Regulation (FRICoRe)

FRICoRe
Judicial Training Project

FRICORE GUIDELINES FOR JUDGES

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The Guidelines inherent to each of the five project areas reflect the concluding remarks presented in the FRICoRe Casebooks, whose authorship should be here acknowledged by reference.

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Judicial dialogue and fundamental rights: new challenges

These Guidelines are meant to offer to national judges a brief overview on some of the main Project outcomes in the field of fundamental rights and effective protection of rights guaranteed by the EU law in a few sectors, namely consumer protection, data protection, asylum and immigration, non-discrimination and health. The focus is on article 47, Charter of Fundamental Rights (hereinafter, CFR) on the right to an effective remedy and a fair trial, and on the application of general principles of EU law such as the principles of effectiveness and proportionality and the duty to provide effective, proportionate and dissuasive sanctions and remedies in the enforcement of EU-based rights. Moving from the analysis of judicial dialogue between national courts, the Court of Justice of the EU and, occasionally, the European Court of Human Rights, these Guidelines aim at stimulating this dialogue further by considering whether and how some of the principles developed by the Court of Justice in preliminary rulings may be applied in different contexts and sectors and whether new preliminary references may be useful to shed additional light in the protection of fundamental rights at EU level.

The methodology of the Project is based on the recognition that preliminary references have represented a significant instrument not only to establish judicial dialogue between European and national courts but also to promote the evolution of EU law by involving national courts. Judicial training has been one of the tools of this dialogue, enabling judges to share questions and experiences on preliminary references' practices.

The dialogue with both European Courts has been relevant in this regard. With due consideration for the distinct roles of the two Courts, being the CJEU's mission broader (to ensure uniform interpretation of EU law generally) and narrower (being its jurisdiction on fundamental rights limited by the scope of application of EU law and the principle of conferral)[1], national judges need to take both Courts' decisions into account when adjudicating fundamental rights cases and providing an effective remedy through a fair trial under article 47 of the Charter and articles 6 and 13 of the European Convention on Human Rights. While acknowledging the broader scope of art. 47 CFR beyond the reference to civil rights and obligations referred in art. 6 ECHR (ECtHR, Grand Chamber, *Vilho Eskelinen and Others V. Finland*, 63235/00, 19 April 2007), the ECtHR itself has often looked at the Charter as concurring basis for the effective protection of fundamental rights (e.g., ECtHR, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, 27765/09, 23 February 2012). Moreover, it has specified the modes and contents of an effective remedy in areas of EU law, therefore covered by art. 47 CFR (see, e.g., ECtHR, *Shahzad v. Hungary*, 12625/17, 8 October 2021, 78 on effective remedy against a collective removal of asylum seekers) and the relevance of the right to a fair trial together with the adversarial principle, with special regard to cases in which the court raises a ground or an objection of its own motion (see ECtHR, *Duraliyski v. Bulgaria*, 45519/06, 4 June 2014, § 31; ECtHR, *Čepek v. the Czech Republic*, 2013, § 45). The extent to which national judges

[1] S. O'Leary, *The EU Charter Ten Years On: A View from Strasbourg*, in M. Bobek – J. Adams-Prassl, *The EU Charter of Fundamental Rights in the Member States*, Hart, 2020, p. 38.

combine the concurring guidelines provided by the two Courts may represent a challenge and a fertile area for training.

Other challenges emerge when looking at the judicial dialogue between national courts and the Court of Justice. Recently, the structure of judicial dialogue has been subject to a request of reconsideration of its basis. In its Opinion rendered in Case C-561/19 (*Consorzio Italian Management*) AG Bobek has framed the obligation of submitting preliminary references by distinguishing between the grounds of the obligation and the exceptions to the obligation of submitting the preliminary reference developed by the case law. The main question is how selective should the obligation to raise the preliminary question be, and, in particular how relevant is the existence of divergent interpretations of EU law by national courts. The issue poses a more general problem concerning the individual and the systemic effects of preliminary rulings.

The Court of Justice has answered to the preliminary reference proposed by reaffirming the pillars of judicial dialogue defined in *Cilfit* (C-283/81). The reference submitted by the Italian Council of State in the *Consorzio Ital Management* case concerned the request of parties to the proceeding to submit a preliminary reference after a preliminary ruling requested by the parties had already been issued by the CJEU. This is the so called phenomenon of "preliminary reference cascade", when the preliminary ruling triggers further references. In such cases, national judge asks what are the limits of the obligation to submit preliminary references, especially after one reference has already been submitted.

The issues raised by AG Bobek are worth discussing in a training project on fundamental rights since they look at the meaning of divergences in the application of EU law by national courts and whether the lack of uniform application should lead to interpretive efforts by CJEU. Moving from this perspective, the project has engaged the national judges in a discussion concerning not only the existence of different interpretations of fundamental rights in national legal orders but also the instruments to reduce these divergences when they undermine the principle of supremacy and uniformity. Such questions become even more critical when, under art. 47 CFR, we consider the fundamental right to an effective remedy and, more broadly, the means of effective enforcement, these including also effective sanctions.

The core question is what level of divergent interpretations by national courts of EU law is compatible with the principle of uniform interpretation. According to *Cilfit* jurisprudence, divergent interpretations among national courts represent a basis for the duty to submit a preliminary reference to CJEU. The FRICORE project aims at raising awareness of divergent national interpretations of fundamental rights and of the right to effective judicial protection in national laws. But when do these divergences become problematic and should lead to a preliminary reference?

Within the perimeters of national procedural autonomy, the divergences concerning the possible obstacles to effective judicial protection have emerged over time in national case laws.

The relevance of admissible divergences and the precondition to submit preliminary references are clearly dependent upon the EU instrument, whether a regulation or a directive, or whether a minimum or maximum harmonization instrument. E.g., divergences concerning the implementation of consumer directives raise different questions from divergences concerning MSs' legislation in the field of data protection, where a regulation has been adopted; the same applies to the procedural safeguards implementing at national level the duty of cooperation established by art. 4, Directive 2011/95/EU, on the assessment of international protection applications and the right to an effective remedy in international protection procedures under art. 46, Directive 2013/32/EU, compared with the application

of art. 27, Regulation (EU) No 604/2013, on the right to an effective remedy against the transfer decision adopted by MS when examining an application for international protection. Normally, the degree of admissible divergences in the interpretation of a regulation by national courts and authorities is significantly lower than that of a directive.

Yet, the degree of deference to MSs' national procedural autonomy may vary despite this abstract distinction. Indeed, for example, though being part of a regulation, art. 80, General Data Protection Regulation (hereinafter GDPR), on representation of data subjects by associations seems to allow for higher divergences compared with the ones allowed by Directive 2020/1828 on representative actions.

As a consequence, the role of judicial dialogue in steering interpretation of EU law and reducing divergencies has been particularly relevant whenever, both in directives and regulations, EU secondary law has left to MSs' autonomy the task to define procedures and remedies to ensure an effective protection of rights. So, e.g., the Court of Justice has significantly impacted on diverging national courts' interpretations concerning the proportionality of defective goods' replacement, whether to be assessed in relation with repair only or to the all the remedies (see CJEU, C-67/06 and 86/06, Weber and Putz, and its impact on Italian and German caselaw). The same has occurred, e.g., in the field of data protection, when the right to data protection needs to be balanced against other fundamental rights such as the right of expression and the one to information and effective remedies are needed (CJEU, C-507/17, Google CLL v. CNIL, para. 67). The impact of the EU caselaw on delisting (Google Spain, C-131/12; CG and Others, C-136/17, Google c. CNIL, C-507/17) is a good example. On the one side, cross-national convergences (e.g., in French, Italian and Polish decisions) may be observed when delisting is considered an adequate and proportionate remedy to strike a balance between data protection and the freedom of expression (being, e.g., the right to press untouched). On the other side, in some legal systems, national judges may struggle more than their colleagues in other Member States in reconciling the right to be delisted with the rules on protection of personality rights (e.g., this is the case for Poland). Furthermore, national judges may develop different approaches as regards the degree of activism expected by search engines, social networks and host providers in removing unlawful contents from the internet, although this is still a largely debated issue (see Glawischnig-Piesczek, C-18/18, and some applications in Italy and France in chapter 8 of the FRICoRe Casebook). The dieselgate provides another good illustration of the divergent applications of sanctions and remedies concerning unfair trade practices. Despite the common position by administrative authorities both administrative authorities and courts reviewing their decisions have determined fines of significant different amount for the same violations (see European Court of Auditors, The EU's response to the 'dieselgate scandal', Briefing Paper, 2019).

The degree of admissible divergences needs to balance the right to effective judicial protection, that is premised on equality, the duty of cooperation under art. 4(3), TEU, that binds all MSs in the same way, and the principle of procedural autonomy, allowing MSs, courts and authorities to exercise some degree of discretion in deciding which procedures should be in place to allow an effective access to justice and a fair trial. Whether article 47 CFR may be relied upon to strike such balance, as recently reaffirmed by the Court of Justice (CJEU, C-896/19, *Repubblika*, 20 April 2021; CJEU, C-430/21, *RS*, 22 February 2022, para. 37), is among the issues addressed in these Guidelines.

Too large differences in granting access to redress for the violations of the same EU provisions violate not only the principle of equality before EU law but also the right of effective judicial protection. Hence, it is important that the Court of Justice is asked to reconcile divergent interpretations by national courts through preliminary references. The objective of FRICoRe Project, as partially reflected in these

guidelines, is to highlight the existence and the reasons of these differences and provide national judges with the necessary comparative knowledge to evaluate these differences.

Vertical and horizontal applications of the right to effective judicial protection

The FRICoRe Project embeds two dimensions: a vertical one and a horizontal one.

The vertical dimension is the one distinctively and separately developing in each of the five areas considered by the FRICoRe Project: consumer protection, data protection, non-discrimination, asylum and immigration, health. The last area is not a specific area of competence of EU law; however, in the framework of art. 168 TFEU, the effective protection of health as linked to many other areas of EU law (from consumer protection to asylum, from data protection to non-discrimination) has in fact been at the core of an important chapter of the EU judicial dialogue (see, e.g., *Sanofi* (C-621/15)), probably due to further develop.

The horizontal dimension of the FRICoRe project cuts across sectors to discuss the applicability of general principles stemming from the application of art. 47 CFR and the principle of effectiveness. Not only the project addresses the horizontal applicability of fundamental rights and in particular of art. 47 CFR in different areas (consumer protection, data protection, non-discrimination, health, asylum and migration). It also examines whether the applications developed in one area may be usefully applied to other areas. By horizontal application or horizontal dimension of fundamental rights we then mean the possibility to apply the same principle, rule or fundamental right across different areas of EU law.

The horizontal nature of art. 47 CFR has been recognized by the case law and in the scholarly debate. Art. 47 CFR, that defines both the procedural and the substantive dimensions of the right to effective judicial protection, applies to all "rights and freedoms guaranteed by the law of the Union" and therefore to all the areas in which EU law applies. This approach is consistent with art. 51 CFR defining the scope of application of the Charter having regard to the implementation of EU law by MS. Moreover, even where art. 47 CFR does not specifically apply but art. 19(1) TUE is relevant (being its scope of application wider than the one of the Charter), article 47 CFR shall be duly taken into consideration for the purpose of interpreting art. 19(1), second paragraph, TUE on the MSs' duty to provide effective remedies for an effective judicial protection (CJEU, C-430/21, *RS*, 22 February 2022, para. 37) with due account to the overarching principle of sincere cooperation[2], which is strictly connected with the principle of effective judicial protection[3]. In relation with *ex officio* powers, art. 47 CFR has been interpreted by the CJEU in

[2] "Under the principle of sincere cooperation laid down in Article 4(3) TEU, it is for the courts of the Member States to ensure judicial protection of a person's rights under EU law. In addition, Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law" (CJEU, 14 June 2017, C-685/15, *Online games*, para. 54).

[3] See Opinion of Advocate General Tanchev, delivered on 16 September 2021, C-177/20, *'Grossmania'*: "The principle of effectiveness is deduced (as is the principle of equivalence) from the principle of sincere cooperation enshrined in Article 4(3) TEU (Judgment of 24 October 2018, XC and Others (C 234/17, EU:C:2018:853, 'the judgment in XC', paragraph 22)). According to paragraph 23 of the judgment in XC, 'the requirements stemming from those principles apply both to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on EU law and to the definition of the procedural rules governing such actions'" (paras 41-2); "in accordance with the principle of sincere cooperation (Article 4(3) TEU), 'the Member States are required to nullify the unlawful consequences of a breach of [EU] law' and 'it is for the authorities of the Member State concerned to take the general or particular measures necessary to ensure that [EU] law is complied [with] within that State … While they retain the choice of the measures to be taken, those authorities must in particular ensure that national law is changed so as to comply with [EU] law as soon as possible and that the rights which individuals derive from [EU] law are given full effect'." (para 24).

the light of the principle of sincere cooperation under art. 4(3), TEU (CJEU, 28 February 2018, C-3/17, *Sporting Odds Ltd*). The application of art. 47 has highlighted the connection between rights, remedies and procedures and the importance of enforcing in MSs the rights regulated at EU level. Art. 47 certainly applies to all the rights of the Charter and to areas where the Charter is silent but fundamental rights emerge from primary or secondary legislation and the common constitutional traditions.

Art 47 has been the most cited provision of the Charter both in EU and national case law. Its relevance however varies significantly across areas, across countries and even within countries among various courts (see FRA 2018).

It has been not the scope of this project to identify the causes and drivers of these differences. More modestly, the its aim has been to explore whether the principles developed by CJEU and national courts in one area, when applying art. 47 CFR, can be applied to other areas. In other words, to what extent the horizontal nature of art. 47 CFR finds its limits in the specificities of each legal domain.

Increasingly, when applying art. 47 CFR, CJEU makes references to application in areas different from the one to which the case belongs (see, e.g. CJEU, C-73/16, *Puškár*), but it has not so far engaged into an analysis of the different applications and the reasons of diversity.

It is very important, e.g. for a judge who needs to decide a data protection case, to know whether the caselaw applying 47 CFR to consumer protection may be applied entirely or only partially. The defensive tendency of national judges is to refer to cases applying art. 47 CFR to the same areas but this is not a necessary constraint, given the horizontal nature of 47 CFR.

Although the two principles do not perfectly coincide, being their content and scope of application partially different, a similar horizontal dimension to the one of art. 47 CFR may be referred to the principle of effectiveness. In its multiple dimensions (also including the right to an effective remedy before a Court; as acknowledged by the CJEU since Case C-14/83, *von Colson*, para. 23), the principle of effectiveness has been indeed applied in all areas of EU law and, for example, has been at the basis of the court's duty to *ex officio* raise questions inherent to the violation of EU law in the field of consumer protection (starting with *Pannon*, C-243/08). The extent to which such applications have been uniform across sectors or has generated different approaches depending on the rights at stake is also explored in FRICoRe Project Materials.

Moving from this double perspective, these Guidelines mostly focus on the vertical dimensions of article 47 CFR and the principle of effective judicial protection, therefore providing a brief overview on the main outcomes of judicial dialogue on these principles in each of the five areas here considered.

Before coming to the areas, the section below is meant to introduce the judges to the three main aspects examined by the Project in each area, namely:

- the duty of cooperation binding courts and their power to ex officio raise questions concerning the violation of rights based on EU law;
- the right to an effective remedy and the duty to provide for effective, proportionate and dissuasive sanctions and remedies;
- the right to an effective remedy in the field of collective redress.

The horizontal dimension of the FRICoRe Project has been mostly developed within the 'Training for Trainers' activities. The relevant materials and guidelines are therefore available in the 'Guidance for Trainers'.

Both the Guidelines for Judges and the Guidance for Trainers may be used together with the sector-specific casebooks (that will be available here: https://www.fricore.eu/content/materials).

A. The duty of cooperation binding courts and their power to ex officio *raise questions concerning the violation of rights based on EU law*

Art. 47 CFR, and before the principle of effectiveness, have had an impact on national procedural laws. They have in certain areas and countries forced to rethink the relationships between judges and parties increasing the role of *ex officio* power.

This development has taken place in consumer protection. More particularly, *ex officio* powers have largely expanded in the field of unfair contract terms, where the power asymmetry between the litigants has made clear that an active role for the judge is needed in order to enable an effective application of EU law and to ensure an effective remedy to the weak party (CJEU, *Asturcom*, C-40/08, paras 31-32). Within this caselaw, the power to ascertain the infringement of EU law (*Oceano*, C-240-244/98) has soon been qualified as a duty (*Mostaza Claro*, C-168/05; *Pannon*, C-243/08) with the consequence that, in due circumstances, liability may be established for a court failing to use these powers (*Tomasova*, C-168/15). Not only it has included the duty to examine such an infringement when legal and factual elements to establish that infringement are available (*Pannon*, C-243/08) but also the duty to act of its own motion to in order to establish those facts (*Pénzugyi*, C-137/08). The scope of the duty to ascertain infringements of EU law is rather wide in the field of consumer protection, being irrelevant whether the consumer is assisted in court by a professional (*Bank BPH*, C-19/20). Of course, in the light of the principle of *audi alteram partem* and fair trial, when exercising *ex officio* powers, the court must invite all the parties to present their views on the raised issue (*Banif*, C- 312/14). This a principle widely applied by the European Court of Human Rights, as well, based on the point that parties should never be taken by surprise by the judge (see ECtHR, *Duraliyski v. Bulgaria*, 45519/06, 4 June 2014, § 31; ECtHR, *Čepek v. the Czech Republic*, 2013, § 45).

The CJEU's rulings on *ex officio* powers in consumer litigation have had a very relevant impact upon national caselaw, especially where MSs had not implemented EU consumer directives by expressly introducing an *ex officio* power to declare contract terms' unfairness and pre-existing caselaw was reluctant to recognize such power (see, e.g., Supreme Court of the Netherlands, 13 September 2013, *Heesakkers v. Voets*). Even where the existence of *ex officio* powers to declare the nullity of unfair terms in consumer contracts has been less controversial (such as in Italy, being the transposing legislation clear on this point), a major impact of *ex officio* powers based on art. 47 CFR is now expected in the light of a very recent jurisprudence (*Banco di Desio,* C-831/19, 17 May 2022): in the view of the Court of Justice, the need for effective judicial protection requires that the court responsible for enforcement of order of payments may assess, even for the first time, the fairness of terms of the contract underlying the order issued by another court upon application of a creditor and against which the debtor has not lodged an opposition (thus making the order final), a situation in which national caselaw used to consider the assessment of term invalidity impliedly covered by the principle of *res judicata*.

Clearly more cautious the Court has been in other contexts, such as freedom of service, when litigation involves public authorities and these are expected to establish infringements of EU law; here, the CJEU has concluded that a national court may not replace the role of the public authorities but only facilitate it in the light of the principle of sincere cooperation (*Sporting Odds Ltd*, C-3/17). By contrast, an equivalent development to the one emerged in consumer protection cannot be observed in other areas of EU law, like non-discrimination or data protection, where similar asymmetry of power exists between the litigants. Then, fundamental questions arise for national courts. If the need for a wider intervention by the judge is based upon the lack of balance in the litigants' relationship, in which other areas of EU law, if any, can a judge observe a comparable need and apply art. 47 CFR accordingly? Can then a national judge deciding a data protection case refer to the principles developed by CJEU in the application of art. 47 CFR to consumer protection?

The case of asylum and migration poses an even more challenging question. Secondary legislation introduces a duty to cooperate by the State, that includes the judiciary; as acknowledged by the Court of Justice, such a duty extends to the judge who shall cooperate with the applicant at the stage of determining the relevant elements of that application (*M.M.*, C-277/11). This duty has also transformed the relationship between judges and parties and moved from a model of adversarial to one of cooperative adjudication. Is this model limited to asylum or does art. 47 CFR embeds a more cooperative model of adjudication suitable for applications in other areas, such as non-discrimination or health?

In this regard the general issue is whether art. 47 CFR reallocates the powers between judges and parties or where it introduces a cooperative perspective where the judge has to collaborate with the party to find the necessary evidence.

One of the critical aspects of this evolution concerns the relationship between art. 47 CFR, the role of the judge before the parties (in the light of expanding *ex officio* powers and the duty of cooperation) and judicial impartiality linked to judicial independence: itself, the latter, a pillar of art. 47 CFR and the "essence of the right to effective judicial protection and the fundamental right to a fair trial" (C-791/19, 15 July 2021, E.C. v. R. Poland). The CJEU has addressed this relationship, concluding that, when ruling on legislation restricting the exercise of a fundamental freedom of the European Union, art. 47 CFR, read with special regard to judicial independence and impartiality, does not preclude that the court is required to examine of its own motion the facts of the case before it in the context of examining whether administrative offences arise, provided that such a system *does not have the consequence that that court is required to substitute itself for the competent authorities of the Member State concerned, whose task it is to provide the evidence necessary to enable that court to determine whether that restriction is justified* (CJEU, Case C-685/15, *Online Games*). At least when an infringement of EU law is contested against a public administration, judicial *ex officio* powers are consistent with judicial independence and impartiality if the court does not *substitute* the role of the party but *supports* it to the extent necessary to enforce the party's right to an effective remedy. Does this application present different implications depending on the area of law? Do ex officio powers and duties of cooperation have different extent in consumer protection, data protection, immigration, health, non-discrimination, asylum and immigration?

The opportunity to evaluate the impact of fundamental rights CJEU jurisprudence on national courts will engage trainers, judges and lawyers coming from different legal traditions to debate scope and functions of art. 47 CFR across sectors. It is only through the dialogue between CJEU and the national courts that the right to effective protection can gain further importance and ensure effective justice to EU citizens.

B. The right to an effective remedy and the duty to provide for effective, proportionate and dissuasive sanctions and remedies

Most of the areas considered (from consumer protection to data protection, non-discrimination and asylum) operate in an integrated enforcement system, where sanctions (pecuniary and non-pecuniary) and remedies are combined. In most of these areas, administrative authorities are vested with enforcement powers, that complement those already assigned to courts. Whereas access to courts shall always be ensured under art. 47 CFR, the extent to which certain enforcement mechanisms and enforcement measures can be also or preliminarily started and sought before administrative authorities depends on the choice made by MSs within national procedural autonomy as limited by the principles of effectiveness and that of equivalence (*Randstadt Italia s.p.a.*, C-497/20).

Art. 47 CFR influences the architecture of enforcement regulating both the relationship between administrative and judicial enforcement (CJEU, C-73/16, *Puškár*) and that between sanctions and remedies. Even if article 47 CFR does not include access to administrative enforcement mechanisms, it does impact on the extent to which MSs can make the exercise of a judicial remedy subject to the prior exhaustion of the remedies available before the national administrative authorities: being this a limitation of the fundamental right to an effective judicial remedy, such limitation may introduced by law to the extent that it complies with the principle of proportionality, namely that the prior exhaustion of the available remedies before the national administrative authorities does not lead to a substantial delay in bringing a legal action, that it involves the suspension of the limitation period of the rights concerned and that it does not involve excessive costs (CJEU, C-73/16, *Puškár*). Such conclusion has been drawn by the Court of Justice in the field of data protection based upon a similar reasoning engaged by the Court in regard of national provisions making the exercise of consumers' right to access the court subject to the prior exhaustion of out-of-court dispute resolution mechanisms (*Alassini*, C-317/08): a sign of the horizontal (cross-sectoral) dimension of art. 47 CFR and of the principle of effective judicial protection.

These Guidelines will show that, on different occasions in the various areas, the application of art. 47 CFR and the one of the principle of effective judicial protection have enabled the Court of Justice to guide national courts in the identification of effective remedies and effective sanctions: the role of invalidity and interim measures compared with compensation has been highlighted in consumer protection cases concerning unfair terms in credit agreements (CJEU, C-34/13, *Kusionova*); so for the relevance of full judicial review in international protection cases as opposed to mere cassational power providing for judicial guidance due to be effectively disregarded by the administrative bodies (AG Bobek, Torubarov, C-556/17; followed by CJEU, 29 July 2019); the right to an effective remedy has also led the Court to expand judicial powers to review the validity of private actors (such as churches as employers) in respect of the principle of non-discrimination (*Egenberger*, C-414/16); likewise, the principle of effectiveness (and dissuasiveness) has been applied to sanctions in the field of consumer protection to ensure that infringers are deprived of the benefits gained through the infringement (*Ultimo Portfolio Investment (Luxembourg) SA*, C-303/20).

Indeed, the Court has shown that the duty to provide for an effective remedy and an affective sanction belongs to a triad. Not only remedies and sanctions need to be effective but also proportionate and dissuasive (*Ultimo Portfolio Investment (Luxembourg) SA*, C-303/20; *NE*, C-205/20). More particularly, according to the Court's settled caselaw relating to the principle of sincere cooperation, now enshrined

in Article 4(3) TEU, while the choice of penalties applicable to infringements of EU law remains within their discretion, Member States must ensure in particular that they are effective, proportionate and dissuasive (CJEU, C-34/13, *Kusionova*, para 59). This conclusion is often mirrored in EU provisions of secondary legislation concerning sanctions and penalties for infringement of EU law. While using the term 'penalty', the Court of Justice has in fact applied these principles to civil remedies such as invalidity of contract terms, compensation and interim measures due to suspend the effect of an enforcement procedure (*Kusionova*, C-34/13). Therefore, though in different ways, remedies and sanctions are both subject to the principles of effectiveness, proportionality and dissuasiveness (with regard to sanctions, recently, *NE*, C-205/20).

The Court of Justice has also clarified the extent to which the principles of effectiveness, proportionality and dissuasiveness may be directly applied by national judges irrespective of whether national legislation has specifically implemented them. The direct application of art. 47 CFR has been acknowledged by the Court in the *Egenberger* case also in cases of disputes between private parties, therefore normally subject to national legislation transposing EU directives (C-414/16, in the field of non-discrimination); the same has been recently recognised by the Court of Justice with regard to the principle of proportionality of sanctions established in EU secondary legislation and not uniformly transposed or interpreted at national level (*NE,* C-205/20). The same judgment considers the principle of proportionality as part of a triad (complemented by effectiveness and dissuasiveness), making then the triad capable of direct application by national judges. This conclusion will probably inspire future judicial dialogue between the Court of Justice and national courts, aimed at clarifying when and to what extent judges may disapply national legislation when this is needed to administer effective, proportionate and dissuasive remedies.

These Guidelines will present the main applications of the triad in each of the considered sector, so introducing the horizontal analysis proposed in the FRICoRe Guidance for Trainers. Indeed, both sanctions and remedies largely vary across sectors, and so for the combination between administrative and judicial mechanisms of enforcement. These diversities make the horizontal analysis proposed in this Project more complex, but still very relevant, especially where classes of remedies and sanctions are compared across the board, such as injunctions, compensation, invalidity of private acts, pecuniary sanctions. Do the general principles of EU law lead the national courts to examine the effectiveness of remedies and sanctions provided by national legislation? Should or could a national judge expand the scope of a remedy or of a sanction to increase its effectiveness? Do proportionality and dissuasiveness play any role in this regard?

Training activity developed within this Project has shown that, though complying with the principle of procedural autonomy, the principles of effectiveness, proportionality and dissuasiveness impact on sanctions and remedies. This impact raises important issues about the possible extension of the CJEU's rulings to areas different from those to that of the ruling. E.g., based on caselaw in the field of consumer protection, does interim relief always represent a necessary element of the right to an effective remedy when a fundamental right is at stake (e.g. the right to health or the right to home)? When an injunction prohibits the use of certain terms, practices, policies by businesses does art. 47 CFR call for an extension of the injunction's effects in favour of future potential victims, regardless their involvement in the dispute before the Court? If ever, is this a general application of art. 47 CFR or shall courts limit such application to specific areas, namely those in which the CJEU has already provided this guidance?

C. The right to an effective remedy in the field of collective redress

The right to an effective collective remedy is part of art. 47 CFR. The enforcement gap concerning the lack of collective redress instruments has been progressively filled by legislative interventions, whose application has gone beyond the field of consumer protection. In a very recent ruling issued across the fields of consumer and data protection (*Meta Platforms Ireland Ltd*, C-319/20), the CJEU mentioned the preventive function of representative actions – which would not be guaranteed if the action provided in Article 80(2) GDPR allowed only the infringement of the rights of a person individually and specifically affected by the infringement.

Collective redress poses relevant questions concerning the balance between the individual and the collective dimension. Does art. 47 CFR have a wider impact beyond the right to judicial review of administrative decisions? Does it also influence the choice of remedies for collective redress? Does it influence the relationship between collective and individual redress, when courts need to decide whether an individual dispute proceeding needs to be suspended pending a collective dispute? In this regard the CJEU has provided some guidance, based on the principle of effectiveness (CJEU, case C- C-381/14 and C-385/14, *Sales Sinués*). Is this guidance useful for a data protection judge that needs to adjudicate an individual claim pending a collective action under art. 80, GDPR?

The individual right to judicial protection cannot be unduly compressed by the collective right to judicial protection. This balance is different depending on the remedy. Injunctions pose less problems than compensation and restitution to reconcile potential conflicting interests between those who opt for individual redress and those who opt for collective redress.

The Project has addressed, among other issues, the applicability of the principles, particularly the one of effectiveness, to collective redress, even if the Directive 1828/2020 concerning representative actions in the field of consumer protection takes them into account only to a limited extent. Indeed, pursuant to Recital (19), since both judicial proceedings and administrative proceedings could effectively and efficiently serve to protect the collective interests of consumers, it is left to the discretion of the Member States whether a representative action can be brought in judicial proceedings, administrative proceedings, or both, depending on the relevant area of law or the relevant economic sector. However, as Recital (19) reads, this should be without prejudice to the right to an effective remedy under Article 47 CFR, whereby Member States are to ensure that consumers and traders have the right to an effective remedy before a court or tribunal, against any administrative decision taken pursuant to national measures transposing this Directive. At least in this respect, art. 47 CFR shall steer the directive's transposition and then the application of transposing legislation.

Collective judicial redress has developed unevenly depending on the remedy and the areas (see the Annex of dir. 1828/2020). Art. 47 CFR affects both the content and the scope of collective redress and its relationship with individual redress.

The development of collective judicial redress has been controversial and EU legislation has regulated primarily injunctions whereas compensation, restitution, and invalidity at the collective level remain significantly regulated at national level with the exception of consumer protection (Directive 2020/1828 and data protection, where art. 80 GDPR at least refers to compensation.

The FRICoRe Project has addressed the question whether art. 47 CFR applies to all sets of remedies. The CJEU has already concluded that the need for an effective remedy does not preclude the declaration of invalidity of an unfair term included in the standard terms of consumer contracts in an action for an

injunction brought against a seller or supplier in the public interest, and on behalf of consumers, by a body appointed by national legislation from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same general business conditions apply, including with regard to those consumers who were not party to the injunction proceedings, and that, in these cases, national courts are required, of their own motion, and also with regard to the future, to ensure that consumers who have concluded a contract with the seller or supplier to which those general business conditions apply will not be bound by that term (*Invitel*, C-472/10).

When collective redress is sought, does art. 47 CFR apply only to injunctions or also to compensation and restitution? This issue has not yet reached the CJEU but it is likely to be a question in the application of Directive 1828/2020. So, e.g., does art. 47 CFR cover remedies not specifically mentioned in the Directive 1828/2020? According to the Directive 1828/2020, 'redress measure' means a measure that requires a trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law.

Furthermore, art. 47 CFR regulates the relationship between collective and individual redress. When collective redress applies are individuals entitled to opt out? What does art. 47 say on the alternative between opt in and opt out? How does it regulate the coordination between collective and individual redress when the former concern injunctions and the latter compensation and/or restitution? What are the effects of injunctive measures on parties that did not participate in the judicial proceedings?

Neither the Court of Justice (to our knowledge), nor these Guidelines will provide concrete answers to these questions, whose relevance will be tested against the concrete transposition of the Representative Actions directive by MSs and the possible adoption of future legislation (at EU and national level) on collective redress in other fields of EU law. Rather, these Guidelines will offer an opportunity to national judges to consider the extent to which existing national legislation in this field may be interpreted in the light of art. 47 CFR and whether preliminary references to the Court of Justice may help judicial dialogue shed light further on these issues.

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Many of the issues introduced above are extensively addressed in the FRICoRe Casebooks and briefly presented in the sections below organized by sector. A horizontal and cross-sector analysis of these issues is proposed in the FRICoRe Guidance for Trainers with a view to develop a new approach to judicial training in the field of article 47 CFR and fundamental rights.

1. Effective Consumer Protection and Fundamental Rights.

Introduction

The developments occurred in judicial dialogue show that the application of the Charter of Fundamental Rights, and in particular **Article 47,** is promoting substantive and procedural changes in consumer protection. Its link with general principles of EU law, particularly the **principle of effective judicial protection and the one of equivalence**, for long established in the EU case law, has enabled the Court of Justice to gradually expand the force and scope of the right to an effective remedy as a fundamental right, which is capable of direct application, even in horizontal relations among private parties (*Bauer*, C-569/16 and 570/16). Beyond the demolitory effect brought by the principle of effectiveness in cases in which national procedural rules (eg, on limitation periods, evidence or appeal) could prove too burdensome for harmed consumers, the affirmative dimension of effective justice is more and more invoked. The need for positive answers in terms of effective remedies challenges even more the principle of national procedural autonomy, despite its continuous recognition by the CJEU in its rulings. **Conforming interpretation** remains the main path to follow in order to overcome possible conflicts between EU principles and national legislation or established case law; **disapplication** is available, however, should interpretative instruments being insufficient in this regard.

Moving from this perspective, the Guidelines below judges and other legal experts with concrete examples of judicial dialogue leading to identify specific forms of conforming interpretation or disapplication of national rules in the light of the Charter and other EU general principles.

1.1. Ex officio powers of civil judges in consumer litigation

In the view of the CJEU, *ex officio* powers contribute to the effectiveness of consumers rights (*Oceano* case, C- 240-244/98; *Profi Credit,* C-176/17, *et al.*).

In the field of consumer law, when applying *ex officio* powers, the CJEU provides the national courts with a ready-made solution, leaving them a narrow margin for interpretation. The scope of *ex officio* powers, as identified by the CJEU, has gradually expanded, being inherent to several aspects of consumer litigation.

1.1.1. *Consumer status*

The principle of effectiveness requires a national court to ascertain *ex officio* the consumer status of a party, even though the consumer has not herself made her status clear when filing the claim or in her defence, as soon as that court has the matters of law and of fact necessary for that purpose at its disposal or may have them at its disposal simply by making a request for clarification (*Faber* case, C-497/13).

1.1.2.*Declaration of unfair contractual terms*

According to CJEU case law (*Pannon* case, C-243/08), a national court must declare the term of a consumer contract unfair of its own motion, even if the consumer has not raised the unfairness of the term in this respect. The obligation of the judge is coupled with the consumer's right to oppose to the declaration of a term as non-binding as long as this declaration does not meet the concrete interest of the consumer (*Pannon* case, C-243/08; *Banif plus*, C-472/11; *Asbeek*, C-488/11). Moreover, the principle of *audi alteram partem* requires the national court, which has found that a contractual term is unfair by its

own motion, to inform the parties of such and to invite each of them to set out their views on the matter (*Banif* case, C-472/11).

1.1.3. *The duty of the judge to investigate*

In light of the principle of effectiveness, the CJEU also expands the duty to ascertain the unfairness of a term with regard to the judge's obligation to investigate in order to evaluate the unfairness of a term (*Pénzügyi* case C-137/08, concerning a jurisdiction clause). In this respect, it should be pointed out that the CJEU has not yet addressed the question of whether the reasoning of the *Pénzügyi* case (C-137/08) could apply to all types of clauses, including the ones that require complex investigation, or whether it could extend to phases of judicial proceedings in which parties may be precluded from providing evidence that supports their claims or defences.

1.1.4. *Judge's liability*

In *Tomášová* (C-168/15), relying on its previous case law on the liability of the State for a breach of EU law and on the national courts' duty to examine the possible unfairness of a contractual term, the CJEU stated that the lack of exercise of *ex officio* duties by a last instance court in relation to the unfairness of consumer contracts' terms is to be considered as a serious breach of EU law after the judgment of 4 June 2009 in *Pannon* (C-243/08). Furthermore, the CJEU considers that the rules for the compensation of damage as a consequence of a violation of EU law are determined by national law, subject to the principles of equivalence and effectiveness.

1.1.5. *Information and transparency violations*

The CJEU declared that effective consumer protection could be achieved only if the national court were required, of its own motion, to examine compliance with information duties in consumer credit contracts set forth in dir. 2008/48. In case of a breach, national courts should establish the consequences under national law of an infringement of those duties, provided that the penalties satisfy the requirements of Article 23 of that directive (*Radlinger,* C-377/14).

1.1.6. *Remedies for the lack of conformity of goods in consumer sales*

According to the CJEU's case law (*Duarte Hueros,* C-32/12) in the light of the principle of effectiveness, national courts must have the power to grant of its own motion an appropriate reduction in the price of goods which are the subject of a contract of sale in the case where a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity is minor.

1.1.7. Ex officio *powers and* res judicata

The Court of Justice has affirmed that, in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided to exercise those rights can no longer be called into question (*Asturcom Telecomunicaciones*, C-40/08). It has also recognised that consumer protection is not absolute and that EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision, regardless of its nature, contained in Directive 93/13 (*Asturcom Telecomunicaciones*, C-40/08; *Naranjo*, C-154/15, C-307/15 and C-308/15), unless national law does not grant such a court that power in the event of infringement of national rules relating to public policy (*Asturcom*, C-40/08).

As a consequence, EU law does not preclude a rule of national law, which prohibits national courts from examining of their own motion the unfairness of contractual terms where a ruling has already been given on the lawfulness of the terms of the contract, taken as a whole, with regard to that directive in a decision which has become *res judicata* (*Banco Primus*, C-421/14). By contrast, where there are one or more contractual terms the potential unfair nature of which has not been examined during an earlier judicial review of the contract in dispute which has been closed by a decision which has become *res judicata*, Directive 93/13 must be interpreted as meaning that a national court, before which a consumer has properly lodged an objection, is required to assess the potential unfairness of those terms, whether at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose; in the absence of such a review, consumer protection would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term (*Banco Primus*, C-421/14).

In a more recent case, the Court has also specified that the need for effective judicial protection requires that an enforcement court may assess, even for the first time, the fairness of terms of the contract underlying the order issued by another court upon application of a creditor and against which the debtor has not lodged an opposition (thus making the order final), a situation in which Italian national caselaw used to consider the assessment of term invalidity *impliedly* covered by the principle of *res judicata* (*Banco di Desio,* C-831/19, 17 May 2022).

1.2. Effective consumer protection against violations of competition law

1.2.1. *Entitlement to compensation for third parties suffering damage causally related to an invalid agreement. Assessment and proof of the causal relation*

According to CJEU case law (*Manfredi*, C-295-298/04), the principle of invalidity of anti-competitive agreements can be relied on by anyone, and the courts are bound by it once the conditions for applying Article 101(1) of the TFEU are met, and so long as the agreement concerned does not justify exemption under Article 101(3) of the TFEU). The full practical effectiveness of the prohibition on agreements, decisions and concerted practices would be adversely affected if it were not open to any individual to claim damages for a loss caused to him/her as a result of undertakings infringing Article 101 of the TFEU. In the absence of EU rules governing the matter, it is up to the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of the consumers' right to compensation, including those on application of the concept of a 'causal relationship', provided that the principles of equivalence and effectiveness are observed.

In the view of the Court, the principle of effectiveness is relevant under two different, though intertwined, perspectives: on the one hand, effectiveness in the relationship between the legal systems of the EU and the MSs, implying that national provisions cannot render impossible or excessively difficult the exercise of rights conferred by EU Law; on the other hand, it implicitly upholds the right to an effective remedy, as also laid down in Article 47 of the CFREU, in close connection with the idea of the practical effectiveness of the Treaty provisions.

Some of the solutions developed by courts have now been embraced by Directive (EU) 2014/104, while both European and national case law are trying to define the role of the principle of effectiveness in shaping the boundaries of private antitrust enforcement. So, national decisions concerning the proof of the causal link between infringement and damages and the evidence status of NCAs decisions still represent, in absence of clear EU rules, the main reference point. More recently, the CJEU used the principle of effectiveness to expand the scope of application of private enforcement, for instance by extending protection to situations not covered by the Directive (*Cogeco*, C-637/17) or by allowing private

parties to seek damage against a business entity which, in concrete, is the successor of the infringer (*Skanska*, C-724/17).

1.2.2. *Limitation Period*

The CJEU (*Manfredi*, C-295-298/04; *Cogeco Communications*, C-637/17) confirmed that, in the absence of EU rules governing the matter, it is up to the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 101 of the TFEU, provided that the principles of equivalence and effectiveness are observed.

The Court stated that a national provision whereby the limitation period runs from the day on which the agreement or practice was adopted might, in practice, render it impossible to exercise the right to compensation, thus violating the principle of effectiveness. However, it is up to the national judge to assess whether or not any such violation actually occurs, and whether the national provisions regarding limitation comply with the principles of equivalence and effectiveness, considering which rules can better ensure effective protection of the right to seek compensation of any individual who has suffered harm as a result of an antitrust infringement. Therefore, the limitation period shall run from the day on which the consumer becomes reasonably aware of the causal link between the harm and the prohibited agreement or practice (*Manfredi,* C-295-294/04). Moreover, the principle of effectiveness precludes national legislation which does not include any possibility of suspending or interrupting the limitation period during proceedings before the national competition authority, because this renders the exercise of the right to full compensation practically impossible or excessively difficult (*Cogeco Communications*, C-637/17).

1.2.3. *Punitive Damages*

According to CJEU case law (*Manfredi*, C-295-298/04), and in the absence of EU rules governing that field, it is up to the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 101 of the TFEU, provided that the principles of equivalence and effectiveness are observed.

In more recent decisions – i.e. *Arjona Camacho and Stowarzyszenie* (C-407/14) – the CJEU ruled that there is no theoretical and systemic incompatibility between the EU legal system and the concept of punitive damages – provided that they do not lead to unjust enrichment – but the national judge may not award punitive damages on the sole basis of EU Law in the absence of a national provision empowering the judge to award them. However, Art. 3 of the Directive n. 104/2014 explicitly prohibits overcompensation by means of punitive or multiple damages.

1.2.4. *Jurisdiction*

According to CJEU case law, (*Manfredi*, C-295-298/04), in the absence of EU law rules governing the matter, it is up to the domestic legal system of each Member State to designate the courts and tribunals with jurisdiction to hear actions for damages based on an infringement of the EU competition rules and to prescribe the detailed procedural rules governing those actions, provided that the principles of equivalence and effectiveness are observed. On the basis of the principle of effectiveness some national Courts stated that increases in cost and time due to the filing of an action before a specific court could render impossible or excessively difficult to exercise the right to compensation.

1.2.5. *Access to information concerning leniency programmes and civil actions upon commitment decisions*

The relevant CJEU case law (*Pfleiderer* AG, C-360/09; *Donau Chemie AG,* C-536/11) focuses on the concept of balancing the various interests at stake, and clarifies that EU law does not lay down common

rules on the right of access to documents relating to a leniency procedure that have been voluntarily submitted to a national competition authority pursuant to a national leniency programme. It is up to the Member States to establish and apply national rules on this right of access. More particularly, it is up to the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused, by weighing up the interests protected by EU law, i.e. the effective application of Articles 101 and 102 of the TFEU, on the one hand, and the right of any individual to claim damages for a loss caused to him/her by conduct that is liable to restrict or distort competition, on the other.

Pursuant to CJEU case law (*Gasorba*, C-547/16), compensatory claims may also be based on commitments decisions, since they create no legitimate expectations about immunity from civil actions. The national judge is also required to take into account the commitment decisions at least as an indicator in order to assess the anticompetitive nature of the conduct questioned.

1.2.6. *Competition infringements and validity of the contracts affected by the infringement*

So far, there is no relevant EU case law on the topic. However, some national courts (especially Italian ones) addressed the point and stated that considering the need for an effective protection of consumers requires the judge to consider the contract as the logical outcome of the infringement, thus declaring the nullity of any contractual clause, which was directly affected by the infringement (Court of Cassation, decisions n. 13846/2019, 21878/2019, 24044/2019). Some Italian courts have so far opted for partial nullity as an ideal solution, while some other more recent decisions, , especially by first instance courts, denied that the judge could declare the nullity (total or partial) of the contract. This issue may attract some future attention in the judicial dialogue with the Court of Justice.

1.3. Effective consumer protection between administrative and judicial enforcement

1.3.1. *Erga omnes effect*

According to the standpoint adopted by the CJEU in two landmark decisions (*Invitel,* C-472/10, *Biuro Podróży Partner* C-119/15), the EU law interpreted in the light of the principle of effectiveness is consistent with national provisions providing that (*in abstracto*) declaration of unfairness of contract terms produces an *erga omnes* effect in favour of all consumers contracting with the same professional who was involved in the reviewing procedure. This effect also applies to all those consumers who concluded a contract including the same clause that has been declared abusive – regardless of the time of such conclusion and with respect to any professional. As a result, consumers can benefit from the injunction (e.g., seeking repayment or damages) in any case in which the contracts contain a particular clause. This possibility should not harm the professionals' right to be heard on the matter, as specified in the *Biuro Podróży Partner* decision (C-119/15).

1.3.2. *Competence*

When multiple administrative authorities concur to the enforcement of consumer protection, some of these operating in specific sectors such as telecom, energy, banking and finance issues, article 47 CFR shall ensure effective coordination among their roles and prevent any gap or duplication. When applying national rules that define authorities' competence and scope of application of special scope legislation in respect of general consumer protection legislation, courts should ensure effective application of EU law and effective protection of consumer rights.

In addition to the criteria introduced by the CJEU in relation to specific sectors and circumstances (e.g. the criterion for identifying the competent authority to sanction unfair commercial practices), the guiding criterion to regulate the relationship between administrative authorities and the performance of their tasks is always the compliance with the principles of effectiveness, proportionality and dissuasiveness, and through these ones, the overall compliance with the principle of good administration. In particular, in accordance with the principle of proportionality, *bis in idem* should be prevented when sanctioning, through criminal sanctions (or administrative sanctions with criminal nature, ECtHR, *Grande Stevens v. Italy*, Application no. 18640/10), infringements that are relevant under both general and special scope legislation.

1.4. Collective Redress and the coordination between collective and individual proceedings

The mechanisms of collective redress in consumer contracts shall be applied with a clear view to the fundamental rights sphere. Collective redress mechanisms shall seek to maintain a proper balance between the effectiveness of consumer protection and the requirements arising from the overall fundamental standards and guarantees existing in the legal system. In particular, these mechanisms are supposed to comply with the proper level of procedural guarantees, safeguarding for every party to judicial or administrative proceedings a right to effective remedy against the decision/judgment that has been based upon collective redress mechanisms (Article 47 section 1 CFREU).

The aforesaid applies especially to decisions or judgments that aim to protect collective consumers' interests, by imposing penalties on a broad array of business parties for committing a deed that has been previously prohibited in the proceedings and that involved one particular business party or an industrial organisation. In all of these cases, the domestic courts should be aware of the fundamental rights perspective, especially to the guarantees derived from Article 47 section 1 CFREU (according to the *Biuro Podróży Partner* case, C-119/15), also with regard to professionals. The CJEU (*Biuro Podróży Partner* case, C-119/15) substantially tackled the problem of *res judicata* in the context of unfair terms review. The declaration of unfairness may enjoy extended scope of *res judicata*, reaching beyond relations that are between the parties to the proceedings. When a general injunction (such as the one displayed by Polish and Hungarian law) is issued, consumers can refer to it directly, without a need to initiate a separate proceeding to review a clause in their contract.

In other words, an abstract judgment, once made, ascertains the unfairness of a clause for any other procedure – both judicial and administrative (especially the public penalization of infringing the injunction). This extension of *res judicata* is, in principle, unlimited. However, according to the *Biuro Podróży Partner* decision (C-119/15), professionals must be vested with effective remedies which guarantee a review on whether a particular clause is actually identical with the clause mentioned in the injunction. The extended *res judicata*, introduced in favour of a consumer, should be thereby balanced with the guarantees of a right to defence in administrative and judicial proceedings.

1.4.1. *Collective vs. individual redress*

According to the *Sales Sinués* case (381/14 and C-385/14), when both collective and individual actions regarding the unfairness of the same clause are simultaneously pending, national courts shall not automatically suspend the individual action, without taking into consideration the position of the claimant and grating him or her the possibility to dissociate from the collective action. the principle of effectiveness of consumer protection requires that, when there are both a collective and an individual action concerning the unfairness of the same clause, national courts cannot automatically suspend the individual action, without the relevance of such a suspension from the point of view of the protection of the consumer who brought the individual action being able to be taken into consideration and without that consumer being able to decide to dissociate himself from the collective action.

1.4.2. *In abstracto vs. in concreto review*

The extended effects of *in abstracto* review, jointly determined in the *Invitel* (C-472/10) and *Biuro Podróży Partner* (C-119/15) cases, is closely interrelated with *in concreto* scrutiny – carried out with respect to the specific contract that contains a particular clause. The review of this kind is carried out usually as a side-issue of the other claim – e.g. if a professional sues a consumer for payment, the defendant can claim unfairness of a clause that was determining the due sum (e.g. specifying interest rate) and deny payment totally or in part. The court will then make its own assessment, using similar criteria as might have been used for *in abstracto* examination of the same clause (this review can be also carried out *ex officio*, without any claim of a consumer).

As follows from the concept of extended effects, expressed in the *Invitel* (C-472/10) and *Biuro Podróży Partner* (C-119/15) decisions, the judgment declaring a clause abusive *in abstracto* can pre-determine the effects of the *in concreto* control.

1.4.3. *Consumer protection associations*

Regarding the intervention of a consumer protection association in a proceeding concerning an individual consumer, according to *Photovost'* (C-470/12) and *EOS KSI* (C-448/17), neither art. 38 CFREU nor art. 47 CFREU can, as such, be interpreted as allowing the right for consumer protection associations to intervene in any individual disputes involving consumers. However, national procedural rules must comply with the principle of equivalence, which precludes national legislation that subjects the intervention by consumer protection organizations in disputes falling within the scope of EU law to less favourable conditions than those applicable in disputes which fall exclusively within the scope of national law.

1.5. Effective, proportionate and dissuasive remedies

1.5.1. *Unfair terms and individual redress: invalidity and moderation/replacement of invalid*

National courts are only required to exclude the application of an unfair contractual term so that it does not produce binding effects with regard to the consumer, without being authorized to revise its content (*Banco Español*, C-618/10). The contract shall in principle survive without any amendment other than that resulting from the deletion of the unfair terms, in so far as such continuity of the contract is legally possible. As a general rule, substitution of unfair terms would undermine the dissuasiveness of the non-bindingness provided by the Directive. Building on the principle of dissuasiveness, the CJEU (*Kásler*, C.26/13) stated that, in such a situation in which a contract concluded between seller or supplier and a consumer cannot survive without an essential term after the declaration of its unfairness, national law may enable the court to cure the invalidity of that term by substituting it with a supplementary provision of national law.

In the *Abanca* (Joined Cases C-70/17 and C-179/17) and *Dziubak* (C-260/18) judgements the CJEU gave further clarifications about the replacement of an unfair clause with a supplementary provision is allowed. The replacement is possible only if: a) the contract is not capable of continuing in existence following the removal of an unfair term, and b) the annulment of the contract will expose the consumer to particularly unfavorable consequences, unless the consumer objects. The CJEU stated that these consequences should be evaluated considering the existing or foreseeable circumstances at the time of the dispute.

Regarding the mandatory replacement of an unfair clause, the legislative act cannot have the result of weakening the position of the consumer (*Dunai*, C-118/17). Moreover, where a clause is declared unfair, the legal and factual situation in which the consumer would have been in absence of such an unfair term

must be restored, in particular by giving rise to a right to restitution (*Dunai*, C-118/17). The CJEU also underlined that it is not possible to substitute an unfair term by making application of national provisions of a general nature, such as the principle of equity or good faith, which cannot be considered as supplementary provisions (*Dziubak,* C-260/18).

In *Banca B.* (C 269/19), the ECJ has held that nothing precludes a national court from inviting the parties to a consumer dispute to negotiate a replacement for an unfair contract term, provided that certain conditions are satisfied. Article 6(1) of Directive 93/13, read in conjunction with Article 47 CFREU must be interpreted as meaning that it is for the national court, finding that a term in a contract concluded between a seller or supplier and a consumer, to inform the consumer, in the context of the national procedural rules after both parties have been heard, of the legal consequences entailed by annulment of the contract, irrespective of whether the consumer is represented by a professional representative (*Bank BPH*, C-19/20).

1.5.2. *Unfair terms and individual redress: invalidity, interim relief and restitution remedies*

In *Aziz* (C-415/11) and *Kušionová* (C-34/13), the CJEU stated that the lack of interim measures within a declaratory proceeding in respect of an enforcement proceeding makes impossible (effective) consumer protection against the use of unfair terms on which the enforcement proceedings are based.

1.5.3. *Non-bindingness of unfair terms and restitutionary remedies*

Following the perspective of the effectiveness and dissuasiveness of consumer protection, the availability of restitution is particularly important. In this respect, in the *Naranjo* case (C-154/15), the CJEU stated that national case law cannot temporally limit the restitutory effects stemming from the declaration of unfairness. In this respect, the CJEU notes that the absence of such a restitutory effect would call into question the dissuasive effect that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) thereof. In short, the CJEU considers the temporal dimension of nullity and restitution as an intrinsic aspect of effective consumer protection: only if nullity, and therefore restitution, extends to the whole time-span of the contractual relation since the time of limitation is such protection effective and dissuasive. *Sziber* (C-483/16) and *Dunai* (C-118/17) confirmed this interpretation, stating that national provisions have to allow the restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed, by, inter alia, creating a right to restitution of advantages wrongly obtained by the professional.

1.5.4. *Unfair practices and individual redress: the role for contract invalidity*

According to the *Pereničová* case (C-453/10), the occurrence of an unfair practice may influence the assessment of unfair terms of the related contract, but no automatic inference shall be made from the former to the latter.

1.5.5. *Delivery of defective goods in consumer sales and the remedies under Article 3, Consumer Sales Directive*

Replacement and reimbursement

The principles of effectiveness and proportionality strongly affect the choice of remedies against non-conforming goods set out in Article 3 section 3 of Directive 1999/44/EC (now repealed by Directive EU/2019/771). In light of these principles, the seller's right to deny replacement due to unreasonably high costs is excluded when the consumer cannot claim reimbursement and replacement is the only available remedy in kind. The principle of proportionality shall apply by comparing the repair and the

replacement, taking into account the priority of remedies in kind over other remedies (*Weber and Putz*, joined cases C-65/09 and C-87/09). While deciding any case regarding the hierarchy of remedies in consumer sales provided by dir. 1999/44 – especially by making a choice between repair and replacement, and the remedies consisting in price reduction and in contract termination – the national court shall observe the general framework of reasoning established by CJEU in the *Weber and Putz* (Joined Cases C-65/09 and C-87/09):

(a) The effectiveness of consumer protection, which underpins all of the choices in the sphere of remedies regarding consumer sales.
(b) Secondly, the remedies ascertained in this way shall be balanced with the protection of a seller's interests. As the *Weber and Putz* decision (Joined Cases C-65/09 and C-87/09) clearly indicates**,** consumer protection in sales agreements is not absolute – *i.e.* should be granted only to the extent necessary for protection of the economic interests of a buyer and should not be unreasonably burdensome for a seller. Therefore, domestic courts are obliged to assess the remedy with respect to the principle of proportionality.

The allocation of replacement costs

All the costs of replacement should be borne, in principle, by the seller. The overriding guideline in this respect shall be the principle of effectiveness of consumer protection – as framed by the ECJ in the *Weber and Putz* (joined cases C-65/09 and C-87/09) judgment. If a national court decides that a good shall be replaced, it should also assess the costs of this operation under the principle of proportionality. If the costs of replacement are excessively high from the perspective of a seller, the national court is entitled to split them between the parties. In this situation, the consumer may be obliged to bear part of the costs of replacing the non-compliant good with a proper one. In this case, the consumer should be granted the possibility to opt for the replacement (sharing the cost with the seller), or for a price reduction – alternatively, to rescind the contract and obtain the full reimbursement of the price. Although art. 14(3), 2019/771 directive expressly charged the seller with the costs of both removal and installation of replaced or repaired goods, as far as the goods had been installed in a manner consistent with their nature and purpose, national judges should always refer to the principle of proportionality under art. 13(3). In this regard the guidance offered by the CJEU in *Weber and Putz* is still conclusive.

The rules concerning the burden of proof

The rules on the burden of proof regarding consumer sales shall be interpreted and applied with a direct view on the principle of effectiveness (*Faber* case, C- 497/13). This requirement also applies to two types of provisions tackling the issue of evidence: (a) the provisions transposing directly into domestic orders the 1999/44/EC directive, and for the future dir. 2019/770 and dir. 2019/771; (b) the other provisions on evidence – especially the general rules of civil procedure that exist in MS.

Limitation period

In interpreting the time limits provided by Article 5(1) of dir. 1999/44 (now art. 10, 2019/771/EU), national judges should consider, in accordance with the CJEU's ruling in *Ferenschild* (C-133/16), that there are two different types of time limits: 1) period of liability of the seller, which refers to the period during which the seller is liable under Article 3 of the directive where a lack of conformity of the goods at issue becomes apparent and, accordingly, this gives rise to the rights set out in that article in favour of the consumer. 2) period of time during which the consumer can actually exercise the rights that arose in the period of liability of the seller. Whether to impose a limitation period for action by the consumer is a matter for national legislation, the mandatory minimum duration of that period must always be, as a rule, at least two years from the time of delivery of the goods concerned.

1.6. Access to justice and effective and proportionate A.D.R. mechanisms

Both in *Menini* (C–75/16) and *Alassini* (joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) the CJEU follows a common pattern, as it is also demonstrated by the incorporation of *Alassini*'s guidelines in the Opinion rendered by the AG in the *Menini* case (C–75/16) and by the joint reference that national Courts made to these cases in order to assess similar issues.

With respect to mandatory ADR schemes in matters related to consumer rights, MSs shall be free to set certain procedures as mandatory in accordance with the principle of procedural autonomy, provided that such imposition does not prevent the consumer from accessing the judicial system in accordance with Art. 47 CFREU, such test to be conducted having regard to the following criteria:

(a) shall not result in a decision which is binding on the parties;
(b) shall not cause a substantial delay for the purposes of bringing legal proceedings;
(c) shall suspend the period for the time-barring of claims;
(d) shall not give rise to significant costs for the parties;
(e) shall not be accessible only by electronic means; and
(f) shall not prevent the grant of interim measures in exceptional cases where the urgency of the situation so requires;
(g) shall allow the consumer to withdraw from the proceeding without penalties even if he or she does not demonstrate the existence of a valid reason.

Furthermore, according to *Volksbank* (C-602/10), the principle of effectiveness of out-of-court procedure does not require that Member States lay down that procedure as mandatory.

1.7. Effective consumer protection in cross-border cases

1.7.1. *Effective consumer protection and courts with jurisdiction over cross-border consumer cases.*

The scope of application of the Brussels I Regulation rules on jurisdiction shall be broadly defined, based on the principle of effectiveness of consumer protection, mitigated by the principle of proportionality [necessity to ensure a fair balance between the rights of the applicant/professional (access to justice) and those of the defendant/consumer (right of the defence)].

Even if the notion of "consumer" is to be strictly construed for the purpose of applying art. 15 and 16 of Regulation no 44/2001 (art. 17 & 18, Reg. no. 1215/2012), judges shall interpret it in light of the principle of effectiveness, taking the concern of consumer protection into account as the party deemed economically weaker and less experienced in legal matters than the other party to the contract. This weakness must be distinguished from the knowledge and information that the concerned person possesses. The consequence is that activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement does not entail the loss of a private Facebook account user's status as a 'consumer' within the meaning of that Regulation (*Schrems*, C-498/16). However, jurisdiction cannot be established through the concentration of several claims concerning consumers domiciled in several MSs, in the person of a single applicant, since the consumer is protected only in so far as he is, in his personal capacity, the plaintiff or defendant in proceedings (*Schrems*, C-498/16).

1.7.2. *Ex officio powers to declare the unfairness of a choice-of-law clause.*

The principle of effectiveness implies that, when dealing with a conflict-of-law clause in a consumer contract, judges shall *ex officio* assess if the clause is unfair by applying the criteria established by the CJEU based on the provisions of Directive 93/13. A pre-formulated choice-of-law clause is unfair when it misleads the consumer on the scope of the protection he is entitled to under art. 6(2) of the Rome I Regulation, securing the protection afforded to the consumer by provisions that cannot be derogated from an agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of default criteria set by the Regulation.

Moreover, if the conflict-of-law clause is unfair, the judge should apply *ex officio* the law of the country of residence of the consumer, instead of the chosen law (*Amazon*, C-191/15, para. 70). This conclusion may not change in cases in which an injunction is sought with regard to the future use of such or of contract terms: indeed, whereas the fairness assessment is subject to the Rome I Regulation being a matter of contractual obligations, only the use of terms and their prohibition have an extra-contractual nature, therefore falling under the Rome II Regulation (*Amazon*, C- 191/15).

1.8. Effective consumer protection in the digital era: online platforms, social networks and effective remedies

1.8.1. *Consumer status in online platforms*

Regardless of the user's activity within the platform and of their possible professional activity in it, the consumers do not focus on their activity within the platform but on their contractual position with respect to the platform. So, whenever platform users are in an imbalance position in their contractual relationship with the platform – essential for European consumer protection regulation to apply – the CJEU expands the status of consumers to embrace those users and hence those contracts with platforms. Article 15 of Regulation No 44/2001 must be interpreted as meaning that the activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement do not entail the loss of a private Facebook account user's status as a 'consumer' within the meaning of that article (*Schrems*, C-498/16).

1.8.2. *Notion of controller of data*

The administrator of a fan page hosted on Facebook had to be regarded as taking part on the definition of parameters depending in particular on its target audience and the objectives of managing and promoting its activities, in the determination of the purposes and means of processing the personal data of the visitors to its fan page – regardless of whether they had a Facebook account. According to the CJEU (*Schrems*, C-498/16), this resulted in the administrator of a fan page to be considered as a controller responsible for the processing of data jointly with Facebook Ireland under Article 2(d) of Directive 95/46. The CJEU established that the holder of a Facebook fan page offering educational services in that platform was to be regarded as "controller" and hence subject to obligations regarding the processing of personal data jointly with Facebook. When defining those obligations, the court argued that one should consider all relevant circumstances of the particular case so that their obligations might not be equivalent, nor simultaneous to the ones of Facebook since they may be established at different stages of processing this personal data. The status of consumer – or not – of a platform user with respect to the platform does not exempt his from the obligations, in this case of data protection, with respect to other platform users.

1.8.3. *Suppliers as consumers in digital platforms*

The CJEU (*Jaouad El Majdoub*, C-322/14) establishes that consumers should be informed not only of the law applicable to the contract but also of the mandatory provisions of the applicable law that would be applied in the case of unfairness of a non-negotiated contract term. A seller or supplier may inform the consumer that the contract entered into the course of electronic commerce is to be governed by the law of the Member State in which the seller or supplier is established. However, the consumer should further be informed that under Article 6(2) of Regulation 593/20008 he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term.

1.8.4. *Consumer contracts in a digital environment*

The method of accepting the general terms and conditions of a contract for sale by 'click-wrapping', concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of that provision, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract. As a result, non-negotiated contract clauses of the contract for sale by 'click-wrapping' concluded by electronic means would be subject to transparency requirements under European law (*Jaouad El Majdoub*, C-322/14).

1.8.5. *When is the platform a trader?*

The CJEU (*Amazon*, C-649/17) established that: (1) sorting and matching, which connect hosts and guests via the electronic platform are services inherent to information society services; (2) creating a rating system for platform participants allows platform users to take informed decisions on the reliability of hosts and guests engaging in each other; (3) providing with a payment system through a company collecting rents from guests and for transferring to the hosts allows for providing for a tool for securing transactions between platform participants; (4) offering an optional civil liability insurance, a guarantee against damage, does not modify the nature of the intermediation service provided by the digital platform.

1.9. Effective consumer and data protection: the intersections

1.9.1. *Collective redress between collective and data protection*

With regard to collective redress, national legislation can allow consumer-protection associations to bring or defend legal proceedings against a person allegedly responsible for an infringement of the protection of personal data (*Fashion ID,* C-40/17). Furthermore, in case a violation of the GDPR caused harm to the interests of a consumer, Dir. 2020/1828 on representative actions for the protection of the collective interests of consumers, which repealed dir. 2009/22 shall be applied. In a very recent ruling (*Meta Platforms Ireland Ltd*, C-319/20), the CJEU has concluded that, in the light of the GDPR, the absence of a mandate and the lack of reference to the specific infringement of a specific right of the data subjects do not preclude consumer associations to bring a claim under consumer protection law when the adoption of invalid terms under consumer law is also able to affect the rights that identified or identifiable natural persons derive from data protection regulation. As affirmed by the Court, "[a]uthorising consumer protection associations, such as the Federal Union, to bring, by means of a representative action mechanism, actions seeking to have processing contrary to the provisions of that regulation brought to an end, independently of the infringement of the rights of a person individually and specifically affected by that infringement, undoubtedly contributes to strengthening the rights of data subjects and ensuring that they enjoy a high level of protection" (para. 76).

1.9.2. *Unfair commercial practices and information provided to the data subject*

In light of the EU Commission's *Guidance on the implementation/application of the Unfair Commercial Practices Directive,* although a trader's violation of Data Protection rules will not, in itself, always mean that there is an unfair commercial practice, data protection violations should be considered when assessing the overall unfairness of commercial practices, particularly in the situation where the trader processes consumer data in violation of data protection requirements.

1.9.3. *Information to be provided to the data subject and consumers rights (dir. 2011/83)*

The amendments of dir. 2011/83 provided in dir. 2019/2161 show the importance of the relationship between data and consumer law. In fact, the directive applies where the trader supplies or undertakes to supply digital content which is not supplied on a tangible medium or a digital service to the consumer and the consumer provides or undertakes to provide personal data to the trader, except in some specific cases (art. 3 dir. 2011/83). Before the consumer is bound by a distance or off-premises contract, the trader shall provide the consumer with the information concerning the fact that the price was personalized based on automated decision-making. However, the remedies available under the Consumer Rights Directive cannot be used against violations of information duties provided in the GDPR alone. Violations of information duties under the GDPR can only be remedied with the Consumer Rights Directive if they also constitute violations of information requirements under that directive.

1.9.4. *Lack of conformity of digital content or services and the GDPR compliance*

In light of art. 47 8 CFREU, and of recital 48 of Directive 2019/770 on digital contents and services, the remedy consisting in the brought into conformity of a service with regard to data protection compliance could be a mean for granting to consumers the right to data protection.

1.10. Effective consumer protection and the right to health and safety: the case of product liability

1.10.1. *Effective protection and the use of presumption in the ascertainment of causal link*

The principle of effective consumer protection could have a special impact on the assessment of producer liability by national courts when the right to health is ata stake. This may influence the use of presumptions in the ascertainment of the causal link in relation to the liability rules related to defective products when they could be dangerous for health.

As acknowledged in the *Sanofi Case* (C-621/15), Directive 85/374 does not preclude national evidentiary rules under which a national court may consider certain factual presumption to constitute serious, specific and consistent evidence of a defect of a product and to constitute the causal link with the damage, even if there is no conclusive scientific evidence. Such evidentiary rules do not bring about a reversal of the burden of proof which, as provided for in article 4 Directive 85/375, is for the victim to discharge. The use of presumptions plays an important role in ensuring effective consumer protection in case of high uncertainty from a scientific point of view and a fair apportionment of risk between the injured person and the producer.

1.10.2. *Effective protection and the right to retrieve information from producer*

The effectiveness of the Directive on products liability does not prevent national legislation from regulating the right of the consumer of medicinal products to obtain relevant information from the producer if that is relevant for seeking protection against violations of consumer rights affecting his health. The Court not only recognizes that the right of information is not part of the matters covered by the Directive, but also analyses the implications of the national rule in the accomplishment of the nature and objectives of the Directive.

1.10.3. *Effective protection and the definition of damage: is the risk of damage relevant? Are replacement costs included?*

Although in the absence of an explicit reference to the principle of effective consumer protection, the Court of Justice has made clear that the notion of defect and the one of damages must be compatible with the high level of safety expected by the consumers of sensitive products for their health, such as pacemakers and implantable defibrillators: the mere risk of malfunctioning of the device can be considered as a defect according to the Directive and it is not necessary to prove that, in the case, the product malfunctioned effectively. In the Court's view, the abnormal risk of damage to which the patient is exposed should be taken into account when ascertaining the existence of damage and when assessing the scope of liability, whether covering the costs incurred by consumers to replace pacemakers if that is necessary to overcome the defect.

1.10.4. *Combination between defective product and service liability*

Not only effective consumer protection pursued under the Directive 85/374 is compatible with the autonomy of MSs to establish a concurrent regime of service provider liability to be combined with the one established at the EU level concerning producer's liability. This concurrence of liability regimes may also contribute to enhance the effectiveness of the EU Directive and the pursue of its objectives in the area of product safety and consumer health (*Dutrueux*, C-495/10). In case of concurring liabilities established at the national level, the principle of effectiveness requires a special coordination so that consumer can always be able to sue the liable producer, or the sued service provider can always claim the producer's intervention to be held harmless.

2. Effective Data Protection and Fundamental Rights

Introduction

These Guidelines aim at examining the impact of the EU Charter of Fundamental Rights on the EU and national caselaw in the field of data protection from the perspective of the judicial dialogue occurred between the Court of Justice, national courts and, only indirectly, data protection authorities.

Largely based on EU secondary legislation (95/46/EC directive and now the GDPR), this dialogue has in fact more and more developed a fundamental right perspective based on articles 7 and 8 of the Charter (*e.g., Schrems I*, C-362/14; *Facebook Ireland Ltd, Maximillian Schrems*, C-311/18). In some cases, the dialogue incorporates the framework established upon the European Convention of Human Rights and, more particularly, upon its article 8 (*e.g.*, in *Digital Rights Ireland,* Joined Cases C-293/12 and C-594/12).

To what extent and how is the role of national judges in data protection affected by the acknowledgment of fundamental rights at EU level?

Firstly, unlike in other domains of EU law, in the field of data protection the Charter goes well beyond the acknowledgment of a fundamental right. Indeed, not only art.7 and, more particularly, art. 8 CFR establish the pillars of data protection regulation having regard to the principles of fairness, lawfulness and finality, then expanded in secondary legislation, but they also define the bases for an effective enforcement; more particularly, art. 8 does so when recognising, on the one hand, the right to access and the one to data rectification and, on the others, the monitoring power of an independent authority.

Secondly, once fundamental rights are at stake, art. 52, CFR, shall be applied, meaning that any limitation on the exercise of such rights must be provided for by law and respect the essence of those rights and freedoms and shall be subject to the ***principle of proportionality***, therefore made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. What is the impact of this principle on the judicial dialogue between EU and national courts in the field of data protection is widely clarified along this Casebook (see part. *Puškár*, C-73/16, ch. 8 with regard to the procedural aspects of the right to an effective remedy in data protection; *Digital Rights Ireland,* C-293/12, and C-594/12 and *LaQuadratureDuNet,* C-511/18, C-512/18; C-520/18, ch. 3 with regard to the limitation of fundamental rights in case of data processing carried out by States for the purpose of protecting public security; *Asociația de Proprietari*, C-708/18, ch. 4, with regard to the interpretation of the legal basis of the legitimate interest in the light of art. 7, 8 and 52 CFR).

Thirdly (and this is the focus of the present Casebook), being data protection regulated at EU level, another fundamental right comes into play, namely, the ***right to an effective remedy and a fair trial*** under art. 47, CFR. Although the latter is seldom explicitly recalled in EU caselaw, its relevance may not be denied in this dialogue (see, *e.g.*, *Schrems*, C-362/14; *Facebook Ireland and Schrems*, C-311/18; *Puškár*, C-73/16). The right to an effective judicial protection is more often referred to in the framework of the principle of effectiveness (*e.g.*, *Promusicae*, C-275/06; *Google v. CNIL* C-507/17; *Rijkeboer*, C-553/07; *C-40/17, Fashion ID*). Although art. 47 CFR does not apply

directly to administrative authorities, being referred to judicial protection (including judicial review of administrative authorities' decisions), its impact extends to the (effective and sincere) cooperation among data protection authorities in cross-border cases, as recently shown by the Court of Justice (C 645/19, *Facebook Ireland Ltd*).

The right to an effective remedy does not only play a role within individual redress proceedings, but also in the context of **collective redress**. As the Court of Justice has recently observed, "[a]uthorising consumer protection associations (…) to bring, by means of a representative action mechanism, actions seeking to have processing contrary to the provisions of that regulation brought to an end, independently of the infringement of the rights of a person individually and specifically affected by that infringement, undoubtedly contributes to strengthening the rights of data subjects and ensuring that they enjoy a high level of protection. (…) the preventive function of actions brought by consumer protection associations, such as the Federal Union, could not be guaranteed if the representative action provided for in Article 80(2) of the GDPR allowed only the infringement of the rights of a person individually and specifically affected by that infringement to be invoked." (*Meta*, C-319/20).

Moving from this perspective, these Guidelines examine the role of fundamental rights and the one of the principles of effectiveness and proportionality in the EU and national caselaw in the field of data protection. By doing so, they aim at supporting judges and other legal experts in the application of data protection regulation through the illustration of cases in which the Court of Justice has used the fundamental right framework and the mentioned principles as tools for interpreting current legislation and defining both the balancing of rights and modes of enforcement.

More particularly, these Guidelines illustrate:

a) whether and how effectiveness and proportionality have contributed to define the scope of application of data protection as regards both its territorial scope (§ 1) and its material one (§ 2);
b) whether and to what extent effectiveness and proportionality have shaped the balance between data protection and general interests (such as public security) calling for specific limitations to the protection of personal data (§ 3);
c) whether and to what extent effectiveness and proportionality have contributed to define the lawfulness of processing with regard to the assessment of its legal bases and the modes in which consent can be rendered to make the data subject's protection effective (§ 4);
d) whether and to what extent effectiveness and proportionality have shaped the balance between data protection and other fundamental rights and freedom (§ 5);
e) whether and why art. 47, the principle of effectiveness and the one of proportionality matter when judicial enforcement is made dependent upon the exhaustion of administrative enforcement procedures (§ 6);
f) what is the impact of art. 47 and the mentioned principles upon the choice of sanctions and remedies and their application (§ 7) and, viceversa, the impact of data protection on access to justice in cases in which personal data are needed to access to court (§ 8);
g) whether effective protection may be improved by joint application of data protection law and consumer law in cases in which the data subject is also a consumer (§ 9).

2.1. Impact of the Charter on the territorial scope of data protection

While assessing the adequacy of data protection provided by third-state legal systems, EU courts need to take into consideration the substantive provisions of GDPR in light of the CFREU. The existence of an adequacy decision is not sufficient to authorise the transfer to the third country concerned by that decision that can be challenged.

The right to be forgotten (de-referencing) is effective against all the versions of a search engine that are in use in EU Member States. The search engines that function outside of the EU territorial domain should use, where necessary, measures which effectively prevent (or at least seriously discourage) an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request.

In cross-border cases, the issue of applicable law is not addressed in the GDPR. Domestic data protection authorities and domestic courts may apply their domestic law. The consistency of the data protection in the EU is then not ensured. Judges could refer to the CJEU whether they should leave their national law unapplied to ensure either better data protection or greater legal certainty.

The competence of national authorities is limited by the one-stop shop mechanism set up by the GDPR. This is not the case for some kind of data protection rules (directive e-privacy). This is also not the case for the jurisdiction of the court to which the data subject's request is referred or before which a collective action is brought. Consequently, while establishing jurisdiction in data protection cases, courts should not pay decisive attention to the domicile of a party against whom the supervisory proceedings are carried out. Instead, it should focus on the habitual residence of the data subject.

The courts of each Member State in which disparaging comments are or were accessible have jurisdiction to hear the case, but the compensation sought is limited to the damage suffered within the Member State of the court seized. For the rectification of incorrect information and the removal of disparaging comments affecting their reputation, only the courts competent to rule on the entirety of the damage have jurisdiction. These courts are those of the Member State in which the publisher of that content is established or before the courts of the Member State in which the plaintiff's centre of interests is based.

2.2. Impact of the Charter on the material scope of data protection

1) Data must be deemed as personal when the person, to whom data refer, is identifiable. Identifiability must be assessed through a relative criterion, taking into account whether there is a reasonable possibility that the controller will be in a position to collect other pieces of information which allow to identify that person (*Breyer*, Case C-582/14).

2) While examining the legality of collecting and processing data that was collected through a dynamic IP address (registered by a social media provider) it is necessary to establish, whether the provider may identify the data subject with use of additional data that the internet service provider has at her disposal. If this condition is satisfied, the data collected through such IP address should be considered to constitute personal data (*Breyer*, Case C-582/14).

3) The notion of personal data processing should be always referred to the particular factual circumstances. It can be understood, for instance, as the practice of public identification of private individuals by putting their contact details or information on employment or hobbies on a publicly available website (*Lindqvist*, Case C-101/01).

4) Processing of personal data may be also constituted – depending on the circumstances – by aggregation, indexing and storing information published on the internet by third parties (which may be proper e.g. for the online search engines) (*Google Spain*, Case C-131/12).

5) While establishing whether particular persons/entities act as controllers or as joint controllers of personal data, a court must establish whether such actor(s) exercise(s) effective control over purposes and means of processing data. In this investigation, courts must build on the actual facts of the case, without adopting all-embracing abstract and formal criteria (*Fashion ID*, Case C-40/17).

2.3. The exceptions to the protection of data, relating to activities outside of the scope of EU law, in particular public security, state security, defence, and criminal matters

2.3.1. *The adequacy test performed by domestic courts*

While assessing whether domestic authorities process data lawfully, a domestic court should establish whether the applied means are adequate to the public interest in retaining and processing the data.The adequacy can be established only as long as: (1) processing of data is carried out in public interest, that (2) it remains necessary for the intended purpose, and that (3) there is sufficient indication allowing to assume that "the data subjects are rightly included in that list" and "that all of the conditions for the lawfulness of that processing of personal data imposed by Directive 95/46 be satisfied".

Protection awarded by the EU data protection rules applies also to third-country individuals who are subjected to administrative proceedings before the domestic authorities in EU Member States. The general adequacy test applies in these situations adequately.

2.4. Impact of the Charter on the assessment of the legitimacy of data processing

The CJEU addressed the cases related to lawful basis for processing – namely the ones concerning the legitimate interest of the data controller or of a third party and the data subject's consent – in the light of art. 8 CFR and other fundamental rights.

2.4.1. *Fundamental rights and legal basis for processing*

With regard to the balance between the right to data protection on the one hand and on the other hand intellectual property rights and the right to conduct a business, within the scope of application of dir. 2002/58, according to the CJEU,

- the right to (intellectual) property (art. 17 CFR) and its enforceability (art. 47 CFR) do not require Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings (*Promusicae,* C-275/06).
- In the light of the right to conduct a business and the right to data protection it is precluded an injunction made against an internet service provider which requires it to install, as a preventive measure for an unlimited period of time, a system for filtering all electronic communications passing via its services, which applies indiscriminately to all its customers, exclusively at its expense, which is capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work (*Scarlet Extended,* C-70/10)
- the systematic recording, by the holder of intellectual property rights as well as by a third party on his or her behalf, of IP addresses of users of peer-to-peer networks whose Internet connections have allegedly been used in infringing activities, and the communication of the names and of the postal addresses of those users to that rightholder or to a third party in order to enable it to bring a claim for

damages before a civil court for prejudice allegedly caused by those users are not prohibited under art. 6(1)(f) GDPR, read in the light of the dir. 2002/58, where the initiatives and requests of that rightholder or of the third party are justified, proportionate and not abusive and have their legal basis in a national legislative measure, within the meaning of Article 15(1) of Directive 2002/58, which limits the scope of the rules laid down in Articles 5 and 6 of that directive (*M.I.C.M.,* C-597/19).

2.4.2. *Legitimate interest as a legal basis for processing*

Furthermore, in order to process lawfully personal data relying on the legal basis of the legitimate interest, three cumulative conditions should be met:

1) the pursuit of a present and effective legitimate interest by the data controller or by the third party or parties to whom the data are disclosed.

2) the need to process personal data for the purposes of the legitimate interests pursued. The necessity concept should be interpreted strictly (*Rīgas satiksme*, C-13/16, § 30), and national courts should consider if the legitimate interest pursued through the processing cannot reasonably be as effectively achieved by other means less restrictive of the fundamental rights and freedoms of data subjects, in particular the rights to respect for private life and to the protection of personal data guaranteed by Articles 7 and 8 CFR.

3) the fundamental rights and freedoms of the person concerned by the data protection do not take precedence over the legitimate interest pursued. The seriousness of the infringement of the data subject's rights and freedoms is an essential component of the balancing exercise on a case-by-case basis (*Rīgas satiksme*, C-13/16, § 28). In that assessment the following elements could be considered (*Asociația de Proprietari* C-708/18):

a) the availability of personal data at issue in public sources.

b) the nature of the personal data at issue, in particular of its potentially sensitive nature, of the nature and specific methods of processing and of the number of persons having access to those data and the methods of accessing them.

c) The data subject's reasonable expectations.

The principle of **proportionality** is recalled in CJEU case law, at least in two different ways: a) as an element of the evaluation of the necessity of the processing for the purposes of the legitimate, b) as a principle which has to be applied in case of limitation of the fundamental rights set forth in the Charter (art. 52 CFR). The relationship between the principle of proportionality of processing and art. 52 CFR with regard to the proportionality of limitations to the exercise of the right to data protection could be object of future CJEU's judgements.

2.4.3. *Data subject consent as a legal basis for processing*

Data subject's consent is not validly constituted as a lawful basis for processing if, in the form of cookies, the storage of information or access to information already stored in a website user's terminal equipment is permitted by way of a pre-checked checkbox which the user must deselect to refuse his or her consent (*Planet49*, C-673/17).

Moreover, in the light of the effectiveness of art. 8 CFR the regulation of data subject's consent should be interpret with the objective of ensuring a genuine choice of the data subject. In this respect, according to *Orange Romania* (C-61/19), according to Reg. EU 2016/679 it is for the data controller to demonstrate that the data subject has given a valid consent to the processing.

2.5. Privacy Vs. Freedom of expression – the fundamental rights perspective

2.5.1. Enforcement of data protection law against a host provider

Domestic courts are entitled to remove or block access to information (content) that is either identical or closely similar (equivalent) to the content that has been previously declared unlawful. The injunction in question may oblige a host provider to monitor the content only for information that remains essentially unchanged compared with the content that was declared illegal. There is no need for the injunction to put an obligation of permanent content monitoring, if the new information differs from the older one (already declared to be unfair) merely in terms of wording.

In this way the domestic courts may impose injunctions that apply not merely to the particular state, but also that have a global effect. In this way – as the *Glawischnig-Piesczek* decision clearly sets forth – courts should revoke the relevant provisions of international law and act within their scope.

2.5.2. Establishing the 'journalist content' exception

Publication of the content that infringes one's privacy may be legitimate as long as the content has been published for journalist purposes. Even if such information has been published in an open-access repository (such as Youtube.com) there is no ground for its removal if it satisfies the definition of journalistic content in the sense of Article 9 of the 95/46 Directive.

It should be possible to clearly establish – given the circumstances of the particular case – that the information has been published solely in order to disclose information, opinions and ideas to the public. This task rests with a domestic court that should evaluate not only the content of the information, but also the context in which it was published and the potential array of its addressees. In this way the domestic judge should, hence, delve into the possible way of understanding the content by the average members of the society – and make sure whether this content may not harm the individual's privacy in disproportionate way. The latter would be the case when the content does not simply convey information, ideas and opinions for socially-useful purposes.

2.6. Effective data protection between administrative and judicial enforcement

2.6.1. *Administrative authorities and effective protection of data subjects*

In data protection the system of cooperation and coordination between administrative authorities plays a strong role in ensuring an effective protection of data subjects. The relationships between such authorities involves a vertical dimension (*i.e.*, between EU institutions and authorities on the one hand and national authorities on the other hand) and a horizontal dimension (*i.e.*, the relationship between national authorities).

As to the former, the CJEU (*Schrems I, C-362/14*; *Facebook Ireland and Schrems, C-311/18*) interpreted **the relationship between the EU authorities and institutions and national DPAs in the light of data subjects' effective protection**, in cases related to data transfers outside external borders and the role of DPAs *vis-à-vis* EU Commission's decisions. In this regard, according to *Facebook Ireland and Schrems,* (C-311/18), under Article 288(4) TFEU a Commission adequacy decision concerning data transfers is, in its entirety, binding on all the Member States to which it is addressed and is therefore binding on all their organs in so far as it finds that the third country in question ensures an adequate level of protection and has the effect of authorising such transfers of personal data. Accordingly, until such time as a

Commission adequacy decision is declared invalid by the Court, the Member States and their organs, which include their independent supervisory authorities, cannot adopt measures contrary to that decision, such as acts intended to determine with binding effect that the third country covered by it does not ensure an adequate level of protection and, as a result, to suspend or prohibit transfers of personal data to that third country (see also: *Schrems I*, C-362/14).

Nevertheless, according to *Facebook Ireland and Schrems,* (C-311/18):

- a Commission adequacy decision adopted pursuant to Article 45(3) of the GDPR cannot prevent persons whose personal data has been or could be transferred to a third country from lodging a complaint, within the meaning of Article 77(1) of the GDPR, with the competent national supervisory authority concerning the protection of their rights and freedoms in regard to the processing of that data.
- a decision of that nature cannot eliminate or reduce the powers expressly accorded to the national supervisory authorities by Article 8(3) CFR and Article 51(1) and Article 57(1)(a) of the GDPR.

- Accordingly, even if the Commission has adopted a Commission adequacy decision, the competent national supervisory authority, when a complaint is lodged by a person concerning the protection of his or her rights and freedoms in regard to the processing of personal data relating to him or her, must be able to examine, with complete independence, whether the transfer of that data complies with the requirements laid down by the GDPR and, where relevant, to bring an action before the national courts in order for them, if they share the doubts of that supervisory authority as to the validity of the Commission adequacy decision, to make a reference for a preliminary ruling for the purpose of examining its validity.

As to the coordination among national authorities, the CJEU interpreted **the cooperation system among DPAs drawn by the GDPR in the light of art. 47 CFR**. In that regard, according to *Facebook Ireland and Others* (C-645/19) a supervisory authority of a Member State which has the power to bring any alleged GDPR infringement to the attention of a court of its Member State and, where necessary, to initiate or engage in legal proceedings, may exercise that power in relation to an instance of cross-border data processing even though it is not the 'lead supervisory authority', within the meaning of GDPR, with respect to that data processing, provided that that power is exercised in one of the situations where GDPR confers on that supervisory authority a competence to adopt a decision finding that such processing is in breach of the rules contained in that regulation and that the cooperation and consistency procedures laid down by that regulation are respected.

According to *Facebook Ireland and Others* (C-645/19), that interpretation of the GDPR is consistent with Art. 47 CFR, as it does not affect the application of art. 78 GDPR, which ensure that every data subject has the right to an effective legal remedy, in particular, against a legally binding decision of a supervisory authority concerning him or her, or against a failure by the supervisory authority which has the competence to adopt decisions to handle a complaint that that data subject has lodged.

2.6.2. *The right to effective judicial remedy and the coordination of administrative and judicial enforcement*

The coordination between administrative enforcement, addressed by national supervisory authorities, and of judicial enforcement is addressed differently by Member States.

The possible relationships between administrative and judicial enforcement are the following:

(a) Alternative;

(b) Complementary with simultaneous or sequential procedures;

(c) Independent.

At the EU level, beside *Facebook Ireland and Others* (C-645/19, see the previous paragraph), the CJEU has imposed a proportionality test in order to evaluate if any coordination mechanism is in line with effective judicial protection, namely:

- The procedures do not cause a substantial delay for the purposes of bringing legal proceedings;
- The procedures suspend the period for the time-barring of claims;
- The procedures do not give rise to excessive costs for the parties;
- The procedures allow for interim measures in exceptional cases where the urgency of the situation so requires (*Alassini*, C-317/08, as referred in *Puskar*, C-73/16).

Moreover, some cases on the matter are pending before the CJEU: *BE v Nemzeti* (C-131/21) concerns the role of art. 47 CFR in interpreting the relationship between administrative and judicial enforcement drawn by the GDPR and *UF v Land Hess* (C-26/22), *AB v Land Hesse* (C-64/22) concern the scope of judicial review of DPAs' decisions.

2.7. Effective, proportionate and dissuasive sanctions and remedies

The principles of effectiveness and proportionality played a strong role in Courts' application of remedies and sanctions.

2.7.1. *The impact of the principle of effectiveness on the system of remedies: the right to be de-listed and the right to access as examples*

The impact of the principle of effectiveness on data protection remedies is well-represented by two examples: the right to be de-listed and the right to access.

As to the former, the application of the right to erasure in the digital environment lead to a significant CJEU **case law on the "right to be de-listed" where the principle of effectiveness played a relevant role**. (*Google Spain,* C-131/12; *Fashion* ID, C-40/17, *GC and Others*, C-136/17, *Google v. CNIL,* C-507/17). In *GC and Others*, C-136/17, the CJEU, relying on its previous case law and specifically on *Google Spain* (C-131/12), stated that the operator of the search engine as a controller must ensure that the processing meets the requirements of data protection laws in order that the guarantees laid down by that legislation may have full effect and that "**effective and complete protection of data subjects**, in particular of their right to privacy, may actually be achieved". Furthermore, the CJEU, taking into account that the right to the protection of personal data is not an absolute right, stated that:

- The prohibition or restrictions relating to the processing of special categories of personal data, apply also, subject to the exceptions provided for by data protection laws, to the operator of **a search engine**, in the context of his responsibilities, powers and capabilities, **as the controller of the processing carried out in connection with the activity of the search engine**, on the occasion of a verification performed by that operator, under the supervision of the competent national authorities, following a request by the data subject.
- The operator of a search engine is in principle required to accede to requests for de-referencing in relation to links to web pages containing sensitive data. Nevertheless, the refusal to accede to the request for de-listing of the search engine could be justified by the fact that the processing is lawful, considering the exceptions to the prohibition of processing provided for by EU law, and interpreting these exceptions in the light of fundamental rights.

Nowadays, two cases concerning the right to be de-listed are pending (*TU, RE v Google LLC*, C-460/20; *Proximus*, C-129/21).

As to the right to access, in *Rijkeboer*, C-553/07, **the CJEU highlighted that the right of access is necessary to enable the data subject to exercise its other rights** (see also: *YS and Others*, joined cases C-141/12 and C-372/12 and *Smaranda*, C-201/14). Accordingly, the CJEU affirmed that the right to access to information on the recipients or categories of recipient of personal data and on the content of the data disclosed may concern the past, in order to ensure that the data subject can **effectively exercise** her rights. With regard to the scope of that right in the past, the CJEU stated that the setting of a time-limit with regard to the right to access to information on the recipients or categories of recipient of personal data and on the content of the data disclosed must allow the data subject her rights. In this respect, the CJEU affirmed that the length of time the basic data are to be stored may constitute a useful parameter without, however, being decisive.

2.7.2. *The impact of the principle of proportionality on the system of remedies and sanctions*

As to the impact of the principle of proportionality on remedies, the tight to be de-listed is a good example, as it shows the importance of such principle in interpreting remedies within the CJEU's case law (*GC and Others*, C-136/17; *Google v. CNIL*; C-507/17, *Salvatore Manni;* C-398/15). In this regard, according to the CJEU (*GC and Others*, C-136/17), the explicit mention, in art. 17 GDPR establishing the right to erasure, of freedom of expression, guaranteed by art. 11 CFR, demonstrates that **the right to protection of personal data is not an absolute right and that it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality** (on this argument see also: *Google v.* CNIL, C-507/17; *Salvatore Manni;* C-398/15). In *GC and Others*, C-136/17 the CJEU expressly referred to **Article 52(1) CFR,** according to which limitations to fundamental rights may be imposed as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. Relying on the above, the CJEU stated that where the operator of a search engine has received a request for de-referencing relating to a link to a web page on which sensitive data are published, the operator must, on the basis of all the relevant factors of the particular case and taking into account the seriousness of the interference with the data subject's fundamental rights to privacy and protection of personal data laid down in Articles 7 and 8 CFR, ascertain, having regard to the reasons of substantial public interest and in compliance with the conditions laid down in EU data protection laws, whether the inclusion of that link in the list of results displayed following a search on the basis of the data subject's name is strictly necessary for protecting the freedom of information of internet users potentially interested in accessing that web page by means of such a search, protected by Article 11 CFR.

According to Art. 83 and Art. 84 GDPR sanctions imposed in case of GDPR infringements must be effective, proportionate and dissuasive.

As to the application of the principle of proportionality on sanction in the CJEU case law, according to *Lindqvist* (C-101/01), national courts or authorities should take into account all circumstances of the case in order to assess what should be the adequate sanction. Although in such a case the Court only refers to the duration of the breach and to the importance of the protection of the data disclosed, it seems that other circumstances could be considered.

2.8. Data protection and procedural rules: the impact of the Charter

2.8.1. Enforcement of data protection law for the sake of forthcoming civil proceedings

Domestic courts are not obliged to force disclosure of personal data for the sole purpose of bringing an action for damages before a civil court for harm caused by the person whose data is at stake. There is no particular right to obtain such data that could be enforceable before a domestic court.

Article 47 CFREU may create a ground for claiming such data only in an exceptional situation where three premises are satisfied independently:

the pursuit of a legitimate interest;

the need to process personal data for the purposes of the legitimate interests pursued;

fundamental rights and freedoms of the person concerned by the data protection do not take precedence.

It is for the domestic court to establish whether these three premises have been satisfied in the case.

2.8.2. Evidence obtained illegally

It is impossible to reject by a domestic court a document issued by a public authority that was obtained unlawfully by a data subject whose data this document concerns. The duty to reject may stem only from domestic law – and as long as it respects both the essential content of the right to an effective remedy and the principle of proportionality.

Article 47 CFREU must be read together with the right to access one's own personal data. Such right encompasses a right to produce evidence that is based on documents that include personal data of such an individual.

In this way, the domestic court should carry out a two-tier test:

In the first step it is necessary to established whether data has been obtained in a lawful way.

At the second stage – providing that the evidence has been produced or obtained unlawfully – the domestic judge must assess whether the legal restriction infringed represents a disproportionate burden for the party providing that evidence, in fact violating her right to access to justice.

2.9. Effective data protection and consumer law: the intersections

The general issue addressed in this paragraph concerns the role of the application of consumer law in ensuring effective data protection (art. 8 and art. 47 CFR).

2.9.1. *Collective redress between collective and data protection*

With regard to collective redress, national legislation could allow consumer-protection associations to bring or defend legal proceedings against a person allegedly responsible for an infringement of the protection of personal data (*Fashion ID,* C-40/17; *Meta*, C-319/20). Furthermore, when a violation of the GDPR violate the interests of consumers, and the person harmed is a consumer, dir. 2020/1828 on representative actions for the protection of the collective interests of consumers, which repeals dir. 2009/22 is to be applied. In any case, the relationship between collective redress in consumer and data protection should be carefully assessed; the existence of collective redress in consumer law, applicable to consumers who seek action for a data protection claim may not be sufficient for ensuring effective data

protection, especially within the digital context (e.g. where the parties are a small professional and an online platform).

2.9.2. *Unfair commercial practices and information provided to the data subject*

In the light of the EU Commission's *Guidance on the implementation/application of the Unfair Commercial Practices Directive,* although a trader's violation of Data Protection rules will not, in itself, always mean that there is an unfair commercial practice, data protection violations should be considered when assessing the overall unfairness of commercial practices, particularly in the situation where the trader processes consumer data in violation of data protection requirements. The Italian decisions of the Consumer protection authority (e.g. Autorità Garante per la Concorrenza e il Mercato – AGCM), decision n° 26597, 11 May 2017, *Whatsapp-Trasferimento dati a Facebook*) are an example of the interplay between data protection rules and dir. 2005/29.

2.9.3. *Information to be provided to the data subject and consumers rights (dir. 2011/83)*

The amendments of dir. 2011/83 provided in dir. 2019/2161 show the importance of the relationship between data and consumer law. In fact, the directive applies where the trader supplies or undertakes to supply digital content which is not supplied on a tangible medium or a digital service to the consumer and the consumer provides or undertakes **to provide personal data** to the trader, except in some specific cases (art. 3 dir. 2011/83). Moreover, before the consumer is bound by a distance or off-premises contract the trader shall provide the consumer with the information concerning the fact that the price was personalized on the basis of automated decision-making. This provision may contribute to ensuring the effectiveness of data protection, by reinforcing information duties provided within data protection legislation.

However, the **remedies** available under the Consumer Rights Directive cannot be used against violations of information duties provided in the GDPR alone. Violations of information duties under the GDPR can only be remedied with the Consumer Rights Directive if they also constitute violations of information requirements under that directive.

2.9.4. *Information to be provided to the data subject and unfair contractual terms*

National case law (especially French and German one) shows the importance of the interplay, with regard to information duties, of the GDPR and the UCTD directive. There are not EU case law or documents in that regard. Nevertheless, the principle of effectiveness and art. 47 and 8 CFR may be of important guidance in order to interpret the relationship between the notion of unfairness under dir. 1993/13 and breaches of data protection law.

2.9.5. *Competent administrative authorities and their coordination*

As explained in a joint statement by the Italian consumer, telecom, and data protection authorities of July 2019, **data protection and consumer protection are seen to be complementary and not exclusive from one another**.

The same conduct can constitute an infringement of consumer, data protection and competition law; at least at the European level, there is a **lack of coordination between the national and European authorities** in charge of consumer, data protection and competition enforcement, which may have negative consequences on the principles of effectiveness, good administration and the duty of cooperation.

2.9.6. *Lack of conformity of digital content or services and the GDPR compliance*

In the light of art. 47 8 CFR, and of recital 48 of Directive 2019/770 on digital contents and services, the remedy consisting in the brought into conformity of a service with regard to data protection compliance could be a mean for granting to consumers the right to data protection.

3. EU Fundamental Rights and Non-Discrimination: Effective Protection in the Light Of Article 21 of the Charter.

3.1. Direct and indirect discrimination

Several guidelines can be extracted from the CJEU's case law with respect to the definition of direct and indirect discrimination.

Direct discrimination

- Direct discrimination comprises two components: (1) a difference of treatment between individuals on the basis of a protected ground; which (2) relates to individuals in comparable situations.

  Difference in treatment

  In the view of the Court of Justice as expressed in *G4S Secure Solutions* (C-157/15):

- A difference in treatment must be based on a protected characteristic to constitute direct discrimination. A measure applied to all individuals in a general and undifferentiated manner, without regard to their possession of a particular characteristic, will not amount to a difference in treatment for the purposes of direct discrimination.

  Comparability of situations

  In the view of the Court of Justice as expressed in *MB* (C-451/16):

- That situations of persons treated differently must be 'comparable' in order for direct discrimination to occur applies whether or not the term 'comparable situations' is present in a directive prohibiting discrimination. The Court applies the same definition of direct discrimination to all directives.
- Situations need not be 'identical', but rather 'similar' in order to be considered 'comparable'.
- Rather than being assessed in a global and abstract manner, the comparability of situations should be assessed in a specific and concrete manner having regard to all the elements which characterise them, in the light, in particular, of the subject matter and purpose of the national legislation which makes the distinction at issue, as well as, where appropriate, in the light of the principles and objectives pertaining to the field to which that national legislation relates.

Indirect discrimination under EU law

In the view of the Court of Justice as expressed in *CHEZ Razpredelenie Bulgaria* (C-83/14):

- A national provision according to which, in order for there to be indirect discrimination on a particular ground, the particular disadvantage must have been brought about for reasons related to that ground, are contrary to EU law.
- The concept of an 'apparently neutral' provision, criterion or practice means a provision, criterion or practice which is worded or applied, ostensibly, in a neutral manner, that is

to say, having regard to factors different from and not equivalent to the protected characteristic.

- A measure will be indirectly discriminatory when, despite its use of neutral criteria not based on the protected characteristic, 'it has the *effect* of placing particularly persons possessing that characteristic at a disadvantage'.
- The concept of 'particular disadvantage' within the meaning of Article 2(2)(b) does not refer to serious, obvious or particularly significant cases of inequality, but denotes that it is particularly persons of a given racial or ethnic origin who are at a disadvantage because of the provision, criterion or practice at issue.
- Assuming that a measure does not amount to direct discrimination, such a measure is then, in principle, liable to constitute an apparently neutral practice putting persons of a given ethnic origin at a particular disadvantage compared with other persons.
- The definition applied to indirect discrimination is the same under each of the relevant equal treatment directives.

3.2. Justifications precluding a finding of discrimination

Many general guidelines concerning the justification of differences in treatment which would otherwise amount to discrimination prohibited by Article 21 CFREU are provided by the CJEU. These are presented below according to the different types of justification.

Justifications regarding direct discrimination

In the view of the Court of Justice as expressed in *MB* (C-451/16):

- Only the grounds listed in the Directive(s) can justify direct discrimination – other grounds, for example national policy goals, cannot justify direct discrimination.

Justifications regarding indirect discrimination

In the view of the Court of Justice as expressed in *CHEZ Razpredelenie Bulgaria* (C-83/14):

- A measure constituting an apparently neutral practice putting persons of a given ethnic origin at a particular disadvantage compared with other persons, is capable of being objectively justified by legitimate aims only if that measure did not go beyond what is appropriate and necessary to achieve those legitimate aims and the disadvantages caused were not disproportionate to the objectives thereby pursued.
- It is for the referring court to determine whether other appropriate or less restrictive means of achieving the aims exist, and if not, whether the measure excessively prejudices the legitimate interest involved.
- Where the existence of a legitimate aim is dependent on the existence of certain facts, the burden of proof lies with the respondent to demonstrate these facts and, where relevant, that these facts remain relevant to the legitimate aim in question despite a time lapse since their occurrence.

Justification on specific grounds

Justification on the grounds of 'genuine and determining occupational requirement'

In the view of the Court of Justice as expressed in *Vital Pérez* (C-416/13):

- Differences in treatment can only be justified in 'very limited' circumstances.
- A genuine, legitimate and justified occupational requirement must comply with the principle of proportionality.

In the view of the Court of Justice as expressed in *Egenberger* (C-414/16):

- The concept 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. It cannot cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of a customer.

In the view of the Court of Justice as expressed in *Wolf* (C-229/08):

- The possession of particular physical capacities may in some cases be regarded as a 'genuine and determining occupational requirement'.

Justification on the grounds of age:

In the view of the Court of Justice as expressed in *Felber* (C-529/13):

- Member States enjoy a broad margin of discretion when choosing to pursue a particular aim with regard to their social and employment policy, as well as in the definition of measures capable of achieving that aim.

In the view of the Court of Justice as expressed in *Vital Pérez* (C-416/13):

- The failure of national legislation to state the objectives it pursues does not necessarily prevent it from being justified on the grounds of age if the aim can be identified and reviewed for the requirements of legitimacy, appropriateness and necessity.
- While Member States have discretion in how to achieve objectives of employment policy, they cannot frustrate the implementation of the principle of non-discrimination.

In the view of the Court of Justice as expressed in *HK Danmark* (C-476/11):

- A measure is appropriate for ensuring attainment of the aims pursued only if it genuinely reflects a concern to attain them in a consistent and systematic manner, which was ultimately for the national court to decide.

3.3. The personal scope of non-discrimination

Several points of guidance are provided by the CJEU in relation to the direct horizontal effect of Article 21 CFREU:

In the view of the Court of Justice as expressed, *inter alia*, in *Egenberger* (C-451/16):

- Article 21 CFREU can have direct horizontal effect, meaning that it can be directly applied in relation to private parties.

In the view of the Court of Justice as expressed in *Cresco* (C-193/17):

- Certain conditions have been laid down for the direct horizontal effect of Article 21 CFREU to apply:
  1. The relevant national law is not in conformity with the applicable directive;
  2. No (legislative) measures have been taken to rectify the discriminatory situation; and
  3. There is a valid point of reference (i.e. information allowing the situations of affected persons to be appropriately compared).
- In these situations, private parties such as employers have to place the persons disadvantaged by the difference in treatment in the same position as those benefitting from it, *until measures reinstating equal treatment have been adopted by the national legislature*.

3.4. Effective protection from non0-discrimination through Article 47 CFREU

Effective judicial protection:

In the view of the Court of Justice, as expressed in *Starjakob* (C-417/13), and in the light of the principle of effectiveness and Article 47 CFREU:

- It is compatible with EU law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty, to the extent that such time-limits are not:
  - Liable to make it in practice impossible; or
  - Liable to make it excessively difficult to exercise the rights conferred by EU law.

In the view of the Court of Justice as expressed in *Egenberger* (C-414/16), and in the light of the principle of effectiveness and Article 47 CFREU:

- Effective judicial review of the decisions of religious organisations, possibly relevant from the perspective of non-discrimination, must be allowed.

In the view of the Court of Justice as expressed in *IR* (C-68/17):

- An organisation whose ethos is based on religion or belief cannot decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that differs according to the faith or lack of faith of such employees, without that decision being subject, where appropriate, to effective judicial review.

Meaning of 'effective, proportionate and dissuasive sanctions':

In the view of the Court of Justice as expressed in *Asociaţia Accept* (C-81/12):

- The fact that a particular sanction is not pecuniary does not necessarily render it symbolic (particularly where there is a sufficient degree of publicity and if it aids a finding of discrimination in a possible action for damages).
- A 'purely symbolic sanction' is not compatible with the requirements of Directive 2000/78. This can be extended by analogy to Directive 2000/43.
- The severity of sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect while respecting the general principle of proportionality.

- The rules on sanctions put in place to transpose relevant equal treatment directives into national law must in particular ensure real and effective legal protection of the rights protected by the directives.
- Whether or not, in light of a possible reluctance of those with standing to assert their rights, the applicable rules on sanctions are genuinely dissuasive, is a matter for the referring court to ascertain.

Relationship and comparison of EU and Council of Europe human rights law:

- Both the CJEU and national courts invoke Article 52(3) CFREU in order to substantively apply case law of the ECtHR in cases based on EU law.

In the view of the United Kingdom Supreme Court in *Benkharbouche*:

- The scope of Article 6 ECHR is not identical to that of Article 47 CFREU. However, in some cases, it is possible to say that a violation of Article 6 necessarily entails a violation of Article 47.

Consequences of incompatibility of UK legislation with the CFREU vs the ECHR:

In the view of the United Kingdom Supreme Court in *Benkharbouche*:

- The consequences of a finding of a conflict between UK law and EU law differ from those of a conflict between UK law and the ECHR – when the former occurs, the conflict must be resolved in favour of EU law and the domestic law must be disapplied, but when the latter occurs, the Court may only make a declaration of incompatibility under Section 4 of the UK Human Rights Act 1998 (this has no binding effect and does not require the law to be amended or disapplied).

Consequences of preliminary rulings:

In the view of the Court of Justice as expressed in *Starjakob* (C-417/13):

- A preliminary ruling does not create or alter the law but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force.

3.5. Discrimination in the context of migration and asylum

Various guidelines can be extracted from the discussions of the CJEU's cases. As well as more specific guidance, the judgments of the Court of Justice shed light on the role afforded to the Charter in cases concerning potential instances of discrimination.

Limitations on the principle of equal treatment and housing benefits

In the view of the Court of Justice as expressed in *Kamberaj* (C-571/10):

- Member States may not treat third-country nationals who are holders of a long-term residence permit differently from citizens of the EU with regard to the granting of housing benefits, to which the principle of equal treatment must be applied.

Right of residence and sexual orientation

In the view of the Court of Justice as expressed in *Coman and Others* (C-673/16):

- A third-country national who married an EU citizen of his or her same sex has a right of residence in the Member State of which the latter is a national, even if the Member State does not recognise same-sex marriage in its legislation.
- Member States cannot discriminate against same-sex spouses, where one spouse is a third-country national and the other an EU citizen, in their enjoyment of the right of residence.

Sexual orientation as a ground of persecution under the Geneva Convention and Directive 2004/83

In the view of the Court of Justice as expressed in *X and Others* (Joined Cases C 199/12 to C 201/12):

- Directive 2004/83 must be interpreted in accordance with its scheme and purpose, in a manner consistent with the Geneva Convention and other relevant international materials, most notably the Charter of Fundamental Rights of the European Union.
- In relation to Article 21 CFREU, it can be noted that Directive 2004/83 includes disproportionately discriminatory prosecution or punishment as one form in which acts of persecution can be taken.
- To constitute a 'particular social group' for the purposes of the Directive, two conditions must be met:
    - Members of that group have to share an innate characteristic or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to their identity that a person should not be forced to renounce it; and
    - That group needs to have a distinct identity in the relevant country because it is perceived as being different by the surrounding society.
- A third-country national outside of their country of nationality owing to a well-founded fear of being subject to disproportionately discriminate punishment (persecution) on the grounds of their sexual orientation may be granted the status of 'refugee'.
- The criminalisation of homosexual acts is not a serious enough violation of fundamental human rights to amount to persecution, unless a punishment of imprisonment is enforced in practice. In such cases there would be a violation of the right to private life in conjunction with the prohibition of discrimination under Articles 8 and 14 of the ECHR and Articles 7 and 21 of the Charter.
- Applications for asylum on the grounds of persecution on account of sexual orientation can be subjected to a credibility assessment like any other application. However, though decision-makers can rely on questions based on stereotyped notions to test the applicant's credibility, applications cannot be evaluated only on the basis of such questions, as they do not sufficiently account for the applicant's individual situation.

Role of the Charter in cases concerning discrimination

- The application by the CJEU of the Charter in the cases above has been disparate. While in *Coman and Others* the referring Court mentioned extensively the Charter as one of the relevant sources of the case, the CJEU merely framed the issue of same-sex marriage under Article 7 (on private and family life), but answered the question mostly by referring to Article 21 of the TFEU (on freedom of movement). The CJEU may have perceived that it was preferable to settle the matter in accordance with more technical aspects of EU law, rather than resorting to a human rights framework which both in the CJEU and the ECtHR has been useful to force recognition of same-sex marriages to states that have still not done so.

Conversely, the Court more freely used different provisions of the Charter in *X and Others* and in *A, B and C* to interpret, through a human rights lens, EU regulations on assessment of asylum applications and ground of persecution that merit recognition of refugee status. However, the incidence of the Charter in these decisions is different. Whereas Article 7 was used in *A, B and C* to prevent credibility assessments from becoming an occasion to intrude into the private life of applicants, in *X and Others* the Court referred to Articles 7 and 21 of the Charter (and Articles 8 and 14 of the ECHR) to argue that, since these were not non-derogable rights, sole criminalisation of homosexual acts, without actually enforcing any punishment, did not amount to a serious violation that would justify a finding of persecution on the grounds of sexual orientation.

3.6. Discrimination in the context of health and in the context of disability

Several general guidelines concerning non-discrimination in health-related cases can be extracted from the case law of the CJEU, most of which relate to cases brought concerning discrimination on the grounds of disability:

- The scope *ratione materiae* of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof. This matches the approach taken in cases discussed in previous chapters of this Casebook, such as *MB* (C-451/16, ECLI:EU:C:2018:49, see Chapter 1.2.2 above). This does not appear to be impacted by the fact that health is a fundamental right. However, the definition of disability itself, which is relatively broad, allows individuals with health issues such as sickness and obesity to be protected from discrimination on the ground of disability in some circumstances despite the fact that these are not protected grounds in themselves.

Effective protection

In the view of the CJEU as expressed in *Coleman* (C-303/06):

- In order to ensure effective protection from discrimination, it is crucial that individuals who are treated differently on the basis of a particular protected characteristic fall within the scope *ratione personae* of the principle of non-discrimination. This would include, for example, the primary *carer* of a person with disabilities.

Role and position of the UN Convention on Persons with Disabilities

In the view of the CJEU as expressed in *HK Danmark* (Joined Cases C-335/11 and C-337/11):

- As an international agreement concluded by the EU, the Convention has primacy over secondary instruments of EU law.

- This requires that relevant parts of Directive 2000/78 (i.e., the concept of 'disability') be interpreted in compliance with the Convention.

Definition and scope of 'disability'

- 'Disability' is defined by the CJEU in the same way whether or not the Charter applies in a particular case. It can therefore be inferred that 'disability' has the same definition when applied in relation to Article 21 of the Charter as in relation to Directive 2000/78, suggesting in turn that there is a common concept of disability regardless of which source of EU non-discrimination law applies. This definition is based on that found in the UN Convention on the Right of Persons with Disabilities.

In the view of the CJEU as expressed in *HK Danmark* (Joined Cases C-335/11 and C-337/11):

- For the purposes of EU non-discrimination law, 'disability' means a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.
- Illnesses as such are not a ground of discrimination under the Directive (*Chacón Navas*, paragraph 57), but if limitations having the abovementioned effects on a long-term basis are caused by an illness, they can be covered by the concept of 'disability'.
- 'Disability' does not necessarily equate to total exclusions from work or professional life, but can also cover situations where a person can only work to a limited extent.
- A 'disability' need not make an individual incapable of exercising an activity, as long as it provides a hindrance to exercising it.

In the view of the CJEU as expressed in *FOA* (C-453/13):

- If the obesity of a worker causes a limitation as explained above, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78.
    - 'Long-term' includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered.
    - A national court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data. Since this evidence falls under the question of whether or not an applicant does indeed have a disability, it may be inferred that it is for the applicant to provide such evidence in order to establish a *prima facie* case of discrimination (based on the rules of burden of proof established in Recital 31 and Article 10 of Directive 2000/78 – see Section 3.3 of this Casebook).

Article 52(1) CFREU

In the view of the CJEU as expressed in *Glatzel* (C-356/12):

- When assessing whether a limitation on the right to non-discrimination contained in Article 21 of the Charter is permissible under Article 52(1) of the same Charter, it is for national courts to determine whether the limitations respect the principle of proportionality.
- From the Court's application in this case, it appears that the limitations allowed under Article 52(1) generally mirror the justifications for differences in treatment found in the equal treatment directives (as discussed in Chapter 1). In the cases discussed in this Casebook, health as a fundamental right did not appear to play a role in the proportionality test applied, beyond the requirement in Article 52(1) CFREU that limitations to rights and freedoms protected by the Charter 'respect the essence of those rights and freedoms'.

4. Effective Justice, International Protection and Fundamental Rights in Asylum and Migration

Introduction

These guidelines for judges rely on CJEU caselaw related to the fundamental rights of third-country nationals legally or illegally staying on the territory of a Member State. They are more precisely focused on the right of the former to effective justice in the meaning of Article 47 CFR to the extent that EU law is applicable to them. It is then centered on the principles that emerge from CJEU preliminary rulings and judicial dialogue with other Courts, such as the European Court of Human Rights and National courts, to guarantee the access to justice to foreign nationals. The first set of guidelines is devoted to the **requirements of effective justice in case of detention of third-country nationals**. It gives a definition of detention, an overview of the conditions for a detention to be lawful under EU Law, as well as a list of the requirements of Article 47 when National Courts deal with detention cases. The second set of guidelines concerns **collective expulsion, return and Dublin proceedings**. It exposes the guidelines to be followed by National Courts to respect the right to be heard in collective expulsion cases and return proceedings, the suspensive effect of appeal in return proceedings, and the extending judicial review in Dublin transfers**.** A third set of guidelines is devoted to the **right to effective justice in asylum proceedings**. It summarizes the requirements of Article 47 CFR regarding the admissibility of applications for international protection, the time-limit and suspensory effect of appeal against a decision of inadmissibility, the sufficient interest of beneficiaries of a subsidiary protection to lodge an appeal against a decision which recognized him/her as a refugee, and the powers of national courts or tribunals to vary administrative decisions on the grant of international protection. The fourth and fifth set of guidelines expose the ways to deal with **challenges raised in the field of EU law of asylum and migration by threats to national security and public health issues**. They offer a definition of the concept of public policy and the requirements of Article 47 regarding the refusal to grand a visa, as well as on the withdrawal of the refugee status. The last set of guidelines presents the EU Commission and UNHCR recommendations to National authorities regarding the closure of external and internal borders.

4.1. Effective justice and detention

The *FMS, FNZ, SA, SA Junior* case is one of the landmark cases of the CJEU in the field of detention of migrants. From its analysis, eight guidelines emerge, as to the definition, lawfulness and procedural safeguards of detention. This case is thus of a major importance for National courts, that are called by the CJEU, on ground of Article 47 CFR and even in the absence of national legislation conferring such jurisdiction to them, to rule on detention's lawfulness and to order, if it proved to be unlawful, the release of the person detained.

Thus, according to the principles applied in this case:

- **Detention means** the confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.

- This definition is the same **whatever the status of the migrant** detained (third-country nationals subject to return proceedings or asylum seekers)

- Third-country nationals who are obliged by national authorities to remain permanently in a **transit zone**, the perimeter of which is restricted and closed, and which he/she cannot leave voluntarily are held "in detention" within the meaning of Directive 2008/115 and 2013/33

- Under Directive 2008/115, detention of an illegally staying third-country national must be **automatically considered unlawful at the end of a maximum period of 18 months**. Moreover, third-country nationals cannot be detained on the sole ground that he/she cannot provide for his/her need.

- Detention must be maintained only for **as long as removal arrangements are in progress and executed with due diligence.**

- There is **no maximum period for continuing detention under Directive 2013/32**, which only requires Member States to guarantee that the detention lasts only so long as the ground on which it was orders continues to apply and administrative procedures are carried out diligently.

- Under Directive 2013/32, detention of an applicant for **international protection** in a **transit zone** cannot last for a period of more than **four weeks.**

- **Article 47 CFR** requires National courts to:
  - assert their **jurisdiction to rule on the legality** of detention;
  - **order the release** of third-country national unlawfully detained;
  - grant **interim relief** pending its final decision;
  - assert their jurisdiction to hear and **determine the action** seeking to guarantee the right to receive either a **financial allowance or housing in kind**

4.2. Migrants' rights and collective expulsion, return and Dublin proceedings

From the CJEU cases on migrants' rights, collective expulsion, return and Dublin proceedings analyzed in the Casebook, several guidelines emerge to deal with cases related to collective expulsion, return and Dublin proceedings:

- Article 13, read in in the light of Article 47 CFR, precludes domestic legislation under which there is no judicial review of amendments to return decisions that modify the country of destination; in such a case, national courts have to declare they have jurisdiction to hear an action against this decision (C-924/19 PPU, C-925/19 PPU);

- Directives 2008/115 and 2005/85, read in light of the principle of non-refoulement and the right to an effective remedy, do not preclude the adoption of a return decision concerning an applicant for international protection whose application has been rejected, provided that the legal effects of the return decision are suspended pending the outcome of the appeal (C-181/16);

- Under Article 4 CFR, a Dublin transfer can take place only in conditions which exclude the possibility that it might result in a real and proven risk of inhuman or degrading treatment, even in the absence of systemic flaws in the Member State responsible for examining the application for asylum (C-578/16 PPU);

- Under Article 4 CFR, an asylum seeker cannot be transferred to another Member State under the Dublin Regulation if the expected living conditions in the latter would expose him or her to a situation of extreme material poverty, amounting to inhuman or degrading treatments (C-297/17);

4.3. Effective justice and applications for international protection

According to the CJEU preliminary rulings during the period under observation, in light of Article 47 CFR and of the rights to an effective remedy enshrined in EU asylum law, domestic Courts have to follow the following guidelines when dealing with issues related to applications for international protection:

- An applicant whose application for international protection has been declared inadmissible by administrative authorities without being interviewed must have the possibility to **set out in person all of his/her argument against this decision at the appeal level** (C-517/18);

- Proceedings challenging a decision declaring a subsequent application for international protection to be **inadmissible** can be subjected to a **limitation period of 10 days,** including public holidays (C-651/19);

- A decision can be **served at the head office of the national authority** which issued it, provided that the applicant has not specified an address in the concerned Member State (C-651/19);

- There is **no requirement** under EU law for **appeal** against a judgement delivered at first instance to have a **suspensory effect**, even in the case where the person concerned invokes a **serious risk of refoulement** (C-180/17);

- An **appeal against a decision** rejecting an application to be recognized as refugee but **granting subsidiary protection** can be declared **inadmissible** only if the rights and benefits afforded by each international protection status are **genuinely identical** (C-662/17);

- National courts have **to vary an administrative decision and substitute its own decision** for it when administrative authorities refuse to apply a first-instance decision which, after making a full and *ex nunc* examination of the facts and law, granted international protection (C-556/17);

National courts have to **disapply a national legislation** which does not provide for an **extension of the time-limit** set up to give a ruling on an action against a decision rejecting an application for international protection where the court is unable to ensure, within that period, that the substantive and procedural rules which EU Law affords to the applicant are effective (C-406/18);

4.4. Asylum and migration in time of threats to national security and public order

The CJEU caselaw on national security and public order issues leads to the following recommendation to Member States and judicial authorities:

- Member States may, on grounds of public policy, **reject an application for entry and residence** on the basis of a **criminal conviction** imposed during a previous stay on the territory of the Member State concerned (C-381/18 & C-382/18);

- Member States may **withdraw a resident permit or refuse** to renew it where a **sentence sufficiently severe in comparison with the duration of the stay** has been imposed on the applicant (C-381/18 & C-382/18);

- National Courts are required to **check whether the offence which warranted a criminal conviction is sufficiently serious** to establish that it is necessary to rule out residence of a third-country national (C-381/18 & C-382/18);

- A third-country national whose **application for a visa** is rejected by a Member State because another **Member State objected on ground of public policy** has the **right to know the identity of the latter**, the **specific ground** for refusal and the reasons for that objection as well as **the authority he/she may contact** to ascertain the remedies available in the objecting State (C-381/18 & C-382/18);

- National courts of a Member State **cannot examine the substantive legality of the objection raised by another Member State** to the issuing of a visa (C-225/19 & C-226/19);

- A **refugee that poses a threat to the national security or community**, in the meaning of Article 14(5) of Directive Qualification **does not cease to be a refugee**; he/she lost only the European part of his/her status, and cannot be deported to a country where he/she would face a risk of being tortured or submitted to inhuman and/or degrading treatment (C-391/16 e.a.).

4.5. Asylum and migrations in times of a world pandemic

The guidelines and recommendations issued by the European Commission[4], as well as by international authorities such as the UNHCR[5], insist on the following points that Member States have to follow in order to cope with migrants' rights in a context of threats to public health:

- Member States can **refuse the entry of third-country nationals on ground of public health issues**. However, any decision on refusal of entry needs to **be proportionate** and **non-discriminatory**;

- Member States can **reintroduce border controls** on ground of a risk posed by a contagious disease. However, in such a case, Member States have **to notify** the reintroduction of border controls in accordance with the Schengen Borders Code. Such controls should be applied in a **proportionate** manner and with **due regard to the health** of the individuals concerned;

[4] Communication from the Commission Covid-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement 2020/C 126/02; C/2020/2516. COM (2020/C 126/02).
[5] Practical Recommendations and good practice to address protection concerns in the context of the COVID-19 Pandemic, UNHCR, 9 April 2020.

- Member States have to **give access to asylum procedures** for people who seek international protection. Protection needs cannot be set aside while implementing measures to address public health considerations at the borders;

- Third-country nationals who apply for international protection must have their **application registered** by the national authorities even with specific temporary arrangements like online procedures;

- Difficulties due to the health crisis, such as **unusual delays, should not be considered as good reason to refuse to register** an application;

- Member States can **omit the personal interview**, depending on the circumstances of the case. **Temporary specific arrangements** like videoconferencing are recommended;

- **Dublin Regulation does not contain a provision to allow suspension** of Dublin time-limits as a result of Covid-19;

- Detention for the purpose of removal shall cease immediately when it appears that a reasonable prospect of removal no longer exists in an individual case. However, the **temporary restrictions** introduced by Member States and third countries to prevent and contain the spread of Covid-19 should **not be interpreted as automatically leading to the conclusion that a reasonable prospect of removal no longer exists** in all cases;

- Member States are **not obliged to hold a personal interview in Dublin procedures**. Where an interview is omitted, the Member States shall ensure that the applicant has the opportunity to submit further information relevant for the correct determination of the Member State responsible before a transfer decision is taken.

5. Judicial Protection of Health as a Fundamental Right

Introduction

The right to health covers a broad spectrum that includes but does not coincide with the right to health care. Hence the right holders are not only patients but also consumers, migrants, prisoners, to name a few. Its definition results from the common constitutional traditions and EU primary, and secondary legislation. It refers to both individual and collective interests.

Governing collective health-related risks entails decision making under uncertainty by both policy makers and courts. Courts have to decide cases on the basis of the available scientific knowledge, in particular medical and technical knowledge. But knowledge and technology evolve rapidly, and courts have to define principles and rules that can adapt to evolution and innovation. These changes are reflected into the legal domain both at EU and national level.

Within the framework of the FRICoRe Project, these Guidelines mostly reflect the European dimension of the right to health with the main focus on the judicial dialogue between national courts and the Court of Justice of the European Union, as well as, in specific instances, the European Court of Human Rights.

Based on the awareness about the States' competence in the organisation of healthcare systems, prior attention is paid to areas in which the European Union has carried out actions to support, coordinate or supplement the actions of the Member States for the protection and improvement of human health under article 6, TFEU, or has exercised its legislative competence in fields such as internal market, consumer protection, cross-border healthcare, and the like, with a view to ensure, under article 168 TFEU, a high level of human health protection in the definition and implementation of all Union policies and activities. This choice has allowed to consider the impact of the general principles of EU law and the one of the Charter of Fundamental Rights on the right to health in national case law.

Within the Charter of Fundamental Rights special consideration shall be given to art. 8 CFR (on the right to private and family life), to art. 35 CFR (on the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices and, more generally, the high level of human health protection as an objective for Union policies), to art. 47 CFR (on the right to an effective remedy and a fair trial), to art. 52 CFR (on the principle of proportionality as applied to limitations introduced by law in respect of fundamental rights and freedom). Although the explicit application of these provisions by national and EU courts is limited (see, however, on art. 35 and 52 CFR, *Léger,* C-528/13; on art. 47 CJEU, *Abdida*, C-562/13), the substantive references to the right to health as a fundamental right and to its effective protection do represent a relevant basis for judicial dialogue in this field (*Sanofi***,** C-621/15, 21 June 2017; *Boston Scientific Medizintechnik*, C 503/13 and C 504/13, 5 March 2015; *Veselības ministrija*, C-243/19, 29 October 2020).

The right to health poses relevant challenges to judges. With regard to legislation aimed at protecting health as a prior interest of individuals and of society at large (e.g. legislation on health safety standards imposed in workplaces or in food production), interpretive challenges may arise concerning the use of general principles or constitutional norms as gap fillers. With regard to other legislation, not primarily aimed at protecting health (e.g. competition law or data protection), health may emerge as a conflicting interest that needs to be balanced together with

or against other rights, including fundamental rights, and again the Charter may play a role in this regard.

Indeed, more and more, both at EU and national levels, health becomes a cornerstone of existing litigation, imposing a new direction to judges' decisions due to the prior ranking assigned to life as an essential value to be preserved. Producer's liability is subject to stricter standards when health is involved instead of or in addition to economic interests; international protection of asylum seekers finds new grounds based upon health protection; the principle of non-discrimination may be boosted when discrimination impairs a person's health, and the intersection between health and disability presents important systemic questions. At the same time, not being health an absolute right (especially if life is not at risk), it may be balanced against other rights: measures due to protect public health, as in the current pandemic, may not always defeat freedom of movement, the right to run a business, the one to enjoy one's property, or data protection, to name a few. Here, the task of law makers, firstly, and, secondly, that of judges is to strike a balance taking account of all circumstances. In this regard, under art. 52 CFR, the principle of proportionality is often the key.

Moving from this perspective, these Guidelines are by definition cross-sector. They do not focus specifically on health law as a sector-specific legislation but as a functional area crossing many other fields, such as food law, consumer protection, non-discrimination, migration, cross-border healthcare, crisis management in times of pandemic.

The European and national caselaw shows that the qualification of the right to health as a fundamental right plays a major role. More particularly, the need to ensure an effective protection of health-related rights based on EU law has an impact on the definition of duties imposed on States, individuals and organisations and on the choice and the functioning of remedies available for the right holder. Moreover, the need to balance the right to health with other rights and freedoms calls for a peculiar application of the principle of proportionality, being the interests at stake potentially linked with the right to life and, in many instances, human dignity.

Under the first perspective, when the right to health (of consumers, asylum seekers, data subjects, etc.) is at stake, **article 47 CFR** and the principle of **effective judicial protection** tend to reinforce the role of procedural safeguards (e.g., with regard to cross border healthcare, see Watts, C-372/04); to enhance the role of preventive and injunctive measures in light of the precautionary principle (e.g., with respect to food safety: *Pfizer*, T-13/99; *Monsanto*, C-236/01); to enlarge the scope of liability rules (e.g., in the field of product liability: *Sanofi* (C-621/15) and the extent to which non-economic losses may be claimed (e.g., in the field of State's liability for infection with the HIV virus through blood transfusion, ECtHR, *Oyal v. Turkey*, Application no. 4864/05, 23 March 2010).

When protection has been claimed against States or public authorities, the caselaw of the ECtHR and the doctrine of positive obligations have played a role (*e.g.*, ECtHR, *Cyprus v. Turkey*, Application no. 25781/94, 10 May 2001; ECtHR, Nitecki v. Poland, App. No(s) 65653/01, 21 March 2002). The dialogue between the two European Courts has been relevant in this and other regards (e.g., in a migration case, *Abdida*, C-562/13, the CJEU relied on ECtHR case law; in a consumer case, *Philip Morris* (C-547/14) the CJEU referred to the ECHR; likewise, in a data protection case: *I v. Finland*, app. no. 20511/03, of 17 July 2008).

The second perspective mentioned above concerns the application of the **principle of proportionality** to limitations imposed on fundamental rights and freedoms by measures protecting health. The balancing between health and the right to run a business and between

health and data protection provide clear illustrations of the function of proportionality. Looking at more recent fields of judicial intervention, the increasing litigation raised by the challenges brought against governments' measures countering the current pandemic represents an unfortunate treasure trove in this regard, especially at national level, since, for many reasons, the role of European courts has been limited so far.

Many interpretive questions arise in judges' daily work in this area. Under art. 52 CFR, subject to the principle of proportionality, limitations to fundamental rights and freedoms may only be upheld if they *necessarily* and *genuinely meet objectives of general interest* recognised by the Union or the need to protect the rights and freedoms of others. A variety of issues stands before national courts. How should the 'necessity' and the 'genuine' adequacy to meet objectives of general interests be interpreted when there is a need to protect public health? Does the notion of health as a collective rather than an individual right make a difference in this regard? When assessing proportionality, how should judges take into account the costs of restrictive measures impinging on people freedoms? Should they distinguish between economic and non-economic burdens posed by such restrictions or between recoverable and not recoverable losses?

Science may also play a major role in the assessment of restrictions' adequacy. Health related issues often require managing risks in conditions of uncertainty. Governing uncertainty calls for a closer interaction between scientists, policy makers and courts. What if the scientific development does not allow to establish a certain correlation between the limitation and the protection of health, being the positive impact possible but not certain? Here, the principle of proportionality is often combined with the **precautionary principle**, according to which, "where there is uncertainty as to the existence or extent of *risks to human health*, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent. Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because the results of studies conducted are inconclusive, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures" (CJEU, C-616/17, *Blaise*, 1 October 2019, para 43). Is this a general principle of EU law due to complement the principle of proportionality? To what extent can it lead judges to justify restrictions on fundamental freedoms despite the uncertain impact of measures on a poorly known risk? The debate on the use of lockdown and curfews in relation to COVID 19 has been a clear example of interpretative challenges posed by scientific uncertainty on policy makers and courts.

5.1. *Cross-border Healthcare*

The case law of the CJEU is coherent in stating that medical treatments have to be considered as services in the light of EU law. Therefore, the fundamental freedom to provide services applies and Member States could only impose those restrictions that are objectively justified under the exceptions provided by the Treaty norms. Within this area of competence, a high level of health protection should be ensured under art. 35 CFR.

In the case in which a person who is endured in one Member State obtains a medical treatment in another Member State, the provisions of Regulation 883/2004 or those of the Directive 2011/24/EU apply. Therefore, the person is entitled either to have the treatment paid by the healthcare insurance of affiliation, or to have the costs reimbursed. To this end, some requirements must be satisfied. A very controversial point concerns those cases in which prior authorisation is missing. The CJEU gave some clarification on the cases in which the prior

authorisation is not necessary or in which the institution of affiliation must reimburse the costs of medical treatment.

In a recent decision (Case C-777/18 WO v Vas Megyei Kormányhivatal, 23 September 2020), the Court said that the person without prior authorisation is also entitled to reimbursement for a scheduled treatment in an amount equivalent to that which would ordinarily have been reimbursed by that institution if the insured person had been granted such authorisation.

This principle applies in connection with some specific reasons, linked to the interpretation of EU law and namely for reasons relating to his or her state of health or to the need to receive urgent treatment. It is also relevant if the insured person was prevented from applying for such authorisation or was not able to wait for the decision of the home institution on her application ('individual circumstances').

Stemming from the need to assess the relationship between the requirement of prior authorisation and legitimate justifications to restrictions on the freedom to provide services, the CJEU progressively refined its interpretation on individual rights in cross-border healthcare. Among those, the Court specified that the list of medical treatments available in one Member State has to be updated, otherwise the patients is entitled to the reimbursement of the more technologically advanced treatment even without prior authorisation. Similarly, also the structural lack of medical material and medications is a reason to recognise the reimbursement without prior authorisation. The CJEU also gave its contribution in the interpretation of the notion of undue delay, as a reason to be entitled to reimbursement.

More generally, we can observe that the Court worked very carefully in defining a framework for a set of procedural rights that have to be respected by national health authorities and by national court when evaluating a request for prior authorisation or when judging a refusal or the denial of reimbursement. These are inspired to the principle of good administration and of effectiveness of judicial remedies.

5.2. *Health and consumer protection*

Consumer rights may relate to interests that are strictly related to health. The effective protection of consumer rights may contribute to ensure a high level of health protection. When this objective requires limitations on other rights and freedoms, such as the freedom of movement of goods or service, such limitation may also be imposed with due respect of the principle of proportionality under article 52 CFR.

Several guidelines emerge from the analysis of consumer protection in health-related cases:

Effective judicial protection of consumers' health and the right to an effective remedy

As expressed by the CJEU in *Schmitt* (C-219/15):

- Directive 93/42 on medical devices does not create rights for end-users to bring a claim against a surveillance body if it fails in its duty of surveillance, but authorises such rights to be implemented in national law.

- The responsibility of the surveillance bodies must be invoked under the same conditions as the other national responsibility regimes (principle of equivalence) and it must not go against the effective transposition of the directive (principle of effectiveness).

As expressed by the CJEU in *Wasserleitungsverband Nördliches Burgenland and Others* (C-197/18):

- A natural or legal person having the option of drawing and using groundwater and who is directly concerned by a level of nitrate that is capable of limiting that person's option by interfering with the legitimate use of that water, must be in a position to require national authorities to observe those obligations, if necessary by bringing an action before the competent courts.

- The Aarhus Convention in conjunction with Article 47 of the CFREU imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law. Where the EU legislature has, by directive, imposed on Member States the obligation to pursue a particular course of action, the effectiveness of such action would be weakened if individuals were prevented from relying on it before their national courts.

The principle of proportionality and the right to an effective remedy

As expressed by the CJEU in *Sporting Odds* (C-3/17):

- Article 56 TFEU and Article 4(3) TEU, read in conjunction with Articles 47 and 48 of the Charter, do not preclude national legislation that does not provide for the *ex officio* examination of the proportionality of measures restricting the freedom to provide services within the meaning of Article 56 TFEU and which puts the burden of proof on the parties to the proceedings.

- Article 56 TFEU, read in conjunction with Articles 47 and 48 of the Charter provides that it is for a Member State which has put in place restrictive legislation to provide evidence to prove the existence of objectives capable of justifying a restriction on a fundamental freedom guaranteed by the FEU Treaty and its proportionality, in the absence of which the national court must draw all the inferences which result from such a failure.

- Pursuant to Article 56 TFEU, it cannot be said that a Member State has failed to satisfy its obligation to justify a restrictive measure because it has failed to provide an analysis of the effects of that measure on the date on which that measure was introduced into national law or the date of the examination of such a measure by the national court.

- Article 56 TFEU does not preclude a system under which certain types of games of chance falling within the State monopoly system, while others fall within the system of concessions and licences for the organisation of games of chance, if the national courts establish that the rules restricting the freedom to provide services in fact pursues in a consistent and systematic manner the objectives (i.e. public health, overriding reasons of consumer protection and prevention of addiction to gambling) relied on by the Member States concerned.

- Article 56 TFEU precludes a national measure according to which the grant of a licence to organise online games of chance is reserved exclusively to operators of games of chance

holding a concession for a casino situated on national territory as that rule does not constitute a vital condition for the achievement of the desired objectives (i.e. public health, overriding reasons of consumer protection and prevention of addiction to gambling), and considering that there are less restrictive measures capable of attaining such objectives.

As expressed by the CJEU in *Philip Morris* (C-547/14):

- A ban on menthol cigarettes is appropriate and proportionate when weighing the economic consequences of this prohibition against Article 35 of the Charter for ensuring a high level of protection to human health.
- By virtue of Article 52(1) of the Charter and in light of Article 35 thereof, the protection of human health outweighs the entitlement of the businesses right to freedom of expression.
- Interference with a business' freedom of expression, which in turn has implications for various economic interests, is proportional if it meets the objective of the protection of human health.

The precautionary principle in health-related cases

As expressed by the CJEU in *Swedish Match AB* (C-151/17):

- Where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent. Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because the results of studies conducted are inconclusive, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.
- Considerations relevant to the precautionary principle should guide an evaluation of the proportionality of a restrictive measure.

Defective products and the protection of consumers' health

As expressed by the CJEU in *Sanofi* (C-621/15):

- Article 4 of Directive 85/374 must be interpreted, in light of the general **principle of effectiveness**, as not precluding national courts from establishing a causal link between the vaccination and the damages arising from it insofar as the scientific evidence can neither confirm nor rule out such a link and insofar as the evidence brought by the plaintiff can be regarded as serious, specific and consistent by the national courts.
- In cases of scientific uncertainty as to whether vaccination can be linked to a medical condition suffered by the plaintiff, Article 4 of Directive 85/374 must be interpreted as precluding national courts from automatically deriving a causal link in favour of the plaintiff.

As expressed by the CJEU in *Boston Scientific Medizintechnik* (Joined Cases C-503/13 and C-504/13):

- In assessing medical products, courts ought to take into account the products' functions and the vulnerable situation of patients that make use of such products. In the Court's view, therefore, patients are entitled to expect particularly high safety requirements for devices such as pacemakers and defibrillators.
- Article 6(1) of Directive 85/374 must be interpreted as meaning that where it is found that products belonging to the same group or forming part of the same production series, such as pacemakers and implantable cardioverter defibrillators, suffer from a potential defect, national courts may classify as defective all the products in that group or production series without having to establish that the product at hand has such a defect.
- Articles 1 and 9(1)(a) of Directive 85/734 must be interpreted as meaning that the damage caused by a surgical operation that is necessary to replace a defective product, constitutes damage caused by death or personal injuries. The producer of such defective products is liable insofar as the surgical operation is deemed to be necessary to overcome the defect of the underlying product. However, it is for national courts to determine whether that is, or is not, the case.

5.3. *Food safety and effective protection of health*

Food safety regulation is strictly connected with the purpose to ensure a high level of health protection. Its impact on fundamental economic freedoms such as the freedom of movement of goods and the freedom to conduct a business often leads to judicial review of food safety measures in the light of the general principles of EU law, including the precautionary principle and the principle of proportionality.

Precautionary principle, risk assessment and scientific evidence

Given its specific purpose, the precautionary principle does not require scientific certainty over the possible risks for health and environment connected to the use of a product, nor does it require a comprehensive and definitive scientific assessment. If such certainty was required, the very logic of the precautionary principle (i.e. that of a preventive action) would be rendered void of sense. On the other hand, however, the precautionary principle cannot be based on purely hypothetical considerations. A risk assessment must always be carried out or, in alternative, scientific evidence, albeit incomplete, must be available (T-13/99, *Pfizer*; C-236/01, *Monsanto*).

The institutions, when carrying out the risk assessment, must therefore determine the level of protection appropriate for the society and, in the second place, determine the level of risk (i.e. critical probability threshold for adverse effects) which they deem unacceptable and above which it is necessary to take preventive measures in spite of scientific uncertainty.

The burden of proof

The party which invokes the application of the precautionary principle must demonstrate that there is an adequate scientific basis for it. In particular, when the public authorities enact protective measures which are then challenged, they have to demonstrate that they carried out a

thorough risk assessment on the basis of the aforementioned criteria before taking action. If other parties (e.g. private parties) oppose the fact that the public authorities did not take any protective measure, they have to prove that scientific evidence justifying the use of the precautionary principle was available or that the public authorities did not carry out a proper risk assessment (C-236/01, *Monsanto*).

The principle of proportionality

When evaluating the respect of the principle of proportionality in cases where safeguard measures were enacted, the courts may also use a cost/benefit analysis in order to determine whether or not the harm suffered by economic operators targeted by safeguard measures are acceptable (T-13/99, *Pfizer*). However, they must take into account certain points:

i) In the context of the agricultural policy, the European institutions enjoy a wide degree of political discretion in determining the strategies and actions pursuant to the objectives laid out in the treaties. The proportionality test is therefore mostly focused on the appropriateness of the safeguard measures with regard to the risk they want to prevent, since the "necessity" of the intervention may depend on the specific policy objectives pursued by the EU institutions.

ii) When assessing the proportionality of the intervention as well as the cost/benefit analysis, courts must consider that, in principle, the protection of human health takes precedence over economic considerations, also in light of the fact that the economic rights and freedoms laid out in the treaties must also be viewed in relation with their specific social function.

Limitations to the freedom of expression, of information and to conduct a business

The protection of human health, especially in situations of scientific uncertainty, represents a goal of general interest that can justify, together with the other conditions established in art. 52 of CFREU, limitations to the freedom of expression, of information and to conduct a business (C-157/14, *Neptune*).

5.4. *Health and data protection*

Health data are qualified as "special categories of personal data" (art. 9 GDPR), and accordingly, they are subject to a specific regime that takes into account the need of protecting privacy and the right to data protection as well as the importance of data processing for health protection purposes (*e.g.*, the general prohibition of processing, and the exceptions related to health purposes). The need of taking into account both health and data protection emerges also in the interpretation and application of art. 14 of the EU directive on patients' rights concerning the data processing within the context of the eHealth network, with specific regard to the need of ensuring the continuity of care across the Member States. Furthermore, health and data protection are at stake in the interpretation of rules concerning data processing for purposes of scientific research, where the principle of proportionality may play a significant role (EDPS, *Preliminary Opinion on data protection and scientific research*, adopted on 6 January 2020; EDPB *Opinion 3/2019 concerning the Questions and Answers on the interplay between the Clinical Trials Regulation (CTR) and the General Data Protection Regulation (GDPR),* adopted on 23 January 2019).

Moreover, the principle of proportionality, jointly with necessity plays an important role also in the current planning of data processing within Health Data Spaces (EDPS *Preliminary Opinion 8/2020 on the European Health Data Space* on 17 November 2020).

In defining the boundaries of lawful health data sharing and disclosure Art 8 ECHR, enshrining the right to respect of private and family life is of particular importance, as shown by the case law. In the ECtHR case law, the complementarity between data and health protection arises. As to complementarity, in several cases the Court stated that in case of lack of health data confidentiality, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community (*Mockutė v. Lithuania*, app. no. 66490/09, of 27 February 2018; *Z. v. Finland*, App. No. 22009/93, of 25 February 1997; see also *I v. Finland,* app. no. 20511/03, of 17 July 2008; *M.S. v. Sweden,* app. No. 74/1996/693/885, of 27 August 1997; *Avilkina and Others v. Russia*, no. 1585/09, 6 June 2013). Possible conflicts between the protection of health data and other interests emerge in the assessment of the "necessity in a democratic society" of existing interference with the right to private life where the Court applied the principle of proportionality (*Z. v. Finland*, App. No. 22009/93, of 25 February 1997; *Avilkina and Others v. Russia,* no. 1585/09, 6 June 2013; *M.S. v. Sweden,* app. No. 74/1996/693/885, of 27 August 1997).

Furthermore, **as to remedies**, the possibility to claim compensation in case of unlawful disclosure of personal data is considered by the ECtHR not sufficient for ensuring the respect of art. 8 ECHR, as it should be provided practical and effective protection to exclude any possibility of unauthorized access occurring in the first place (*I v. Finland,* app. no. 20511/03, of 17 July 2008).

5.5. *Health and non-discrimination*

Health conditions may be at the basis of discriminatory practices occurring in relationships that fall within the scope of application of EU law. In these instances, a judge may be required to enforce EU law with due regard to the impact that discriminatory practices may have on individual health and, viceversa, on the impact that health conditions may have on individual inclusion and wellbeing from the perspective of non-discrimination law.

Several general guidelines concerning non-discrimination in health-related cases can be extracted from the case law of the CJEU, most of which relate to cases brought concerning discrimination on the grounds of disability:

- The scope *ratione materiae* of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof. This matches the approach taken in cases discussed in cases concerning other aspects of non-discrimination law, such as *MB* (C-451/16, ECLI:EU:C:2018:49). This does not appear to be impacted by the fact that health is a fundamental right. However, the definition of disability itself, which is relatively broad, allows individuals with health issues such as

sickness and obesity to be protected from discrimination on the ground of disability in some circumstances despite the fact that these are not protected grounds in themselves.

Effective protection

In the view of the CJEU as expressed in *Coleman* (C-303/06):

- In order to ensure effective protection from discrimination, it is crucial that individuals who are treated differently on the basis of a particular protected characteristic fall within the scope *ratione personae* of the principle of non-discrimination. This would include, for example, the primary *carer* of a person with health conditions amounting to a disability as well as the person with a disability themselves.

Definition and scope of "disability"

- "Disability" is defined by the CJEU in the same way whether or not the Charter applies in a particular case. It can therefore be inferred that "disability" has the same definition when applied in relation to Article 21 of the Charter as in relation to Directive 2000/78, suggesting in turn that there is a common concept of disability regardless of which source of EU non-discrimination law applies. This definition is based on that found in the UN Convention on the Right of Persons with Disabilities.

In the view of the CJEU as expressed in *HK Danmark* (Joined Cases C-335/11 and C-337/11):

- For the purposes of EU non-discrimination law, "disability" means a limitation which results in particular from physical, mental or psychological (i.e. health) impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.

- Illnesses as such are not a ground of discrimination under the Directive (*Chacón Navas*, paragraph 57), but if limitations having the abovementioned effects on a long-term basis are caused by an illness, they can be covered by the concept of "disability".

- "Disability" does not necessarily equate to total exclusions from work or professional life, but can also cover situations where a person can only work to a limited extent.

- A "disability" need not make an individual incapable of exercising an activity, as long as it provides a hindrance to exercising it.

In the view of the CJEU as expressed in *FOA* (C-453/13):

- If the obesity of a worker causes a limitation as explained above, and the limitation is a long-term one, obesity can be covered by the concept of "disability" within the meaning of Directive 2000/78.
    - "Long-term" includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered.

- A national court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data. Since this evidence falls under the question of whether or not an applicant does indeed have a disability, it may be inferred that it is for the applicant to provide such evidence in order to establish a *prima facie* case of discrimination (based on the rules of burden of proof established in Recital 31 and Article 10 of Directive 2000/78 – see Section 3.3 of the FRICoRe Casebook on EU Fundamental Rights and Non-Discrimination: Effective Protection in the Light of Article 21 of the Charter).

Article 52(1) CFREU

In the view of the CJEU as expressed in *Glatzel* (C-356/12):

- When assessing whether a limitation on the right to non-discrimination contained in Article 21 of the Charter is permissible under Article 52(1) of the same Charter, it is for national courts to determine whether the limitations respect the principle of proportionality.
- From the Court's application in this case, it appears that the limitations allowed under Article 52(1) generally mirror the justifications for differences in treatment found in the equal treatment directives. In the cases discussed in this chapter, health as a fundamental right did not appear to play a role in the proportionality test applied, beyond the requirement in Article 52(1) CFREU that limitations to rights and freedoms protected by the Charter "respect the essence of those rights and freedoms".

5.6. *Migration, Asylum and Health*

In the context of international protection, EU law provides for specific safeguards when the need to protect migrants' health comes into view. It happens in different areas, such as reception condition (article 19 of Directive 2013/33/EU), return procedures (Article 14 of the Return Directive) and with regard to beneficiaries of international protection (article 30 of Directive 2011/95/EU).

The pertinent analysis developed in the pertinent FRICoRe Project has shown that the health status of a migrant can play a role even when its protection – or its relevance within the concrete area covered by EU law – is not formally requested. Thus, there is a need to consider also this aspect – more concretely, the impact of a national authority's decision in terms of migrant's health – when Member States use their legitimate discretion for implementing EU law (return, reception, family reunification). It becomes a criterion which integrates the concrete enforcement of different areas of migration law, and international protection in particular. It may happen in different areas of EU migration law, such as – among others – irregular migrants, asylum seekers under Dublin III Regulation, residence permit on health grounds and family reunification. From this perspective, it is worth underlying that it is possible to derive from the CJEU's case-law the identification of "inter-sectorial" concepts and criteria which become relevant in different contexts, such as "grave and irreversible deterioration of health", "serious illness", "dependency".

At the same time, migrants' health situation does not automatically become relevant, possibly limiting Member States' scope of intervention. On the contrary, States are often free to decide whether to protect on this ground (i.e. family reunification) and to establish the concrete safeguards to be provided with the aim of protecting migrants' health (i.e. cases related to the absence of the duty to grant subsidiary protection). At the same time, States' choices must be measured – in terms of proportionality, effectiveness of the protection and compatibility with the CFREU – also in the light of a proper/adequate assessment of the relevance of migrant's state of health. It happens especially in case of serious illness affecting a migrant (suspensive effect of appeal against denial for international protection); here, the need to protect migrant's health may become an "indirect" reason of protection, such when it contributes to guarantee the effectiveness of the principle of non-refoulement or when it provokes the suspension of transfers to other Member States under the Dublin III Regulation. It must also be underlined that it seems to express a procedural – more than a substantive – relevance within the CJEU assessment. In general terms, it appears from the CJEU case-law that when migrant's health comes into view, special procedural safeguards must be implemented when Member States assess migrants' applications.

Significantly enough, in many of the analysed cases, the reference to article 47 – often in conjunction with articles 4 or/and 19.2 – of the CFREU becomes essential in order to give relevance to health status; at the same time, the latter becomes a condition for the concrete respect of the formers, as it happened in the case of the need to confer suspensive effect to an appeal against a return decision (*Abdida*, C-368/98). The link between health and effectiveness of protection guaranteed by EU law may lead to broaden the scope of the latter up to include also third subject related to migrant affected by a serious illness (*LM,* C 402/19).

To this end, the CJEU often calls national judges to provide a scrutiny targeted to assessing the existence – and the proper and effective enforcement – of adequate procedural safeguards when health status becomes relevant. It may happen also by exercising a duty to cooperate, for instance by assessing existing evidence on the concrete case or acting *ex officio*, when the special nature of rights or principles (i.e., the principle of non-refoulement) at stake requires it (*S.K.*, C-578/16PPU), or even by not applying national law contrary to the EU law and principles (*B.*, C-233/19).

5.7. *Health and COVID*

Covid-19 has posed new challenges that are modifying the modes of interaction between EU institutions and MSs. Developed in the framework of art. 168 TFEU, the EU vaccine policy and the EU Digital COVID Certificate[6]) provide good examples of a much broader set of issues generated by the pandemic shaping a new institutional equilibrium thereof (see Commission Communication, *Building a European Health Union*, 11 November 2020, COM(2020)724 final)). National judiciaries have been guardians of citizens' rights and have reviewed governmental choices in the context of pandemic emergency. The scope of judicial review in times of pandemic has gained more relevance, given the delegation of power to the executives by the legislators. It is too soon to say whether the principles emerging from this case law are likely to stay or will be

[6] Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic.

associated with emergency time. Clearly the challenges both at national and EU level are unprecedented, calling for a conceptual legal framework different from the one used for previous health crises. Here is a small selection of guidelines emerging from European and (mostly) national caselaw on two major issues addressed by court within the Covid-19 litigation: the vaccination mandates and the impact of health related measures on data protection.

The fundamental right to health and the vaccination mandate

Though not related to Covid-19 vaccines, the recent case *Vavřička and Others v. the Czech Republic*, decided by the ECtHR on 8 April 2021, has provided some guidelines in the field of mandatory vaccination. The Court, as usual in its case law, assessed the compatibility of that legislation assessing: i) the existence of an interference with art. 8 ECHR, that was considered proven in that case; ii) justification of the interference (in accordance with the law; necessity in a democratic society, including proportionality test). In this respect, the Court stated that the interference was provided for by law, and focuses on the assessment of **the necessity of the measure in a democratic society**. In the **proportionality assessment**, which is part of the necessity test, the Court considered several elements: **i)** the general consensus of States on the effectiveness of vaccination as a mean of vital importance for protecting populations against diseases that may have severe effects on individual health, and that, in the case of serious outbreaks, may cause disruption to society**; ii)** the safety of vaccines and the risk of relevant negative consequences, **iii)** the means of enforcement of mandatory vaccination in case of violation of that obligation **iv)** the possibility for the authorities to react with flexibility to the epidemiological situation and to developments in medical science and pharmacology; **v)** the transparency of decision making; **vi)** the existence of a conflict of interest in authorities which takes decision was not proven by the applicants.

Once vaccination has been available in the context of the Covid-19 pandemic and some States have adopted measures to either promote or impose it to one or more groups of people, national courts have been asked to review the validity of legislative measures introducing such impositions. A few examples follow.

The **Slovenian Constitutional Court**, with the judgment No. UI No.210/21, dated November 29, 2021 and published on December 6, 2021, upheld the appeal filed by some public employees against a government decree, requiring all public sector employees the vaccine against Covid19 as of October 1, 2021, in order to perform duties at the workplace, on the premises of the employer or other state agency, administration. The Court declared this regulation unconstitutional and stated that mandatory vaccination requires a prior amendment to the Law on Infectious Diseases, effectively postponing the choice on the introduction of mandatory vaccination to parliamentary discussion, in order to be introduced into the legal system.

On 14 February 2022 the **French Council of State** rejected the argument that the application of a booster dose for people under the age of sixty-five was an inappropriate, unnecessary, and disproportionate measure. The Council of State heavily relied on scientific evidence to justify this type of mandatory vaccination, including based on reports by the relevant health authorities

On 22 March the Sicilian administrative court referred to the **Italian Constitutional Court** the constitutionality question about mandatory vaccination for health care professionals established by the Italian law in 2021. The administrative court asked the Constitutional Court whether the law complies with the constitutional requirements on legislation related to vaccines that impose balancing between the collective benefits stemming from mandatory vaccination and the individual costs. The limitations of the right to self-determination must be fully justified by the

protection of collective health according to the principles established by the Italian Constitutional Court (Judgment 5/2018). The referring court, however, highlighted the differences between the principles related to mandatory vaccination in ordinary times and those in pandemic emergency. It asked the Constitutional Court to revise the criteria for mandatory vaccination in times of pandemic particularly in relation to the pharmacovigilance and monitoring associated to vaccines subject to conditional authorization. The decision is still pending.

Data and Health protection in the light of the principles of proportionality, of data minimization, and of art. 8 CFR

During the pandemic, data processing operations were conducted in relation to the COVID-19 for several purposes. Within the case law, documents and decisions of data protection authorities, the following issues emerge, among others:

i) the impact of the principles of proportionality, of data minimization, of the right to data protection on the assessment concerning the lawfulness of processing of personal data for purposes related to COVID-19, such as processing for contact tracing purposes (e.g., EDPB, *Guidelines 4/2020 on the on the use of location data and contact tracing tools in the context of the COVID-19 outbreak*; as to the application of proportionality, see the decision of the French Constitutional Council no. 2020/800 of 21 May 2020 and the decision no. 2020/800 of 21 May 2020; Norwegian DPA of 17 August 2020), for scientific research purposes (see EDPB *Guidelines 03/2020 on the processing of data concerning health for the purpose of scientific research in the context of the COVID-19 outbreak*, adopted on 21 April 2020), or for monitoring the pandemic (French Council of State, decision no. 440916 of 19 June 2020) and the establishment of a system of certificates concerning medical events such as vaccination or recovering (e.g., EDPB-EDPS *Joint Opinion 04/2021 on the Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery*, adopted on 31 March 2021).

ii) the role of the abovementioned principles in defining the criteria for evaluating the lawfulness of data processing aimed at ensuring the enforcement of health security rules established for facing the COVID-19 pandemic (e.g., on data processing through drones see Council of State, decision of 18 May 20220, nn. 440442, 440445; Council of State, in its decision of 22 December 2020, n°446155; on the mandatory collection of contact details for catering establishments see Austrian Constitutional Court, decision no. V 573/2020, of 10 March 2021).

iii) the need to ensure effective data protection in relation to data transfers outside the EEA for purposes related to COVID-19, also considering the impact of the *Schrems Facebook Ireland case* on national case law (e.g., French Council of State, in its **decision n°444937, of 13 October 2020**).