ERA
Academy of European Law

YOUNG LAWYERS CONTEST 2021

221DT23 Trier, 4-5 Februrary 2021

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With the support of the Justice Programme 2014-2020 of the European Union

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Online Young Lawyers Contest 2021

EU law in practice

Trier, 4-5 February 2021 CET

UP GRADE
YOUR LEGAL EXPERTISE

Professional Training (CPD)
www.era.int

List of Jurors

Antigoni Alexandropoulou, Chair of the Company Law Committee of the CCBE; Lawyer in Private Practice; Assistant Professor of Corporate and Commercial Law, European University Cyprus, Nicosia

Wendy De Bondt, Assistant Professor of criminal law and rights of the child, Faculty of Law and Criminology, Department of Criminology, Criminal Law and Social Law, University of Ghent

Gráinne Gilmore, Barrister, Member of the Bar of Ireland, Dublin

Vanessa Knapp OBE, Independent Consultant; Visiting Professor, Queen Mary University of London

Łukasz Lasek, Partner, Wardynski & Partners law firm, Warsaw

Daniel Sarmiento Ramírez-Escudero, Legal Counsel, Uría Menéndez, Madrid

Michael Schweiger, Partner, Loyens & Loeff, Luxembourg

www.younglawyerscontest.eu

Key topics

- Criminal law
- Fundamental rights
- Access to data
- Company law
- Data protection

Language
English

Event number
221DT23

Organiser
Florence Hartmann-Vareilles (ERA)

Partner
Warsaw Bar Association (Izba Adwokacka w Warszawie)

Supporting organisation
Council of Bars and Law Societies of Europe (CCBE)

Co-funded by the Justice Programme of the European Union 2014-2020

Young Lawyers Contest 2021

Thursday, 4 February 2021

08:00 Teams receive the documentation of the contest via e-mail

08:15 **Connection to VirBELA**

CONFERENCE HALL

08:45 **Opening and introduction to VirBELA and to the rules of the contest**
Stage (public sphere*) : *Florence Hartmann-Vareilles, Antigoni Alexandropoulou, Wendy de Bondt, Grainne Gilmore, Vanessa Knapp, Lukasz Lasek, Daniel Sarmiento*

I. FIRST ROUND: ORAL DEFENSE SESSION OF THE WRITTEN REPORT

09:00 **Defence of teams' written reports (5 parallel sessions)**
(**private sphere*/count down timer**)
Each team/jury is invited to sit at its designated table. Each team is given 10 minutes in order to introduce its written report to jury and the other team(s)

Table A : **Team 3 and Team 5** (7 persons)
Topic: juvenile delinquency
Lukasz Lasek

Table B: **Team 10 and Team 11** (7 persons)
Topic: juvenile delinquency
Jury: *Wendy de Bondt*

Table C: **Team 1 and Team 4** (8 persons)
Topic: Access to Justice
Jury: *Antigoni Alexandropoulou*

Table D: **Team 6 Team 7 and Team 8** (10 persons)
Topic: Access to justice
Jury: *Grainne Gilmore*

Table E **Team 9 and Team 2** (7 persons)
Topic: Access to justice
Jury: *Vanessa Knapp*

Table M : **Jury /ERA organisers**

Jury « tour de table »: *Daniel Sarmiento*

09:45 **Questions and answers by Teams and Jury (private sphere)**
Each team is given 5 minutes in order to ask 1 to 2 questions to the other team(s), before the jury is invited to ask questions to the different teams. Each team is given 10 minutes to answer the questions.

CONFERENCE HALL / LARGE BREAK OUT ROOM

11:00 Break and networking

CONFERENCE HALL

11:30 **Wrap up session with Jury and Teams: what went right and wrong?**
(**private sphere)**
Jury and teams join their tables. Jury comments on teams' pleadings and gives tips and tricks to teams

12:00 Lunch break for participants and Jury deliberation

II. SECOND ROUND: NEGOTIATION EXERCISE

CONFERENCE HALL

13:15 **Preparation of negotiation exercise (private sphere/Count down timer)**
Teams are invited to sit at their designated table. Jury makes a tour de tables in conference hall, and answer to potential questions raised by participants
Table A Team 1
Table B Team 2
Table C Team 3
Table D Team 4
Table E Team 5
Table F Team 6

Objective

The competition will bring together future lawyers from different European countries at a time when they are undergoing entry-level training to enable them to share common values, exchange new experiences and discuss fresh perspectives in areas of shared interest. Building a genuine European legal culture and fostering valuable synergies among legal professionals from different Member States will contribute to strengthening the area of freedom, security and justice in the EU.

Who should attend?

Trainee lawyer or, in jurisdictions in which initial training does not include a period of legal practice, newly qualified lawyers.

You will learn how to…

- Identify and deal with European issues in legal practice
- Develop skills necessary to successfully work with colleagues from other Member States
- Defend the rules of law through a moot Court on the promotion of European perspectives and values
- Develop the critical thinking and communication skill in negotiation

Virtual Platform

The competition will be hosted on the virtual reality platform VirBELA. You will be able to interact immediately and directly with the jury, the members of your team, and other participants.

**

Public sphere/Public chat: your conversation can be heard by all/ can be seen by all. The public sphere will be opened each time ERA takes the floor on the stage, and during the breaks

Private sphere/private chat: your conversation can only be heard/seen by the persons belonging to the private sphere (marked by a blue circle). You can share documents via chat in this sphere. The private sphere will be organised as soon as the teams start their pleadings.

Times indicated are CET
(Central European Time)

Table G Team 7
Table H Team 8
Table I Team 9
Table J Team 10
Table K Team 11
Table L Team 12
Table M: Jury/ERA organisers

14:15 Break (public sphere)

14:30 **Oral negotiation (private sphere/count down timer)**
Each Team/jury joins its table. It is confronted to another team in front of a jury. Each team is given 10 minutes in order to give its position, before the negotiation continues in order to reach an agreement

Table A: **Team 1 and Team 3**
Jury: Daniel Sarmiento

Table B: **Team 9 against Team 5**
Jury: *Gráinne Gilmore*

Table C **Team 2 and Team 12**
Jury: *Vanessa Knapp*

Table D: **Team 4 against Team 8**
Jury: *Lukasz Lasek*

Table E: **Team 6 against Team 11**
Jury: *Antigoni Alexandropoulou*

Table F : **Team 10 against Team 7**
Jury: *Wendy de Bondt*

Jury "tour de Table » : Michael Schweiger

15:30 **Wrap up session with the Jury: what went right and wrong? (private sphere)**
Jury and teams join their tables. Jury comments on teams' pleadings and gives tips and tricks to teams

16:00 End of first day on VirBELA (**public sphere**) and Jury deliberation

ZOOM

18:00 **Get together**
Each candidate is offered the opportunity to introduce in one or two minutes (max) her/his favourite drink or food speciality of her/his area or country of origin

19:00 End of the first day

Friday, 5 February 2021

08:30 Access to VirBELA

CONFERENCE HALL

Stage (public sphere) : *Florence Hartmann-Vareilles, Antigoni Alexandropoulou, Wendy de Bondt Grainne Gilmore, Vanessa Knapp, Lukasz Lasek, Daniel Sarmiento*

Table A Team 1
Table B Team 2
Table C Team 3
Table D Team 4
Table E Team 5
Table F Team 6
Table G Team 7
Table H Team 8
Table I Team 9
Table J Team 10
Table K Team 11

What participants said about former Contest

"I strongly recommend to young lawyers and trainee lawyers across Europe to enrol in the next Young Lawyers Contest. It is a great opportunity to meet and work with colleagues from different cultures and backgrounds."

Vincent Berthier-De Bortoli
Member of 2018 winning team

Your contact persons

Florence Hartmann-Vareilles
Head of Section Business law
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Nathalie Dessert
Assistant
E-Mail: ndessert@era.int

Save the date

Summer Course on European Intellectual Property Law
Online, 21-25 June 2021

Summer Course on EU Financial Regulation and Supervision
Trier, 28 June-2 July 2021

Summer Course on EU Antitrust Law
Trier, 5-9 July 2021

Summer Course on EU Public Procurement Law
Trier, 13-17 September 2021

Summer Course on European Information Technology Law
Trier, 20-24 September 2021

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www.era.int/elearning

08:45 **Announcement of the two winning teams for the final round**

I. THIRD ROUND: MOOT COURT

CONFERENCE HALL

9:00 **Teams Briefing before pleading (private sphere/count down timer)**
The two winning Teams sit at their designated tables and prepare their pleading- The other Teams prepare one or two questions for the two winning teams.

10:00 **Oral Pleading by First Team (public sphere)**
The two winning teams are invited to stand on the stage. The jury sits on the chairs or stand on the podium

10:30 **Oral Pleading by Second Team (public sphere)**

11:00 **Questions by Jury and by the other Teams (public sphere)**

11:30 **Response by Second Team (public sphere)**

11:45 **Response by First Team (public sphere)**

12:00 **Wrap up session with the Jury: what went right and wrong? (public sphere)**

CONFERENCE HALL OR LARGE BREAK OUT ROOM

12:15 Break/ Jury deliberation

CONFERENCE HALL

13:00 **Announcement of winning Team and prize award (public sphere)**
Teams sit on their tables in the conference hall: Jury and two winning teams are invited to join the stage. Jury announces the winning team and award prices.

14:00 End of the Contest

This programme has been produced with the financial support of the Justice Programme 2014-2020 of the European Union.

The content of this programme reflects only ERA's view and the Commission is not responsible for any use that may be made of the information it contains.

Team 1	**Topic: Access to Justice**
Robert BRODZIK (PL)	
Rosanna LAURIKAINEN-KLAMI (FIN)	
Cindy SVIHALEK (SK)	
Oana MANU (RO	
Team 2	**Topic: Access to Justice**
Patrycja POLACZEK (PL)	
David MINCA (FR)	
Alexandra Madalina ION (RO)	
Team 3	**Topic: juvenile delinquency**
Aleksander PETRYS (PL)	
Ioan Victor MATEESCU (RO)	
Andrea Fernández GRYMIERSKI (SP)	
Team 4	**Topic: Access to Justice**
Laura DORNEANU (RO)	
Julius MALKA (FIN)	
Laura COECKELBERGHS (BE)	
Team 5	**Topic: juvenile delinguency**
Patricycja SIKORSKA (PL)	
Raluca LUNGU (RO)	
Anne-Valentine RENSONNET (BE)	
Team 6	**Topic: Access to Justice**
Bianca FLOREA (RO)	
Demian BOŠKA (SK)	
Vittoriano TODISCO (IT)	
Team 7	**Topic: Access to Justice**
Bartolomiej GILEWSKI (PL)	
Lili ALBERT (HU)	
Lavinia ILEANA (RO)	
Team 8	**Topic: Acess to Justice**
Mateusz TOMCZAK (PL)	
Andromachi ANASTASIOU (GR)	
Dóra Éva BAKSA (HR)	
Team 9	**Topic: Access to Justice**
Lukasz OSTAS (PL)	
Patrik ALBRECHT (CZ)	

Stephanie DE POTTER (BE)	
Team 10	**Topic: juvenile delinquency**
Martin GROEGER (PL)	
Gabriela PETÁKOVÁ (SK)	
Ceile VARLEY (IR)	
Team 11	**Topic: juvenile delinquency**
Piotr SZCZEPAŃSKI (PL)	
Andrea STĂNICĂ (RO)	
Alina ŠKILJIĆ (CR)	
Team 12	Negotiation exercise
Martin Kisgyörgy (HU)	
Jan-Konstantin Federer (D)	
Tom Vallée (FR)	

First round of the Young Lawyers Contest

Topics for the Young Lawyers Contest 2020-2021

First round: written and oral exercise

One topic to be chosen among the following two questions:

Question on access to justice and access to documents

The covid-19 outbreak has created unprecedented turmoil with significant impact on the functioning of key public services. In the case of the justice system of the Member States of the EU, many courthouses have been shut down as a means to halt the fast expansion of the virus. In several Member States, the lockdowns of courts have included criminal courts, as well as family courts and courts with jurisdiction over minors. Due to the sudden outbreak, the justice systems of these Member States were not ready to go on-line and provide certain services, like the holding of hearings or deliberations, through remote access. Some of these lockdowns have lasted three months. In other Member States the lockdowns are still ongoing and cases are being handled only in the event of extreme urgency. This has led to situations in which access to justice has been denied or at least severely disrupted.

Does this situation have any link with EU Law? In what cases, if any, would EU law apply and what would be the relevant provisions to be invoked? If the Charter of Fundamental Rights of the EU is to apply, are the measures taken by Member States as a result of the covid-19 outbreak justified under Art. 52 of the Charter? Besides jurisdictional remedies, could the affected parties make use of any non-jurisdictional remedies provided under EU Law?

Question on juvenile delinquency law

The Directive on the rights of children confronted with a criminal procedure (EU/2016/800), establishes that it is possible for a European Arrest Warrant to be issued against a minor (see Art. 1.b). In the Framework Decision on the European Arrest warrant (2002/584/JHA), it is stipulated however, that the European Arrest Warrant may be refused if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State (see Art. 3.3). It is unclear how “criminally responsible” and “under the law of the executing state” should be interpreted. Different from the Council of Europe (in light of the applicability of Article 6 ECHR), the European Union has not listed criteria based on which it can be determined whether or not a national legal system should be qualified as either or not criminal in nature. Should the ECHR criteria apply in this context? Does this mean that if a juvenile justice system is considered ‘criminal’ in nature for the ECHR, it is also a form of ‘criminal responsibility’ in light of the refusal grounds in the European Arrest Warrant? How would you qualify a ‘criminal procedure’ in light of determining the scope of the EAW?

To what extent are individual member states allowed to freely qualify juvenile justice systems as either or not criminal in nature, to decide on the scope of the refusal grounds of the European Arrest Warrant?

Written Report for Young Lawyers Contest

COVID-19 AND ACCESS TO JUSTICE IN THE EU MEMBER STATES

Robert Brodzik
Rosanna Laurikainen-Klami
Cindy Svihalek

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I. SCOPE OF THE REPORT

This report is drafted as a part of the Young Lawyers Contest organized by the Academy of European Law in years 2020/2021. It examines the link between the EU legislation and the problems and threats caused by COVID-19 pandemic to access to justice in the EU Member States.

The restrictions imposed by the Member States in response to the health threat caused by the pandemic have on several occasions resulted in limitations to access to justice. Right to access to justice in the European Union context is determined in the EU Charter of Fundamental Rights (Charter), and this report examines whether and in which cases this right is applicable in the bodies of the Member States, as well as the content of the right as described in the Charter. The right to access to justice is not absolute, and the Charter imposes framework for legitimate limitations. The report addresses also the justification of the restrictions imposed in the Member States taking into account the framework and conditions of the Charter as well as the jurisdictional and non-jurisdictional remedies the parties may invoke in case their rights have been violated.

II. CONCLUSIONS

a. The situation with the COVID-19 pandemic has a **strong link to EU law**, which defines, inter alia, the right of access to justice. Any action by Member States, including adopted law in relation to the application of human rights restrictions, can be assessed from the point of view of EU law, including judicial review by the CJEU and the ECHR.

b. The application of the law and the admissibility of the assessment of actions and regulations of Member States to restrict fundamental rights shall be subject to judicial review in each case of such restriction. The normative framework is determined primarily by the EU Charter of Fundamental Rights, i.e. Article 47 (right to an effective remedy and to a fair trial), partly Article 48 (right to defense) and Article 52 (scope and interpretation of rights and principles). The provisions of Articles 4(3) and 19 of the Treaty on European Union defining the legal framework for the application of EU law will also be related to this, and the provisions of the European Convention on Human Rights and Article 15 are complementary.

c. Given the scale of the threat posed by COVID-19, in particular the threat to life and health, as well as the lack of appropriate measures to assess the threat and to address it effectively, the **measures taken by the Member States should in principle be considered acceptable and justified**. It should be noted that it is important to apply the principle of proportionality and to apply measures in proportion to a rapidly changing situation. Circumstances in which Member States restrict the right of access to justice beyond current possibilities and knowledge should be adapted in order to minimize the burdens. However, the uniqueness of a pandemic, which constitutes a force majeure and a threat to values of a greater legal interes, **we consider restricting the right to justice to be justified under Article 52 of the EU Charter of Fundamental Rights**.

d. Member States have the competence to uphold actions of individuals seeking protection against national measures that are incompatible with EU law or financial compensation for the damage caused by such measures. Therefore, besides jurisdictional remedies **the affected parties are able to make use of various non-jurisdictional remedies provided under EU law** which are closely specified in the Report such as, inter alia, submitting a file to whether national or regional ombudsmen, initiating infringement proceedings conducted by the Commission, submitting petitions to the EU Parliament's Committee on Petitions on issues related to EU policy or law, as well as filing a complaint to the European Ombudsman.

III. ASSUMPTIONS

a. To the extent that EU law refers to the domestic law of the Member States, this report does not take into account issues relating to the legal systems in individual countries, including constitutional traditions.

b. We assume, to the best of our knowledge, that the restrictions on access to justice imposed by the Member States are only temporary in nature and that none of them is in any way permanent.

c. We assume that, from a medical point of view, the COVID-19 pandemic poses a serious threat to the health and life of people in all Member States, and these effects can be counteracted by isolating individuals. We also assume that the consequences of the pandemic were not reasonably foreseeable.

IV. FACTUAL CIRUMSTANCES

Due to the serious health risk caused by the COVID-19 pandemic, states around the world have been forced to introduce emergency legislation and, by the powers conferred by those as well as normal legislation, impose restrictions to everyday life of their citizens. Justice systems have been affected by these restrictions both directly and indirectly. Justice institutions as well as the individuals working in them and using them, have been required to comply with relevant social-distancing regulations. The restrictions have forced the courts to reduce their activities and have, in some cases, led to temporary closures of courts.[1] This has impacted to the course of pending proceedings as well as filing of new ones. Non-urgent trials have been postponed to later dates, in many cases also suspending procedural and enforcement action deadlines and processes have been transferred into written ones.[2]

This has raised concerns regarding the realization of access to justice. On the other hand, technological means have been increasingly put to use as countries around the world have taken steps to find alternative means to provide access to justice and facilitate resolution of legal problems in the face of the pandemic. The increased use of technology and remote access to court has provided tools which have been undoubtedly necessary. However, in several cases the introduction of these

[1] See for example Council of Europe: Management of the judiciary – compilation of comments and comments by country, available at: https://www.coe.int/en/web/cepej/compilation-comments

[2] In the European Union context see European e-justice portal https://e-justice.europa.eu/content_impact_of_the_covid19_virus_on_the_justice_field-37147-en.do. There is also a preliminary ruling pending before the European Union Court of Justice, C-220/20, concerning these issues.

measures has been executed in prompt schedules and has, thus, evoked some concerns and conversation regarding for example equal access to these tools.[3]

V. ANALYSIS

1. Legal framework

Access to justice is an essential element of the rule of law recognized both in the EU level as well as in the field of international human rights.[4] In the EU level, access to justice is primarily seen as the access of individuals or legal persons to the judicial system of the Union.[5] It signifies an individual´s right to go to court to obtain a remedy in case her/his rights have been violated. It applies in civil, criminal and administrative law and is both a process and a goal, as it is crucial when seeking benefit from other procedural and substantive rights.[6]

Access to justice is guaranteed in Article 47 of the Charter as a right to an effective remedy and to a fair trial. According to the Article "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."*[7]

Article 48 of the Charter specifies the right further by guaranteeing a presumption of innocence and a right of defense for anyone who has been charged in criminal proceedings. In addition, more specific regulation is given by secondary law. These include for example Legal Aid Directive (2002/8/EC)

[3] See for example Golubeva, But and Prokhorov: Access to justice due to Covid19 pandemic. Revista de Derecho, Vol 9(II)(2020), pp. 47-64.
[4] Many of the rights in the Charter are also included in the European Convention on Human Rights (ECHR). The rights of ECHR and the Charter overlap in many situations and are to be interpreted convergently. See Explanations relating to the Charter of fundamental rights (2007/C303/02), explanation of Art 52.
[5] Nasiya Daminova: `Access to justice´ and the development of the Van Gend en Loos doctrine: The role of courts and of the individual in EU law. Baltic Journal of Law and Politics 10:2 (2017): 133-153. p. 135.
[6] Handbook on European law relating to access to justice. European Union Agency of Fundamental Rights and Council of Europe 2016, p. 16.
[7] In the ECHR access to justice is guaranteed in Articles 6 and 13. Compared to Article 47 of the Charter there is a difference in terms of applicability. Article 6 of the ECHR applies to all situations falling within the definition of "*criminal charges or civil rights and obligations*", whereas Article 47 of the Charter only applies when Member States are applying EU law. In this sense, Article 47 provides a less comprehensive system of protection. On the other hand, as most of the EU Member States are also States Parties to the ECHR, the ECHR may apply in situations which the Charter doesn´t. See Handbook on European law relating to access to justice 2016, p. 20.

and Directive 2013/48/EU on the right to access to a lawyer in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings and Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.[8]

The Charter is applicable not only to the institutions of the Union, but also to Member States when they are implementing EU law. This is established in Article 51 regarding the field of application of the Charter: ”*The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. ---”*. The explanations of the Charter states that the Charter´s obligations apply when Member States are acting “*within the scope of EU law*”. The Court of Justice of the European Union (CJEU) has confirmed that “*implementing*” and “*in the scope of*” carry the same meaning. It covers situations where Member States are, for example, implementing EU directives and regulations.[9] The right of access to justice must be applied directly by courts of the Member States whenever rights and freedoms guaranteed by EU law are involved.[10]

The effective application of EU legislation in the Member States is guaranteed in Articles 4(3) and 19 of the Treaty on European Union. Article 4(3) requires the member states to take appropriate measures to ensure the fulfilment of obligations arising from EU law and Article 19 requires Member States to provide sufficient remedies that ensure effective legal protection in the field covered by EU law.[11] Thus, it is for the Member States to establish a system of effective legal remedies and procedures that ensure respect for rights conferred by EU law and as a consequence national legislation shall not undermine the effective protection of these rights.[12]

On the other hand, the right to access to justice is not absolute. Article 52 of the Charter determines the framework for legitimate limitations by stating: *“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they*

[8] Handbook on European law relating to access to justice 2016, p. 62-63.
[9] Handbook on European law relating to access to justice 2016, p. 20.
[10] Handbook on European law relating to access to justice 2016, p. 29. See also p. 5-10 of George Arestis: Fundamental rights in the EU: three years after Lisbon, the Luxembourg Perspective. Cooperative Research Paper in College of Europe, Department of European Legal Studies and Department of European Political and Administrative Studies 02/2013. Available at http://aei.pitt.edu/43293/.
[11] Handbook on European law relating to access to justice 2016, p. 19.
[12] See f. e. joined cases C-87/90 – C-89/90, Verholen etc. para. 24 and case C-432/05, Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern, 13 March 2007, para. 42.

are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. ---"

In addition, derogation clauses in international human rights standards permit states to temporarily adjust some of their legal obligations in exceptional circumstances.[13] In fact, the possibility of this kind of derogation as regard to Article 15 of European Convention on Human Rights (ECHR) is especially acknowledged in the explanations of the Charter, with some prerequisites. According to Article 15 of ECHR, a state may derogate from its obligations in times of war or other public emergence threatening the life of the nation. However, Section 3 of Article 15 includes a notification requirement from a derogating state to the Council of Europe, and a failure to deliver this notification results in non-applicability of Article 15. The notification need not to be made before introducing a derogation, but without any unavoidable delay.[14]

2. Content of the right to "access to justice"

The term "*access to justice*" concludes Article 47 of the Charter as a whole. It follows that access to justice takes many forms[15] and unjustifiable restriction to any of them may, in principle, be a violation of EU law. To understand these possible violations, we need to take a closer look at the content of the concept.

Access to court is an important element of access to justice as courts provide protection against unlawful practices and uphold the rule of law. Access to court includes, for instance, access to information and to court judgements as well as availability of interpretation.[16] The concept of "*a court*" has also been an issue of discussion and the CJEU has determined the features of a body to be qualified as court (or a tribunal).[17] In addition, for the process to be due, the court must be independent and impartial.[18] Also efficiency is required.[19]

[13] Handbook on European law relating to access to justice 2016, s. 29, with a reference to ECHR Article 15.
[14] Guide on Article 15 of the European Convention on Human Right, 9/2016, updated 8/2020, p.12.
[15] Access to justice in Europe: an overview of challenges and opportunities. European Union Agency for Fundamental rights 2011, p. 15. See also p. 16 according to which also other terminology is used interchangeably or to cover particular elements of access to justice. These are effective remedy, access to court, fair trial, redress, judicia protection and due process
[16] Handbook on European law relating to access to justice 2016, s. 25.
[17] See C-54/96, Dorch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH, 17 September 1997, para 23.
[18] As regard to impartiality, see f. e. C-506/04, Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg, 19 September 2006, para. 53, and regarding independence see f. e. C-24/92, *Pierre Corbiau v. Administration des contributions*, 30 March 1993, para. 15.
[19] Handbook on European law relating to access to justice 2016, s. 28.

Right to a fair trial requires a hearing that is both procedurally fair and public. The right to a fair hearing consists of the rights to equality of arms, to adversarial proceedings, to a reasoned decision and to secure the execution of a final judgement.[20] Equality of arms refers ensuring that each party has a reasonable opportunity to present its case in conditions that do not disadvantage either party. Adversarial proceedings refer to the right to have knowledge of, and comment on, all evidence filed to influence the court´s decision, the right to have sufficient time to familiarize oneself with the evidence before the court and the right to produce evidence.[21] The right to a public hearing, helps to promote confidence in courts by rendering visible and transparent administration of justice. The right implicitly refers to organization of oral hearings, but limitations may be imposed in some circumstances, for instance in civil cases concerning legal issues of limited nature.[22]

Right to legal aid is provided in Article 47 of the Charter. Furthermore, Article 48 guarantees the right of defense for anyone who has been charged.[23] Member States are free to decide how to meet their legal obligations and, therefore, the legal aid systems vary widely. [24] The substantial factor is that legal aid shall be available when the lack of such aid would result in impossibility to ensure an effective remedy.[25]

Right to be advised, defended and represented exists in both criminal and non-criminal cases. In non-criminal proceedings reasonable restrictions may be placed thereon and whether providing legal representation depends on the specific circumstances of each case, in particular the nature of the case and the applicant´s background, experience and level of emotional involvement.[26] In criminal proceedings, by contrary, the right has a more essential role and is specifically guaranteed in Article 48 of the Charter. For instance, the right to legal assistance applies to the entire criminal proceedings and requires effective presentation.[27]

[20] Handbook on European law relating to access to justice 2016, s. 40-41.
[21] Handbook on European law relating to access to justice 2016, s. 43-44.
[22] Handbook on European law relating to access to justice 2016, p. 45-47.
[23] Handbook on European law relating to access to justice 2016, p. 67.
[24] Handbook on European law relating to access to justice 2016, p. 58.
[25] Explanations relating to the Charter of fundamental rights (2007/C303/02), explanation of Art 47.
[26] Handbook on European law relating to access to justice 2016, p. 74.
[27] Handbook on European law relating to access to justice 2016, p. 78.

3. Legitimate limitation in accordance with the Charter

According to Article 52 of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided by law and respect the essence of those rights and freedoms. The essence of the right of access to justice is the actual possibility of an autonomous and independent court, including the right to a fair trial, the right to legal aid, as well as the right to be advised, defended or represented. The essence of this right is that it should be applied equally to all individuals who are entitled to it and on an equal footing. The essence of the access to justice right consists of the possibility of benefiting from judicial protection and as regards the proceedings before the court. Another factor having an impact on the access to justice is the possibility of an independent assessment, as well as control over the social factor, for example, by means of a jury or by conducting a public trial. To the extent that the restriction in question is not aimed at the essence of the right, the restriction will remain admissible under the other conditions listed below.

Subject to the principle of proportionality, limitations may be 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. The principle of proportionality applies to the actions of the Member States, including actual measures and legislation adopted. These actions should be appropriate (appropriate to the objective), necessary (which cannot be better achieved by any other means, most appropriate to achieve the objective pursued), proportionate in the strict sense (which are least restrictive of the pursuit of the other interests of the entities and their rights, the final "gains" and "losses" should be checked and balanced)[28]. To the extent that the restriction must not affect the general interest, it should be pointed out that the main focus of this criterion is the effect of the restriction as a benefit to the general interest, including society, state and community.

According to Article 52(2) of the Charter, rights recognised by the Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties. However, the regulations in the Charter and the Treaties on the right of access to justice are complementary to each other and do not contradict. It is therefore not necessary to apply this conflict-of-law rule.

[28] Consolidated version of the Treaty on the Functioning of the European Union – PROTOCOLS – Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Official Journal 115 , 09/05/2008 P. 0206 – 0209.

In so far as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions[29]. In practice this means that the application of the right of access to justice should also take into account the historical context of that right in so far as it is common to the Member States.

4. Evaluation of the restrictions imposed by the Member States

The measures implemented by the Member States have differed according to the epidemic situation, organisational and technical conditions, as well as national procedures. The circumstances under which the Member States acted were not the same and the risk was not the same for each country. As a result, the measures taken were naturally diverse. However, all of them were aimed at isolating people and adopting a hygiene and sanitary regime. Many of the implemented restrictions resulted in the cessation of many state institutions, private and social organisations, and also the courts. At the same time, it needs to be pointed out and be taken into account when evaluating the measures that the threat posed by COVID-19 was then impossible to assess.

As indicated in this Report, restrictions on rights and freedoms are possible under EU law, although they require a number of criteria and conditions to be met. It is therefore necessary to assess the actions taken by the Member States as regards the justification for introducing restrictions on access to justice, including whether their implementation was proportionate.

Since the Member States have introduced restrictions on all persons and in the same way, **the criterion of the essence of the right of access to justice is met**. If it were to be assumed that the restriction of that right was based on subjective criteria relating to natural persons and that those criteria differed and were discriminatory, then such action would constitute an infringement of the essence of that right of access to justice. At the same time, it should be pointed out that the measures introduced by the Member States are characterised by **temporariness for a specific circumstance**. At the same time, the adopted measures are intended to protect greater value, which is the protection of life and health in the face of a serious threat. The lack of access to court or justice in general introduced by the Member States does not affect the independence of the courts or the possibility of obtaining legal aid or representation. What is more, the vast majority of Member States have decided to keep the courts functioning for urgent cases requiring rapid actions (e.g. security proceedings, decisions on provisional detention, etc.).

[29] Article 52(4) of the Charter.

For a proper assessment of the actions taken by the Member States, it is important to carry out this assessment in the context of the proportionality principle. These actions should be primarily appropriate to the objective. Given the nature of the pandemic, including transmission of the COVID-19 through human contact, **isolation is essential to combat this risk**. Given that the judiciary requires human contact and that a large part of the dimension of the outbreak cannot be carried out without it, therefore it is appropriate to limit physical access to the courts.

Also in accordance to the principle of proportionality, the measures implemented should be necessary. This means that the measures should be such as to achieve the objective pursued. Since the pursued objective is the protection of life and health, as well as the fact that the SARS-CoV-2 virus causing the COVID-19 illness spreads through human contact, **physical restrictions and thus a restriction on the functioning of the judiciary were necessary**.

The measures applied should also be proportionate in the strict sense, i.e. the final ”gains” and ”losses” should be checked and balanced. Given the knowledge of the virus, as well as the unpredictable nature of the epidemic, it should be assumed that **any measures to preserve human existence will meet this criterion**. Although there are various theories in practice about how to prevent pandemics, the isolation of people for the time necessary to prepare society should be considered proportionate, particularly in view of the reduction of the main source of the spread of the virus and thus the effectiveness of such a method.

It is important to point out *a contrario* that **if the restrictions in question were not acted upon, that would result in a faster and more severe spread of the virus and a greater number of people being exposed to death**. Similar necessary restrictions have been introduced by Member States for many other areas of social and the economic activities, including many areas of the private sector. It shall be indicated that the courts are workplaces like other institutions, where the virus can spread with the greatest ease.

Any restrictions adopted by the Member States were aimed at reducing the spread of the virus. Different approaches may result from the specificities of individual Member States and their current, changing and dynamic health situation. Nevertheless, Member States should introduce restrictions that are as light as possible, but at the same time effective in order to protect the health and life of citizens. However, given the unpredictability and the scale of the threat posed by COVID-19, actions

that go beyond necessity should also be considered acceptable up to a certain point due to the very lack of a reliable means of assessing the situation.

5. Other values to be protected

It´s important to emphasize that the protection of public health, as well as the health and wellbeing of EU citizens is the top priority for the European Union. From experiencing response to other epidemics, we have the knowledge that public health measures that respect human rights will prove to the most effective in terms of health outcomes. Beyond the economic impact and immediate health, the COVID-19 crisis created a huge variety of different kind of challenges in nowadays society specifically for legal and constitutional systems and public administrations as well. The crisis has been and still remains a real-life stress test for the resilience of national systems. Key tests for the emergency measures have included whether measures were limited in time, whether safeguards were in place to ensure that measures were strictly necessary and proportionate, and whether parliamentary and judiciary oversight as well as media and civil society scrutiny could be maintained.[30]

As mentioned above, the extent of measures taken as a result of the current COVID-19 threat vary according to the Member State in question. While some restrictive measures adopted by the Member States may be justified on the ground of the usual provisions of the European Convention on Human Rights relating to the protection of health[31], measures of exceptional nature may require derogations from the states' obligations under the Convention.

In case of any derogation, this will be assessed by the European Court of Human Rights (Court) in different kind of cases that will be brought before it. The Court has granted states a large margin of appreciation in this field: "*It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an*

[30] The Council of Europe provided a useful guidance on the criteria to consider. These include whether the laws and emergency regimes were adopted in line with the applicable procedures, whether a state of emergency and the emergency measures are all strictly limited in time, a narrow definition of emergency powers, whether the "easing" of checks and balances is limited and proportionate, and on the indispensable parliamentary control of executive action. https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-oflaw-and-human-rights-in-th/16809e1f40 and https://www.venice.coe.int/webforms/documents/?pdf=CDLPI(2020)005rev-e.

[31] See Article 5 paragraph 1e, paragraph 2 of Articles 8 to 11 of the European Convention on Human Rights and Article 2 paragraph 3 of Protocol No 4 to the Convention.

emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 § 1 (...) leaves those authorities a wide margin of appreciation."[32]

A derogation under Article 15 is not contingent on the formal adoption of the state of emergency or any similar regime at the national level. At the same time, any derogation must have a clear basis in domestic law in order to protect against arbitrariness and must be strictly necessary to fighting against the public emergency. States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort should be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness. While derogations have been accepted by the Court to justify some exceptions to the Convention standards, they can never justify any action that goes against the paramount Convention requirements of lawfulness and proportionality.

Although the protection of public health and the health and wellbeing of EU citizens is the top priority for the European Union, restrictions are permitted in a case when they are proportionate, when they have a legitimate interest or purpose and do not impair the very essence of the right. International human rights law allows for the limitation of certain rights, especially when addressing a major health crisis. „*We clearly need strong public health responses to protect life during the pandemic. But we can protect our health and respect human rights. It is not a zero-sum game. The more we respect human rights, the better will be our public health strategies. Our health strategies must also ensure that any limitations to people's fundamental rights should only last as long as necessary*."[33]

6. Jurisdictional and non-jurisdictional remedies

The primary guarantors of EU law are national courts. Article 4(3) of the Treaty of European Union requires to take appropriate measures by Member States to ensure the fulfilment of obligations arising from EU law while Article 19 requires Member States to provide sufficient remedies that ensure effective legal protection in the field covered by EU law. The Member States have the primary responsibility for transposing, applying and implementing EU law correctly and therefore they are obliged to provide sufficient remedies to ensure effective legal protection in the fields covered by EU law. They have the competence to uphold the actions of individuals seeking protection against

[32] Ireland v. UK Judgment of 18.01.1978, Series A No 25, para 207.
[33] Michael O'Flaherty, Director of the EU Agency for Fundamental Rights, Protect human rights and and public health in fighting COVID-19, March 2020, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf

national measures that are incompatible with EU law or financial compensation for the damage caused by such measures.

This might be accomplished by jurisdictional remedy such as filing a complaint to national court as the main path to seek jurisdictional remedy to a violation of EU law. Subsequently the national court then has the right to ask for preliminary ruling from the Court of Justice of the European Union in order to ensure a consistent application of EU law. As stated in Treaties, public authorities and national courts have the main responsibility for the application of EU law.

It is important to say that if solving problem requires the annulment of a national decision, individual who is filing a complaint to national court has to be aware that only national courts can annul their decisions. When an individual is seeking compensation for damage, it is only the national court who has the power, where appropriate, to order national authorities to compensate this individual for losses that he had suffered due to a breach of EU law.

As one of the methods of non-jurisdictional remedies that individual who claims that his fundamental right has been violated by a Member State may apply is to submit a file either to a national ombudsman or a regional ombudsman, depending on the system in each country. Ombudsman is an independent, non-governmental official who´s typical duties are to investigate complaints and attempt to resolve them.

Although individuals will usually be able to enforce his rights better in the country where they are living, the European Union offers resources that may also be able to help them. As another method of non-jurisdictional remedy (in the European Union level) it is possible for an individual who claims that his fundamental rights have been violated by a Member State to inform the European Commission about the action of breaking the terms of EU law, and this may trigger an infringement proceeding conducted by the Commission. According to Articles 258 – 260 of the Treaty on Functions of European Union, the Commission may initiate proceedings against the state which fails to implement a piece of EU human rights related legislation or implements EU legislation in a way that conflicts with fundamental rights. The Commission plays an important role as the guardian of EU treaties and this option presents a significant mechanism to protect fundamental rights in the EU.[34]

[34] See Administrative steps to submit a complaint to the European Commission at web: https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law/how-make-complaint-eu-level_en#administrative-steps-to-submit-a-complaint-to-the-european-commission

Members of the public, businesses and civil society contribute significantly to the Commission's monitoring by reporting shortcomings in the application of EU law by the Member States. The Commission acknowledges the crucial role of complaints in detecting infringements of EU law[35].

Another way how to reach non-jurisdictional remedy in the European Union level is the European Parliament's Committee on Petitions, which may take up a complaint from an individual on any subject that falls within the EU´s area of competence. These petitions must concern matters that affect citizens directly and that fall within the Union's fields of activity**.** Petitions may be lodged individually or in association with others. The Petition Committee is authorized to deal with complaints relating to the behavior of EU institutions and also to the behavior of national or local authorities. Petitions are examined by Parliament's Committee on Petitions, which takes a decision on their admissibility and is responsible for dealing with them. The Petition Committee´s objective is to provide a non-judicial remedy to legitimate concerns on issues related to the EU fields of activity raised by petitioners. Parliament consider petitions as a key element of participatory democracy. It has also underlined their importance in revealing instances of incorrect transposition and implementation of EU law by the Member States. In fact, a number of petitions have led to legislative or political action, EU pilot cases, preliminary rulings or infringement proceedings.[36]

Individuals are also able to file a complaint to the European Ombudsman as another form of reaching non-jurisdictional remedy. The European Ombudsman investigated alleges of maladministration in the institutions and bodies of the EU. The Ombudsman has very close relations with Parliament, which has sole power to elect and ask the CJEU to dismiss him/her, lays down rules governing the exercise of his/her duties, assists with investigations and receives his/her reports. Parliament has repeatedly emphasized that the EU institutions should fully cooperate with the European Ombudsman to increase the Union's transparency and accountability, notably by implementing his/her recommendations. Wherever possible, the European Ombudsman acts in concert with the institution or body concerned to find a solution satisfactory to the complainant. Where the European Ombudsman establishes that maladministration has occurred, his/her recommendations are referred

[35] Communication from the Commission, EU law: Better results through better application (2017/C 18/02) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XC0119(01)&from=EN
[36] European Parliament: Fact Sheet regarding The right to petition. Available at https://www.europarl.europa.eu/factsheets/en/sheet/148/the-right-to-petition

to the institution or body concerned, which then has three months in which to inform the European Ombudsman of its views.[37]

To assist the Member States in their efforts to implement EU law, and to ensure that they live up to their responsibilities in correctly applying EU legislation, the Commission deploys a wide array of tools. These range from preventive measures and early problem-solving to pro-active monitoring and targeted enforcement.[38] Apart from the motives of the EU institutions, especially the European Union Commission and the European Parliament, an increasing effort is visible in involving individuals in the role of active subjects enforcing their rights deriving from Union law.

VI. LEGAL ACTS

For the purposes of this Report, the following legal acts were analysed:

1) Charter of Fundamental Rights of the European Union of 2 December 2000,
2) Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950,
3) Treaty on European Union of 7 February 1992,
4) Treaty on the Functioning of the European Union of 25 March 1957,
5) Protocol (No 2) on the application of the principles of subsidiarity and proportionality of the Treaty on the Functioning of the European Union,
6) Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[37] European Parliament, Fact Sheet regarding the European Ombudsman. Available at https://www.europarl.europa.eu/factsheets/en/sheet/18/the-european-ombudsman

[38] See Communication from the Commission — EU law: Better results through better application C/2016/8600. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2017.018.01.0010.01.ENG&toc=OJ%3AC%3A2017%3A018%3ATOC

Young Lawyers Contest 2020-2021

First round: written and oral exercise

Team no. 2

Question on access to justice and access to documents

A. Introduction

"The European Union is founded on the values of freedom, democracy, the rule of law and respect for human rights. These values are common to all of us. We must uphold and defend them, even in these challenging times [...]."

This is how the President of the European Commission, Ursula von der Leyen, commenced her statement regarding the outbreak of the covid-19 pandemic and the emergency measures imposed my Member States due to this outbreak, which was released on March 31, 2020[1].

Moreover, her position remains intransigent as she completes her statement with the following: *"Any emergency measures must be limited to what is necessary and strictly proportionate."*

However, having in mind the extended lockdowns throughout Europe, the question arises whatever Member States were able to regulate in such a manner that the democratic values and the guarantees offered by the rule of law were preserved and protected.

Access to justice and access to documents and their legal meaning have a crucial importance for a democratic regime. Access to justice must be understood as a fundamental principle of the rule of law as encloses key human rights. It can be better understood through the concepts of fair trial and an effective remedy, as it enables individuals to protect themselves against infringements of their rights or to defend themselves in criminal proceedings.

We can conclude that, access to justice is crucial for individuals seeking to benefit from their procedural and substantive rights. Even though our rights are protected by the law and guaranteed by a constitutional order and moreover by EU's legal order, we must enforce this protection and we do so by exercising our fundamental right of access to justice.

[1] Available at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_567

However, due to the spread of the new coronavirus, courts in every Member State were in a difficult position as it was impossible to continue their normal operations under these extraordinary circumstances. A massive slowdown and in some cases even lockdowns became a reality of the judicial system. However, an increase in the number of people needing help with legal matters (e.g. unemployment, health care, infringement of human rights) was also a consequence of the new measures imposed by Member States, which leads to a contradictory and dangerous situation regarding the protection and free exercise of fundamental rights.

In a recent statement, judge Jose Igreja Matos, President of the European Association of Judges**,** reflected on the issue of the emergency measures taken by Member States as a response to the sanitary crisis, concluding that: *"[...] In all countries that decide to implement restrictions on the constitutional order, the risk of undermining the role of the judiciary will inevitably emerge."*[2]

As presented on the chosen topic, situations in which access to justice has been denied or at least severely disrupted are harsh realities of this pandemic. Moreover, if we correlate the limitation on access to justice with the alteration of the normal balance of powers between the executive and legislative powers, from a legal point of view, a legitimate question arises – how can individuals, as European citizens, protect themselves from and prevent the abuse of power?

Therefore, in the following paragraphs we aim to achieve an objective analysis through which we can offer a pertinent response.

B. The extraordinary times we face – an overview of the EU Member States most restrictive emergency measures regarding judicial activity

According to the study published by the International Union of Judicial Officers, the measures taken to prevent the spread of the new coronavirus by Member States governments are predominantly similar, even though the constitutional frameworks within which those measures have been taken may differ. In the majority of the cases, the courts' activity was

[2] Available at https://www.unodc.org/dohadeclaration/en/news/2020/03/access-to-justice-in-times-of-judicial-lockdown.html

suspended or partially suspended, only urgent proceedings being held. Also a similar characteristic is that all restriction measures were imposed for a limited period of time.

To better understand the context we have chosen France and Italy and their first imposed restrictive measures as examples.

In France, the Emergency Law, which came into force on March 24, 2020 and empowered the Government to take the needed measures in the context of the health crisis, establishing a state of emergency for two months.

The rules of criminal procedure were adopted by Ordinance no. 2020-303 of March 25, 2020 which regulated the automatic extension of the period of pre-trial detention during the state of health emergency. However, after the prolongation of the state of emergency in June, this extension could only be implemented by decision of a competent court following an adversarial debate.

Also, the Ordinance introduces the generalized use of videoconferencing, which is an exception from the normal provisions which ensured the publicity of the proceedings. Moreover, even though in normal conditions the consent of the parties was mandatory for the use of video-conference, according to the provisions of the Ordinance, even if the parties raise different objections, the rule of video-conference hearings remains applies with priority. Also, during the first phase of the state of emergency (i.e. ...) a derogation from the principle of collective decision by a panel of judges was imposed– a single judge could sit in different criminal proceedings.

Regarding non-criminal hearings, Ordinance No. 2020-304 of March 25, 2020 provides for a certain number of measures for the adaptation of the rules governing the operation of judicial courts ruling in civil matters. The first most important measure was the extension of procedural time limits which applied to all judicial courts ruling on non-criminal matters, with the exception of the following: proceedings before a civil liberty and custody judge and proceedings before juvenile courts for which special provisions have been adopted.

Also, during the state of emergency, the hearings may take place by video- conference or phone call conference, provided however that the technologies used enabled the identification of the parties, guaranteed a good transmission quality and the confidentiality of the hearing. As an exception from the oral and contradictory features, the court had the freedom to decide the

issuance of rulings without any hearing being held, by following a procedure based exclusively on the parties' written submissions.

The Italian government also adopted urgent and extraordinary measures in relation to the judicial activity as a response to the public health crisis. Approved on March 17, 2020 Law-Decree no. 18/2020 also know as *Cura Italia* law regulated judicial activities from March 9 to June 30, 2020.

During a first phase, from March 9 to May 11, the hearings of civil and criminal proceedings pending before all the judicial offices were postponed until after May 11. Furthermore, the terms and deadlines for the undertaking of any judicial activity (e.g. filing of briefs, submission of motions, etc.) in civil and criminal proceedings were suspended.

However, some urgent proceedings were still allowed to take place. For example: hearings regarding obligations arising from family relationships, procedures related to the protection of fundamental human rights, criminal proceedings related to the parties' current or imminent deprivation of liberty, and those criminal proceedings which involved the urgent collection of evidence. Also, if there was an imminent risk to provoke serious prejudice to the parties because of the delayed proceedings, the court president could adopt a declaration of urgency allowing the hearing to take place, but in special conditions.

The implementation of the second phase consisted in a transfer of discretional power to the court presidents of any judicial office. Court presidents could enact organizational measures such as the following: limit public access, ensuring in any case the access of people who have urgent tasks; adopt binding guidelines on the scheduling and carrying out of the hearings; establish remote hearings which involve video-conference hearings or decide to hold the hearing in writing, etc.

C. Does this situation (i.e. situation in which, due to imposed restrictions, access to justice has been denied or at least severely disrupted) have any link with EU Law? In what cases, if any, would EU law apply and what would be the relevant provisions to be invoked?

The European Union can be defined as a sui generis system with a unique legal order. As stated by the European Court of Justice, the EU law is an integral part of the legal systems of all 28 Member States.[3] EU legal order's cornerstone is represented by the primary law which includes

[3] CJUE, Case C-6/64 Flamino Costa c. ENEL

the EU treaties and the EU Charter of Fundamental Rights as provided by art. 6 of the Treaty on European Union (TEU).

In order to understand the link of EU law with the recent limitations regarding the access to justice right in EU Member States, the principle of sincere cooperation is a good starting point. According to art. 4 alin. (3) of TEU, Member States shall implement appropriate measures to ensure the fulfillment of obligations arising from EU Treaties or other European normative acts.

Pursuant to art. 19 of the TEU, Member States are required to provide efficient remedies which must ensure the legal protection of the fields regulated by EU law.

Of great importance is art. 6 of TEU, which states that the EU recognises the rights and freedoms set out in the Charter of Fundamental Rights of the European Union. The Charter is binding and became part of the EU primary law, having the same legal value as the Treaties, since 2009. Also, under Article 51, Charter of Fundamental Rights applies to Member States "*when they are implementing Union law or when they act within the scope of EU law.*"[4] For example, when Member States are implementing EU directives or applying EU regulations. However, all 28 EU Member States are also parties to the ECHR Convention. Even though the content of ECHR Convention and of the EU Charter of Fundamental Rights overlap regarding the access of justice rights, if the EU Charter of Fundamental Rights does not apply, the ECHR may and for the protection of individuals' rights this is an additional guarantee.

According to art. 47 of the EU Charter *„everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in Article 47. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."*[5]

Article 47 of the EU Charter of Fundamental Rights encloses the EU legal principle that Member States must ensure effective judicial protection of an individual's right arising from EU law. This means that the right of access to a court applies whenever rights and freedoms guaranteed by EU law are involved.

[4] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214%2801%29

[5] Charter of Fundamental Rights of the European Union, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

In Boxus v. Région Wallonn case, a Belgian court raised a question concerning the Environmental Impact Assessment Directive after a project was authorised by the legislative power. According to the national law, no substantial review procedure was available to challenge the measures approved, in this case the Law-Decree. The CJEU confirmed that the power to exercise review over the legislative act was necessary to ensure the effective judicial protection of individual procedural rights, even if this was not envisaged by national law.[6]

In order to insure the delivery of justice, we are of the opinion that the restrictive measures imposed by Member States, even in the extraordinary circumstances of the public health crisis, must be in accordance with the European legal standards and regulations, as stated above.

Even though the restricted activity of the judicial courts could be linked to the EU law, in case C-220/2020, the European Court of Justice ruled in an interesting way. Following the preliminary ruling procedure, *the Giudice di pace of* Lanciano, Italy, considered that the effects of the emergency measures infringe the rights of the parties to have their case heard fairly and within a reasonable time and asked the Court how the EU law shall apply in this case.
The request for a preliminary ruling concerned the interpretation of Article 2, Article 4 (3), Article 6 (1) and Article 9 TEU as well as Article 67, paragraphs 1 and 4 and Articles 81 and 82 TFEU in conjunction with Articles 1 st , 6, 20, 21, 31, 34, 45 and 47 of the Charter of fundamental rights of the European Union.
The Court ruled that the request for a preliminary ruling does not meet the admissibility requirements. The Court considered that the procedure established by Article 267 TFEU is an instrument of cooperation between the Court and the national courts and this is how the European Court provides explanatory notes regarding the interpretation of Unional law, but only when the EU law applies to a specific dispute and the national court is called to settle that specific dispute. Moreover, the Court stated that *„the justification for a preliminary ruling is however not the formulation of advisory opinions on general or hypothetical questions, but the need inherent in the effective solution of a dispute."*[7]

[6] CJUE, Joined Cases, C-128/09 to C-131/09, C-134/09 and C-135/09, Antoine Boxus, Willy Roua, Guido Durlet and Others, Paul Fastrez, Henriette Fastrez, Philippe Daras, Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh), Bernard Page, Léon L'Hoir, Nadine Dartois v. Région wallonne

[7] CJUE, Case C-220/2020, Request for a preliminary ruling from the Ufficio del Giudice di Pace di Lanciano

The European Court of Justice did not take into consideration the arguments provided by the national court which emphazises the impact of the emergency restriction on the judicial independence. Also, a very important aspect is that the Court dismissed also the arguments of the Justice of Peace which implied that the applicable Italian provisions (i.e. the normative acts which introduced the relevant restrictions) were the result of the transposition of EU Directives. However, in its reasoning the Court states that the order for reference does not contain either the required statement of the reasons which led the national court to question the interpretation of those provisions of EU law, or of the link which it establishes between those provisions and the national legislation applicable to the main proceedings. The Court does not exclude the existence of such a link and under different circumstances and provided with strong arguments from the national court, it implies that its analysis and ruling could have been different.

D. If the Charter of Fundamental Rights of the EU is to apply, are the measures taken by Member States as a result of the covid-19 outbreak justified under Art. 52 of the Charter?

In order to offer a response to the above question we consider that the statement of the President of the European Commission is relevant. *Any emergency measures must be limited to what is necessary and strictly proportionate* stated Ursula von der Leyen and we could not agree more. Therefore, in order to assess if the measures taken are justified under art. 52 of the EU Charter of Fundamental Rights a proportionality test should apply.

According to the Explanations relating to the Charter of Fundamental Rights *„[...] it is well established in the case-law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights' (judgment of 13 April 2000, Case C-292/97, paragraph 45 of the grounds)."*[8]

The notion of proportionality was theorized by Aristotle and remains a necessary mechanism for courts all over the world when assessing difficult problems, irrespective of the law system

[8] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214%2801%29

they belong to. In the context of the public health crisis, the proportionality matter can be translated as a matter of priority between different values and interests – to which values shall we give priority and to what extent?

To illustrate such an analysis we have chosen the German model of a proportionality test. In German law, we have 3 dimensions of control through the proportionality test:

a. *pertinence*, through which we assess if the measure taken is capable in itself of achieving the purpose for which it was taken. In this case, pertinence is a result of the analyis of the purpose and the means used to implement the measure. It was worth implement such a restriction and more important, how the national governments did it. Another important question is if the purpose was legitimate and if the mechanism used were appropriate?

b. *necessity*, which is proven if the results show that without taking the measure a situation of danger / damage / disaster would be created. Therefore, we have to be in the presence of a response to a concrete, real and serious need/danger. However, the nation of necesityt must be evaluated after we are certain of the fact that the result generated by the respective measure does not bring a greater violation of fundamental rights than the avoided danger.

c. *proportionality*, which shall be understood in a narrow sense, respectively measuring what we have achieved and what we have lost after the introduction of such measures.

We can conclude that, even though accepting restrictions of rights through the proportionality test is possible, this must not lead to the infringement of the hard core of fundamental rights. Any restrictive measure, even if proportional and necessary, must not affect the hard core of key human rights. These rights can never be suspended. Therefore, the imposed restriction can only limit to some extend the exercise of such rights.

However, in the last years, the strict scrutiny test was preferred by the European Court of Human Rights which established a permanent comparison between fundamental human rights and the preservation of the general interest. Using this type of scrutiny, the limitation of certain fundamental rights could be considered legitimate and proportionate if the the public order is endangered.

Nevertheless, every restrictive measured must be analysed separately and all details must be considered and assessed.

For example, the automatic extension of the period of pre-trial detention during the state of health emergency introduced by the French Government, even if the threat posed by the new coronavirus was major, can be interpreted as an unjustified and disproportionate measure.

French national institution also found the automatic extension of the pre-trial detention of suspects whose cases have been postponed *"unacceptable given that this measure goes into force without adversarial debate or individual examination of the situation by a judge"*.[9] Also, France's highest administrative court indicates that *"the Ordinance in question extended these periods, without making any other modification to the rules of the Code of Criminal Procedure which govern the placement and maintenance of pre-trial detention. It also notes that this text specified that these extensions apply only once during each procedure and that they are without prejudice to the possibility for the competent court to order at any time, ex officio, on request of the public prosecutor or on request of the interested party, the withdrawal of the measure*. *"*[10]

F. Conclusions

"The price of liberty is eternal vigilance" said Thomas Jefferson and his words are extremely relevant today, when restrictive measure are still in force and the balance of power is still altered in all EU Member States.

The public health crisis, despite its challenges, has offered us an opportunity to asses the democratic mechanism of checks and balance. Moreover, as part of a unique legal order, Member States have to consider that EU law establishes, in some cases, higher standards regarding the preservation and protection of fundamental rights. Even though it can be challenging, national governments have a special responsibility towards individuals to create legal rules which enables access to justice and access to documents.

[9] France, National Consultative Commission on Human Rights, "Another emergency: the restoration of normal functioning of the justice system", 28 April 2020, p. 7, available at: www.cncdh.fr/sites/default/files/avis_2020_-_4_-_200424_avis_urgence_fonctionnement_justice.pdf

[10] European Union Agency for Fundamental Rights, Coronavirus pandemic in the EU – Fundamental Rights Implications study, available at https://fra.europa.eu/sites/default/files/fra_uploads/fr_report_on_coronavirus_pandemic_-_may_2020-1.pdf

IMPACT OF COVID-19 ON ACCESS TO JUSTICE AND DOCUMENTS

On the application of EU law, the Charter of Fundamental Rights and the possibility of non-jurisdictional remedies

YOUNG LAWYERS CONTEST 2020-2021

Written report handed in by Laura Dorneanu, Julius Malka and Laura Coeckelberghs (Team 4)

INTRODUCTION

"The COVID-19 outbreak has created unprecedented turmoil with significant impact on the functioning of key public services. In the case of the judicial system of the Member States of the EU, many courthouses have been shut down as a mean to hall the fast expansion of the virus. In several Member States, the lockdowns of courts have included criminal courts, as well as family courts and courts with jurisdiction over minors. Due to the sudden outbreak, the justice systems of these Member States were not ready to go on-line and provide certain services, like the holding of hearings or deliberations, through remote access. Some of these lockdowns are still ongoing and cases are being handled only in the event of extreme urgency. This has led to situations in which access to justice has been denied or at least severely disrupted"

With the spread of the COVID-19 virus, Member States of the European Union (**EU**) needed to look at other ways to safeguard the right to an effective remedy and fair trial, and found a solution in the implementation of remote access to justice. Soon various human rights advocates already expressed their concerns about the impact of such a solution on fundamental rights and feared that remote access to justice would become a permanent solution in the future in light of costs and efficiency advantages.[1]

Given the global nature of the pandemic there might however be a way for the EU to intervene in this issue at a supranational level, not only in order to assist the Member States themselves, but also to support the nationals of each of those Member States in case the situation becomes threatening to their rights as an EU citizen.[2]

In what follows, we will take a closer look at this possible power that the EU has within the EU legal framework, and decide whether the current situation has any link with EU law. Can it force the Member States to take or refrain from certain actions relating to the organisation of proceedings? Secondly, if EU law applies, the provisions of the Charter of Fundamental Rights (**Charter**) apply and national restrictions will have to be proportionate. Finally, we will turn to the possibility of affected parties to rely on non-jurisdictional measures. If there are concerns about remote access to justice, there might instead be different ways to preserve their rights as EU citizens.

[1] X., 'Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings' (*FairTrials*, 3 April 2020), <https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf> accessed on 31 December 2020.

[2] Article 9 of the TEU stipulates that the Union shall "*observe the principle of the equality of its citizens (...)"* recognising that every national of a Member State shall be a citizen of the Union.

THE APPLICATION OF EU LAW TO NATIONAL MEASURES TAKEN IN LIGHT OF THE COVID-19 CRISIS

In 2007 the Treaty of Lisbon replaced the well-known Three-Pillar System by a more harmonised and integrated model merging the different pillars, including the former Justice and Home Affairs pillar.[3] The European integration process hereby came to a point where the Union received a single legal personality with clear values, aims and objectives stipulating that "*the Union is founded on the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights (…)*" (Article 2 of the Treaty on European Union (**TEU**)). Furthermore, it introduced the area of freedom, security and justice (AFSJ) determining that the Union shall "*constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States"* including access to justice, in particular *"through the principle of mutual recognition of judicial and extrajudicial decisions"* in civil and criminal matters (Article 67 of the Treaty on the Functioning of the European Union (**TFEU**) *juncto* Article 3 TEU).

The competence of the EU in civil and criminal matters having cross-border implications

In light of these values and objectives, the Union has in accordance with Articles 81 and 82 TFEU, the power to serve the aim of developing judicial cooperation in civil and criminal matters having cross-border implications, by adopting measures for the approximation of the laws and regulations of the Members States. In accordance with the ordinary legislative procedure, the Union is able to – except in relation to family law issues – adopt measures aimed at (i) mutual recognition and enforcement of judgements and decisions, (ii) eliminating obstacles to the proper functioning of proceedings, (iii) effective access to justice, and (iv) in criminal cases, the establishment of minimum rules concerning the rights of individuals in criminal proceedings and the rights of victims of crime.

In cases with a cross-border dimension it thus becomes clear that the national measures taken in light of the COVID-19 pandemic are subject to possible EU legal review when the EU has adopted measures pursuant to Articles 81 and 82 TFEU. In relation to cross-border cooperation in criminal matters, these EU measures mostly concern measures like the European Arrest Warrant (**EAW**)-regime, extradition from/to third states, the European Investigation Order,

[3] J. Fairhurst, *Law of the European Union* (11th edn., Pearson 2016) 27-28.

mutual legal assistance, transfer of sentenced people, freezing orders, confiscation orders and Joint Investigation Teams.[4]

With COVID-19 some of these measures and forms of cooperation obviously suddenly became postponed or non-prioritised due to the remote working requirements and travel or border restrictions, causing severe delays, prolongation of detention or even inactivity in some Member States. Some Member States already recognised that prolonging the detention would be in conflict with the principle of proportionality under the EAW[5] and released certain people from detention putting them under alternative surveillance methods.[6] However, others like the United Kingdom's High Court ruled instead that ongoing detention was lawful even if extradition could temporarily not take place due to COVID-19, with reference to the humanitarian reasons-clause in Article 23 (4) of the EAW Framework Decision.[7]

Coming back to Articles 81 and 82 TFEU, it can be mentioned that these articles were recently also invoked in a preliminary question referred to the European Court of Justice ("CJEU") by an Italian Justice of the Peace. An Italian judge wondered whether these articles in conjunction with the rights of the Charter, precluded COVID-19 related national legislation declaring a state of national health emergency and paralysis of civil and criminal justice.

Through an order of the 10th of December 2020, the CJEU however declared the preliminary question manifestly inadmissible. The Court recalled that for these EU law provisions to apply, the dispute in the main proceedings should have transnational implications, namely any connection with the provisions of the EU Treaties or a situation where the national court would have to apply any of the EU provisions to solve the dispute.[8] In this case, the dispute concerned a damages claim relating to a traffic accident whereby the Italian court did not provide any clear cross-border links with EU law provisions, nor referred to any applicable national provisions for such claim for damages, and instead merely confined itself to making general considerations

[4] U. Bux, 'Judicial cooperation in criminal matters' (*Fact Sheets on the European Union*, February 2020) <https://www.europarl.europa.eu/factsheets/en/sheet/155/judicial-cooperation-in-criminal-matters> accessed on 20 December 2020.

[5] X., 'European arrest warrant', <https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en#proportionality > accessed on 14 December 2020.

[6] Article 12 EAW Framework Decision; X., 'Short Update: Council of European Union publishes information on impact of COVID-19 on cooperation in criminal matters' (*FairTrials*, 18 May 2020) <https://www.fairtrials.org/news/short-update-council-european-union-publishes-information-impact-COVID-19-cooperation-criminal> accessed on 12 December 2020.

[7] X., 'Short Update: UK High Court rules detention pending surrender under EAW is lawful even if extradition cannot take place temporarily due to COVID-19', (*FairTrials*, 15 May 2020), <https://www.fairtrials.org/news/short-update-uk-high-court-rules-detention-pending-surrender-under-eaw-lawful-even-if> accessed on 14 December 2020.

[8] CJEU 10 December 2020, C-220/20, *XX v. OO*, ECLI:EU:C:2020:1022, §35-37.

on the impact of COVID-19 on the judicial system. The mere statement that most of the national law provisions applicable to the case resulted from the transposition of Union law without any further clarification or precision, was held to be insufficient.

COVID-19 related preliminary questions to the CJEU will therefore likely only be successful if the underlying national proceedings have a clear EU link in the form of application of EU law provisions or EU measures having cross-border implications, e.g. the EAW-regime.

The competence of the EU in criminal proceedings after the Roadmap of 2009

Besides the application of EU law in cases with a cross-border dimension, reference can also be made to the Resolution on a Roadmap adopted by the Justice Council on 30 November 2009. In this Roadmap the Council called for the creation of certain procedural rights of suspected or accused persons in criminal proceedings in relation to: translation and interpretation (measure A), information on rights and information about the charges (measures B), legal advice and legal aid (measure C), communication with relatives, employers and consular authorities (measure D), and special safeguards for suspected or accused persons who are vulnerable (measure E)[9].[10]

The European Council subsequently made this Roadmap part of the Stockholm Programme and in the years that followed, six Directives saw the light of day[11]: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings, Directive 2013/48/EU on the right of access to a lawyer, Directive 2016/1919/EU on the right to legal aid, Directive 2016/343/EU on the right of the presumption of innocence and to be present at trial, and Directive 2016/800/EU on procedural safeguards for children suspected of accused in criminal proceedings.[12]

Based on the supremacy of EU law and the principle of direct effect[13], Member States will – even in times of COVID-19 – have to make sure that they abide by the fundamental procedural

[9] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, *OJ C 295, 4.12.2009, p. 1-3.*
[10] A similar resolution has recently been adopted with regard to civil law proceedings: the European Parliament resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union.
[11] P. Craig and G. De Burca, *EU law : Text, cases and materials* (7th edn., OUP 2020) 1064.
[12] C. Riehle and A. Clozel, '10 years after the roadmap: procedural rights in criminal proceedings in the EU today' (*SpringerLink*, 2 October 2019), <https://link.springer.com/Article/10.1007/s12027-019-00579-5> accessed on 13 December 2020.
[13] The CJEU has held that directives have direct effect when their provisions are unconditional and sufficiently clear and precise (CJEU 5 February 1963, C-26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1), and when the

rights that are granted to citizens within the scope of application of the directives. This means that in criminal cases Members States will have for example to do their utmost best to make it possible for nationals to have access to: a lawyer (Article 3 Directive 2013/48/EU), physical presence and participation of a lawyer during questioning (Article 3 (b) Directive 2013/48/EU), the materials of the case (Article 7 Directive 2012/13/EU), interpretation (Article 2 Directive 2010/64/EU), translation of essential documents (Article 3 Directive 2010/64/EU), legal aid (Article 4 Directive 2016/1919/EU) and presence at trial (Article 8 Directive 2016/343/EU). Furthermore, special attention should be paid to the so-called 'vulnerable persons' for which each of these directives explicitly prescribe that "*Member States shall ensure that the particular needs of vulnerable persons are taken into account in the application*" of the directive in question.

With the challenges that COVID-19 brought, it became clear that some Member States were having a hard time adapting to what was going to be the new normal, being remote access to justice and new ways of organising legal proceedings. It cannot be denied that a lot of Member States were not well enough equipped to deal with these sudden changes. Most of them did not have the right infrastructure in place to deal with the shift from physical to digital, especially when it came to access to materials of a case. Looking at Belgium for example, the situation was and still is that materials of criminal proceedings can only be consulted physically at the court. So when the whole judicial system was shut down due to COVID-19 restrictions and the court registry became only accessible when urgent, the defence in criminal proceedings – concerning people not in detention – became very difficult, if not impossible. On top of that, taking into account that hearings were still taking place, an issue of equality of arms arose since only law enforcement was having remote access to materials of a case thanks to an internal digital system that is only accessible by the courts and the prosecutor's office.

A Belgian lawyer rightly put it like this: "*While the magistrates of the public prosecutor's office work, for the most part at home, on the preparation of these files, there is nothing we can do. As a result, once the coronavirus crisis is behind us, we are going to end up with a whole series of postponed files, new fixations, files prepared by the magistrates whereas on the defence side, they won't be. It is a system that creates great inequality*".[14]

Member State has not transposed the directive by the given deadline (however limited to direct vertical effect against the state) (CJEU 4 December 1974, C-41/74, *Van Duyn*, ECLI:EU:C:1974:133).

[14] N. Bensalem, 'L'avocate Nathalie Gallant pousse un coup de gueule : « Si le ministre ne nous laisse pas travailler via JustScan, la situation sera catastrophique par la suite », <https://www.dhnet.be/actu/belgique/l-avocate-

This issue of postponement of files and hearings also brings in another element of EU law: what with the principle of having a fair and public hearing within a reasonable time as covered by the right to a fair trial (Article 47 of the Charter)?

THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The protection under the Charter comes into play in areas in which EU law rights are engaged (Article 51 of the Charter)[15], such as cross-border cases and situations dealing with the implementation of the Roadmap directives. The rights under the Charter might well be impacted by the decisions that Members States have been making by closing courts thereby making filing of documents, access to legal aid, gathering of evidence, and public hearings impossible or extremely difficult.[16] Moreover, courts are organising hearings in different ways and limiting the cases to urgent ones while postponing others. Such restrictions on access to justice and documents, and operations of the courts in general, self-evidently carry the inherent risk of limiting the fundamental rights of EU citizens.

Pursuant to Article 47 of the Charter each individual has the right to an effective remedy and fair trial. These rights do not only entail access to a lawyer, legal aid, translation or interpretation, but equally the right to be present at trial in criminal proceedings.[17] Technology has been frequently relied upon by the Member States to organise hearings on a remote basis to limit the spread of the virus. However, as the European Union Agency for Fundamental Rights already pointed out in its bulletin, if these remote hearings are considered to be the default rule, there could be a negative impact on the minimum standards of suspects and accused as developed under Article 47 of the Charter, in particular in relation to effective participation in proceedings, including one's right to be present at trial and access to adequate facilities for the review of evidence.[18] Furthermore, some reports show that suspects and lawyers have not been

nathalie-gallant-pousse-un-coup-de-gueule-si-le-ministre-ne-nous-laisse-pas-travailler-via-justscan-la-situation-sera-catastrophique-par-la-suite-5e7c5d3e9978e228414234c0> accessed on 20 December 2020.

[15] Also see CJEU 13 April 2000, C-292/97, *Kjell Karlsson and Others,* ECLI:EU:C:2000:202, §37; confirmed by the CJEU in C-220/20, §43.

[16] A. Shabbir, 'Access to justice and COVID-19-related state of emergency: litigation before the Court of Justice' (*EU Law Live*, 28 August 2020), <https://eulawlive.com/access-to-justice-in-cross-border-cases-and-COVID-19-related-state-of-emergency-litigation-before-the-court-of-justice/> accessed on 13 October 2020.

[17] Article 8 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

[18] FRA, 'Coronavirus pandemic in the EU – Fundamental Rights Implications – Bulletin 1' (8 April 2020), <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf> accessed on 26 December 2020.

able to exchange confidentiality before, during or after a remote hearing given the possible presence of court or prison staff at either end, as well as time constraints.[19] In addition, suspension of non-urgent cases and the inequality of arms in countries like Belgium will also impact the overall length of proceedings and consequently due process, defence rights and the right to liberty contained in Article 6 of the Charter.

The effects on fundamental rights are also visible in civil proceedings where the same issues arise, especially in cases relating to family matters and minors where also the right to respect for private and family life (Article 7 of the Charter) and the rights of the child (Article 24 of the Charter) come into play.

The justification of national restrictions on fundamental rights under Article 52 of the Charter

Even as statutes of the Charter concern fundamental rights, they are not absolute. Even prior to the establishment of the Charter, the Court of First Instance (Third Chamber) stated that "*fundamental rights, however, do not constitute unfettered prerogatives but may be restricted"*[20]. This statement was later codified and expanded on in Article 52(1) of the Charter. Pursuant to Article 52(1) of the Charter "*any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be 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*".

Several requirements for limiting the fundamental rights stated in the Charter may be identified from Article 52 of the Charter. The requirements for limiting the fundamental rights of the Charter largely correspond with the requirements for limiting fundamental rights in national legislation and international human rights conventions.[21] The requirements for limitation contain the following aspects: the statutes of the Charter may be limited if:

1. the limitation is provided by law;
2. the provided law is clear and exact;
3. essence of the statute of the Charter is respected;

[19] X., 'Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings' (*FairTrials*, 3 April 2020), <https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf> accessed on 26 December 2020.
[20] Case T-176/94, *K v Commission of the European Communities*, ECLI:EU:T:1995:139, §33.
[21] T. Ojanen, *EU-oikeuden perusteita*, (3rd ed. 2016), p. 164.

4. the limitation of the Charter genuinely meets objectives of general interest recognised by EU or the need to protect the rights and freedoms of others;
5. the limitation to the Charter is necessary and proportionate; and
6. the limitation to the Charter is in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms[22].[23]

In many EU Member States the limitations to fundamental rights have been provided by clear and exact laws. For example, in Finland, the exercising of the Emergency Powers Act (1552/2011, as amended) provides significant restrictions to fundamental rights, some of which are also included in the Charter. The limitations are established with clear and precise sections of the law. Thus, it may be stated that the first and the second requirement for limitations of fundamental rights are not likely to constitute an issue in light of exercising Article 52 of the Charter.

The third requirement requires that the limitation respects the essence of the statute of the Charter. A fundamental right may not be limited to the extent that would render the fundamental right completely insignificant.[24] This requirement has been recently exercised in the *Digital Rights Ireland*-judgement, in which the CJEU held that the retention of data did not adversely affect the essence of the fundamental right to the protection of personal data because the relevant directive established certain principles of data protection and data security to be respected by providers of publicly available electronic communications services or of public communications networks.[25] Thus it was resolved that the right to privacy was not rendered completely insignificant.

The legislation, through which the Member States have implemented limitations to access to justice must limit the access to justice-article of the Charter without rendering it completely insignificant. This means that, as in the *Digital Rights Ireland*-case, certain principles of the access to justice-article must be upheld even if the access to justice-article is being limited. In Finland access to justice has been limited due to extensive shutdowns of courthouses. However, the Finnish legislation provides a possibility to host the proceedings virtually (Chapter 8, Section 13 of the Criminal Procedure Act and Chapter 5 Section 15d of the Code of Judicial

[22] European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No.005)
[23] T. Ojanen, *EU-oikeuden perusteita*, (3rd ed. 2016), p. 166.
[24] T. Ojanen, *EU-oikeuden perusteita*, (3rd ed. 2016), p. 165.
[25] CJEU, C-615/10, *Digital Rights Ireland*, ECLI:EU:C:2014:238, §40

Procedure), which has limited the damage to the access to justice-article.[26] Thus it could be stated that the access to justice-article of the Charter has in Finland been limited in a way, which does not render the access to justice-article completely insignificant.

The fourth requirement requires that the limitation of the Charter genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. A limitation of the Charter may thus be implemented in order to protect a fundamental right protected under EU law for example in the Charter. Furthermore, the limitation may be justified by protecting a general interest recognised by the EU such as public policy, security or health.[27] Public health, as an important general interest of the EU, has been codified in many of the EU's most significant conventions and treaties. For instance, the Treaty on the Functioning of the European Union[28] states that a high level of human health protection shall be ensured in the definition and implementation of all EU policies and activities. Furthermore, the CJEU has in its judgements considered that the objective of the protection of the health and life of humans ranks foremost among the assets or interests protected by Article 36 TFEU.[29] Articles 6 and 35 of the Charter provide further protection to public health as a fundamental right. As the COVID-19 pandemic is foremost a health crisis, it may be stated that the limitations to the fundamental rights provided by the Charter[30] meet the objective of protecting both a general interest recognised by the EU and rights and freedoms of others by preventing the spread of the virus and thus causing more extensive public health issues.

The fifth requirement requires that the limitation is necessary and proportionate in order to achieve the acceptable goal of the limitation. On the principle of proportionality, the CJEU has regularly stated that the measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question. Furthermore, when there is a choice between several appropriate measures, recourse must be taken to the least onerous measure.[31] Same rules on proportionality may be applied to the limitations on fundamental rights presented in the Charter.

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[26] Tuomioistuinviraston opas tuomioistuimille etäyhteyksien käyttöön oikeudenkäynnissä (*unofficial translation: Guide on the use of virtual means of communication in court procedures by the National Courts Administration of Finland*), p. 4 <https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/thenationalcourtsadministrationgaveinstructionsonremotesessions-theaimistolowerthethreshold.html> accessed on 20 December 2020.

[27] T. Ojanen, *EU-oikeuden perusteita*, (3rd ed. 2016), p. 165.

[28] Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012 P. 0001 - 0390

[29] CJEU, C-333/14, *Scotch Whiskey Association*, ECLI:EU:C:2015:845, §35

[30] For instance, the fundamental right of access to justice provided for in Article 47 of the Charter.

[31] CJEU, C-343/09, *Afton Chemical* ECLI:EU:C:2010:419, §45

All limitations on, for example, access to justice must not exceed what is appropriate and necessary in order to safeguard public health. Further, all limitations must be the least onerous measures available. As stated before, many states have shut down entire court systems to prevent the spread of COVID-19. As social distancing has been found – based on current available information – to be the most effective way of preventing the spread, the shutdowns may be construed to be the most effective measure to prevent the spread of the virus and thus protect public health. Whether there were less onerous measures available, is still unclear, as there is very little information available on the virus.

The requirements for limiting the fundamental rights of the Charter largely correspond with the requirements for limiting fundamental rights in national legislation and international human rights conventions.[32] Therefore, the sixth requirement shall not be separately discussed in this paper.

NON-JURISDICTIONAL REMEDIES UNDER EU LAW

The awareness of the potential of Alternative Dispute Resolution mechanisms (hereby referred to as **ADR**) and the increasing interest shown in the Member States of the EU in order to improve the access to justice, has led to adopting regulations in this matter.

The identification of ADR has caught the attention of experts even since 1987, when at the initiative of the European Commission, in order to harmonize national legislation in the field of civil procedural law and to develop a European model code of civil procedure, a study has been prepared[33].

On a general approach, the main mechanisms of non-jurisdictional remedies are represented by: arbitration, mediation, negotiation, conciliation, the Ombudsman or consumer complaints platforms. These methods benefit from growing recognition, support and acceptance.

ADR remedies generally share a common goal, namely the management of disputes more effectively than contradictory procedures. However, they differ considerably in structure, framework, clientele, staff, size, relationship with the judiciary, sources of funding, objectives or intermediate methods.

[32] T. Ojanen, *EU-oikeuden perusteita*, (3rd ed. 2016), p. 164.
[33] Rapprochement du Droit Judiciaire de l'Union Européenne. Approximation of Judiciary Law in the European Union, Kluwer Academic Publishers Group, Dordrecht, 1994.

Among the factors that have determined the development of alternative methods of dispute resolution are the increase in the number of disputes before the courts, the increasing length of court proceedings, the increase in procedural costs, as well as the high volume and complexity of the legislation which makes it more likely for access to justice to become difficult. To all these, the effects of the COVID-19 pandemic shall be added as in most of the countries the activities of the courts have been either suspended or limited.

ADR for consumer law disputes

It should be noted from the outset that arbitration, as an alternative method of dispute resolution, has not, at least so far, been the subject of regulation of Community legal instruments adopted in international civil proceedings.

Until the adoption of the first Community legal instrument on alternative dispute resolution procedures, namely **Directive 2008/52/EC**[34], efforts have been made in order to encourage access to such procedures in particular areas, such as consumer protection, family law and employment law.

The initial concerns have been initially focused on consumer protection and in particular on the settlement of foreign disputes.

In addition to the problems inherent in national judicial dispute resolution proceedings (the high level of legal representation and assistance costs, the complexity and formalism of some legal proceedings) with the intensification of cross-border consumer transactions, the development of new sales techniques, and the existence of risks and barriers to access to justice in cases of foreign disputes, the need to identify these ADR has become more obvious.

The regulatory scope of Directive 2008/52/EC is, in principle, limited to procedural provisions on the relationship between mediation and judicial proceedings.

Its objective pursued is clearly stated in recital 7 of the preamble, according to which, *"in order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure"*.

[34] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters

The provisions of Directive 2008/52/EC are applicable in all cases where the court may, in accordance with national law, invite the parties to resort to mediation, as well as where national law provides for this ADR method.

According to recital 13 in the preamble to Directive 2008/52/EC, mediation is conceived as *"a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate as a voluntary procedure, with the parties having the opportunity to establish the procedure applicable to mediation and being able to use this alternative method of dispute resolution at any time"*.

Mediation as an ADR method should not be considered an inferior solution to the judicial procedure due to the fact that the observance of the clauses agreed by the parties through the agreement concluded as a result of the completion of the mediation procedure would depend on their will.

Also, it is important to outline that starting from this year, as the **Regulation 2019/1150**[35] has entered into force, a new obligation has been imposed for the providers of online intermediation services. Therefore, they shall identify at least two public or private mediators with which they are willing to engage. This shall lead to a new chapter in the applicability of ADR mechanisms.

ADR for consumer family and labour law disputes

In the field of family law, the EU has also introduced some legislative solutions to facilitate the promotion of alternative dispute resolution. We consider, first of all, the provisions of Article 55 lit. e) of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereby referred to as **Regulation 2201/2003**), according to which the central authorities of the Member States active in order to ensure the effective exercise of parental responsibility, at the request of a central authority of another Member State or the holder of parental responsibility, have the obligation to facilitate the conclusion of agreements between the holders of parental responsibility, through mediation or other means.

[35] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services

The laws of most Member States provide for alternative methods of resolving conflicts of interests or rights, individual or collective, in the field of labour law. These alternative procedures are organised either by the social partners or by public institutions.

Conciliation institutions and mediation or arbitration services have been set up in most Member States, which, as a rule, have an autonomous status.

Online dispute resolution platforms

As key players in the internal market, consumers are constantly catching the attention of the European legislator. The increase in the number of online transactions and also the need to increase the confidence of consumers and traders has led to the shaping of a digital dimension of the internal market and to the creation of a regulatory framework for out-of-court settlement of cross-border disputes in an online environment.

To this end, the European Commission has created the European online dispute resolution platform (SOL platform). This innovative digital tool facilitates the independent, impartial, transparent, effective, expeditious, equitable and out of court settlement of disputes concerning contractual obligations arising out of contracts for the sale or provision of online services between a consumer residing in the Union and a trader established in the Union. The legal basis for the establishment of the ODR platform is **Regulation on consumer ODR**[36].

The Consumer SOL Regulation describes the main functions of the platform and the steps a complaint must go through. And in the case of choosing to settle a dispute by accessing the ODR platform, the invoked regulatory framework transposes the usefulness of encouraging consumers by Member States to contact the trader in any appropriate way, in order to settle the dispute amicably, before submitting the complaint through the new platform.

The SOL platform takes the form of an interactive website[37] , free of charge and available online in all official languages of the Union institutions, which provides a single point of entry for consumers and traders seeking out-of-court settlement of disputes arising from online transactions. The SOL platform allows consumers and traders alike to submit complaints by completing an electronic complaint form and attaching relevant documents. A trader's complaint against the consumer may be initiated on the ODR platform only to the extent that

[36] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC
[37] <https://webgate.ec.europa.eu/odr/main/?event=main.home.show&lng=RO> accessed on 27 December 2020.

the law of the Member State in which the consumer has his habitual residence allows such disputes to be settled by the intervention of an ADR entity.

However, this platform shall not replace the possibility for the parties to appeal to the courts, a procedure that is usually more expensive and longer.

In order to facilitate consumer access to information on the ODR platform and the possibility to use it to resolve disputes with traders, the European legislator has imposed on traders established in the Union, which conclude sales or service contracts online, the obligation to provide on their web pages an electronic link to the SOL platform, as well as to specify their e-mail addresses.

CONCLUSION

According to Article 4(3) TEU "*the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*". This would mean that the national measures taken by the Member States in light of the COVID-19 crisis should be in conformity with the Treaty provisions and secondary EU legislation. Member States should thus question their actions and take into account the measures that the EU has already taken in cross-border cases as well as the procedural safeguards adopted following the Roadmap of 2009. Furthermore, once EU law applies, the fundamental rights enshrined in the Charter apply, most importantly the right to an effective remedy, fair trial, liberty, respect for private and family life, and the rights of the child.

Restricting these fundamental rights without a careful balancing exercise can seriously endanger the rights of EU citizens under EU law. At the moment it is however impossible to assess whether each limitation of the rights in the Charter, implemented by Member States, complies with all the requirements for a justified limitation, without having a thorough knowledge of each jurisdictions legislation and legislative system. It may however be stated that, as public health – as a general principle – is of great importance and highly valued in EU, it is likely that the measures undertaken to protect public health do meet the requirements for limiting the fundamental rights provided in the Charter. Each measure does however require a thorough assessment especially from a proportionality point of view, in order not to extensively

restrict one fundamental right on the account of another fundamental right. This assessment should be made in each member state as COVID-19 measures are legislated and implemented.

In what concerns the non-jurisdictional remedies under EU law, we shall conclude that the diversity of ADR mechanisms does not deprive the parties of their right to bring an action in court to resolve the dispute. The right to an effective remedy and to a fair trial are fundamental rights enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. The extrajudicial settlement options have not been designed to replace judicial proceedings and do not deprive the parties to the conflict of the right to seek redress before the courts.

If up to this year when it came to settling a dispute the tendency would have been to opt for a court procedure, individually or in the form of collective lawsuits, the effects of the COVID-19 pandemic may represent a turning point in the matter of settling at least some types of disputes. Consequently, for a better spread of access to alternative mechanisms, it is necessary to increase the level of public awareness of the existence of these options, as well as educating the public in the field, facilitating access to such methods and, possibly, imposing the obligation to use certain such tools in resolving disputes.

Young Lawyers Contest 2020-2021

First round: written and oral exercise

Access to Justice and Access to Documents

Team 6:

Bianca Florea

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Introduction

The world was not prepared for the COVID-19 pandemic and the European Union ("**EU**") is no exception. The rapid spread of the virus called for an immediate response. To halt the pandemic and protect the health of citizens, EU Member States were compelled to introduce unprecedented measures. These measures, albeit adopted with good intentions, took their toll on the fundamental rights of the EU citizens. One of the most frequently introduced measures by Member States was the lockdown of courts. Even after the first wave of the pandemic, most of the Member State courts continued to operate in restricted regimes handling only cases of extreme urgency.

The present report is concerned exactly with the consequences of these measures. In particular, the report focuses on the following questions - whether the described measures have any connection with the law of the EU ("**EU Law**"), what EU law provisions could individuals invoke to protect their rights of access to justice and access to documents, whether the introduced measures could be justified under the Charter of Fundamental Rights of the European Union ("**Charter**"), and if the affected individuals may take any advantage of non-jurisdictional remedies under EU law.

1. Does this situation have any link with EU Law?

The situation, as described in the assignment, undoubtedly involves EU Law because various measures adopted by Member States to counter the COVID-19 crisis affect individual rights protected by EU law, especially the rights of access to justice and access to documents. The access to justice refers to an ability of "*individuals to protect themselves against infringements of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in criminal proceedings*" and it applies "*across civil, criminal and administrative law*."[1] Right of access to documents constitutes an inextricable part of the right of access to justice and refers to the right of parties to review documents relating to their case.

1.1. Primary EU law

The protection of these rights is anchored at the level of primary EU law. The Treaty on the European Union ("**TEU**") emphasizes several times the importance of justice as a core value of the EU.[2] According to Article 4(2) TEU, justice falls within concurrent competences of the EU.[3] Consequently, the EU has the power to adopt legally binding acts in this area along with the Member States. Articles 15 and 67 of the Treaty on the Functioning of the European Union

("**TFEU**") build on the core values of the EU and explicitly establish the rights of access to justice and access to documents.[4] Articles 81 and 82 TFEU further promote the development of judicial cooperation in civil and criminal matters and thereby affirm the EU's commitment to ensure a high level of legal security and facilitate access to the rights under consideration.[5]

On par with the TEU and TFEU in terms of legal value - since the entry into force of the Lisbon Treaty - is the Charter. In the Charter, an entire chapter comprising four articles addresses the topic of justice. However, only Article 47 is of interest for the purposes of the present report. Article 47 provides "*everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal* […] *is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law* […] *shall have the possibility of being advised, defended and represented*." It clearly follows that individual rights of which the access to justice comprises, in particular the right to an effective remedy and the right to have a hearing within a reasonable time, were affected by the measures in question. Whether these measures were justified, is the subject of the third question.

1.2. Case law and secondary legislation

The Court of Justice of the European Union ("**CJEU**") has long recognized the right to an effective judicial remedy as a general principle of EU law,[6] which, together with the right to a fair trial represent the pillars of the EU's legal order.[7] The right to a fair trial breaks down into several subcategories such as the right of defense, the duty to provide reasons or the right to a fair and public hearing within a reasonable time.[8] The relevance of the latter has been continuously and tediously recognized by the case law.[9] Indeed, by closing the courtrooms and failing to provide other effective means of holding the hearings, the right to a hearing within reasonable time was affected in a perceptibly.

As already indicated, access to justice covers various partial rights. The protection of these rights is further ensured by the secondary legislation. In order not to exceed the scope of the report, we further address only those rights that COVID-19 measures prevent from exercising or otherwise affect in a negative way. These include the right of access to materials of the case in criminal proceedings,[10] the right to interpretation and the right to translation of essential documents.[11] There are also another two categories of rights which we discuss separately due to their specific nature.

The first category concerns the rights of children being suspect or accused in criminal proceedings. With respect to this category, the following rights could have been violated or impeded by the measures taken due to the pandemic - right to a medical examination, right to limit the deprivation of liberty at the shortest period of time possible, the right to appear in person at, and participate in, their trial, and, most importantly, the right to timely and diligent treatment of cases.[12]

The second category comprises the rights of victims of crime. These rights - potentially affected by the closure of courts in a negative way - include the right to receive information about a victim's case, right to interpretation and translation, right to be heard, right to reimbursement of expenses, right to return of property, right to compensation from the offender, right to timely assessment of the case, right to protection during criminal proceedings.[13] We believe that the right to legal aid was not affected by the measures taken due to the pandemic because it does not directly relate to the closure of courts.[14]

2. In what cases, if any, would EU law apply and what would be the relevant provisions to be invoked?

EU law applies in cases where the COVID-19 measures resulted in denial or violation of rights afforded to individuals by EU law. For the determination of relevant provisions to be invoked by the individuals, the principles of direct and indirect effect of EU law are essential because they are a precondition for the application of these provisions against the Member States. We analyze only the direct effect of EU directives because we did not identify any primary law provisions with confirmed direct effect applicable to the case at hand,[15] the direct applicability of regulations is unquestionable[16] and the decisions have direct effect only *inter partes*.[17]

2.1. The principle of direct effect

The direct effect refers to the ability of EU law to create rights and obligations for individuals, which may be invoked by them directly before national courts.[18] For example, if an EU directive granted an individual rights and these rights would not be correctly transposed in the domestic legal order, the individual would be able to invoke these rights before the domestic courts regardless of the non-existent or flawed transposition. First established in the Van Duyn case,[19] the doctrine of direct effect of directives has been since then continuously developed by the case law. At the moment, the following conditions must be met by a provision of a directive in order to have direct effect: (i) the transposition period of the directive shall

have expired,[20] (ii) the directive is either not correctly transposed or its full effectiveness is not secured,[21] (iii) the particular provision of the directive affording the right must be sufficiently clear, precise and unconditional,[22] and (iv) the direct application of the directive shall not result in the imposition of an obligation on natural or legal persons or imposition of criminal liability on those who violate the provision.[23] We believe these conditions were met for example with respect to the rights analyzed in the last three paragraphs of the section addressing the first question.

2.2. The principle of indirect effect

The principle of indirect effect refers to the duty of Member States' courts and other authorities to interpret domestic law in accordance with EU law.[24] The CJEU first established this principle in the Von Colson case by ruling that "*the Member States' obligation arising from a Directive to achieve the result envisaged by the Directive and their duty* […] *to take all appropriate measures* […] *to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including* […] *the courts. It follows that, in applying the national law* […] *national courts are required to interpret their national law in the light of the wording and purpose of the Directive*."[25] Ever-evolving case law reaffirmed and clarified this principle on several occasions.[26] A great advantage of the principle of indirect effect over the principle of direct effect is that it may be used for provisions not having the direct effect.[27] Therefore, individuals may also invoke other provisions than those with direct effect which support their argument that they were denied the rights of access to justice and access to documents.

3. If the Charter of Fundamental Rights of the EU is to apply, are the measures taken by Member States as a result of the covid-19 outbreak justified under Art. 52 of the Charter?

As already established, the Charter applies to the case at hand. Therefore, Member States must observe the rights set forth therein and, at the same time, comply with the conditions for limiting those rights. The third question concerns exactly such limitations. In particular, the question inquires whether COVID-19 measures introduced by Member States, which impact the rights of access to justice and access to documents, can be justified under Article 52 of the Charter. The first paragraph of Article 52 of the Charter lays down four conditions under which a Member State may limit the rights protected by the Charter. We analyze these below. Moreover, we also explain why we believe that the European Convention on Human Rights

("**ECHR**") applies to the present case and what are the consequences. Based on these analyses, we assess the justification of the COVID-19 measures based on Article 52 of the Charter.

3.1. The limitations based on the Article 52 of the Charter

According to Article 52 of the Charter, limitations to any of the rights protected under the Charter - such as the rights to access to justice and access to documents - are subject to the following conditions: (i) limitations shall be provided for by law, (ii) limitations shall respect the essence of the limited rights and freedoms, (iii) limitations shall be subject to the principle of proportionality and (iv) limitations shall genuinely meet the objectives of general interest pursued by the EU.

The first step in assessing the legality of measures taken by the Member States relates to the scrutiny of their legal basis. The importance of this step cannot be overemphasized because it is a safeguard for avoiding arbitrariness and an "*essential feature of the rule of law*."[28] The lockdown of courts and other similar measures taken by Member States, such as the restriction of access to justice and documents, may be deemed legally valid subject to the condition that they are based on a time-limited emergency rule.[29] Further, the restriction's legal basis shall also be sufficiently predictable and equally apply[30] and therefore, it shall not leave any leeway for interpretation as to its applicability. In determining the restriction's predictability, the consideration of whether it is formulated with sufficient precision is vital.[31]

Article 52 of the Charter also requires Member States to observe the essence of the rights and freedoms that are being limited.[32] As such, there must be no infringement of the essential content of the rights through the limitations.[33] In the present case, the effectiveness of the access to justice and access to documents is the sole criterion for assessing the consequences of restrictions imposed by Member States on procedural time limits and other aspects of judiciary.[34]

In line with Article 52 of the Charter, the following condition requires the limitations imposed on the affected rights to comply with the principle of proportionality. This criterion - generally[35] - supposes that the limitation needs to be appropriate to achieve the envisaged objective[36], necessary to achieve the objective[37] and proportionate *stricto sensu* to the pursuit of the objective.[38] Instrumental in determining the object of the aforementioned three conditions is Article 35 of the Charter which states that "[…] *a high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities*." Having established the objective, we now turn to the proportionality condition.

First, within the context of the COVID-19 pandemic, it remains unquestionable that human interactions have to be limited to the highest extent possible. This extends to courts as well because they are places where there is a high risk of virus contagion due to the high movement of different people in closed and small spaces. Therefore, the measures put in place within different jurisdictions regarding the activity of courts contribute to the realization of the objective of public health protection.[39] Consequently, they may be deemed appropriate.

Second, the limitations need to be necessary to achieve the objective, in the present case the high level of human health. Therefore, the lockdown of courts shall not last more than the sanitary situation requires, in order for the limitation not to go beyond what is strictly necessary to reach the objective[40] of public health protection. This condition cannot be assessed in advance because as of the date of writing the report, the pandemic is still ongoing.

Third, the limitations to fundamental rights must not be disproportionate considering the envisaged objectives.[41] As such, when there is a choice to be made between various measures, locking down the courts for a certain period of time needs to be the least constraining one that would efficiently lead to attaining the objective of protecting the health of EU citizens.[42]

Finally, the restrictions in question must genuinely meet the objectives of general interest pursued by the European Union. This condition is met because the restrictions directly aim at health protection. Article 3 TEU further supports this conclusion by making it clear that the well-being of the European citizens is to be promoted, which undoubtedly implies *inter alia* protecting their health. Moreover, the protection of the public health may be deemed an objective of general interest recognized by the Union[43] what makes the measures fall within the ambit of the Article 3 TEU.[44]

3.2. The parallel between the applicability of the Charter and the ECHR

It is a general rule that for as long as the Charter contains rights corresponding to those guaranteed by the ECHR, it applies that "*the meaning and scope of those rights shall be the same as those laid down by the said Convention*."[45] However, that does not prevent the EU from providing more extensive protection.[46] This fact might be of particular importance for the assessment of the measures taken by the Member States to counter the COVID-19 pandemic. The CJEU - on more than one occasion - used Article 52(3) of the Charter to interpret the rights provided for in it in accordance with those in the ECHR, resulting in an equivalent level of protection of rights granted under the two legal instruments.[47] Put differently, if maximum

restrictions to rights permissible under the ECHR let individuals enjoy rights to a greater extent than those under the Charter, restrictions under the Charter would have to be loosened in order to achieve the same level as the ECHR ensures.

As a preliminary point of analysis, rights listed in Article 15(2) ECHR must be taken into account because the ECHR does not allow to derogate from these rights. Parties to the ECHR must afford individuals these rights at any and all circumstances. However, as the ECHR does not classify the right to access to justice as a non-derogable right, it follows that it is a derogable one. Consequently, the derogations to Article 6 ECHR made pursuant to Article 15 ECHR are analogous to the derogations made to Article 47 of the Charter under Article 52 of the Charter. Therefore, derogations made under the Charter must meet at least the standard required for derogations under the ECHR.[48]

Undoubtedly, the "*public emergency threatening the life of the nation*" in the current situation equates to "*an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed*."[49] Therefore, the first condition under Article 15 of the ECHR is met. Moreover, the COVID-19 crisis proved that "*normal measures or restrictions permitted by the Convention for the maintenance of [...] health [...] are plainly inadequate.*"[50]

Further, it is for the European Court of the Human Rights ("**ECtHR**") to appreciate to what extent the measures are "*strictly required by the exigencies of the situation.*"[51] Therefore, the judges will assess factors such as "*the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.*"[52] In this sense, the ECtHR will decide on a case-by-case basis whether "*the measures are a genuine response to an emergency situation*"[53] and "*whether the measures were used for the purpose for which they were granted."*[54]

A significant number of Member States have already notified the Secretary General of the Council of Europe of their derogations from the ECHR.[55] Up-to-date ECtHR rendered no decision on this point, however, it has already been largely accepted that all the conditions are met when it comes to the COVID-19 crisis.[56] Based on the analysis, we agree with this conclusion.

4. Besides jurisdictional remedies, could the affected parties make use of any non-jurisdictional remedies provided under EU law?

The fourth question inquires whether the parties could make use of non-jurisdictional remedies provided under EU law. We understand that non-jurisdictional remedies refer to alternative dispute resolution ("**ADR**") mechanisms such as mediation or other similar tools of dispute resolution that suppose the intervention of an independent third-party to solve the dispute. Indeed, there are such ADR mechanisms under EU law to which parties may resort (not only) in the case when a Member State court does not deliver the justice sought. Both commentators[57] and the EU institutions[58] recognize the ADR as effective means of delivering justice. However, as explained below, these mechanisms do not apply *en block* to all disputes. Rather, opting for an ADR mechanism regulated by EU law requires certain conditions to be met. We address individual procedures as well as their conditions in turn below.

4.1. Alternative consumer dispute resolution

As far as the *ratione materiae* of the Directive on the Consumer ADR is concerned, the Directive applies to the extra-judicial resolution of non-excluded[59] domestic and cross-border disputes arising under contracts concluded between traders established in the EU and EU consumers, via the intervention of an ADR entity[60], which proposes or imposes a solution to the dispute.[61] The *ratione personae* of the Directive on the consumer ADR comprises consumers and traders. For the purposes of the Directive on the consumer ADR, a consumer means "*any natural person who is acting for purposes which are outside his trade, business, craft or profession*."[62] On the other hand, a trader is any person acting in its or on behalf of its name in its trade, business, craft or profession.[63] Having established the *ratione materiae* and *personae*, the analysis shifts to the dispute resolution itself.

The Directive on the consumer ADR does not lay down any exact procedure for settlement of consumer disputes. Instead, it obliges the Member States to facilitate consumers' access to ADR procedures before a respective ADR authority on their territory.[64] Member States shall ensure that such ADR proceedings are transparent, fair, effective, and conducted before independent and impartial natural persons with the necessary expertise to resolve the dispute.[65] Moreover, traders shall inform consumers about the option to submit a dispute to the respective ADR authority and, in the event of a cross-border dispute, consumers from one Member State shall receive the necessary assistance to bring a claim before the ADR authority of another Member State.[66] The Directive on the consumer ADR affords consumers greater

protection in case of conflict of laws and stipulates that an agreement to submit a dispute to ADR shall not bind them, if a consumer and a trader concluded the agreement prior to the dispute's materialization.[67]

4.2. Online consumer dispute resolution

The EU framework for consumer online dispute resolution ("**ODR**") is laid down in the Regulation on the consumer ODR. This legislative act has the same *ratione personae* as the Directive on the consumer ADR.[68] The Regulation, however, relates to a narrower scope of disputes between consumers and traders than the directive – it governs only disputes arising from online sales or online services.[69] In case that a trader initiates a dispute against a consumer, it is required that the legislation of the Member State where the consumer habitually resides allows resolving the dispute at hand by ADR means.[70] Traders engaging in online trade and services shall also observe the obligation to inform consumers about the ODR on their websites.[71]

In line with the Regulation on the consumer ODR, the Commission shall establish an ODR platform that should serve consumers and traders seeking access to out-of-court resolution of their online disputes.[72] By using the platform, parties to a dispute shall identify a relevant ADR authority, file a complaint with the authority and conduct the proceedings online before it.[73] Therefore, unless the parties have agreed and unless rules of procedure of the respective authority provide for it, there is no requirement to conduct the proceedings in person.[74] Moreover, the ADR authorities are bound to resolve the dispute within a specified time limit.[75]

4.3. Cross-border mediation

The last out-of-court dispute resolution method governed by EU law available to parties is mediation, as envisaged by the Cross-border Mediation Directive.[76] The Directive applies to mediation in commercial and civil disputes – except where the rights are not at parties' disposal under the applicable domestic law – where one party to a dispute resides in another Member State than the other party to the dispute.[77] Revenue, customs, administrative matters and liability of Member States for the exercise of State authority are excluded from the scope of the Directive.[78] In line with the Directive, Member States shall promote the mediation of disputes and ensure that mediation is conducted in an effective, impartial and competent way.[79] Written agreements resulting from mediation shall be enforceable in all Member States except Denmark, provided that they do not contradict the Member State's domestic law.[80] Further,

limitation periods and other limitations prescribed by applicable domestic law shall not prevent parties from initiating mediation.[81]

Conclusion

The measures in question introduced by Member States to counter the COVID-19 pandemic definitely have a relation to EU law. As established, the EU legal order is based on the rule of law, vital elements of which are the rights of access to justice and access to documents. Their protection is guaranteed by both primary and secondary EU law. By locking down the courts and restricting their operation, Member States directly interfered with the enjoyment of these rights. Therefore, the affected individuals could challenge these measures and seek access to justice by claiming that partial rights of the right of access to justice granted by the EU law have direct effect. Further, the individuals could invoke the principle of indirect effect and request to interpret the domestic measures in line with EU law. On the contrary, Member States could argue that the adopted measures were necessary to protect the health of the EU citizens and therefore, they could not contravene EU law. The problem reduces to balancing the individual rights of access to justice and access to documents against the public health protection. The problem could not be unilaterally resolved by an academic debate, it is up for the courts to decide which interest prevails. However, in the meantime, some eligible parties could take advantage of ADR procedures provided for by EU law and have their disputes resolved by independent third parties.

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[1] Handbook On European Law Relating To Access To Justice (2016) https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf. [Accessed 2 January 2021]
[2] Preamble and Article 2 of the *TEU*.
[3] Ugo Villani, Istituzioni di diritto dell'Unione europea 74 (2014).
[4] Articles 15 and 67 of the *TFEU*.
[5] Kellerbauer, M., Klamert, M. and Tomkin, J., 2019. *The EU Treaties And The Charter Of Fundamental Rights: A Commentary*. 1st ed. Oxford: Oxford University Press, p.870.
[6] C-386/10 P, (2012), par. 52; C-279/09, (2010), par. 30, 31; C-457/09, (2011), par. 25; C-69/10, (2011), par. 49.
[7] Klamert, Kellerbauer, Tomkin, *supra* note 5, at 2215.
[8] *Ibid*.
[9] Elsbeth Beumer, The recent landmark cases on the reasonable time requirement: Is the Court caught between Scylla and Charybdis? European Law Blog (2013), https://europeanlawblog.eu/2013/12/09/the-recent-landmark-cases-on-the-reasonable-time-requirement-is-the-court-caught-between-scylla-and-charybdis/. [Accessed 2 January 2021]
[10] Article 7 of the *Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings*.
[11] Articles 2 and 3 of the *Directive 2010/64/EU of the European Parliament and of the Council 20 October 2010 on the right to interpretation and translation in criminal proceedings*.
[12] Articles 8, 10, 16 and 13 of the *Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings*.
[13] Articles 6, 7, 10, 14-16, 22-24 of the *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*.

[14] *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*.
[15] TFEU provisions having direct effect mainly relate to the functioning of the internal market and the TEU provisions having direct effect concern predominantly institutions; See also Craig, P. and De Búrca, G., 2011. *EU Law: Text, Cases, Materials*. 5th ed. Oxford: Oxford University Press, pp.183-189; Siman, M. and Slastan, M., 2012. *Právo Európskej Únie: Inštitucionálny Systém A Právny Poriadok Únie S Judikatúrou*. 1st ed. Bratislava: EUROIURIS, pp.370-372.
[16] Article 288 of the TFEU.
[17] Craig, De Búrca, *supra* note 15, at 191.
[18] Jacqué, J., 2018. *Droit Institutionnel De L'union Européenne*. Dalloz. p.656.
[19] 41/74, (1974).
[20] C-157/02, (2004), par. 42-44; Case 148/78, (1979), par. 39 et seq.; C-246/06, (2008), par. 30.
[21] C-62/00, (2002), par. 25-27; C-253/95, (1996) par. 13; C-433/93, (1995) par. 24.
[22] C-268/06,(2008), par. 57; C-226/07, (2008), par. 22-23; Joined cases C-152/07 and C-154/07, (2008) pas. 39-44; Joined cases C-471/07 and C-472/07, (2010), par. 25-29.
[23] C-168/95,(1996), par. 37; 14/86,(1987), par. 19 and 20; C-297/03, (2005), par. 32-35; C-102/02, (2004), par. 63.
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[29] Ramona Coman, New challenges to liberal democracy in times of COVID-19 | Politique européenne Politique-europeenne.eu (2020), http://politique-europeenne.eu/fr/new-challenges-to-liberal-democracy-in-times-of-covid-19/. [Accessed 2 January 2021]
[30] Sunday Times v. United Kingdom, 6538/74 (1979), par. 49.
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[32] Fabrice Picod & Sébastien Van Drooghenbroeck, Charte des droits fondamentaux de l'Union européenne 740 (1 ed. 2018).
[33] Joined cases C-411/10 and C-493/10, (2011).
[34] European e-Justice Portal - Impact of COVID-19 on the justice field, E-justice.europa.eu (2020), https://e-justice.europa.eu/content_impact_of_the_covid19_virus_on_the_justice_field-37147-en.do. [Accessed 2 January 2021]
[35] Picod & Drooghenbroeck, *supra* note 32, at 746.
[36] Opinion of Advocate General, Tele2 Sverige AB, joined cases C-203/15 and C-698/15, (2016), par. 176.
[37] *Id*. at par. 185.
[38] Picod & Drooghenbroeck, *supra* note 32, at 747.
[39] *Id.* at 748.
[40] Opinion of Advocate General, Tele2 Sverige AB, *supra* note 36, at par. 196.
[41] C-283/11, (2013), par. 50.
[42] *Id.* at par. 55.
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[45] Article 52 (3) of the Charter.
[46] Ladenburger C., Fundamental Rights and Citizenship of the Union 329 (2007).
[47] Picod & Drooghenbroeck, *supra* note 40, at 764.
[48]Article 52 - Scope and interpretation, European Union Agency for Fundamental Rights, https://fra.europa.eu/en/eu-charter/article/52-scope-and-interpretation-rights-and-principles#Tab. [Accessed 2 January 2021]
[49] Lawless v. Ireland (no. 3), par. 28.
[50] Denmark, Norway, Sweden and the Netherlands v. Greece (the "Greek case"), Commission report, par. 153.
[51] Article 15 (1) of the ECHR.
[52] Brannigan and McBride v. the United Kingdom, par. 43; A. and Others v. the United Kingdom, par. 173.
[53] Alparslan Altan v. Turkey, par. 118; Brannigan and McBride v. the United Kingdom, par. 51.
[54] Lawless v. Ireland (no. 3), par. 38.

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[56] Gérard Gonzalez, L'article 15 de la Convention européenne à l'épreuve du Covid19 ou l'ombre d'un doute | Revue des droits et libertés fondamentaux Revuedlf.com (2020), http://www.revuedlf.com/cedh/larticle-15-de-la-convention-europeenne-a-lepreuve-du-covid19-ou-lombre-dun-doute/. [Accessed 2 January 2021]
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[59] Article 2(2) of the *Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC*.
[60] List of the ADR entities is available online; Article 15(1) of the *Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC*..
[61] Article 2(1) of the *Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC*.
[62] *Id*. at Article 4(1)(a).
[63] *Id*. at Article 4(1)(b).
[64] *Id*. at Article 5(1).
[65] *Id*. at Articles 6-10.
[66] *Id*. at Articles 13-14.
[67] *Id*. at Articles 11-12.
[68] Article 2 of the *Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC*. Article 4 of the same Regulation explicitly refers to definitions laid down in the Directive on the Consumer ADR.
[69] *Id*. at Article 2(1).
[70] *Id*. at Article 2(2).
[71] *Id*. at Article 14(1)-(2).
[72] *Id*. at Article 5(1)-(2).
[73] *Id*. at Article 5(4).
[74] *Id*. at Article 10(2).
[75] *Id*. at Article 10(1).
[76] *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*.
[77] *Id*. at Articles 1 and 2.
[78] *Id*. at Article 1(2).
[79] *Id* at. Article 4.
[80] *Id*. at Article 6.
[81] *Id*. at Article 8.

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TEAM 7 of Young Lawyers Contest

Access to justice and access to documents in the light of COVID-19

1. Introduction[1]

COVID-19 is foremost a public health concern. However, the impact of the crisis as well as the legal and policy responses developed by European Member States ("States") to counter the spread of COVID-19 have much wider ramifications that affect a broad range of human rights, including the ability of people to access justice in a timely, fair, and effective manner. The crisis also presents specific justice 'needs', such as addressing the rise in gender based violence and making additional institutional reforms to strengthen the effectiveness of the justice chain in a radically shifted social context. A key concern is that the economic fallout of the crisis will put many groups in society further behind, including children, women, older persons, persons with disabilities, indigenous peoples, lesbian, gay, bisexual, transgender, and intersex ("LGBTI") persons, displaced populations, stateless people, migrants, asylum seekers, victims of human trafficking, day labourers, and people living at or below the poverty line. The pandemic is making inequalities more visible, such as acute disparities in wealth, access to health, employment and livelihood, and in the ability to adopt preventive and isolation measures (e.g. space, access to water and sanitation, etc.). These inequalities are being further exacerbated by the crisis as well as the need for accessible mechanisms to resolve disputes, redress rights violations, and/or counter discrimination – whether related to housing, employment, legal/residency status, access to health benefits, or other social protection mechanisms.

Access to legal services and legal information is critical for empowering people and communities to address these issues. As Member States adopt emergency measures to address the crisis, they must continue to uphold the rule of law, protect and respect the rights set out in the Charter of Fundamental Rights of the EU ("Charter"), especially the rights to access to justice and documents. Limitations on the fundamental rights should be proportionate, non-discriminatory, time bound, strictly related to the containment of the contagion, and subject to review. Legal safeguards and oversight mechanisms must be in place to ensure that any

[1] Based on the Guidance Note „Ensuring Access to Justice in the Context of COVID-19" of UNODC, downloaded on the 13th of December 2020, from here: https://www.unodc.org/documents/AdvocacySection/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf

derogation or restrictions/limitations of rights does not continue indefinitely, and that states protect and ensure human dignity and the rights of all people. The role of the judiciary, as a check on executive actions and as an upholder of the rule of law, is crucial at this time.

From reducing rates of pretrial detention and improving access to fair and effective dispute resolution mechanisms as well as putting in place measures to ensure better representation in the judiciary, evidence-based strategies to ensure more equitable access to justice are crucial, if recovery plans are to truly reach, and secure the rights, of those who are furthest behind.

2. Problem of legal qualification of pandemic and socio-economic background of legal analysis of presented problem

One of the most important issues in case of this pandemic is answering the question of what is a pandemic in a legal sense. First answer which comes to mind is “emergency state”, but as a matter of fact not all Member States of the EU applied constitutional provisions which regulate this matter. On the other hand, despite that *de iure* some states are functioning in ordinary manner, *de facto* almost all States in every aspect of state’s *dominium* operate under an extraordinary legal regime. For these reasons it is reasonable to state that “pandemic” should be at least classified as a natural state of emergency.

Consequently this situation creates a fundamental problem for all further legal analysis presented in this paper, namely almost every limitation of particular human rights, including access to justice, due to pandemic or implementation of extraordinary procedures or *ad hoc* solutions should be examined on the ground of the rule of proportionality and provisions of Art. 52 of the Charter of Fundamental Rights of European Union.

Identification of the pandemic as a factual state of emergency is not only dogmatic classification, but also has very practical meaning. Avoiding by some Member States the application of adequate constitutional procedures related to state of emergency can be a consequence of the concerns of the political class across the European Union (“EU”) related to the protection of the financial interest of the state against a mass appearance of compensation claims due to the declaration of emergency. Even if it directly does not affect all the States, it clearly shows the general tendency of pandemic emergency legislations, giving priority to interests of the state above the interests of the individuals. For this reason, it is reasonable to point out probably the most important function of the EU during the present crisis, namely in the areas of its competences, EU should balance actions of the state and empower the position of individuals.

Especially in the area of justice system, the pandemic and the States' responses to it with its unprecedented effect on the functioning of the whole justice systems should be balanced by the EU law. Right now courts are closing, reducing, adjusting their operations, which can negatively impact the provision of timely and fair hearing, contribute to increased case backlogs, and lead to increased length of judicial and administrative proceedings. Certain groups, including women and children at risk of violence, undocumented migrants, refugees, and asylum seekers, and those in migrant detention centers are acutely affected by these changes. Reduced court operations may also result in the prolonged detention of pretrial detainees or of prisoners eligible for early release, for example if bail or parole hearings are postponed. Juvenile detainees are particularly vulnerable. Finally, without functioning judicial oversight, persons detained while emergency measures are in place to contain the virus may not be brought before a judge in a timely manner. This can reduce the impact of an important safeguard for monitoring and preventing torture and other ill-treatment in detention facilities. Emergency measures must therefore include guarantees of due process of law in order to ensure they do not negatively impact the rights of defendants or victims. In some cases, access to justice services can be lifesaving and critical for the preservation of physical integrity, such as in cases of grave sexual violence, domestic violence, or torture cases, or where release of detainees may also help avoid the spread of the virus in prisons and detentions centers. In all these cases there is a room for harmonization of law or establishment of standard by the EU which help vulnerable groups to secure their rights.

The postulate presented above may turn out to be more difficult to implement than it may seem. First of all, we should pay attention to the fact that most limitations of human rights in recent times are actually accepted by society, which generally shows understanding of the seriousness of the situation. Secondly, historically in times of public danger people were more likely to gather. This aspect has found reflection in most constitutional emergency procedures. However the present situation forces us to distancing one another, which is a totally new circumstance at such scale and this may justify a departure from classic procedures of emergency. The Fourth important aspect of the present state is the wide application of electronic means of communication and fast digitalization of subsequent spheres of life. On one hand, in the present circumstances this process is a necessity, on another hand, in the long term, it can cause social alienation or even exclusion of a serious number of people from the social life. Finally, we cannot forget about economic crises: various sectors in various scales are and will be touched by this crisis – one branch will face a mass wave of bankruptcies or at least fundamental

restructuring while others will collect giant profits (e-commerce, logistic etc.). Drastic increase of unemployment in traditional sectors of economy and dynamic development of new, digitized sectors will deepen social inequalities, create common sense of injustice and lead to mass social tensions. Situation can become even more dangerous, when we take into consideration chaos in the information area caused by fake news or by the so called information bubbles. All presented above circumstances will justify further drastic increase of executive power, especially administration and governmental entities, which may result in seeking effective measures to respond to the crisis in the first place and ignoring the issue of their legality ("*efficiency before legality*"). This tension between legal procedures and factual necessity should become the main criteria for entities and organs of the EU that should be considered by planning and implementing policies directed on empowerment of the position of individuals. In practice it means that every time the EU will want to intervene, at first, the further question should be asked: *does protection of public health and public order is adequate justification for severe limitations of basic human rights?*

3. Access to justice

Access to justice is one of the most important guarantees of human rights and freedom. Title VI of the Charter of Fundamental Rights of the European Union, "Justice", emphasizes the most important conditions to be met so the access to justice for everyone to be real and effective. It is also an international standard of liberal, democratic state and core element of rule of law from the perspective of individuals. Most characteristic feature of access to justice as a human right is its complexity. There is no general provision which guarantees access to justice, but it is rather a conglomerate of various rights among which most important are rights to: fair and public hearing before an independent and impartial tribunal, court or other dispute resolution body (including the right to physical access to courts and alternative paths to justice); resolution of disputes in reasonable time; legal aid; be advised, defended and represented (including not only formal but also qualitative legal assistance, the right to adequate time and facilities to prepare one's defense); effective remedy.

In European Union's human rights law, the notion of access to justice is enshrined in Article 47 of the EU Charter of Fundamental Rights, which guarantees the right to a fair trial and to an effective remedy, as interpreted by the Court of Justice of the European Union (CJEU)[2].

[2] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to access to justice*, , 2016, p. 17

However to define the scope of application of this provision, it's necessary to take into consideration Article 51 the EU Charter of Fundamental Rights, according to which Charter applies to EU institutions and bodies without restriction, and to Member States "when they are implementing Union law"[3]. Term „implementing" should be also read as „acting (by a Member State) within the scope of EU law" according to the interpretation of CJUE[4]. This means that scope of art. 51 of the Charter covers situations where Member States are implementing EU directives and regulations[5].

Taking into account that the Charter of Fundamental Rights of the European Union, alongside the Treaties, are a primary source of law for the Member States, every Member State has and currently is implementing the necessary measures to ensure the access to justice and to improve its judicial system and consequently, the access to justice. In our opinion the more easier and effective is the access to justice, the more progressive the society.

The evolution of society, on a large scale, and of the European Union, on a smaller scale is a process. A process which sometimes stagnates, other times it is surprisingly fast and unfortunately, sometimes it even takes a step back.

The pandemic caused by the COVID-19 has brought an unforeseen challenge upon our society and European justice is not an exception in this regard. As a measure of protection for the population, the majority of Member States have entered lockdowns. Because of the lockdown, many courthouses have shut down or restrained their activity, thus affecting the access to justice for their inhabitants.

The most pressing issues caused by the COVID-19 are the complete or partial suspension of the work of courts, the delays in judging, enforcing a decision or in serving a judicial document, the inadaptation of the means of communication as the system was not ready to go online, the modification (suspensions or discontinuations) of time limits[6]. All the actors of the judicial system (the legislative power, the executive power, judges, lawyers, court clerks etc.) have been forced to adapt and create ways and methods to ensure that the access to justice is respected, despite the lockdowns.

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[3] Charter of Fundamental Rights of the European Union, Art. 51.

[4] CJEU, C-617/10, *Åklagaren v. Fransson*, 7 May 2013, paras. 17–21

[5] CJEU, C-206/13, *Cruciano Siragusa v. Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo*, 6 March 2014, paras. 24–25.

[6] Based on the information from the European E-Justice site: https://e-justice.europa.eu/content_impact_of_the_covid19_virus_on_the_justice_field-37147-en.do

4. Access to documents

Nevertheless almost every presented above element requires, to be effective, access to several kinds of documents. The right to a fair hearing essentially includes the right to equality of arms, the right to adversarial proceedings and the right to a reasoned decision. All these elements are required for their effectiveness exchange or sharing documents. Also in case of legal aid or representation access to documents prepared during the ongoing process is crucial for effective execution of rights of individuals. For instance under EU law, the Directive on the right of access to a lawyer confirms that a suspect or an accused person have the right for his/her lawyer to be not only present but also participate effectively[7], which requires an appointed lawyer to at least read the evidence collected in the case.

Access to documents follows indirectly from Article 47 of the EU Charter of Fundamental Rights, which guarantees the right to a fair trial and to an effective remedy, as interpreted by the Court of Justice of the European Union (CJEU)[8]. For this reason it isn't absolute and can be limited in the same manner as other rights enshrined in this provision. Limitations must be proportionate and respect the essence of the right. This means that limitations must not go beyond what is appropriate and necessary to meet the "objectives of general interest recognized by the Union" or to protect the rights and freedoms of others[9].

With a pandemic outbreak and introducing lockdown policies access to documents has been strictly limited as a result of limitations of emergency legislation directed on the judiciary. Some courthouses and buildings were fully closed, others partially, dealing with only "urgent" cases. The extent to which judges and court staff have been able to operate in person and virtually during this time has depended on the particular State's response to the pandemic, the regulations imposed by the authorities and the type of court and cases they deal with[10].

Despite differences, almost in every jurisdiction of EU Member States we can observe a speedy shift to online working in order to deal with the lockdown and rules on physical distancing, which in first place touches digitalization of documents. This process most often takes the form

[7] Directive 2013/48/EU, on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty Art. 3 (3) (b).
[8] European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to access to justice, 2016, p. 17
[9] CJEU, C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen, 9 November 2010, para. 74
[10] The functioning of courts in the Covid-19 pandemic, https://www.osce.org/files/f/documents/5/5/469170.pdf, access 28-12-2020

of scanning documents and sending by electronic means of communication, however not always scanned documents are properly secured due to insufficient technical means.

Also emergency legislation, which is adopted with limited parliamentary oversight and changed with serious frequency causes various problems in the present field. For instance many states introduced various solutions accelerating the courts proceedings like fast track trials or special judiciary bodies, which lead to limitation of procedural guarantees like reduction of judicial periods what also restricts access to procedural documents.

Fast digitalization of circulations of documents in the justice system in corona times can also cause exclusion of various social groups (like migrants, homeless people etc.) and *de facto* denial of justice. In this particular case it is important to take into consideration jurisprudence of CJEU which stated that "electronic means" cannot be the only means offered for accessing procedures because this may make it impossible for some people to exercise their rights[11].

5. Impact of COVID-19 on example issues

a. Domestic violence and child abuse

Restrictions, lockdowns and related with it the need to stay at home for a long time, finally deepening economic crisis and uncertainty about the future are causing social tensions and global rise of frustrations. On this ground even if we observe some decrease of one kind of offence during pandemic (e.g., burglary and assault), in the same time we experienced a rapid increase of other crimes from reasons pointed above. Especially in this second group we can observe drastic growth of crimes related to domestic violence[12]. Women, children, older persons and persons with disabilities became more vulnerable to violence and neglect at times of emergency, very often finding themselves at an elevated risk of domestic violence during lockdown situations[13].

In recent period of lockdowns, victims of domestic violence and child abuse found themselves in very hard position. As it was mentioned above, the stats' response to pandemic has an

[11] CJEU, Joined cases, C-317/08, C-318/08, C-319/08 and C-320/08, *Rosalba Alassini v. Telecom Italia SpA, Filomena Califano v. Wind SpA, Lucia Anna Giorgia Iacono v. Telecom Italia SpA* and *Multiservice Srl v. Telecom Italia SpA*, 18 March 2010, para. 58.

[12] UN Secretary-General's Policy Brief:The Impact of COVID-19 on Women https://www.unwomen.org/en/digital-library/publications/2020/04/policy-brief-the-impact-of-covid-19-on-women, access 2020-12-29

[13] Ensuring AccesstoJustice in the Context of COVID-19, https://www.unodc.org/documents/Advocacy-Section/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf, access 2020-12-28

enormous impact on the functioning of the judiciary. Very often courts have to close, reduce or at least adjust their operations, which very negatively affects the provision of timely and fair hearings, contribute to increased case backlogs, and lead to increased length of judicial and administrative proceedings. Consequently victims of domestic violence, in various scope depending on jurisdiction, were or still are deprived of the right to access to justice. What is more, at the same time also services to support victims are being disrupted or made inaccessible, which very often forces them to stay with their torturers.

For reasons presented above it is vital to secure for victims of domestic violence effective access to justice and other necessary social services which can be in many cases lifesaving factor for them and critical for the preservation of their physical integrity. So at first place these cases should be considered as urgent. According to ODIHR report *The functioning of courts in the covid-19 pandemic* determining what is urgent should take into consideration those cases where defendants are in (pre-trial) detention, cases where immediate protection is required by women or other vulnerable groups from (domestic) violence (in particular during confinement in quarantine), other urgent family disputes and cases relating to violation of measures concerning COVID-19 that imply irreparable harm[14]. For good example can serve laws adopted during the height of the pandemic in Italy, Portugal and Slovenia which provided that urgent acts in which fundamental rights were at stake should have been carried out despite situations of lockdown, such as proceedings where minors are at risk, in urgent guardianship and domestic violence proceedings.

However, it should be borne in mind that the urgency given to these matters itself is not sufficient to ensure effective protection of victims of domestic violence, especially in case of various remote proceedings. In such high sensitive cases parties or witnesses should have guaranteed safety and confidentiality. Alone remote procedures are not always able to work in favour of at risk groups when, for instance, abusive partners are able to intimidate victims during videoconferences. In such cases an individual may not be able to give evidence to a virtual hearing safely from home. For these reasons it is necessary to set up a general standard at the level of Community law of taking evidence of vulnerable witnesses or individuals remotely, from a place where they are not directly exposed to an alleged perpetrator of violence. Such a solution will be of a coordinating nature and will fill potential gaps in local

[14] Ibidem.

jurisdictions due to the fact that most Member States have already introduced such a standard even before pandemic outbreak.

Last but not least, the problem of cases of domestic violence is the question of a criminal justice reaction. In many emergency legislations the list of cases of non-custodial measures was expanded, especially during lockdowns. Nevertheless in such sensitive cases where such important interest of individuals (e.g. physical integrity) is at stake, interest of justice requires to resign from non-custodial measures. Of course, in this situation some very important procedural guarantees would be sacrificed like fair hearing, equality of arms or even presumption of innocence, however both doctrine and jurisprudence allow such limitations of guarantees when interest of individuals and interest of justice requires that.

b. Child custody cases and visiting rights

As long as the parents live together, they usually hold custody over their child jointly. However, if the parents get divorced or split up, they need to decide how this responsibility will be exercised in the future. They may decide that the child shall live alternately with both parents, or with one parent. In the latter case, the other parent usually has a right to visit the child at certain times. Custody rights also cover other rights and duties linked to the education and care of the child, including the right to look after the child and his/her assets. The parents usually have the parental responsibility for a child, but parental responsibility may also be given to an institution to which the child is entrusted. The parents may decide on these matters by mutual agreement. If the parents are unable to reach an agreement they may have to go to court. The court may decide that both parents shall have custody over the child (joint custody) or that one of the parents shall have custody (single custody). In the case that only one parent has custody, the court may decide on visiting rights for the other parent. In the case of an international couple, EU rules determine which court has the responsibility to deal with the case. The principle is that the responsible court is the court in the country where the child habitually resides[15].

With the COVID-19 pandemic spreading all over the world and the lockdowns, courts are faced with new challenges. Child custody cases are extremely affected by the pandemic's negative effects on the access to justice, and not just in the case of cross border marriages. Despite different regulations, all EU-Countries recognize the child's right to personal and direct contact with both parents, even though living in different countries. Due to this right, in cases of divorce

[15] https://e-justice.europa.eu/content_parental_responsibility-302-en.do, access on 2020.12.20

or separation it must be determined in advance where and with whom the child will reside, whether with one parent or with both parents, where they may alternate custody.

Because of the spread of the virus in some Member States a state of emergency was declared, and as a consequence courts were closed. Most of the cases were carried out through written procedure, however custody cases are nearly impossible to be carried out in such form. Moreover, exercising the visiting rights during lock down and compulsory self-isolation can be restricted, especially in case of international families[16].

A good example for comparison of various approaches regarding challenges related to child custody cases and visiting rights are model regulations proposed by state legislation of Republic of France and local legislation of municipal government in Berlin (Germany).

First field of comparison is the question on whether applications in family matters could be filled in front of the jurisdiction during the lockdown and how pending cases were dealt with.

In France, a state of health emergency was ordered for two months from 24 March 2020 (*Loi d'urgence of 23 March 2020*) until 24 May 2020. During the "lockdown", the courts were officially closed and the only applications that could be submitted in family matters were international child abduction cases or urgent claims to obtain a restraining order in cases of domestic violence.

For pending cases:

- The hearings that had been originally set during the "lockdown period" were usually cancelled and postponed at another date,
- In written proceedings where the representation by a lawyer is mandatory, such as divorce, or in oral proceedings when the two parties have a lawyer, the court could decide that the proceeding will continue only in written that is so say without a hearing, solution that could be refused by the parties,
- Decisions that were supposed to be rendered during the lockdown could be postponed. Exceptionally, some decisions related to cases already heard in Court could be rendered and sent to the parties by all means.

[16] https://www.mondaq.com/italy/family-law/907244/cross-border-divorce-and-child-custody-what-to-do, access on 2020.12.20

In Germany, on another hand, there has never been an official “lockdown” in justice. As the organization of the courts is a competence of each Bundesland (state) the handling is different in every Bundesland and often even different from court to court. In Berlin, which is a city and Bundesland as well, no decree has been issued, but all hearings in Family matters, that were originally set from March 16th on, were cancelled and postponed at another date, mostly starting by the end of May. Applications in family matters could continue to be filed by written application, sent to the court by post or by the German secured digital service “beA”, the official register of all attorneys in Germany with an official secure mail account with the Federal Bar Association (*Bundesrechtsanwaltskammer*). All of the four Family Courts in Berlin continued working, but in a very reduced way. Only urgent matters such as domestic violence, guardianship issues or questions related to statutory limitations were treated.

Second field of comparison is the question on how were the means of communication with courts in family matters during this time.

In France the Ordonnance n°2020-304 of 25 March 2020 allowed the court to communicate with the parties to keep them informed by all means. This includes letters, emails, phone calls or via the RPVA (Private Virtual Network for Lawyers). But in practice, contacting family courts was difficult. Basically, family justice in France had come to a standstill. Most courts could not be reached by email and for written proceedings that were usually carried through the RPVA, no answer was usually received. Video hearings were legally allowed but in fact, were rarely, not to say never, proposed in family matters. Lawyers were encouraged to only communicate with the courts when absolutely necessary and had no other solution than waiting for information.

In Berlin applications could be filed digitally at every court in Germany by the beA, the official register of all attorneys. Response would only be obtained by courts that are already using the system effectively, which are few. Usually the answers were delivered by Fax (if urgent) or by post. There were no remote hearings or video conferences. If considered necessary, there was still a hearing in a courtroom. Usually, those hearings would take place in the biggest court rooms existing in the building to permit a large distance between the parties. As a consequence, written communication still was the main mean of communication with courts in family matters.

Third field of comparison is the question on consequences of the "lockdown" on the rights of the parents and is there any official guidance.

In France decisions setting parental rights were still applicable. According to the official guidance (www.service-public.fr/particuliers/actualites/A13987), the exercise of parental rights had to be respected in the health context. However, parents were invited to limit travels of children and avoid public transportation. Parents were therefore encouraged to find agreements to adapt their organization but when they couldn't the decision prevailed. In international situations, when parents live in different countries, visitation rights were usually not possible because of the closing of the borders. Some exceptions could take place depending on the nationality of the child and each country's policy about authorizing to come back or from another country. In that case, when the distance between the parents was significant and forbade a geographic displacement, contacts between the child and the parents had to be maintained by all means (phone, video calls). Many situations could not be solved only by following the official guidance and no judicial applications could be submitted during the "lockdown" to provide for news conditions. The role of family lawyers was thus more than ever crucial to accompany the parents to find solutions and help them to adjust the implementation of their rights in the best interest of the child.

Contrary to French regulations, in Berlin there was no official guidance. Violations of rulings on visitation rights could be pursued with a fine up to 25.000,00 EUR or imprisonment (if the fine cannot be paid) up to six months, if the violation is a willful act and cannot be excused by health issues. This opened a wide field for interpretation for parents. As a by constitution granted right, the contact between children and their parents is a priori considered as in its best interest, even more in stressful situations as actual. Unfortunately, there are not few cases, when mostly fathers claim, that they were being denied access to the children using the pretext of the COVID-19. As courts could not execute the visitation rights directly, those questions will be pleaded after the crisis. When parents live abroad, visitation rights were usually not possible because of the closing of the borders. When the geographic displacement was impossible, contacts between the child and the parents had to be maintained by all means (phone, video calls). Parents and children were actually under a lot of pressure and the unknown situation leads to a great insecurity. Attorneys had to negotiate with utmost prudence to maintain the stability for children.

The last field of comparison is the question on alternative dispute resolution methods used during pandemic and whether they are efficient to replace the slowing down or closing of the jurisdiction.

In recent years, France has increased the number of alternative methods for settling family disputes. Among the best known, family law specialists have been using mediation, but also collaborative law. In the present context, mediation is especially promoted and has been offered by phone or video conference meetings. A special mediation group for urgent family matters had been created by the Paris Bar Association. Recently France has also given rise to a technique known as *procédure participative*, which can be used to privatize the processing of the procedure while it is being carried out (*procédure participative de mise en état*) or to provide a framework for reaching an agreement out of court (*procédure participative*). When using this method, it is possible to define the conditions of exchanging the legal arguments and pieces of evidence, to appoint experts (real estate or company valuations) or to hire a notary when necessary or any third party agreed by the parties. In all cases, the procedure participative makes it possible to exchange views out of sight of the court and to make partial or total progress on the outcome of the dispute. The agreement reached can be homologated by the court as well as the remaining dispute decided by the court. France is also very much involved in the development of arbitration, which offers a wide range of possibilities when the matter is arbitrable, something we still have to work on in family matters to expand the spectrum.

In Germany, there are basically two methods of mediation in family matters: One in private or social institutions. Those would be open to the public, if they were living in the same household. Usually social institutions don’t provide mediation for the moment. Court mediation is practiced in court by a judge with a degree in mediation. Those mediations are postponed for the moment.

Video mediations are suggested by private institutions or private mediators. Depending on the client’s decision they can take place. Lawyers have always been able to validate settlements via court. This is an often used option to avoid a hearing “just to sign” the agreement found by the parties. Therefore, one of the attorneys submits the agreement to court in asking for formal transmission to the opponent. If the latter accepts the proposition (evidently negotiated before), court rules formally close.

6. Conclusion

No one knows what will be the final effects of the pandemic of COVID-19, but there are only few people who could deny that right now we are facing revolutionary changes in almost every aspect of our life. Law isn't an exception. It is really hard to find the branch of law, which wasn’t touched by COVID-Covid19. By this expression we shouldn’t understand the traditional

problem of law of legal reaction on raised issues in socio-economic sphere, creation of new legal institutions and some technical problems of its implementation. Impact of COVID-19 is far deeper and touches the fundamentals of the legal system. On almost every level of legal hierarchy we are facing so many new phenomena and legal dilemmas that it is impossible to answer them based on the present doctrine. The main reason why lawyers have encountered many problems with the present situation is that actually, for the first time since the end of World War II, we observe such enormous tension between core values of the whole legal system (for example necessity of protection of public health very often interferes with the guarantees of rule of law - the case of fast track emergency legislation, freedom of assembly - the case of ban of assembly, or even personal freedom, ban of movement in case of strict lockdowns or quarantines). Situation is even more complicated when we take into consideration the fast and unprecedented digitization process forced by the current situation. Taking all these circumstances, it won't be too poetic to state that the way the legal system reacts to the present challenges will set the direction of development of law in the 21st Century.

For obvious reasons, the justice system also faces challenges caused by the pandemic of COVID-19. In this case, the present situation doesn't relate to organizational issues but touches core elements of the whole system, especially basic human rights, such access to justice. We can clearly observe that the measures taken by the States show the general tendency of pandemic legislation, which is to give priority to the interests of the state above the interests of individuals.

For this reason, it is reasonable to point out probably the most important function of the European Union during the present crisis, namely in the areas of its competences, the European Union should balance the actions of the state and empower the position of individuals, especially in the area of justice system and access to it.

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Written report

Questions on access to justice and access to documents

1. Does this situation have any link with EU Law?

The COVID-19 pandemic has caused many problems to the European jurisdiction that challenges not only Member States but also European Union's institutions which carry considerable responsibility arising from preparing recommendations for the Member States. As this is an extraordinary situation and happens for the first time, there is no legal path that could guide EU institutions and Member States to know what measures should be taken to prevent infringement of fundamental human rights. Furthermore, the situation is changing rapidly so the EU institutions and Member States cannot afford to implement relevant measures so the judicial system can be functioning without disruption.

While the situation is out of control, the response of the European Union and its Member States is criticised for reacting too slow and inadequate. As is well known, the EU must act within the limits of the power conferred on them by the Treaties – the Treaty on European Union ("***TEU***") and the Treaty on the Functioning of the European Union ("***TFEU***"). The EU have only two possible outcomes of reacting:

1. being proactive in taking steps to deal with cross-border problems of public health,
2. reacting to measures taken by member states in response to the virus.

There are tried and tested methods for determining whether the use made of these exceptions and derogations is legitimate, appropriate and proportionate. But any of these processes take more time than a global pandemic allows. It may take months to show up whether measures adopted today should be approved, disapproved or even penalised.

EU institutions create European standard which is considered as legal instrument that constitute common rules, creates direction and thought process and states universal guidelines to be implemented by Member States. However, European standards should not be limited only to the legal order of EU but also to what does the Council of Europe. The Treaty establishing the European Community, Treaty on European Union and European Courts of Justice case law, European Convention for the Protection of Human Rights and Fundamental Freedoms and the activities of the Committee of Ministers of the Council of Europe shall be indicated. European law does not in itself constitute the structure for jurisdiction in Member States, it is the opposite – Member States have its own organizational autonomy, according to the Treaty establishing

the European Community. It means that they can establish not only judicial authorities, but also internal organization in general. Therefore, each Member State can decide about its organization and the mode of operating. They are either free to determine its instance.[1]

2. In what cases, if any, would EU law apply and what would be the relevant provisions to be invoked?

The most important guidance if any of the EU law would be applicable at the times of pandemic is article 47 of the Charter of Fundamental Rights of the EU ("***Charter***") which guarantees the right to an effective remedy and right to independent and impartial tribunal. According to this article: *Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice*[2].

Above-mentioned article, is set of powers that are covered by the term *effective judicial protection*, which consists of: 1) fair hearing 2) public hearing 3) hearing within a reasonable time 4) hearing by an independent tribunal 5) hearing by an impartial tribunal 6) tribunal previously established by law 7) possibility of being advised 8) possibility of being defended and represented.[3] In current situation public hearing, hearing within a reasonable time, possibility of being advised and possibility of being defended and represented are not fully respected by the Member States, as many of them have cancelled or postponed hearings, limited admission of a public on a hearing and limited access to the case files in the court.

In the light of the considerations, there seems to be no doubt that individuals not only have the possibility of directly relying on Art. 47 of the Charter as a source of specific rights and obligations, but also that this article is an independent source of specific rights and does not require the authorities applying it to treat it as an accessory provision, serving the effective assertion of other fundamental rights or other rights guaranteed to individuals by the EU law.

[1] Maliszewska-Nienartowicz 2007, p. 43-47.

[2] Charter of Fundamental Rights of the European Union.

[3] Górski 2016, p. 37-44.

At the same time, Art. 47 of the Charter becomes a guarantee for an individual in proceedings before a national court that its case will be heard by an independent and impartial court[4].

However, the laws written in Art. 47 of the Charter does not have an imperative nature and may be subject to limitations in certain circumstances. Furthermore, clauses regarding to exceptions in international standards in the field of human rights allows Member States to temporarily adjust some of obligations in extraordinary circumstances. And by law European Court of Human Rights (**"Court"**) takes into consideration the importance of having an access to justice as a democratic rule. In accordance with the law, the limitation must have reasonable aim, be proportionate and ensure protection from breach of the law [5].

The fundamental rights guaranteed by the Charter are applicable when national legislation is affecting fundamental freedoms and the Member State is justifying such affection by the public interest. In such case the Court stated that the use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must, therefore, be regarded as 'implementing EU law' within the meaning of Article 51(1) of the Charter of Fundamental Rights of the EU. So the only reason why the EU law can apply is an obligation to comply with fundamental rights that falls within the scope of the Charter [6].

The scope of application of the Charter to the Member States and its Article 51 (1) should be broadly defined as covering all those cases in which the Member States act within the scope of the principle of primacy or effectiveness of EU law. The risk of violating EU fundamental rights should not be relevant for determining the scope of application of the Charter. Thus, the scope of application of the Charter should not be understood narrowly when there is no threat to EU law, but broadly when such a risk exists. However, another issue is the justification of the need for the Charter intervention - its application instead of the national standard of protection of fundamental rights. Recognizing that a case falls within the scope of application of the Charter *ratione personae* only allows it to be applied and does not require the Charter to be used as a substitute for fundamental national rights. The Charter should be activated in a subsidiary manner in relation to national standards of fundamental rights protection. In situations where

4 Douglas-Scott 2011, p. 645–682.

5 Opinion of the Council of Europe

6 see CJEU Judgment AGET Iraklis C-201/15

national standards are appropriate and do not pose a threat to the Charter standard or to the performance of EU obligations by Member States, they should have priority of application[7].

Above-mentioned opinion is broadly well-founded in case law. According to the case C-617/10 Åkerberg – Fransson, Art. 51 is to be interpreted as the Charter is addressed to the Member States when they are acting within the scope of the EU law. It means that the Charter guarantees protection only in situations that are concerning to its scope so the Court of Justice (Court) is able to examine the national legislation with the Charter. In such case, Member State can request a prejudiciary question to be provided with a guidance of interpretation whether the national legislation is compatible with fundamental rights ensured by the EU law.[8] It must be remembered that the Court states that the provisions of the EU law raised by the national court do not impose any obligation on the Member States. Moreover, the objectives of the EU law rules and those of the national legislation at issue are not the same and the provisions of the national legislation at issue do not constitute an implementation of rules of the EU law[9].

3. If the Charter of Fundamental Rights of the EU is to apply, are the measures taken by Member States as a result of the COVID-19 outbreak justified under Art. 52 of the Charter?

Fundamental rights are not granted absolute protection. They are subject to limitations in accordance with the general limitation rule provided by Art. 52 Sec 1 of the of the Charter. A limitation in this sense is any conduct of a member state that has an adverse effect on any fundamental rights.[10]

According to Article 52 Sec 1 of the Charter *any limitation on the exercise of the rights and freedoms recognised by the Charter must be (i) provided for by law and (ii) respect the essence of those rights and freedoms. Subject to the (iv) principle of proportionality, limitations may be made only if they are necessary and genuinely meet (iii) objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*

As we have discussed above the measures taken by Member States as a result of the COVID19 outbreak are a limitation on the exercise of the rights and freedoms recognised by Article 47 of the Charter. For such a limitation to be justified under EU law, the conditions set by Article 52

[7] Półtorak 2014, p. 17-28.

[8] see CJEU judgement Åkerberg Fransson C-617/10

[9] see CJEU judgement Siragusa C-206/13

[10] Meyer/Hölscheidt 2019, Section Art. 52 at para. 27

of the Charter must be met. Only if all the below conditions are met can such a measure be justified.

3.1. Provided for by law

Considering the scope of the Charter, limitations must be provided by law without an exception at the EU level, while at the Member States ("***MS***") level limitations must be provided by law only when MS are implementing EU law in accordance with Art. 51 Section 1 of the Charter.

Therefore, if the Charter applies then Member States can only provide a limitation on the exercise of fundamental rights by laws. This means that either a law adopted by the legislative body of the Member State can provide such a limitation or the legislative body of a MS can mandate other institutions to create such limitations.[11]

According to the case law of the Court of Justice of the European Union ("***CJEU***") the law containing the limitation must also be clear and precise in nature.[12] Furthermore such an limitation must be precisely circumscribed by provisions to ensure that the fundamental right is actually limited to what is strictly necessary.[13]

I believe that it must be determined in every individual case if the limitations created by Member States are provided by law. I think however that in most of the Member States the legislative body has created laws to react to the special situation caused by COVID-19.

Therefore, I think that the first condition set out by Art. 52 Section 1 of the Charter (if applicable), would probably be met by Member States. However, we need to keep in mind that if all the following conditions are also met, only then the COVID-19 restrictions would be justified under EU law.

3.2. Respect the Essence of Fundamental Rights

As a second condition it must be ensured that the limitation respects the essence of the fundamental right in question. According to the CJEU case law this means that the limitation must respect the essential content of the fundamental right and the fundamental right cannot be called into question as such.[14]

In the Scherms decision the CJEU has examined what constitutes the essence of the fundamental right to effective judicial protection (which is relevant in our case). The CJEU has

[11] Meyer/Hölscheidt 2019, Section Art. 52 at para. 27

[12] C-293/12, Digital Rights Ireland at para. 54

[13] C-293/12, Digital Rights Ireland at para. 65

[14] Peter Puškár, C-73/16 at para. 64

found in the Schrems case that the legislation did not provide for any possibility for an individual to pursue legal remedies, which does not respect the essence of the fundamental right to effective judicial protection.[15] Hence the essence of the right to effective judicial protection "is only compromised where the limitation in question empties those rights of their content or calls their very existence into question."[16]

While the shutdown of the courts and hence the prolongation of the procedures due to COVID 19 in Member States can result in a breach of the reasonable time condition set out by Art. 47 Section 2 of the Charter. Considering the CJEU cases especially the Schrems case, where there was no possibility for any legal remedies, this breach or limitation does not compromise the right to effective judicial protection. These limitations does not strip away the right to an effective remedy and to a fair trial, considering that the affected citizens of the member states still have a right for legal remedies in accordance with the procedural laws of the MS in question.

3.3. Objectives of general interest

As a third condition, limitations may be made only if they genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Under objectives of general interest belong not only the values of the European Union set out by Art. 3 of the Treaty of the European Union ("***TEU***"), but also any interests that are specifically protected under primary law.[17] According to Art. 3 TEU Sec 1 the EU's aim is to promote the well-being of its peoples. At the same time according to Article 168 of the Treaty of the Functioning of the European Union ("***TFEU***") a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. Even if we argue that the well-being of it's citizens are not a clear enough reference to the public health interest, from Art. 168 TFEU it is clear that public health is an objective of general interest recognised by the Union. Hence the third condition set by Art. 52 of the Charter is also met in our case, considering that the shutdown of the court due to COVID-19 were a measure to promote public health during the pandemic.

3.4. Principle of proportionality

The last but most important condition is the principle of proportionality. The principle of proportionality requires, according to the settled case-law of the CJEU, that the measures adopted do not exceed the limits of what is appropriate and necessary in order to attain the

[15] Schrems, C-362/14 at paras. 94-97.

[16] Lenaerts 2019, 784

[17] Meyer/Hölscheidt 2019, Section Art. 52 at paras. 35 - 36

legitimate objectives pursued by the legislation in question, since the disadvantages caused by the legislation must not be disproportionate to the aims pursued.[18]

a) Appropriate

A limitation is appropriate in accordance with settled case-law, if it ensures the attainment of the objective pursued and it genuinely reflects a concern to attain the objective in a consistent and systematic manner.[19] Considering that the shutdowns of the courts were ordered for every court within the member state without an exception and the limitation ensured the attainment of the public health objective recognised by the EU, I believe that the limitation was appropriate.

b) Necessary

In accordance with settled case-law this condition requires that when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued.[20]

In our cases in order to stop the spread of the COVID-19 pandemic courts within member states had to be shut down. While I think this limitation is not disproportionate to the aim pursed, i.e. to ensure the health and safety of the citizens of the Member States.

At the same time, we must also ask what were the possible appropriate measures that the Member States could have chosen.

> *Option A:* MS could shut down the Courts and delay every hearing and every proceeding, except for cases of extreme urgency.
>
> *Option B:* MS could hold hearings online and judges could have continued to work from home, which would mean that the procedures are not significantly delayed. In some of the MS however this might not have been a possibility due to technical difficulties.
>
> *Option C:* MS where online hearings are not possible, could have also decided to enable judges to work on cases from home. For instance, instead of oral hearings, it is possible to receive written statements from witnesses and from other parties within the procedure, which would also enable the proceedings to continue.

[18] F v. Bevándorlási és Állampolgársági Hivatal C-473/16, para. 56 (also see, to that effect, judgments Tempelman and van Schaijk C-96/03 and C-97/03 para. 47; CHEZ Razpredelenie Bulgaria C-83/14 para. 123; and N., C-601/15 PPU para. 54)

[19] Fries C-190/16 para. 48 (also see, to that effect, judgments Fuchs and Köhler, C-159/10 and C-160/10, paras. 85 and 86)

[20] Menci C-524/15 para. 46 (also see, to that effect, judgements Müller Fleisch C-562/08, para. 43; ERG and Others C-379/08 and C-380/08, para. 86; and EL-EM-2001, C-501/14, paras. 37 and 39 and the case-law cited).

Considering that there are options for legal proceedings to continue without hearings that the parties take part in "in person", I think that Member States that have shut down their judicial systems entirely during COVID-19, did not choose the least onerous measures. Both option B and option C would be a less onerous measure than option A set out above.

In conclusion the condition of principal of proportionality is not met and as a result the above-mentioned measures taken by Member States due to the COVID-19 outbreak are not justified under Art. 52 of the Charter. Keeping in mind, that every measure of every Member State must be examined separately in order to give a definite answer to this question.

4. Besides jurisdictional remedies, could the affected parties make use of any non-jurisdictional remedies provided under EU Law?

The non-jurisdictional remedies that are considered relevant for the case at hand are the right to a petition, the European Citizen's Initiative, the complaint to the European Commission and the procedure of Art. 7 of the TEU.

The application of the tools mentioned above can come into play in the cases at hand, since the emergency measures taken by the Union's Members contain a risk of violating the principles of democracy, rule of law[21], fundamental rights and in particular the right of access to justice which is established under Art. 47 of the Charter[22]. As stated by the commission, the fundamental principles and values of the founding treaties should not be overlooked in times of a crisis[23].

In order to initiate these procedures, the alleged breach should not have a purely individual impact. Regarding the infraction of the right of access to justice during the COVID-19 crisis, it is evident that the measures at stake are of a comprehensive nature interfering with numerous cases in the majority of the Member States.

4.1. European Citizen's Initiative

The European Citizen's initiative is established under Art. 11 of the TEU[24]. The aim of this procedure is to activate the Commission in order to enact legislation. European Citizens should register with the committee in order to organize the Initiative, collect the statements of support,

[21] For the definition of the rule of law *see* Rule of Law Communication of the EC p.1

[22] According to Article 6 para.1 of TEU *the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*

[23] Rule of Law Report

[24] There is also a specific Regulation referring to the ECI, *see* Regulation (EU) No 211/2011

request verification and certification by the involved national authorities and then submit it to the Commission with the aim to enact legislation[25]. In the case at hand the European citizens could submit an appropriate proposal regarding how the judicial branch of the Member States should react to COVID-19 pandemic, considering that this is a matter where a legal act of the Union is required for the purpose of implementing Article 168 of the TFEU on public health.

4.2. Petition to the European Parliament

The non-judicial tool which can be addressed to the Parliament is that of the petition. This right is essential and should not be overlooked since it is indispensable and strongly linked with the EU citizenship. The right to petition is established by Article 44 of the Charter[26]. According to the commentary of the Charter this right corresponds to the right guaranteed under Articles 20 and 227 of the TFEU[27] to the European Union's citizens and residents.

The ratione personae condition is met since the affected persons are either EU citizens or reside within the EU. At the same time this instrument has a broad ratione materiae, considering it only requires that the petitionmust *be relevant to the activities of the European Union.* Therefore, the infringement of Art. 47 of the Charter (Right to an effective remedy and to a fair trial)and subsequent the risk of a breach of the rule of law falls under this material scope, as a consequence the affected parties can initiate such a procedure. Under affected party we understand any European citizen or resident that's legal proceedings have been prolonged and postponed due to the shutdown of the courts during the COVID-19 pandemic.

If the petition is admissible it will be thenb examined by the Committee on Petitions and if the petition refers to one or more individual breach(es), the Committee will communicate with the competent authorities to settle the dispute[28]. If the petition refers to a potential rule of law breach, the case may be transferred to another EU institution, i.e., the Commission[29], to initiate an infringement procedure. Lastly, even if the Parliament is not bestowed with legislative

[25] Fact sheet on the Citizens Initiative

[26] According to article 44 of the Charter *any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.*

[27] According to Article 227 TFEU *any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly.*

[28] Fact sheet on the right to petition

[29] Gallop/Stefanova 2006, pp.15-16

power, the pressure imposed by the petition may also result in, that the Parliament provides a proposal of a legislation to the Commission under Art.225 TFEU[30].

4.3. Infringement Proceedings before the European Commission Art.258 TFEU

The European Commission's role expands also to challenges derived from the application of EU law[31] which transform it to what is known as *"the guardian of the Treaties"*. Under this competence of the European Commission lies the non-judicial infringement procedure. In particular, at the case at hand the occasion triggering such a procedure lies either in the inability of the concerned member state to comply with the obligations emanating from Art.2 TEU, or in the failure of the former to respect the fundamental rights which stem from the values of the Union, i.e., Art.2 TEU while applying EU law. In case of activating Art.258 TFEU based on Art.2 TEU the infringement should have a systematic nature[32], a condition which in the case at issue could be met regarding certain European countries which have been proceeded to constant violations of these values and have been in the core of EC's discussions lately[33].

According to Art.258 TFEU a complaint can be filed by an individual who considers that a fundamental right of his own stemming from EU law has been infringed. In order for a person to file a complaint there are some requirements that should be met. As to the persons able of proceeding to such an action, there is no limitation. Nonetheless, this is not the case with regard to the object of the complaint. More precisely, anyone can complain about any measure taken or being omitted by the public authorities of a Member State[34]. There is also a territorial limitation, meaning that this procedure is only available within the EU borders.

The submission can be followed by a Letter of Formal Notice drafted by the Commission sent to the concerned MS with the view of the latter to express its view on the matter. If the MS does not reply in a two-months period (usually) or if it does reply but the Commission is not satisfied by the response, then the latter issues a Reasoned Opinion as an ultimate attempt to dissuade the MS requesting it to comply with EU law and proposing measures to be taken in order for the breach to cease. If the MS does not waive the questionable regulations within two months (usually), then the Commission *may* set the case before the CJEU. In this case, the non-judicial character transforms to a judicial one, but if the MS conforms in one of the previous stages,

[30] Suchnova 2017, pp.68-70

[31] Coen/Richardson 2009, pp.20-21

[32] see Resolution of the EP

[33] Kochenov/Pech 2015, p. 520.

[34] How to make a complaint at EU level, available at https://ec.europa.eu (last accessed on 20.11.2020)

e.g., by suspending the measures, then the infringement has been paused without judiciary interference[35].

Applying what was elaborated above in the case of measures taken during the pandemic which led to an infringement of the right of access to justice, the following observations have to be made. First, the territorial condition is met since the alleged infringement occurred within the Union. Second, the measures which applied and led to such a breach were in some cases acts of the executive power and in some other acts of the *corps législatif.* In both cases, the actions are attributable to the national authorities which developed and imposed the provisions that led to the alleged breach of EU law. Last, the right of access to justice as established under Art.47 of the Charterforms part of the European Union's law[36], and the failure of the member states to respect it and provide the required vehicles that lead to its jouissance is considered as infringement.

4.4. Article 7 TEU

Since the measures at issue may consider an erosion of the rule of law, Art. 7 TEU has been considered as a relevant alternative to the judicial remedies. It is important that this article does not only apply when EU is competent upon a matter, but also in sectors where member states are autonomous.

The main objective of Art. 7 TEU is to ensure that the common values of the EU, including the rule of law, are respected by the Member States. Therefore, this procedure is being initiated either when there is a clear risk of a serious violation (para.1) or an existing persistent breach of the aforementioned values (para.2). In the former case the competent instruments to plead for its application are the Council, the Parliament or 1/3 of the Member states, while in the latter case are the Council or the Parliament.

In the cases at hand, it might be overwhelming to claim that the risk has been materialized, therefore the invocation of the prevention mechanism seems to be more appropriate. The determination of the *clear and serious risk* relies upon the Council which should first address to the Member State allowing it to express its opinion on the subject-matter. If the Member State does not comply with the recommendations and a majority of 4/5 of the Council agrees - having obtained the Parliament's consent – the issuance of a Recommendation follows,

[35] De Schutter 2017, pp.27-28

[36] It is also important to examine the extent to which article 51 para.1 of the EU CFR allows such an invocation since this piece of legislation applies only when the national application falls under the EU law. This was clarified in Akerberg Fransson C-617/10 where the ECJ held that *"[…] the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter." See* para.16 C-617/10 Case of Akerberg Fransson of 7 May 2013

advising the member state with respect to the actions to which it should proceed to cease the infraction. However, this procedure cannot enforce the member state to comply, since the Recommendation is not of a binding nature, but it is able of imposing a significant political pressure upon the involved member state. While it constitutes a measure of a comprehensive nature aiming to cease the breach and not providing specific remedies to the individuals involved.

Even if the enactment of Art. 7 TEU is deemed exceptional[37] and the thresholds set by it is considerably high, its application in such cases is urgently advised in order to demonstrate that the values of Art. 2 TEU dispose of a certain substance and they are not non-binding proclamations[38].

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THE IMPACT OF THE COVID-19 OUTBREAK ON THE FUNCTIONING OF KEY PUBLIC SERVICES AND ITS LINK WITH EU LAW

First round of the Young Lawyers Contest 2020/2021: Written report

DATE OF SUBMISSION:

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I. INTRODUCTION

1. As of March 11, 2020 a global pandemic was confirmed by the World Health Organisation (the "**WHO**")[1] as a result of a massive outbreak of the new type of coronavirus - SARS-CoV-2 virus ("**COVID-19**") which origins root back to Wuhan a capital of Hubei Province in the People's Republic of China. Following this WHO´s statement, the majority of European Union ("**EU**") Member States chose un-coordinated national lockdowns hoping to stop the spread of the new virus. These national measures affected daily life of all the people and generated significant questions about the necessity of securing the public health for a price of human rights´ limitation or even derogation. As we are drafting this report, such debate is still not over as the EU is only entering into the second phase of the "war with the virus" – a vaccination. While the European Commission believes the pandemic might be controlled by the end of 2021,[2] the majority of EU Member States are under strict lockdowns and govern under state of emergency frameworks.

2. In this report, we focus on how COVID-19 might have affected the access to justice in the EU. Although at this very moment, it is still rather a theoretical question, we strongly believe many cases will emerge as harmed individuals will seek remedies before the national courts for any kind of limitation of their rights during the pandemic.

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[1] *WHO Director-General's opening remarks at the media briefing on COVID-19*. Available at: https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 [accessed 26 December 2020].

[2] *Questions and Answers: COVID-19 vaccination in the EU*. Available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2467 [accessed 26 December 2020].

We have, however, exclusively aimed only at the EU dimension[3] – this report will therefore shed light on this situation against the background of the applicable EU law. It will also seek to provide an answer to the question whether the measures, taken by EU Member States as a result of the COVID-19 outbreak, are justified under Article 52 of the Charter of Fundamental Rights of the EU. Furthermore, the report will outline whether, in addition to jurisdictional remedies, the affected parties may also have access to any non-jurisdictional remedies provided under EU law.

II. ACCESS TO JUSTICE AT THE EU LEVEL

3. According to Article 6 (1) of the Treaty on European Union ("**TEU**"),[4] the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union as of December 7, 2000, as further amended ("**EU Charter**").[5] The EU Charter has the same legal value as the Treaties and therefore enjoys the direct effect (ensuring both the application and effectiveness of EU law in all EU Member States). The addressee of the obligation to respect human rights is primarily the EU, in particular its various institutions and the EU Member States (mainly the courts of justice) when applying the EU law. The EU Charter therefore applies when EU Member States adopt or apply a national law implementing an EU directive or when EU regulation and/or treaties apply directly.

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[3] This distinction is absolutely essential; one must follow the "red line" between "national" and "EU" dimension as we draw your attention on the recent order of the CJEU of December 10, 2020 in case C-220/20. In a request for a preliminary ruling lodged on May 28, 2020, the *Giudice di Pace* of Lanciano referred several questions to the CJEU concerning the postponement of hearings and the lack of remote access to justice. The national court considers that the effects of the emergency measures undermine (1) the independence of the judiciary and (2) the rights of the parties to a fair hearing within a reasonable time. The main proceedings concerned a damages claim in the context of a traffic accident. Nevertheless, it was not apparent from the request that the dispute had a connection with EU law provisions. Consequently, the CJEU held that the requirements of Article 94 of the Rules of Procedure were not met: not only was the case insufficiently substantiated, but there was also no connection with EU law. Therefore, the CJEU has found this request "manifestly" inadmissible (CJEU, *XX v. OO.,* Case C-220/20, December 10, 2020, ECLI:EU:C:2020:1022).

[4] European Union, *Consolidated version of the Treaty on European Union,* 26 October 2012, OJ C 326/13-390, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT [accessed 29 December 2020].

[5] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT [accessed 18 November 2020].

4. Article 47 of the EU Charter guarantees the right to a fair trial and to an effective remedy. We especially underline the second subsection of this provision: "*Everyone is entitled to* ***a fair and public hearing*** *within* ***a reasonable time*** *by an independent and impartial tribunal previously established by law. Everyone shall* ***have the possibility of being advised, defended and represented***."

5. The right to a fair trial includes the right of access to a court.[6] When interpreting this right, it is possible to follow both the case law of the European Court of Human Rights ("**ECtHR**") and the Court of Justice of the European Union ("**CJEU**") in accordance with Article 53 of the EU Charter. Under this provision, the rights of the EU Charter which correspond to rights of the European Convention on Human Rights ("**ECHR**")[7] are granted the same meaning and scope of protection as those of the ECHR. The Explanations to the EU Charter[8] confirms that Article 47 of the EU Charter is included in Article 6 (1) ECHR without the limitation on civil right and obligations set out in Article 6.[9] In this respect, the interpretation of access to justice derived from ECtHR's case law regarding to Articles 6 and 13 ECHR[10] also applies.

6. The notion of "*access to a court*" has been discussed many times in European jurisprudence. That right, including effective judicial review of the actions of the authorities, is an element of the rule of law on which the EU is based.[11] Thus, access to court to pursue an EU claim serves the effectiveness of EU law and also guarantees the rule of law. It is therefore linked to Article 2 TEU and Article 19 TEU, which entrusts the CJEU and national courts with the task of ensuring the full application of EU law

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[6] ECtHR 21 February 1975, *Golder v. The United Kingdom,* No. 4451/70, European Union Agency for Fundamental Rights, *Handbook on European law realting to access to justice,* January 2016, p. 25 and next., available at: Handbook on European law relating to access to justice (coe.int) [accessed 27 December 2020].

[7] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16*, 4 November 1950, available at: https://www.echr.coe.int/documents/convention_eng.pdf [accessed 18 November 2020].

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[9] *Trade Agency LTD v. Seramica Investments LTD,* Case C-619/10, ECLI:EU:C:2012:531, 6 September 2012

[10] Article 6 ECHR entails the right to a fair trial, whereas Article 13 ECHR comprises the right to an effective remedy. Although different systems govern the enforcement of the ECHR and the EU Charter, both underline that the rights to an effective remedy and to a fair trial should principally be enforced at national level.

[11] *Beate Vever v. European Parliament,* Case C-314/91, ECLI:EU:C:1993:109, 23 March 1993, § 8; *Associaco Sindical dos Juizes Portugueses v. Tribunal de Contas*, C-64/16, ECLI:EU:C:2018:117, 27 February 2018, §36.

and the judicial protection of rights which individuals derive from EU law.[12] Non-compliance with Article 47 of the EU Charter may lead to annulment of an EU act.[13] In particular, it is necessary to notice that the CJEU has already ruled that access to court can involve the geographical remoteness of the court, if its location prevents applicants from being present at all stages of the proceedings.[14]

7. The right of access to a court is not absolute. It can be limited.[15] Restrictions cannot, however, affect "the very essence of the right".[16] Primary, article 47 of the EU Charter may be subject to limitation when other fundamental rights need to be guaranteed.

8. For example, in the event of a conflict between the right to an effective remedy and the right to privacy (personal data protection), the CJEU has given priority to the protection of privacy over access to justice.[17]

9. Furthermore, the CJEU has found that there is no restriction on the access to court where the application of provisions of model contracts with the same content as those of provisions declared inadmissible by a final court judgment and entered in the national register of provisions of model contracts declared inadmissible may be regarded as an illegal act in relation to another trader who did not take part in the proceedings which resulted in the entry of those provisions in the register.[18]

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[12] *Associaco Sindical dos Juizes Portugueses v. Tribunal de Contas*, C-64/16, ECLI:EU:C:2018:117, 27 February 2018, §32; *Slowakische Republik v. Achmea BV,* C-284/16 ECLI:EU:C:2018:158, § 36.

[13] *Maximillian Schrems v. Data Protection Commisioner,* C-362/14, ECLI:EU:C:2015:650, 6 October 2015.

[14] *Baczó a Vizsnyiczai*, C-567/13, ECLI:EU:C:2015:88, February 12, 2015, §56-57; *Asociación de Consumidores Independientes de Castilla y León*, C-413/12, ECLI:EU:C:2013:800, December 5, 2013, §41.

[15] ECtHR 21 November 2001, *Fogarty v. the United Kingdom,* No. 37112/97 § 33.

[16] ECtHR 28 May 1985, *Ashingdane v the United Kingdom*, No. 8225/78, §57.

[17] *Productores de Musica de Espana (Promusicae) v. Telefonica de Espana SAU,* C-275/06, ECLI:EU:C:2008:54, 29 January 2008, § 70. The CJEU has ordered the interpretation of Directive 2008/58 (Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector) and, consequently, its transposition into national law in such a way as to ensure an adequate balance, "*which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order*". It also stated that EU law does not oblige states to establish an obligation to transfer personal data in order to ensure effective copyright protection in civil proceedings. He therefore gave priority to the protection of private life over the right to a court. Although this thesis was derived by interpreting the provisions of the relevant directives, the interaction was done in the light of balanced fundamental rights: the right to judicial protection and the right to privacy.

[18] However, in such a case, it is necessary that the trader has an effective remedy against a decision recognising the identity of the contractual terms in question and against a decision imposing a financial penalty for the

10. In different context, such a limitation may relate to the length of the proceedings. The principle is that court proceedings must be concluded within a reasonable time.[19] In any case, delays may occur. Excessive procedural delays can undermine respect for the rule of law and prevent access to justice. There are no such thing as specific time frames for what constitutes a "reasonable time". Cases have to be assessed individually and in the light of all particular circumstances.[20]

III. COVID-19 RELATED STATE OF EMERGENCY MEASURES VS. THE ACCESS TO JUSTICE RIGHTS

11. According to Article 52(1) of the EU Charter, the exercise of the EU rights and freedoms may be limited only if these limitations are necessary to genuinely meet objectives of general interest recognised by the EU or to protect the rights and freedoms of others. Such limitations must be provided for by law, respect the essence of the affected rights and freedoms and respect the principle of proportionality. Moreover, these limitations do not apply to absolute rights, i.e. rights and freedoms or principles, which, by their very nature are not subject to any limitation – such as human dignity, the right to life, the prohibition of torture and the prohibition of inhuman treatment.[21]

12. Public health is identified in CJEU case law, as one of the legitimate aims that "*may be invoked as a ground for limiting certain rights in order to allow a EU Member state to take measures dealing with a serious threat to the health of the population or individual members of the population*".[22] We understand the pandemic COVID-19 as an immediate threat to life of a nation, therefore the measures might have been necessary. This question will however be assessed by public health experts, which should explain whether the measures (closing the court buildings) were required by the COVID-19 situation. In most cases we do believe they were, as COVID-19 is a highly transmissible

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application of those terms. See CJEU, *Biuro Podróży Partner v. Prezes Urzędu Ochrony Konkurencji i Konsumentów,* case C-119/15, 21 December 2016, ECLI:EU:C:2016:987, § 47.

[19] Article 6 ECHR and Article 47 EU Charter.

[20] European Union Agency for Fundamental Rights and Council of Europe, *op.cit.*

[21] K. Lenarts, *Limits on Limitations: The Essence of Fundamental Rights in the EU*, German Law Journal 2019, vol. 20, p. 782-784.

[22] A. Sparado, *COVID-19: Testing the Limits of Human Rights.* European Journal of Risk Regulation 2020, vol. 11, p.1-9. CJEU case law: *Commission of the European Communities v Federal Republic of Germany,* C-62/90 ECLI:EU:C:1992:169, 8 April 1992, § 23; *G. J. Dokter, Maatschap Van den Top and W. Boekhout v Minister van Landbouw, Natuur en Voedselkwaliteit*. C-28/05, ECLI:EU:C:2006:408, 15 June 2006, § 75.

virus, although the judicial system will always guarantee the right to a fair trial, in this situation it was rather factually impossible.

13. Several EU Member States have imposed restricting measures in connection with the COVID-19 pandemic, affecting, amongst others, the judiciary, national authorities and legal practitioners, as well as business and citizens. Courthouses were largely closed down in EU Member States in order to control the spread of the virus. This led, among other things, to the postponement of hearings. Some Member States were able to move court hearings (and even trials) online. Although this was already a step forward, it also led to some concerns: how about jury trials? In addition, research indicates that defendants are more likely to be unrepresented in virtual hearings and are sentenced to imprisonment or remand in custody.[23] Not only criminal courts, but also family courts face previously unprecedented risks. In cases involving domestic abuse, remote hearings seem more likely to lead to more problems. What if the perpetrator lives in the same physical space as the victim?[24] Another concern is related to transparency of hearings. Article 47 of the EU Charter guarantees that the case will be handled publicly by the court. Transparency in the judiciary leads to increased efficiency and effectiveness and promotes confidence in the judicial system and in the fair administration of justice. It also encourages judges to act fairly, consistently and impartially.[25] According to the case law of European courts, transparency of proceedings also includes the right to an oral hearing, which can also be seen as part of the right to the defence.[26] In this context, the closure of the court building causing a lack of public participation at the hearing may result in a restriction of the right to a fair trial for this cases, which are still proceeded, but only in writing or via closed video hearings.

14. In other EU Member States, lockdowns are still ongoing and attempts are being made to at least deal with urgent matters.[27] The COVID-19 pandemic has led to situations in which ensuring access to justice has suddenly become a very challenging task.

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[23] C. Ferstman and A. Fagan (eds.), *Covid-19, Law and Human Rights: Essex Dialogues*, 1 July 2020, University of Essex, p. 212-213.

[24] C. Ferstman and A. Fagan (eds.), *op.cit.*, p. 243.

[25] G. France, F. Constantino *Transparency of court proceedings,* September 2019.

[26] Court of First Instance, *Atlantic Container Line and Others v Commission*, joined cases T-191/98, T-213/98, T-214/98, 30 September 2003, part II-3338.

[27] In Belgium, for example, a distinction is made according to the type of procedure. In accordance with the recommendations of the College of Courts and Tribunals, it is clearly stated that, notwithstanding the measures

15. It goes without saying that EU law rights, in particular **the right to a fair trial** and **an effective remedy**, both embedded in the ECHR as well as the EU Charter, **are impacted** by the closing of courthouses and courts ceasing to operate. These exceptional measures have put European standards on human rights and the rule of law **under remarkable stress**. Against this background, the question arises whether such measures are justified under Article 52 of the EU Charter.

16. First and foremost, it should be stressed that protection under the EU Charter is limited to areas where rights of EU law apply. If this is the case, for example, in cross-border cases (contracts, non-contractual obligations, heritage), or when limiting the essential EU laws with direct effect (freedom of movement,[28] competition law), or when the EU Member State applies national law based on a Directive´s implementation (consumer laws, transport, energy and environmental laws), the situation shall be assessed in the light of Article 52 of the EU Charter. Hence, it has to be examined whether the

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in force, all hearings should continue to take place as far as possible. Where certain (non-urgent) procedures are necessarily suspended, others (such as civil proceedings) take place by videoconference. The written procedure is rather used as an exemption. As far as criminal proceedings are concerned, it was considered that they should take place physically (i.e. not via videoconference), also in view of the principle that the client should be able to participate physically in the criminal proceedings, the possibility of organising criminal proceedings by videoconference has been eliminated. The person concerned must have the right to attend and actually participate in the trial. (*Actuele maatregelen van de balie en justitie in verband met het coronavirus*, https://www.henribaliemagazine.be/actuele-maatregelen-van-de-balie-en-justitie-verband-met-het-coronavirus [accessed 29 December 2020]).

[28] For instance, the Czech Government adopted a law (resolution no. 198 as of March 12, 2020), restricting any entrance on the territory of the Czech Republic to any "risk country" (at that time majority of the EU Member States) and prohibiting Czech citizens to travel to any "risk country". This resolution was further amended by resolution no. 334 as of March 30, 2020 – widening the scope of exceptions for EU citizens who are married to Czech citizens and for essential workers (international transport, doctors, diplomats etc.). Such law (especially for the first 18 days version), should any person challenge it before the respective court of justice, shall be strictly scrutinize under the EU Charter (Article 45: *Every citizen of the Union has the right to move and reside freely within the territory of the Member States.*) and TFEU (Article 21: 1. *Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.)* and under Directive 2004/38 (*EU citizens can live in another EU country for up to three months without any requirements other than holding a valid identity card or passport).* Although the EU Member States are granted to restrict such right, especially to protect the public health during a pandemic, according to our opinion, the respective judge shall examine whether the resolutions were proportionated and strictly necessary. The judge might then maybe conclude that the Czech Government instead of completely locking down the whole country, should instead rather apply a wider pro-EU approach (exceptions not only for married couples, but also for not married couples /or same sex partners; letting the EU citizens entry under the condition of presenting the negative test), which would definitely not violate the EU fundamental human rights.

restrictions imposed on EU citizens (1) **are provided for by law**, (2**) respect the values and fundamental rights of the EU,** (3) **have a legitimate aim**, which meet objectives of general interest recognised by the EU (e.g. public health) or need to protect the rights and freedoms of others (4) **are proportionate** and (5) **do not impair the very essence of the right on access to justice.**[29]

17. When executing such test, one should also take into consideration the reality of justice in the EU Member States – court staff is usually underpaid, working conditions are low (massive overload of cases) and IT infrastructure is mostly not competitive to private sector. COVID-19 has just showed in what state the justice is and what is called a fair and due process is sometimes only a fraction of the standard expected. The post-COVID courts will have to invest into new and modern technology to deal with the future crisis of such extend. However, we do not believe remote justice is something EU Member States shall continue to expand in every judicial procedure. For example, if there are witnesses, they must be seen and "felt" in the court room. Only the public hearing where all the parties are physically involved can serve full justice. Imagine the psychological aspect of a lying witness – when in the courtroom you can observe body language (shaking hands, glances etc.), but on camera the only thing you see is the face. Moreover, when observing the witness only via camera, it is not possible to verify whether someone is falling out of sight of the camera view and whisper to the witness how to answer. This will be one of the biggest challenges of post-COVID justice – to ensure a fair trial with 21st century technology, COVID-19 has just escalated this process.

IV. THE SEARCH FOR REMEDIES FOR THE AFFECTED PARTIES

18. If the right derived from EU Law is violated, there are few ways how to demand a justice for this violation. In general, the measures are divided into judicial and non-judicial measures. The first of aforementioned measure, served by national courts and CJEU, is not optimal in every case and for everybody. Many complainants draw attention to the economic aspect of their claim – bringing an action very often involves the payment of a (high) legal fees and legal representation. Pursuant to Article 47 of EU Chapter, Member States are obliged to provide a legal aid to those who lack sufficient resources. Unfortunately, not always this aid is sufficient or relevant to the matter of the

[29] *Openbaar Ministerie v. TC,* C-492/18, ECLI:EU:C:2019:108, 12 February 2019, §56.

case. Other possible barriers for compliments in terms of access to justice may include, for example:

- abuse of power by authorities,
- ineffective law enforcement, or of court decisions,
- gaps in law – e.g. insufficient protection of children, women, the poor people etc.,
- limited knowledge of laws, which is related to the lack of awareness of the population.[30]

19. Moreover, non-judicial measures may be justified should the nature of issues at hand is rooted with the political decision leaving out and thus violating the fundamental democratic principles or should the problem results from a loophole in the essential national law. Without international intervention, such problems are sometimes actually impossible to resolve.

20. Under the EU Law, non-judicial remedies are in particular governed by European Commission, European Parliament, and by national and regional ombudsmen. We are further focusing on each and every of these non-judicial remedies.

European Commission

21. In accordance with Article 258 **TFEU**,[31] *if the **Commission** considers that a **Member State has failed to fulfil an obligation under the Treaties**, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union*.

22. The aforementioned provision is not addressed to the individuals, but to the European Commission ("**Commission**"), however in fact many proceedings are initiated after complaints of individuals, who alert the Commission about a legal issue in a particular Member State.[32]

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[30] United Nation Development Programme, *Access to Justice. Practice Note,* 9 March 2004.

[31] European Union, *Consolidated version of Treaty on the Functioning of the European Union,* 26 October 2012, OJ C 326/47-390 ("**TFEU**").

[32] In 2015 almost 50% of proceedings were initiated after the individual or associations complaints. See source mentioned in Sachanova V. *Access to Justice. Non-judical Remedies in EU Law, University of Iceland, 1 September 2017,* p. 25.

23. A complaint against an EU Member State may be filed by any person and may be regarded to any infringement, including law and administrative action, or even a non-action. What is important is that the complaint cannot relate to a particular private case of a complainant. **A limited right of access to justice may therefore be the subject of such complaint**, however the remedy for a claimant might be dealt only within the national proceedings, exclusively (under the subsequent burden of EC procedure). The complaint may be submitted in writing or through the Commission's website.[33] The complainant's role ends with the filling of the complaint. Unfortunately, he has no right to require the Commission to act under a complaint and take proposed action or to be involved in a dispute. The Commission has full discretion to bring or not to bring an infringement action.[34]

24. Another measure conducted under auspices of European Commission is SOLVIT - this is a service provided by the national administration in each EU Member State and in Iceland, Liechtenstein and Norway, aimed at solving problems:

- resulting from violation of the rights of citizens or companies under EU law,
- caused by a state authority in another EU country,
- containing a cross-border element (e.g. a Polish citizen has problems with the French office).

25. SOLVIT helps with cases which have not (yet) been brought to a court of justice.[35] A service is free of charge and usually provided online. The target deadline for solving presented issues is 10 weeks from the acceptance of the case by the SOLVIT Centre. SOLVIT is helping to resolve many issues in the area of taxation, unemployment benefits, discrimination, goods and services or pension rights. We therefore believe SOLVIT may be a decent first non-judicial remedy in case of a violation of rights under the EU law to choose from.

European Parliament

26. Under Article 227 TFEU, any citizen of the European Union, or resident in an EU Member State, may, individually or in association with others, submit a petition to the European Parliament ("**Parliament**") on a subject which comes within the EU's fields

[33] See https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/ [assessed 27 December 2020].

[34] V. Suchnova, *op.cit.* p. 49.

[35] See https://ec.europa.eu/solvit/what-is-solvit/index_en.htm [assessed 27 December 2020].

of activity and which affects them directly. Any company, organisation or association with its headquarters in the EU may exercise this right, too. The right to petition in the same range also derives from Article 44 of the EU Charter and Article 20 TFEU.

27. What distinguishes this non-judicial measure is its broad scope of application. Petitions may be submitted on matters of public interest or private interest. The petition may be in the form of a complaint, or even a request to the Parliament to take action on the matter or simply to comment on it. It should be stressed that an applicant has to be directly affected by measures adopted by an EU Member State or an authority of the EU under EU law or by activities (or inactivity) of those institutions falling with the scope of the EU law. A petition to the Parliament may be submitted in writing or through the Parliament's website. The whole procedure is free of charge. The petitioners are informed of all the essential decisions taken in connection with their petitions and the reasons which led to the decision. Unfortunately, the wide scope of application of the right of petition means that a large number of complaints are lodged each year, which results in a long period of time for the complaint to be processed.[36] Moreover, the outcome of the Parliament is not enforceable, however it may be a driving force for the Commission or the EU Member States' authorities to take the required steps.

28. The right of petition highlights the role of democracy within the EU. It opens the way for direct contact of citizens (residents) with the EU institutions.[37] This makes the petition to Parliament a practical means of drawing Parliament's attention to the question whether national legislations applied as a result of the COVID-19 pandemic comply with the EU law, in particular with Article 47 of the EU Charter.

National and regional Ombudsmen

29. The affected party may also seek for assistance by ombudsmen, who are present in each EU Member State. They deal with complaints against the public authorities of the EU Member States, including complaints that relate to activities that are within the scope of the EU law. Although the powers and responsibilities of different ombudsmen in the particular EU Member States vary widely, they are all committed to providing the public with a service that is impartial, effective and fair. They may act on their own initiative or following a notification (complaint). In both cases, if they notice that some

[36] A. Vallina, *Report on the activities of the Committee on Petitions 2015*, 2 December 2016.

[37] V. Suchnova, *op.cit.,* p. 74.

EU law has been violated, an ombudsman may criticize what has taken place and state how, in his or her opinion, the case should have been properly handled. Unfortunately, in the most EU countries, an ombudsman does not make legally binding decisions,[38] so this authority may (just) propose a reviewing decision, giving an apology, or providing financial compensation.[39] Nevertheless, out of respect for this institution, public authorities often follow an ombudsman' decisions. Otherwise, the ombudsman can, for example by notifying Parliament, draw political and public attention to the case.

30. A complaint to the Ombudsman is free of charge and in most of the EU Member States might be lodged in any form, including oral (testimony to the protocol). A complaint may concern both EU and national laws. Enforcement of the right to access a court undoubtedly falls within the Ombudsman's remit. Given the nature of this right, the Ombudsman is to be expected to take the above-mentioned steps to deal with the complaint and to deal with the case respectively. This is also in the interest of the EU Member State concerned, as a violation of fundamental EU rights is considered as particularly negative.

31. Regional and national ombudsmen, together with the European Ombudsman are affiliated in the European Network of Ombudsmen, which helps to share information about the EU law and its impact in Member States. It facilitates cooperation between ombudsmen, with a view to safeguarding the rights of EU citizens and individuals under EU law.

Other non-judicial remedies

32. In addition to the above-mentioned remedies, it is also worthwhile to seek the help of institutions which will provide some guidance at the beginning of raising a claim. For example, **Your Europe Advice** is an EU advice service for the public, consisting of a team of 65 independent lawyers who (**i**) provide free and personalized advice in the language of applicant, (**ii**) clarify the EU law that applies in certain cases, and (**iii**) explain how the applicant can exercise his EU rights.[40]

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[38] Under certain circumstances, UK's ombudsman decision were legally binding. See https://www.lawyersdefencegroup.org.uk/our-services/conduct-and-regulatory-issues/legal-ombudsman-issues/ [assessed 27 December 2020].

[39] See https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/about/en [assessed 27 December 2020].

[40] See more at https://europa.eu/youreurope/advice/index_en.htm [assessed 27 December 2020].

33. Even if such NGO is unable to deal with the complaint, its support may affect the position of the public authority or at least ensure that the case is publicized, thereby influencing many other and similar cases and completing the public opinion on the respective EU laws violation.

V. CONCLUSION

34. The COVID-19 has undoubtedly changed the world like we know it. This happened quickly and basically without any warning. However, human rights and the principles of rule of law shall be preserved, therefore, in this report, we have deeply analysed the current legal situation regarding the access to justice as one of the fundamental (EU) right.

35. We have concluded that generally the access to justice was limited and that such limitation might be executed under the framework of Article 52(1) of the EU Charter. However, each and every case of such limitation shall be treated individually – taking into the consideration the principle of proportionality. Every restriction shall be based on legal certainty, legality and general rule of law principles. We believe that in many cases the EU Member States failed to follow the principles and rights laid down in the EU Charter. We expect rise of follow-on legal proceedings and disputes initiated by victims across the EU.

36. In the Report, we have focused exclusively on the EU-dimension, we took the liberty to comment on a recent landmark case before the CJEU (C-220/20) dealing with this very issue of distinction between violating the EU Charter and the national fundamental right charters. This case has shown that the stakeholders will be often in a precarious situation of "inadmissibility" and will often find themselves with "no connection" with the EU law. We have presented therefore four alternative ways how to claim non-jurisdictional remedies, these should be used as well to promote and keep the fundamental rights within the EU at the highest level and centre of attention.

37. The future is a terra incognita. We expect COVID-19 will accelerate digital transformations to the justice, such changes will, however, bring major challenges to the right to access to justice. Maybe even greater than we are facing right now during the pandemic. We have therefore briefly analysed some key post-COVID-19 issues with regards to the justice system.

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ERA YOUNG LAWYERS CONTEST 2021 – Report submission

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The Directive on the rights of children confronted with a criminal procedure (EU/2016/800), establishes that it is possible for a European Arrest Warrant to be issued against a minor (see Art. 1.b). In the Framework Decision on the European Arrest warrant (2002/584/JHA), it is stipulated however, that the European Arrest Warrant may be refused if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State (see Art. 3.3). It is unclear how "criminally responsible" and "under the law of the executing state" should be interpreted. Different from the Council of Europe (in light of the applicability of Article 6 ECHR), the European Union has not listed criteria based on which it can be determined whether or not a national legal system should be qualified as either or not criminal in nature. Should the ECHR criteria apply in this context? Does this mean that if a juvenile justice system is considered 'criminal' in nature for the ECHR, it is also a form of 'criminal responsibility' in light of the refusal grounds in the European Arrest Warrant? How would you qualify a 'criminal procedure' in light of determining the scope of the EAW? To what extent are individual member states allowed to freely qualify juvenile justice systems as either or not criminal in nature, to decide on the scope of the refusal grounds of the European Arrest Warrant?

Introduction

Virtually every legal jurisdiction considers, in one way or another, that children often lack the necessary knowledge, experience and maturity to make responsible decisions, thus being preferred that their interest be represented by adults, such as parents or other representatives.

In this context, the participation of children in judicial proceedings becomes a sensitive topic as, on the one hand, they lack the full autonomy of adults but, on the other, they are holders of rights and bearers of duties and responsibilities.[1]

Thus, in judicial proceedings the need for a special treatment that takes into considerations the children's specific needs in relation to their age, maturity and level of understanding arises without any doubt.

The age threshold for the right of children to participate in judicial proceedings varies significantly among the European Union Member States. In respect to criminal matters, the participation of children in criminal proceedings has to be adequately balanced from the perspective of children, seen as bearers of duties, and children seen as persons in need of a special protection from harm.

[1] Committee on The Rights of The Child, General Comment No 12, UN Doc CRC/C/GC/12 (2009), para 1.

In this respect, while most of the Member States implemented special procedural safeguards in criminal matters for children until the age of 18, others, for example Luxembourg[2], exclude their participation from such proceedings by providing a special juvenile justice system that deals with the acts of crime committed by children.

While Member States are generally free in adopting their strategy in dealing with juvenile delinquency, in the context of judicial cooperation in criminal matters the difference between the approaches taken by them in this respect is susceptible of generating significant issues.

One of those issues appears to be in respect to the execution of the European arrest warrant (hereinafter EAW) in respect to children, as, while Article 1(b) of the EU Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings establishes that it is possible for a European Arrest Warrant to be issued against children, Article 3(3) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereinafter EU Decision 2002/584/JHA) states that "[t]he judicial authority of the Member State of execution… shall refuse to execute the European arrest warrant... if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State."

From this perspective, the question that naturally arises is to what extent are Member States allowed to freely qualify their juvenile justice systems as either or not criminal in nature, to decide on the scope of the refusal grounds of the EAW?

In answering this question, it is necessary to firstly clarify the notions of "criminally responsible" and "under the law of the executing state" found in the wordings of Article 3(3) of the EU Decision 2002/584/JHA as it is unclear how they should be interpreted.

Section II will look into whether the criteria set by the European Court of Human Rights (hereinafter ECtHR) in respect to the determination of the criminal nature of justice systems should apply. This is important as an affirmative verdict will answer the main question.

Last but not least, Section III will analyse whether, under a preliminary ruling procedure, the European Court of Justice (hereinafter ECJ) could limit the Member States prerogative to freely qualify their juvenile justice systems as either or not criminal in nature. Can such a limitation be compatible with the principle of mutual recognition or with the wordings of Article 82 of the Treaty on the Functioning of the European Union? The article argues that it cannot and concludes that, in regard to the EAW proceedings, Member States are allowed to freely qualify their juvenile justice systems as either or not criminal in nature to the largest extent.

[2] See: Article 1 and 2, Luxembourg's Law of 10 August 1992 on youth protection.

I. General meaning of the notions of 'criminal responsibility' and 'under the law of the executing state'

1. Criminal responsibility

Concept

Criminal responsibility is defined as the legal duty imposed on an imputable individual to answer for his unlawful action under Criminal Law as a crime, of which he is guilty, and to suffer its legal consequences.

The traditional rules of the mechanism of responsibility in criminal matters stablish that, in order to be recognised as criminally responsible for a substantive act amounting, under the law of the place where it was committed, to a criminal offence, the person committing that act:

a. must have known what he was doing
b. must have known that the act was prohibited and;
c. must have nonetheless intended to commit that act.

Foundation of Criminal Responsibility

Different theories have been developed historically to seek the ultimate basis of criminal responsibility. As an initial approach, we should consider that the man who is responsible is a conscious, free man who acts out of his will, which allows the individual to behave differently. For the classical school, which has its roots in the Middle Ages and was developed by the theologians of that time, this responsibility was based on the free will of the individual and on moral responsibility. However, positivism denies the free will of the individual since he lives in society, where he is limited, and believes that the basis of criminal responsibility would then be social responsibility. Intermediate positions between these two theories can be found, as for example in the work of Von Liszt, who founded criminal responsibility on the faculty of acting normally, or other authors who brought criminal responsibility, in addition to social responsibility, to the capacity to feel the psychological coercion of the threat.[3]

[3] Guías Jurídicas Wolter Kluwers: "La responsabilidad penal" (https://guiasjuridicas.wolterskluwer.es/)

Criminal Responsibility and Legal Age

The age of criminal responsibility must not be confused with the age of criminal majority. Minors may be held criminally responsible for offences which they commit. Criminal majority, on the other hand, is a concept which defines the age from which a person is subject to the general law of criminal responsibility. This was made clear i

According to the opinion of the Advocate General on Case C-367/16 (Criminal Proceedings v Dawid Piotrowski, those attributes (awareness, capacity to distinguish right and wrong and intention) are to be assessed in concreto, on a case-by-case basis, and, with due regard to the rules governing a fair trial, they fall to be established by the judicial authorities responsible for investigation, prosecution and judgment. This case was initiates after the Brussels Court of Appel issued a request for a preliminary ruling to the European Court of Justice under Article 267 TFEU in proceedings relating to the execution of a European arrest warrant issued against Dawid Piotrowski, a underaged young men and polish national.

2.2. Under the law of the executing state

All EU Member States are Parties to the ECHR, and, by mandate of the Treat f Lisbon (2009), the EU must as well be a Party of the Convention. The accession of the European Union to the European Convention on Human Rights denotes the process whereby the European Union will join the community of 47 European states which have entered into a legal undertaking to comply with the Convention and have agreed to supervision of their compliance by the European Court of Human Rights. The European Union will thus become the 48th Contracting Party to the Convention. Required under the Treaty of Lisbon, EU accession to the Convention is destined to be a landmark in European legal history because it will make it possible, at last, for individuals and undertakings to apply to the European Court of Human Rights for review of the acts of EU institutions, which unquestionably play an increasingly important role in our everyday lives.

Under article 6 ph. 3 of the Treaty of the European Union “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"[4].

Article 46 of the ECHR states that all judgements from the Court of Strasbourg have binding force and that the Contracting Parties must abide and execute its rulings, therefore, the Judgements from the Chamber and Grand Chamber of the European Court on Human Rights can be qualified as "law of the executing state"

II. The potential application of the ECtHR criteria.

Considering that the European Union has not listed any criteria by which the potential criminal nature of a domestic legal system could be determined, some might advance the idea that the criteria established by the ECtHR' jurisprudence in this respect should also apply when determining whether or not special juvenile justice systems are criminal in nature.

Indeed, this argument has its merits. After all, virtually all Member State accept the jurisdiction of the ECtHR and are, thus, bound by its decisions. Moreover, Article 6(3) of the Treaty on the European Union (hereinafter TEU) expressly states that "[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms… shall constitute general principles of the Union's law" and the Union itself is bound by the wording of the same Article to accede to the ECHR.[5]

However, while applying the ECtHR's criteria in regard to determining whether or not a national legal system should qualify as criminal in nature seems, *prima facie,* compelling, it has to be said that there are virtually no grounds that can force the Member States to accept such an application.

The reason for this being that the ECtHR cannot label a specific domestic national legal system as having a criminal character in the sense that Member States would be bound to consider the respective legal system as having a criminal nature as this would exceed the ECtHR' competence.

On the contrary, ECtHR clearly stated in its case law that, in the light of the Convention, the Contracting Parties enjoy total discretion in qualifying their domestic legal systems as either or not criminal in nature, the scope of the ECtHR' usage of its determination criteria in respect to determining whether or not a certain domestic legal system is criminal in nature being to ensure that, by classifying their domestic legal systems as not criminal in nature, Member States do not avoid their obligations under Article 6 of the ECHR. As the ECtHR stated,

[4] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Official Journal 2012/C 326/01

[5] Article 6(2) of TEU: The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7 (art. 7). Such a choice, which has the effect of rendering applicable Articles 6 and 7 (art. 6, art. 7), in principle escapes supervision by the Court.

The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18 (art. 17, art. 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal.[6]

In other words, although the Contracting Parties are free qualify their domestic legal systems as they wish, this does not mean that their obligation to comply with Article 6 of the ECHR can be ignored.

Therefore, it is submitted that whether in the light of the ECHR a domestic juvenile justice system might qualify as being criminal in nature is irrelevant from the perspective of EAW proceedings, as the only obligation for Member States that can derive from such a classification is that juvenile justice systems respect the guarantees provided by Article 6 of the ECHR.

Moreover, coming back to the central question of this paper, it has to be said that even if the ECtHR' criteria would be applicable in respect to the EAW proceedings and, hence, special juvenile justice systems would be susceptible of being qualified as criminal in nature, this would hardly have any impact on the EAW proceedings that involve children.

This is due to the fact that if Member States decide to adopt a national policy that excludes children from being criminally liable under national law, they do not necessarily have to implement a special juvenile justice system outside their criminal law that exempts children from having criminal responsibility. As Member States are free to set their minimum age of criminal responsibility as high as they please under their criminal legal system, they are also free to exclude children from having criminal responsibility altogether.

In other words, from the perspective of the refusal grounds of the EAW as prescribed by Article 3(3) of the EU Decision 2002/584/JHA, labelling a domestic justice system as being either or not

[6] *Engel and others v. The Netherlands,* App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976), para 81; See also: *Öztürk v. Germany,* App no 8544/79 (ECtHR, 21 February 1984), para 49.

criminal in nature has hardly any significance, as whether children can be held criminally responsible under the national law of the executing state is not dependent on the classification of the justice system that deals with 'acts of crime' committed by children.

III. Could the ECJ, under the preliminary ruling procedure, limit the individual member States right to freely qualify their juvenile justice systems as either or not criminal in nature?

The development of the integration between the Member States of the European Union, observed especially in recent years, the significant expansion of its scope, initially covering only economic cooperation, has led to the emergence of an unprecedented form of cooperation between sovereign states. The changes taking place within the European Union have not bypassed the criminal law, which is a particularly sensitive area reserved so far only for countries where international cooperation was conducted solely on the basis of intergovernmental mechanisms.[7]

The gradual abolition of border controls within the EU has significantly increased the freedom of movement of European citizens, but also made it easier for criminals to operate across borders. In order to meet the challenge of cross-border crime, measures supporting judicial cooperation in criminal matters between the Member States have been included to supranational regulations. The starting point is the so-called rule of mutual recognition, crucial from the perspective of EU criminal law regulation. Specific measures have been adopted to counter transnational crime and to ensure the protection of the rights of victims, suspects and prisoners throughout the Union. Judicial cooperation in criminal matters is based on the principle of mutual recognition of judgments and judicial decisions and includes measures for the approximation of Member States legislation in several areas (article 82 TFEU - „Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition")[8]. The Lisbon Treaty has provided a stronger basis for the development of an area of justice in criminal matters.

From the point of view of the EAW, the principle of mutual recognition obliges the executing Member State to accept and respect an accusation or a judgment issued by another Member State against the individual.

The key question is therefore the scope of functioning of this rule under criminal law, including under the EAW procedure. From the perspective of this paper, we should indicate the so-called 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. According to its preamble,

> *The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender*

[7] Judicial cooperation in criminal matters: [https://www.europarl.europa.eu/factsheets/en/sheet/155/wspolpraca-sadowa-w-sprawach-karnych]
[8] Anne Pieter van der Mei, The European Arrest Warrant system: Recent developments in the case law of the Court of Justice, MJEC vol. 24(6) 2017

between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

The mechanism of the European Arrest Warrant is therefore based on a high degree of confidence in relations between Member States.[9]

Moreover, in defining the EAW procedure Article 1 provides that '[t]he European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order'. The EAW institution is therefore a key and fundamental agreement in the field of criminal law solidarity of EU countries.

What's important from the perspective of the principle of mutual recognition is the fact that according on Article 1(1) of the EU 2002/584/JHA, 'Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision'. Therefore, the principle of mutual recognition is the primary rule for the European Arrest Warrant and forms the basis of this agreement. While Article 82 of the TFEU provides only a general framework for the functioning of this rule, from the perspective of juvenile delinquency this legal act constitutes an important limitation of this institution, i.e. – Article 3(3) of the EU Decision 2002/584/JHA: 'The judicial authority of the Member State of execution shall refuse to execute the European arrest warrant in the following cases… (3) if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State'.

From the perspective of this prohibition and limitation, the question arises as to the functioning of this institution in the jurisprudence of the Courts in cases of juvenile delinquency. The best way to clarify and describe how the mutual recognition in fields of juvenile delinquency functioning between the Member States is to refer to the practical recognition, i.e. Court of Justice of the European Union (CJEU) judgment of 23 January 2018 on the execution of the European arrest warrant issued against David Piotrowski (C-367/16).[10]

D. Piotrowski was born in 1993. On 17 July 2014. District Court in Bialystok issued a European arrest warrant for D. Piotrowski, asking for to be handed over to the Polish authorities for the purpose of executing the sentences imposed by the two sentences issued by this court. First

[9] Report from the Commission [https://ec.europa.eu/transparency/regdoc/rep/1/2020/PL/COM-2020-270-F1-PL-MAIN-PART-1.PDF]

[10] *Request for a preliminary ruling from the Hof van beroep te Brussel*, Case C-367/16 (ECJ, 12 September 2016)

sentence (6 months imprisonment for stealing bicycle) was released in September 2011, the second in September 2012.

In June 2016. D. Piotrowski was arrested in Belgium. The court decided to transfer him to Poland in order to execute the 2012 judgment. However, he indicated that the transmission does not include the 2011 judgment, as it concerned an act committed by D. Piotrowski, when he was only 17 years old. In Belgium, the criminal liability of as a rule, you can only be carried out after the age of 18. As an exception, a younger person may be criminally responsible, but at least 16 years old, if he or she has committed a traffic offence or if a juvenile court has referred the case for criminal prosecution. To be admissible, however, additional conditions must be met, such as the fact that the offender has been previously cared for, protected or educated or has committed or attempted to commit one of the serious offences listed in the Penal Code. In addition, the decision to transfer must be justified by arguments relating to the personality of the offender, his degree of maturity and his environment. As a rule, handover is only possible after an environmental interview and a psychiatric examination of the person. In the case of D. Piotrowski, these additional conditions were not met, so that Belgium could not penalize him. The decision refusing to execute the EAW with respect to the 2011 judgment was challenged by the prosecutor to the Court of Appeal in Brussels, which asked CJEU several legal questions.[11]

Having doubts as to the correct interpretation of Framework Decision 2002/584, the Brussels Court of Appeal decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

Is Article 3.3 of Framework Decision to be interpreted as meaning that the surrender of persons is permissible only if, under the law of the executing Member State, those persons are regarded as having reached the age of majority, or does that decision permit the executing Member State to surrender also minors who, under national law, may be held criminally responsible from a certain age and possibly subject to a number of conditions?

Moreover, if the transfer of minors is not prohibited under Article 3.3 of the Framework Decision, is that provision to be interpreted as meaning that:

(a) the existence of the possibility under the national law of punishing minors from a certain age is a sufficient criterion for allowing surrender to take place (in other words, by making an abstract assessment on the basis of the age from which a person is deemed to be criminally responsible, without taking account of any additional conditions, if any), or

(b) the principle of mutual recognition do not preclude the executing Member State from making an assessment in concrete terms of the individual case in respect of which the person in the context of transfer may be required to meet the same conditions of criminal liability as those applicable to its own nationals in the executing Member State, having regard to i.e. their age at the time when

[11] The European Arrest Warrant in the context of minors [https://www.hfhr.pl/wp-content/uploads/2018/06/TSUE-orzeczenie-C%E2%80%91367-16.pdf]

the acts were committed and to the nature of the alleged offence, and possibly even having regard to previous judicial intervention even if those conditions are not provided for in the issuing Member State?

The Court pointed out that Article 3(3) of the EAW Framework Decision, requires to refuse to execute the EAW if the person subject to the EAW cannot, due to his or her age to be held criminally responsible for the acts for which the arrest warrant was issued. This provision therefore does not cover all minors, but only those who have not reached the age required by the law of the executing state to be held criminally responsible for the acts underlying the EAW. Therefore, on the basis of this provision of the Framework Decision, the surrender of minors who have reached the minimum age of criminal responsibility for the act underlying the EAW cannot be refused. Such an interpretation is also supported by the analysis of other EU acts, including Directive 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural guarantees for children who are suspected or accused in criminal proceedings.

In the second question, the court sought to determine whether, making a decision on If a person is transferred under the EAW, the court should only check whether the person has achieved it, under the law of the executing State, the minimum age of criminal responsibility for the act , or perhaps it should also examine whether additional conditions are met, on which the law of the executing State makes specific prosecution or sentencing conditional a minor.

The Court rightly pointed out that Article 3(3) of the Framework Decision only refers to age as a condition for refusing to execute the order. That means that the executing judicial authority is obliged, under that provision, to refuse to execute the order when the requested person has not reached the age for being held criminally responsible under the law of the executing Member State. Thus, the discussed provision does not give the court of the executing Member State the competence to examine other conditions (e.g. concerning the individual assessment of the committed act, the circumstances and nature of the act, the degree of demoralisation, the previously applied educational measures or the previous criminal record) on which the execution of the order could be dependent.

An examination of the additional circumstances of the case would necessitate a second procedure which, in the view of the Court, would violate the principle of mutual recognition. Member States have mutual trust in each other's acceptance of the application of criminal law in force in other States, even if the application of their own laws would lead to a different solution.

The Court rightly held that article 3(3) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that, for the purpose of issuing a decision on the surrender of a person who is the subject of a European arrest warrant, the executing judicial authority must only verify that the person has reached the minimum age for being held criminally responsible in the executing Member State for the acts on which that warrant is based,

without any additional conditions, which the law of that Member State makes specific reference to the prosecution or sentencing of the minor for those acts.[12]

At the end, it should be stated that the Court of Justice, should point out the problem of respect for the rights of minors responsible for the offences, thus pointing to a certain gap in the regulation of the rules on the transfer of minors under the EAW regulation. The Framework Decision, does not contain other grounds, for refusing to execute the order, which take account of the specific characteristics of minors for example Rule 11.1 of the Committee of Ministers' Recommendations on European Prison Rules, which states that children under the age of 18 should not be placed in adult prisons, but in specially designated establishments.

In conclusion, it should be remarked that the characteristic of this matter - juvenile delinquency, is very vulnerable and difficult to regulate. On the one hand, each Member State has the right to shaping the legislation under its own State rules but on the other hand has to respect the rules set by community law of the European Union what is the only solution to improve cooperation in the field of legislation, including criminal law legislation.

In addition, on the subject of juvenile delinquency, it should be noted that it is difficult to come to a single supranational solution. There are many arguments in favour of and against the criminalisation of minors, e.g. that a conviction for a crime may have a negative impact on their rehabilitation, children need protection from the criminal consequences of their behaviour until they are sufficiently developed to understand whether their behaviour is inappropriate. An important role of European Union bodies and the Court is to standardize basic procedures, e.g. in the area of the EAW, and in the long run to expand mutual cooperation in this area.

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In conclusion, as Member States enjoy a large freedom in respect to regulating the extent of their criminal jurisdiction, determining the scope for exercising criminal competence and legislation on own nationals, including to determine the conditions of criminal responsibility, it is submitted that in respect to deciding on the scope of the refusal grounds for the EAW, Member States have no impediment in freely qualifying their juvenile justice systems as either or not criminal in nature.

[12] Age of minors and the possibility of their transfer [https://www.glosprawa.pl/artykul-50/wiek-nieletnich-a-mozliwosc-ich-przekazywania-na-podstawie-europejskiego-nakazu-aresztowania-glosa-do-wyroku-trybunalu-sprawiedliwosci-unii-europejskiej-z-23-stycznia-2018-r-w-sprawie-c367-16-pi#_ftn4]

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2021

REPORT OF THE TEAM 5

YOUNG LAWYERS CONTEST

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List of Abbreviations

CJEU	Court of Justice of European Union
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
EU Member States	European Union Member States
Framework Decision	Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)
p.	page(s)
para.	paragraph
Report	this report
TEU	Treaty on European Union

1 Introduction

Juvenile justice systems are designed to handle cases of minors who infringe the law. Generally, it may be said that in juvenile justice systems, as opposed to criminal justice systems for adults, the focus is on rehabilitation. However, it should be noted that lack of full harmonisation resulted in distinctiveness in the juvenile justice systems of the European Union Member States (the "**EU Member States**"). These differences may be found in such important aspects like i.a.: (i) definition of juvenile delinquency, (ii) whole structure of the systems (i.e. in some countries, juvenile justice system has been separated from the criminal justice system for adults, whereas in some of the countries the criminal system for adults is applicable with adjustments regarding the measures), and (iii) the age of juvenile criminal responsibility[1]. The above-mentioned differences in the juvenile justice systems may provide significant difficulties in the European Arrest Warrant (the "**EAW**") proceedings in relation to minors.

The age of criminal responsibility is the minimum age that a child can be prosecuted and punished by law for an offence. Most EU Member States have distinct ways of dealing with underage people in conflict with the law. Therefore, "*the terms 'juvenile' and 'young person' may in some places refer to a person under 18 and in others simply to a person who is treated differently by the criminal justice system from an adult*"[2].

The age of criminal responsibility is understood in general as denoting a complete bar to prosecution, however this does not necessarily mean that youths will be prosecuted from that age. Many countries do not prosecute youths as soon as they reach this minimum age. They employ a typical compromise, combining two different age levels with more or less discretion. They use the age of criminal responsibility as "*the upper limit of absolute criminal incapacity and as the beginning of a period of conditional criminal responsibility*"[3].

The EU Member States' laws define the minimum age for criminal responsibility differently and there are differences regarding the relevant moment at which the "age of criminal

[1] Opinion of the International Juvenile Justice Observatory, 'Freedom, Security and Justice: What will be the future? – Consultation on priorities of the European Union for the next five years (2010-2014)' <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/public-consultation/2008/pdf/contributions/international_juvenile_justice_observatory_en.pdf> accessed 20.12.2020.
[2] L. Janes, 'Criminal liability of minors and severity of penalties: European trends and developments', The Howard League for Penal Reform (England and Wales), 2008, p. 1.
[3] I. Weijers,'The minimum age of criminal responsibility in continental Europe has a solid rational base', The Northern Ireland legal quarterly 67, 2016, p. 301-310.

responsibility" is determined – either when the suspected offence takes place or when the person is charged.

The Committee on the Rights of the Child makes it clear that children who are over the minimum age of criminal responsibility and in conflict with the law have less culpability than adults because they "*differ from adults in their physical and psychological development, and their emotional and educational needs*"[4]. Therefore, "*States must accommodate these differences by establishing justice procedures for children that guarantee their right to a fair trial and that are focused upon rehabilitation of the child rather than on punishment or retribution*"[5]. As a result, most of the EU Member States have a justice system that encompasses legislation, policies, procedures and institutions specifically applicable to children.

In the absence of harmonisation in regarding the age of a criminal responsibility, each EU Member State has the discretion to determine the minimum age from which a person satisfies the requirements to be regarded as criminally responsible.

In this report (the "**Report**") we were requested to determine the extent to which EU Member States are allowed to freely qualify justice systems as either criminal in nature or not, as well as to decide on the scope of the refusal grounds of the EAW. To this extent, the Report analyses the possibility to apply to the EAW proceedings the criteria developed by the European Court of Human Rights (the "**ECtHR**"), in light of the applicability of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "**ECHR**").

2 Applicability of the ECHR to the EAW proceedings

Respect for human rights is one of the fundamental principles of the European Union. This is reflected in Article 6 of the Treaty on European Union (the "**TEU**"), which in Article 6 para. 3 states that "*fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*". The above is supplemented by Article 6 para. 2, which states that the European Union shall accede to the ECHR. However, the European Union is still not a member of the ECHR

[4] Committee On The Rights Of The Child, 44th session, 'General Comment No. 10 - Children's rights in juvenile justice, Geneva', 2007, para. 10.
[5] Penal Reform International, 'Justice for Children', Briefing No. 4, 2013, p. 2.

framework and therefore the ECHR "(…) *does not constitute a legal instrument which has been formally incorporated into the legal order of the EU*"[6].

It must be nevertheless stated that the Charter of Fundamental Rights of the European Union (the **"EU Charter")** enshrines into primary EU law a wide array of fundamental rights enjoyed by EU citizens and residents, which are sometimes exactly the same than the rights of the ECHR. According to Article 52 para. 3 of the EU Charter, the meaning and scope of the rights of the EU Charter, which correspond to rights guaranteed by the ECHR, shall be the same as those laid down by the ECHR. However, the EU law can provide more extensive protection.

In relation to the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) (the "**Framework Decision**"), the principle of respect for human rights is reflected in the Preamble and Article 1 para. 3 of the Framework Decision. The preamble of the Framework Decision states that the Framework Decision "*respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union*". Moreover, Article 1 para. 3 states that the Framework Decision "*shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union*". It shall be noted that also during works on the Framework Decision it was stated that "*in the issuing and execution of European arrest warrants, the national courts will of course remain subject to the general norms relating to protection of fundamental rights, and particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Charter of Fundamental Rights of the European Union*"[7].

It may be also observed that the EU Member States broadly reflected the principle of respect for human rights in its legal systems by introducing a mandatory ground for non-execution based on the violation of fundamental rights[8]. It should be noted that such mandatory ground

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[6] CJEU, *Case Opinion 2/13*, 18 December 2014, EU:C:2014:2454, para.179. See to that effect, judgments in Kamberaj, C-571/10, EU:C:2012:233, para. 60, and Åkerberg Fransson, EU:C:2013:105, para. 44).

[7] European Commission, 'Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States', Brussels, 19.9.2001, COM(2001) 522 final, 2001/0215 (CNS), p. 5.

[8] European Commission, 'The Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States', Brussels, 2.7.2020, COM(2020) 270 final, para. 3.3.2.

for non-execution was not explicitly provided in Article 3 (mandatory grounds for non-execution) of the Framework Decision.

The above analysis leads to the conclusion that the protection of human rights shall be paramount and shall be taken into account by the judge when dealing with the EAW. All the EU Member States as signatories are obliged to respect the ECHR. It may be concluded that the criteria on determination the nature of charge developed by the ECtHR, which is responsible for interpretation of the ECHR, may be therefore helpful to decide whether the juvenile justice systems of the EU Member States are "criminal" in nature.

It shall be however noted that on the other side, there is the mutual recognition rule, and such approach may seem contrary to it, as due to this rule, the EU Member States are required to apply decisions delivered in another EU Member State with the minimum questioning, taking on trust that the EAW was issued in accordance with the law.

3 The ECHR criteria in the light of Article 3 para. 3 of the Framework Decision

3.1 Description of the ECHR criteria

In light of the applicability of Article 6 of the ECHR, the nature of the charge has its own autonomous meaning developed by the ECtHR, which is different than provided in the national legal systems. The criteria were established in order to determine whether the protection of the *ne bis in idem* principle shall be triggered (as stated in Article 4 of Protocol no. 7 to the ECHR).

Engel and Others v. the Netherlands case[9] provides the following criteria to assess whether the charge is of criminal nature:

(i) classification in domestic law;

(ii) nature of the offence;

(iii) severity of the penalty that the person concerned risks incurring.

The criteria are to be alternatively met, but the ECtHR may, depending on the particular circumstances of the case, assess them cumulatively[10].

[9] *Engel and Others v. the Netherlands* (1976) Series A no 22.
[10] *Garyfallou AEBE v. Greece* (1997) ECHR 1997-V.

It should be noted that situations may exist when the charge is determined as of being of criminal nature, however the third criterion is not fulfilled. This is because lack of seriousness of the penalty cannot divest an offence of its inherently criminal character[11].

3.1.1 Classification in the domestic law

As a starting point, it should be determined how the provision defining the offence charged would be classified in the legal system of the country. Classifying an offence as criminal (as opposed to disciplinary offence) under the domestic law will be decisive herein. It should be noted that this criterion is of relative weight and serves only as a starting point.

3.1.2 Nature of the offence

The second criterion is much broader than the first criterion. When assessing, it may be taken into consideration[12]:

a) whether the provision in question has a generally binding character or is directed solely at a specific group[13];

b) whether the proceedings are conducted by a public body with statutory powers of enforcement[14];

c) whether the provision has a punitive or deterrent purpose[15];

d) whether the provision seeks to protect the general interests of society usually protected by criminal law[16];

e) whether the imposition of any penalty is dependent upon a finding of guilt[17];

f) how comparable procedures are classified in other Council of Europe member States[18].

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[11] *Öztürk v. Germany* (1984) Series A no 85.
[12] Criteria as provided in ECHR, 'Guide on Article 6 of the European Convention on Human Rights published by the European Court of Human Rights', updated on 31 August 2020 < https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf> accessed 20.12.2020.
[13] *Bendenoun v. France* (1994) Series A no 284.
[14] *Benham v. the United Kingdom* (1996) ECHR 1996-III.
[15] *Öztürk v. Germany* (1984) Series A no 85.
[16] *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia* App. No 47072/15 (ECtHR, 23 October 2018).
[17] *Benham v. the United Kingdom* (1996) ECHR 1996-III.
[18] *Öztürk v. Germany* (1984) Series A no 85.

3.1.3 Severity of the penalty

The third criterion should assess the severity of the penalty. When assessing, the maximum potential penalty for the particular offence should be taken into account[19]. Penalty typical for criminal offences would result in establishing the existence of the third criterion.

3.2 The balance between the respect of fundamental rights and the mutual trust principle

In the *Case Opinion 2/13*, the Court of Justice of the European Union (the "**CJEU**") justifies the non-accession to the ECHR by stating that it contravenes to the principle of mutual trust between the EU Member States under the EU law. This principle, fundamental in the EU law, "(…) *requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, judgments in N. S. and Others, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80, and Melloni, EU:C:2013:107, paragraphs 37 and 63)*"[20].

Furthermore, this principle presumes that each EU Member State respects fundamental rights. Regarding this principle, the EU Member States are not allowed to demand *"(…) a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU*"[21].

In other words, the implementation of the ECHR requires that all contracting Parties to check the conformity of other contracting parties to fundamental rights. Therefore, this obligation contravenes to the obligation of mutual trust between EU Member States under the EU law. Thus, the accession to the ECHR is liable to upset the underlying balance of the EU and undermine the autonomy of the EU law.

3.3 Determining the scope of "criminal" in "criminal responsibility"

Given the topic of this Report, respectively the assessment of a justice system in its entirety as being "criminal in nature", we consider set of criteria described in section 3.1 above to be of particular interest in order to be able to make a relevant comparison.

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[19] *Campbell and Fell v. the United Kingdom* (1984) Series A no 80; *Demicoli v. Malta* (1991) Series A no 210.
[20] CJEU, *Case Opinion 2/13*, 18 December 2014, EU:C:2014:2454, para. 191.
[21] CJEU, *Case Opinion 2/13*, 18 December 2014, EU:C:2014:2454, para. 192.

As shown in the previous sections, when analysing the concept of "criminal responsibility", it is important to particularize the "criminal" aspect in light of the criteria described above. So then the question arises, whether when considering the criminal responsibility of a person that, "*owing to his age, may not be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State*", we can include in our analysis those offences that are not criminal *per se*, but can be qualified as a *criminal charge* under Article 6 of the ECHR.

Given how, in the Nicoleta Gheorghe v. Romania judgment, the ECtHR stated that "*the fact that an imprisonment sanction cannot be imposed is not in itself a determining element of the application of art. 6 ECHR, as it cannot lead to the removal of the intrinsic criminal character of the offence*"[22], it appears as though this extension of the "criminal charge" could be applicable to the issue at hand.

Considering the fact that:

i. in most juvenile justice systems, there are no imprisonment sanctions - the whole purpose of the system being that of reeducating the juveniles and offering them a second chance at social integration,
ii. the lack of imprisonment sanctions has not affected the application of the EAW to minors,

we believe – given the similarities – that the same measures may apply for an administrative sanction or a misdemeanour.

But then the question arises regarding the opportunity of issuing the EAW if the sanctions that are to be imposed can be just as well administered in the Issuing State. However, taking into account the fact that an offence that meets the Engel criteria, and is qualified henceforth as being criminal under the ECHR, triggers the protection of the *ne bis in idem* principle – "*ubi eadem est ratio, eadem solutio esse debet"* (where the same reasoning is used, the same solution shall apply) we deem that these offences should also trigger the protection of Article 3 para. 3 of the Framework Decision.

[22] *Nicoleta Gheorghe v. Romania* (2012) App. no 23470/05 (ECtHR, 3 April 2012).

3.4 The age of criminal responsibility: the Piotrowski case

In case C-367/16, the CJEU has interpreted for the first time Article 3 para. 3 of the Framework Decision. Therefore, it is of vital importance to describe the findings of the CJEU.

The first question concerned the scope of application of Article 3 para. 3 in the light of the concept of criminal responsibility. The CJEU was assessing whether this provision should take into account only the age of majority under the law of the executing EU Member State or the situation of minors who, on the basis of national rules, can be held criminally responsible from a certain age (assessing, if necessary, whether there has been compliance with various conditions).

The aim of the EU legislature and the purpose of Article 3 para. 3 were not to exclude from surrender all minors but only "(…) *those persons who, on account of their age, cannot be the subject of any criminal prosecution or conviction in the executing Member State in respect of the acts in question*"[23]. Furthermore, in the absence of harmonisation in this field, each EU Member State has "(…) *the discretion to determine the minimum age from which a person satisfies the requirements to be regarded as criminally responsible for such acts*"[24].

The CJEU stated that although there is no prohibition for the executing judicial authorities to surrender minors who have reached the age of criminal responsibility in the executing EU Member State, it is, nevertheless necessary, that such minors have the benefit of certain specific procedural rights guaranteed in national criminal proceedings to ensure that the best interests of a child who is the subject of the EAW are always a primary consideration, in accordance with Article 24 para. 2 of the EU Charter[25].

The CJEU interpreted that Article 3 para. 3 by stating *"(…) that the executing judicial authority must refuse to surrender only those minors who are the subject of a European arrest warrant and who, under the law of the executing Member State, have not yet reached the age at which they are regarded as criminally responsible for the acts on which the warrant issued against them is based*"[26].

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[23] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para. 30; EUROJUST, *Case Law by the Court of Justice of the EU on the European Arrest Warrant*, 15 March 2020, p. 43.
[24] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para. 30.
[25] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para. 37.
[26] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para.38.

The second question concerned the room of manoeuvre for the executing judicial authority in case of surrender i.e. whether other additional conditions relating to an assessment based on the circumstances of the individual, to which the prosecution and conviction of a minor are specifically subject under the law of that EU Member State, should be met[27].

The objective of the EAW was to replace the system of extradition and is based on the principle of mutual recognition[28]. By quoting its jurisprudence, the CJEU stated that the principle of mutual recognition is the 'cornerstone' of judicial cooperation in criminal matters. In application of this principle, each EU Member States are, in principle, obliged to give effect to the EAW[29]. Each exception to this principle must be interpreted strictly[30]. These exceptions made to the principles of mutual recognition and mutual trust between the EU Member States cannot have the effect of modifying the obligation to respect fundamental rights, particularly, apparent from Article 1 para. 3 of the Framework Decision and the Article 24 of the EU Charter concerning the rights of children, which EU Member States are required to observe when implementing the Framework Decision[31]. The CJEU adds in the EAW process, each EU Member State is responsible of its compliance to fundamental rights and their compliance with EU law and fundamental rights is presumed[32].

The CJEU stated that it is not up to the executing judicial authority to give effect to the EAW *"(…) on the basis of an analysis for which no express provision is made in that article or in any other rule of that framework decision, such as the rule which calls for a determination of whether the additional conditions relating to an assessment based on the circumstances of the individual (…)*"[33]. In other words, it excludes the possible additional considerations linked to a case-by-case assessment as an "*in concreto*" analysis would imply to take into consideration subjective elements[34]. Furthermore, this re-examination *"(…) would infringe and render ineffective the principle of mutual recognition, which implies that there is mutual trust as to the*

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[27] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para.39.
[28] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para. 46.
[29] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para. 47.
[30] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para. 48. EUROJUST, *Case Law by the Court of Justice of the EU on the European Arrest Warrant*, 15 March 2020, p. 43.
[31] Case 367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para. 49; Case C404/15 & C-659/15 PPU, *Aranyosi and Căldăraru* [2016], EU:C:2016:198, para. 82 & 83.
[32] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para. 50.
[33] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para. 51; EUROJUST, *Case Law by the Court of Justice of the EU on the European Arrest Warrant*, 15 March 2020, p. 43.
[34] D. Flore & A. Berrendorf, 'Le mandat d'arrêt européen : aperçu actualisé des cadres législatifs européen et belge ainsi que des nouveautés jurisprudentielles', Actualités de droit pénal et de procédure pénale, Commission Université-Palais, 2019, p. 415-416.

fact that each Member State accepts the application of the criminal law in force in the other Member States, even though the implementation of its own national law might produce a different outcome, and does not therefore allow the executing judicial authority to substitute its own assessment of the criminal responsibility of the minor(…)" who is the subject of the EAW issued by the Issuing EU Member State[35]. In addition, it would be *"(…) incompatible with the objective of facilitating and accelerating judicial cooperation pursued by Framework Decision 2002/584*"[36].

To conclude, the Court recognised that "*the executing judicial authority must simply verify whether the person concerned has reached the minimum age required to be regarded as criminally responsible in the executing Member State for the acts on which such a warrant is based, without having to consider any additional conditions, relating to an assessment based on the circumstances of the individual, to which the prosecution and conviction of a minor for such acts are specifically subject under the law of that Member State* [37]",

By its interpretation, the CJEU has chosen an "*in abstracto*" interpretation, which allow to safeguard the "*effet utile*" of the Framework Decision on the basis of the mutual recognition principle[38].

4 Conclusions

Different from the ECtHR (in light of the applicability of Article 6 ECHR), there are no criteria in the EU legal framework to determine whether a national legal system should be qualified as criminal in nature or not.

This Report has highlighted that the ECHR criteria should also have applicability in this context, since EU Member States – as signatories – should follow the provisions of the ECHR. Consequentially, the criteria set forth by the ECtHR are to be applied, as they extend the protection of the ECHR to more than strictly criminal matters.

Hence, the determination of a juvenile justice system as being 'criminal' in nature would, naturally, lead to a form of 'criminal responsibility'. Therefore, that would constitute a bar to

[35] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para. 52.
[36] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para. 53 and para. 54. EUROJUST, *Case Law by the Court of Justice of the EU on the European Arrest* Warrant, 15 March 2020, p. 43.
[37] Case C-367/16, *Dawid Piotrowski* [2018], EU:C:2018:27, para. 62.
[38] D. Flore & A. Berrendorf, 'Le mandat d'arrêt européen : aperçu actualisé des cadres législatifs européen et belge ainsi que des nouveautés jurisprudentielles', Actualités de droit pénal et de procédure pénale, Commission Université-Palais, 2019, p. 415.

the execution of the EAW, in light of the mandatory refusal ground provided by Article 3 para. 3 of the Framework Decision.

As it could be observed throughout this Report, there are currently significant differences between 'theory' and 'practice' when confronted with the EAW and the possibility of a ground for refusal. In theory, an EU Member State that follows the guidelines set forth by the CJEU when confronted with the EAW and the possibility of a ground for refusal, it would have to limit itself and its analysis to the very basic notion of whether a person has reached the age of minimum criminal responsibility in the Executing State. This would be an approach that is compliant with the principle of mutual recognition, the Executing State making only the bare minimum verifications before executing the EAW.

However, as it has been shown in practice, when making the decision on whether to execute the EAW or find that there is a ground for refusal, the analysis should be an in-depth one that takes into account the general context in which the problem arises (both Issuing State and Executing State being EU Member States).

EU Member States cannot, in good faith, presume that all other conditions required for the execution of the EAW are met *de plano* – by applying the mutual trust principle – especially when doubts have arisen in regard to inhumane conditions or lack of guarantees for basic human rights.

Of course, given the time efficient character of this procedure, to make a very detailed analysis of all of the above is impossible without disregarding the duration of the procedure, but we consider that the EU Member States invested with making this decision should apply a compromise, as follows:

- When requested with the execution of the EAW, the EU Member State should *prima facie* verify that there are no mandatory grounds for refusal applicable to the current procedure – in this particular case (provided by Article 3 para. 3) making sure the requested person has reached the age of criminal responsibility in the Executing State;
- Next, is should proceed to a summary verification of the conditions available in the Issuing State, in regards to respect of the fundamental human rights, and not consider this *res ipsa loquitur* due to the mutual recognition principle.

It is our belief that an '*in concreto*' approach needs to be taken when confronted with the EAW procedure regarding a minor, in order to provide all guarantees and safeguards to the respect of his fundamental rights in the execution of such warrant.

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3. Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391;
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TEAM 10:

Question on Juvenile Delinquency Law

To what extent are individual member states allowed to freely qualify juvenile justice systems as either or not criminal in nature, to decide on the scope of the refusal grounds of the European Arrest Warrant?

Contents

A. Introduction

1. The European Union does not impose a unified system of penalties or liabilities for children who commit criminal offences.[1] Although European and international human rights instruments require a certain baseline of substantive and procedural rights protections for children within the criminal justice process, Member States of the European Union are afforded a striking degree of discretion with regard to the treatment of child offenders. Each Member State may decide on the system to apply in the event that children are accused or convicted of committing a criminal offence. Similarly, the European Union does define a standard minimum age of criminal responsibility –the age at which a child can be held responsible in law for a crime they have committed – allowing each Member State to impose their own definitions.[2]

2. Despite the lack of uniformity within the European Union with regard to child offenders, Union Law allows for a European Arrest Warrant ("*EAW*") to be issued against a child who has been suspected or convicted of committing a criminal offence. Where a child is subject to an EAW, the Member State who has responsibility for executing the request must ascertain whether the basic requirements of Framework Decision 2002/584/JHA are complied with. The mandatory grounds for refusal are clearly defined and limited to those set out in the Framework Decision. A further number of optional grounds for refusing to execute an EAW may apply where a Member State has voluntarily transposed the grounds into national law.

3. The principle of mutual recognition of judgments and judicial decisions is the fundamental grounding principle underpinning the EAW system.[3] The principle of mutual recognition is an important limiting factor on the ability of Member States to

[1] See, *inter alia*: Directive 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1; The UN Standard Minimum Rules for the Administration of Juvenile Justice; The UN Convention on the Rights of the Child 1989; The Rules for the Protection of Juveniles Deprived of their Liberty; General Comment No. 10 on children's rights in juvenile justice; The European Rules for juvenile offenders subject to sanctions or measures (2008); The Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

[2] Article 40(3)(a) of the United Nations Convention on the Rights of the Child (UNCRC) requires State Parties to establish a minimum age below which children shall be presumed not to have 'the capacity to infringe the penal law', otherwise known as the minimum age of criminal responsibility.

[3] Art 82 TFEU. Article 82(1) provides: "*Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83*."

define juvenile justice systems as criminal in nature, as opposed to civil or merely administrative. As a result, it appears that the discretion afforded to a Member State to refuse to execute an EAW on the basis of a particular Juvenile Justice system not being truly 'criminal' in nature may be strictly limited.

B. ***EAW Framework Decision (2002/584/JHA)***

4. The EAW system was introduced by way of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. ("*the Framework Decision*") The EAW is described as the "*first concrete measure in the field of criminal law implementing the principle of mutual recognition"*.[4] The purpose of the Framework Decision is to abolish the system of extradition between Member States, and to replace it with a system providing for the transfer of persons between States for the purpose of recognising and giving effect to judicial decisions in the sphere of criminal law.[5] Persons may be transferred to another Member State for the purpose of serving a conviction within that State, or to facilitate an investigation. The new system was intended to reduce delays and complexities associated with the process of extradition, and to provide for a *"system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions"*.[6]

5. Article 1.1 of the Framework Decision defines the EAW as a "…*judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order".*[7]

6. There is a presumption that an EAW which is issued by another State is valid and complies with European Law and Article 6 TEU.[8] The Grand Chamber discussed this

[4] Recital 6, EAW Framework Decision.
[5] Pollicino, Oreste (2008), "European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems" *German Law Journal,* 9(10), 1313-1355.
[6] Recital 5, EAW Framework Decision.
[7] Article 1.1, EAW Framework Decision.
[8] See, inter alia: Opinion 2/13 on the *Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU: C:2014:245; Case C-396/11 *Ciprian Vasile Radu*, EU: C:2013:39, para. 36-42; Case C-399/11 *Stefano Melloni v. Ministerio Fiscal*, EU: C:2013:107, para. 61-64.

principle in Joined Cases C-404/15 and C-659/15PPU *Aranyosi and Căldăraru* (judgment of 05 April 2016):

> *Both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.*[9]

C. ***Directive on the Rights of Children Confronted with a Criminal Procedure (EU/2016/800)***

7. Directive EU/2016/800 was adopted by the European Parliament and Council on the 11th of May 2016. (*"the Children's Directive*") The Children's Directive aims to ensure a minimum standard of procedural safeguards for children who are navigating the juvenile justice system as persons suspected or accused of committing a criminal offence.[10] Children have the right to a fair trial under the ECHR and international human rights law.[11] The Directive does not seek to limit those rights, but rather to ensure an additional degree of procedural protection to children who are subject to criminal proceedings, including children who are the subject of an EAW. The Directive applies to every person under the age of 18[12], as well as young people in respect of whom it cannot be determined whether or not they have reached the age of 18.

8. Article 1.1 defines an EAW as *"...a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."*[13] Article 1.2 confirms that Member States *"...shall execute any*

[9] Joined Cases C-404/15 and C-659/15PPU *Aranyosi and Căldăraru* (judgment of 05 April 2016) at [78].
[10] Directive 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1.
[11] Zilli, Livio (2002) "Children's Right to a Fair Trial under International Law" 5 *Trinity C.L. Rev.* 224.
[12] Article 3.1, Children's Directive.
[13] Article 1.1, Children's Directive.

European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision."[14] [emphasis added]

9. Article 2.1 establishes the scope of the Directive as applying to children who are "*suspects or accused persons in criminal proceedings"*, and to children who are *"requested persons"* subject to an EAW.[15] Where a child is subject to an EAW, the Directive applies from the time of the child's arrest in the executing Member State.[16] Article 2.5 of the Children's Directive confirms that the Directive *"...does not affect national rules determining the age of criminal responsibility."*[17]

10. Article 2.6 provides as follows:

> *Without prejudice to the right to a fair trial, in respect of minor offences:*
>
> *(a) where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or*
>
> *(b) where deprivation of liberty cannot be imposed as a sanction,*
>
> *this Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters.*[18]

11. Although Recitals are not binding in European Union Law[19], they are useful in clarifying and explaining ambiguous provisions of law.[20] Recital 8 of the Directive establishes that Member States "…*should ensure that the child's best interests are always a primary consideration, in accordance with Article 24(2) of the Charter of Fundamental Rights of the European Union (the Charter)"*, in criminal proceedings or in the event that a child is subject to an EAW.[21] Recital 62 notes that – while children who are subject to an EAW should be able to exercise their rights fully under this

[14] Article 1.2, Children's Directive.
[15] Article 2.1, Children's Directive.
[16] Article 2.2, Children's Directive.
[17] Article 2.5, Children's Directive.
[18] Article 2.6, Children's Directive.
[19] As per the decision of the Grand Chamber in Case C-162/97 *Nilsson* [1998] ECR I-7477 at [54].
[20] Klimas, Todas and Vaiciukaite, Jurate (2008) "The Law of Recitals In European Community Legislation," *ILSA Journal of International & Comparative Law*: Vol. 15 : Iss. 1 , Article 6.
[21] Recital 8, Children's Directive.

Directive – the time-limits provided under the EAW Framework Decision should be complied with.

12. Recital 17 of the Directive appears to distinguish between criminal proceedings, and 'other types of proceedings' including Juvenile Justice programmes.

> *This Directive should apply only to criminal proceedings. It should not apply to other types of proceedings, in particular proceedings which are specially designed for children and which could lead to protective, corrective or educative measures.*[22]

D. ***Fundamental and Procedural Rights of Child Offenders subject to an EAW***

13. The executing Member State has an obligation to uphold those fundamental rights recognised by European Union Law in respect of a child offender subject to an EAW request. Article 1.3 of the EAW Framework Decision confirms that the Framework Decision *"... shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."*[23]

14. Article 6(1) TEU[24] has the effect of placing the Charter of Fundamental Rights[25] on the same level as the Treaties, as a fundamental cornerstone of EU Law. Articles 6(2) and 6(3) confirm the European Union's ascension to the European Convention on Human Rights ("*ECHR*"), and the incorporation of the fundamental rights protections provided by that instrument as constituting general principles of EU Law.

15. Directive EU/2016/800 explicitly confirms that certain minimum procedural rights apply to children who are subject to an EAW. The primary rights which the Directive ensures include the right for the child to be promptly informed about their rights under the Directive, and in general, once they have been made aware that they are a suspect

[22] Recital 17, Children's Directive.
[23] Article 1.3, EAW Framework Decision.
[24] Article 6(1) TEU.
[25] Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2000.

or an accused person in criminal proceedings.[26] Member States are required to deal with criminal proceedings involving children in a timely and diligent way, ensuring that all appropriate measures are taken to uphold the child's dignity and individual requirements[27], and to uphold the privacy of children subject to criminal proceedings.[28]

16. Children who are subject to criminal proceedings – including EAW proceedings – may have the right to legal aid. Article 18 of the Directive requires Member States to ensure that national laws relating to the provision of legal aid are sufficient to guarantee the 'effective exercise' of the right for the child to be assisted by a lawyer.[29]

17. Article 17 requires Member States to ensure that the rights protected by Articles 4, 5, 6 and 8, Articles 10 to 15 and Article 18 *"…apply mutatis mutandis, in respect of children who are requested persons, upon their arrest pursuant to European arrest warrant proceedings in the executing Member State."* As a result the obligations upon an executing Member State to uphold the child's fundamental rights extend beyond the conditions within the executing State, to conditions within the requesting State.

E. Refusal to Execute EAW

18. In certain circumstances, the executing judicial authority are required to refuse to execute an EAW issued by another Member State. Article 3 lists the mandatory grounds for non-execution. Article 3.3 establishes that a Member State *shall* refuse to execute an arrest warrant from another Member State, "*…if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.*[30]

[26] Article 4, Children's Directive. Children subject to an EAW have the right for their parent or guardian to be informed of the child's rights under the Directive and the right to be assisted by a lawyer. In the event that a child is detained, and deprived of their liberty, the child has the right to a medical examination without undue delay for the purpose of determining the child's physical and mental health, and their capacity. Children should be deprived of their liberty only as a last resort, and any such period of detention should be strictly limited with regard to the child's age and circumstances. Where possible, the receiving Member State should have access to alternative measures other than detention. Article 12 recognises that Member States have particular responsibilities to ensure the safety and dignity of children who have been detained and recognises that children should not be detained with adults unless it is considered to be in the child's best interest. Article 15 protects the right for a child to be accompanied by their parent or guardian during court hearings, or by another appropriate adult in the event that the presence of the child's parent or guardian would not be in the child's best interests.
[27] Article 13, Children's Directive.
[28] Article 14, Children's Directive.
[29] Article 18, Children's Directive.
[30] Article 3.3, EAW Framework Decision.

19. The Framework Decision specifies time-limits within which an executing Member State must decide whether or not to execute an EAW, where requested.[31] Where a Member State requires further information to reach a decision in respect of executing the EAW, Article 15.2 allows the Member State to seek supplementary information from the requesting State.[32]

20. In Case C-367/16, the Grand Chamber considered a request for a preliminary ruling under Article 267 TFEU relating to the execution of an EAW which had been issued against Dawid Piotrowski[33]. Mr Piotrowski was a 17-year-old Polish man who was resident in Belgium. The Polish authorities issued an EAW in respect of Mr Piotrowski, for the purpose of allowing him to serve two prison sentences for the theft of a bicycle and for giving false information relating to a serious attack. Belgian law allowed for minors to be held criminally responsible from the age of 16, provided that certain pre-conditions were satisfied. (ie that the Belgian Juvenile Court had declined jurisdiction). As these conditions could not logically be applied in the event of an EAW transfer, and in circumstances where national law did not appear to comply with the principle of mutual recognition underpinning the EAW Framework Decision, the Belgian Court referred a number of questions to the European Court for determination.

21. The Grand Chamber made a number of important clarifications. *First*, it clarified that the ground for mandatory non-execution under Article 3.3 of the Framework Decision does not apply to all minors in general, but rather "…*only to those who have not reached the age required, under the law of the executing Member State, to be regarded as criminally responsible for the acts on which the warrant issued against them is based."*[34]

22. *Second*, the Grand Chamber confirmed that Member States have extremely limited discretion in the execution of an EAW from another Member State.

[31] Article 17, EAW Framework Decision.
[32] Article 15.2, EAW Framework Decision.
[33] Case C-367/16, Request for a preliminary ruling under Article 267 TFEU from the hof van beroep te Brussel (Appeal Court, Brussels, Belgium) in proceedings relating to the execution of a European arrest warrant issued against Dawid Piotrowski. Judgment of the Grand Chamber of 23 January 2018.
[34] Case C-367/16, *Piotrowski*, at [29].

> *The EU legislature therefore intended to exclude from surrender not all minors but only those persons who, on account of their age, cannot be the subject of any criminal prosecution or conviction in the executing Member State in respect of the acts in question, giving that Member State, in the absence of harmonisation in this field, the discretion to determine the minimum age from which a person satisfies the requirements to be regarded as criminally responsible for such acts.*[35]

23. In effect, the Grand Chamber concluded that – in principle – the Framework Decision does not permit Member States to refuse to surrender minors who are subject to an EAW in circumstances where that minor has reached the age of criminal responsibility in respect of the relevant offense or impugned behaviour under the law of the executing Member State.[36] While the general rule is that a Member State should execute an arrest warrant, however, *"…the refusal to execute such a warrant is intended to be an exception [to that rule] which must be interpreted strictly.*"[37]

24. *Third*, the Court noted that Member States maintains a jurisdiction in respect of reviewing and upholding the procedural and fundamental rights afforded to the child offender who is subject to the EAW – both within the executing Member State and within the requesting Member State.

> *Nevertheless, [the Framework Directive] requires such authorities to satisfy themselves, when implementing the framework decision, that such minors have the benefit of certain specific procedural rights guaranteed in national criminal proceedings, in order to ensure that, as stated in recital 8 of that directive, the best interests of a child who is the subject of a European arrest warrant are always a primary consideration, in accordance with Article 24(2) of the Charter.*[38] [emphasis added]

25. *Fourth*, where a Member State is refusing to execute an arrest warrant, this should be on the basis of the text of the Framework Decision itself, rather than by re-opening the manner in which the judicial decision was made in the issuing Member State. Such a

[35] Case C-367/16, *Piotrowski*, at [30].
[36] Case C-367/16, *Piotrowski*, at [31].
[37] Case C-367/16, *Piotrowski*, at [48].
[38] Case C-367/16, *Piotrowski*, at [37].

re-examination of the main proceedings would not be consistent with the principle of mutual trust and recognition, and judicial cooperation.[39]

26. The Grand Chamber held that re-opening the proceedings would:

> *…infringe and render ineffective the principle of mutual recognition, which implies that there is mutual trust as to the fact that each Member State accepts the application of the criminal law in force in the other Member States, even though the implementation of its own national law might produce a different outcome, and does not therefore allow the executing judicial authority to substitute its own assessment of the criminal responsibility of the minor who is the subject of a European arrest warrant for that previously carried out in the issuing Member State…*[40]
>
> .

27. The fact that the executing Member State might not have adopted the same procedure as adopted by the referring State is not a ground for refusing to execute the EAW.

28. *Fifth*, in the event that the executing Member State is not satisfied with the sufficiency of evidence provided by the requesting State, they can seek supplemental information in line with Article 17 of the Framework Decision. Where the information is required as a matter of urgency, the executing State may request that additional information be provided as a matter of urgency pursuant to Article 15(2) of the Framework Decision, before the decision is made. However, this information should not be sought for the purpose of identifying whether any additional circumstances exist which require the executing State to refuse to execute the warrant, in circumstances where such information was not initially available.

29. The Court described the ultimate decision for the Member State as relatively straightforward. The Member State must verify "*…simply verify whether the person concerned has reached the minimum age required to be regarded as criminally responsible in the executing Member State for the acts on which such a warrant is based, without having to consider any additional conditions, relating to an assessment*

[39] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, at [76]; Case C-640/15, *Vilkas*, at [3].
[40] Case C-367/16, *Piotrowski*, at [52].

based on the circumstances of the individual, to which the prosecution and conviction of a minor for such acts are specifically subject under the law of that Member State."[41]

30. The Opinion of AG Bot in Case C-367/16 (*Dawid Piotrowski)* was published on the 06 September 2017. AG Bot noted that the 'age of criminal responsibility' is distinct from the 'age of criminal majority', and that the two concepts must not be confused.

> *I would add that the age of criminal responsibility must not be confused with the age of criminal majority, these being two distinct concepts. Minors may be held criminally responsible for offences which they commit. Criminal majority, on the other hand, is a concept which defines the age from which a person is subject to the general law of criminal responsibility.*[42]
>
> *It is thus evident that the EU legislature, in laying down in this provision that the judicial authority of the executing Member State must refuse to surrender to the authorities of the issuing Member State a person who 'may not, owing to his age, be held criminally responsible' for his acts, was not referring to persons who have not yet reached the age of criminal majority, but to minors who cannot be held criminally responsible under the law of the executing Member State.*[43]

31. Neither the Grand Chamber nor AG Bot provide any clarification as to the definition of "criminally responsible" or the definition of "under the law of the executing State". This is unfortunate considering the variety of Juvenile Justice programmes across the European Union, and the failure of Member States to adopt uniform naming practices. A Member State which requires children convicted of offences to engage in mediation, for example, may describe this as an aspect of a "criminal proceeding", while the executing State may consider this to be a purely civil or administrative procedure.

32. The answer would appear to lie in Recital 17 of the Children's Directive, which provides that the Directive "…*should apply only to criminal proceedings. It should not apply to other types of proceedings, in particular proceedings which are specially*

[41] Case C-367/16, *Piotrowski*, at [62].
[42] Case C-367/16, *Piotrowski*, Opinion of AG Bot at [31].
[43] Case C-367/16, *Piotrowski*, Opinion of AG Bot at [32].

designed for children and which could lead to protective, corrective or educative measures."[44]

33. The explanatory memorandum to the '*Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings*' further clarifies as follows:

> *15. National rules on the age of criminal responsibility for children will not be affected by this Directive. This is the age when a child becomes criminally responsible for his or her actions.*
>
> *16. In certain Member States children who have committed an act qualified as an offence are not subject to criminal proceedings according to national law but other forms of proceedings which may lead to the imposition of certain restrictive measures (for instance protection measures, education measures). Such proceedings do not fall within the scope of this Directive.*

34. In 2017 the Commission published a 'Handbook on how to issue and execute a European arrest warrant'.[45] In relation to non-execution on the grounds of age of criminal responsibility, the Commission provides as follows:

> *Due to his or her age, the requested person cannot be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing Member State. Member States laws define the minimum age for criminal responsibility differently. Also the moment when this age operates on a particular case varies: the relevant moment might be, for example, when the suspected offence takes place or when the person is charged. Grounds for non-execution apply if, in the executing Member State, the requested person might only face civil or administrative proceedings, but not criminal, due to his or her age.*[46]

[44] Recital 17, Children's Directive.
[45] Commission Notice — Handbook on how to issue and execute a European arrest warrant of 06 October 2017 - (2017/C 335/01).
[46] Commission Notice — Handbook on how to issue and execute a European arrest warrant of 06 October 2017 - (2017/C 335/01) at Article 3.3.

35. On the basis of Article 17 of the Directive, and the Commission's handbook, it would appear that the definition of whether or not a Juvenile Justice procedure is criminal in nature is a matter to be determined in line with the law of the executing Member State.

F. <u>European Convention of Human Rights</u>

36. In the context of cases concerning EAWs, the European Court of Human Rights ("*the ECtHR*") has held that in the event that a State did not have any margin of manoeuvre in applying EU law, the principle of 'equivalent protection' applied, as developed in the ECtHR's case-law.[47] This is the case where the mutual recognition mechanisms require the court to presume that the observance of fundamental rights by another member State has been sufficient. As envisaged by the EAW framework, the domestic court is thus deprived of discretion in the matter, leading to automatic application of the presumption of equivalence. However, any such presumption can be rebutted in the circumstances of a particular case. Even taking into account, in the spirit of complementarity, the manner in which mutual recognition mechanisms operate and in particular the aim of effectiveness which they pursue, the ECtHR must verify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights.[48]

37. In this sense, where the courts of a State which is both a Contracting Party to the Convention and a Member State of the European Union should apply a mutual recognition mechanism established by EU law, such as the EAW, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. Meanwhile, if a serious and substantiated complaint is raised before the Court to the effect that the protection of a Convention right has been manifestly deficient and this situation cannot be cured by EU law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law. In such cases, they are obliged to apply EU law in compliance with Convention requirements.

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[47] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,* App. No. 45036/98 (GC, 30 June 2005) at 149-158; *Avotiņš v. Latvia,* App. No. 17502/07 (GC, 25 February 2014) at 115-116)
[48] *Pirozzi v. Belgium,* App. No. 21055/11, [2018] ECHR 337 at 62.

G. Conclusion

38. While Member States to the European Union have a great degree of discretion in the selection and operation of Juvenile Justice systems, it is not the case that Member States are allowed to freely decide on the scope of the refusal grounds for an EAW. Article 3.3 of the Framework Decision clearly provides that a Member State must refuse to execute an EAW in the event that, due to the age of the suspect, the person who is subject to the EAW could not be held criminally responsible for the acts on which the European arrest warrant is based under the law of the executing Member State. Where these criteria are satisfied, a Member State does not have discretion to execute the EAW, but must refuse it. The Grand Chamber clarified in *Piotrowski* that the 'general rule' is that Member States must execute EAWs. While an exception exists to this general rule requiring Member States to refuse to execute EAWs in certain circumstances, the criteria for refusing must be strictly applied in line with the wording of the Framework Decision, and with regard to the executing State's obligations to uphold fundamental and procedural rights.

39. The Framework Directive is intended to ease judicial cooperation and further mutual trust and recognition between Member States. It is clear that the drafters of the Directive did not envision that States would enter into a re-assessment of the proceedings in the requesting State before executing an EAW. In this regard is noted that each State applies different standards with respect to the age of criminal responsibility and operates a variety of Juvenile Justice structures, some of which are defined as civil or administrative in nature. Should individual Member States be required to enter into an assessment of the nature of the requesting State's Juvenile Justice system, it is submitted that the principles of mutual trust and recognition would not be sufficiently protected. For those reasons it is submitted that the question of whether or not a particular Juvenile Justice system is criminal in nature is to be determined with reference to the law of the executing State.

Team 10

02 January 2020

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SUBMISSION FOR YOUNG LAWYERS CONTEST

Question on juvenile delinquency law

The Directive on the rights of children confronted with a criminal procedure (EU/2016/800), establishes that it is possible for a European Arrest Warrant to be issued against a minor (see Art. 1.b). In the Framework Decision on the European Arrest warrant (2002/584/JHA), it is stipulated however, that the European Arrest Warrant may be refused if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State (see Art. 3.3). It is unclear how "criminally responsible" and "under the law of the executing state" should be interpreted. Different from the Council of Europe (in light of the applicability of Article 6 ECHR), the European Union has not listed criteria based on which it can be determined whether or not a national legal system should be qualified as either or not criminal in nature. Should the ECHR criteria apply in this context? Does this mean that if a juvenile justice system is considered 'criminal' in nature for the ECHR, it is also a form of 'criminal responsibility' in light of the refusal grounds in the European Arrest Warrant? How would you qualify a 'criminal procedure' in light of determining the scope of the EAW?

To what extent are individual member states allowed to freely qualify juvenile justice systems as either or not criminal in nature, to decide on the scope of the refusal grounds of the European Arrest Warrant?

TEAM 11

Andrea Stănică, Piotr Szczepański, Alina Škiljić

January 1, 2021

A. INTRODUCTORY OBSERVATIONS AND FRAMEWORK LEGISLATION

1. Criminal liability of, and enforcement against, minors is a matter of discussion in many legal systems in the world and has not circumvented the European Union (hereinafter: the "**EU**"). On the one hand, due to their age and sensitivity minors merit specific protection, while one the other hand, criminal enforcement must be efficient and serve its purpose.
2. The regulation of criminal liability has always faced difficulties, *inter alia*, in establishing the accountability of juvenile offenders, the age of criminal liability proving to be a delicate and complex issue.[1] The historical evolution regarding the limits of criminal liability of minors, conditioned by their age, demonstrates the existence of a long and intense reflection process of the legislator not only in the EU, but also in each EU Member State.[2]
3. In the area of the EU law, criminal liability of minors is of specific importance within the enforcement of the European Arrest Warrant (hereinafter: the "**EAW**").[3]
   3.1. Can the EAW be issued against a minor? Can enforcement of the EAW be refused based on the fact that the concerned person is a minor?
   3.2. If the answer to the latter is yes, what is, *de facto*, decisive – that a person is a minor (regarded as being under 18 years old) or under a specific minimum age?
   3.3. And what if, in light of the partial harmonisation in criminal law matters, this specific minimum age for a person to be "criminally responsible" differs between EU Member States, most importantly between an executing and a requesting Member State?
   3.4. How are the terms comprising the minimum age refusal ground – "criminally responsible" and "the law of executing state" – to be interpreted?
   3.5. What if the Member States' legislation differs not only regarding the minimum age for criminal liability but also in qualifying a procedure as criminal or not in nature?
4. The Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings (hereinafter: the "**Directive**")[4] lays down, *inter alia*, common minimum rules concerning certain rights of children who are subject to EAW proceedings.
5. The first evaluation criterion relates to the scope of the Directive and its applicability. The Directive achieves the laudable aim of being not only applicable to children labelled as

[1] Buneci, B., ed. UJ, 2019. *Minorul. Subiect de drept din perspectiva interferenței criminalisticii cu normele procesual-penale* (English: *The Minor. Subject of law from the perspective of the interference between criminology and criminal procedure norms).*
[2] ibid.
[3] The European arrest warrant ("EAW") is a simplified cross-border judicial surrender procedure – for the purpose of prosecution or executing a custodial sentence or detention order.
[4] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132 (the "Directive").

suspected or accused according to the law of the executing Member State, but also to children who are labelled as requested persons following the receipt of a EAW.

6. Thus, the Directive ensures that children would not fall outside its scope, simply for not qualifying as suspects or accused in the executing Member State, as being subject to an EAW procedure warrants the applicability of the Directive.[5] Regrettably, the effect of the rights attributed to children is not extended to also cover the execution phase. Although it was originally intended to also cover the execution phase[6], the decision to limit its scope came from a place of purely political choices and lacks a reasonable explanation.
7. Minors may be subject to the EAW, *argumentum a fortiori*, pursuant to the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (hereinafter: the "**FD EAW**").[7] Precisely, Article 3.3 of the FD EAW lays down a mandatory refusal ground for EAW, where a person concerned is under age for being held criminally responsible for the acts on which the EAW is based under the law of the executing Member State.[8] Thus, the EAW may be issued against a minor, whereby the refusal ground refers to a minimum age of a minor.
8. Namely, the FD EAW clarifies that if the age of the requested person is under the "criminally responsible" threshold in the executing Member State, an executing Member State has the refusal ground. The construction of this provision also suggests that respective provisions of Member States' laws might differ.
9. The following sections of this Submission aim to define the EAW minimum age refusal ground, identify main problems in the application of this refusal ground, find a solution for the definition of terms which form parts thereof and ultimately clarify to what extent the individual Member States are allowed to freely qualify juvenile justice systems as either or not criminal in nature, to decide on the scope of the EAW refusal grounds.

[5] See, e.g., De Bondt, W. and Lauwereys, H., 2020. Children's rights and child participation in criminal proceedings. In: R. Pereira, A. Engel and S. Miettinen, ed., *The Governance of Criminal Justice in the European Union Transnationalism, Localism and Public Participation in an Evolving Constitutional Order*. Edward Elgar, p.238. ("De Bondt, W. and Lauwereys, H., 2020").

[6] Proposal for a Directive of the European Parliament and of the Council of 30 April 2014 on procedural safeguards for children suspected or accused in criminal proceeding – Revised text [2014] Doc 9335/14, whereby the relevant provision reads as: "*In view of the comments provided by delegations, the Presidency suggests that this Directive will not apply to the phase of the execution of a judgment".*

[7] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190 ("FD EAW").

[8] ibid, Article 3.3.

B. MINIMUM AGE AS A REFUSAL GROUND

1. The need for interpretation generally arises if the legal provision is insufficiently clear, or where the provision relates to multiple jurisdictions which differ in their essential facets.
2. Age is one of the grounds for mandatory non-execution of the EAW, unconditionally reciprocated by all Member States. This is the only level on which we can argue that there is a harmonisation as far as the EAW is concerned.[9]
3. In the context of the EAW and the minimum age refusal ground, the questions for interpretation arise:
   3.1. if terms comprising the legal provision thereof are insufficiently clear and
   3.2. if the sanctioning system for the committed crime is different.
4. The first is *de facto* caused by the latter. The relevant provision of the Article 3.3 of the FD EAW which defines the minimum age refusal ground reads as follows:
   The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:
   3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State."[10]
5. As the wording of this provision, and the further discussed Piotrowski case in the section E suggest, the FD EAW does not aim to exclude minors from the EAW enforcement. It leaves the manoeuvre space for Member States to apply their own provisions governing the minimum age for criminal responsibility as a refusal ground. And this presents the second, and fundamental, cause of the problem in executing the EAW against minors.

C. PROBLEM 1: partial harmonization and differences in the EAW implementation

1. EU Member States' legislation in criminal matters is only partially harmonised.
2. The first problem arises from the previously mentioned manoeuvre space left for defining minimum age. Namely, where the legislation of the issuing Member State provides the possibility of applying a punishment for the crime committed by a minor of a certain age, but the domestic law of the executing Member State prescribed a different minimum age.

[9] Szumiło-Kulczycka, D., 2008. 5.3. Wiek odpowiedzialności karnej a odmowa wykonania europejskiego nakazu aresztowania. In: P. Hofmański, ed., *Europejski nakaz aresztowania w teorii i praktyce państw członkowskich Unii Europejskiej*. [online] Oficyna. Available at: <https://sip.lex.pl/#/monograph/369187578/330937?tocHit=1> [Accessed 30 December 2020]. ("Szumiło-Kulczycka, D., 2008. In: P. Hofmański, ed.").
[10] FD EAW, Article 3.3.

3. Partial harmonisation occurs under the provisions of the Judicial Cooperation in criminal matters (Article 82 of the Treaty on the Functioning of the European Union (hereinafter: the "**TFEU**"))[11]. The following provision is especially significant:

   "Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in".

4. The mutual recognition principle is the central point of the EU criminal matters - but it does not have harmonisation effects. Under the TFEU, the European Parliament and the Council of the EU are authorized to adopt measures to, *inter alia*, prevent and settle conflicts of jurisdiction between Member States and facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.[12] Further, the TFEU, gives authority to the European Parliament and the Council to establish minimum rules in certain criminal matters, all to the extent necessary to facilitate mutual recognition.[13]
5. However, the TFEU prescribes that such rules shall take into account the differences between the legal traditions and systems of the Member States.[14] Moreover, adoption of the previously mentioned minimum rules shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.[15]
6. The regulatory differences in Member States are both historical and geographical, requiring judicious interpretation of the EU rules on the implementation of the EAW among minors.[16] And that despite European efforts to bring closer the provisions regulating minimum age

[11] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326 ("TFEU") Article 82.
[12] ibid.
[13] ibid.
[14] ibid.
[15] ibid.
[16] See, Pușcaș, A.L., ed. UJ, 2019. *Sancțiunile aplicabile infractorilor minori*. (English: *Sanctions applicable to juvenile offenders).* E.g. in Poland, only a person who has reached the age of 17 and has committed a prohibited act may be held responsible in accordance with the rules laid down in the Polish Criminal Code, with the exception juveniles who, after reaching 15 years of age, have committed a crime listed in Article 10 § 2 Polish Criminal Code (such as assault at the President's life, manslaughter and murder, etc.) and if specific conditions have been fulfilled (e.g. where the educational or corrective measures previously taken have proven not to be effective.) Ustawa z dnia 6 czerwca 1997 r. Kodeks karny (t.j. Dz. U. z 2020 r. poz. 1444 z późn. zm.) (Polish Criminal Code). Further, in Romania, The Criminal Novel in Transylvania from 1908 adds to the conditions of age and discernment the moral and intellectual development. The current Criminal Code sets criminal liability limits for 3 categories of underage offenders: under 14 years of age do not have criminal liability; between 14 and 16 years of age have criminal liability if proven they committed the act with competence; who turned 16 shall have criminal liability as under the law.Art. 113 din Noul cod penal al României (Romanian Criminal C ode). In Croatia, juveniles who turned 14 years old have criminal liability, differences between age being releva nt for the penalization Zakon o sudovima za mladež (NN 84/11, 143/12, 1 48/13, 56/15, 126/19) (Law on Juveni le Courts).

for criminal responsibility. An example of this is the Report of the Council of Europe calling Member States to set a minimum age for criminal liability of at least 14 years.[17]

7. However, the Article 3.3 of the FD EAW requires considering minimum age for criminal responsibility of minors under each Member State's legal system.
8. In this regard, some countries directly indicate in the EAW implementation acts the exact age when the EAW can be executed. For instance: Holland – 12 years; France – 13 years; Slovenia and Estonia – 14 years; Sweden, Finland, Luxemburg – 16 years.[18] Some countries, instead reference the internal regulation: England and Wales – 10 years; Austria – 14 years; Denmark – 15 years, Poland – 17 years, some grave crimes – 15 years.[19]
9. These differences are not, however, the main problem. The bigger issue, further discussed, is the definition of terms forming the minimum age refusal ground – what is meant under "criminally responsible" and "under the law of the executing State"?

D. PROBLEM 2: definition of terms comprising the minimum age refusal ground and qualifying a procedure as "criminal in nature" when determining the EAW scope

1. The minimum age refusal ground is not a problem *per se*. To recall, the EAW can be refused if the requested person, owing to his age, cannot be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State."[20]
2. In light of the partial harmonisation of EU criminal enforcement and the differences in Member States' legal systems as exemplified above, several further questions arise.
3. To start with, neither the legislations nor the jurisdictions of the EU and Member States define the meaning of legal liability, setting only the conditions under which a person can be held liable, respectively the principles of liability, the nature and extent of the applicable sanctions and the limits within which they operate, each having its particularities.[21]
4. Apart from differences in minimum age, some Member States, e.g. Holland, Belgium and Poland, nurture "conditional" criminal responsibility of juveniles - conditional upon the level of psychological development, assessed on a case by case basis by the competent

[17] The relevant provision reads of the Article 6 reads as: "*In particular, the Assembly calls on the member States to:… 6.2. set the minimum age of criminal responsibility at least 14 years of age, while establishing a range of suitable alternatives to formal prosecution for younger offenders". See* Report | Doc. 13511 | 19 May 2014, Child-friendly juvenile justice: from rhetoric to reality, available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20914&lang=en> [Accessed 30 December 2020].
[18] Szumiło-Kulczycka, D., 2008. In: P. Hofmański, ed., n 9.
[19] ibid.
[20] FD EAW, Article 3.3.
[21] Boroi, A., Rusu, I., Rusu, M.I., ed. C.H. Beck, 2016, *Tratat de Cooperare judiciară internațională în materie penală*. (English: *International judicial cooperation in criminal matters*).

judge.[22] Other countries have variations – the possibility of proving the lack of the necessary level of psychological development for being held criminally responsible, such as England, Wales and Austria.[23]

5. In the EAW execution proceedings, the basis of the EAW is what is important – that is the offence on which the EAW is based. There is no time and no possibility of assessing the psychological development of the concerned juvenile. The executing judicial authority does not have the access to the body of evidence and has a limited understanding of the case. Under EU mutual trust, it seems that if the subject of the EAW may, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing Member State, he should be surrendered – even if theoretically the psychological development should be assessed under the internal regulations.[24]
6. The opposite, and more problematic situation arises if, under the issuing Member State's law, the assessment of the psychological development is required to determine if someone can be held criminally responsible (criminal justice system) or if it is a case of nonpenal responsibility of juveniles (juvenile justice system).
7. A great example of this is the case heard in 2006 by the Polish Supreme Court of a juvenile suspected of murder, against whom the EAW was issued in Belgium[25]. It was determined that the EAW can be executed if the issuing Member State deemed the case as criminal, and not nonpenal responsibility of juveniles. However, if it would later be determined in the issuing Member State that the case should be tried within the juvenile justice system, the surrendered juvenile would have to be returned to Poland.[26]
8. This approach is effective only for countries like Poland and Belgium, where both concerned Member States distinguish between the criminal and juvenile justice systems.
9. More fundamentally, questions arise regarding the conceptualisation of 'criminal proceedings' used to shape the applicability and scope of the Directive.
10. Namely, it is not clear if "criminal proceedings" should also encompass the "criminal-law-like procedures" which have been specifically designed for children in some Member

[22] See, for instance, Szumiło-Kulczycka, D., 2008. In: P. Hofmański, ed., n 9.
[23] ibid.
[24] Szumiło-Kulczycka, D., 2008. In: P. Hofmański, ed., n 9.
[25] Uchwała SN z 20 lipca 2006 r., I KZP 21/06, Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa 2006, z. 9, poz. 77. LEX no: 188843. Available at: <https://sip.lex.pl/#/jurisprudence/520282539/1?directHit=true&directHitQuery=I%20KZP%2021~2F06> [Accessed 30 December 2020].
[26] ibid.

States. The sensitivity of qualifying juvenile justice systems as criminal in nature, becomes apparent from the formulation of the 17th clause of the Directive's preamble.[27]

11. These clauses, although not legally binding, clarify that the Directive should apply only to criminal proceedings, and not to other types of proceedings, in particular ones specifically designed for children, which could lead to protective, corrective or educative measures.
12. It is unclear who decides whether a "proceeding designed for children" qualifies as criminal, and under which criteria. The Directive and the FD EAW seem to point to the discretion of the national legislator.[28] Namely, leading up to the adoption of the Directive, the European Commission already argued that in some Member States children who have committed an act qualified as an offence are not subject to criminal proceedings.[29] This would, however, make the scope of the Directive completely dependent on the qualification of juvenile justice systems by each individual Member State.
13. In addition, the above would also be completely opposite to the current case law of the Court of Justice of the European Union (hereinafter: the "**CJEU**") which – albeit in other contexts – clearly stipulates that these kinds of EU concepts should be interpreted autonomously[30] and should not be left to national interpretation.[31]
14. To ensure consistent and effective application of the Directive and to avoid that Member States undermine the functioning thereof by unjustly refusing to qualify their national juvenile justice systems as criminal, clear guidance in this regard is needed.
15. Until then, two concepts should be taken into consideration:
    15.1. the takeaways and standpoint of the CJEU in the Piotrowski case, analysed under Section E of this Submission and
    15.2. the ECHR system, particularly definitions and interpretations given by the ECHR, analyzed under Section F.

[27] The provision of Clause 17 of the Directive reads as: *"This Directive should apply only to criminal proceedings. It should not apply to other types of proceedings, in particular proceedings which are specially designed for children and which could lead to protective, corrective or educative measures."*
[28] FD EAW, Article 3.3.
[29] See Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM (2013) 822 final, para 16.
[30] See e.g. on the concept of a judicial authority: CJEU 10 November 2016, nrs. C-477/16, Ruslanas Kovalkosas, C-452/16, Krzystof M. Poltorak en C-453/16, Halil Ibrahim Özçelik; HvJ 14 November 2013, C-60/12, Marián Baláž.
[31] The court argued that it should not be left to the Member States to determine the scope of EU instruments. See CJEU 10 November 2016, nrs. C-477/16, Ruslanas Kovalkosas § 32; CJEU 17 Ju2008, C-66/08, Kozłowski, § 43; CJEU 16 November 2010, C-261/09, Mantello, § 38.

E. CASE C-367/16, JUDGMENT of 23 JANUARY 2018 ("Piotrowski case")[32]

1. Questions on the enforcement of the EAW against minors are perfectly exemplified in the Piotrowski case before the CJEU, resulting from the deferred question of the Polish Regional Court and constituting the first time the CJEU interpreted the refusal ground covering minors deemed responsible for offences committed in another Member State.
2. The CJEU, interpretating the Article 3.3 FD EAW and its application aimed to provide answers regarding the minimum age refusal ground.
3. In the brief, Mr Piotrowski was 17 at the time of the offence. As the age of criminal responsibility is 18 in Belgium, the competent Belgian investigating judge refused to execute the EAW issued in Poland. The Belgian public prosecutor challenged the investigating judge's decision, on the grounds that a minor over the age of 16 may nonetheless be held criminally liable based upon an individual assessment.
4. The main problematic questions were as follows: "*Must Article 3(3) EAW FD be interpreted as meaning that surrender can be granted only in respect of persons who are regarded as having attained the age of majority under the law of the executing Member State, or does that provision allow the executing Member State also to grant the surrender of minors who, on the basis of national rules, can be held criminally responsible from a certain age and subject to certain conditions?"*[33]
5. The standpoint taken by the CJEU in this case appears to be crucial for assessing the minimum age refusal ground. Key takeaways can be summarized as follows:
   5.1. Minimum age for criminal responsibility in the executing Member State is crucial; other circumstances related to criminal liability should not be analysed for the EAW;[34]
   5.2. Ground for non-execution laid down in Article 3.3 FD EAW provision does not cover minors in general but refers only to those who, under the law of the executing Member State, have not reached the age required to be regarded as criminally responsible;[35]
   5.3. The previous point arises particularly from the fact that Member States, in the absence of harmonisation, have the discretion to determine the minimum age from which a

[32] Judgment of the Court (Grand Chamber) of 23 January 2018 Dawid Piotrowski C-367/16 (ECLI:EU:C:2018:27) ("Piotrowski case").
[33] Piotrowski case.
[34] ibid. See also Publications Office of the EU, Case law by the Court of Justice of the EU on the European arrest warrant (15 March 2020). Available at: <https://op.europa.eu/en/publication-detail/-/publication/f5fcc052-9655-11ea-aac4-01aa75ed71a1> [Accessed 30 December 2020]. pp 42-43.
[35] Piotrowski case, para 29.

person satisfies the requirements to be regarded as criminally responsible for such acts (thus, the CJEU confirms the observations from the Section B of this Submission);[36]

5.4. Finally, the CJEU clarified that the refusal to execute an EAW is intended as an exception, to be interpreted strictly. Article 3.3 FD EAW cannot be interpreted as enabling the executing judicial authority to refuse to give effect to the EAW on the basis of an analysis for which no express provision is made in relevant legislation. This would infringe and render ineffective the principle of mutual recognition.[37]

6. The CJEU clarified that the executing Member State must refuse to surrender only those minors who, under the law of the executing Member State, have not yet reached the age to be criminally responsible for the acts for which the EAW is issued against them.
7. Most importantly, the CJEU argued that when deciding if a minor should be surrendered, the executing judicial authority must verify if the person concerned has reached the minimum age required to be regarded as criminally responsible in the executing Member State. This verification does not require considering any additional conditions relating to an assessment based on the individual circumstances, to which the prosecution and conviction of a minor are specifically subject under the law of that Member State.
8. Having in mind the latter, the Piotrowski case is not only relevant for the minimum age requirement but also for defining the term "criminally responsible".
9. Lastly, the CJEU noted the objective of the EAW to understand the scope of the refusal grounds. The aim of the FD EAW was to establish a simplified and more efficient system for the surrender of persons which implies, *inter alia*, that Member States are required to comply with the time limits for adopting decisions relating to the EAW (Article 17 FD EAW) and that recourse to Article 15 FD EAW (requests for necessary, supplementary information) may be had only as a last resort in exceptional cases.[38]

F. THE ECHR'S ROLE IN THE INTERPRETATION OF "CRIMINAL IN NATURE"

1. Having in mind the above, and the partially clear situation after the Piotrowski case, for the purpose of examining to which extent Member States are allowed to freely qualify whether or not a national legal system should be qualified as criminal in nature, it is essential to consult the European Court of Human Rights (hereinafter: the "**ECHR**").
2. The EU has not listed criteria based on which this can be determined. The situation is significantly different with respect to the ECHR whereby, in light of the applicability of

[36] ibid. para 30.
[37] ibid. para 48, 51, 52.
[38] Piotrowski case, para 55, 56, 61.

Article 6 of the European Convention on Human Rights (hereinafter: the "**Convention**")[39], ECHR has developed criterions for qualifying national legal systems as criminal in nature.

3. These criterions are:

   3.1. classification in domestic law;

   3.2. nature of the offence;

   3.3. severity of the penalty that the person concerned risks incurring.[40]

4. The EU missed the opportunity to explicitly link the EU's interpretation of "criminal procedure" to the ECHR's interpretation. Should the ECHR criteria apply in the context of the EAW? If a juvenile justice system is considered "criminal" in nature for the ECHR, it is also a form of "criminal responsibility" in light of the refusal grounds in the EAW?

5. Firstly, it must first be stressed that the EU is still not a party to the Convention and its Protocols, thus it is not directly bound by the interpretations of the ECHR. The negotiations of the EU accession to the ECHR are ongoing and the EU will be bound to respect the ECHR and will be placed under the external control of the ECHR following the accession.[41]

6. Where does that leave the EU now? The fact that the EU is still not directly bound by the Convention does not explicitly mean that ECHR's interpretations are irrelevant. Quite the opposite, the Convention and jurisprudence of the ECHR should be taken into consideration (to a certain extent) on the following grounds:

   Article 52.3 of the Charter of Fundamental Rights of the EU (hereinafter: the "**Charter**")

   6.1. Firstly, according to this Article, insofar as the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the Convention. The applicability of this

[39] Article 6 of the Convention governs the Right to a Fair Trial. Available at: <https://www.echr.coe.int/documents/convention_eng.pdf> [Accessed 30 December 2020]. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. Available at: <https://www.refworld.org/docid/3ae6b3b04.html> [accessed 31 December 2020].

[40] See Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb), updated on 31 August 2020. Available at: <https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf> [Accessed 30 December 2020].

[41] For information on the EU accession to the Convention, see <https://www.coe.int/en/web/human-rights-intergovernmental- cooperation/accession- of- the- european- union- to- the- european- convention- on- human-rights#:~:text=In%20addition%20to%20the%20internal,European%20Court%20of%20Human%20Rights.; Legislative train schedule, Area of Justice and Fundamental Rights, Completion of EU accession to the ECHR, <https://www.europarl.europa.eu/legislative- train/theme- area- of- justice- and- fundamental- rights/file- completion- of- eu- accession- to- the- echr#:~:text=Discussed%20since%20the%20late%201970s,of%20the%20Treaty%20of%20Lisbon.&text=The%20draft%20Accession%20Agreement%20of,finalised%20on%205%20April%202013.> [Accessed 30 December 2020].

provision for the case at hand is unquestionable – the Article 6 of the Convention corresponds to the Article 47 of the Charter, as they both cover the right to a fair trial;[42]

Reference to the ECHR case law in CJEU judgments

6.2. Secondly, the CJEU regularly refers to the ECHR and its case law in its judgments but applies them indirectly, as part of the general principles of the EU law;[43]

EU Member States are bound by the Convention

6.3. Even though the Convention does not directly bind the EU and CJEU, it does bind the EU Member States, even when they are applying or implementing EU law. In other words - EU Member States, enforcing an EU instrument, such as the EAW, are bound by the Convention. It is crucial to stress the following: one of the ECHR's criterion for determining "criminal in nature" is the determination according to the national law.

6.4. Thus, the EU should take into account the Convention and the ECHR's interpretation of the "criminal in nature", as both form part of the Member States' law. This is also a guidance which should be relied upon when interpreting "under the law of the executing Member State", a part of the minimum age refusal ground.

EU will be bound by the Convention in the future.

6.5. Following all the foregoing, although EU is not (yet) a party to the Convention and is thus not fully bound by the ECHR case law, "criminal in nature" should be interpreted in accordance with the ECHR case law. After all, the ECHR and Convention aim to achieve the same level of human rights within the Council of Europe member states, something that, at least with respect to the EAW and criminal matters, is not achieved within the EU. In addition, it would be completely opposite to the current ECHR case law arguing that the applicability of criminal law procedural safeguards should not be left to the discretion of individual law-makers and upholding that European criteria should be used to define the criminal nature of national legal systems.[44]

G. FINAL REMARKS: to what extent are individual Member States allowed to freely qualify juvenile justice systems as either or not criminal in nature, to decide on the scope of the refusal grounds of the EAW?

7. This question cannot be observed separately from the above problems and theses.

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[42] See the Charter of Fundamental Rights of the European Union OJ C 326 ("Charter"), Article 52.3. and Article 47.

[43] See, for instance, CJEU case law in Article 47 - Right to an effective remedy and to a fair trial, available at: <https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial#TabCaseLaw> [Accessed 30 December 2020].

[44] See, e.g. ECHR Öztürk v Germany App no 8544/79 para 50 and ECHR Engel v The Netherlands App no 1978/223, para 82-83.

In this regard, to summarize all the points made in this Submission:

7.1. the FD EAW does not aim to exclude minors from the EAW enforcement; it leaves the manoeuvre space for Member States to apply their own provisions governing the minimum age for criminal responsibility as a refusal ground, whereby national laws differ and only partial harmonisation in criminal matters is achieved;

7.2. apart from differences in the minimum age, Member States' differ in defining criminal responsibility of minors, thus causing problems with respect to qualifying a procedure as "criminal or not in nature", an essential aspect of the EAW;

7.3. when enforcing the EAW, the executing authorities simply need to verify the minimum age requirement for criminal responsibility in the executing Member State for acts on which the EAW is based; any other conditions relating to an assessment of the individual cannot be considered. In fact, any interpretations to the contrary would lead to a breach of the mutual recognition principle, which requires Member States to accept the result of the issuing Member State's analysis in relation to the existence of guilt, the juvenile's discernment and restore the demanding and difficult extradition system;

7.4. the ECHR case law and Convention should be considered when qualifying "criminal responsibility" and "criminal in nature", as they form a part of the national laws.

8. It seems from the above that Member States have a relative freedom to classify the juvenile justice system as criminal in nature or not, the grounds for justified refusal arising not only from the different regulations on the age limit for minors up to which criminal liability is excluded, but also due to the differences in the sanctions regime applicable to this category.

9. However, this relative freedom is limited by several principles, essential for the correct interpretation of the Article 3.3 FD EAW, namely:

9.1. the EU principle on mutual recognition;

9.2. the interpretations of the CJEU given in the Piotrowski case;

9.3. the ECHR case law and Convention which are binding on all EU Member States;

9.4. the provisions of the Article 24. 2 of the Charter, according to which "*In all actions concerning children, whether carried out by public authorities or by private institutions, the best interest of the child shall be a primary consideration*."[45] Therefore, the national law of each Member State must be consistent with the principle of the best interests of the child in all areas of regulation, including criminal law.

[45] Charter, Article 24.2.

10. In line with these considerations, if the law of the executing Member State prohibits the criminal enforcement given the age of the minor, the refusal to execute is justified.
11. Conversely, if there is concordance between the minimum age for criminal responsibility of the issuing Member State with the rules of the executing Member State, the latter should be obliged to hand over the minor, irrespective of other circumstances.
12. Notwithstanding the intricacies in interpretation of the relevant terms in assessing the minimum age refusal ground, a consensus among Member States on the establishment of a common age limit to exclude criminal liability is much needed. Studies, statistics, judicial practice on juvenile delinquency and the results of sociological research on cognitive maturation, conclude that under a certain age the criminal sanction of minors is completely inappropriate, thus justifying the harmonisation of the minimum age limit for criminal responsibility.[46] This harmonisation is especially relevant for the purposes of the EAW.
13. Eliminating the large discrepancies between Member States' age threshold regulations for the criminal liability of minors, would help reduce the existing inconsistencies in the regulation due to legislative differences between the issuing Member State and the Member State called upon to execute it, thus ensuring the effective implementation of the rule of law with respect to the EAW in the EU.
14. Until this is achieved, the criminal procedure for the purposes of the EAW should be qualified under the case law of the ECHR, as the predominant relevant framework already in force in all EU Member States, contributing to the harmonisation efforts in the EU.
15. In conclusion, while the right of Member States to regulate their domestic law should be respected, it is imperative to find appropriate and common legal solutions in order to reduce situations of legislative conflict and ensure higher level of legal protection for the fragile category of juvenile offenders.

[46] Pușcaș, A.L., ed. UJ, 2019, *Sancțiunile aplicabile infractorilor minori.* (English: *Sanctions applicable to juvenile offenders).*

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Second round
of the
Young Lawyers Contest

ERA-CCBE Young Lawyers Contest – Negotiation exercise

Background information

Company A is incorporated as a private company in Finland. It manufactures various batteries which it sells worldwide, including a business manufacturing batteries for solar power in Ireland. It has been quite successful and wants to develop this business. Company A is in discussions with Company B.

Company B is incorporated as a private company in Spain. It has developed a new exciting technology that it believes will significantly increase the storage capacity of batteries for solar power. It has licensed this technology to a company in Peru and now wants to exploit the technology in Europe.

Company A and Company B want to form a joint venture private company in Ireland to manufacture the batteries using Company B's technology. It is expected that the batteries will be sold throughout Europe. Company A has agreed to transfer its Irish business, including employees, to the new joint venture company in return for a 55% interest in the shares of the joint venture company. They have agreed that Company B will have 45% of the shares in the joint venture company and they will not renegotiate these percentages. Company B has agreed to licence its technology to the joint venture business for use in Europe and also to second Ms Garcia, a senior employee who is very knowledgeable about its technology, from Spain to Ireland to work for the joint venture company. Discussions have been in English and the parties have agreed that all documents will be written in English.

The parties have agreed that each company will be able to appoint 2 directors to the board of the joint venture company, that Company A will appoint the Chair of the board from one of its directors and that the Chair will have a casting vote if there is a tie in voting by the directors. The parties have agreed an initial business plan for the joint venture company for the first 3 years and the share capital they are subscribing for should provide enough funding to the joint venture company to fund the plan. If all goes well, the joint venture company should be profitable after 3 years and be able to sustain growth from its own resources after that. However, there are a number of uncertainties that mean this may not be the case.

The parties are about to meet to discuss various points of concern, including any restrictions on their ability to carry on business similar to the joint venture company. They have agreed that they will not renegotiate their percentage interests in the company.

Instructions to both teams

The team for Company B will have a maximum of 15 minutes in which to put forward its negotiating position, including:

1. any points on what law should govern the agreement,

2. how any disputes should be resolved,

3. its proposals on how to fund the joint venture company if it turns out the company is not able to fund itself after the initial 3 years,

4. any protections it wants in view of its minority shareholding and

5. any restrictions it thinks the parties should agree, to make sure the joint venture company is successful.

The team for Company A will then have 15 minutes to respond to this and put forward its point of view and any other points of concern. The teams will then take it in turns to respond in order to progress the negotiation. Each further response will have a maximum time of 5 minutes.

At the 55-minute mark the invigilator will call time and the parties will take a 5 minute break to regroup before trying to achieve a final agreement within the overall time of 90 minutes. Both parties are very keen to reach agreement. For the purpose of this exercise, you need not worry about any provisions of Finnish, Spanish or Irish law or any tax aspects of the transaction.

Third round
of the
Young Lawyers Contest

Case Description

On Sunday 26 May 2019, MC was elected as a member of the European Parliament. Referring back to the provisions of several international agreements, such as the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of Persons with Disabilities, and the Charter of fundamental rights of the European Union, MC has always been a strong advocate for the right to health and access to health care. He promised his constituents to use all his power and try his utmost best to intensify the impact of the EUs health care policies and in doing so to improve people's lives.

MC's quest to improve the right to health and access to health case, rose to an unforeseen intensity since the outbreak of the COVID-19-pandemic. Whilst recognizing good intentions of European and national policy makers, MC has been tremendously frustrated from the very beginning. In his opinion, policy makers are not responding fast and firm enough and he is particularly appalled with the procrastination of developing a solid contact tracing strategy. In his view, focusing on contact tracing combined with strict and lengthy quarantine measures is the only way to beat the COVID-19-virus.

On Friday 13 March 2020 his national government saw itself confronted with a scarcity in the reagents needed to perform lab tests. In light thereof the testing strategy needed to be redesigned. The decision was taken to no longer test asymptomatic persons. Instead, people having had a risk-contact with a person who tested positive for COVID-19, were to self-quarantine, without being tested themselves. The obvious downside of this strategy, is the impact on contact tracing possibilities. Despite not getting labelled as 'positive', asymptomatic persons can still carry the virus and infect other people, beyond the realm of the contact tracers.

Utterly displeased with that decision, MC protested in front of a COVID-testing-center on Wednesday 18 March 2020 accusing several national government officials of violating several human rights (including the right to health) and being responsible for thousands of people who would inevitably get infected and die because of the flawed testing strategy. MC got arrested for slander and defamation.

MC argues that as a MEP known for advocating for the right to health, he could not be prosecuted for sharing his opinion. Relying on the text of the Protocol (No 7) on the privileges and immunities of the European Union, he argues that he cannot be prosecuted for an opinion expressed in the performance of his duties. By decision of May 2020, acting in response to MCs request, the European Parliament, in accordance with the report of its legal committee, decided to defend his immunities and privileges. In the report, it was argued "*that MC merely commented on facts in the public domain, on the impact of the new COVID-testing strategy on the right to health and access to health care. The change in testing strategy had an important impact on the daily life of his constituents. He did not act for his own interest. In doing so, he was carrying out his duty as a Member of Parliament in expressing his opinion on a matter of public interest to his constituents*." The national court cannot support that reasoning of the European Parliament, for it is clear to them that the 'expressed opinion' in no way constitutes an act in the performance of his duties.

The referring court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

"Do the facts construed *in abtracto* as a criminal offence committed by MC, a member of the European Parliament, correspond to the expression of an opinion in the performance of parliamentary duties for the purpose of Article 8 of the Protocol?"

MOOT COURT TEAM

From: 'Legal research assistant'
Send: Thursday 4 February 2021
To: 'Moot Court Team'
Subject: COMPETENCE DISCUSSIONS in relation to immunities and privileges of MEPs

You asked me to look into the rules governing privileges and immunities of MEPs.

For your convenience, I have copied the relevant provisions below:

Protocol (No 7) on the privileges and immunities of the European Union,

CHAPTER III
MEMBERS OF THE EUROPEAN PARLIAMENT

Article 7
(ex Article 8)

No administrative or other restriction shall be imposed on the free movement of Members of the European Parliament travelling to or from the place of meeting of the European Parliament. Members of the European Parliament shall, in respect of customs and exchange control, be accorded:

(a) by their own government, the same facilities as those accorded to senior officials travelling abroad on temporary official missions;

(b) by the government of other Member States, the same facilities as those accorded to representatives of foreign governments on temporary official missions.

Article 8
(ex Article 9)

Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.

Article 9
(ex Article 10)

During the sessions of the European Parliament, its Members shall enjoy:

(a) in the territory of their own State, the immunities accorded to members of their parliament;

(b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament.
Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members.

You also asked me to look into possible competence discussions regarding those rules.

Before going into that, I would like to raise another competence issue, namely and issue regarding the competence of the Court of Justice of the European Union. I was a bit surprised by the way the referring court formulated its question. I carefully studied Article 267 TFEU, pursuant to which the proceedings were brought to the court, but I am not sure how to read that provision. I can imagine that this will be brought up during the debates. I copied it for your convenience:

> ***Article 267 TFEU (ex Article 234 TEC)***
>
> *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
>
> *(a) the interpretation of the Treaties;*
>
> *(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*
>
> *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*
>
> *Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*
>
> *If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.*

That being said, you asked me to look into the competences of the different actors, more specifically the legal value of the decision of the European Parliament to uphold the immunity of its MEP for the underlying behavior. Honestly, I could not find a definitive answer to that. I think the Court's position could go either way. During my research, I stumbled upon the Patriciello case (C163/10) which seems to suggest that the position of the European Parliament is merely advisory and does not really have any meaningful value. In point 39 it says:

> *It is to be borne in mind that even if, as in the case in the main proceedings, the European Parliament, in response to the request of the Member concerned, has taken a decision to defend the latter's immunity, that decision, adopted in accordance with its Rules of Procedure, is no more than an opinion without any binding effect on national courts, for there is no provision in the Protocol obliging those courts to refer to the Parliament the decision whether the conditions laid down in Article 8 of the Protocol have been met.*

However, it appears to be not a simple as that. In the Marra Case (joint cases C-200/07 and C-201/07), reference is made to the importance of the principle of loyal cooperation as enshrined in Article 4 TEU. In his opinion Advocate General Poiares Maduro develops an interesting line of argumentation in that respect. This is a bit too complex for me, so you will have to think about it yourselves. Last night, I wondered whether it could be argued that despite the fact that the European Parliament is not awarded any explicit competence to decide on the immunity of MEPs, any decision taken by the European Parliament should be followed, because not doing so would give way for conflicting interpretations of the scope of the immunity. As those conflicting interpretations would violate the principle of loyal cooperation, this principle would offer a sort of legal basis for some weight to be attributed to the decision of the European Parliament. I am not sure whether that makes any sense.

Article 4 TEU

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

*3. Pursuant to the **principle of sincere cooperation**, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

I think it is important to develop a clear line of argumentation on this, to make sure that the Court clearly decides on the role of the European Parliament in matters of immunity, and does so in favor of our position.

Do let me know if you want me to further look into this.

Kind regards,
Your legal research assistant

MOOT COURT TEAM

From:	'Legal research assistant'
Send:	Thursday 4 February 2021
To:	'Moot Court Team'
Subject:	the interpretation of PERFORMANCE OF DUTIES
Attachments:	PatricielloJudgement.pdf; PatricielloOpinion.pdf; MarraJudgement.pdf; MarraOpinion.pdf

You asked me to look into the case law on privileges and immunities of the Court of Justice of the European Union and summarize what I could find on the criteria to decide whether behavior would fall within the scope of 'performance of the duties' of an MEP.

There are three things I feel might be relevant for the case against MC.

Firstly, I think we need to develop an argumentation regarding the need for a link between **the EUs competence to take initiatives to handle this COVID-pandemic** and the actual statements made by MC. Can it be an MEPs duty to express an opinion about something outside of the EUs competence? The question is whether MC should be able to rely on his MEP immunity for statements in relation to aspects of the pandemic falling outside the EUs competence. Would the EU have any competence regarding these testing strategies? I am still puzzled about the relevance thereof. I know the general rule is that MEPs should be able to freely discuss issues of public interest – I read that somewhere in one of the cases I looked into - , but should that be restricted to public interest in matters within the competence of the EU?

Secondly, I think we need to develop an argumentation regarding **the interpretation of *'public interest'*** beyond the discussion of whether the statements are somewhat related to the competence of the EU. What type of opinions would be a matter of 'public interest'? Whilst going through the case law, I was wondering whether it should be the topic of the opinion that should relate to matters of public interest or the statement itself. Surely the right to health and access to health care as the topics of the opinion shared by MC constitute a matter of public interest, but my question is whether the actual statement would also have to meet that criterion. Could it ever be a matter of public interest to cause additional anxiety and fear amongst the general public by making bold statements that *'thousands of people who would inevitably get infected and die because of the flawed testing strategy'*? My attention was drawn to a specific paragraph in the opinion of the Advocate General in the Marra case (Joint-cases C-200/07 and C-201/07).

> *37. The rule that Article 9 should be interpreted broadly and offer wide protection to Members of the European Parliament is subject to two qualifications. First, the opinion at issue in any given case must be about a genuine matter of public interest. While a statement on an issue of general concern will be covered by the absolute privilege guaranteed by Article 9 regardless of whether it is made inside or outside the premises of the European Parliament, this privilege may not be relied upon by MEPs in the context of cases or disputes with other individuals that concern them personally but have no wider significance for the general public. A similar view has been adopted by the European Court of Human Rights in relation to the level of protection that different types of speech enjoy. A statement that does not contribute to a debate of general interest, although falling within the scope of the right to freedom of expression, will not attract the very high level of protection enjoyed by political speech and speech on other issues of general importance. I want to be clear in this respect: the question whether or not such a statement contributes to a public debate is not to be determined by the style, accuracy or correctness of the statement but by the nature of the subject-matter. Even a possibly*

offensive or inaccurate statement may be protected if it is linked to the expression of a particular point of view in discussing a matter of public interest. It is not the role of courts to substitute their own views for those of the public in judging the correctness and accuracy of political statements.

My doubts are linked to the fact that it says that statements must contribute to a debate. Given the fact that the local government saw itself confronted with 'a scarcity in the reagents needed to perform lab tests,' there seems to be little room for debate, which might impact on the level of protection of the opinion expressed by MC. I am not sure what to make of that. However, I feel as though this leaves some margin for interpretation, that we can use to our advantage.

Thirdly, I struggled with the difference between **general statements and factual allegations** against an individual. I am still not sure how to differentiate between the two. It is however of utmost importance to get this clear, as the protection offered by *the Protocol covers statements of opinion and value judgments on issues of public and/or political relevance but it may not be invoked in relation to factual allegations about an individual or in the context of private matters unrelated to issues of public relevance or issues that constitute part of the political debate*. You can find that quote in the opinion of the Advocate General in the Marra Case. In our case description at hand here, it says that MC accused several national government officials of violating several human rights (including the right to health) and being responsible for thousands of people who would inevitably get infected and die because of the flawed testing strategy. It is not clear to me how to decide whether MCs statement is either general in nature or a factual allegation against several individuals. The individuals named in the statements are not targeted in a private capacity, but in their capacity as responsible members of the national government. I am not sure whether or not this turns the opinions shared by MC into 'statements general in nature'.

I think it would be a good thing, if we could ask the court to shed light **on a fourth criterion** that should be used to assess whether opinions would fall within the scope of 'performance of their duties'. However, I had too little time to come up with a fourth one. Maybe you have some more inspiration.

Regardless of the criteria for the assessment of opinions, I think we should ask the court to shed some more light on the appropriateness of either **a restrictive of an extensive interpretation** of 'performance of duties'. I know that in a lot of member states discussions are ongoing regarding the appropriateness of having these types of immunities in the first place and the extent to which they should offer protection. Whereas it could be argued that it is not appropriate to offer MEPs too much protection for opinions expressed outside the premises of the European Parliament (which seems to point to an argumentation in favor of a restrictive and limited interpretation), it could equally be argued that in light of rising political tensions witnessed in several member states, now more then ever a broad protection of MEPs is warranted (which seems to point to an argumentation in favor of an extensive and broad interpretation). Surely we should use this opportunity to provoke the Court into taking an explicit position on this, to our advantage.

Do let me know if you want me to further look into this.

Kind regards,
Your legal research assistant

JUDGMENT OF THE COURT (Grand Chamber)

6 September 2011 (*)

(Member of the European Parliament – Protocol on Privileges and Immunities – Article 8 – Criminal proceedings for the offence of making false accusations –Statements made outside the precincts of the Parliament – Definition of opinion expressed in the performance of parliamentary duties – Immunity – Conditions)

In Case C-163/10,

REFERENCE for a preliminary ruling pursuant to Article 267 TFEU, from the Tribunale di Isernia (Italy), made by decision of 9 March 2010, received at the Court on 2 April 2010, in the criminal proceedings against

Aldo Patriciello,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and J.-J. Kasel, Presidents of Chambers, G. Arestis, A. Borg Barthet, M. Ilešič, J. Malenovský, A. Ó Caoimh (Rapporteur), C. Toader and M. Safjan, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 15 February 2011,

after considering the observations submitted on behalf of:

– Aldo Patriciello, by G. Ranaldi and G. Scalese, avvocati, and by S. Fortunato, assistente,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Russo, avvocato dello Stato,

– the Greek Government, by K. Georgiadis and by M. Germani and G. Papagianni, acting as Agents,

– the European Parliament, by H. Krück, A. Caiola and N. Lorenz, acting as Agents,

– the European Commission, by I. Martínez del Peral and C. Zadra, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 June 2011,

gives the following

Judgment

1 The reference for a preliminary ruling relates to the interpretation of Article 8 of the Protocol on the Privileges and Immunities of the European Union, annexed to the EU, FEU and EAEC Treaties (‘the Protocol’).

2 The reference was made in criminal proceedings brought against Mr Patriciello, a Member of the European Parliament, for the offence of making false accusations.

Legal context

European Union ('EU') legislation

3 Article 8 of the Protocol provides:

'Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.'

4 Article 9 of the Protocol provides:

'During the sessions of the European Parliament, its Members shall enjoy:

(a) in the territory of their own State, the immunities accorded to members of their parliament;

...'

5 Article 18 of the Protocol provides:

'The institutions of the Union shall, for the purpose of applying this Protocol, cooperate with the responsible authorities of the Member States concerned.'

6 Rule 6 of the Rules of Procedure of the European Parliament (OJ 2005 L 44, p. 1, 'the Rules'), entitled 'Waiver of immunity', is worded as follows:

'1. In the exercise of its powers in respect of privileges and immunities, Parliament shall seek primarily to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in performance of their duties.

...

3. Any request addressed to the President by a Member or a former Member to defend privileges and immunities shall be announced in Parliament and referred to the committee responsible.

...'

7 Rule 7 of the Rules, containing the rules on procedures on the immunity of Members of the Parliament, provides at subparagraphs (2), (6) and (7):

'2. The committee shall make a proposal for a decision which simply recommends the adoption or rejection of the request for the waiver of immunity or for the defence of immunity and privileges.

...

6. In cases concerning the defence of immunity or privileges, the committee shall state whether the circumstances constitute an administrative or other restriction imposed on the free movement of Members travelling to or from the place of meeting of Parliament or an opinion expressed or a vote cast in the performance of the mandate or fall within aspects of Article 10 of the Protocol on Privileges and Immunities which are not a matter of national law, and shall make a proposal to invite the authority concerned to draw the necessary conclusions.

7. The committee may offer a reasoned opinion about the competence of the authority in question and about the admissibility of the request, but shall not, under any circumstances, pronounce on the

guilt or otherwise of the Member nor on whether or not the opinions or acts attributed to him or her justify prosecution, even if, in considering the request, it acquires detailed knowledge of the facts of the case.'

National legislation

8 In accordance with the first paragraph of Article 68 of the Italian Constitution:

'Members of Parliament may not be called to answer for opinions expressed or votes cast in the performance of their duties.'

9 Article 3(1) of Law No 140 laying down provisions to give effect to Article 68 of the Constitution and concerning the prosecution of persons in high State office (legge n. 140, disposizioni per l'attuazione dell'articolo 68 della Costituzione nonché in materia di processi penali nei confronti delle alte cariche dello Stato), of 20 June 2003 (GURI No 142, of 21 June 2003), provides as follows:

'The first paragraph of Article 68 of the Constitution shall apply in all circumstances with regard to the presentation of draft laws or of proposals for a law, amendments, agenda, motions and resolutions, to [interpellations and] questions and interventions in the Assemblies and other bodies of the Chambers, to all votes cast, however formulated, to all other parliamentary acts, and to all other activities of examination, disclosure, criticism and political statements connected with the duties of a Member of Parliament, even when performed outside the Parliament.'

The dispute in the main proceedings and the question referred for a preliminary ruling

10 In criminal proceedings before the Tribunale di Isernia (District Court, Isernia) Mr Patriciello is charged with wrongfully accusing of illegal conduct an officer of the municipal police of Pozzilli (Italy), in the course of an altercation which took place on 1 August 2007 in a public car-park not far from a neurological institute and close to his home.

11 It is apparent from the order for reference that Mr Patriciello is charged with the offence of making false accusations under Article 368 of the Italian Penal Code, with the aggravating circumstance that the person he accused was a public official acting in the performance of her duties for the purpose of Article 61(10) of that Code. It is alleged that he claimed that the municipal police officer had falsified the times concerned when booking several drivers whose vehicles were parked in contravention of road traffic laws and so accused the officer in question of the offence of forgery under Article 477 of the Penal Code. Mr Patriciello is further alleged to have repeated his accusations before police officers [carabinieri] who came to establish whether the offences of which Mr Patriciello accused the officer of the municipal police had in fact been committed.

12 By decision of 5 May 2009, the European Parliament, acting in response to Mr Patriciello's request under Article 6(3) of its Rules of Procedure, decided, in accordance with the report of its Committee on Legal Affairs, to defend his immunities and privileges ('the decision to defend immunity'). The following reasons are given in the report:

'As a matter of fact, in his statements, Mr Patriciello merely commented on facts in the public domain, the rights of the citizens to have an [sic] easy access to a Hospital and to the healthcares [sic], which had an important impact on the daily life of his constituents.

Mr … Patriciello did not act for [sic] his own interest, he did not want insult [sic] the public official but he act [sic] for general interest of his electorate in the framework of his political activity.

In so doing he was carrying out his duty as a Member of Parliament in expressing his opinion on a matter of public interest to his constituents.

...

On the basis of the above considerations, the Committee on Legal Affairs, having examined the reasons for and against defending immunity, recommends that the immunity of Mr … Patriciello be defended.'

13 In its decision for reference, the Tribunale di Isernia notes, none the less, that under subparagraph (a) of the first paragraph of Article 9 of the Protocol, members enjoy, with regard to acts committed in national territory, immunities and privileges on the same substantive and formal conditions as those laid down by domestic law. According to Article 68 of the Italian Constitution, however, the privilege of parliamentary immunity does not cover extraparliamentary activities unless they are closely linked to the performance of duties typical of the parliamentary mandate, and carried out strictly for the purposes of that mandate.

14 In those circumstances, that court considers that, without prejudice to any appraisal of the substance of the accusation, it is unable, on the basis of domestic law, to support the reasoning that prompted the European Parliament to adopt the decision to defend immunity. The circumstances giving rise to the prosecution in the main proceedings were not, in fact, connected to any expression of an opinion in the performance of the duties of a Member of the European Parliament.

15 In this regard, that court notes that, according to the public prosecutor, the argument that Mr Patriciello did no more than comment on matters of common knowledge, namely, the right of a citizen to have easy access to hospitals and healthcare, with no intention of insulting a public official, would appear groundless. In point of fact, it is alleged, although it remains to be established, that Mr Patriciello explicitly accused a public official of forgery before members of the police force. At first sight such conduct would seem to be unconnected to the general interest of his constituents and, as such, would seem incapable, even in the abstract, of falling within the rules on immunity.

16 Nevertheless, the Tribunale di Isernia remarks that the decision to defend immunity was adopted after reference had been made not only to subparagraph (a) of the first paragraph of Article 9 of the Protocol but also to Article 8 thereof. It notes that the Court has held that, that article making no reference to national rights, the scope of immunity for which it provides must be established on the basis of EU law alone. Furthermore, even if the decision to defend immunity constitutes an opinion without binding effect on national courts, the court making the reference is bound by the duty to cooperate in good faith with the European institutions in accordance with Articles 4(3) TEU and 18 of the Protocol (Joined Cases C-200/07 and C-201/07 *Marra* [2008] ECR I-7929, paragraphs 26 and 39 to 41).

17 In those circumstances, the Tribunale di Isernia decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the facts construed *in abstracto* as a criminal offence committed by [Mr] Patriciello, a Member of the European Parliament (described in the indictment and in favour of whom the European Parliament has adopted a decision … to defend his immunity), categorised as making false accusations under Article 368 of the Penal Code, correspond to the expression of an opinion in the performance of parliamentary duties for the purposes of Article [8] of the Protocol?'

The question referred for a preliminary ruling

18 As a preliminary point, it is to be borne in mind that, as the Court has previously held, the parliamentary immunity of Members of the European Parliament, as provided for in Articles 8 and 9 of the Protocol, comprises the two forms of protection usually afforded to members of national parliaments in the Member States, that is to say, immunity in respect of opinions expressed and votes cast in the exercise of their parliamentary duties, and parliamentary privilege, including, in principle, protection from judicial proceedings (*Marra*, paragraph 24).

19 As the actual wording of the question makes clear, it is the interpretation of Article 8 of the Protocol alone that is relevant to the dispute in the main proceedings.

20 In this respect, it must be stated, as the Italian Government has done, that by its question as it is worded the court making the reference asks the Court itself to apply Article 8 of the Protocol to the case before it, giving a ruling on the issue of whether the statements made by the Member of the European Parliament in question giving rise to the prosecution in the main proceedings constitute an opinion expressed in the performance of his parliamentary duties and are, therefore, covered by the immunity provided by that article.

21 In proceedings brought pursuant to Article 267 TFEU the Court of Justice has no jurisdiction to apply rules of EU law to a particular case. It may, however, provide the national court with all guidance on interpretation concerning EU law that could be useful for its decision (see, in particular, Case C-54/07 *Feryn* [2008] ECR I-5187, paragraph 19 and case-law cited).

22 Consequently, in a case such as that in the main proceedings, it is for the court making the reference to decide whether the statements at issue are covered by the immunity provided by Article 8 of the Protocol, by determining whether the substantive conditions laid down in that provision in order to give effect to that immunity have been satisfied (see *Marra*, paragraph 33).

23 On the other hand, it is for the Court of Justice to provide the national court with all necessary information with a view to offering guidance in that determination, recasting, if need be, the question referred to it (see, inter alia, Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 46, and Case C-243/09 *Fuß* [2010] ECR I-0000, paragraph 39).

24 In that regard, it is clear from the documents before the Court that in actual fact the Tribunale di Isernia seeks by its question a definition of the tests relevant for determining whether a statement such as that in issue in the main proceedings, made by a Member of the European Parliament outside the precincts of that institution and giving rise to prosecution in his Member State of origin for the offence of making false accusations, constitutes an opinion expressed in the performance of his parliamentary duties for the purpose of Article 8 of the Protocol.

25 On this point, it has to be emphasised that, unlike the parliamentary immunity provided by subparagraph (a) of the first paragraph of Article 9 of the Protocol, which depends on national law, the extent of the immunity provided by Article 8 of the Protocol must be established on the basis of EU law alone, for that article makes no reference to national laws (see, to that effect, *Marra*, paragraph 26).

26 As the Court has previously held, Article 8 of the Protocol, which constitutes a special provision applicable to all legal proceedings for which the Member benefits from immunity in respect of opinions expressed and votes cast in the exercise of parliamentary duties, is intended to protect the freedom of expression and independence of Members of the European Parliament, with the result that it prevents any judicial proceedings in respect of those opinions or votes (see, to that effect, *Marra*, paragraphs 45 and 27).

27 It follows that, whatever the rules on immunity laid down in national law or the limits fixed therein may be, if the substantive conditions for recognition of immunity under Article 8 of the Protocol have been met, immunity may not be waived by the European Parliament and the national court with jurisdiction to apply it is bound to dismiss the action brought against the Member concerned (see, to that effect, *Marra*, paragraph 44).

28 As has been maintained by all the parties who have presented their observations in this case, statements made by a Member of the European Parliament are not to lose this immunity merely because they were made outside the precincts of the European Parliament.

29 It is true that Article 8 of the Protocol, in the light of its objective of protecting the freedom of

speech and independence of Members of the European Parliament and in the light of its wording, which expressly refers to votes cast as well as to opinions expressed by the Members, is in essence intended to apply to statements made by those members within the very precincts of the European Parliament.

30 Nevertheless, it is not impossible that a statement made by those Members beyond those precincts may amount to an opinion expressed in the performance of their duties within the meaning of Article 8 of the Protocol, because whether or not it is such an opinion depends, not on the place where the statement was made, but rather on its character and content.

31 In referring to opinions expressed by the Members of the European Parliament, Article 8 of the Protocol is closely linked to freedom of expression. Freedom of expression, as an essential foundation of a pluralist, democratic society reflecting the values on which the Union, in accordance with Article 2 TEU, is based, constitutes a fundamental right guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union which, pursuant to Article 6(1) TEU, has the same legal value as the Treaties. This freedom is also affirmed in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

32 In consequence, it is to be considered that ‘opinion’ for the purpose of Article 8 of the Protocol must be understood in a wide sense to include remarks and statements that, by their content, correspond to assertions amounting to subjective appraisal.

33 It is clear too from the wording of Article 8 of the Protocol that, in order to enjoy immunity, an opinion must have been expressed by a Member of the European Parliament ‘in the performance of [his] duties’, thus entailing the requirement of a link between the opinion expressed and the parliamentary duties.

34 The issue being, as in the case in the main proceedings, statements made by a Member of the European Parliament prosecuted in his Member State of origin, it must be held that, as can be seen from paragraph 27 above, the immunity provided by Article 8 of the Protocol is capable of definitively preventing national courts and judicial authorities from exercising their respective jurisdictions in the field of prosecutions and penalties for criminal offences for the purpose of ensuring the observance of law and order in their territory and, as a corollary, capable of thus denying the persons damaged by those statements any judicial remedy whatsoever, including, as the case may be, claiming compensation before the civil courts for the damage suffered.

35 Having regard to those consequences, it has to be accepted that the connection between the opinion expressed and parliamentary duties must be direct and obvious.

36 Furthermore, having regard to the descriptions of the circumstances and the content of the allegations made by the Member of the European Parliament at issue in the main proceedings, they appear to be rather far removed from the duties of a Member of the European Parliament and hardly capable, therefore, of presenting a direct link with a general interest of concern to citizens. Thus, even if such a link could be demonstrated, it would not be obvious.

37 It is in the light of this guidance that the court making the reference must determine whether the statement at issue in the main proceedings can be regarded as the expression of an opinion in the performance of parliamentary duties, with the result that the substantive conditions for recognition of immunity under Article 8 of the Protocol have been satisfied, which, as has been pointed out at paragraphs 21 and 22 above, falls within that court’s exclusive jurisdiction.

38 If, on completing that determination, that court should find that such is the case, it would have no choice but to give due effect to that immunity by dismissing, as indicated in paragraph 27 above, the action brought against the Member of the European Parliament concerned (*Marra*, paragraphs 33 and 44). Contrariwise, if it should find that such is not the case, the substantive conditions for

immunity not being satisfied, that court would have to continue hearing the action.

39 It is to be borne in mind that even if, as in the case in the main proceedings, the European Parliament, in response to the request of the Member concerned, has taken a decision to defend the latter's immunity, that decision, adopted in accordance with its Rules of Procedure, is no more than an opinion without any binding effect on national courts, for there is no provision in the Protocol obliging those courts to refer to the Parliament the decision whether the conditions laid down in Article 8 of the Protocol have been met. As the Court has previously held, the fact that the law of a Member State, like the law in question in the main proceedings, provides for a procedure to defend members of the national parliament, enabling the latter to intervene when the national court does not recognise that immunity, does not imply that the same powers are conferred on the European Parliament in relation to its Members from that Member State, for Article 8 of the Protocol does not expressly provide such a power and does not refer to rules of national law (see, to that effect, *Marra*, paragraphs 35 to 40).

40 In consequence, and contrary to what was argued at the hearing by the defendant in the main proceedings, although, by reason of the duty of the European institutions and national authorities to cooperate in good faith laid down in Articles 4(3) TEU and 18 of the Protocol, the European Parliament and the national courts must indeed cooperate in order to avoid any conflict in the interpretation and application of the provisions of the Protocol (*Marra*, paragraph 42), EU law does not place the national court making the reference under any particular obligation as regards the reasons given for its decisions if, having regard to the interpretation provided by this judgment given pursuant to Article 267 TFEU, it should decide not to follow the opinion of the European Parliament of which it had been informed, concerning the application of Article 8 of the Protocol to the facts in the main proceedings.

41 Having regard to the foregoing, the answer to be given to the question referred is that Article 8 of the Protocol must be interpreted to the effect that a statement made by a Member of the European Parliament beyond the precincts of that institution and giving rise to prosecution in his Member State of origin for the offence of making false accusations does not constitute an opinion expressed in the performance of his parliamentary duties covered by the immunity afforded by that provision unless that statement amounts to a subjective appraisal having a direct, obvious connection with the performance of those duties. It is for the court making the reference to determine whether those conditions have been satisfied in the case in the main proceedings.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 8 of the Protocol on the Privileges and Immunities of the European Union, annexed to the EU, FEU and EAEC Treaties, must be interpreted to the effect that a statement made by a Member of the European Parliament beyond the precincts of that institution and giving rise to prosecution in his Member State of origin for the offence of making false accusations does not constitute an opinion expressed in the performance of his parliamentary duties covered by the immunity afforded by that provision unless that statement amounts to a subjective appraisal having a direct, obvious connection with the performance of those duties. It is for the court making the reference to determine whether those conditions have been satisfied in the case in the main proceedings.

[Signatures]

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 9 June 2011 (1)

Case C-163/10

Aldo Patriciello

(Reference for a preliminary ruling from the Tribunale di Isernia (Italy))

(Member of the European Parliament – Article 8 of the Protocol on Privileges and Immunities – Meaning of 'opinion expressed in the performance of parliamentary duties' – Criminal proceedings for the offence of making false accusations – Substantive immunity – Conduct of a Member of the European Parliament outside the precincts of the European Parliament – Organic link)

I – Introduction

1. By the question it has referred for a preliminary ruling, the national court asks the Court about the substantive conditions for giving effect to the immunity conferred by European Union ('EU') law on the Members of the European Parliament in respect of the opinions they express in the performance of their duties.

2. Although the Court has already been able to rule on the procedures for giving effect to the parliamentary immunity granted to the Members of the European Parliament, (2) it is requested, in the present case, to define the substantive aspects of immunity in the light of Article 8 (formerly Article 9) of Protocol No 7 on the Privileges and Immunities of the European Union. (3)

3. Like the constitutional systems of several Member States that have followed the example of the model developed in France after the revolution of 1789, the Protocol offers two principal types of protection specific to Members of the Parliament: (4) first, protection of freedom of speech in a Member's performance of his duties, that is to say, substantive immunity, also called 'absolute immunity' or 'parliamentary immunity', (5) and procedural immunity, also called 'freedom from arrest', (6) guaranteed to Members of the European Parliament in respect of legal proceedings during their term of office. Moreover, the Protocol gives Members the freedom to attend and participate in the activities of the Parliament during its sessions. (7) In the present case, the Court is requested to define the scope of the former type of immunity, namely substantive immunity.

II – Legal framework

A – *EU law*

1. Charter of Fundamental Rights

4. Under Article 11 of the Charter of Fundamental Rights of the European Union, (8) all persons have the right to freedom of expression, which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. Protocol No 7 on the Privileges and Immunities of the European Union

5. Article 8 of the Protocol provides that 'Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties'.

6. Subparagraphs (a) and (b) of the first paragraph of Article 9 (formerly Article 10) of the Protocol provide that, during the sessions of the Parliament, its Members enjoy, in the territory of their own State, the immunities accorded to members of the parliament of that State and, in the territory of any other Member State, immunity from any measure of detention and from legal proceedings. The last paragraph of that article also provides that the Parliament may decide to waive the immunity of one of its Members.

3. Rules of Procedure of the European Parliament (9)

7. Rule 6 of the Rules of Procedure of the European Parliament ('the Rules of Procedure of the Parliament'), entitled 'Waiver of immunity', provides, in paragraph 1, that, in the exercise of its powers in respect of privileges and immunities, Parliament is to seek primarily to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in the performance of their duties. Rule 6(3) states that any request addressed to the President by a Member or a former Member to defend privileges and immunities shall be announced in plenary session and referred to the committee responsible.

8. Rule 9 of the Rules of Procedure of the Parliament, entitled 'Members' financial interests, standards of conduct, mandatory transparency register and access to Parliament' is worded as follows:

'…

2. Members' conduct shall be characterised by mutual respect, be based on the values and principles laid down in the basic texts on which the European Union is founded, respect the dignity of Parliament and not compromise the smooth conduct of parliamentary business or disturb the peace and quiet of any of Parliament's premises. ...

3. The application of this Rule shall in no way detract from the liveliness of parliamentary debates nor undermine Members' freedom of speech.

It shall be based on full respect for Members' prerogatives, as laid down in primary law and the Statute for Members.

It shall be based on the principle of transparency and be so undertaken that the relevant provisions are made clear to Members, who shall be informed individually of their rights and obligations

…'

9. Chapter 4 of Title VI of the Rules of Procedure of the Parliament, which includes Rules 152 to 154, governs the measures applicable in the event of non-compliance with the standards of conduct of Members.

10. Rule 152, relating to immediate measures, sets out the powers of the President enabling him to call to order any Member who disrupts the smooth conduct of the proceedings or whose conduct fails to comply with the relevant provisions of Rule 9. Rule 153 of the Rules of Procedure of the Parliament sets out the penalties

applicable to Members, which include a reprimand and temporary suspension from participation in the activities of Parliament. Rule 154 governs appeal procedures.

11. Annex XVI to the Rules of Procedure of the Parliament, entitled 'Guidelines for the interpretation of the standards of conduct of Members', is worded as follows:

'1. A distinction should be drawn between visual actions, which may be tolerated provided they are not offensive and/or defamatory, remain within reasonable bounds and do not lead to conflict, and those which actively disrupt any parliamentary activity whatsoever.

2. Members shall be held responsible for any failure by persons whom they employ or for whom they arrange access to Parliament to comply on Parliament's premises with the standards of conduct applicable to Members.

The President or his representatives may exercise disciplinary powers over such persons and any other outside person present on Parliament's premises.'

B – *National law*

12. The first paragraph of Article 68 of the Italian Constitution provides that Members of Parliament shall not be called to answer for opinions expressed or votes cast in the exercise of their office.

III – The facts and the question referred for a preliminary ruling

13. Mr Patriciello, an Italian Member of the Parliament, is charged, in criminal proceedings brought against him before the Tribunale di Isernia (District Court, Isernia), Italy, with having falsely accused an officer of the Municipal Police of Pozzilli, Italy, of unlawful behaviour, during an altercation which took place on 1 August 2007 in a public parking area situated not far from a neurological institute.

14. It is apparent from the order for reference that Mr Patriciello has to answer a charge of making false accusations under Article 368 of the Italian Penal Code for declaring that the police officer had falsified the times when booking several drivers whose vehicles were parked in contravention of road traffic laws and, accordingly, for accusing the officer in question of the criminal offence of forgery of documents. Mr Patriciello persisted in the presence of policemen who had come to the scene in order to check whether the alleged unlawful behaviour had indeed taken place.

15. By decision of 5 May 2009, the European Parliament, following a request from Mr Patriciello, based on Rule 6(3) of the Rules of Procedure of the Parliament, decided, on the basis of the report of the Committee on Legal Affairs, to defend his immunity ('the decision to defend immunity'). The decision is reasoned as follows:

'As a matter of fact, in his statements, Mr Patriciello merely commented on facts in the public domain, the rights of the citizens to have an [sic] easy access to a Hospital and to the healthcares [sic], which had an important impact on the daily life of his constituents. Mr Aldo Patriciello did not act for [sic] his own interest, he did not want [sic] insult the public official but he act [sic] for [sic] general interest of his electorate in the framework of his political activity. In so doing he was carrying out his duty as a Member of Parliament in expressing his opinion on a matter of public interest to his constituents.' (10)

16. In the order for reference, the Tribunale di Isernia notes that, under Article 9(a) of the Protocol, Members of the European Parliament are to enjoy, in respect of acts committed on their national territory, the immunities and privileges with the same substantive and procedural limits as those provided for by the national law. However, according to Article 68 of the Italian Constitution, the privilege of absolute immunity extends to extra-parliamentary activities only if they are closely linked to the performance of the duties and aims of the parliamentary mandate.

17. In those circumstances, the national court points out that, without prejudice to any assessment as to the soundness of the charge, the facts giving rise to the main proceedings have no link whatsoever with any expression of opinion in the performance of Euro-parliamentary duties. As the order for reference shows, according to the indictment, the argument that Mr Patriciello did no more than comment on matters concerning the general public, that is to say, on the right of citizens to be able to have easy access to hospitals and healthcare, with no intention of insulting the official, appears to be unfounded. Indeed, the Member, even if this remains to be ascertained, expressly accused an officer of the Municipal Police, in the presence of the police, of forgery of official documents. Such conduct appears, prima facie, to have no connection with the general concerns of his constituents and, as such, does not seem, even *in abstracto*, to be covered by the defence of immunity, as recognised by the Parliament in its decision to defend immunity.

18. However, the Tribunale di Isernia notes that the decision to defend immunity was adopted on the basis not only of Article 9(a) but also of Article 8 of the Protocol.

19. Against that background and having regard to its duty, under Article 4(3) TEU, to cooperate in good faith, the Tribunale di Isernia decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the facts construed as a criminal offence allegedly committed by Aldo Patriciello, a Member of the European Parliament, described in the indictment and in favour of whom the European Parliament adopted a decision on 5 May 2009 to support a defence of immunity, categorised as making false accusations under Article 368 of the Penal Code, constitute the expression of an opinion in the performance of parliamentary duties for the purposes of Article [8] [(11)] of the Protocol?'

IV – Procedure before the Court

20. The reference for a preliminary ruling was received by the Court on 2 April 2010. Written observations have been lodged by Mr Patriciello, the Italian and Greek Governments, and by the Parliament and the European Commission. All, with the exception of the Italian Government, were represented at the hearing of 15 February 2011.

V – The procedural aspects of the question referred for a preliminary ruling

A – *The admissibility of the Parliament's observations*

21. First of all, I note that the admissibility of Parliament's written observations may raise certain doubts in the light of the wording of the provisions of the first and second paragraphs of Article 23 of the Statute of the Court of Justice of the European Union. Under those provisions, the request for a preliminary ruling is notified by the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute.

22. In the present case, it is clear that the European Parliament is not the author of the Protocol, which is the only subject-matter of the question referred for a preliminary ruling. (12) However, the present case undoubtedly relates to the constitutional interests of the Parliament and concerns its institutional dimension.

23. Therefore, in view of the intrinsic link between the provisions of the Rules of Procedure of the Parliament and Articles 8 and 9 of the Protocol, and of their common aim of ensuring that the Parliament performs its constitutional mission without impediment, as representative of the citizens at Union level, (13) it seems to me that in this case the Court should take a rather liberal attitude. I would add that I consider that the Court's case-law supports giving the Parliament the opportunity to express its views on this. (14) Consequently, I propose that the Court consider the Parliament's written observations to be admissible.

B – *The significance of the question referred for a preliminary ruling*

24. I think it important, as a preliminary point, to put forward the significance of this reference for a preliminary ruling, by which the Court is asked whether a measure such as that at issue in the main proceedings constitutes an opinion expressed in the performance of parliamentary duties.

25. The difficulty faced by the national court in the present case seems to lie in a certain tension between, on the one hand, the reasons for the decision to support the defence of Mr Patriciello's immunity and, on the other hand, the incriminating evidence relating to the matters in question. In that decision, the European Parliament invoked both Article 9(a) and Article 8 of the Protocol.

26. In that regard, while recognising, like Advocate General Poiares Maduro, that Articles 8 and 9 of the Protocol may sometimes cover the same acts, for they function in a cumulative manner, and should be read together, (15) I nevertheless think it clear that Article 9 of the Protocol often relates to acts that constitute ordinary

or non-political crimes or offences not falling within the ambit of Article 8 of the Protocol, in particular, acts that cannot be described as opinions or votes, whether they take place within Parliament or without.

27. Moreover, the Court has already held that, in proceedings brought against a Member of the European Parliament in respect of opinions expressed or votes cast by him, the assessment whether the conditions for applying the absolute immunity provided for in Article 8 of the Protocol have been met falls within the exclusive jurisdiction of the national courts which, if they have doubts, may refer a question to the Court under Article 267 TFEU, courts of final instance being, in such circumstances, obliged to make a reference to the Court. (16) Consequently, even if the Parliament, pursuant to a request from the Member concerned, adopts, on the basis of the Rules of Procedure of the Parliament, a decision to defend immunity, that constitutes an opinion which does not have binding effect with regard to national judicial authorities. (17)

28. Moreover, the national court expressly ruled out the possibility of applying in favour of Mr Patriciello the provisions of the Italian Constitution in conjunction with Article 9(a) of the Protocol, according to which a Member enjoys, in the territory of his own State, the immunities accorded to members of the parliament of that State.

29. Having regard to all the foregoing, I consider that the reply to be given in the present case must be based exclusively on Article 8 of the Protocol, which concerns the scope of substantive immunity.

30. Finally, it is evident that it is for the national court alone to determine the alleged facts and to classify them in the light of the Italian legislation. Consequently, the question referred for a preliminary ruling will have, in my view, to be substantially reformulated so that the Court must rule on the interpretation of the relevant provisions of the Protocol and on the scope of the immunity enjoyed by Members of the European Parliament, thus providing the national court with the most extensive guidance to help it to rule in the proceedings pending before it.

VI – The substance of the question referred for a preliminary ruling

A – *Freedom of political expression as a fundamental right*

31. Article 8 of the Protocol is undoubtedly intended to protect the freedom of expression of the Members of the European Parliament, without which a representative body cannot exist. Indeed the Members of the European Parliament may not be bound by any instructions or receive a binding mandate. It is therefore a free mandate, which represents their freedom of political expression given form. (18)

32. However, everyone has the right to freedom of expression. It includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (19)

33. Thus, as a fundamental right, freedom of expression gives everyone the right to express opinions, however questionable or shocking, minority or extravagant they may be. Nevertheless, the exercise of that freedom may be limited by the rights and interests of others.

34. The lawfulness of those limits of freedom of expression varies according, on the one hand, to the nature of the opinions and the context in which they are expressed and, on the other, to the position of the person expressing them. Thus, for example, freedom of expression in the sphere of political debate is more extensive than in business communications. In the light of the specific calling of journalists or parliamentarians, the overriding reasons justifying restrictions of their freedom of expression must be more forceful than those invoked generally.

35. Freedom of expression has the particular feature that it is both a right in itself but also a matrix essential to nearly every other form of freedom. (20) In the context of public debate, freedom of expression constitutes one of the pillars of a democratic society, the constituents of which, according to the European Court of Human Rights, are pluralism, tolerance and broadmindedness. (21) Freedom of expression is inseparable from the objective of democracy. (22)

36. In the same way as in the Member States, the legitimacy of the European Union is based on the principle of democratic representation. (23) The Members of the European Parliament are thus entrusted with a specific mission of democratic representation which is carried out, in particular, through free political discussion.

37. In accordance with the case-law of the European Court of Human Rights, freedom of political expression, as a preferred means of achieving the objectives relating to the development of a democratic society, covers electoral and parliamentary statements. It is established that the limits of criticism with regard to a politician, acting in that capacity, and with regard to the government, must be wider than in relation to a private individual. (24) According to the European Court of Human Rights, freedom of political debate is undoubtedly not absolute in nature. (25) Conversely, an offensive or slanderous remark may become a subject for political debate, if there is a general interest in discussing it. It is a question of securing a safe space for public discourse to take place. (26) However, in its recent case-law, the European Court of Human Rights has acknowledged the possibility of interfering in the context of electoral debate. (27)

38. In the present case, the European Parliament considered, in its decision to defend immunity, that Mr Patriciello had acted in the general interest of his constituents. In that regard, it should be pointed out that, in the case-law of the European Court of Human Rights, opinions relating to matters of public concern are placed on an equal footing with political discussion. (28) That court has expressly stated that the problem of the use of social security funds, (29) public expenditure, (30) the appropriation of public assets, (31) and corruption among politicians, (32) inter alia, are matters of public concern. The national courts should, in the light of that case-law, be able to identify whether a criticism relating to a particular point is part of a more general debate. If it is, the opinion in question has special status and requires greater protection. (33)

39. Moreover, since the case in the main proceedings concerns an officer of the Municipal Police, it should be pointed out that, by virtue of their position, civil servants are placed, in the eyes of the European Court of Human Rights, halfway between private individuals and politicians. Without equating politicians to civil servants, that court makes it clear that the limits of acceptable criticism with regard to civil servants, exercising their official functions, may in some circumstances be wider than in relation to private individuals. (34)

40. However, the European Court of Human Rights has pointed out that civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may prove necessary to protect them from offensive verbal attacks when on duty. That applies also to defamatory allegations concerning acts performed in the exercise of their duties. (35) The requirements connected with the protection of civil servants must, if necessary, be weighed against the interests of freedom of the press or freedom to discuss matters of public concern. (36)

B – *The principles governing parliamentary immunity in the Parliament and in the Parliamentary Assembly of the Council of Europe*

41. By way of introduction, I note that there is a historical link, based on a common principle and identical provisions, between the system of privileges and immunities granted to the Members of the Parliamentary Assembly of the Council of Europe and that granted to the Members of the Parliament. (37) In my view, that link justifies harmonising the two texts for the purpose of interpreting the scope of parliamentary immunity in the present case.

42. Under Article 343 TFEU, the Union enjoys in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, on the conditions laid down in the Protocol. Chapter III of the Protocol sets out the idea of legal guarantees for the Members of the European Parliament.

43. Thus, the privileges and immunities of the Members of the Parliament are those of the Union, which have been established in order that the Union may carry out its task.

44. It is to be pointed out that the very imprecise scope of the immunities, on which the European parliamentarians can rely, reflects its origins, namely, that the immunities scheme was conceived only as a supplement to the national rules relating to the privileges of Members. (38) In spite of the Parliament's various initiatives, no draft amendment to Articles 8 and 9 of the Protocol has as yet been successful. (39)

45. In this regard, I wish to stress that the main reason for establishing European immunity is not to benefit individuals but to help effectively to protect their tasks. Parliamentary immunity is therefore conceived not as a personal privilege of parliamentarians but as a safeguard for the institution. Since the integrity of the European Parliament must be protected, certain freedoms and immunities have been granted to its Members in order to enable them to move freely within the European Union, to act freely in the performance of their duties as parliamentarians and to be free of any threat in connection with those duties. (40)

46. As is apparent from the Rules of Procedure of the Parliament, in the exercise of its powers in respect of privileges and immunities, the Parliament seeks primarily to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in the performance of their duties. (41)

47. In comparison, under the Statute of the Council of Europe, the representatives of the Member States of the Council enjoy the privileges and immunities necessary to the performance of their functions. (42) These immunities are granted in order to preserve the integrity of the Parliamentary Assembly of the Council of Europe and to safeguard the independence of its Members in exercising their European office. (43) Moreover, under the Additional Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, those privileges and immunities are granted to the representatives of the Members, not for their personal benefit but in order to safeguard the independent exercise of their functions in connection with the Council of Europe. (44)

48. However, the foregoing considerations do not undermine the hypothesis of the dual aspect of parliamentary immunity, the aim of which is to protect both the Parliament and its Members as individuals. (45)

49. Thus, as regards, first, the protection of freedom of speech and of the vote in connection with a Member's performance of his duties, substantive immunity, also called 'absolute immunity' or 'parliamentary immunity', (46) reflected in Article 8 of the Protocol, enables a Member to avoid legal proceedings for certain categories of act, namely those linked to the exercise of his mandate.

50. The Court of Justice has already held that that substantive immunity is absolute in nature. (47)

51. This consideration must be interpreted in the light of the principle, (48) which underlies substantive immunity, that absolute immunity being unlimited in time, it is valid both during the mandate and after its expiry. It is also absolute in that it covers all forms of legal liability, in particular criminal and civil liability. Moreover, it is an unconditional non-liability, for it may not be waived by either the Parliament or the Member. Nevertheless, the absolute nature of the immunity covers, under Article 8 of the Protocol, only 'opinions expressed or votes cast by them in the performance of their duties'.

52. Secondly, the purpose of procedural immunity or freedom from arrest, referred to in Article 9 of the Protocol, is to prevent the exercise of the parliamentary mandate's being hampered by criminal actions in respect of acts committed by Members as ordinary citizens. Article 9 therefore guarantees the Members of the European Parliament protection against legal proceedings during the term of their mandate. The freedom from arrest provided for in Article 9 is limited to the duration of the sessions and becomes ineffective if the Member is found in the act of committing an offence and if the Parliament waives immunity. (49)

53. Historically, the purpose of that procedural immunity was to stop the executive power or individuals preventing or hampering the performance of Members' functions by bringing proceedings or making unfounded criminal accusations against them. Consequently, the immunity concerned is not absolute in nature but merely requires the measures adopted against a Member to be implemented after or between sessions of the Parliament.

54. Substantive immunity stemming from absolute immunity applies simply because it is laid down in the Protocol, and on condition that a Member's acts fall within the ambit of substantive immunity. In contrast, for procedural immunity to apply, a decision of the European Parliament is required in order to permit or prohibit an arrest or legal proceedings.

55. Bearing in mind these principles, it seems to me that freedom of expression in general, freedom of expression in political debate and relating to the public interest and the scope of the substantive immunity of a Member of the Parliament are rights which, although they are different, are continually confused. It is worth pointing out that the expression of an opinion by a Member of the Parliament may be protected, either by bringing into action the principle of the wider freedom of expression that applies to political debate, or by bringing into action the principle of freedom of expression that is in general applicable, with the result that such an opinion may not automatically be penalised, even if it has been expressed in circumstances that do not fall within the ambit of the substantive immunity linked to the performance of the duties of a Member of the Parliament. The present case therefore concerns the question how to draw the line of demarcation, in respect of freedom of expression, between the degree of protection of an individual in general, of a participant in political debate and of a Member of the Parliament.

C – *Concerning the rules of conduct applicable to Members of the Parliament*

56. Under Article 232 TFEU, the European Parliament is to adopt its Rules of Procedure. Without wishing to establish a direct parallel between the provisions of the Protocol and those of the Rules of Procedure of the Parliament, I consider the latter to be a useful reference document for the purpose of the reply to be given in the present case. It should be added that an institutional practice, well established within the Parliament, has grown up concerning the application of Article 9 of the Protocol in requests for waiver of the immunity of Members of the European Parliament. (50)

57. As regards its objective, parliamentary immunity includes, in my view, not only rights but also responsibilities. (51) The importance of this approach has also been underlined by the Council of Europe's Parliamentary Assembly, according to which the possibility of sanctions (52) should be increased in the event of the opinions expressed by Members of the Assembly containing defamation, insults or slander. (53) The rare cases of defamatory opinions attributable to Members of the Parliamentary Assembly have led to a proposal to reinforce protection for the reputation of injured persons. (54)

58. It is important to point out that, although the Members of the Parliament benefit, in the exercise of their functions, from substantive immunity, they are still subject to the rules of conduct laid down by that institution.

59. Those rules, especially Rules 9(2), 152 and 153 of the Rules of Procedure of the Parliament, seek to define the limits of the behaviour of Members of the Parliament and the sanctions in the event of infringement. It is apparent from those Rules of Procedure that the conduct in question has to be based on the values and principles defined in the fundamental EU legislation, to preserve the dignity of Parliament and not to compromise the efficient progress of parliamentary work.

60. In so far as those rules show the very nature of the behaviour which forms an integral part of the exercise of parliamentary duties, I consider that that information may be taken into consideration in the interpretation of Article 8 of the Protocol in order to define the scope of substantive immunity.

D – *The scope of substantive immunity as provided for in Article 8 of the Protocol*

61. According to an argument put forward by academic lawyers, substantive immunity extends to all the forms which parliamentary activity may take, whether in writing in parliamentary documents, or in speeches and votes in all their forms, in the parliamentary assemblies and committees. (55)

62. There are undoubtedly various parliamentary models of and approaches to substantive immunity among the Member States of the European Union. However, they all have the same objective, namely to safeguard the performance of the duties of a Member of Parliament and, *in fine*, the functioning of the institution. (56)

63. The classic model of substantive immunity which covers opinions expressed or votes cast by Members in the exercise of their functions applies also to the Members of the Council of Europe's Parliamentary Assembly. (57) In that connection, the term 'opinions expressed' includes both the oral and written interventions of Members in the exercise of their functions within that Assembly. A parliamentarian's insults addressed to a person in the public domain do not fall under the definition of opinion. (58) Substantive immunity also includes opinions expressed during official functions exercised by Members in the Member States. (59) It is therefore a question of protecting parliamentarians on official business in the Member States of the Council of Europe.

64. In addition, it is interesting to note an initiative of the European Parliament of 1987, seeking to amend Article 8 of the Protocol, so that Members of the European Parliament are protected in respect of opinions expressed and votes cast during parliamentary debates, within bodies established by Parliament or working with it or on which the Members sit as Members of the Parliament. (60)

65. Consequently, the current debate concerning the criterion to be used for defining parliamentary activities for the purposes of Article 8 of the Protocol has refocused on the choice between a 'spatial' criterion and a 'functional' criterion. In order to contribute to this discussion, I should like to ask the Court to alter the perspective of the examination of the statements at issue.

66. Substantive immunity covers, in my view, three aspects. The first, which is objective in nature, is designed to give Members the opportunity of engaging in and conducting parliamentary political debate entirely freely and so of promoting various political causes in order to influence the exercise of Parliament's legislative, budgetary and review powers. The second aspect, which is also objective in nature, is designed to safeguard the opportunity of expressing critical opinions, inter alia, in respect of the executive of the European Union and of the Member States and thus of contributing to a vertical and horizontal division of powers within the Union. The

third aspect, which is subjective, must be understood from the point of view of a fundamental right that restricts the fundamental rights of other citizens, such as the right of access to justice. These three aspects of substantive immunity therefore result in the establishment of an exception to the principle of equal treatment of citizens. (61) For this reason, it is essential to find, when interpreting its scope, the balance necessary in a democratic society.

67. In that regard, I share the opinion of the Commission, which points out that Article 8 of the Protocol must have a scope fully compatible with Article 6 of the ECHR which corresponds to Article 47 of the Charter of Fundamental Rights. A restriction of the right of access to justice by reason of parliamentary immunity must not be disproportionate to the legitimate aim, safeguarded by that immunity. (62)

68. As regards the 'spatial' criterion, I agree with Advocate General Poiares Maduro. I believe there can be no doubt that the limitation of the scope of absolute immunity only to the place or seat of the Parliament no longer corresponds to the contemporary reality of political debate and cannot therefore succeed as an exclusive criterion. (63)

69. I note that, according to the Council of Europe's Parliamentary Assembly, given the international nature of the Assembly, it is important that absolute immunity should be defined in relation to the typical activities of its Members and not by reference to a notion of geographical location. (64)

70. However, in my view, the importance of parliamentary premises as a privileged place of political debate, also at Union level, must not be disregarded. Accordingly, the interpretation of the concept of parliamentary immunity must not standardise the Parliament as a political institution by treating in the same way opinions expressed by a Member of the European Parliament in the parliamentary forum and those which he may express, for example, in a television reality show.

71. That said, it is important to point out that substantive immunity does not apply to all the activities of a Member of the Parliament, even if they are conducted within the Parliament or during sessions. (65) In order to apply the spatial criterion, the activity in question must necessarily have a link with the activities carried out as a Member of the Parliament. In the Member States, there is, in most cases, a link between the substantive and temporal scope of absolute immunity and the notion of opinions inherent in the activities particular to the Parliament. (66) Thus, discussions *intra muros* during parliamentary work in the broad sense (67) clearly fall within the scope of Article 8 of the Protocol.

72. With regard to activities and statements outside the confines of the Parliament, the main difficulty is linked to the application of the 'functional' criterion, which is therefore the only relevant criterion for interpreting the scope of substantive immunity. In my view, the objective of Article 8 of the Protocol cannot be to extend immunity to all statements of Members of the Parliament. Such an interpretation seems to me to conflict with the fundamental rights which are equality before the law (68) and access to justice, even though the Parliament appears to have adopted this position in its practice concerning the lifting of immunity. (69) However, substantive immunity is designed to protect the Members of the Parliament as such, and not as politicians in general.

73. In his Opinion in *Marra*, Advocate General Poiares Maduro suggested that, for the purpose of deciding whether the statements of a Member of the Parliament have been made in the performance of his duties, the criterion should be the nature and content of the comments of Members of the European Parliament. He made the classification of opinions subject to two conditions, namely, the opinions must be of genuine public interest and a distinction must be drawn between factual allegations and value judgements. (70)

74. Inasmuch as, in my view, this aspects requires deeper analysis, I should like, before I answer the question of the interpretation of the expression 'opinion expressed or vote cast in the performance of his duties' included in Article 8 of the Protocol, to consider the concepts of public interest and of the distinction between value judgements and factual allegations, and then propose that the scope of substantive immunity should be established by means of an organic rather than a functional link.

1. Genuine public interest

75. Public interest is one of the fundamental aspects of freedom of expression, for it contributes to the protection of the multiplicity of values in the society which that freedom is capable of preserving. Nevertheless, as regards the scope of the immunity arising under Article 8 of the Protocol, I think it difficult to require every statement made by a Member of the European Parliament to have a political connotation that always reflects a genuine public interest.

76. The aim of an extensive freedom of expression, such as that conferred on the Members of the Parliament, is to offer them the opportunity of participating in political debate linked to their functions without unjustified hindrance. That freedom must also include the opportunity of expressing opinions that are subjective, selfish or unsuitable, since a parliamentarian's purpose is to promote political causes, without being subject to any duty whatsoever to be objective.

77. In fact, the aim of democratic political debate is to contribute to the definition of the public interest, by suggesting different conceptions of it. The public interest does not precede democratic debate, but it is that debate which contributes to a better understanding of the public interest.

78. The concept of genuine public interest cannot therefore, in my view, constitute a relevant criterion for applying substantive immunity to the positions taken by Members of the Parliament and falling within the scope of Article 8 of the Protocol. If it could, the content of political debate would be subject to censure a posteriori by the legal authorities, which in itself would wholly contradict the idea of parliamentary immunity. (71)

2. Value judgements and statements of fact

79. The distinction between a statement of fact and a value judgement, (72) evoked inter alia in the observations of the European Parliament and the Commission, appears established in contemporary thought. The origin of this thesis is found in the statement of David Hume that duty cannot be inferred from facts. (73) In 20th century philosophy, that principle was adopted by the 'non-cognitivist' theories according to which comments relating to values or rules lie outside the dichotomy between what is true and what is false. In contrast, statements of fact are either true or false. Thus, objectivity is possible in so far as the debate concerns facts, but value judgements are more or less relative, or even subjective. (74)

80. In view of the conceptual difficulties in the field of moral philosophy, attaching to that distinction, it seems to me dangerous to base the legal interpretation of a rule of EU law on that distinction. It seems to me, as to certain exponents of legal theory, that to establish a clear distinction between value judgements and statements of fact in the area of the law is, from a conceptual point of view, difficult if not impossible. Moreover, I note that it is quite possible to express value judgements by means of a sentence which is presented on a semantic level as a purely factual statement. (75)

81. Nevertheless, it is useful to note that the distinction between value judgements and statements of fact is one of the classic criteria in the practice of the European Court of Human Rights. In short, in the case of a statement of fact, the Court acknowledges that it is possible to prove the truth of the facts (*exceptio veritatis*) (76), which is excluded in cases of value judgements.

82. It has been rightly pointed out in academic writings that the European Court of Human Rights does not apply a simple dichotomy between the two concepts, that is to say, it distinguishes not between a 'pure opinion' and a 'factual statement', but between 'pure factual statements' and mixed statements, expressing both fact and opinion. (77)

83. That proves, in my view, that the opposition of these two concepts is not free from doubt, as the European Court of Human Rights has itself acknowledged. (78) In accordance with the case-law of that Court, the difference between value judgements and statements of fact therefore lies in the level of factual proof to be established. (79) However, I doubt whether it is possible purely and simply to transpose that case-law to the limits of the substantive immunity of a Member of the Parliament.

84. I would point out that substantive immunity shields certain opinions expressed by the Members of the Parliament from possible criminal or civil liability. From this perspective, opinions must be studied as acts, more specifically as speech acts that may or may not constitute offences such as making false accusations, defamation or insult. (80)

85. In an assessment of opinions as acts, the question whether an assertion is a statement of fact or a value judgement seems to me less important than the objective sought by the author of the opinion and the response provoked in interlocutors by that speech act, even if the veracity of the statement may affect the legal characterisation of the act in question. I would add that I do not think that the Parliament's practice concerning the waiver of immunity draws a distinction between statements of fact and value judgements. (81)

86. Finally, I think it timely to draw the Court's attention to the fact that a comparison between the concept of 'exercise of [his] parliamentary functions' and value judgements leads to a limitation of the scope of freedom of political debate.

87. Indeed, when carrying out his duties, a Member of the Parliament must be able to express the concerns and defend the interests of his constituents. For that reason, he must, while being protected by substantive immunity, be free to make statements of fact that have not been established or that may be incorrect. More often than not, they will be mixed expressions within the meaning of the case-law of the European Court of Human Rights. A Member of the Parliament must therefore be given the 'benefit of the doubt', namely the opportunity of criticising the functioning of other institutions without having first to carry out extensive research for the purpose of proving his statements.

88. I therefore take the view that substantive immunity must cover not only value judgements but also statements of fact, provided that they satisfy the organic criterion which I am going to propose.

E – *The establishment of an organic criterion (82)*

89. Inasmuch as I am convinced that the criterion of a 'functional' link based on the concept of public interest and on the distinction between value judgements and statements of fact does not enable a useful reply to be given to the question concerning the substantive conditions for giving effect to the immunity conferred by EU law, I propose that the Court should introduce a criterion specific to the nature of the duties of a Member of the European Parliament, on the basis of the case-law of the European Court of Human Rights. This criterion links substantive immunity not to the content of a Member's comments, but rather to the relationship between the context in which those comments are made and the parliamentary work of the Parliament.

1. The criterion of proportionality stemming from the case-law of the European Court of Human Rights

90. As regards the case-law relating to the limits of immunity, according to the European Court of Human Rights, while freedom of expression is important for everybody, it is especially so for a person elected by the people who represents the electorate, draws attention to their preoccupations and defends their interests. In a democracy, Parliament or such comparable bodies are the essential forums for political debate. (83) That Court also points out that it is important that the assessment be made in the light of the specific circumstances, and that it should not be a review *in abstracto*. (84)

91. In general, when interpreting the scope of parliamentary immunity, the European Court of Human Rights appears to opt for a restrictive approach. Accordingly, it has considered compatible with the ECHR an immunity which covered statements made during parliamentary debates in legislative chambers and was designed to protect the Parliament's interests as a whole, as opposed to those of its Members taken individually. (85)

92. In point of fact, I think the fundamental judgment is that in *A. v. the United Kingdom*. After concluding that the parliamentary immunity enjoyed by the member of the House of Commons in the case pursued the legitimate aims of protecting free speech in parliament and maintaining the separation of powers between the legislature and the judiciary, the European Court of Human Rights examined the proportionality of the immunity in question. Accordingly, from the point of view of its compatibility with the ECHR, the broader an immunity, the more compelling must be the reasons justifying it. (86)

93. Moreover, the judgment in *Cordova v. Italy* (87) resulted, in particular, in a narrow interpretation of immunity, to the effect that it is not intended to protect a Member of Parliament when he is not acting as such. In that judgment, the European Court of Human Rights emphasised that the conduct of a Member could be not linked to the exercise of his parliamentary functions in their strict sense and, above all, that it could not, by its very nature, be compared with an act falling within the scope of parliamentary functions. That Court considered that the behaviour at issue (88) was more consistent with a personal quarrel and that, in such circumstances, it would not be right to deny someone access to a court. (89)

94. On the basis of that finding, the Court held that 'the lack of any clear connection with a parliamentary activity requires it to adopt a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed. This is particularly so where the restrictions on the right of access stem from the resolution of a political body. To hold otherwise would amount to restricting in a manner incompatible with Article 6(1) of the Convention the right of individuals to have access to a court whenever the allegedly defamatory statements have been made by a parliamentarian'. (90)

95. In the light of these arguments, the proportionality of the scope of the immunity must, in my view, be considered a key aspect for the purposes of interpreting Article 8 of the Protocol, which prompts me to suggest that the Court of Justice should introduce a new, 'organic' criterion.

2. The criterion of an organic link

96. For the purposes of interpreting Article 8 of the Protocol, I suggest applying the criterion of an organic link between the activities of a Member of the European Parliament and the scope of substantive immunity. (91) In my view, it is necessary to distinguish, within the very concept of substantive immunity, between the hard kernel and the sphere surrounding it.

97. I propose classifying at the heart of immunity activities constituting the exercise par excellence of the duties of a Member of the Parliament. These would cover, inter alia, opinions expressed and votes cast in the forum of the Parliament, in the Parliament's committees, delegations and political organs and also in the political groups. I suggest including there activities such as participation in conferences, missions and other political meetings outside the Parliament, as a Member of the Parliament. (92)

98. While I accept that it is probably impossible to list all the acts concerned, I consider that approval of the concept of 'activities which are in essence parliamentary' will facilitate the examination of the national court, which, in the event of doubt, may or must refer a question to the Court of Justice for a preliminary ruling in that regard.

99. As regards acts which cannot be classified as constituting the function of a Member of the European Parliament, it is necessary, following the example of the European Court of Human Rights, to apply the principle of proportionality. As that court has held, the lack of any clear connection with a parliamentary activity calls for a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed. (93)

100. Consequently, the further the act or statement of a Member of the Parliament departs from the essential core of his duties, the more compelling must be the reasons justifying his immunity. That means striking a balance between a Member's freedom of expression, on the one hand, and the access to justice and equal treatment of citizens, on the other.

101. Conversely, the greater the comparison as to substance with the activities of a Member of the Parliament, the wider the substantive immunity conferred on Members becomes. Above all, the question whether a speech of a Member of the European Parliament in the media is covered by substantive immunity must be assessed on the basis of those criteria. It seems to me that substantive immunity must cover statements which are made straight after parliamentary debates, which reproduce them or which comment on them. On the other hand, in so far as concerns the participation of Members of the Parliament in electoral debates or other political debates in general, those Members must not be in a better legal position than the other participants in those debates.

102. However, the question arising in this context is whether a Member of the European Parliament is entitled to rely on the protection conferred on him by Article 8 of the Protocol, when he is clearly acting as a national, regional or local, politician.

103. Indeed, the challenge which parliaments and their members must now face is to demonstrate that they are acting in the interest of the population, to improve the quality of life of the citizens and to act in such a way that their message is not discredited. (94)

104. Since the substantive immunity established in the Protocol is based on the Treaty which, in Article 343 TFEU, refers to the performance of the tasks of the Union, I consider that that immunity is intended to cover the activities of a Member of the European Parliament, not when he deals with matters which are of concern only to a national politician but when he carries out activities as a European parliamentarian.

105. It is clear that, having regard to the scope of contemporary political debate, most of the comments of a Member of the European Parliament have a dual nature. A speech at European level may have a clear link with the national, regional or local level. However, in the opposite case, that is to say, in the case of statements made in a purely national or local context, it may be more difficult to establish a link with the Union dimension.

106. I note, in that regard, that the Rules of Procedure of the Council of Europe's Parliamentary Assembly refer to the 'European office', (95) which may support the argument that its scope is limited to that area.

107. To summarise, in view of the nature of the immunity of the Members of the Parliament, understood as the immunity of the Union essential to the performance of its tasks, acts falling within the scope of political debate in general or when the Member speaks as a protector of the interests of the electorate at national or regional level may not, in the light of the organic criterion, be regarded as covered by substantive immunity as provided for by Article 8 of the Protocol.

108. I therefore propose that the Court should apply a balanced interpretation of substantive immunity, based on the test of an organic link, and that must observe the principles of equal treatment of citizens and of the right of access to the courts.

109. In the main proceedings, the reasons given for Mr Patriciello's immunity do not seem to me to prevail over those principles. As is apparent from the general report of the Parliament, cases of defamation concerning individuals rather than institutions have usually been regarded as falling outside a Member's political activity. That applies, for example, to attacks on individual police officers but not to a criticism of the police as an institution. (96) The decision to defend Mr Patriciello's immunity therefore moves away from that approach.

110. In the light of all the foregoing, I consider that the act committed by Mr Patriciello falls outside the activities of a Member of the Parliament in the organic sense that I have just proposed. As is apparent from the order for reference, Mr Patriciello acted outside the precincts of the Parliament. Next, given the subject-matter of his act, he seems to have acted as a national politician, or even as an annoyed citizen. Moreover, subject to verification of the facts by the national court and their classification in the light of Italian criminal law, Mr Patriciello's behaviour cannot be regarded as having a relevant link with the exercise of his functions as a Member of the Parliament.

VII – Conclusion

111. In view of the foregoing, I propose that the Court reply to the question from the Tribunale di Isernia as follows:

The conduct of a Member of the European Parliament, such as that at issue in the main proceedings, given that it has no link to the activities of the European Parliament, does not constitute an opinion expressed in the performance of parliamentary duties for the purposes of Article 8 of Protocol No 7 on the Privileges and Immunities of the European Union.

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1 – Original language: French.

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2 – Joined Cases C-200/07 and C-201/07 *Marra* [2008] ECR I-7929.

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3 – (OJ 2010 C 83, p. 266, formerly Protocol No 36 on the Privileges and Immunities of the European Communities (1965) (OJ 2006 C 321E, p. 318; 'the Protocol'). Inasmuch as the reference was made on 2 April 2010 and the subject-matter of the question referred for a preliminary ruling concerns the interpretation of the Protocol, the numbering of the FEU Treaty will be used in this Opinion.

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4 – See the European Parliament's comparative study No PE 168.399 entitled 'Parliamentary immunity in the Member States of the European Union and in the European Parliament', *Legal Affairs Series*, working paper, available at the following address: http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=4125#search=%20Parliamentary%20Immunity%20in%20the%20Member%20States%20of%20the%20European%20Union%20and%20the%20European%20Parliament.

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5 – The constitutions and doctrine applicable in the different Member States use different terminology to designate the two aspects of immunity. Thus, the first aspect covers 'l'irresponsabilité' in France, 'insidicabilità' in Italy, 'inviolabilidad' in Spain, 'non-liability, non-accountability, privilege of freedom of speech' in the United Kingdom, 'Verantwortungsfreiheit' in Germany and 'berufliche Immunität' in Austria.

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6 – The second aspect is designated by the term 'inviolabilité' in France and Belgium; by the term 'inmunidad' in Spain; by the term 'Immunität' or 'Unverletzlichkeit' or 'Unverfolgbarkeit' in Germany; by the term 'außerberufliche Immunität' in Austria; by the term 'inviolabilidade' in Portugal; by the terms 'inviolabilità' and 'improcedibilità' in Italy; and by the term 'freedom from arrest' in the United Kingdom.

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7 – This freedom is referred to in Article 7 of the Protocol, which is irrelevant to the present case.

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8 – OJ 2010 C 83, p. 389; 'the Charter of Fundamental Rights'.

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9 – Rules of Procedure of the European Parliament, adopted pursuant to Article 199 EC (now Article 232 TFEU) (OJ 2005 L 44, p. 1), as amended. The latest version is available on the website of the European Parliament.

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10 – Report A6-0286/2009 on the request for defence of the immunity and privileges of Aldo Patriciello (2009/2021(IMM)), available on the website of the European Parliament: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0286+0+DOC+PDF+V0//EN.

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11 – The wording of the question referred for a preliminary ruling refers to the former Article 9 of the Protocol. However, in the version applicable to the facts of the case in the main proceedings, Article 9 has become Article 8 of the Protocol.

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12 – Unlike *Marra*, paragraphs 22 and 23, the Rules of Procedure of the Parliament are not the subject-matter of this reference for a preliminary ruling.

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13 – See Article 10(1) and (2) TEU.

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14 – I recall the classic judgments concerning Parliament's capacity to be sued (Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339) and Parliament's capacity to sue (Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041), followed by a judgment on the merits (Case C-70/88 *Parliament* v *Council* [1991] ECR I-4529). I consider that such a reading is justified, a fortiori where Parliament's institutional interests are concerned.

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15 – See the Opinion of Advocate General Poiares Maduro in *Marra*, point 10.

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16 – *Marra*, paragraphs 32 to 34.

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17 – Ibid., paragraph 39

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18 – Article 4 of the Act of 1976 concerning the election of the representatives of the Assembly by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC,

Euratom of 20 September 1976, decision of the representatives of the Member States meeting within the Council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage (OJ 1976 L 278), See also Article 2 of the Rules of Procedure of the Parliament.

19 – Article 11(1) of the Charter of Fundamental Rights.

20 – Expression of Mr Justice Cardozo, decision of the United States Supreme Court in *Palko* v *Connecticut*, 302 US 319 (1937), in Hallé, M., *Discours politique et Cour européenne des droits de l'homme*, Brussels, 2009, p. 7.

21 – European Court of Human Rights, *Handysidev.the United Kingdom*, judgment of 7 December 1976, Series A no. 24. See Moyse, F., 'La liberté d'expression et l'ordre public en droit européen', *Annales du droit luxembourgeois*, Vol. 15, 2005, pp. 57 to 71. Article 52(3) of the Charter of Fundamental Rights, which relates to the scope and interpretation of rights and principles, provides that, in so far as the rights contained in the charter correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), their meaning and scope, including the accepted limitations, are the same as those laid down by the ECHR. It is therefore necessary to be guided by that case-law in this case.

22 – Charrière-Bournazel, Ch., 'La liberté d'expression et ses limites', *Annuaire international des droits de l'homme*, Vol. II, 2007, p. 236.

23 – Just like the Member States, the European Union is required to comply with the democratic principle, both under national constitutional laws and under EU law. With the entry into force of the Treaty of Lisbon, that principle is enshrined in Title II TEU, the whole of which is dedicated to it. It follows, therefore, that any exercise of powers by the Union must be able to be linked to the will of the people, see Gennart, M., 'Les parlements nationaux dans le traité de Lisbonne: évolution ou révolution', *Cahiers de droit européen*, 2010, Nos 1 and 2, pp. 17 to 46.

24 – European Court of Human Rights, *Lingensv.Austria*, judgment of 8 July 1986, Series A no. 103, § 42, and *Oberschlick v. Austria*, judgment of 23 May 1991, Series A no. 204, § 59.

25 – European Court of Human Rights, *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, § 46.

26 – See the Opinion of Advocate General Poiares Maduro in *Marra*, point 36.

27 – European Court of Human Rights, *Etxeberria and Others v. Spain*, judgment of 30 June 2009, no. 35579/03; *Féret v. Belgium*, judgment of 16 July 2009, no. 15615/07; and *Willem v. France*, judgment of 16 July 2009, no. 10883/05.

28 – This interpretation was upheld by the European Court of Human Rights in *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, § 64.

29 – European Court of Human Rights, *Eerikäinen and Others v. Finland*, judgment of 10 February 2009, no. 3514/02, §§ 66 to 68.

30 – European Court of Human Rights, *Flux v. Moldova*, judgment of 24 November 2009, no. 25367/05, § 39.

31 – European Court of Human Rights, *Porubova v. Russia*, judgment of 8 October 2009, no. 8237/03, § 43.

32 – European Court of Human Rights, *Bacanu and R v. Romania*, judgment of 3 March 2009, no. 4411/04, § 91.

33 – Where the national court has failed to take this aspect into account, the European Court of Human Rights has censured a State for infringement of Article 10 of the ECHR. See European Court of Human Rights, *Eerikäinen and Others v. Finland* and *Karsai v. Hungary*, judgment of 1 December 2009, no. 5380/07, § 29.

34 – European Court of Human Rights, *Janowski v. Poland*, judgment of 21 January 1999, *Reports of Judgments and Decisions* 1999-I, § 33. See also European Court of Human Rights, *Thoma v. Luxembourg*, judgment of 29 March 2001, *Reports of Judgments and Decisions* 2001-III, § 47, and *Mamère v. France*, judgment of 7 November 2006, *Reports of Judgments and Decisions* 2006-XIII, § 27.

35 – See, inter alia, *Janowski v. Poland*; *Busuioc v. Moldova*, judgment of 21 December 2004, no. 61513/00, § 64; *Mamère v. France*, § 27; and *Taffin v. France*, judgment of 18 February 2010, no. 42396/04, § 64.

36 – European Court of Human Rights, *Haguenauer v.France*, judgment of 22 April 2010, no. 34050/05, §§ 47 and 48.

37 – Harms, Th., *Die Rechtsstellung des Abgeordneten in der Beratenden Versamlung des Europarates und in Europaïschen Parlament*, Hansischer Gildenverlag, 1968, p. 88. See also Resolution 1325 (2003) on immunities of Members of the Parliamentary Assembly, available on the website of the Assembly of the Council of Europe at the following address: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta03/FRES1325.htm. See also the identical provisions of the Agreement on the Statute of the Western European Union, international representatives and personnel, of 11 May 1955.

38 – The Protocol was adopted in 1965, at the time when the Parliament was composed of Members elected by the national parliaments, in accordance with their national procedures. The Protocol was supposed to cover only the 'European' part of parliamentary activity. See Benlolo Carabot, M., 'Les immunités des Communautés européennes', *Annuaire français de droit international*, 2008/2009, pp. 549 to 588.

39 – With regard to the European Parliament's attempts to specify the terms of the Protocol, see the report of the Legal Affairs Committee of the European Parliament, entitled 'Parliamentary immunity in the European Parliament', No PE 360.487/REV2, October 2005, available at the following address: http://www.europarl.europa.eu/activities /committees/studies/download.do?file=17288. See the European Parliament resolution of 6 July 2006 on modification of the Protocol on Privileges and Immunities, P6_TA(2006) 0314, available on the Parliament's website http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0314&format=XML& language=EN.

40 – See *Privileges and immunities of Members of the European Parliament*, *Eighth Report of House of Commons* of 18 March 1986, comments of Donnez, G., *Select Committee on the European Communities*, London, 1986, paragraph 17.

41 – Rule 6(1) of the Rules of Procedure of the Parliament. Moreover, this approach underlies the Court's case-law, inter alia Case 149/85 *Wybot* [1986] ECR 2391, paragraph 12. In the light of this, the approach taken by the Court of First Instance of the European Communities in Case T-345/05 *Mote* v *Parliament* [2008] ECR II-2849, which had the effect of creating a subjective right for the beneficiaries of immunities seems to me to be debatable in the light of the aim of immunity based on the protection of the exercise of their functions; see paragraphs 29 to 34 of that judgment.

42 – The Members of the Assembly enjoy the privileges and immunities provided for in the General Agreement on Privileges and Immunities of the Council of Europe (of 2 September 1949) and its Additional Protocol (of 6 November 1952). See Article 40 of the Statute of the Council of Europe, and Articles 13 to 15 of the General Agreement on Privileges and Immunities, and also Articles 3 and 5 of the Additional Protocol, volume 'Statute of the Council of Europe'.

43 – Article 65 of Part XVII of the Rules of Procedure of the Assembly. Moreover, the **Committee on Rules of Procedure, Immunities and Institutional Affairs** of that assembly follows the evolution at European and international level of legal instruments concerning privileges and immunities of parliamentarians; see the Rules of Procedure of the Assembly, Terms of reference, Part IX. **Committee on Rules of Procedure, Immunities and Institutional Affairs** (paragraph 5).

44 – Article 5 of the abovementioned Additional Protocol to the General Agreement on Privileges and Immunities. This shows, moreover, that the Member States of the Council of Europe have not only the right but the duty to waive the immunity of their representatives. See also Resolution 1490 (2006) on the interpretation of Article 15a of the General Agreement, available at the following address: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERES1490.htm.

45 – See the Opinion of Advocate General Poiares Maduro in *Marra*, point 12. I would point out, however, that, at a hearing of the Constitutional Law Committee of the Finnish Parliament in 1933, eminent constitutionalists of the time proposed that the substantive immunity of members of parliament should give them the opportunity to criticise freely the government, the authorities and other persons or contemporary things or phenomena, without fear of legal proceedings or without the need to study in detail the criminal code before expressing an opinion. See Hakkila, E., *Suomen tasavallan perustuslait* (The constitutional laws of the Republic of Finland), Porvoo, 1939, p. 416.

46 – Compare with footnote 5.

47 – *Marra*, paragraph 27.

48 – Since Article 8 of the Protocol does not refer back to national legislation, the substantive immunity for which it provides must be regarded as founded exclusively on EU law. See *Marra*, paragraph 26.

49 – In that regard, I think the Parliament's practice is inconsistent and likely to cause controversy. On the one hand, the Parliament has considered that the procedural immunity referred to in Article 9 (formerly Article 10) of the Protocol applies not only to acts committed during the term of the mandate, but also retroactively to acts committed by former Members of the Parliament. According to the Parliament, only acts committed after the expiry of the mandate are excluded from the scope of procedural immunity, hence the need to waive immunity in respect of former Members (see Report No PE 360.487/REV2 of the Legal Affairs Committee of the European Parliament, referred to in footnote 39, p. 7). I have serious doubts as regards the compatibility of that interpretation with the objective of procedural immunity referred to in Article 9 of the Protocol and with the principles of equality before the law and those relating to access to the law enshrined by the Charter of Fundamental Rights. On the other hand, the Parliament has stated that it is very doubtful that Article 9 can apply to former Members of the Parliament. According to the Parliament, it is necessary to protect former Members from attacks in respect of opinions expressed or votes cast in the performance of their duties. However, the application of Articles 7 (formerly Article 8) and 9 of the Protocol seems to be limited to Members of the Parliament during its sessions. See the report on the request for defence of immunity and privileges of Koldo Gorostiaga (2004/2102(IMM)) of 25 January 2005, and the report on the request for defence of immunity and privileges of Andrzej Pęczak, former Member of the European Parliament (2005/212/(IMM)), of 22 November 2005.

50 – On this practice, see Report No PE 360.487/REV2 of the Legal Affairs Committee of the European Parliament, referred to in footnote 39.

51 – See the publication of the Inter-Parliamentary Union (IPU) entitled 'Freedom of expression, Parliament and the promotion of tolerant societies', Geneva, 2005, available at the address: http://www.ipu.org/pdf/publications/freedom_en.pdf. (p. 57 et seq.).

52 – Rule 21 of the Rules of Procedure of the Parliamentary Assembly.

53 – See Resolution 1325, paragraph 5. I would point out that, in German law, under Paragraph 46(1) of the Basic Law, defamation is excluded from the scope of the substantive immunity of members of parliament.

54 – Doc. 12059, entitled 'Ensuring protection against attacks on the honour and reputation of persons', available at the address: http://assembly.coe.int/Documents /WorkingDocs/Doc09/EDOC12059.pdf.

55 – Jeuniaux, M.-Ch., 'Le statut personnel des membres du Parlement européen', Doctoral thesis, University of Toulouse, 1987, p. 179.

56 – See the Parliament's comparative study No PE 168.399, referred to in footnote 4.

57 – Substantive immunity is the subject of Article 14 of the General Agreement on Privileges and Immunities of the Council of Europe.

58 – See the report of the Committee on Rules of Procedure and Immunities of 25 March 2003 entitled 'Immunities of Members of the Parliamentary Assembly', Doc. 9718 revised, available at the address: http://assembly.coe.int//Mainf.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9718.htm.

59 – See Resolution 1325 (2003) of the Council of Europe's Parliamentary Assembly and the report of the Committee on Rules of Procedure and Immunities of 25 March 2003, referred to in footnote 58.

60 – See the Protocol on the revision of the Protocol on Privileges and Immunities of the European Communities of 8 April 1965 in so far as it concerns the Members of the European Parliament (OJ 1987 C 99, p. 43): 'Members of Parliament shall not be subject to any form of inquiry, detention or legal proceedings, in connection with civil, criminal or administrative proceedings, in respect of opinions expressed or votes cast during debates in Parliament, in bodies created by or functioning within the latter or on which they sit as Members of Parliament.'

61 – See Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights. On the proportionate nature of this limitation, see the Opinion of Advocate General Poiares Maduro in *Marra*, point 31.

62 – European Court of Human Rights, *Patrono, Cascini and Stefanelli v. Italy*, judgment of 20 April 2006, no. 10180/04, §§ 63 and 64, and *C.G.I.L. and Cofferati v. Italy*, judgment of 24 February 2009, no. 46967/07, §§ 74 and 75.

63 – See the Opinion of Advocate General Poiares Maduro in *Marra*, point 35.

64 – Doc. 9718 revised, referred to in footnote 58, in which it is stated that '[s]ince the upheavals that occurred between 1989 and 1991, the Assembly and its [M]embers have been more involved on the ground: observation of elections, visits to the scene in the event of crises and in the course of parliamentary diplomacy, members' negotiations with national officials as part of the accession procedure for countries requesting Council of Europe membership, and the monitoring procedure'.

65 – By way of example, verbal harassment of waitresses in the Parliament cafeteria would not fall within the scope of Article 8 of the Protocol.

66 – In Belgian law, under Article 58 of the Belgian Constitution, non-liability (non-accountability, privilege of freedom of speech) covers the opinions or votes of a parliamentarian, provided that he is acting 'in the exercise of his parliamentary mandate'. In German law, Paragraph 46(1) of the Basic Law refers to a 'statement or vote in the Bundestag'. In Spanish law, Article 71 of the Spanish Constitution, in French law, Article 26 of the French Constitution, and in Luxembourg law, Article 68 of the Luxembourg Constitution use the expression 'in the exercise of his functions'. In Finnish law, Article 30 of the Finnish Constitution links the scope of parliamentary immunity to the opinions and attitudes adopted by the Member in the Parliament.

67 – Namely participation in sessions, parliamentary work, committees, meetings, press conferences, and receiving delegations.

68 – By way of example, in Sweden, the proposal to amend the Swedish Constitution seeking to extend the scope of parliamentary immunity to political debate *extra muros* was rejected, owing to the inequality or which would result between the different participants in those debates. See the report of the Constitutional Reform Committee, entitled 'En reformerad Grundlag–Betänkande av Grundlags Untredningen', SOU 2008:125, pp. 609 and 610.

69 – In the practice of the European Parliament, immunity is not waived if the criminal charges relate to the 'political activities' of a Member of the Parliament. This term has been interpreted by the Parliament on a basis which it described in its report as 'extremely broad and flexible'. See Report No PE 360.487/REV2 of the Parliament's Legal Affairs Committee, referred to in footnote 39, pp. 23 and 24.

70 – Opinion of Advocate General Poiares Maduro in *Marra*, points 37 to 39.

71 – I cannot deny, as the case-law of the European Court of Human Rights has shown, the role which the public interest may play in the assessment of whether a statement is covered by freedom of expression or whether it may be sanctioned. In the case of the Members, such an assessment is therefore possible only after it has been established that the statement at issue does not fall within the scope of the substantive immunity conferred on Members.

72 – According to the generic definition, the role of value judgements is to provide an assessment, either positive or negative, of their object. See Villa, V., 'Legal theory and value judgements', in *Constructing Legal Systems, European Union in Legal Theory*, ed. MacCormick, p. 119. For the purposes of analysing parliamentary immunity, it is necessary to include judgements expressing deontological assessments, concerning the fairness or moral value of acts, in the category of value judgements.

73 – The Scottish philosopher affirmed this thesis in his *Treatise of Human Nature* published in 1739. This idea was extended to apply to value judgements by the English philosopher G.E. Moore (1873-1958).

74 – See on this argument, for example, Shafer-Laundau, R., *Moral Realism. A Defence*, Oxford University Press, 2005, pp. 18 to 52.

75 – For example, a statement which refers to the objective fact that a political opponent is of a certain ethnic origin may reveal a negative value judgement on the part of the person expressing it. Revisionist statements regarding the Holocaust constitute a flagrant example of the fact that it is possible to express shocking value judgements by statements which appear purely factual.

76 – See a classic judgment of the European Court of Human Rights on the subject: *Bladet Tromso A/S and Stensaas v. Norway*, judgment of 20 May 1999, *Reports of Judgments and Decisions* 1999-III, § 65.

77 – Hochmann, Th., 'La protection de la réputation. Cour européenne des droits de l'homme. Pfeifer c. Autriche, 15 novembre 2007', *Revue trimestrielle des droits de l'homme*, 2008/76, p. 1185. This leads to a widening of the scope of the concept of 'value judgement' and to a narrowing of the concept of 'statement of fact'.

78 – European Court of Human Rights, *Scharsach and News Verlagsgesellschaft v. Austria*, judgment of 13 November 2003, *Reports of Judgments and Decisions* 2003-XI, § 40.

79 – Idem.

80 – In philosophy, the theory of the speech acts states that statements constitute not only a means of transmitting information but also acts. It is therefore necessary to distinguish between the propositional content of a statement and its illocutionary force. Speech acts structure social interaction through their illocutionary force which creates a link between interlocutors. See Moreso, J.J., *Legal Indeterminacy and Constitutional Interpretation*, Dordrecht, 1998, pp. 12 and 13, and Ruiter, D.W., *Institutional Legal Facts*, Dordrecht, 1993, pp. 37 to 51. A finding of fact may therefore have an illocutionary force which characterises it as a defamatory act.

81 – For example, in these two cases (Cases A3-0088/89 and A3-0040/90), concerning comments made by Mr Le Pen, his first comment may be categorised as a value judgement and the second as a revisionist statement of fact. In both cases, the competent parliamentary committee had proposed that immunity should not be waived , but the plenary session of the Parliament did not follow its advice. See the annex to Report No PE 360.487/REV2 of the Parliament's Legal Affairs Committee, referred to in footnote 39.

82 – Which is related to the institutional position of a Member of the Parliament in the constitutional organisation of the European Union. The term 'organic' is therefore not used in the sense of 'inherent to' or 'specific to'.

83 – European Court of Human Rights, *Jerusalem v. Austria*, judgment of 27 February 2001, *Reports of Judgments and Decisions* 2001-II, §§ 36 and 40.

84 – *Mutatis mutandis*, European Court of Human Rights, *Padovani v. Italy*, judgment of 26 February 1993, Series A no. 257-B, § 24.

85 – European Court of Human Rights, *A. v. the United Kingdom*, judgment of 17 December 2002, *Reports of Judgments and Decisions* 2002-X, §§ 84 and 85.

86 – European Court of Human Rights, *A. v. the United Kingdom*, §§ 77 and 78. However, when it is a question of assessing the proportionality of an immunity, its absolute nature cannot be decisive; see European Court of Human Rights, *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B.

87 – European Court of Human Rights, judgment of 30 January 2003, *Reports of Judgments and Decisions* 2003-I.

88 – The Court considered that ironic or derisive letters accompanied by toys personally addressed by Mr Cossiga to a prosecutor cannot, by their very nature, be construed as falling within the scope of parliamentary functions. See § 62 of the judgment in *Cordova v. Italy*.

89 – *Cordovav. Italy*, §§ 61 and 62.

90 – Ibid., § 63.

91 – The application of such an organic link in a slightly more simplified form has already been suggested by academic writers; Harms, Th., op. cit., p. 91.

92 – According to the Council of Europe's Parliamentary Assembly, 'obviously the words "in the exercise of their functions" apply to plenary sessions and to meetings of Assembly committees, sub-committees and other subsidiary bodies of the Assembly ...'. Substantive immunity should also extend to the official activities performed by Assembly Members in connection with meetings and conferences of other Council of Europe bodies. See the abovementioned Doc. 9718 revised.

93 – *Cordova v. Italy*, § 63.

94 – See the publication of the Inter-Parliamentary Union (IPU) entitled 'Freedom of expression, Parliament and the promotion of tolerant societies', referred to in footnote 51, pp. 64 and 65.

95 – Rule 65.1 of Part XVII of the Rules of Procedure of the Council of Europe's Parliamentary Assembly.

96 – See Report No PE 360.487/REV2 of the Parliament's Legal Affairs Committee, referred to in footnote 39, p. 24. In point of fact, the Parliament has waived immunity in cases concerning attacks on police officers; see cases A2-0130/88, A2-0105/85 and A6-0156/2006. See the annex to Report No PE 360.487/REV2, referred to in footnote 39.

JUDGMENT OF THE COURT (Grand Chamber)

21 October 2008 (*)

(Reference for a preliminary ruling – European Parliament – Leaflet issued by a Member of the European Parliament containing insulting remarks – Claim for non-pecuniary damages – Immunity of Members of the European Parliament)

In Joined Cases C-200/07 and C-201/07,

REFERENCES for preliminary rulings under Article 234 EC from the Corte suprema di cassazione (Italy), made by decisions of 20 February 2007, received at the Court on 12 and 13 April 2007, in the proceedings

Alfonso Luigi Marra

v

Eduardo De Gregorio (C-200/07),

Antonio Clemente (C-201/07),

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, J.-C. Bonichot and T. von Danwitz, Presidents of Chambers, J. Makarczyk, P. Kūris, E. Juhász, L. Bay Larsen, P. Lindh and C. Toader (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 April 2008,

after considering the observations submitted on behalf of:

– Mr Marra, by himself and L.A. Cucinella, avvocato,

– Mr De Gregorio, by G. Siporso, avvocato,

– Mr Clemente, by R. Capocasale and E. Chiusolo, avvocati,

– the Italian Government, by R. Adam, acting as Agent, and P. Gentili, avvocato dello Stato,

– the European Parliament, by H. Krück, C. Karamarcos and A. Caiola, acting as Agents,

– the Commission of the European Communities, by I. Martínez del Peral, F. Amato and C. Zadra, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 June 2008,

gives the following

Judgment

1 These references for preliminary rulings concern the interpretation of the Community rules on the immunity of Members of the European Parliament, in particular Articles 9 and 10 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 (OJ 2006 C 231 E, p. 318; 'the Protocol') and Rule 6(2) and (3) of the Rules of Procedure of the European Parliament (OJ 2005 L 44, p. 1; 'the Rules of Procedure').

2 The references were made in the course of two sets of proceedings between Mr Marra, a former Member of the European Parliament, and Mr De Gregorio and Mr Clemente, who brought actions for damages against Mr Marra for the injury which he allegedly caused them by distributing a leaflet containing insulting remarks about them.

Legal context

Community law

The Protocol

3 Article 9 of the Protocol provides:

'Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.'

4 Article 10 of the Protocol provides:

'During the sessions of the European Parliament, its Members shall enjoy:

(a) in the territory of their own State, the immunities accorded to members of their parliament;

(b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to Members while they are travelling to and from the place of the meeting of the European Parliament.

Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members.'

5 Article 19 of the Protocol provides:

'The institutions of the Communities shall, for the purpose of applying this Protocol, co-operate with the responsible authorities of the Member States concerned.'

The Rules of Procedure

6 Rule 5(1) of the Rules of Procedure, entitled 'Privileges and Immunities', provides:

'Members shall enjoy privileges and immunities in accordance with the Protocol on the Privileges and Immunities of the European Communities.'

7 Rule 6 of the Rules of Procedure, entitled 'Waiver of Immunity', states:

'1. In the exercise of its powers in respect of privileges and immunities, Parliament shall seek primarily to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in performance of their duties.

2. Any request addressed to the President by a competent authority of a Member State that the immunity of a Member be waived shall be announced in Parliament and referred to the committee responsible.

3. Any request addressed to the President by a Member or a former Member to defend privileges and immunities shall be announced in Parliament and referred to the committee responsible.

The Member or former Member may be represented by another Member. The request may not be made by another Member without the agreement of the Member concerned.

...'

8 Rule 7 of the Rules of Procedure, which contains the rules governing procedures on immunity of Members of the European Parliament, states in paragraphs 6 and 7:

'6. In cases concerning the defence of immunity or privileges, the committee shall state whether the circumstances constitute an administrative or other restriction imposed on the free movement of Members travelling to or from the place of meeting of Parliament or an opinion expressed or a vote cast in the performance of the mandate or fall within aspects of Article 10 of the Protocol on Privileges and Immunities which are not a matter of national law, and shall make a proposal to invite the authority concerned to draw the necessary conclusions.

7. The committee may offer a reasoned opinion about the competence of the authority in question and about the admissibility of the request, but shall not, under any circumstances, pronounce on the guilt or otherwise of the Member nor on whether or not the opinions or acts attributed to him or her justify prosecution, even if, in considering the request, it acquires detailed knowledge of the facts of the case.'

National law

9 Article 68 of the Italian Constitution provides:

'Members of Parliament shall not be called to answer for opinions expressed or votes cast in the exercise of their office.

No members of Parliament may, without the authorisation of the Chamber to which they belong, be subjected to searches of their persons or their homes, nor arrested or otherwise deprived of personal liberty, or kept in custody, except in execution of a definitive judgment of conviction, or if they are caught in the act of committing an offence for which arrest is mandatory.

A similar authorisation shall be required in order to subject Members of [the Italian] Parliament to any form of interception of their conversations or communications, and in order to seize their correspondence.'

The main proceedings and the questions referred for a preliminary ruling

10 It is apparent from the two orders for reference that Mr Marra, a former Member of the European Parliament, was ordered by the Tribunale di Napoli (District Court, Naples) to pay damages for the injury he had caused to Mr De Gregorio and Mr Clemente by distributing a leaflet containing insulting remarks about them, while he was a Member of the European Parliament.

11 By two judgments delivered on 23 January 2001 and 25 January 2002 the Corte d'appello di Napoli (Court of Appeal, Naples) upheld, in essence, the two judgments of the Tribunale di Napoli finding against Mr Marra. In those judgments, the Corte d'appello di Napoli did not accept that Mr Marra's actions with regard to Mr De Gregorio and Mr Clemente constituted opinions expressed in the performance of his duties as a Member of the European Parliament, and also did not accept Mr

Marra's argument that it was necessary, in order to bring civil proceedings against him, to request prior authorisation from the European Parliament in accordance with Rule 6 of the Rules of Procedure.

12 By letter of 26 March 2001, addressed to the President of the Parliament, Mr Marra stated that proceedings were being brought against him in a number of Italian courts, referring, inter alia, to the proceedings brought by Mr De Gregorio and Mr Clemente. He complained of an infringement by the Italian judicial authorities of Article 6 of the Rules of Procedure, inasmuch as they had not sought 'authorisation' before initiating proceedings against him.

13 Following that request, the Parliament adopted, on 11 June 2002, a Resolution on the immunity of Italian Members in Italy and the Italian authorities' practices on the subject (OJ 2003 C 261 E, p. 102), which concludes as follows:

'1. [The Parliament] decides that the cases of … Alfonso Marra raise a prima facie case of absolute immunity and that the competent courts should be put on notice to transmit to Parliament the documentation necessary to establish whether the cases in question involve absolute immunity under Article 9 of the Protocol in respect of opinions expressed or votes cast by the members in question in the performance of their duties and that the competent courts should be invited to stay proceedings pending a final determination by Parliament;

2. Instructs its President to forward this decision and the report of its committee to the Italian Permanent Representative marked for the attention of the appropriate authority of the Italian Republic.'

14 It is apparent from the orders for reference that that resolution did not reach either the courts at first instance or the Corte suprema di cassazione (Supreme Court of Cassation).

15 Before the Corte suprema di cassazione, Mr Marra asserted his immunity and claimed that, under Rule 6 of the Rules of Procedure, the courts at first instance and the appeal court, to be able to give judgment against him, should have first requested the European Parliament to waive his immunity.

16 The referring court indicates that Article 68 of the Italian Constitution exonerates the Members of the Italian Parliament from all civil, criminal and administrative liability in respect of an opinion expressed or a vote cast in the exercise of their office, in order to secure their freedom of decision-making and judgment in the exercise of their mandate.

17 It points out, furthermore, that the enjoyment of that immunity is not subject, in principle, to a 'preliminary decision of [the Italian] Parliament'. Nevertheless, according to the case-law of the Corte costituzionale (Constitutional Court), if the Parliament gives a ruling on that immunity, that decision is binding on the court before which the action against the Member of Parliament concerned has been brought. If the Parliament and that court take different views, the system allows for the possibility of the dispute being brought before the Corte costituzionale.

18 The referring court points out, lastly, that in the system devised by the Community legislature, which is different from that provided for under Italian law, Rule 6 of the Rules of Procedure provides that a request to defend privileges and immunity may be addressed to the President of the Parliament either by a competent authority of a Member State, or directly by a Member of the European Parliament.

19 Having regard to those considerations, the Corte suprema di cassazione decided to stay the proceedings and to refer the following questions, which are drafted in the same terms in both the main proceedings, to the Court for a preliminary ruling:

'1. In the event that a Member of the European Parliament does not act by exercising the right granted to him under Rule [6(3)] of the Rules of Procedure of the European Parliament

directly to request the President to defend privileges and immunities, is the court before which a civil action is pending in any event required to request the President to waive immunity for the purposes of pursuing proceedings and adopting a decision?

or

2. In the absence of a communication by the European Parliament that it intends to defend the immunities and privileges of the Member concerned, may the court before which that civil action is pending rule as to the existence or otherwise of that privilege, regard being had to the specific circumstances of the case?'

20 By order of the President of the Court of 18 June 2007, Cases C-200/07 and C-201/07 were joined for the purposes of the written and oral procedure and of the judgment.

Admissibility of the observations submitted by the Parliament

21 The first two paragraphs of Article 23 of the Statute of the Court of Justice afford the European Parliament the right to submit its observations on references for preliminary rulings concerning acts adopted 'jointly' by the European Parliament and the Council of the European Union. That provision does not explicitly afford the Parliament the right to submit observations in cases, such as those in the main proceedings, which concern the Protocol and the Rules of Procedure.

22 Nevertheless, since Article 23 affords the Parliament the right to submit written observations in cases concerning the validity or interpretation of an act for which it is a co-legislator, such a right must, a fortiori, be afforded to it where a reference for a preliminary ruling concerns the interpretation of an act adopted by that institution of which it is the sole author, such as the Rules of Procedure.

23 It follows that the Parliament must be afforded the right to submit its observations in the present proceedings.

The questions referred

24 It should be noted, at the outset, that the parliamentary immunity of Members of the European Parliament, as provided for in Articles 9 and 10 of the Protocol, comprises the two forms of protection normally afforded to members of national parliaments in the Member States, that is to say, immunity in respect of opinions expressed and votes cast in the exercise of their parliamentary duties, and parliamentary privilege, including, in principle, protection from judicial proceedings.

25 Article 10 of the Protocol provides that, during the sessions of the European Parliament, its Members enjoy, in the territory of their own State, the immunities accorded to members of the parliament of that State and, in the territory of any other Member State, immunity from any measure of detention and from legal proceedings. The last paragraph of that article also provides that the Parliament can decide to waive the immunity of one of its members.

26 Article 9 of the Protocol sets out the principle of immunity of Members of the European Parliament in respect of opinions expressed or votes cast by them in the performance of their duties. As that article makes no reference to national rights, the scope of that immunity must be established on the basis of Community law alone (see, by analogy, Case 149/85 *Wybot* [1986] ECR 2391, paragraph 12).

27 Such immunity, which is that relied upon by Mr Marra in the disputes in the main proceedings, must, to the extent that it seeks to protect the freedom of expression and independence of Members of the European Parliament, be considered as an absolute immunity barring any judicial proceedings in respect of an opinion expressed or a vote cast in the exercise of parliamentary duties.

28 It should be observed that, by the present references for preliminary rulings, the Court is not asked whether an act such as that at issue in the main proceedings constitutes an opinion expressed in the exercise of parliamentary duties within the meaning of Article 9 of the Protocol, but is asked only to clarify the rules under which the national courts and the Parliament implement that article.

29 By its two questions the referring court asks, in essence, whether, where a Member of the European Parliament does not make a request to the Parliament for defence of his immunity, or where a decision from the Parliament on that immunity is not communicated to the national judicial authorities before which actions such as those in the main proceedings are brought, those authorities are required to request the Parliament to waive the immunity of the member in question, and to await the decision of that institution before ruling on whether such immunity exists.

30 The referring court proceeds on the basis that, in the main proceedings, the applicant did not approach the Parliament to defend his immunity and that, as a result, that institution did not adopt any decision in that regard. However, as is apparent from the documents submitted by the Parliament, Mr Marra made a request for defence of his immunity and the Parliament adopted a resolution which was sent to the Permanent Representative of the Italian Republic. It is not in dispute that the courts of first instance and the Corte suprema di cassazione were not aware of Mr Marra's request or of that resolution.

31 Having regard to those factors, and in order to provide the referring court with a reply which may be of use to it in determining the outcome of the disputes in the main proceedings, the questions referred should be understood as asking, first, whether, where the national court which has to rule on an action for damages brought against a Member of the European Parliament in respect of opinions expressed by him has received no information regarding a request from that member to the Parliament seeking defence of his immunity, that court may itself rule on whether the immunity provided for in Article 9 of the Protocol applies with regard to the factors in the particular case; second, whether, where the national court is informed of the fact that that member has made such a request to Parliament, that court must await the decision of the Parliament before continuing with the proceedings against that member; and, third, whether, where the national court finds that that immunity does apply, it must request the waiver of that immunity for the purposes of continuing with the legal proceedings. As the answers to those questions are based on the same considerations, it is appropriate to deal with them together.

32 In order to establish whether the conditions for the absolute immunity provided for in Article 9 of the Protocol are met, the national court is not obliged to refer that question to the Parliament. The Protocol does not confer on the Parliament the power to determine, in cases of legal proceedings against one of its Members in respect of opinions expressed or votes cast by him, whether the conditions for applying that immunity are met.

33 Therefore, such an assessment is within the exclusive jurisdiction of the national courts which are called on to apply such a provision, and which have no choice but to give due effect to that immunity if they find that the opinions or votes at issue were expressed or cast in the exercise of parliamentary duties.

34 If, in applying Article 9 of the Protocol, those courts have doubts concerning the interpretation of that article, they may refer a question to the Court under Article 234 EC on the interpretation of that article of the Protocol, courts of final instance being, in such circumstances, obliged to make such a reference to the Court.

35 Furthermore, it cannot be inferred, even implicitly, from Rules 6 and 7 of the Rules of Procedure – which contain the internal rules concerning the procedure for waiving parliamentary immunity – that the national courts are obliged to refer to the Parliament the decision on whether the conditions for recognising that immunity are met, before ruling on the opinions and votes of Members of the Parliament.

36 Rule 6(2) of the Rules of Procedure is limited to establishing the procedure for the waiver of parliamentary immunity provided for in Article 10 of the Protocol.

37 Rule 6(3) of the Rules of Procedure sets down a procedure for defence of immunity and privileges which can be triggered by the Member of the European Parliament. That procedure also concerns immunity for opinions expressed and votes cast in the exercise of parliamentary duties. Rule 7(6) of those rules provides that the Parliament is to 'state' whether legal proceedings brought against a Member of the European Parliament constitute a restriction on the expression of an opinion or the casting of a vote, and to 'make a proposal to invite the authority concerned to draw the necessary conclusions'.

38 As has been emphasised out by the Parliament and the Commission of the European Communities, the Rules of Procedure are rules of internal organisation and cannot grant powers to the Parliament which are not expressly acknowledged by a legislative measure, in this case by the Protocol.

39 It follows that, even if the Parliament, pursuant to a request from the Member concerned, adopts, on the basis of those rules, a decision to defend immunity, that constitutes an opinion which does not have binding effect with regard to national judicial authorities.

40 In addition, the fact that the law of a Member State provides for a procedure in defence of members of the national parliament – enabling that parliament to intervene where the national court does not recognise that immunity – does not imply that the same powers are conferred on the European Parliament in relation to its Members coming from that Member State, since, as has been held in paragraph 32 above, Article 9 of the Protocol does not expressly grant the Parliament such power and does not refer to the rules of national law.

41 However, according to settled case-law, the duty of sincere cooperation between the European institutions and the national authorities, enshrined in Article 10 EC and reiterated in Article 19 of the Protocol, which applies both to the national judicial authorities of Member States acting within their jurisdictions and to the Community institutions, is of particular importance where that cooperation involves the judicial authorities of a Member State who are responsible for ensuring that Community law is applied and respected in the national legal system (see, in particular, order in Case C-2/88 IMM *Zwartveld and Others* v *Commission* [1990] ECR I-3365, paragraph 17, and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 93).

42 It must be held that that duty of cooperation applies in the context of disputes such as those in the main proceedings. The European Parliament and the national judicial authorities must therefore cooperate in order to avoid any conflict in the interpretation and application of the provisions of the Protocol.

43 Therefore, where an action has been brought against a Member of the European Parliament before a national court and that court is informed that a procedure for defence of the privileges and immunities of that Member, as provided for in Article 6(3) of the Rules of Procedure, has been initiated, that court must stay the judicial proceedings and request the Parliament to issue its opinion as soon as possible.

44 Once the national court has established that the conditions for the absolute immunity, provided for in Article 9 of the Protocol are met, the court is bound to respect that immunity, as is the Parliament. It follows that such immunity cannot be waived by the Parliament and that, as a result, that court is bound to dismiss the action brought against the Member concerned.

45 First, Article 9 of the Protocol does not grant such a power to the Parliament. Second, as that article constitutes a special provision applicable to all legal proceedings for which the Member benefits from immunity in respect of opinions expressed and votes cast in the exercise of parliamentary duties, that immunity cannot be waived by the application of the third paragraph of Article 10 of the Protocol, which concerns immunity in legal proceedings relating to acts other than those referred to

in Article 9. It follows that only the immunity covered by Article 10 may be waived for the purposes of continuing legal proceedings against a Member of the European Parliament.

46 Having regard to all of the foregoing, the reply to the questions referred must be that the Community rules relating to the immunity of Members of the European Parliament must be interpreted as meaning that, in an action for damages brought against a Member of Parliament in respect of opinions he has expressed,

– where the national court which has to rule on such an action has received no information regarding a request by that Member to the Parliament seeking defence of the immunity provided for in Article 9 of the Protocol, it is not obliged to request the Parliament to give a decision on whether the conditions for that immunity are met;

– where the national court is informed of the fact that that Member has made a request to the Parliament for defence of that immunity, within the meaning of Rule 6(3) of the Rules of Procedure, it must stay the judicial proceedings and request the Parliament to issue its opinion as soon as possible;

– where the national court considers that that Member enjoys the immunity provided for in Article 9 of the Protocol, it is obliged to dismiss the action brought against the Member concerned.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The Community rules relating to the immunity of Members of the European Parliament must be interpreted as meaning, in an action for damages brought against a Member of the European Parliament in respect of opinions he has expressed,

– where the national court which has to rule on such an action has received no information regarding a request by that Member to the European Parliament seeking defence of the immunity provided for in Article 9 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965, it is not obliged to request the European Parliament to give a decision on whether the conditions for that immunity are met;

– where the national court is informed of the fact that that Member has made a request to the European Parliament for defence of that immunity, within the meaning of Rule 6(3) of the Rules of Procedure of the European Parliament, it must stay the judicial proceedings and request the European Parliament to issue its opinion as soon as possible;

– where the national court considers that that Member enjoys the immunity provided for in Article 9 of the Protocol on the Privileges and Immunities of the European Communities, it is obliged to dismiss the action brought against the Member concerned.

[Signatures]

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL
Poiares Maduro
delivered on 26 June 2008 (1)

Joined Cases C-200/07 and C-201/07

Alfonso Luigi Marra
v
Eduardo De Gregorio
and
Antonio Clemente

(Reference for a preliminary ruling from the Corte Suprema di Cassazione (Italy))

1. In the present reference from the Corte Suprema di Cassazione (Supreme Court of Cassation) (Italy), the Court of Justice is asked about the correct interpretation of the provisions of the Protocol on the Privileges and Immunities of the European Communities and the Rules of Procedure of the European Parliament in relation to the immunity from suit and prosecution that Members of the European Parliament enjoy.

2. The two cases that gave rise to this preliminary reference concern defamation claims brought against an Italian Member of the European Parliament (MEP). The national courts found him liable and awarded damages to the claimants. The Court is asked, first, whether a national court dealing with civil proceedings against an MEP is under an obligation to request the European Parliament to waive his immunity, in the event that the MEP has not himself asked the Parliament to defend his immunity, and, second, whether the national court itself has the power to rule whether the MEP's conduct is covered by immunity, should the European Parliament not have communicated its intention to defend the immunity of the Member concerned.

I – Factual background

3. The defendant in the main proceedings, Mr Alfonso Luigi Marra, was a Member of the European Parliament between 1994 and 1999. While an MEP, he circulated a number of pamphlets criticising the Italian justice system and individual judges. Mr Antonio Clemente and Mr Eduardo De Gregorio, who were named in the pamphlets, issued defamation claims against Mr Marra. When the court of first instance found in their favour and awarded them damages, Mr Marra appealed to the Corte d'appello di Napoli (Naples Court of Appeal). In its judgments of 23 January and 6 March 2002 (in the case of Mr Clemente) and of 22 February 2002 (in the case of Mr De Gregorio) the Corte d'appello di Napoli upheld the judgments of the court of first instance holding that the statements in question were not covered by the Protocol on the Privileges and Immunities of the European Communities. Mr Marra appealed on points of law to the Corte Suprema di Cassazione,

arguing, inter alia, that the Corte d'appello di Napoli had misapplied Rule 6 of the Rules of Procedure of the European Parliament which specifies the process to be followed in relation to requests for waiver of immunity of an MEP.

4. In the meantime, Mr Marra had written to the President of the European Parliament on 16 February 2001, asking for the Parliament to intervene in accordance with Rule 6 in order to defend his immunity. His request was transmitted to the Committee on Legal Affairs and the Internal Market by letter of the President dated 11 April 2001. At its meeting of 23 January 2002, the Committee decided to intervene in favour of Mr Marra and a relevant recommendation was made in the Report on the Immunity of Italian Members and the Italian authorities' practices on the subject of 30 May 2002. (2) On 11 June 2002 the European Parliament adopted a Resolution on parliamentary immunity in Italy and the Italian authorities' practices in the matter, (3) which concludes as follows:

'1. [The Parliament] decides that the cases of … and Alfonso Marra raise a prima facie case of absolute immunity and that the competent courts should be put on notice to transmit to Parliament the documentation necessary to establish whether the cases in question involve absolute immunity under Article 9 of the Protocol in respect of opinions expressed or votes cast by the members in question in the performance of their duties and that the competent courts should be invited to stay proceedings pending a final determination by Parliament;

2. Instructs its President to forward this decision and the report of its committee to the Italian Permanent Representative marked for the attention of the appropriate authority of the Italian Republic.'

II – The questions referred

5. By order dated 20 February 2007, the Corte Suprema di Cassazione referred two questions to the Court of Justice in relation to the provisions on immunity of MEPs.

'1. In the event that a Member of the European Parliament does not act by exercising the powers granted him under Rule [6(3)] of the Rules of Procedure of the European Parliament directly to request the President to defend privileges and immunities, is the court before which a civil action is pending in any event required to request the President to waive immunity for the purposes of pursuing proceedings and adopting a decision?

or

2. In the absence of a communication by the European Parliament that it intends to defend the immunities and privileges of the Member concerned, may the court before which that civil action is pending rule as to the existence or otherwise of that privilege, regard being had to the specific circumstances of the case?'

6. Given the way in which the questions are formulated, the national court appears to assume that Mr Marra has not requested the President of the European Parliament to defend his immunity and that the Parliament has not communicated an intention to do so. However, there is no doubt that Mr Marra has submitted such a request and that the Parliament has indicated that his statements may be covered by immunity, that it has asked for the competent national court to be put on notice to transmit the relevant documents and has instructed its President to forward its decision to the Italian Permanent Representative. (4) At the hearing, counsel for the Parliament confirmed that the Resolution was communicated not to the national court directly but to the Italian Permanent Representative. The order for reference mentions the Report of the Committee on Legal Affairs and the Internal Market of 30 May 2002 but not the actual Resolution of the European Parliament of 11 June 2002, which adopted the recommendations made in the Report. When asked for clarification at the hearing, counsel for the Italian Government referred us to those points in the order where the Report of 30 May 2002 is mentioned and submitted that the national court phrased its questions in

this manner because it treated the Report as being the provisional, and not the final, position of the Parliament. Yet, the Parliament did adopt a final position in its Resolution of 11 June 2002, which, counsel for the Parliament told us, was communicated to the Italian Permanent Representative.

7. In any case, since both Mr Marra and the European Parliament have taken action, I think the two questions may be reformulated as follows:

'Where a civil action is brought against a Member of the European Parliament, is the court before which the action is pending required to request the opinion of the Parliament as to whether the conduct complained of is covered by parliamentary immunity or can that court rule itself as to the existence or otherwise of that privilege?'

III – Parliamentary immunity in European law

Principles

8. The relevant provisions can be found in Articles 9 and 10 of the Protocol on the Privileges and Immunities of the European Communities. Article 9 provides as follows:

'Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.'

9. Article 10 reads:

'During the sessions of the European Parliament, its members shall enjoy:

(a) in the territory of their own State, the immunities accorded to members of their Parliament;

(b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to members while they are travelling to and from the place of meeting of the European Parliament.

Immunity cannot be claimed when a member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its members.'

10. The first point to note is that those two articles are not mutually exclusive; they function in a cumulative manner, and should be read together. Therefore, it is possible that the same conduct may fall within the scope of and benefit from the protection offered by both articles.

11. Second, in interpreting those provisions, it is important to bear in mind their aim and object. As the Parliament and the Commission rightly submit, parliamentary immunity is an institutional arrangement which aims to guarantee the independence of the European Parliament and its members and facilitate its functioning as a collective body which plays a vital role in the context of a free and democratic society. At the same time, though, it must be accepted that specific individuals, the Members of that Parliament, are also beneficiaries of this arrangement. By its very nature, parliamentary immunity grants to certain individuals, because of their institutional function, which is instrumental to Parliament's democratic role, a privilege which is not granted to other citizens who do not perform such a function. The underlying idea is that as members of the political community we have agreed that, in the context of representative democracy, it is in the interest of every member of the community that those elected to represent us should enjoy this privilege in order to be able to do so properly and effectively. Thus, there should be no doubt that the object of parliamentary immunity is to protect both the institution of the Parliament as such, as well as its members as individuals.

12. The dual aspect of parliamentary immunity is discernible in the wording and structure of Articles 9 and 10 of the Protocol. Article 10 sets out the circumstances in which a Member may benefit from immunity during the sessions of the Parliament in the territory of his or her own Member State, another Member State or when travelling to and from the place of meeting of the Parliament, and then stipulates that immunity may be waived by the Parliament and cannot be claimed at all if the Member is found in the act of committing an offence. Here, the concern of the Community legislature appears to be to protect MEPs from measures that could interfere with their ability to participate in the sessions of the Parliament and perform their parliamentary duties. However, the Parliament can always waive this privilege if it takes the view that a Member's conduct does not relate to his role as Member of Parliament and thus cannot benefit from parliamentary immunity. For instance, if a Member is accused of fraud or murder the Parliament should, in principle, waive his immunity despite the fact that his conviction will make it impossible for him to perform his parliamentary duties, as these are acts totally unrelated to the nature of the office of MEP, unless, of course, it has reasons to believe that the charge is devoid of any substance and is aimed at interfering with the MEP's political functions and preventing him from exercising his parliamentary duties. By contrast, Article 9, which applies to opinions and votes cast by MEPs in the performance of their duties, is primarily aimed at protecting the integrity of political discourse and thus the integrity of the European Parliament and its processes as such. Taking measures against a Member in respect of an opinion he has expressed or a vote he has cast in his capacity as an MEP would offend against the institution of Parliament itself, since it would undermine its place as the forum *par excellence* of open debate and democratic deliberation. Of course, in Article 9, as in Article 10, individual Members also benefit from the immunity, in the sense that they are spared the trouble of answering a case in court; but the reason for this arrangement is that to allow legal proceedings in respect of opinions or votes would strike at the essence of deliberative, representative democracy.

13. This difference of emphasis is evidenced by the fact that it is possible for the European Parliament to waive immunity under Article 10, but not under Article 9. Article 10 is wider in scope than Article 9 as it covers not only opinions and votes but also other conduct; yet, the protection it offers is qualified, since immunity may be waived by the Parliament. On the other hand, Article 9 is narrower in scope – it protects only opinions and votes in the performance of a Member's parliamentary duties – but offers absolute protection: once an opinion or vote is found to be relevant to a Member's parliamentary duties, the privilege may not be waived in any way. In this sense, it could be said that Article 9 constitutes the hard core of parliamentary privilege as it cannot be waived and may be invoked by MEPs even for proceedings that were initiated after their term had finished, while Article 10 offers additional protection (as it is wider in scope than Article 9), which, however, may be waived by the Parliament and covers only proceedings brought during the MEP's mandate.

The case of Mr Marra

14. Mr Marra is an Italian citizen who wishes to benefit from immunity in Italy for events that took place while he was a Member of the European Parliament. He had circulated the pamphlets in question between 1996 and 1997 and Mr De Gregorio issued his defamation claim on 8 June 1998. (5) Since the proceedings were initiated while he was still an MEP he was entitled, first of all, to the protection of Article 10 of the Protocol; under Article 10(1)(a) he should be granted the same privileges that Members of the Italian Parliament enjoy.

15. Article 68(1) of the Italian Constitution protects statements made by Members of the Italian Parliament in the following terms: 'Members of Parliament may not be called to answer for opinions expressed or votes cast in the exercise of their office'. It is clear from the order for reference that an Italian court before which civil or criminal proceedings are initiated against a Member of the Italian Parliament is under no obligation to seek the prior authorisation of that Parliament before entertaining proceedings against the defendant MP or to seek its opinion as to whether the immunity provided for in Article 68(1) of the Italian Constitution applies. The latter grants Italian MPs

protection in relation to opinions and votes in terms which are identical to those of Article 9 of the Protocol, and, as the European Parliament observed in its Resolution of 11 June 2002, both provisions offer the same type of absolute privilege. (6) It is for the court itself to assess whether this privilege applies to the facts of a specific case and proceed accordingly. It seems, however, that if the Italian Parliament has expressly decided that the case falls within the ambit of Article 68(1) of the Constitution, and is thus covered by absolute immunity, the court must either comply and discontinue all proceedings against the MP in question or challenge this decision before the Constitutional Court.

16. The Italian Parliament's prior authorisation, though, is necessary if a court intends ordering one of the measures listed in Articles 68(2) and 68(3) to be taken against an MP; these include search, arrest or other deprivation of liberty, interception of communications and seizure of correspondence. These provisions offer Italian MPs a form of qualified privilege: they are in principle protected from such measures unless Parliament decides to allow them following a request from a judicial authority.

17. Accordingly, if Mr Marra were threatened with arrest or another measure depriving him of his liberty as a result of the defamation claims brought against him, the court would be under an obligation to request the European Parliament to waive his immunity under Article 10(3) of the Protocol and to refrain from taking any action before Parliament's decision on the request. Yet, Mr Marra never came under such a threat; the claimants in the main proceedings brought a civil action against him and he was ordered to pay damages. The Italian courts were under no obligation to ask for a waiver of immunity before making an award of damages and Article 10(3) of the Protocol is not applicable in such a case.

18. Mr Marra claims that his statements were covered by the absolute privilege of Article 9 of the Protocol, which, in essence, guarantees for Members of the European Parliament the same protection in relation to opinions that Article 68(1) of the Italian Constitution guarantees for Members of the Italian Parliament. (7) What is the process that national courts must follow when faced with such a claim? This is the central question in relation to which the referring court asks the Court of Justice for guidance. Under the corresponding provision on absolute immunity of the Italian Constitution (Article 68(1)), the courts may form their own view as to the existence or not of the privilege in a particular case without asking for Parliament's opinion where the latter has remained silent. Can they do the same when interpreting Article 9 of the Protocol? Or, is it necessary to ask the European Parliament to decide this point?

19. In its first question the Corte Suprema di Cassazione refers to a request to 'waive immunity'. As explained earlier, no such possibility exists in relation to the absolute immunity of Article 9 of the Protocol. What is meant, essentially, here, is whether the national court should ask for the European Parliament's *opinion* or *recommendation* as to whether the facts of a particular dispute raise a case of absolute immunity in cases in which the European Parliament has not expressed an opinion on the issue.

20. In answering this question, the starting point must be the wording of Article 9. This provision grants a substantive privilege – absolute immunity from any form of proceedings – but does not impose on national courts the procedural obligation to consult with the European Parliament about the existence of the privilege in a particular case. If the Community legislature intended to limit the powers of national courts in this respect, it would have done so explicitly; in the absence of such a rule, Article 9 of the Protocol cannot be interpreted as meaning that national courts are required to request the opinion of the European Parliament as to whether or not the privilege exists.

21. A similar conclusion may be deduced from Article 6(3) of the Rules of Procedure of the European Parliament which reads as follows: 'any request addressed to the President by a *Member* or a *former Member* to defend privileges and immunities shall be announced in Parliament and referred to the committee responsible' (emphasis added). Here it is made clear that the initiative rests with the Member or former Member concerned. He or she should bring his or her case to the

attention of the President and ask for the Parliament to intervene in defence of his or her immunity. There is nothing in Article 6(3) or any other provision in the Rules of Procedure which could support the view that national courts are requested to initiate this process themselves. Moreover, such an obligation for national courts could not have been included in the Rules of Procedure. While the Protocol on Privileges and Immunities constitutes part of primary Community law, the Rules are merely an internal document produced by the European Parliament to regulate the conduct of its own affairs; they do not have legal effects in the legal orders of the Member States and cannot impose obligations on national courts.

22. Therefore, I think that if the European Parliament has not indicated that a specific case is covered by immunity, following a request from a Member or a former Member, the national court is not obliged to initiate the process itself and seek the opinion of the Parliament as to whether or not the immunity exists.

23. Let us now take the opposite scenario and suppose that the Parliament has actually spoken. In this case, the Member or former Member who wishes to benefit from immunity has requested the President to defend his privilege in accordance with Article 6(3) of the Rules of Procedure and the Parliament has decided that his case is covered by immunity. Is this decision binding on the national court?

24. In principle, I think it is not. The legal basis for the process by which the Parliament defends its Members' privileges and expresses a view as to whether immunity applies to a specific case are the Rules of Procedure. As I mentioned earlier, these are internal rules for the organisation of the Parliament's internal affairs and cannot be the source of obligations for national authorities. This is clearly implied in Rule 7(6) which reads: 'in cases concerning the defence of immunity or privileges … [the Parliament] shall make a proposal to invite the authority concerned to draw the necessary conclusions'. Here, the Parliament itself takes the view, and rightly so, that the outcome of the process of defence of privilege is an invitation to the national authority to draw the necessary conclusions about how to deal with a particular case.

25. However, the Parliament's views on absolute immunity, their lack of binding effect notwithstanding, should be taken seriously into account and attributed considerable persuasive force by the national court. This is a requirement that flows from the principle of loyal cooperation enshrined in Article 10 EC and repeated, in relation to the Protocol on Privileges and Immunities, in Article 19 thereof. (8) If the national court is unable to agree with the Parliament, it should give reasons. In fact, were such a disagreement to arise, it would be an indication that the case was an appropriate one for a reference to the Court of Justice, from which the national court may seek guidance as to the correct interpretation of the relevant provisions.

26. I said in the preceding paragraphs that when the European Parliament has stated its views as to the existence or not of the absolute privilege under Article 9 in a particular case, national courts are not 'in principle' bound to follow the Parliament and, should they disagree with its opinion, they 'may' (but are not obliged to) refer the case to the Court of Justice. However, such an obligation could on occasion arise as a result of the combination of the relevant provisions of national law and Article 10(1)(a).

27. We saw that Article 10(1)(a) requires that a Member of the European Parliament enjoy, in his home country, exactly the same privileges that Members of the national Parliament enjoy. This is a requirement of strict equivalence. Suppose now that in a particular Member State there is a provision of national law according to which, when the national Parliament has expressed a view that a Member's statement is covered by privilege, national courts must either follow Parliament's view or refer the case to a superior court, such as a constitutional or supreme court. A Member of the European Parliament from that State is entitled to exactly the same treatment. That means that if the European Parliament has expressed a view about his case, the national courts should either follow it or refer the case to the Court of Justice. The basis for such an obligation is Article 10(1)(a) of the Protocol, which requires strict equivalence between the privileges accorded to the Members of

the national Parliament and those accorded to the Members of the European Parliament within their own States. (9) Thus, a national court before which proceedings against an MEP are pending should, first, ask what its obligation would have been under national law if the person concerned were not a member of the European but of the national Parliament. If the point could have been decided in a manner which ran contrary to the opinion of the national Parliament, then it can do the same in relation to the opinion of the European Parliament, but should seriously consider whether a reference to the Court of Justice is appropriate. If, on the other hand, it would have been bound to follow the opinion of the national Parliament or to refer the case to a superior court, then it should also either follow the opinion of the European Parliament or make a reference for a preliminary ruling to the Court of Justice. In this way, Members of the European Parliament will enjoy exactly the same immunity as that enjoyed by Members of the national Parliament. Of course, it is a matter for the national court to interpret domestic law and ascertain what it requires.

28. To recapitulate: there is nothing in the Protocol on Privileges and Immunities which, in cases where the Member concerned has not asked the Parliament to defend his privilege, could be interpreted as requiring national courts to initiate this process themselves and to ask the European Parliament for an opinion or recommendation as to the existence or not of the privilege in a given case. Where the Member has asked the Parliament to defend his privilege and the latter has expressed its opinion, this opinion is not, in principle, binding on the national court, but should be taken seriously into consideration. If the national court reaches a different conclusion from the European Parliament, a reference to the Court of Justice may be appropriate. If, however, under national law, in a similar situation involving a Member of the national Parliament, the national courts would have been under an obligation to follow the opinion of the national Parliament or to refer the case to a superior court, then they have the same obligation in relation to the opinions of the European Parliament and they should either follow them or refer the case to the Court of Justice.

29. In the light of the above, I think that the Court should answer the question as follows:

A national court before which a civil action against a Member of the European Parliament is pending is not required to request the opinion of the Parliament as to whether the conduct complained of is covered by parliamentary immunity, if the Member concerned has not himself initiated the process under Article 6(3) of the Rules of Procedure of the European Parliament concerning Members' requests to the Parliament to defend their privileges. If the Member concerned has initiated the process and the Parliament has expressed an opinion concerning his immunity, this opinion is not binding on the national court but should be taken seriously into account. If the national court takes a different view from the Parliament, a reference for a preliminary ruling to the Court of Justice may be appropriate. If, however, in a similar situation involving a Member of the national Parliament, the national courts would have been under an obligation to follow the opinion of the national Parliament or to refer the case to a superior court, then they have the same obligation in relation to the opinions of the European Parliament and they should either follow them or refer the case to the Court of Justice, that being a matter for the national court to assess.

IV – The scope of Article 9 of the Protocol: 'in the performance of their duties'

30. Although the referring court did not ask the Court of Justice for guidance in relation to the scope of Article 9 of the Protocol, a considerable part of the order for reference deals with this very question: which expressions of opinion should be considered as falling within a Member's duties and thus covered by the absolute privilege provided for in this article? To repeat, such an issue may appropriately constitute the subject of a reference for a preliminary ruling, especially if the national courts have been unable to agree with the European Parliament as to the availability or not of the privilege in a specific case. In the present case, the Corte Suprema di Cassazione will eventually need to decide whether the lower courts have correctly applied Article 9, so it is not only reasonable, but also desirable, for the Court of Justice to offer at least some guidance in relation to this issue. (10)

31. It is true that, when a citizen who feels aggrieved by a statement made by a Member of

Parliament is prevented from seeking redress before a court because the latter relies on parliamentary privilege, his right to access to justice is compromised. In order to avoid the creation of two classes of citizens – Members of Parliament, on the one hand, who are not amenable to the courts for the statements they make, and ordinary citizens, on the other, who may be subject to the limitations imposed on free speech by civil and criminal law – virtually all legal orders restrict reliance on privilege to situations where the Member was exercising his parliamentary duties. Parliamentary immunity is not a weapon which Members of Parliament can use to resolve personal differences, but an institutional arrangement to support the democratic functioning of the political community. As such, it does not constitute, in principle, a disproportionate restriction of the right to access to justice. (11)

32. When a court needs to assess whether an opinion expressed by a Member of Parliament falls within the concept of parliamentary duties the starting point of the inquiry should be the principle justifying parliamentary immunity, namely that Members should be free to engage in debates on matters of public interest without being obliged to tailor their opinions in a way that makes them acceptable or inoffensive for the listener out of fear that otherwise they may be sued or prosecuted. (12) This means, inevitably, that the views expressed by an MEP will on occasion be considered by some people to be excessive, irritating or offensive. However, in a liberal, democratic State the importance of an uninhibited dialogue on public issues is such, that, in principle, even offensive or extreme views should not be silenced. This applies with particular force to Members of Parliament who, because of the very nature of their office, play a central role in the scheme of representative governance.

33. The origins of the parliamentary privilege of freedom of speech can be traced back to the periods of Tudor and Stuart rule in England. The privilege developed progressively as a reaction by Parliament against attempts by the Crown to intervene in parliamentary debate and restrict Parliament's right to initiate business on its own. (13) It found legislative expression in Article 9 of the Bill of Rights: 'that the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament'. The privilege started its life as a spatially restricted institutional arrangement because, at the time, political discourse was concentrated within Parliament. The power of Parliament was antagonistic to that of the monarch, who saw parliamentary activity as a threat to his own status; hence the effort to intervene in what was taking place inside Parliament and the latter's reaction which led to the establishment of the privilege.

34. Nowadays, though, the forum in which political discourse and debate on matters of public relevance takes place is considerably wider. There exists now a much broader public arena, which includes printed and electronic media and the internet, within which individuals interact and participate in public dialogue. The role of Members of Parliament as channels and instigators of political debate in this broad public arena is as important as their role within the strict confines of Parliament; it is a feature of modern democracy that we expect them to engage in dialogue with the civil society and present their ideas not only on the floor of Parliament but also in the fora that civil society provides. Indeed, I venture to suggest that a very significant part of contemporary political discourse takes place outside Parliament altogether. This is a reality which we cannot ignore; and we would be doing exactly that if we were to take the view that parliamentary privilege protects only statements made within Parliament itself.

35. Therefore, the criterion determining which statements were made in the exercise of a Member's duties cannot be spatial. It would be too narrow to say that only statements made in parliamentary proceedings within the European Parliament enjoy the protection of Article 9 of the Protocol. For members of the European Parliament, to be able to participate in debates on the floor of Parliament without fear of legal proceedings is as important as their being able to participate in wider public dialogue without such a fear. In other words, in determining whether Article 9 of the Protocol applies, it is the *nature* of what the Members of Parliament say and not *where* they say it that matters. (14)

36. This approach is, in my view, consistent with the case-law of the European Court of Human Rights on the importance of political speech. It is an established principle that such speech enjoys the highest level of protection under Article 10 of the European Convention on Human Rights and that national measures which affect the expression of political opinions will be subjected to strict scrutiny by the Strasbourg Court. (15) The latter has extended this strong protection of political speech to other issues of public concern. (16) The logic justifying this approach is that we need to secure a safe space for public discourse to take place; within that space even offensive or outrageous speech may be protected as it has, very often, a 'unique power to focus attention, dislocate old assumptions and shock its audience into the recognition of unfamiliar forms of life'. (17) This is exactly the kind of public discourse that Article 9 of the Protocol was intended to protect and foster, especially in relation to opinions expressed by MEPs.

37. The rule that Article 9 should be interpreted broadly and offer wide protection to Members of the European Parliament is subject to two qualifications. First, the opinion at issue in any given case must be about a genuine matter of public interest. While a statement on an issue of general concern will be covered by the absolute privilege guaranteed by Article 9 regardless of whether it is made inside or outside the premises of the European Parliament, this privilege may not be relied upon by MEPs in the context of cases or disputes with other individuals that concern them personally but have no wider significance for the general public. A similar view has been adopted by the European Court of Human Rights in relation to the level of protection that different types of speech enjoy. A statement that does not contribute to a debate of general interest, although falling within the scope of the right to freedom of expression, will not attract the very high level of protection enjoyed by political speech and speech on other issues of general importance. (18) I want to be clear in this respect: the question whether or not such a statement contributes to a public debate is not to be determined by the style, accuracy or correctness of the statement but by the nature of the subject-matter. Even a possibly offensive or inaccurate statement may be protected if it is linked to the expression of a particular point of view in discussing a matter of public interest. It is not the role of courts to substitute their own views for those of the public in judging the correctness and accuracy of political statements.

38. Second, a distinction must be drawn between factual allegations against particular individuals and opinions or value judgments.(19) As the European Court of Human Rights has held 'while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10'. (20) When a Member of Parliament makes a value judgment about a matter of general importance, no matter how upsetting or offensive some people may find it, he should, in principle, be able to avail himself of absolute privilege. However, Article 9 of the Protocol, which expressly refers to 'opinions', does not cover statements made by MEPs which contain factual allegations against other individuals. For instance, to say of someone that he is incompetent and should resign his job is a form of criticism which, although offensive for the person concerned, constitutes an expression of opinion and falls within the ambit of Article 9 of the Protocol. In the same way, statements which are not addressed to specific individuals but constitute, instead, institutional characterisations should benefit from a broad protection. Without meaning to enter into the questions of fact surrounding the present case, it seems to me that there is a relevant difference between statements that have been addressed to individual judges and statements that concern the judicial system in general. The latter is an important aspect of public life whose discussion is certainly relevant in terms of the political debate. By contrast, to say that someone, be it a judge or anyone else for that matter, has embezzled public money or is corrupt is a factual allegation and the person about whom the statement was made must be able to take recourse to courts to clear his name and the speaker should be called upon to prove the truth of his allegations, irrespective of whether he is a Member of Parliament.

39. This distinction between a statement containing general criticism and a factual allegation against an individual was at the heart of the Strasbourg Court's judgment in *Patrono, Cascini and Stefanelli v Italy* (21) to which the Corte Suprema di Cassazione refers in the order for reference.

The case concerned statements made by two MPs against a number of judges in relation to their professional conduct while working at the legislative bureau of the Ministry of Justice. The Strasbourg Court emphasised that the defendant MPs had not expressed general political opinions on the relationship between the judiciary and the executive, but had attributed to the claimant judges specific acts of wrongful conduct and had suggested that they were criminally liable. (22) It is true that the Court also referred to the fact that the statements were made in a press conference and not in a legislative chamber but this is a secondary consideration. The European Court of Human Rights has never held that a statement is not covered by parliamentary privilege merely because it was made outside parliamentary premises.

40. To conclude, Article 9 of the Protocol, which guarantees to MEPs an absolute privilege in relation to opinions expressed in the performance of their duties, should be interpreted broadly. It covers statements of opinion and value judgments on issues of public and/or political relevance whether they are made inside or outside the European Parliament. This includes statements that may upset or offend the public at large or the specific individuals whom they, directly or indirectly, concern. On the other hand, it may not be invoked in relation to factual allegations about an individual or in the context of private matters unrelated to issues of public relevance or issues that constitute part of the political debate.

V – Conclusion

41. For the reasons given above, I think that the Court should give the following answer to the Corte Suprema di Cassazione:

A national court before which a civil action against a Member of the European Parliament is pending is not required to request the opinion of the Parliament as to whether the conduct complained of is covered by Parliamentary immunity, if the Member concerned has not himself initiated the process under Article 6(3) of the Rules of Procedure of the European Parliament concerning Members' requests to Parliament to defend their privileges. If the Member concerned has initiated the process and the Parliament has expressed an opinion concerning his immunity, this opinion is not binding on the national court but should be taken seriously into account. If the national court takes a different view from the Parliament, a reference for a preliminary ruling to the Court of Justice may be appropriate. If, however, in a similar situation involving a Member of the national Parliament, the national courts would have been under an obligation to follow the opinion of the national Parliament or to refer the case to a superior court, then they have the same obligation in relation to the opinions of the European Parliament and they should either follow them or refer the case to the Court of Justice, that being a matter for the national court to assess.

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1 – Original language: English.

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2 – (2001/2099(REG)), A5-0213/2002, Rapporteur: Sir Neil MacCormick.

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3 – (2001/2099(REG)), P5_TA (2002)0291.

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4 – A possible explanation may be that when the court of first instance heard the cases against Mr Marra the European Parliament had not yet issued its Resolution, so that the Corte Suprema di Cassazione, in reviewing the decisions of the lower courts, was actually focusing on the question whether their judgments were correct in the absence of action on the part of Mr Marra or the European Parliament. In any case, I think that the answers I shall give in the following pages will provide sufficient guidance as to the interpretation of the relevant provisions of the Protocol to allow the national court to decide the case, even if the facts were as described in the order for reference.

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5 – The order for reference in the case of Mr Clemente does not state the date on which he issued his claim against Mr Marra.

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6 – Resolution (2001/2099(REG)), P5_TA (2002)0291, point C.

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7 – Thus, the relationship of equivalence required by Article 10(1)(a) of the Protocol is, in this case, between the immunity enjoyed by Members of the Italian Parliament under Article 68(1) of the Constitution and that enjoyed by Members of the European Parliament under Article 9 of the Protocol.

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8 – 'The institutions of the Communities shall, for the purpose of applying this Protocol, cooperate with the responsible authorities of the Member States concerned.'

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9 – Naturally, the view of the European Parliament will be relevant only if it decides that a current MEP benefits from immunity under Article 10(1)(a). If Parliament were to waive immunity under Article 10, the national court could still grant the privilege if it believed that a particular statement was covered by the immunity arising under Article 9, which the Parliament itself cannot waive. The apparent complexity that arises from the cumulative application of Articles 9 and 10 results from the fact that their interpretation is dependent on two different institutions (the European Parliament and the courts) and that a decision on immunity in a specific case may depend on decisions made by both of them.

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10 – It may be argued that the Corte Suprema di Cassazione may make a second reference in the present case if it requires information on the substantive interpretation of Article 9 of the Protocol. However, considerations of procedural economy, the need for a speedy resolution of the dispute and the desirability of economising on the Court's time and resources point in the direction of discussing this issue here. Of course, even if the Court does so, the national court is not precluded from making a further reference if it considers it necessary.

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11 – See the discussion in, *Cordova v. Italy (no. 1)*, no. 40877/98, §§ 58 to 61, ECHR 2003-I.

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12 – As the European Court of Human Rights noted in *A. v. the United Kingdom*, no. 35373/97, § 75 ECHR 2002-X, '[the] underlying aim of the immunity accorded to [MPs] … [is] to allow [them] to engage in meaningful debate and to represent their constituents on matters of public interest without having to restrict their observations or edit their opinions because of the danger of being amenable to a court or other such authority'.

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13 – Limon, D., and McKay, W.R., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, Butterworths, 1997, p. 69 et seq.; Blackburn, R. and Kennon, A., *Griffith and Ryle on Parliament Functions, Practice and Procedures*, Sweet and Maxwell, 2003, p. 126.

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14 – Both the European Parliament and the Commission submitted that a spatial criterion is inappropriate and that statements made outside Parliament should also enjoy the protection of Article 9 of the Protocol if they are linked to the activities of the Member of Parliament *qua* Member.

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15 – *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103; *Barfod v. Denmark,* judgment of 22 February 1989, Series A no. 149; *Castells v. Spain,* judgment of 23 April 1992, Series A no. 236; *Schwabe v. Austria.* judgment of 28 August 1992, Series A no. 242-B; *Oberschlick v. Austria* (No 1), judgment of 23 May 1991, Series A no. 204; *Lehideux and Isorni v. France,* judgment of 23 September 1998, *Reports*

of Judgments and Decisions 1998-VII. See further the discussion in Loveland, I., *Political Libels: A Comparative Study*, Hart Publishing, 2000, p. 107 et seq.

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16 – *Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, § 64: 'there is no warrant in the case-law for distinguishing … between political discussion and discussion of other matters of public concern'.

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17 – Post, R., *Constitutional Domains: Democracy, Community, Management*, Harvard University Press, 1995, p. 139.

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18 – For example, in *von Hannover v. Germany* (2005) 40 EHRR 1 the Strasbourg Court held that the publication of photographs showing Princess Caroline of Monaco engaging in various everyday activities, such as having dinner or going shopping, enjoyed limited protection under Article 10 of the Convention compared to publications of a political nature.

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19 – It is true that it will not always be easy to distinguish between a value judgment and a statement of fact, and a number of analytical approaches have been adopted to this effect by different judges and scholars. It remains, however, the best distinction possible. See the discussion in Post, R., cited in footnote 17, p. 153 et seq.

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20 – *Feldek v. Slovakia,* no. 29032/95, § 75, ECHR 2001-VIII.

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21 – Application Number 10180/04, judgment of 20 April 2006.

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22 – Ibid. paragraph 62: '[the defendants] were not expressing political opinions on the relationship between the judiciary and the executive, or on the draft legislation on letters rogatory, but rather attributed specific and wrongful conduct to the applicants. In such a case, it is not possible to justify a denial of access to legal redress on the sole ground that the dispute might be political in nature or connected to political activity'.