

*Judicial Training Project*

*Roadmap to European Effective Justice (Re-Jus): Judicial Training  
Ensuring Effective Redress to Fundamental Rights Violations*

# RE-JUS

# GUIDANCE FOR TRAINERS



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## Introduction

Dealing with judicial training today means carrying out a challenging activity in many respects. The development of a European area of justice requires judges to be fully aware of the role played by judicial dialogue between the national and European courts and its impact at the EU and national levels. The use of conforming interpretation, preliminary references, and disapplication poses continuous challenges in daily judicial activity and calls for a deep knowledge of the rulings made by the Court of Justice (hereinafter the CJEU). The CJEU jurisprudence is the outcome of a continuous dialogue with national courts. Its development is incremental and reflects the impact of the rulings on the referring court, on the courts of the referring country especially when there are divergent interpretations, and on the courts of the other MSs. Evaluating the impact of a CJEU judgment requires an accurate understanding of the context and of the national legal system in which the reference arises. Not only do national judges need to know the preliminary rulings that arise out of the preliminary references proposed by their fellow nationals but they must also adapt the ruling when the preliminary references are submitted by the courts of other MSs. Understanding the impact of the CJEU's judgments upon different legal systems requires a complex methodology, that can largely benefit from the use of comparative law. The project has organized the material around clusters of judgments, underlining the differences when they come from the courts of different MSs. The key dimension is the impact of CJEU judgments on the national courts and the reasons for their divergence.

The REJUS methodology mimics judicial dialogue in action by bringing together national and European judges to discuss the impact of CJEU judgments on both the substantive and procedural rules of 10 or more national legal systems. Article 47 of the Charter of fundamental rights (hereinafter CFR) has been a useful training device for exploring the different reactions of national judicial systems to CJEU jurisprudence. The focus of the Project is on the collaborative interaction between the national courts of various MSs and the European Court of Justice. The dialogue in the area of fundamental rights and the right to effective judicial protection in particular has been rich, intense, and diverse.

The Charter of Fundamental rights of the European Union provides a necessary lens for the correct interpretation of EU legislation applied by the national courts and, within its scope of application, may call for a particular interpretation of national legislation not only when EU law is specifically implemented but also when the effectiveness of EU law to be applied is directly influenced. Article 47 CFR, on the right to an effective remedy and fair trial, is a cornerstone in this respect, as it is increasingly the legal basis for reinterpreting or challenging national procedural law in order to remove existing obstacles to the fulfilment of effective judicial protections. The same goes for the general principles of EU law which are directly or partially linked to the Charter's provisions: the principles of effectiveness and equivalence, of proportionality, of dissuasiveness or deterrence of sanctions, as well as the principles of good administration, of a fair trial, and of the right to be heard. National courts are continuously asked to apply these principles and to take the EU perspective into account whenever the case requires that it do so.

What then are the implications for a judge's daily activity? Building on previous and interconnected projects (JudCoop and Actiones in particular) RE-Jus training has provided methodological tools as well as the chance to apply them to critical issues of legal interpretation in certain areas of EU law.

In light of this, the REJUS methodology aims to allow judges to acquire and constantly update fundamental legal knowledge and, at the same time, learn and strengthen the ability to use this knowledge in the development of judicial dialogue with the EU courts. REJUS not only wants to raise awareness of the relevance of the Charter in different domains but also to explore the processes of adaptations of CJEU rulings within each legal system. When applying EU law to their national systems judges are often confronted with different problems depending on the context; REJUS offers the possibility of examining and solving these problems within a comparative law approach and to find innovative solutions that are unlikely to emerge in national trainings.

This Guidance is primarily addressed to those who provide training to judges and legal practitioners, namely to both training institutions and individual trainers, such as academics, professional trainers and legal experts. Along with the other REJUS materials, it can also be a useful tool for any jurist interested in exploring an innovative method of judicial training, with specific reference to the European legal perspective.

Towards this end, this document consists of two parts: the first describes the **REJUS learning methodology** applied over the course of the two-year judicial training project; the second provides practical examples of the implementation of this method by presenting some of the **hypothetical cases** discussed by participating judges during the REJUS national and transnational workshops (hereinafter NTW and TTW respectively).

With respect to the subjects analysed according to the method described here, the REJUS project focused on protection of rights based on EU law, including fundamental rights, in light of the Charter of Fundamental Rights of the European Union and the general principles of EU law mentioned above. More specifically, training events have addressed the following areas: **consumer protection**, **immigration and asylum** and **data protection**. An important part of the project also aimed at comparing the different impacts of the Charter in these three fields and understanding whether there are general aspects that can be extended beyond the boundaries of each, possibly including others not covered in this project.

This document is meant to be a possible point of reference after the completion of the project itself, as well as beyond the areas of law directly considered herein, providing support to judicial trainers and, as a result, making a contribution to the field of judicial training and cooperation for the protection of fundamental rights at the European level.

## 1. The Methodology Developed in the REJUS Project

### 1.1. The Mutual Learning Process: Continuous Involvement

The development of a judicial training methodology is influenced nowadays, on the one hand, by the aim of meeting specific training needs that reflect the changes in the surrounding legal and social context and, on the other, by the availability of new tools.

With regard to the first point, one of the main challenges lies in the need to work within an increasingly complex multi-level framework characterized by the presence of a plurality of enforcers at the national and supranational level. As a result, it has become increasingly necessary to bring the national judges of EU Member States closer to the principles and dynamics of the EU, as well as promote mutual trust among judges from different Member States. In fact, in this context, knowledge of the guiding principles, such as effectiveness, proportionality and dissuasiveness, and a command of fundamental mechanisms represent an indispensable compass for every European judge.

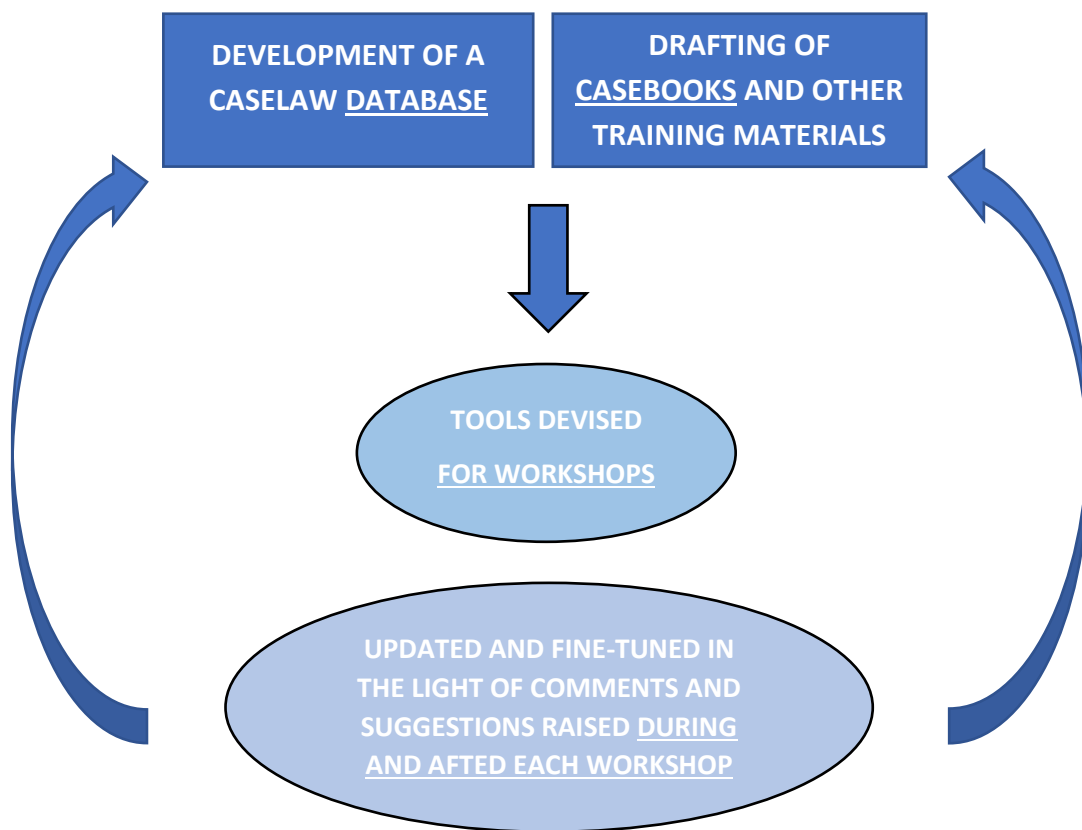
With regard to the availability of new tools, today judicial training can take advantage of IT and web-based resources in order to circulate teaching materials and to create networks among magistrates who can participate in both national and transnational training events.

The REJUS project is conceived on the basis of the awareness of both these aspects, as specified below.

#### *Mutual learning and a multiple training tools approach: the collaborative process of casebook building*

This project has involved national judges throughout its duration. It is based on the creation of thematic networks of judges who collaborate with the research team independently from their participation in individual workshops and who also provide case law and indicate which national developments would be the most relevant to the project. Judges belonging to the network also contribute to the preparation of material, which they discuss and critically evaluate during the transnational and national workshops in addition to their participation in the revision which takes place after the workshops.

The “Workshops” represent the main tools used in the Rejus project to build a mutual learning experience that involves judges both as trainers and trainees. However, it is not considered a self-standing activity disconnected from the other training tools or a final output. The development of a caselaw Database as well as the preparation of Casebooks are at the same time instrumental activities with respect to the Workshop preparation and follow-up activities in that they further develop knowledge and materials shared within the Workshop.



In order to enable this process, selection of participants in the workshop is informed by the objectives of the project. Priority is given to judges who submit preliminary references and who participate in judicial dialogue within their system and with the courts of other MSs. A balance between the lower and higher courts is instrumental to exploring how internal judicial dialogue interacts with the dialogue between the national and European courts.

The design of a workshop therefore starts many months ahead of time, and is itself a cooperative venture with the participants as well as with the network of judges who participate in the project more broadly. It moves from a joint effort between academics and a network of national judges and aims to identify the core decisions by the CJEU in a given domain as well as the different forms of impact these judgments are making in several MS jurisdictions. Decisions are not examined as isolated from one another; instead, they are **clustered** within groups of judgments addressing similar issues, and that possibly regard different jurisdictions. This approach enables trainers to take a comparative legal analysis into account, showing how similar principles may have different impacts depending on the specific context of each legal system. At the same time, this analysis contributes to development of the Database, drafting of the Casebook and to Workshop preparation. The selection of material, identification of the most relevant issues, and description of the different impacts in various MSs is the outcome of a process that will last the entire duration of the Project.



### *Mutual learning and workshop structure*

The workshop structure reflects the same cooperative dynamics.

First, learning methods characterised by passive roles for attendees are set aside and introductory sessions are combined with round tables and interactive sessions.

**Introductory sessions** often involving key-note speeches from the EU and national courts aim at providing workshop participants with a clear picture of the questions to be addressed as well as the legal and conceptual background in which these questions arise. They build on the casebooks and develop sets of issues to be discussed in round tables and in hypothetical scenarios.

Questions are then addressed in **roundtables** of academics and judges in order to provide the attendees with a perspective that is as wide as possible. The presence of trainers with different backgrounds makes the training wider and more effective indeed, ensuring an accurate analysis of the matter from several different viewpoints.

Roundtables are followed by discussion of a practical case. The hypothetical situation distributed in advance allows judges to be confronted with application of the principles defined by the CJEU.

Once the questions as well as the conceptual and legal backgrounds are presented, the core of the workshop is represented by **interactive sessions** which are the key to a training event aimed at allowing all participants to exchange skills and views. This is, in fact, the phase in which the most recent findings on the effectiveness of hands-on learning in the field of judicial trainings are put into practice.

These sessions require distribution of about 10/15 people into small groups, submission of the same hypothetical case study to each as well as the active participation of each judge in discussion of the case (see examples in the second part of this document). To apply the REJUS methodology, one or more trainers act as facilitators and are in charge of stimulating and guiding the discussion by presenting the hypothetical case to be addressed, asking questions to the working group, and suggesting cues drawn from current law as well as case law. Here judicial dialogue is critical: through reference to decisions from the CJEU, “clustered” by issues and topics, the trainer may demonstrate how national legislation from different jurisdictions may be interpreted in conformity with EU law and to what extent some concrete issues might be better addressed if new questions were referred to the Court of Luxembourg.

In addition to activities carried out by the facilitators during group sessions, the active engagement of attendees is also encouraged before the workshop takes place. Training materials and the hypothetical cases to be discussed are sent electronically at least two weeks before the training event so that participants may familiarise themselves with the topics to be examined and their attention may be drawn before the training workshop begins.

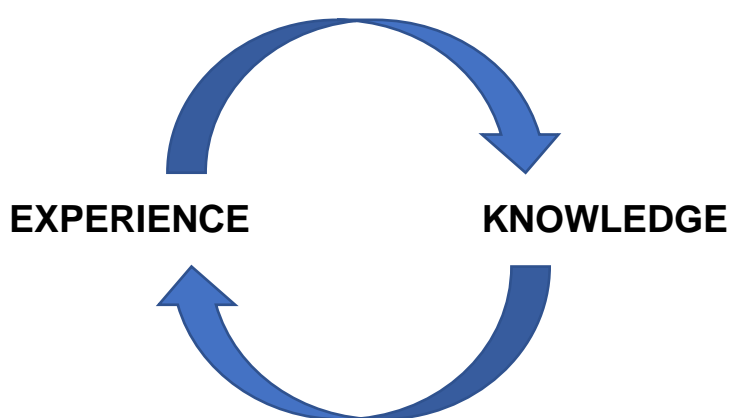
Active participation is a determining factor for achieving training objectives, since it allows participating judges to apply newly-learned theoretical knowledge first hand, allows them to exchange views and best practices with colleagues from other national courts or countries, and to sharpen practical skills like problem-solving, cooperation, or assertiveness.

Finally, after analysing hypothetical cases separately, participants are given the chance to summarize and compare issues raised within their respective working groups in **plenary sessions**. In this last phase, the same participants from the theoretical introduction session can

then complete the initial theoretical framework by discussing issues and solutions, as well as similarities and differences that emerged during examination of the hypothetical cases.

*Mutual learning: a circular process based on dialogue*

The above process can be considered circular overall, both with regard to the workshop structure - since roundtables, working groups and plenary sessions alternate one after another in succession - and with regard to the workshop outcomes themselves. In fact, since every stage of the workshop can be characterized by the active participation of both academics and legal practitioners, this leads to a continuous exchange between knowledge and experience, which feed each other and thereby ensure a **mutual learning process**.



*The Mutual Learning Process Cycle*

With regard to the contents of the training curriculum, no judicial trainer can ignore the increasingly close interdependence between national legal orders and EU law.

For this reason, it is important to consider that a judicial training event must necessarily provide a wide range of tools that are useful for fully understanding and coping with the effects of such interaction. The REJUS workshops not only deal with the impact of general European principles on national enforcement systems precisely for this purpose, but also address practical aspects useful in everyday judicial activity that are related to the preliminary reference procedure to the Court of Justice of the EU (art. 267 TFUE) or, more generally, the relationship between the national enforcement authorities and European courts.

It must also be borne in mind that building a European area of justice requires the strengthening of judicial cooperation among magistrates from different Member States above all.

For this reason, seminars at both the national and European scale have been organised within the framework of the REJUS project, which involve judges of different nationalities who come from each of the partner countries for the second type of events. In the context of these cross-border activities trainees can share views, experiences and best practices from their respective national courts thanks to the application of the methodology described above, thereby strengthening their mutual knowledge and trust.

Besides exploiting available technologies - creating a mailing list or encouraging the exchange of e-mail addresses for instance - it is also possible to build a network that judges may use beyond the conclusion in the strict sense of the subject of the single training event.

In light of this, the keyword of the REJUS method is certainly **dialogue**. In fact, dialogue can be considered an object of analysis on the one hand – since a judicial trainer cannot refrain from highlighting the effects of the judicial dialogue and the mutual influence between national enforcement authorities and the European courts – and on the other, it should be considered a concrete approach to be put into practice in every training event by judicial trainers to encourage the active participation of attendees and the related consequences of development of practical skills and the creation of judicial cooperation networks.

## 1.2. Operational Aspects. The Three Phases of a Training Workshop

The structure of a REJUS workshop can be divided into three phases.

The **preliminary phase** is aimed to design the training curriculum, select participants and build teaching instruments.

- **Planning the training curriculum:** first of all, the training objectives to be achieved must be precisely identified and, as a consequence, the contents that will be addressed. Once these aspects have been defined, it is therefore possible to identify the most suitable trainers. In doing so, in accordance with the REJUS approach, it is important to involve both academics and legal practitioners as trainers in order to guarantee a thorough analysis of each subject from different perspectives. Both in the planning of the programme and in the choice of trainers, it may be particularly useful to take the results of the evaluation questionnaires distributed in previous workshops into consideration, putting comments and suggestions received from earlier events into practice.
- **Selection of participants:** takes place through a *Call for Judges* on the website in accordance with pre-determined criteria. Firstly, knowledge of and experience with the topic to be addressed is an essential precondition for implementing the mutual learning process. A good command of English is obviously another fundamental requirement for the transnational workshops. However, assessment of the applications is also based on further criteria such as: a balance in terms of gender, age and nationality as well as a heterogeneity of different tiers of the judicial system as well as non-judicial authorities. At the end of the application assessment candidates are notified via e-mail about the result of the selection.
- **Preparation of training materials:** the drafting and sending of relevant materials to selected participants is intended to enable them to prepare in advance for the issues to be dealt with, thereby encouraging their active participation in workshop discussions. Future attendees are provided with a *Casebook* focusing on the subject of the workshop and supported by an Annex of hypothetical cases to be discussed within the working groups. The Casebook is written in cooperation with academics, scholars and legal practitioners and provides a thorough analysis of the entire lifecycle of a number of leading cases related to the workshop subject: from the preliminary reference to the European Court of Justice to the impact of the European decision on the national legal order. In this first stage participants receive a draft version of the text that will be integrated and refined (before

being definitively published on the website) after the seminar's conclusion with collaboration from the participating judges themselves.

As discussed in paragraph 1.1, a REJUS seminar is characterized by the continuous alternation of **three different types of activities**. These activities take place cyclically over about two days and involve a target group of at least 30 to 40 participants, depending on the scale – national or transnational – of the training event. The TTWs also involve judges from EU MSs, including the 9 different EU countries represented in the project consortium.

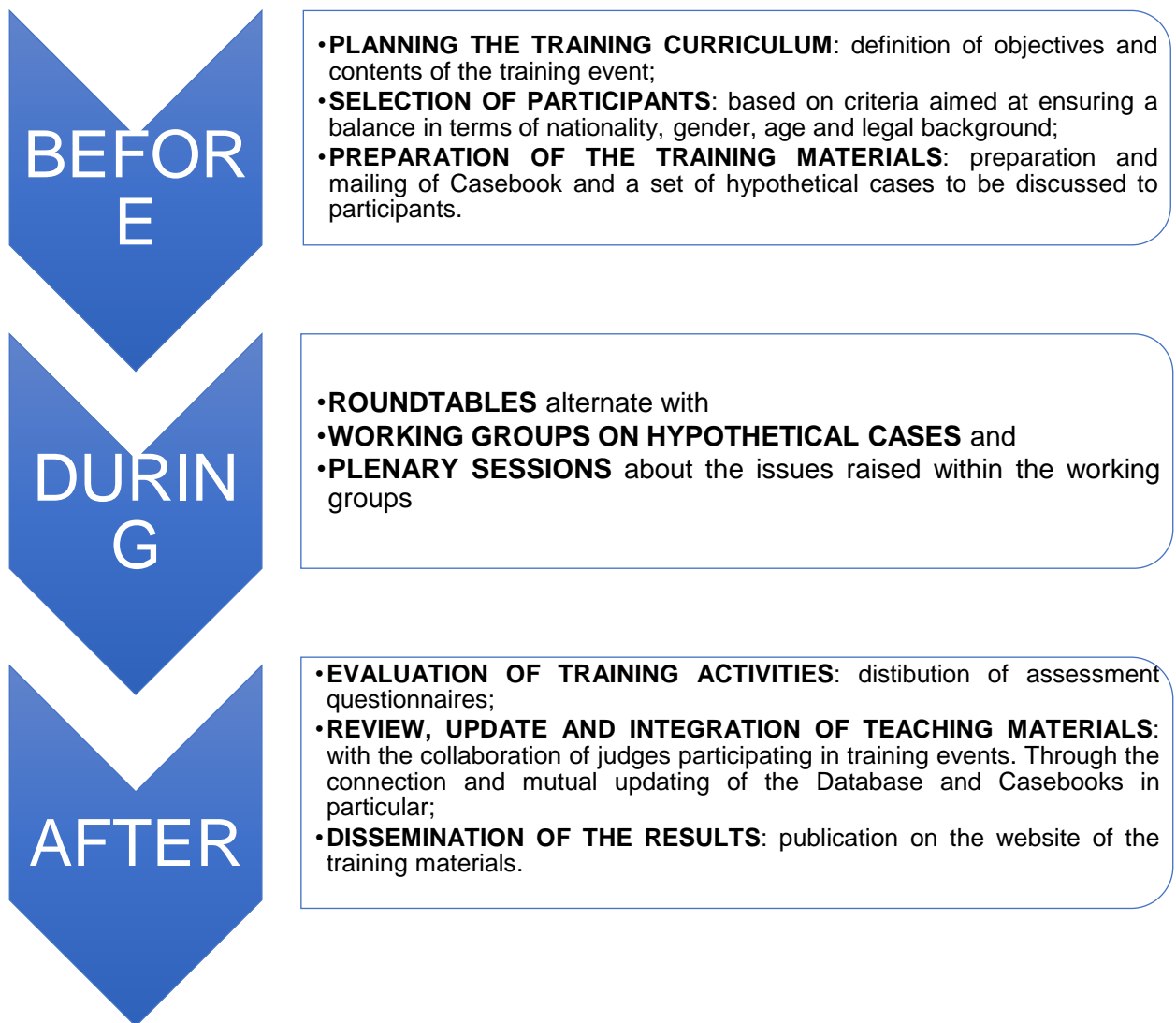
- **Roundtables:** each REJUS workshop starts with a roundtable that aims to frame the subject to be examined. This kind of training meeting is generally characterised by the opportunity of interaction between trainers and the audience as well as among trainees themselves. In the context of a REJUS roundtable trainers are in charge of first providing a theoretical framework of the issues to be addressed and, afterwards, of stimulating and coordinating the discussion between and among themselves and the attendees. In order to maximize the participation of trainees, as stressed above, each panel consists of speakers with skills and experiences developed in different contexts and fields, from lecture rooms to courtrooms.
- **Working groups on hypothetical cases:** following introduction of the main topic, participants are divided into small-groups (about 10-15 people) which are provided with the same hypothetical cases to be discussed. Since participating judges are informed ahead of time about case study content, as mentioned above, these sessions start with a short presentation of the hypothetical case to be analysed in order to dedicate as much time as possible to open discussion. Each interactive session begins with a description of facts, following which the group facilitator submits a series of questions to the judges in order to begin debate; the facilitator also proposes a series of possible solutions by referring to applicable law and previous rulings on similar cases both at the European and national levels. The effectiveness of these sessions lies in the fact that each participating magistrate does not only apply his/her legal expertise to address the issues raised, but also points out difficulties and/or best practices that are directly drawn from his/her own professional experience, thereby fuelling a mutual exchange of knowledge and information.
- **Plenary sessions:** the cycle ends with a joint session, in which all participants present the issues and solutions that emerged within their respective groups and draw final conclusions. In a two-day workshop, the succession of the above three activities can be replicated as many as four times, considering a morning and an afternoon session each day.

The **follow-up** after a workshop is as important as its execution, since it is only in this phase that it is possible to evaluate and disseminate the results of the training event and to further build upon Workshop outcomes by developing the Database, Casebook and future Workshops.

- **Evaluation of training activities:** at the end of the workshop, an evaluation questionnaire is distributed to measure participants' satisfaction and in order to understand the strengths and weaknesses of the event and improve the quality of subsequent teaching activities. The questionnaires - which may contain open questions and/or numerical indicators - are aimed at investigating the effectiveness of activities in terms of learning new knowledge and skills as well as the opportunity to use them in everyday professional practice. Once collected, the results are processed and summarized in an evaluation report. It is also important to allow trainees to communicate their

impressions long after the conclusion of the evaluation procedure, by leaving an e-mail address for example, to which judges can send their comments on the actual impact of the training workshop on their professional activity in the long run.

- **Review, updating and integration of teaching materials:** as specified above, the Casebook sent to participants in advance of the workshop is actually a draft version of the document that will officially be published on the REJUS website at the conclusion of the project. To this end, participants are informed during the workshop on how to contribute to the updating and refining of the draft Casebook at a later date: above all by suggesting relevant national and EU decisions to be published on the online REJUS case-law Database. During this follow up phase, the organising team is therefore in charge of collecting such suggestions and coordinating the mutual development of the Casebooks and Database in the light of these.
- **Dissemination of the results:** once updated and refined, the *Casebooks* (as well as other training tools described in the following paragraph) are ready to be published on the website. More specifically, the publication of training materials is scheduled after the completion of the project and is aimed to enable legal practitioners interested in the topics addressed to have a point of reference that is freely available and accessible as well as useful to their daily professional activities. Following publication, REJUS training materials are also available to the wider public and are not reserved exclusively for workshop attendees. Therefore, from this perspective, the REJUS project provides not only a mutual learning process implemented during the course of each specific workshop but a long-term learning system as well that is usable beyond the project duration itself.



*The Three Phases of a Training Workshop*

### 1.3. Operational aspects. The Training Materials Available

The REJUS instruments can be divided into two categories: workshops and training materials. The latter are meant to be used both as preparation tools in view of training events and as a "tool box" for the daily application of EU law and case law by legal practitioners and scholars.

As we have just seen, this dual feature is typical of the **Casebooks** in particular, conceived both as a support for the preparation of attendees to the seminars and, in their final version, as a long-term point of reference for any legal practitioners regardless of their participation in a REJUS event.

The close connection between this specific instrument and the workshops emerges from numerous elements. First of all, it is necessary to highlight that each of the 3 Casebooks created during the project reflect the subjects addressed in the sectoral TTW. As a result, we have the following materials specific to the organized workshops:

- REJUS Casebook *“Effective Justice in Consumer Protection”*
- REJUS Casebook *“Effective Justice in Asylum and Immigration”*

➤ REJUS Casebook “*Effective Justice in Data Protection*”

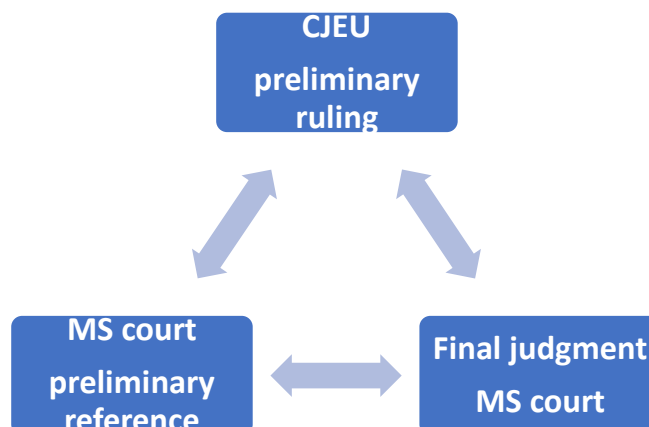
The Casebook structure itself reflects the method followed by the work-groups for the discussion of cases: it starts by identifying main questions, then reports answers provided by EU and case law and, finally, examines the impact of such EU rules on the national legal order considered. Thanks to a comparative approach, the analysis of a plurality of legal systems makes it possible to demonstrate how the application of EU law, principles and jurisprudence is influenced, in practice, by the different remedies and procedures envisaged at a national level, as well as by the different constitutional traditions and institutional architecture. Nor is the Casebook analysis limited only to the effects of interaction between the European and national courts (so-called “vertical” dialogue). It also extends to the mutual influence among domestic courts, or non-judicial authorities too, in adjudicating similar cases in light of European law (so-called “horizontal” dialogue).

Another important training instrument is the REJUS **Database**, which can be consulted on the project website (<https://www.rejus.eu/content/database-index>). It is a collection of cases, related to the three areas of interest of the project, which aim to explore the impact of art. 47 CFR as well as the principles of effectiveness, proportionality and dissuasiveness on the case law of Member States.

Cases are examined throughout their *life-cycle* during the three phases of the referral procedure to the CJEU: from the request for a preliminary reference by a national court, to the CJEU decision and the final judgment of the referring court in application of the European ruling. Where possible, the analysis also extends to cases in which European jurisprudence is applied by MSs other than those of the referring court.

The Database can therefore be considered an instrument that makes the entire life-cycle of a case more easily visible, since it examines not only the phases of the referral procedure (ascending and descending) but also the two kinds of dialogue (vertical and horizontal) between the European and national courts. On a practical level, this is made possible thanks to the constant updating of cases by judges and scholars who suggest national and European decisions and report their developments and links.

Finally, a case search is facilitated by the possibility of referring to multiple research criteria, on the basis of which the cases are clustered, such as “Member State,” “Area of Law,” or “Relevant Principles.”



The last two REJUS instruments are the **Guidelines for Judges** and the present **Guidance for Trainers**.

The former is conceived as an operative tool, complementary to the Casebooks, that is specifically addressed to judges and enforcers and that aims to provide practical criteria for addressing national cases involving the protection of rights based on EU law and fundamental rights. It consists of one introductory and general chapter and three sections concerning the three project areas.

The Guidelines are designed as a support instrument for choosing effective procedures and remedies in the fields of consumer protection, migration, data protection and possibly other areas. Indeed, one of the aims of the Project is to understand the extent to which general criteria exist for applying article 47 CFR and other general principles of EU law in the enforcement of any right based on EU law and whether these general criteria may be derived from the analysis developed in the three project areas. These criteria exist to some extent, although their concrete application may diverge from case to case or from sector to sector.

It is important to stress the close connection between this tool and the training workshops, since the method suggested has been developed and improved in light of the comments and suggestions raised during discussions among the participants.

As specified in the beginning, the present **Guidance** is specifically addressed to judicial trainers interested in applying a learning method developed to face the growing complexity of a multi-level legal framework.

Based on the assumption that the best way to understand the dialogue between the courts is to encourage dialogue among judges, the purpose of this document is therefore to describe the materials and the training events grounded in this approach.

To recap, in addition to the national and transnational workshops, the REJUS instruments for judicial training are:

- **3 Casebooks** (one for each project area)
- **The REJUS Database**
- **The Guidelines for Judges**
- **The Guidance for Trainers**

To conclude, it is appropriate to once again point out the circularity and mutual interaction among all the REJUS instruments, which feed into one another thanks to a process of continuous refinement and updates carried out during the project by all subjects involved both as trainers (academics, scholars and legal practitioners) and learners (judges participating in training events).

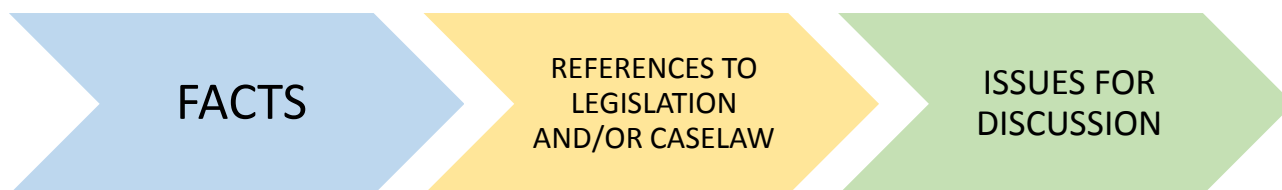
## **2. The REJUS Methodology Applied in Practice: Some Examples**

This chapter presents three hypothetical cases chosen from those actually discussed during the working group sessions of three REJUS transnational workshops.

In particular, each case concerns one of the three areas of interest of the project, namely consumer protection (a subject addressed at the Warsaw TTW), immigration and asylum (addressed at the Trento TTW) and data protection (examined at the Paris TTW).



The three selected cases share a structure characterized by the following elements:



These three basic sections follow a linear structure (starting from the facts the group gradually examines legal issues that concern those same facts) or facts may be varied in order to introduce different issues into the discussion. A useful example in this last regard is the case concerning consumer sales (par. 2.1), in which the fact is proposed in three different scenarios and, in each of these, suggestions from the CJEU, legislative references, and discussions all alternate several times in a cyclical manner.

Another recurrent element is the use of a precise and pragmatic style, as can be seen from the texts below, as well as expressions aimed at allowing participants to identify themselves first-hand with the “hypothetical judge” of the case being considered. This technique is particularly evident for instance in the case concerning immigration (par. 2.2), characterized by the use of frequent direct questions addressed to the magistrates involved.

The purpose of this chapter is therefore to help future trainers find, through an analysis of similarities and differences among the cases presented, the best formula for achieving their training objectives and to lead participating magistrates to share their skills and knowledge as much as possible.

## **2.1. AREA 1: Consumer Protection** *(Hypothetical case in the field of consumer sales)*

The case below, concerning consumer sales, represents a first proposal for the construction of a hypothetical case to be analyzed in the context of a group session.

As anticipated above, the method adopted by the trainer presents three different possible scenarios. Initially a specific fact is submitted to the working group and analyzed in light of European legislation and jurisprudence; the trainer subsequently makes some variations to the fact proposed previously in order to allow participants to further assess aspects and issues as well as new references to legislation and caselaw.

### FACTS

Mr. Johnson concludes a sales agreement concerning an armchair for his flat for 1,500 EUR. The furniture is manufactured according to the special requirements of the buyer who wants it to be functional for his elderly mother. After delivery the furniture is found not to be compliant with the specifications provided by the buyer and is not fit for the intended purpose. Bringing the furniture into conformity with the contract would require substantial reconstruction of the armchair and would cost 1,000 EUR.

The buyer seeks repair of the item to a state conforming with specifications, or alternatively to have a new one delivered. The seller declines this claim, indicating that the costs of repair or replacement would be disproportionate for him, considering the value of materials and construction of the original furniture. The consumer sues the seller and seeks repair or replacement of the goods.

### LEGISLATIVE BACKGROUND

Article 3 (99/44/EC Directive)  
Rights of the Consumer

2. In case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge **by repair or replacement**, in accordance with paragraph 3, or have **an appropriate reduction made in the price or the contract rescinded** with regard to those goods, in accordance with paragraphs 5 and 6.

3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, **unless this is impossible or disproportionate**.

### ISSUES FOR DISCUSSION

What are the criteria upon which the national court should ascertain whether the remedy sought may be granted? In particular, what is the specific understanding of the criterion of (dis)proportionality set forth in Article 3 (3) of the 99/44/EC Directive? Should it be regarded as an “absolute” (i.e. referring to the general economic criteria and market specificity) or as a “relative” lack of proportionality (i.e. based on a comparison between the costs of repair and replacement as alternative remedies)?

### REFERENCES TO EU CASELAW

CJEU, *Weber & Putz* (C-65/09 and C-87/09)

“[A]lthough **the first subparagraph of Article 3(3)** is, in principle, formulated in a manner which is sufficiently broad to cover cases of an **absolute lack of proportionality**, **the second subparagraph of Article 3(3)** defines the term ‘disproportionate’ **exclusively in relation to the other remedy, thus limiting it to cases of a relative lack of proportionality**. Furthermore, it is clear from the wording and purpose of Article 3(3) of the Directive that it refers to two remedies provided for in the first place, namely the repair or replacement of the goods not in conformity.” (*para. 73*)

Indeed art. 3(3), sec. para.: “A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, **in comparison with the alternative remedy**, are unreasonable, taking into account:

- the value the goods would have if there were no lack of conformity,
- the significance of the lack of conformity, and
- whether the alternative remedy could be completed without significant inconvenience to the consumer.”

### ISSUES FOR DISCUSSION

Is it possible for a judge to carry out a proportionality test as set forth in Article 3 (2) of the 99/44/EC Directive on her own motion? If yes, what is the relevance of the parties’ statements made during the proceedings? In particular, is the judge obliged – in light of the right to be heard embedded in Article 47 CFREU – to ask the seller to take a standpoint if the particular remedy complies with the requirement of proportionality? Who shall provide evidence about the (dis)proportionality of remedies sought?

### REFERENCES TO EU CASELAW

There are no explicit references in CJEU case-law to these specific issues, but consider:

- the general requirement of proportionality in consumer sales law  
(see above **Weber & Putz**, C-65/09 and C-87/09)

- *ex officio* powers in consumer sales

(see generally **Duarte Hueros** (C-32/12), deciding that the national court should *ex officio* apply the appropriate remedy, though not specifically demanded, if national procedural law does not allow for an amendment of the application, nor for filing a new claim due to *res judicata*)

- the right to be heard as a procedural guarantee in consumer law whenever *ex officio* powers are adopted  
(see *Baniş*)

Is article 47, CFREU, relevant under these respects?

### ISSUES FOR DISCUSSION

If a remedy of the first sequence (repair/replacement) is impossible or disproportionate, can a judge, acting *ex officio*:

- adjudicate another remedy from the first sequence (e.g. replacement instead of repair);
- adjudicate a remedy from the second sequence (e.g. a price reduction instead of replacement or repair originally claimed by a buyer);
- allow the parties to present their views about the possible use of an alternative remedy and eventually revise the original claim, opting for another remedy;
- reject the original claim with a view to the possibility that the consumer files an alternative remedy in another cause of action without this being banned by rules of *res judicata*?
- Does national procedural law oppose any of the above options?**

### REFERENCES TO EU CASELAW

CJEU, **Duarte Hueros** (C-32/12)

“Directive 1999/44 must be interpreted as precluding legislation [...] which **does not allow the national court hearing the dispute to grant of its own motion an appropriate reduction in the price of goods** which are the subject of a contract of sale in the case where a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity in those goods is minor, even though that consumer is not entitled to refine his initial application or to bring a fresh action to that end.” (*para. 43*)

### FACTS - Variation

Mr. Johnson concludes a sales agreement concerning an armchair for his flat for 1,500 EUR. The furniture is manufactured according to the special requirements of the buyer, who wants it to be functional for his elderly mother, **and is delivered on May 3, 2014. Subsequently, in August 2014, several ruptures begin to appear in the armchair’s frame, which threaten to cause the entire piece of furniture to collapse over time.**

The buyer seeks repair of the item to a state conforming with specifications, or alternatively to have a new one delivered. In response the seller claims that **the defect is a result of the natural weakness of the wood which happens from time to time and cannot be verified *ex ante*. Therefore, the defect of the good remains beyond his scope of liability – and the consumer has not proven any other cause of non-conformity. The consumer sues the seller and seeks repair or replacement of the good.**

### LEGISLATIVE BACKGROUND

Article 5 (99/44/EC Directive)- Time limits

1. The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery.

[...]

3. Unless proven otherwise, any lack of conformity **which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.**

### ISSUES FOR DISCUSSION

What is the allocation of the burden of proof in the case of non-conformity? What facts should be proven by a consumer? Specifically, should the consumer provide evidence of the cause of non-conformity? Does it make a difference whether the non-conformity appears within the first six months or beyond? Is the allocation in question affected by the right to effective remedy in the meaning of Article 47 CFREU? If so, what are the consequences for the domestic court? Is there any possible tension, in this respect, between national procedural rules and the right to an effective protection for the consumer?

### REFERENCES TO EU CASELAW

CJEU, *Faber* (C-497/13)

“If the lack of conformity has become apparent within six months of delivery of the goods, Article 5(3) of Directive 199/44 relaxes the burden of proof which is borne by the consumer by providing that the lack of conformity is presumed to have existed at the time of delivery.

In order to benefit from that relaxation, the consumer must nevertheless furnish evidence of certain facts.

In the first place, the consumer must allege and furnish evidence that the goods sold are not in conformity with the relevant contract in so far as, for example, they do not have the qualities agreed on in that contract or even are not fit for the purpose which those types of goods are normally expected to have. The consumer is required to prove only that the lack of conformity exists. He is not required to prove the cause of that lack of conformity or to establish that its origin is attributable to the seller.

In the second place, the consumer must prove that the lack of conformity in question became apparent, that is to say, became physically apparent, within six months of delivery of the goods.” (para. 68-71)

### ISSUES FOR DISCUSSION

Can the seller oppose the consumer’s request by claiming that the non-conformity stems from natural causes, beyond human control? Is it up to the consumer, in such a case, to prove that non-conformity had another cause or was controllable?

### REFERENCES TO EU CASELAW

CJEU, *Faber* (497/13)

“It is therefore for the professional seller to provide, as the case may be, evidence that the lack of conformity did not exist at the time of delivery of the goods, by establishing that the cause or origin of that lack of conformity is to be found in an act or omission which took place after delivery.

If the seller does not manage to prove to the requisite legal standard that the cause or origin of the lack of conformity lies in circumstances which arose after the delivery of the goods, the presumption laid down in Article 5(3) of Directive 1999/44 enables the consumer to assert the rights which he derives from that directive.” (para. 73-74)

### FACTS – Variation

Mr. Johnson concludes a sales agreement concerning an armchair for his flat for 1,500 EUR. The furniture is manufactured according to the special requirements of the buyer, who wants it to be functional for his elderly mother. **After delivery the furniture is installed in the flat by removing a part of parquet flooring and attaching the chair permanently to the floor.** Over the course of time it occurs that the furniture does not comply with the specifications provided by the buyer and is useless for the intended purpose.

The buyer seeks repair of the item to a state conforming with specifications, or alternatively to have a new one delivered. The seller declines this claim, indicating that costs of repair or replacement would be disproportionate for him, considering the value of materials and construction of the original furniture. **He also claims that the costs of replacement exceed economic rationality for which this remedy is not available.**

The consumer sues the seller, seeking repair or replacement of the goods. The courts, after hearing an expert witness, assesses **the costs of replacement at 800 EUR**, considering the need to uninstall the furniture and make adjustments to the parquet, manufactured from a high-quality wood.

### LEGISLATIVE BACKGROUND

Article 3 (99/44/EC Directive)  
Rights of the Consumer

2. In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity **free of charge** by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.
3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case **free of charge**, unless this is impossible or disproportionate.
4. The terms “free of charge” in paragraphs 2 and 3 refer to the **necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.**

### ISSUES FOR DISCUSSION

Who should bear the costs of replacement of a defective good? Are they, in principle, allocated to the side of the buyer or the seller?

### REFERENCES TO EU CASELAW

CJEU, *Weber & Putz* (C-65/09 and C-87/09)

“Article 3(2) and (3) of the Directive is to be interpreted as meaning that, where consumer goods not in conformity with the contract, which were installed in good faith by the consumer in a manner consistent with their nature and purpose before the defect became apparent, are restored to conformity by way of replacement, **the seller is obliged either himself to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and installation of the replacement goods.**” (*para. 62*)

### ISSUES FOR DISCUSSION

Can the seller deny repair/replacement only because the costs of replacement are excessive? How are the right to effective remedy (Article 47 CFREU) and the principle of effectiveness relevant to this issue? Does this right contribute to an interpretation of the expression “free of charge” in the meaning of Article (4) of the 99/44/EC Directive?

### REFERENCES TO EU CASELAW

CJEU, *Weber & Putz* (C-65/09 and C-87/09)

“Article 3(3) of the Directive must be interpreted as **precluding national legislation from granting the seller the right to refuse to replace goods not in conformity, as the only remedy possible**, on the ground that, because of the obligation to remove the goods from where they were installed and to install the replacement goods there, replacement imposes costs on him which are disproportionate with regard to the value that the goods would have if there were no lack of conformity and to the significance of the lack of conformity.” (*para. 78*)

### ISSUES FOR DISCUSSION

Is it possible to divide the costs of a replacement of goods? If so, what are the criteria that ought to be considered by a domestic court? Is the principle of effectiveness and Article 47 CFREU relevant?

In particular, can the buyer refuse to bear a part of the replacement costs and have the price reduced or the contract cancelled?

### REFERENCES TO EU CASELAW

CJEU, *Weber & Putz* (C-65/09 and C-87/09)

“Article 3(3) of the Directive does not preclude the consumer’s right to reimbursement of the cost of removing the defective goods and installing the replacement goods **from being limited, where necessary, to an amount proportionate to the value the goods would have if there were no lack of conformity and the significance of the lack of conformity**. Such limitation leaves intact the consumer’s right to seek replacement of goods not in conformity.” (para. 74)

“[I]n the event that the right to reimbursement of those costs is reduced, **the consumer should be able to request, instead of replacement of the goods not in conformity, an appropriate price reduction or rescission of the contract**, pursuant to the last indent of Article 3(5) of the Directive, since the fact that a consumer cannot have the defective goods brought into conformity without having to bear part of these costs **constitutes significant inconvenience for the consumer.**” (para. 77)

### ISSUES FOR DISCUSSION

If the costs are to be shared, how could they possibly be allocated by a court in the particular circumstances of this hypothetical situation? Would the principle of proportionality influence this apportionment?

### REFERENCES TO EU CASELAW

CJEU, *Weber & Putz* (C-65/09 and C-87/09)

“In considering whether, in the case in the main proceedings, it is appropriate to reduce the consumer’s right to reimbursement of the costs of removing the goods not in conformity and of installing the replacement goods, the referring court will therefore have to bear in mind, first, **the value the goods would have if there were no lack of conformity and the significance of the lack of conformity**, and secondly, **the Directive’s purpose of ensuring a high level of protection for consumers**. The possibility of making such a reduction cannot therefore result in the consumer’s right to reimbursement of those costs being effectively rendered devoid of substance, in the event that he had installed in good faith the defective goods, in a manner consistent with their nature and purpose, before the defect became apparent.” (para. 76)

## 2.2. AREA 2: Immigration and Asylum (*Hypothetical case in the field of asylum requests*)

The case considered in this paragraph concerns an asylum request submitted by an applicant during her administrative detention.

Unlike the previous case, the trainer proposes a single version of facts in this one, avoiding subsequent changes. Nevertheless, the case is analyzed in depth thanks to the selection by the trainer of three specific profiles to be dealt with progressively (i.e. admissibility of the appeal, suspension effect of the appeal, merit of the asylum application).

Moreover, the trainer in this case uses frequently directed questions and expressions aimed at involving the participating judges and stimulating their active involvement (for instance “*You are first judging the suspension of the return decision...*” or “*Imagine you admitted the appeal and granted the suspensive effect*”).

### **FACTS**

- Jennifer is a 19 year old Nigerian woman, who speaks and understands only the Esan language.
- She left her home and family when she was around 17 years old, for fear of undergoing Female Genital Mutilation (FGM). While in another town in Nigeria she followed a lady who first offered her accommodation in exchange for domestic help, then offered her further help to reach Europe. They first arrived in Libya where she was obliged to be a prostitute. She arrived in Italy in June 2016, where she maintained herself with money earned from prostitution. She feels she was obliged to do so because of the lady's order and the debt she thinks she owes her.
- She was subject to an expulsion order and detention order on the basis of the risk of absconding – September 4<sup>th</sup>.
- She only lodged an asylum application while in pre-removal detention – 14<sup>th</sup> of September.
- An interview with the administration was scheduled on the 22<sup>nd</sup> of September. The translator spoke Pidgin English although she only speaks Esan. She did not share during the interview that she was already forced into prostitution in Libya, but mentioned the FGM as grounds for international protection. She mentioned that she is working for a Nigerian lady in exchange for accommodation, and that the lady's sister helped her escape from her native village, however she did confirm that she paid for the trip with sex services.
- On the 7<sup>th</sup> of November, the asylum authority rejected her asylum claims as unfounded. On the basis of the EASO COI, the administrative authority found that she does not fall within the ethnic group and age of women who are most likely to undergo FGM. Genital mutilation was not commonly found in the local region where the applicant came from and in any event is a practice that is only occasionally applied to females over 15 years old. In addition, the asylum authority also found several inconsistencies in her story regarding her travel from Nigeria to Libya and then to Italy. The asylum authority did not consider the possible risk related to trafficking.
- The asylum authorities assessed the asylum claim according to an accelerated procedure. On the 8<sup>th</sup> of October she was told that the Member State authority for asylum rejected her request, but she did not understand why. The negative decision was given in English and the official language of the Member State where she was located. She did not understand that she had the right to lodge an appeal within 15 days from the moment of being notified of the negative decision. The translator always spoke in English or Pidgin despite the fact that Jennifer consistently communicated that she only spoke the Esan language.
- On the 31<sup>st</sup> of October, 16 days after notification of the decision by the Member State asylum authority, a lawyer visiting the detention center on behalf of an NGO requested whether it was possible that Jennifer speak with an Esan translator. With the help of this translator, she was able to understand the procedure. The lawyer decided 25 days after notification of the negative decision by the asylum authority to lodge a complaint before the competent Court even though the time limit had already expired.

### **ISSUES FOR DISCUSSION**

#### **I. ADMISSIBILITY OF THE APPEAL – ARTICLE 47 EU CHARTER**

**In light of the principle of the right to effective access to a court/judge, would you consider such a claim admissible, even if lodged after the expiry of the time limit?**

- Was it legitimate to establish an accelerated procedure?
- Do Member States have complete freedom to establish procedural time limits?
- Is the 15-day time limit to lodge an appeal compliant with the principle of effectiveness? Consider the causes of the lateness of the appeal.
- Do you know of any European or national cases that could be of help?

## LEGISLATIVE BACKGROUND

### Legal basis for accelerated asylum procedures

Grounds for accelerated procedure – Art. 31(8)(g) recast as Asylum Procedure Directive (APD) – to delay or frustrate the removal; (h) has entered the territory irregularly and failed to make an application as soon as possible. EXCEPTIONS: - Art. 24(3) APD vulnerable groups (including rape or other forms of sexual violence) - when the state considers the applicant to be in need of special procedural guarantees as a result of an accelerated procedure which would not properly allow the consideration of the individual's position as a vulnerable person shall not apply or shall cease to apply.

Article 31(9) of the Recast APD grants discretion to Member States to establish time limits for deciding on applications under the accelerated procedure. In addition, Art. 46(4) requires that time limits for lodging appeals should not render the right to an effective remedy impossible or excessively difficult.

## REFERENCES TO CASELAW

Although Member States enjoy procedural autonomy for establishing time limits, the principle of effectiveness requires that these time limits do not render the exercise of the asylum rights (see *Danqua* C-429/15, para. 29, 39 and 42) practically impossible or excessively difficult.

In principle a time limit of 15 days for lodging an appeal falls under the national procedural autonomy of Member States and is not in conflict with the principle of effectiveness (*Diouf*, C-69/10). However, there cannot be an automatic application of the conclusions reached by the CJEU in a particular case. The CJEU preliminary ruling must be applied by taking the precise circumstances of the case into account, according to the principle of individualization. In *Diouf*, for instance, unlike the present case, the accelerated procedure came about after an ordinary procedure.

On the other hand, in *I.M. v France* (Appl. No. 9152/09), the ECtHR found a violation of Arts. 5 and 15 ECHR among other reasons, due to the examination of the application for asylum being placed directly under the fast track procedure (as it was in the present case study). Since the accelerated procedure was the only opportunity for the individual to have his claim examined prior to his deportation, the ECtHR found the short appeal deadlines while the third country national was in detention as not being in compliance with effective remedy requirements.

Cases that can offer inspiration (cases involving third country nationals lodging appeals outside domestic time limits):

- **CJEU: *Danqua*** (C429/15) a citizen of Ghana asked for international protection in Ireland on account of being subjected to the Trohosis practice where family members are required to enter indentured service in order to atone for negative past activities. The application was rejected and she received a letter in English informing her of her right to make an application for subsidiary protection within 15 days. She was illiterate but with the help of solicitors she filed such an application **1 year and a half later**. Her application was rejected for being lodged outside the time limits.

The CJEU held that the 15 day time limit for lodging the subsidiary protection application was found to be contrary to the principle of effectiveness (no time limit for asylum claims). Some factors to be considered when assessing the conformity of national time limits with the principle of effectiveness:

- a) Complexity of the procedure
- b) The specific human and material circumstances of the case



- **National cases:** In the Czech Republic, an issue regarding time limits arose with regard to the detention of irregular migrants. The time limit for lodging an appeal against an expulsion decision is only five days. However, due to the lack of access to free legal assistance in Czech detention facilities, both the **Constitutional Court (Judgment File No. I. ÚS 630/16 of 7 December 2016)** and the **Supreme Administrative Court (Judgment File No. 4 Azs 122/2015 of 30 June 2015)** have highlighted that in light of EU norms and Article 13 of the ECHR judges must consider appeals admissible and make decisions on their merits. In **Italy**, the courts admit the possibility of a late appeal where the individual, through no fault of their own, lacked knowledge of the time-limit. This occurs in cases where the person concerned is illiterate or due to a lack of knowledge of Italian has not been able to understand the content of the decision denying international protection (e.g. jurisprudence of the Court of Appeals of Bari).

### ISSUES FOR DISCUSSION

#### **II. SUSPENSIVE EFFECT OF APPEAL – ARTICLE 47 CFR**

**You are first judging the suspension of the expulsion order which was reactivated after rejection of the asylum application became final for lack of an appeal.**

- Would you admit the suspension of the expulsion order?
- Would Art. 47 CFR play a role in your reasoning?
- Is there a possible violation of Art. 19(2) CFR if Jennifer is returned? Which of the FGM or re-trafficking would be a possible source for future ill treatment?
- What does ‘automatic’ suspensive effect of appeal mean?
- Consider that the lawyer has not asked for suspensive effect of appeal of the return decision or of the negative asylum decision, would you consider it ex officio the suspensive effect of appeal, as the judge adjudicating on the asylum claim?

### LEGISLATIVE BACKGROUND:

- Art. 13 Return Directive (2008/115) – no automatic suspensive effect of appeal in return proceedings – Member States have a choice of recognizing an appeal against return related measures (including expulsion orders) by way of ex officio or by interim relief.
- Protection of vulnerable groups – see recital 29 of the Asylum Procedure Directive (2013/32) and Article 3(9) of the Return Directive.

### REFERENCES TO CASELAW

**CJEU: *Abdida*** (C-562/13) When there is a risk of violation of Art. 19(2) CFR in asylum proceedings –automatic suspensive effect of appeal.

It follows from the foregoing that Articles 5 and 13 of Directive 2008/115, taken in conjunction with Articles 19(2) and 47 of the Charter, must be interpreted as precluding national legislation which does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration of their health. (para. 53)

Trafficking is considered to fall under Art. 4 on the prohibition of slavery, ECHR, while FGM is considered to be a violation of Art. 3 ECHR – see ECtHR, ***Collins v. Sweden***, Appl. No. 23944/05.

The difference between an ‘automatic’ and ‘individual application’ suspensive effect of appeal has been provided more recently by the CJEU in the ***Gnandi*** case, C-181/16.

N.B. the particular circumstances of that case, when considering applying the CJEU conclusions in ***Gnandi*** in this case.

When there is a risk of violation of Art. 19(2) CFR in asylum accelerated proceedings – *Tall* case (C-239/14) – automatic suspensive effect of appeal.

**The recognition of an automatic suspensive effect of appeal depends on whether the enforcement of the challenged decision is likely to expose the third-country national concerned to a risk of ill-treatment contrary to Article 4 of the EU Charter or Article 3 ECHR, and does not depend on the legal qualification of the decision or the type of asylum procedure within which the decision was adopted (i.e. regular, accelerated, border).** (Tall, C-239/14)

The **appeal with suspensory effect is necessary** “when it is brought against a return decision whose enforcement may expose the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, thereby ensuring that the requirements of Articles 19(2) and 47 of the Charter are met in respect of that third-country national.” (Tall, C-239/14)

In Tall, the CJEU held that the appeal did not require an automatic suspensive effect against a decision such as the one at issue in the main proceedings, when the enforcement of such is not likely to expose the third-country national concerned to a risk of ill-treatment contrary to Article 3 ECHR

#### **National Case law: SAC Estonia, Judgment of March 22, 2016**

Indicated that the notion of an effective remedy under Article 13 ECHR required that the remedy prevent the execution of measures that were contrary to the Convention and whose effects were potentially irreversible. The Court found that according to the practice of the ECtHR, in cases where there is a need to protect a person's private and family life, the suspension of the removal order may be the only measure capable of ensuring an effective legal remedy. In the case of expulsion of a complainant to a state where they have no contacts or place to live, their participation in the proceedings is essential to ensuring respect for their private and family life. The Supreme Court concluded that suspending the execution of the order to leave is essential to ensuring that the complainant could efficiently take part in court proceedings assessing the merits of the order to leave.

In conclusion: possible grounds for suspensive effect to consider – FGM and re-trafficking

According to Tall and Abdida, the judge has a duty to examine ex officio and refuse to enforce the removal order if there is a risk of refoulement. Both FGM and re-trafficking can be considered a risk of refoulement.

### **ISSUES FOR DISCUSSION**

#### **III. MERITS OF THE ASYLUM APPLICATION – DUTY OF COOPERATION**

**Imagine you admitted the appeal and granted the suspensive effect.**

Questions related to assessing the credibility of Jennifer's claim:

- How would you assess the facts and law? Would you limit assessment to the proof of the administration or do independent fact finding?
- What kind of proof would you consider under your investigative power, duty of cooperation and principle of effectiveness of EU rights? N.B. for instance:
- Would you consider hearing an anthropological expert in light of the duty to cooperate in assessing facts?
- Would you consider it feasible to require an international rogatory or to consult the Nigerian embassy/consulate in order to verify whether the place of birth of Jennifer's mother corresponds to a Nigerian region where female genital mutilation is a current practice?
- What other proof would you consider?
- Judicial powers are divided among national courts between a passive role (a sort of arbitrator among the parties with proof submitted by them) and a more active role (independent fact finding). Does the principle of effectiveness and the duty of cooperation harmonize these various powers to a certain extent?

- Is FGM the only possible grounds? Would you consider whether you have a duty/power to consider new grounds, although not expressly invoked by the parties? What would Art. 47 CFR together with Art. 4 of the Qualification Directive (2011/95) require?
- Would you order a hearing of the person in order to assess whether they have been effectively subject to trafficking and/or whether they are still under the control of criminal trafficking networks?
- Do your applicable national norms allow you to admit this inquiry instrument or would they oblige you to quash the administrative decision and refer back to the administrative stage (see the CJEU preliminary ruling in the Sacko case)?

Would the right to an effective remedy and the full and ex nunc examination of both facts and points of law, according to Article 47 EU Charter and Article 46(3) of the Recast Asylum Procedure Directive play a possible role in extending your inquiry and hearing powers?

#### **REFERENCES TO CASELAW**

- The CJEU has shifted the onus probandi from the asylum applicant to the public authorities (administration and judiciary) in *Elgafaji and Diakité cases (C-465/07 and C-285/12)* – judges need to take into consideration both the risk stemming from general violence in the CO, and from individual threats.
- The Italian Supreme Court (Court of Cassation judgment no. 2015/73333): it is the duty of the judicial authorities to make an assessment of the legal qualifications. The Court of Appeals of Bari consistently held that it is the story of the claimant which sustains the asylum application. In the case of Jennifer, her story tells the judge that there are further grounds to possibly consider.
- ECtHR – see *J.K. v Sweden* (Application No. 59166/12, GC Judgment 23 August 2016) and *Hirsi v Italy (Appl. No. 27765/09, ECtHR Judgment of 23 February 2012)*. In *F.G. v. Sweden* (Grand Chamber 23 March 2016), an Iranian national converted to Christianity. He did not mention this fact at the beginning of the refusal of his asylum application. He lodged a new asylum application. This subsequent application was rejected because it was not considered as relying on new grounds. The ECtHR held that it is not for the state examining the request to look for a risk factor that the asylum seeker did not present. The national authorities are obliged to assess that risk ex officio where they know the asylum seeker is likely to belong to a group of persons systematically exposed to such treatment.

### **2.3. AREA 3: Data Protection**

#### ***(Hypothetical case in the field of the right to be forgotten)***

The hypothetical case analyzed in this paragraph concerns the right to be forgotten. As can be seen below, the trainer addresses an open question to participants immediately after description of the fact, inviting them to explain the available options for protecting the right to be forgotten, in the case in point, in their respective legal systems.

As in the previous case, the analysis concerns different profiles taken from the same hypothetical facts and, with reference to each issue raised, the trainer provides the judges with a series of references to case law. In this regard, it is important to underline that the trainer considers both judgments of the CJEU (starting from the *Google Spain* leading case) and decisions taken from national caselaw, thereby highlighting and integrating both dimensions - vertical and horizontal - of the judicial dialogue.

### **FACTS**

In 2005, Mr. X, a national politician, was under investigation by the national police, because he was suspected of several criminal activities, including fraud. The investigation of this person was then dismissed. The case was reported on the website of the Newspaper Company in 2005 and never further updated.

On December 1, 2017, Mr. X started a notice and take down procedure with regard to Google “National” (Google France/Italy/Spain...), based on the **right to be forgotten**, in **order to delist a web-page from the Google results linked with his name** which displayed an old newspaper article about the above investigation.

Google rejected the request denying its role as data controller of Mr. X’s data.

### **ISSUES FOR DISCUSSION**

What are the **options available** to Mr. X to protect his “**right to be forgotten**” in your legal system?

#### **Enforcement mechanism**

- Claim before the national supervisory authority
- Claim before the national court

#### **Type of remedies available (in particular injunction/order, damages)**

- Claim before the national supervisory authority: ...
- Claim before the national court: ...

### **RELATIONSHIP BETWEEN THE TWO ENFORCEMENT MECHANISMS**

**Alternative:** A claim may be lodged either before the national supervisory authority or the national court (precluding access to the other procedure).

**Complementary - simultaneous:** a claim may be lodged before the national supervisory authority or the national court at the same time.

**Complementary – sequential:** a claim may be lodged before the national supervisory authority or the national court in a predefined sequence. First supervisory authority, then court (judicial review).

**Independent:** no coordination is provided by law.

### **FACTS - Variation**

#### **ASCERTAINMENT OF DATA BREACH, BALANCE OF INTERESTS AND PECULIARITY OF THE DATA CONTROLLER**

Let us assume that Mr. X lodges a complaint **against the Newspaper company** with a court or a supervisory authority.

On which basis shall the enforcer ascertain whether a **data protection breach** has occurred?  
Are there **conflicting interests** to be balanced? [e.g. freedom of expression v. data protection]

Let us now assume that Mr. X lodges a complaint **against the search engine (Google)** with a court or a supervisory authority.

To what extent should the balancing be different in this case?  
What are the **conflicting interests** to be balanced and how?

### REFERENCE TO EU CASELAW

#### ASCERTAINMENT OF DATA BREACH

In *Google Spain* (C-131/12), the Court states that the assessment may depend on:

- the **nature of the information** in question and
- its **sensitivity for the data subject's private life** and
- the fact that its **initial publication** had taken place 16 years ago balanced with the public interest in having that information, an interest which may vary, in particular, according to
- the **role played by the data subject in public life**.

*From here onwards we focus on procedures against Google*

### BALANCE OF CONFLICTING INTERESTS

In *Promusicae* (C-275/06), the CJEU affirms that Directive 2002/58 does not preclude Member States from laying down, with a view to ensuring effective protection of copyright, an obligation to communicate personal data that will enable the copyright holder to bring civil proceedings based on the existence of that right. Member States can adopt legislative measures to restrict the obligation of confidentiality of personal data where that restriction is necessary, *inter alia*, for the protection of the rights and freedoms of others, which include the protection of the right to property or situations in which authors seek to obtain that protection in civil proceedings.

The CJEU assesses the potential conflict between property rights, the right to effective judicial protection and the right to data protection. In order to comply with the requirements of the protection of these fundamental rights, the Member States should transpose and implement directives to avoid any conflict of fundamental rights. In the view of the CJEU, if such a conflict cannot be avoided, Member States should rely on general EU principles, in particular the principle of proportionality, to find a balanced solution that will not unduly sacrifice the effective protection of one fundamental right for the protection of another.

The CJEU then elaborated a set of criteria to be used in the balance by national courts:

- a) the duration of the breach of data protection;
- b) the importance, for the persons concerned, of protecting the data disclosed;
- c) the fact that the data in question already appears in public sources; the nature of the information in question and its sensitivity for the data subject's private life;
- d) the public interest in the information;
- e) the age of the data subject.

### AVAILABILITY OF THE CORRECTIVE MEASURE (DELISTING)

The enforcer (SA or Court) concludes that Mr. X's personal data have been violated.

### ISSUES FOR DISCUSSION

- Can it issue a **delisting order** against Google?
- Or should this order be made conditional upon another measure (**order for removal of unlawful contents**) to be taken against the Newspaper Company responsible for the linked webpage unlawfully publishing personal data?
- Would the solutions change depending on whether the claim was filed before the court or the SA?

## LEGISLATIVE BACKGROUND

Art. 17 GDPR provides the right to erasure (“right to be forgotten”) of the data subject, and it states that the extension of this right (e.g. the data subject cannot claim the erasure if the processing is necessary for exercising the right of freedom of expression and information).

With regard to the obligations of the controllers, paragraph 2 of art. 17 GDPR states that “*where the controller has made the personal data public and is obliged (...) to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.*”

### Enforcement mechanism and type of remedies available

- **Claim before the national supervisory authority:**

According to art. 58 GDPR the Supervisory authority has the corrective power to “*order the controller or the processor to comply with the data subject’s requests to exercise his or her rights*” pursuant to the GDPR, and specifically to “*order the rectification or erasure of personal data or restriction of processing pursuant to Articles 16, 17 and 18 and the notification of such actions to recipients to whom the personal data have been disclosed pursuant to Article 17(2) and Article 19.*”

Art. 77 GDPR states that “*without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority.*”

- **Claim before the national court:**

- judicial review of administrative decisions:

Art. 78 GDPR states that “*without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them*” and set forth the rules on judicial review of administrative decisions.

Art. 78 GDPR is to be interpreted in light of art. 47 CFR, as the recital 141 GDPR testifies: the national legislator can define the coordination mechanisms of judicial review with respect to the decisions of supervisory authorities, provided that this coordination should not limit access to justice to data subjects. The jurisprudence of the CJEU stated that a limitation can be justified on objectives of the general interest, such as the swiftness of administrative proceedings and the efficiency of judicial proceedings. Furthermore, the CJEU has imposed a proportionality test in order to evaluate whether any coordination mechanism is in line with effective judicial protection. More specifically:

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

### **Right to an effective judicial remedy against a controller or processor:**

Art. 79 GDPR states that “*without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under [the GDPR] have been infringed as a result of the processing of his or her personal data in non-compliance with [the GDPR]*”. Art. 79 GDPR also provides rules on jurisdiction.

### REFERENCES TO EU CASELAW

Google Spain (C-131/12) (given before the GDPR entered into force):

“Following the appraisal of the conditions [*i.e. balance between internet users’ interest in having access to information and data subject’s rights*] **the supervisory authority or judicial authority may order the operator of the search engine to remove from the list** of results displayed, following a search made on the basis of a person’s name, links to web pages published by third parties containing information relating to that person, without an order to that effect presupposing the previous or simultaneous removal of that name and information — of the publisher’s own accord or following an order of one of those authorities — from the web page on which they were published.” [para. 82]  
“Given the ease with which information published on a website can be replicated on other sites and the fact that the persons responsible for its publication are not always subject to European Union legislation, **effective and complete protection** of data users [*rectius, data subjects*] could not be achieved if the latter had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites.” [para. 84]

### ISSUES FOR DISCUSSION

Could Mr. X **also claim damages** in this case?

Only before a court?

### LEGISLATIVE BACKGROUND

According to art. 82 GDPR (Reg. 679/2016) “Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.”

The provision regulates compensation, stating that:

- any controller involved in processing shall be liable for the damage caused by processing which infringes the GDPR;
- a processor shall be liable for the damage caused by processing only where it has not complied with obligations of the GDPR specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller. A controller or processor shall be exempt from the liability rules provided in art. 82 GDPR if it proves that it is not in any way responsible for the event giving rise to the damage;
- in order to ensure effective compensation of the data subject, the liability of the controllers or processors is joint and several when more than one controller or processor, or both a controller and a processor, are involved in the same processing. In such a case, controller or processor shall be entitled to claim back from the other controllers or processors involved in the same processing that part of the compensation corresponding to their part of responsibility for the damage;
- Court proceedings for exercising the right to receive compensation shall be brought before the courts competent under the law of the Member State referred to in Article 79 GDPR.

### REFERENCES TO EU CASELAW

In Holstein (C-210/16) and Jehovah (C-25/17), the Court raises the issue of joint responsibility in relation to the processing of data in light of the objective of ensuring effective and complete protection of data subjects. Interpreting art. 2(d) dir. 95/46, the Court stated that a party is a controller as long as it contributes to the processing by taking part in the determination of the purposes and means of processing the personal data. The existence of joint responsibility does not necessarily imply equal responsibility or involvement in the processing, nor equal access to the personal data.

### ISSUES FOR DISCUSSION

Would **administrative fines** be applied against Google and, if so, through which procedure?

Only before a court?

Before a Supervisory Authority (SA)?

### **LEGISLATIVE BACKGROUND**

According to art. 58, par. 2, lett. i) GDPR the Supervisory Authority (SA) shall have the power to impose an administrative fine, in addition to, or instead of measures provided in art. 58 GDPR, depending on the circumstances of each individual case.

Art. 83 GDPR (Reg. 679/2016) provides the general conditions for imposing administrative fines (e.g. the intentional or negligent character of the infringement; the categories of personal data affected by the infringement), stating that they shall, in each individual case, be effective, proportionate and dissuasive. The CJEU applied the principles of proportionality and effectiveness with regard to sanctions in the *Bodil Lindqvist* case, C-101/01.

It should be recalled that art. 83, par. 8 GDPR states that “*The exercise by the supervisory authority of its powers (...) shall be subject to appropriate procedural safeguards in accordance with Union and Member State law, including effective judicial remedy and due process.*” However, Art. 83(8) GDPR, should be interpreted in light of Art. 47 CFR and of the general principles of EU law, as recital 148 GDPR testifies. From this perspective, with regard to the right to be heard, the national supervisory authorities cannot deny the possibility of an oral hearing to data subjects or deny them the right to have their views presented before the administrative authority in case of a claim. In this respect, it should be recalled that, according to CJEU caselaw (part. *Puskar*, C-73/16), in light of the principle of proportionality, the right to be heard should not create an overly heavy burden on the judicial procedure when it has been fully ensured within the administrative phase, and no new elements have appeared to justify additional hearings in person.

### **FACTS - Variation**

#### **COORDINATION WITH NSA DECISION**

- Let us assume that **Mr. X lodged a claim before the NSA against Google** asking that the webpage be delisted.
- The **NSA rejects** the delisting claim, based on the citizens’ right to be informed about the conduct of politicians.
- Mr. X then files a separate suit against Google National before the **court** asking to be delisted and for damages.

### **ISSUES FOR DISCUSSION**

- Should such claims **be dismissed once the NSA has denied** the existence of a data protection breach?
- Provided that damages can be only awarded by the courts, **should the judge admit the only claim for damages** dismissing the other claim for delisting?
- Provided that the claim is admissible, **is the judge bound by the decision of the NSA?** If the factual circumstances allow, can the judge affirm Mr. X’s right to be delisted (against the decision of the NSA)?

Answers may depend on the **applicable MS procedural law**. Would this application be consistent with the principle of effective judicial protection and the right of access to justice under article 47, CFREU?

In case of **conflict**, would there be any space for conforming interpretation, disapplication or preliminary reference proceedings under article 267 TFEU?

### **LEGISLATIVE BACKGROUND**

#### **AND REFERENCES TO EU CASELAW**

Although the GDPR calls for a dual (administrative/judicial) system, it does not provide information about how both channels should interact. This is not surprising, since such issues are governed by the principle of MS procedural autonomy.

However, comparison with CJEU case law in other fields (notably consumer protection, see for example: *Invitel*, C-472/10 and *Biuro*, C-119/15 cases) shows that the Charter, particularly the principle of effectiveness of judicial protection, and art. 47 CFREU can both be used to shape guidelines regarding the interdependent functioning of administrative and judicial proceedings.

### **FACTS - Variation**

#### **JUDICIAL REVIEW OF NSA DECISION**

Let us assume that **the NSA accepts Mr. X’s requests**, imposes erasure of the link to the newspaper article by Google “National,” and adds a fine for breaching data protection law.

**Google “National” then appeals against the measure before the national judge.**



### ISSUES FOR DISCUSSION

- What are the **powers of judges** in judicial review?  
Can the judge **quash** the NSA's decision?  
Can the judge **modify** the administrative decision or is it **bound to refer back** to the NSA for a new decision?  
Can the judge **amend the amount of the fine eventually issued** by the administrative authority?

### REFERENCES TO CASELAW

In the *East Sussex Council* case (C-71/14), outside the field of data protection, the CJEU affirmed that where EU law does not specify the scope of judicial review, it is for the legal systems of the MS to determine that scope, subject to the principles of equivalence and effectiveness.

This is confirmed by national case law. In *Italy*, first instance courts performing the function of judicial review are not bound by the decisions of the national supervisory authorities with regard to the existence of the violation, or the use and acquisition of (new) evidence, or the type and content of the penalty (*Tribunale di Milano*, no. 10374/2016; *Tribunale di Milano*, no. 5022/2017). In a different case, the Italian Supreme court addressed the impact of the decision of the national supervisory authority on judicial proceedings concerning damages (*Corte di Cassazione*, n°13151/2017, 25 May 2017). The Supreme Court affirmed that the decision of the supervisory authority cannot bind the civil court: an administrative decision will never acquire the status (or have the effects) of *res judicata*, due to the fact that the data protection authority is an administrative body, and its procedure guarantees the impartiality of the data protection authority as does the procedure of a court in a legal proceeding.

### FACTS - Variations

#### **COORDINATION BETWEEN ADMINISTRATIVE AND JUDICIAL ENFORCEMENT**

Let us assume that national applicable law required that a data subject's rights should **first be enforced before the NSA and, only if the NSA dismissed the claim or omitted addressing the case, then the data subject could access the court**. Let us suppose that Mr. X did not lodge any complaint with the NSA but filed a claim for delisting and damages before the court.

### ISSUES FOR DISCUSSION

- Should the judge **declare the claims inadmissible**?
- Provided that damages can be only awarded by courts, should the judge admit the only claim for damages dismissing the other claim for delisting?
- Should the judge question whether the applicable law represents a **limitation of the right of access to justice** and under which parameters should this assessment be made, if ever?

### REFERENCES TO EU CASELAW

#### Coordination between administrative and judicial enforcement

The *Puškár* case, September 27, 2017, C-73/16

CJEU: the obligation to exhaust additional administrative remedies must be scrutinized **in light of Article 47 CFREU**, Article 4 (3) of the TEU (principle of sincere cooperation) and Article 19 (1) of the TEU (effective judicial protection in the fields covered by EU law). Since such an obligation to exhaust additional administrative remedies constitutes a limitation of the right to an effective judicial remedy; it may therefore be justified according to the criteria set in accordance with article 52 (1) CFREU, namely, only when it is:

- i) provided by law;**
- ii) respectful of the essence of the right** (access to justice);
- iii) subject to the principle of proportionality** (see below);
- iv) compliant with objectives of the general interest recognized by the EU or the need to protect the rights and freedoms of others** (shorter time of dispute resolution before the administrative authority; efficiency gain for reduced litigation before the courts).

### Coordination between administrative and judicial enforcement

#### **The Puškár case and the proportionality test**

Reference to the decisions in *Alassini* (C-317/08) and *Menini* (C-75/16) (on the requirement of out-of-court attempts at dispute resolution before access to the court in consumer protection cases).

Most relevant criteria for the case at stake:

- The required extra-judicial procedures do not cause a substantial delay for bringing legal proceedings;
- The procedures suspend the period for the time-barring of claims;
- The procedures do not give rise to costs — or give rise to very low costs — for the parties;
- The procedures allow for interim measures in exceptional cases where the urgency of the situation so requires.

### ISSUES FOR DISCUSSION

#### Coordination between administrative and judicial enforcement

##### **The right to damages**

The NSA affirms that the **data subject is entitled to receive damages from Google “National”** though it may not directly award them.

- Can Mr. X **claim his right to damages before the national courts**?

If so, what is the legal effect of the decision by the national supervisory authority in the proceedings?

- Can **proof** collected by and before the NSA be used in the proceedings before the court? Can those be counterbalanced by the new means of proof?
- Can the judge come to a **different conclusion** concerning the existence of the infringement?
- If the infringement was confirmed, how should damages be assessed? Which types of damages could in fact be claimed?
- If **non-material damages** were claimed, should these be distinctively assessed, or should they automatically be considered as a necessary component of any damages caused by data protection infringement?

### REFERENCES TO CASELAW

#### Coordination between administrative and judicial enforcement in damages claim procedures

##### **Bindingness of SA decision**

Again, those issues have not been addressed so far in CJEU decisions.

Some helpful indications arise from **national caselaw**.

E.g. the Italian **Supreme Court n. 13151/2017, May 25, 2017** addressed the impact of the decision of the national supervisory authority vis-à-vis the judicial proceedings concerning damages.

Given that the decision of the court may also be handed down in a different proceeding temporally following the claim before the national supervisory authority with regard to the breach of data protection rules, the Supreme court affirmed that **the decision of the supervisory authority cannot bind the civil court, as such a decision will never acquire the status (and have the effects) of res judicata**, due to the fact that the Data Protection authority is an administrative body and its procedure does NOT guarantee the impartiality of the Data Protection authority as the one ensured by the court in a legal proceeding.

### Coordination between administrative and judicial enforcement

#### **Damages**

According to the case *EDPS v European Parliament* (T 343/13), the EU Civil Service Tribunal addresses the question whether the annulment of an act of Parliament may in itself constitute appropriate and, in principle, sufficient reparation for non-material damage and, if not, how non-material damage should be assessed. The Tribunal stated that the annulment of the administration's unlawful act cannot constitute full reparation for non-material damage:

- a) if that act contains an assessment of the abilities and conduct of the person concerned which is capable of offending him;
- b) where the illegality committed is particularly serious;
- c) where the annulment of an act has no practical effect.

With regard to **non-material damages**, the main issue is finding a proper **balance** between the effectiveness of protection in the field of privacy and **full compensation of victims** on the one hand, and, the principle of “**de minimis non curat praetor**” on the other (the judge does pay attention to trivial matters), intended as a “European rule of tort law,” to which the **ECtHR decision n. 77/07, January 7, 2014** refers.

Some indications come from national caselaw. See for instance, the **Italian Supreme Court** (Corte di cassazione), Third Civil Chamber, **July 15, 2014**, n. 16133 (University of “Rome Three” v. Pieraccini et al.), which states that in data protection **non-economic losses may be recovered if the infringement is serious and the consequences are substantial and concrete.**