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Application of EU law in the national context: principles and challenges for a judge

Judge Beatrice Ramascanu

14 October 2024, Naples

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- *L'Europe des Juges*
- Robert Lecourt
- Judge - European Court of Justice 1962- 1976
- President of the Court 1967 - 1976
- Rapporteur in Costa v. ENEL case 1964

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Judicial dialogue in the European **judicial space**

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National/European judge

- the national judge has been coined the ‘ordinary judge of EU law’ (*Simmenthal* /1978)
- National judge has the primary responsibility for ensuring the effectiveness of EU law in practice through different techniques

CVRIA

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- *A general is just as good or just as bad as the troops under his command make him*

- To understand the everyday application of EU law is necessary to adopt a **<u>national judge-centred focus</u>**

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…from Montesquieu
l*e juge, bouche de la loi*
to
current challenges

Les juges ne sont que la bouche qui prononce les paroles de la loi; ***des êtres inanimés qui ne peuvent en modérer ni la force ni la vigueur.***

To

Shared responsibility in applying EU law/submitting preliminary ruling questions to CJEU

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The Source of the challenges

- Specific characteristics of EU law
- independent source of law - the Treaties/primacy over the laws of the Member States/the direct effect
- structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other (Opinion 2/13)

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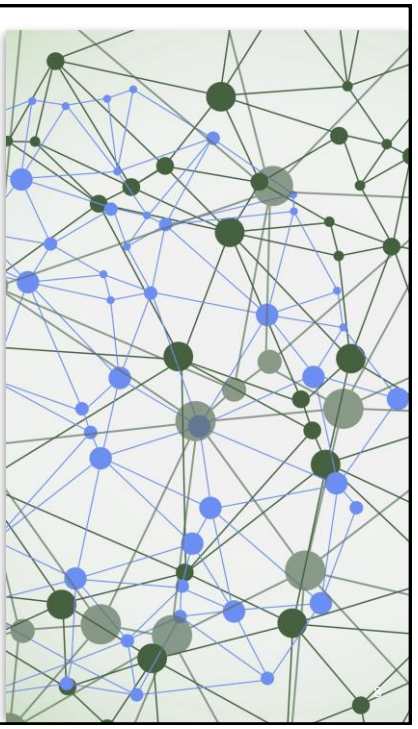
The Source of the challenges

- EU - a **new kind of legal order**, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation (par. 158)
- the constitutional structure of the EU, which is seen in the principle of conferral of powers (Articles 4(1), 5 (1) and 2 TEU)
- Sincere cooperation (Article 4(3) TEU)
- Mutual trust
- Autonomy of a legal order / a judicial system intended to ensure consistency and uniformity in the interpretation of EU law

(Opinion 2/13)



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How does the mind of a national judge operate?

Thinking
Planning
Organizing
Problem-solving
Short-term memory
Action

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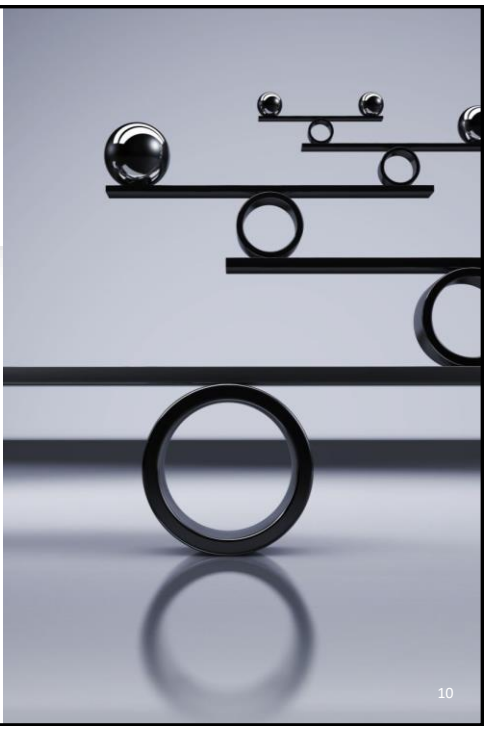
National mindset vs EU specific *logic*

- Legal concepts
- Methods of interpretation
- Methods of adjudicatingg
- Judicial activism/judicial restraint



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- **autonomous concepts vs national definitions** (legal concepts that do not necessarily have the same meaning as the corresponding concepts that may exist in the law of the MS (Cilfit, 283/81, EU:C:1982:335, par. 19)

- **uniform interpretation and application in all MS** (that interpretation must take into account not only the wording of those provisions, but also their context and the objective pursued by the legislation in question (Oberle, C-20/17, EU:C:2018:485, para. 33).

- **Multilinguism** (Consorzio Italian Management, C-561/19, EU:C:2021:799, Cilfit 2)

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Textualism?

- "textualism will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law"
- "textualism is the only methodology faithful to the rule of law, which requires that legal interpretive rules be stable and that their application be predictable, consistent, objective, and neutral" (Scalia)
- **BUT**
- CJEU - methods of interpretation (grammatical, systematic, purposive, teleological) for development of EU law
- **Judge-made law**

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Literal interpretation

- The literal interpretation of a clear and precise provision is the method of interpretation that best reflects **the principle of legal certainty, as it guarantees a high degree of predictability** in the judgments of the ECJ.
- (K. Laenarts, To say what the Law of EU is)

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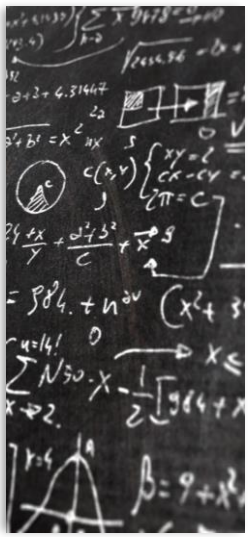
National judges *lost* in translations



Regulation No 1/58 determining the languages to be used by the European Economic Community

Charter -Article 41 -Right to good administration

Constitutional principle of EU law law

Manifested in the recognition of the equality of all the official languages

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the different language versions of a [EU] text must be given a uniform interpretation and hence in the case **of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it publication.** (Stauder, Case 29-69, EU:C:1969:57)

the necessity for uniform application and … uniform interpretation of an EU measure makes it impossible to consider one version of the text in isolation, but requires it to be interpreted **on the basis of the real intention of its author and the aim pursued by the latter, in the light, in particular, of the versions in all other official languages**. (Confédération paysanne, C-298/12)

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- Opinion of Advocate General Sharpston, 14 November 2013 Case C-390/12, Robert Pfleger
- *I note that (predictably)* ***there is a degree of linguistic variation*** *in the texts of the Charter in different equally authentic languages. Thus, whilst the English text speaks of 'implementing', the German has 'bei der Durchführung des Rechts der Union' and the French* ***'lorsqu'ils mettent en oeuvre le droit de l'Union'.*** *The Spanish and Portuguese (for example) are broader ('cuando apliquen el Derecho de la Unión' and 'quando apliquem o direito da União', respectively).*

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Practical impact

- CILFIT (283/81) Exceptions to the duty to refer
- **Act Clair**
- The correct application of EU law is so obvious as to leave no scope for any reasonable doubt:

➢ to other national courts of last instance of other Member States;

➢ to CJEU;

➢ **in every language version**;

➢ in EU law peculiar terminology;

➢ In light of the provisions of EU law as a whole

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*„42 … EU legislation is drafted in several languages and that the different language versions **are all equally authentic***

*43. According to the Court's settled case-law, **one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions**. Provisions of EU law **must be interpreted and applied uniformly in the light of the versions existing in all languages of the European Union .***

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44. While a national court or tribunal of last instance cannot be required to examine, in that regard, each of the language versions of the provision in question, the fact remains that it must bear in mind ***those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the parties and are verified****".*
*(*Consorzio Italian Management, C-561/19, EU:C:2021:799)

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Difficulties

- the national court must examine the wording of the provision in question.
- BUT
- the literal interpretation of that provision does not always capture its true meaning
- For example- where the provision in question contains an **autonomous concept of EU law –**
- the national court must also examine the normative context of that provision and the objectives it pursues.

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Act clair

"coming across a "true" *acte clair* situation would, at best, seem just as likely as encountering a unicorn" (Advocate General Wahl)

"those elements that are stated in *objective* terms are simply unattainable, at least for mortal national judges not possessing the qualities, time, and resources of Dworkin's Judge Hercules (comparing (all) language version; interpreting each provision of EU law in the light of EU law as a whole, while having a perfect knowledge of its state of evolution at the date on which that provision is interpreted)"

Advocate General Bobek

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Overlapping

- national concepts on EU autonomous concepts
- Applying national methods of interpretation

(C-397/01, Pfeiffer, 2004, par.116)

- National judicial reasoning

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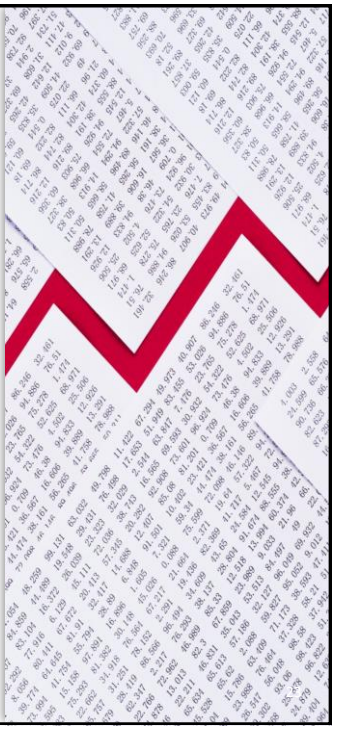
National mindset vs EU specific *logic*



- **JURISDICTION**
- Regulation no. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
- **DECLINE (** Article 29 *Lis pendes,* Article 31)
- ARTICLE 31
- 1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall **decline jurisdiction** in favour of that court.

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National mindset vs EU law specific

- **JURISDICTION**
- Regulation no. 1111/2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (Regulation 2201/2002)
- Regulation no. 4/2009 maintenance obligation
- **ANCILLARY ACTIONS**
  - **MAIN CLAIM –** DIVORCE and PARENTAL RESPONSIBILITY
  - **automatically** for maintenance claim (ancillary to the main claim on divorce, parental responsability)

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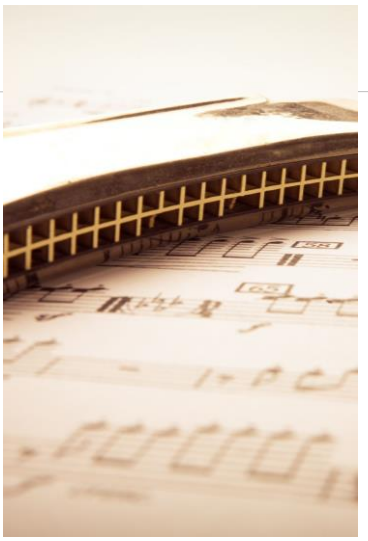
Autonomous concepts

habitual residence



- **Regulation (EC) No 1111/ 2019 Recast** (2201/2003) – Articles 3, 6 to 8 and 14
- **Regulation (EC) No 4/2009** – Articles 3 and 7
- **Regulation (EU) No 650/2012 Succession-** Article 4 (Recitals, 23-33)

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Habitual residence – *Brussels II Bis Recast*

- **child's habitual residence** is an **autonomous concept of EU law**, which has to be interpreted in the light of the context of the provisions referring to that concept and the objectives of Regulation No 2201/2003, in particular that which is apparent **from recital 12** thereof, according to which the grounds of jurisdiction which it establishes are shaped in the light of the best interests of the child, in particular on the criterion of proximity (judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 40)
- the child's place of habitual residence must be established on the basis of all the circumstances specific to each individual case. In addition to the physical presence of the child in the territory of a Member State, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that it reflects some degree of integration of the child into a social and family environment (judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 41 and the case-law cited), which is the place which, in practice, is the centre of that child's life (judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 42).

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Habitual residence - Maintenance Regulation

- **in the absence of such a definition or reference to the law of the Member States** for the purpose of determining the meaning and scope of that concept, that concept has to be given **an autonomous and uniform interpretation, taking into account the context of the provisions referring to that concept and the objectives of that regulation** (, judgment of 25 November 2021, IB, C-289/20, EU:C:2021:955, paragraphs

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Different grounds for establishing jurisdiction?

- C-184/14, *A,* 6 July 2015, *(*EU:C:2015:479),
- by its nature, an application relating to maintenance in respect of minor children **is intrinsically linked to proceedings concerning matters of parental responsibility.**
- that the court with jurisdiction to entertain proceedings concerning parental responsibility **is in the best position to evaluate *in concreto* the issues involved in the application relating to child maintenance** and to set the amount of that maintenance intended to contribute to the child's maintenance and education costs, by adapting it, according to
  - (i) the type of custody (either joint or sole) ordered,
  - (ii) access rights and the duration of those rights and
  - (iii) other factual elements relating to the exercise of parental responsibility brought before it. (par. 43)

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Same but ….different reasons

- the most closely connected with the creditor's situation and therefore to be the best adapted to govern the specific problems which the maintenance creditor may encounter (judgment of 12 May 2022, *W. J. (Change in the habitual residence of the maintenance creditor)*, C-644/20, EU:C:2022:371, paragraph 64 and the case-law cited).
- that connection has the principal advantage of determining the existence and amount of the maintenance obligation with regard to the legal and factual conditions of the social environment in the State where the creditor lives and engages in most of his or her activities. In so far as the maintenance creditor will use his or her maintenance (see, to that effect, judgment of 12 May 2022, *W. J. (Change in the habitual residence of the maintenance creditor)*, C-644/20, EU:C:2022:371, paragraph 65).
- It is, therefore, justified to consider that, having regard to that objective, the maintenance **creditor's habitual residence is that of the place where the creditor's life is, in fact, centred, taking into account his or her family and social environment**, in particular where a minor child is involved
- (see, to that effect, judgment of 12 May 2022, *W. J. (Change in the habitual residence of the maintenance creditor)*

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- C-468/18, R,
- 5 September 2019
- Facts of the case
- Context of the referral

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Outcome

- Article 3(a) and (d) and Article 5 of Regulation No 4/2009 must be interpreted as meaning that where there is an action before a court of a Member State which includes three claims concerning, respectively, the divorce of the parents of a minor child, parental responsibility in respect of that child and the maintenance obligation with regard to that child, the court ruling on the divorce, which has declared that it has **no jurisdiction to rule on the claim concerning parental responsibility**, nevertheless has jurisdiction to rule on the claim concerning the maintenance obligation with regard to that child where it is also the court for the place where the defendant is habitually resident or the court before which the defendant has entered an appearance, without contesting the jurisdiction of that court.

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A different meaning of a legal concept in EU specific context than in the national setting?

Examples

Implementing EU law
/Derogation
(EU Charter of fundamental rights)

Conjunction ***or***

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Applicability of Charter FR

- **Article 51 – MS *implementing EU law***
- **MS when they act in the scope of Union law**
- (Explanations of Charter, judgment of 18 December 1997 (C-309/96 Annibaldi [1997] ECR I-7493)

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To be or not to be within the scope of EU law?

'implementing EU law'

=

'acting within the scope of EU law'/

↓

When does a situation brought before the national authorities fall within the scope of EU law?

BUT

?Same as "***fields covered by Union law"?***

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Derogation = *"implementing EU law"?*

Where a MS enacts a measure that **derogates** from a fundamental freedom guaranteed by the TFEU, *that measure falls within the scope of Union law*. (see, eg, ERT)

The power to derogate from the fundamental freedom guaranteed by EU law in certain circumstances is a power that Member States retain and that EU law recognises; **but the *exercise* of that power is circumscribed by EU law**.

When a court reviews whether national legislation restricting the exercise of such a fundamental freedom falls within the Treaty derogation (and is thus permissible) **that process of review is carried out by reference to, and under criteria derived from, EU law,** not national law.

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Derogation = *"implementing EU law"?*

-When a national measure which restricts a fundamental freedom guaranteed by the FEU Treaty is justified on the basis of that Treaty or by an overriding reason in the public interest recognised by EU law, such a measure must be regarded as implementing Union law within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental rights enshrined in the Charter.

(C-78/18, Judgment of 18 June 2020 (Grand Chamber), Commission v Hungary (Transparency of associations), EU:C:2020:476)

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Methods of interpretation Systemic

- in interpreting a provision of EU law - consider not only its wording, but also **the context in which it occurs and the objectives pursued**
- Example - *the scheme and the objectives of Regulation No 4/2009.*
- *So far as the scheme of Regulation No 4/2009 is concerned, that regulation sets out, in Chapter II thereof, entitled 'Jurisdiction', all of the applicable rules to designate the court having jurisdiction with respect to maintenance obligations. Recital 15 of that regulation stipulates in that regard that there should no longer be any referral to the rules on jurisdiction in national law, since the rules resulting from that regulation must be considered to be exhaustive.*
- Judgement of 5 September 2019 C, C-468/18, par. 42

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? Preamble

- no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions n or for interpreting those provisions in a manner clearly contrary to their wording (Karen Millen, C-345/13, EU:C:2014:2013)

<u>Travaux préparatoires</u>

- the purpose and aim of that legislation, as is apparent from the relevant travaux préparatoires, was to extend the prohibition to cover non-Danish operators offering gaming in Denmark over the Internet (Bent Falbert and Others, C-255/16, EU:C:2017:983)

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OR…means?

- ”the conjunction ‘or’ may, linguistically, have an alternative or a cumulative sense and must consequently be read in the context in which it is used and in light of the objectives of the act in question. In the present case, having regard to the context and objective of Directive 2011/95 as set out in recitals 3, 10 and 12 thereof, and taking account of the case-law […], that conjunction must, in Article 14(6) of that directive, be understood in a cumulative sense”. (M and others, C-391/16, C-77/17 and C-78/17, EU:C:2019:403).

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National mindset vs. qualification of legal situations based on EU law

- Compensation for damages in case of infringing EU law - Brasserie du Pêcheur, C-46/93 and C-48/93, EU:C:1996:79
- National qualification- **Liability/Tort/4 conditions**
- **BUT**
- State liability cannot be conditioned by a proof of misuse of powers in the exercise of a public function or of the intention of the national authority to cause harm

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State liability

- the principle of legal certainty
- res judicata
- independence and authority of the judiciary
- the absence of a court competent to determine disputes relating to State liability for FINAL decisions

The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred **but not necessarily a declaration invalidating the status of res judicata of the judicial decision which was responsible for the damage.** In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.

(judgment of the Court of 30 September 2003, C-224/01, Köbler, par. 39)

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National judges adjudicating

- Applying EU law based on the principles of primacy and direct effect of EU law
- to interpret national measures in conformity with EU law
- **disapplication** of national measures contrary to EU law
- Applying the standard of protection of EU fundamental rights instead of their higher constitutional standard (Melloni)

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• EU law precludes a national rule under which national courts **have no jurisdiction to examine the conformity with EU law** of national legislation which has been held to be constitutional by a judgment of the **constitutional court of** the Member State (RS , C - 430 /21 , EU : C :2022 :99)

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Disapplying national legislation

- **primacy of EU law** means that the national courts must be under a duty to **give full effect** to those provisions, if necessary **refusing of their own motion to apply any conflicting provision of national law, and without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means** (see, to that effect, judgments of 9 March 1978, Simmenthal, 106/77, EU:C:1978:49, paragraphs 17, 21 and 24)

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Exceptions

- A risk that the annulment of the measure could create **a legal vacuum** that is incompatible with that Member State's obligation to adopt measures to transpose another act of EU law concerning the protection of the environment (Case C-41/11 *Inter-Environnement Wallonie and Terre wallonne*) or another general interest

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Judicial activism vs. judicial restraint

If no national provisions are available, should national judges "create" a procedure?

Filling in the blanks?

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters

Staying proceedings in a similar case than the one in which a preliminary ruling was submitted to CJEU (yes in civil matters, no similar regulation in criminal matters)

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Some specific aspects for national judges. *Judicial activism?*

To put into place effective judicial remedy against decisions on applications for international protection **even if no national provisions are available**

See C - 556/17, Torubarov, 29 July 2019, ECLI:EU:C:2019:626, para. 73 – 74

Therefore, in order to guarantee that an applicant for international protection has an effective judicial remedy within the meaning of Article 47 of the Charter, and in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, a national court or tribunal seised of an appeal ***is required to vary a decision of the administrative or quasi-judicial body,*** *in the present case the Immigration Office, that does not comply with its previous judgment and* ***to substitute is own decision*** *on the application by the person concerned for international protection by disapplying, if necessary, the national law that prohibits it from proceeding in that way (see, by analogy, judgment of 5 June 2014, Mahdi, C-146/14 PPU, EU:C:2014:1320, paragraph 62).*

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Specific aspects for national judges based on CFR

C-560/20, CR and Others v Landeshauptmann von Wien, 30 January 2024, para. 48

Thus, in accordance with settled case-law, the Member States, in particular their courts, must not only interpret their national law in a manner consistent with EU law ***but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the legal order of the European Union*** *(judgment of 16 July 2020, Etat belge (Family reunification – Minor child), C-133/19, C-136/19 and C-137/19, EU:C:2020:577, paragraph 33 and the case-law cited).*

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Thank you for your attention!

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