

# TRAINING LAWYERS TO THE RULE OF LAW

## EUROPEAN CASE LAW HANDBOOK

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Lawyers Initial Training on  
European Law



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# Acronyms and Abbreviations

<b>EU</b>	European Union
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>EChFR</b>	European Charter of Fundamental Rights
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>SLAPPS</b>	Strategic Lawsuits Against Public Participation
<b>EAW</b>	European Arrest Warrant
<b>NGO</b>	Non Governmental Organisation

# 1. Introduction and Overview

This handbook is designed as a practical guide for lawyers committed to upholding the rule of law. It aims to clarify the central role of legal practitioners in safeguarding democratic values and ensuring justice within the European Union. By illustrating key principles, obligations, and mechanisms under EU law, this resource provides actionable insights for legal professionals.

The rule of law serves as a cornerstone of democracy, guaranteeing fundamental rights, legal certainty, and access to impartial justice. Lawyers are pivotal in ensuring compliance with these principles by scrutinizing state actions, securing effective judicial remedies, and advocating for their clients' rights. This handbook explores the intricacies of these responsibilities and provides essential tools for legal professionals to navigate their obligations effectively.

## Purpose of the Handbook



This handbook provides a comprehensive overview of the rule of law within the European Union framework. It examines the legal foundations, principles, and recent case law that define and protect the rule of law. The purpose is to empower legal professionals by equipping them with the knowledge to:

- Identify violations of fundamental rights.
- Apply EU law to protect individuals and organisations.
- Advocate for justice and transparency in judicial processes.



## 2. The role of Lawyers in the protection of the Rule of Law

### 2.1 Defining the rule of law

The rule of law can be understood as resting on two fundamental principles: the principle of legality and the right to an effective remedy before a court. The first ensures that all state actions are governed by law, and that any limitation of rights and freedoms must be clearly provided for by law. The second guarantees access to an independent and impartial judiciary. Judges must administer justice within a reasonable timeframe and ensure that their decisions are effectively enforced by the competent authorities..

### 2.2 The Lawyer's role in ensuring legal certainty

Lawyers are at the heart of the application of these two principles. They must protect their client's interests by ensuring that any norm or decision whether civil or criminal, being applied by the State or its bodies, complies with in law. Moreover, they must secure effective judicial remedies to challenge such norms or decisions as mandated by Article 19 TEU and Article 47 of the Charter). This is a fundamental aspect of a lawyer's daily work and extends equally to disputes involving the application of rules or decisions between private individuals or legal entities.

A core aspect of the rule of law is legal certainty, which protects individuals from arbitrary decisions. The rule of law must provide those to whom the law is addressed with a **clear, precise and stable framework**, providing them with the necessary certainty and enabling them to foresee the consequences of their actions. Lawyers play a key role in scrutinising state measures to ensure these requirements are met.

In criminal law for example, legal norms must be clear, comprehensible, accessible and non-retroactive, as required by **Article 49 of the Charter**. Legal norms must ensure that measures taken by the State to deprive individuals of their liberty comply with **Article 6 of the Charter** of Fundamental Rights (Right to liberty and security).

In civil matters, legal certainty is safeguarded by **Article 6-1 of the European Convention** as interpreted by the European Court of Human Rights.

### 2.3 The Lawyer's role in guaranteeing fair trials and judicial independence

A fundamental duty of lawyers is to ensure that the judicial procedures guarantee a fair trial (Article 47 of the Charter). This includes addressing issues related to the composition of courts, the appointment of judges and the impartiality of judges.

The right to a fair trial, enshrined in Article 47 of the Charter, requires that lawyers scrutinise judicial processes to ensure their clients' rights are respected. They also act as safeguards against political or institutional biases that could undermine the impartiality of the judiciary.

## 2.4 The lawyer's role in protecting fundamental rights

Lawyers must uphold the general principle of non-discrimination enshrined in Articles 2 and 3 of the EU Treaty and Article 21 of the Charter of Fundamental Rights.

Lawyers must ensure that the State respects the non-derogable rights guaranteed by the Charter. These include:

- **Article 3:** Right to the integrity of the person
- **Article 4:** Prohibition of torture and inhuman or degrading treatment or punishment
- **Article 5:** Prohibition of slavery and forced labour



## 2.5 The lawyer's role in safeguarding the freedom of the press and media pluralism

In disputes concerning freedom of the press, the right to information and media pluralism, lawyers must ensure that European and international standards protecting the rule of law are upheld. They must challenge disproportionate or unjustified restrictions that could undermine these freedoms.

Civil society organizations (NGOs), lawyers and human rights defenders play an essential role in democratic life, actively promoting the rule of law, democracy and fundamental rights on the ground. Their role is fundamental in identifying and raising awareness of violations of the rule of law.



Lawyers can use the full spectrum of European Union law, including the protection of whistleblowers under the Directive, the case law of the European Court of Human Rights on Article 10 of the European Convention on Human Rights, and the protection of defenders under the forthcoming anti-SLAPP Directive.

# 3. The rule of law : a core principle of European Union law

## 3.1 Foundations of the Rule of Law in EU Treaties

The rule of law is one of the common values on which the European Union is founded, as outlined in Article 2 of the Treaty on European Union (TEU). Similarly, the rule of law is one of the conditions for membership of the Union, in application of Article 49 of the TEU.





**Article 2 TEU:** *“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”*

**Article 19 (1) TEU:** *“The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”*

**Article 49 TEU:** *“Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.”*

## 3.2 The rule of law in European Union case law

### **The right to independence of the judiciary as a guarantee of a fair trial at the heart of the rule of law.**

Judicial independence is a vital component of the rule of law, ensuring fair trials and effective protection of rights under EU law. The Court of Justice of the European Union acts as the guardian of the rule of law in cases where the independence of the judiciary is called into question within domestic legal systems.



**CJEU Judgement in Cases C-64/16, (Associação Sindical dos Juizes Portugueses, February 27, 2018)**

*Keywords: Legal remedies - Effective judicial protection — Judicial independence — Charter of Fundamental Rights of the European Union — Article 47 — Reduction of remuneration in the national public administration — Budgetary austerity measures*

**Facts:**

The case concerned a temporary reduction in the remuneration of members of the Tribunal de Contas (Court of Auditors of Portugal), implemented as part of Portugal's budgetary austerity measures. Associação Sindical dos Juizes Portugueses (Trade Union of Portuguese Judges) contested the reduction, arguing it undermined judicial independence. The Portuguese court referred a question to the CJEU, seeking clarification on whether the principle of judicial independence under the SECOND subparagraph of Article 19(1) TEU precluded such measures.

**Ruling:**

The CJEU ruled that the second subparagraph of Article 19(1) TEU embodies the value of the rule of law affirmed in Article 2 TEU. It established a structural obligation on Member States to provide legal remedies sufficient to ensure effective judicial protection in areas covered by EU law. Judicial independence was affirmed as a critical element of this protection, requiring safeguards not only against removal from office but also through remuneration commensurate with the importance of judicial functions.

The Court emphasized that under the principle of sincere cooperation (Article 4(3) TEU), Member States must ensure the application and respect of EU law within their jurisdictions. This obligation includes the establishment of a legal framework that guarantees effective judicial review.

The Court affirmed that judicial independence is essential to the rule of law and effective judicial protection. It further stated that the principle of effective judicial protection, as referred to in the second subparagraph of Article 19(1) TEU, is rooted in the constitutional traditions common to Member States and reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union.

The Court concluded that **the very existence of effective judicial review is a fundamental component of the rule of law. Member States are therefore required to ensure that courts or tribunals within their judicial systems meet the requirements of independence and effective protection in areas covered by EU law.**





**CJEU Judgement in Cases C-83/19, C- 127/19, C-195/19, C-291/19, C-355/19 et C-397/19, (Forumul Judecătorilor din România, May 18, 2021) / CJEU Judgement in Cases C-430/21, (RS, February 22, 2022)**

*Keywords: Rule of law – Judicial independence – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Laws and government emergency ordinances adopted in Romania in the course of 2018 and 2019 concerning the organisation of the judicial system and the liability of judges*

**Facts:**

In 2018, Romania enacted a law establishing a section within the Public Prosecutor's Office to investigate offences committed by judges and prosecutors (the SIIJ). This law was widely contested by Romanian magistrates, who argued that its primary purpose was to undermine efforts against corruption and exert pressure on national judges, thereby compromising their independence.

The controversy escalated to the Court of Justice of the European Union (CJEU) in the context of rulings regarding judicial independence and the primacy of Union law. The Romanian Constitutional Court interpreted constitutional provisions in ways that deprived lower courts of the power to disapply national laws conflicting with EU law. Judges who attempted to uphold Union law risked facing disciplinary proceedings, further intensifying the crisis.

**Ruling:**

The CJEU, in its May 2021 judgment in *Forumul Judecătorilor din România*, held that the principle of primacy of Union law precludes a constitutional provision or its interpretation from restricting the ability of national courts to disapply national laws incompatible with EU law. The Court reiterated that national judges, as part of the EU judicial system, play a crucial role in safeguarding the primacy of Union law and ensuring effective judicial protection.

In the subsequent February 2022 judgment in Case C-430/21 (RS), the CJEU expanded on this principle. It ruled that the second subparagraph of Article 19(1) TEU, read in conjunction with Articles 2 and 4(2) and (3) TEU, Article 267 TFEU, and the principle of primacy of EU law, prohibits national rules or practices that prevent ordinary courts from examining the compatibility of national legislation with EU law. The Court also declared that disciplinary liability imposed on judges for applying EU law, as interpreted by the CJEU, is incompatible with the principle of the primacy of EU law.

The judgments reinforced the primacy of EU law over conflicting national laws, even those with constitutional status. National courts must have the authority to disapply national provisions inconsistent with EU law. The rulings also underscored the **critical role of judicial independence in upholding the rule of law. The imposition of disciplinary liability on judges for applying EU law constitutes an unacceptable interference with judicial independence, further undermining the principles of effective legal protection and sincere cooperation between Member States and the EU.**



### CJEU Judgement in Cases C-619/18, (*European Commission v Republic of Poland*, June 24, 2019)

*Keywords: Failure of a Member State to fulfil obligations — Second subparagraph of Article 19(1) TEU — Rule of law — Effective judicial protection in the fields covered by Union law — Principles of the irremovability of judges and judicial independence — Lowering of the retirement age of Supreme Court judges*

#### **Facts:**

The case arose from legislative changes in Poland that lowered the retirement age for Supreme Court judges. This rule was applied retroactively to judges who had already been appointed prior to the law. Additionally, the law granted the President of the Republic discretionary power to extend the term of office for judges beyond the new retirement age.

The European Commission initiated action against Poland, arguing that these changes undermined the principles of judicial independence and the rule of law, as guaranteed by Article 19(1) TEU. The case marked the first time the CJEU condemned a Member State for breaching principles of effective judicial protection, judicial independence, and security of tenure.

#### **Ruling:**

The CJEU ruled that the independence of the judiciary is an essential component of the fundamental right to a fair trial. Judicial independence includes protections such as the irremovability of judges and safeguards against external influences, including political control. The Court stated that rules governing disciplinary systems for judges must include sufficient guarantees to prevent such systems from being used to influence judicial decisions.

While Poland argued that the law aimed to create a more balanced age structure within the judiciary, the Court determined that these legislative changes introduced elements that could create serious doubts about the true objectives. The changes were likely to raise legitimate concerns among litigants about the impartiality and independence of the judiciary, given the discretionary powers granted to the President.

Earlier in the proceedings, the Court issued interim orders (October 19, 2018) requiring Poland to suspend the application of the contested provisions. These orders highlighted the Court's concern that the provisions posed a direct threat to judicial independence.



### CJEU Judgement, C-791/19, (European Commission v Republic of Poland, July 15, 2021)

*Keywords: Failure of a Member State to fulfil obligations – Disciplinary regime applicable to judges – Rule of law – Independence of judges – Effective legal protection in the fields covered by Union law – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Disciplinary offences resulting from the content of judicial decisions – Independent disciplinary courts or tribunals established by law –*

#### **Facts:**

The European Commission brought an action against Poland, asserting that the disciplinary chamber of the Polish Supreme Court failed to meet the requirements of independence and impartiality under Article 19(1)(2) TEU. The Commission argued that Poland's disciplinary regime, particularly the definitions of disciplinary offences, allowed for the regime to be used to exert pressure on judges and influence their decisions.

The disciplinary system restricted judges' independence by creating a chilling effect, deterring them from making decisions contrary to political expectations. Moreover, the system's procedural shortcomings, such as its lack of guarantees for impartiality and its potential to interfere with judicial decision-making, significantly undermined the rights of the defence, including the right to be heard and access to legal counsel.

#### **Ruling:**

The CJEU ruled that the requirement of judicial independence, as derived from the second subparagraph of Article 19(1) TEU, demands that national courts tasked with applying EU law adhere to procedural standards that safeguard effective judicial protection. This includes ensuring that disciplinary mechanisms for judges operate under the oversight of independent bodies that fully respect the rights guaranteed under Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.

The Court concluded that disciplinary proceedings must not be designed to exert political control over judicial decisions. Judges must be free to interpret and apply EU law without fear of repercussions. To this end, the disciplinary system must not impose disproportionate restrictions on judges' rights of defence or hinder their ability to access legal representation.

The CJEU also underscored those restrictions on fundamental rights, such as the right to defence, are only permissible if they pursue legitimate objectives of general interest and do not result in disproportionate or intolerable interference that infringes upon the essence of those rights.

**The Court reaffirmed that judicial independence is an indispensable element of the rule of law and effective legal protection.** Member States are obligated to establish disciplinary regimes that:

- Avoid any perception or reality of political control over the judiciary.
- Provide sufficient procedural safeguards, including impartiality and independence of disciplinary bodies.
- Ensure timely resolution of disciplinary cases to maintain public trust in the judiciary.

The ruling further emphasised that disciplinary systems that fail to protect judges' rights of defence undermine the essence of judicial independence and contravene EU law. The decision reinforced the CJEU's role in safeguarding the fundamental principles underpinning the rule of law within the European Union.



**CJEU Judgement, C-157/21, (Parlement and European Commission v Republic of Poland, February 16, 2022)**

*Keywords: Protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States –, legal certainty, proportionality and equality of the Member States before the Treaties – Alleged misuse of powers*

**Facts:**

The case concerned the validity of the rule of law conditionality mechanism adopted in September 2020, which allows the European Union to suspend funding to Member States that undermine or risk undermining the rule of law. The mechanism was challenged by Poland and Hungary, which argued that it exceeded the powers of the EU institutions and infringed on Member State sovereignty.

The European Parliament and Commission defended the mechanism, asserting that it is essential to protect the Union's budget and ensure compliance with the principles of sound financial management. The mechanism ties respect for the rule of law to access to EU funds, reflecting the shared values underpinning the Union.

**Ruling:**

The CJEU upheld the rule of law conditionality mechanism, confirming its validity under Article 322(1)(a) TFEU, which allows financial rules concerning the Union budget to be adopted by regulation. The Court ruled that respect for the rule of law is indispensable to ensuring sound financial management, and breaches of the rule of law in Member States can justify the suspension of Union funding.

The Court explained that Article 2 TEU serves as a legal foundation for the conditionality mechanism. The rule of law, as enshrined in Article 2, is a shared value of the Member States and underpins the Union's legal and institutional framework. Respect for the rule of law is not limited to the accession phase for candidate countries; it remains an ongoing obligation for all Member States.

The Court acknowledged that the contested regulation does not explicitly define the principles of the rule of law it mentions. However, recital 3 of the regulation refers to principles such as legality, legal certainty, the prohibition of arbitrariness, effective judicial protection, and the separation of powers. These principles are deeply rooted in EU case law and shared legal traditions among Member States.

The Court further referenced earlier judgments to substantiate these principles, including *Hungary v Parliament* (C-650/18) and *Belgian State* (C-930/19), which address equality before the law, non-discrimination, and other core aspects of the rule of law. These principles are intrinsic to the Union's legal system and are recognised across Member States.

## **European Arrest Warrant and respect of the rule of law**

The European Arrest Warrant (EAW) is governed by a 2002 framework decision, based on the principle of mutual recognition between member states and their judicial authorities. The surrender of the person named in an EAW (for the purposes of criminal prosecution or enforcement of an existing sentence) is the principle, while refusal to execute the EAW (refusal to surrender) is the exception. The judicial authority of the executing Member State may therefore refuse to execute the EAW only on the grounds exhaustively listed, and in particular to ensure respect for the fundamental rights of the wanted person.

For example, if surrender to the issuing judicial authorities would expose the person to a risk of violation of one of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, the warrant cannot be executed. Specifically, if it is established that there is a risk of inhuman or degrading treatment within the meaning of article 4 of the Charter, the executing judicial authority must refuse the surrender



**CJEU Judgement, C-404/15 and C-659/15, (Aranyosi and Căldăraru, April 5, 2016)**

*Keywords: Police and judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrant — Grounds for refusal to execute — Charter of Fundamental Rights of the European Union — Article 4 — Prohibition of inhuman or degrading treatment — Conditions of detention in the issuing Member State.*

**Facts:**

In this case, a Hungarian examining magistrate issued two European arrest warrants for Mr. Pál Aranyosi, a Hungarian national, to bring criminal proceedings for two burglaries committed in Hungary. The German authorities were tasked with examining these warrants for potential execution. Similarly, a European arrest warrant was issued for Mr. Robert Căldăraru, a Romanian national, for the enforcement of a custodial sentence imposed in Romania.

The German court raised concerns regarding the conditions of detention in Hungarian and Romanian prisons. Relying on previous judgments of the European Court of Human Rights from June 10, 2014, and March 10, 2015, which highlighted overcrowding in Hungarian and Romanian prisons, the German court questioned whether executing these warrants would violate fundamental rights. Specifically, the court sought clarification on whether execution could or must be refused or delayed if there was a risk of inhuman or degrading treatment under Article 4 of the Charter of Fundamental Rights of the European Union. The German court also inquired whether execution could be made conditional on obtaining further assurances from the issuing Member State regarding detention conditions.

**Ruling:**

The Court of Justice of the European Union (CJEU) ruled that where the executing judicial authority finds that there is a real risk of inhuman or degrading treatment under Article 4 of the Charter, the execution of the European arrest warrant must be deferred. Article 4, which prohibits inhuman or degrading treatment or punishment, imposes binding obligations on Member States and their courts when implementing EU law, as stated in Article 51(1) of the Charter. This includes situations where the issuing and executing judicial authorities are applying provisions of national law adopted to transpose the Framework Decision on the European Arrest Warrant.

The Court clarified that the executing judicial authority must assess whether there is evidence of systemic or generalized deficiencies in detention conditions in the issuing Member State. If such deficiencies are identified, the authority must seek supplementary information from the issuing Member State regarding the specific detention conditions to which the individual would be exposed. Execution of the EAW can only proceed if the executing authority is satisfied, based on the information provided, that the individual will not face a real risk of inhuman or degrading treatment.



### CJEU Judgement, C-216/18, (*Minister for Justice and Equality/LM*, July 25, 2018)

*Keywords: Police and judicial cooperation in criminal matters — European arrest warrant — Framework Decision 2002/584/JHA — Article 1(3) — Surrender procedures between Member States — Conditions for execution — Charter of Fundamental Rights of the European Union — Article 47 — Right of access to an independent and impartial tribunal.*

#### Facts:

The case concerned LM, a Polish national, who was the subject of three European arrest warrants issued by Polish courts for prosecution on charges of illegal drug trafficking. LM was arrested in Ireland on May 5, 2017, but he refused to consent to his surrender to the Polish authorities. LM argued that reforms to the Polish judicial system created a real risk that he would not receive a fair trial in Poland due to deficiencies in judicial independence.

The Irish High Court referred the matter to the Court of Justice of the European Union (CJEU), seeking guidance on whether concerns about the issuing Member State's judiciary could justify refusing to execute an EAW.

#### Ruling:

The CJEU ruled that under Article 47 of the Charter of Fundamental Rights of the European Union, which guarantees the right to an independent and impartial tribunal, the executing judicial authority must refrain from giving effect to a European arrest warrant if it determines that there is a real risk of a breach of the fundamental right to a fair trial.

The Court emphasised that such a determination must be made in two stages:

1. The executing judicial authority must first assess whether there is objective evidence of a systemic or generalised deficiency in the independence of the judiciary in the issuing Member State.
2. If such deficiencies are established, the authority must then evaluate whether there is a specific and substantiated risk that the individual concerned would suffer a breach of their fundamental right to an independent and impartial tribunal in the context of their specific case.

**The person resisting surrender must provide documentation and evidence to support their claim that these deficiencies pose a serious risk to their right to a fair trial. Lawyers play a crucial role in assisting the person concerned in presenting their case before the executing judicial authorities.**



## Right to freedom of association

### CJEU Judgement in Cases C-78/18, (*European commission v Hongrie*, June 18, 2020)



*Keywords: Article 12 of the Charter of Fundamental Rights of the European Union — Right to freedom of association — National rules imposing on associations receiving financial support sent from other Member States or from third countries legally binding obligations of registration, declaration and publication which can be enforced — Article 7 of the Charter of Fundamental Rights — Right to respect for private life — Article 8(1) of the Charter of Fundamental Rights — Right to the protection of personal data*

#### Facts:

The case concerns Hungary's adoption of the Law of 2017 on the Transparency of Organisations Receiving Support from Abroad, referred to as the "Transparency Law." This law imposes legally binding obligations of registration, declaration, and publication on civil society organizations that receive financial support from other Member States or third countries above a specific threshold. Organizations failing to comply with these obligations are subject to penalties. The European Commission brought the case before the Court, arguing that these measures were discriminatory, unjustified, and unnecessary restrictions on foreign donations to civil society organizations.

The Commission contended that the Transparency Law violated Hungary's obligations under Article 63 of the Treaty on the Functioning of the European Union (TFEU), which ensures the free movement of capital. Furthermore, the Commission argued that the law breached Articles 7, 8, and 12 of the Charter of Fundamental Rights of the European Union. Article 12 guarantees the right to freedom of association, Article 7 ensures the right to respect for private life, and Article 8 protects the right to personal data.

#### Ruling:

The Court ruled that the Transparency Law introduced significant limitations on the right to freedom of association, as protected under Article 12(1) of the Charter. The obligations of registration, declaration, and publication imposed by the law made it significantly more difficult for associations and foundations to operate, particularly by deterring foreign financial support. The penalties for non-compliance amplified this dissuasive effect, further hindering the operation of civil society organizations. Consequently, the provisions of the law were found to limit the right to freedom of association.

The Court also found that the Transparency Law violated Articles 7 and 8 of the Charter. Under Article 7, everyone has the right to respect for private and family life, while Article 8 guarantees the right to the protection of personal data. The Court observed that the law required the disclosure and publication of personal data associated with foreign donors. Such obligations constitute limitations on the right to respect for private life and the right to data protection. The processing of personal data, as required by the Transparency Law, failed to meet the standards of fair processing under Article 8(2). Hungary did not demonstrate that the provisions complied with these requirements. As a result, the obligations imposed by the law infringed both the right to private life and the right to the protection of personal data.

The Court acknowledged that the stated objective of the Transparency Law, namely to enhance transparency in the financing of civil society organizations, could be considered a legitimate public interest. However, it concluded that the measures imposed by the law were disproportionate and incompatible with the requirements of EU law. In pursuing transparency, the law excessively interfered with fundamental rights and could not be justified.

In its final judgment, the Court declared that Hungary's Transparency Law was in breach of Article 63 TFEU, as well as Articles 7, 8, and 12 of the Charter of Fundamental Rights of the European Union.

## Legal professional privilege and confidentiality of lawyer and client relation

Legal professional privilege is a cornerstone of the legal profession and a fundamental aspect of the rule of law. It ensures that communications between lawyers and their clients remain confidential, fostering trust and enabling individuals to seek legal advice freely without fear of disclosure. This principle is critical in democratic societies, where lawyers play a key role in defending litigants and ensuring justice. Legal professional privilege is protected under Article 7 of the Charter of Fundamental Rights of the European Union, which guarantees the right to respect for private and family life, including private communications. The importance of maintaining confidentiality in lawyer-client relationships was at the heart of the CJEU's judgment in Case C-694/20: *Orde van Vlaamse Balies et Belgian Association of Tax Lawyers*, which assessed the compatibility of a directive imposing reporting obligations on lawyers with the Charter.



### CJEU Judgement, C-694/20, (*Orde van Vlaamse Balies et Belgian association of tax lawyers*, December 8, 2022)

*Keywords : Directive 2011/16/EU, as amended by Directive (EU) 2018/822 – Article 8ab(5) – Validity – Legal professional privilege of the lawyer – Exemption from the reporting obligation for the benefit of lawyer-intermediaries subject to legal professional privilege – Obligation on that lawyer-intermediary to notify any other intermediary who is not his or her client of that intermediary's reporting obligations – Articles 7 and 47 of the Charter of Fundamental Rights of the European Union.*

**Facts:** This case concerned the insertion of a provision into Directive 2011/16/EU by a May 2018 directive, aimed at combating aggressive tax planning. The provision required lawyers, who are exempt from reporting potentially aggressive cross-border tax planning schemes to tax authorities due to legal professional privilege, to notify other intermediaries (such as financial or accounting professionals) of their reporting obligations under the directive.

The Belgian Constitutional Court requested a preliminary ruling to the Court of Justice of the European Union (CJEU), questioning the validity of this provision. The reference for a preliminary ruling was based on concerns that it infringed the legal professional privilege of lawyers, as protected by Article 7 of the Charter of Fundamental Rights, which guarantees respect for private communications, including between lawyers and their clients.

**Ruling:** The CJEU declared the contested provision invalid, holding that it constituted an unjustified interference with the legal professional privilege of lawyers. Article 7 of the Charter provides strengthened protection for communications between lawyers and their clients, ensuring confidentiality both in the content and the existence of consultations.

The Court reasoned that the obligation for lawyers to notify other intermediaries of their reporting duties breached this protection in two significant ways:

1. **Disclosure of Client Information to Third Parties:** The provision required lawyers to disclose information concerning their clients, including the identity of the lawyer and their legal analysis of the tax arrangement, to intermediaries who were not their clients. This obligation undermined the confidentiality of lawyer-client communications.
2. **Subsequent Disclosure to Tax Authorities:** The notified intermediaries were in turn required to report this information to tax authorities, further breaching the confidentiality of legal consultations.

The Court emphasised that legal professional privilege is fundamental to a lawyer's role in defending litigants in a democratic society, enabling individuals to seek legal advice freely without fear of disclosure. Any interference with this privilege must be strictly justified and proportionate, which was not the case here.

## Judicial cooperation and Execution of judicial decision

Judicial cooperation within the European Union is built on the principle of mutual recognition of judicial decisions across Member States. Regulation (EC) No 1393/2007 facilitates this cooperation by establishing rules for the service of judicial and extrajudicial documents in civil and commercial matters. However, this framework must align with the fundamental rights enshrined in EU law, particularly the right to a fair hearing.

The CJEU's judgment in Case C-325/11: *Krystyna Alder v Sabrina Orłowska* illustrates the balance required between the efficiency of cross-border judicial cooperation and the protection of procedural rights, ensuring the effective execution of judicial decisions while upholding the rights of the defence.



### CJEU Judgement in Cases C-325/11, (*Krystyna Alder v Sabrina Orłowska*, December 19, 2012)

*Keywords: Regulation (EC) No 1393/2007 – Service of documents – Party domiciled in the territory of another Member State – Representative domiciled in national territory – None – Procedural documents placed in the case file – Presumption of knowledge.*

#### Facts:

This case concerned the interpretation of Article 1(1) of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, and repealing Council Regulation (EC) No 1348/2000, and of Article 18 TFEU.

The preliminary reference has been made in the context of proceedings between, on the one hand, Mrs Alder and Mr Alder and, on the other, Mrs Orłowska and Mr Orłowski ('Mr and Mrs Orłowski') in relation to the application, introduced by Mr and Mrs Alder, to have proceedings resumed in the case of a claim for debt that they had brought against Mr and Mrs Orłowski.

#### Ruling:

The court held that the regulation has, admittedly, the objective of improving and expediting the transmission of judicial documents between Member States. However, as the Court has already held, those objectives **cannot be attained by undermining in any way the rights of the defence of the addressees, which derive from the right to a fair hearing, enshrined in the second paragraph of Article 47 of the Charter of fundamental Rights and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms**, signed in Rome on 4 November 1950.



**CJEU Judgement, C-34/17, (*Eamonn Donnellan v The revenue Commissioners*, April, 26, 2018)**

*Keywords: Mutual assistance for the recovery of claims — Directive 2010/24/EU — Article 14 — Right to an effective remedy — Charter of Fundamental Rights of the European Union — Article 47 — Possibility for the requested authority to refuse recovery assistance on the basis that the claim was not duly notified.*

**Facts:**

This case arose from a dispute between Mr. Eamonn Donnellan and the Revenue Commissioners of Ireland over the recovery of a claim based on a fine imposed by a Greek customs authority. The fine, along with associated interest, costs, and penalties, was being recovered by the Irish authorities at the request of the Greek authorities under Directive 2010/24/EU.

Mr. Donnellan argued that he had not been duly notified of the fine and its reasoning in Greece, which deprived him of the opportunity to challenge the decision in the issuing Member State. The Irish national court referred the case to the Court of Justice of the European Union (CJEU) to determine whether Article 14(1) and (2) of the Directive allows the requested authority to refuse recovery assistance in cases where the right to an effective remedy has been compromised.

**Ruling:**

The CJEU ruled that Article 14(1) and (2) of Directive 2010/24/EU must be interpreted in light of Article 47 of the Charter of Fundamental Rights, which guarantees the right to an effective remedy. This right ensures that individuals must have adequate knowledge of decisions affecting them to defend their interests effectively.

The Court held that:

1. To exercise their right to an effective remedy, individuals must be able to understand the reasons and scope of decisions affecting them. This requires that the addressee of a claim be duly notified of the decision and its reasoning, either through direct access to the decision or by obtaining the necessary details upon request.
2. The person concerned must be given an opportunity to contest the claim in the applicant Member State under conditions compatible with their fundamental right to a fair hearing. If this opportunity is not provided, the requested authority cannot enforce the recovery request.
3. In cases where the addressee has not been duly notified and has not had a chance to raise their objections before the courts of the applicant Member State, the requested Member State may refuse to enforce the recovery request. Enforcing such a claim without ensuring the individual's right to an effective remedy would contravene the principles of the Directive and the Charter.

### 3.3 Directive SLAPPS

Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”). Manifestly unfounded or abusive court proceedings against public participation (commonly referred to also as strategic lawsuits against public participation or ‘SLAPPs’) are a recent but increasingly prevalent phenomenon in the European Union. They are a particularly harmful form of harassment and intimidation used against those involved in protecting the public interest. SLAPPs are groundless or exaggerated court proceedings typically initiated by powerful individuals, lobby groups, corporations or state organs against parties who express criticism or communicate messages that challenge or inconvenience the claimants, on matters of public interest. Their purpose is to censor, intimidate and silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition. These lawsuits are initiated to intimidate the defendants and to drain their resources. The goal is to achieve a chilling effect, silence the defendants and deter them from pursuing their work. Typical targets of SLAPPs are journalists and human rights defenders. This extends beyond individual persons to media and publishing houses and civil society organisations, such as those involved in environmental activism. This phenomenon poses a serious threat to European democracy and the rule of law. Human rights defenders have a critical role to play in upholding fundamental rights, democratic values, social inclusion, environmental protection and the rule of law. The proposed directive is part of the European Democracy Action Plan which aims to strengthen media pluralism and media freedom in the European Union. It also seeks to protect human rights defenders, who play a key role in our democracies and who are also increasingly vulnerable to such abusive forms of harassment.

The proposal aims to protect targets of SLAPPs and prevent the phenomenon from further expanding in the EU.

On 29 November 2023, the European Parliament and the Council of the EU reached a compromise on the proposed directive to protect journalists and human rights activists from abusive cross-border civil proceedings, commonly referred to as strategic lawsuits against public participation (SLAPPs). The directive is designed to enable judges to identify SLAPPs and order their early dismissal, thereby sparing journalists or activists targeted by such proceedings the burden of defending against manifestly unfounded claims brought against them in bad faith with the sole purpose of harassment. The directive includes provisions for the reimbursement of legal costs incurred by SLAPP victims, unless it can be shown that such costs were excessive. While journalists are also targeted by criminal SLAPPs, this directive applies solely to civil litigation, and only in cross-border cases. The European Parliament has approved the compromise text during its session in the week of 26 February 2024. EU Member States have two years to implement the directive, that is, by 2026.





### 3.4 Protection for whistleblowers

**Key text:** Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

Directive- (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law- was adopted on 23 October 2019 and entered into force on 16 December 2019. Member States had until 17 December 2021 to transpose it into their national laws.

Individuals working for a public or private organisation or those working with such organisations in the context of their work-related activities are often the first to become aware of threats or harm to the public interest which arise in that context. By reporting breaches of Union law that are harmful to the public interest, these individuals act as ‘whistleblowers’ and thereby play a critical role in exposing and preventing such breaches and in safeguarding the societal welfare. However, many potential whistleblowers are deterred from reporting their concerns or suspicions due to fear of retaliation. In this context, the need for balanced and effective whistleblower protection is increasingly acknowledged at both Union and international levels.

Individuals who report information about threats or harm to the public interest obtained in the context of their work-related activities exercise their right to freedom of expression. This right, enshrined in Article 11 of the Charter and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, encompasses the right to receive and impart information, as well as the freedom and pluralism of the media. Accordingly, the Directive builds upon ECHR case law on freedom of expression, and the principles developed by the Council of Europe, including its Recommendation on the Protection of Whistleblowers adopted by its Committee of Ministers on 30 April 2014.

Whistleblowers are particularly important sources for investigative journalists. Providing effective protection to whistleblowers from retaliation increases legal certainty for potential whistleblowers, thereby encouraging them to come forward, including via the media. This protection is crucial for safeguarding the ‘watchdog’ role of investigative journalism in democratic societies.

The protection of whistleblowers is also essential for detecting and preventing corruption. The transposition of the EU Directive on whistleblower protection has resulted in revised or new legislation in many Member States, as noted in last year’s report. Since July 2022, several countries have adopted or implemented laws to transpose the Directive or to otherwise strengthen the protection of whistleblowers.

Nevertheless, there are still major obstacles to reporting corruption cases in practice with less than half of Europeans (45%) knowing where to report a case of corruption and 30% of Europeans believing that reporting is futile, as those responsible are unlikely to face punishment. Legislative measures are being bolstered by efforts to implement new laws and encourage whistleblowers to use the new channels for reporting.