**NETWORK OF THE PRESIDENTS OF THE SUPREME JUDICIAL COURTS**

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Questionnaire

***Topic: Impact of European Law on National Law***

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In the following questionnaire European law should be understood as encompassing the Convention for the Protection of Human Rights and Fundamental Freedoms and European Union law. Indeed, these are “*two branches of law which, although distinct, influence each other and form two aspects of the same legal reality: the reality of a law integrated into the national legal order*”[[1]](#footnote-1).

These previously much-criticised rights have now been incorporated within the legal orders of the Member States of the European Union. It is therefore relevant to refer to the Europeanisation of law. In academic writing, the concept of Europeanisation has three main dimensions:

*1) “A vertical movement from the top (the European institutions) to the bottom (the Member States), through which European Union law exerts an influence on domestic law;*

*2) An inverse vertical movement from the bottom (the Member States) to the top (the European institutions), by means of transfers of powers to the European Union or transfers of prerogatives to the European institutions (however, the fact that the adoption of European rules, whether primary law or secondary law, results from negotiations which, on occasion, may be more advantageous for one State than another, does not prevent it from being seen, generally speaking, as a form of Europeanisation);*

*3) A horizontal movement from one Member State to another. In other words, the convergence of national laws is the result of a transfer or an imitation: one Member State can decide to adopt a rule that was issued in another Member State without it being imposed from above by the institutions of the European Union” [[2]](#footnote-2).*

This multifactorial Europeanisation bears witness to the impact of European law on the positive law of the Member States and modulates the organisation of the judicial institution. This observation is reinforced by a process of progressive expansion and acceptance of fundamental rights in domestic legal systems (“fundamentalisation”), notably through the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union.

Therefore, in order to structure this questionnaire and our future thinking, allow me to refer to Professor Mireille Delmas-Marty who, in her work on *La grande complexité du monde juridique*[[3]](#footnote-3) (the great complexity of the legal world), refers to the various forms of legal integration in terms of the “*globalisation of law*”[[4]](#footnote-4), namely “*normative, jurisdictional and institutional, which are developing simultaneously on a regional and global scale*”. This questionnaire will provide an opportunity to examine the impact of European law on the positive law of the Member States, particularly from (I) the institutional, (II) the jurisdictional and (III) the normative standpoints. These three parts will be preceded by preliminary questions that are general in nature, and followed by examples relating to common themes.

To help you analyse the questions and draft your answers, you will find some short answers relating to France in the footnotes, and all the detailed answers from the French Cour de cassation in the appendix to the questionnaire.

Preliminary questions

1. Can you explain how the provisions of European Union primary law and the international treaties of the Council of Europe such as the European Convention for the Protection of Human Rights and Fundamental Freedoms are positioned in your country's domestic legal order? Do these provisions have directly binding legal force (monist tradition)? Do they have to be transposed into national law (dualist tradition)? Alternatively, do you have a mixed system? Are there any debates on this subject?
2. What is the position of European law in relation to international law in your country (is a distinction made)?
3. Similarly, how are the provisions of European law placed within the hierarchy of norms of your domestic legal system? Please briefly describe your country's case law on the construction of this hierarchy of norms and on the principle of primacy of European Union law.

**I§ Institutional impact**

*What is the impact of European law on the institutional organisation of supreme courts?*

**Question 1.** (a) Has European law and the case law of the supranational courts led to reforms in your institutions?

Please provide a few practical examples highlighting the institutional impact of European law on your court or jurisdiction (following a ruling by the CJEU or the ECHR, for example).

(b) What recent justice reforms have been driven by Europe in your country?

**Question 2.** Has your country created a legal channel and/or a specialised body for the recognition in domestic law of the effects of judgments handed down by the European Court of Human Rights? If so, is it linked to your Court?

**Question 3.** Has your court, and more generally the justice system in your country, benefited from a European programme? If yes, what was its impact?

**Question 4.** What methods are used and what measures have been put in place within your Court to enable the judges and legal practitioners of your court to follow the case law of the CJEU and the ECHR with a view to improving the reception and implementation of European law? Do the members of your court receive training in European law?

**II§ Jurisdictional impact**

*How has European law changed the role or function of the judge and how has it inserted itself into the case law of the supreme judicial courts?*

**Question 5.** In what way do you consider that European law has modified your role or position as a judge?

**Question 6.** As a judge of ordinary law, of European Union law and primary judge of the European Convention for the Protection of Human Rights and Fundamental Freedoms, do you regularly and explicitly refer in your judgments to provisions of European law, general principles of law and decisions handed down by the CJEU and the ECHR? If that is the case, can you briefly outline the history of your supreme court's acceptance of these “rights originating from elsewhere”[[5]](#footnote-5), in particular the rulings that marked this acceptance?

For what purposes are CJEU and ECHR rulings referred to in the decisions of your courts (whether it be vis-à-vis internal/external stakeholders or to engage in judicial dialogue)?

**Question 7.** (a) Discussion between judges is essential “at a European level, where not only do the national legal orders and the Community legal order coexist, but the national legal orders also coexist with the legal order resulting from the Convention for the Protection of Human Rights and Fundamental Freedoms”[[6]](#footnote-6). Does your court regularly refer questions to the CJEU for a preliminary ruling (under Article 267 TFEU) or request advisory opinions from the ECHR (Protocol No. 16)?

(b) The national court decides, on the basis of considerations of procedural utility and cost saving, at what stage of the proceedings to refer a question to the CJEU for a preliminary ruling (under Article 267 TFEU (*CJEC, Judgment of 10 March 1981, Irish Creamery Milk Suppliers Association and Others, Joined cases 36 and 71/80, ECLI:EU:C:1981:62 X., paragraphs 7 to 9; CJEC, Judgment of 7 January 2004, Case C-60/02,* *ECLI:EU:C:2004:10,* *X., paragraph 28*)). The request for an advisory opinion (Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms) follows the same logic.

Therefore, in practice, how do you decide whether to use these mechanisms to refer a question to the CJEU for a preliminary ruling or to request an advisory opinion from the ECHR? Do you tend to use them at the initiative of the parties or at your own discretion?

**Question 8.** (a) Have you developed a template, a standard form or any other useful instrument to help judges make a reference for a preliminary ruling to the CJEU, following the recommendations of the CJEU (2019/C 380/01), in order to avoid a request for clarification (under Article 101 of the Rules of Procedure of the CJEU) or the question being declared manifestly inadmissible because it does not comply with the minimum requirements imposed by the CJEU (requirements laid down in Article 94 of the aforementioned Rules), or an advisory opinion to the ECHR?

(b) When you make a reference for a preliminary ruling or submit a request for an advisory opinion to a supranational court, do you put forward your court's position on the debated issue? Do you feel that you have an influence on the CJEU case law or the ECHR case law?

**Question 9.** (a) Under Protocol No. 16 to the Convention, seven advisory opinions have been delivered by the ECHR (at the request of France, Armenia, Lithuania, Finland and Belgium) and two requests for an advisory opinion have been rejected (the requests made by Estonia and Slovakia). Have you already used this mechanism? If so, for which case(s) and if not, how would you explain the lack of use of this mechanism?

(b) Have you ever had occasion to refer to opinions delivered by the ECHR in your decisions, even though the request for an opinion had been made by another Member State? If so, can you give details of the judgment(s) in question?

**Question 10.** (a) The CJEU and the ECHR provide substantial reasons for their decisions. In the light of European requirements, have you had to modify your practice of giving reasons for your judgments? If the answer is yes, can you indicate whether this reform was undertaken following an adverse ruling, or because of European law or the practices of neighbouring supreme or supranational courts? Has the European courts' drafting methodology influenced the way you give reasons for your judgments (for example, making more references to your own legal precedents or to comparative law)?

(b) Do you think that European law has changed the notion of case law in continental legal systems?

**Question 11.** Insofar as possible, can you refer to decisions handed down by your court

(a) Explicitly or implicitly taking into account the national margin of appreciation provided for by European law;

(b) Adopting the interpretation of the CJEU/ECHR and setting aside national case law.

**Taking this further. The impact of European law: dialogue between judges and the extraterritorial influence of European law**

**Question 12.** As mentioned in my introductory remarks, Europeanisation is also marked by a horizontal movement from one Member State to another. The use of case law from other Member States in judgments is a perfect illustration of this movement. Does your court give an important place to comparative law in its reasoning?

**Question 13.** Are you aware of a ruling of the ECHR or the CJEU, or one of your own decisions handed down in application of European law, that has been used by a supreme court of a third State?

**III§ Normative impact**

*How has European law affected rules of domestic law in the Member States?*

**Question 14.** Europeanisation is characterised by a vertical movement from top to bottom and a vertical movement from bottom to top. Therefore, two questions arise:

(a) Can you estimate, on the basis of the information available to you, the number of national provisions having a European origin?

(b) What ties does the legislative power have with the European institutions? Furthermore, does your country's legislature cooperate actively with the European institutions in the process of drafting European standards?

**Question 15.** In terms of European Union law, does your country fully transpose all European directives and more generally bring its legislation into line with all European standards? In this sense, are you aware of any infringement proceedings brought by the European Commission against your State in recent years for breach of European Union law by a judicial authority (under Article 258 TFEU) or for failure to fulfil its obligation to adopt measures transposing a directive (under Article 260(3) TFEU)?

**Question 16.** When your court applies European secondary legislation, do you directly cite the directive (instead of the transposing law)? Do you refer to the preparatory works behind the European provisions in the reasoning of your decisions (i.e. using a teleological interpretation)?

**Question 17.** In the light of the information at your disposal, can you indicate which major rulings handed down by the ECHR have had a normative/jurisprudential impact on the organisation or operating of your legal system[[7]](#footnote-7) (idea of a tripartite dialogue between the supranational judge, the national judge and the legislator)?

Insofar as possible, please provide examples of judgments handed down by your court in response to a European judgment that has led to legislative reform (adverse ruling, rulings validating your legislative developments, rulings handed down against other Member States that have had an impact on you, etc.).

**Question 18.** The impact of European law is also reflected in the idea of the equivalence of European and national provisions, particularly constitutional provisions. It follows that the ECHR, when interpreting the applicant's obligation to raise, in substance, a complaint alleging a violation of the Convention, has accepted that applicants may rely on equivalent provisions of domestic law (*Guberina v Croatia, 22 March 2016, no. 23682/13*) [[8]](#footnote-8). This issue also arises from the standpoint of the national court. When reviewing the conformity of a national act transposing European Union law with a constitutional provision that has its equivalent in European Union law, do the higher courts in your country rely on the constitutional provision or the European provision? In other words, do they apply the theory of equivalence when reviewing conformity to European law?

Specific examples on common themes

Can you explain, on the basis of the information available to you, how European law has had an impact on positive law and judicial practices in your country in the three areas below? In other words, what are the normative, jurisdictional and institutional consequences of European standards and the case law of supranational courts in these areas?

* **Example 1 (Data protection and retention)**

What impact has European law had in your country on the retention of, and access to, connection data for use in the fight against crime? Has your court (or any other court in your country) requested a reference for a preliminary ruling? If that is the case, please explain the impact of the CJEU decision on your legal system.

* **Example 2 (Environmental law)**

Do you take into account European Union law and the law of the European Convention for the Protection of Human Rights and Fundamental Freedoms when dealing with environmental and climate-related disputes? Is it relevant to the study of these issues?

* **Example 3 (Criminal law)**

In criminal matters, in the context of a European Arrest Warrant, and if this has already been the case, have your courts handed down decisions that set aside the principle of mutual trust in order to prevent an infringement of fundamental rights?

Has your State adopted more severe penalties than the maximum or minimum penalties imposed by Union law? If so, in what areas? Apart from offences relating to the EU's financial interests, has your State created new offences as a result of a European directive?

Finally, the European Arrest Warrant has enabled Member States to simplify extradition within the EU. Have you modified the quantum of certain sentences in order to extend the number of offences for which the European Arrest Warrant can be used?

1. Jean-Bernard Auby (dir.) and Loïc Azoulai, *L’influence du droit européen sur les catégories juridiques du droit public*, (*The influence of European law on the legal categories of public law*)*,* Chaire Mutations de l’action publique et du droit public (*Chair in Changes in Public Action and Public Law*), Science-Po, 2009. [↑](#footnote-ref-1)
2. Laetitia Guilloud-Colliat, Henri Oberdorff and Fabien Terpan, *L’européanisation du droit, quelle influence de l’Union européenne sur le droit français ? (The Europeanisation of law: what influence does the European Union have on French law?)*; collection Grands Colloques, LGDJ, 2016, p 2. [↑](#footnote-ref-2)
3. Mireille Delmas-Marty, *La grande complexité juridique du monde (The great legal complexity of the world)*, in Recherches 2008, éditions La Découverte, p 349 to 362. [↑](#footnote-ref-3)
4. Ibid. [↑](#footnote-ref-4)
5. Expression used by Dean Carbonnier (le doyen Carbonnier). [↑](#footnote-ref-5)
6. Speech of 30 March 2009, Jean Marc Sauvé, “*Réflexion autour de la procédure préjudicielle*” (“Thoughts on the preliminary ruling procedure”). [↑](#footnote-ref-6)
7. For more information, see:  [MA-France-FRA.docx.pdf (coe.int)](https://rm.coe.int/ma-france-fra/1680a2a380). [↑](#footnote-ref-7)
8. In this case, the applicant lodged an appeal to the Constitutional Court on the basis of Article 14 of the Constitution. During the proceedings before the ECHR, the respondent State argued that the applicant had not exhausted all domestic remedies as he had not cited the precise provision of the Constitution in his constitutional appeal. The Court rejected this preliminary objection: the applicant had expressly invoked Article 14 of the Constitution, which guaranteed protection against discrimination, and had complained of discrimination resulting, in his view, from the unfair application of the relevant tax legislation. By explicitly raising his claim of discrimination, which in substance concerned his property rights, he had thus offered the Constitutional Court the opportunity to remedy the alleged violations. [↑](#footnote-ref-8)