Speakers' contributions

Applying the Charter of Fundamental Rights of the European Union

Focus on the Right to a Fair Trial

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Lisbon, 25-26 October 2021

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Maria José Rangel de Mesquita

Applying the Charter of Fundamental Rights of the European Union: Focus on the Right to a Fair Trial
SEMINAR FOR LAWYERS IN PRIVATE PRACTICE
Lisbon, 25-26 October

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The Role of the Charter within the EU legal Framework and its relevance for national legal orders

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(1) The legal value of the Charter: from Nice to Lisbon

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(2) The contents of the Charter: main categories and general clauses

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(3) The Charter as binding EU primary law: destinataries, criteria and legal effects

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(4) Rights and principles in the Charter: main diferences

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- Principles: become significant for the Courts only when such acts are interpreted or reviewed (legality ruling); may only be invoked in combination with an implementing act

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(5)

The relevance of the Charter for national legal orders, public authorities and national courts

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(5) The relevance of the Charter for national legal orders, public authorities and national courts

- Binding source of law fully applicable in national legal orders: all State powers, all public authorities (national, regional, local)
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(6) The relationship between the Charter and the ECHR at present

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(7) The Charter and the ECHR in light of the EU accession to the ECHR

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Aligning Article 47 of the Charter and Articles 6 and 13 of the ECHR

Maria José Rangel de Mesquita

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Aligning Article 47 of the Charter and Articles 6 and 13 of the ECHR

25 October 2021 – 14:30

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- (1) The Charter and the ECHR: common grounds
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- (3) Added value of Article 47 of the Charter compared to Article 6 and 13 ECHR
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- (5) Concluding remarks

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(1)

The Charter and the ECHR: common grounds

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(1) The Charter and the ECHR: common grounds

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- On-going renegotiation of the EU accession to the ECHR

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(2)

The wording of Article 47 CFREU and Articles 6 and 13 ECHR: overlapping wording and main differences

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(2) The wording of Article 47 CFREU and Articles 6 and 13 ECHR: overlapping wording and main differences

- The ECHR as a source of the Charter (Explanation on Art. 47)
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  - Art. 47, par. 2 – Art. 6,1 ECHR
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- Overlapping wording: partial correspondence
- Main diferences: wider scope of the Charter; specific rights regarding criminal proceedings in the ECHR (Art. 6, 2 and 3)

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(2) The wording of Article 47 CFREU and Articles 6 and 13 ECHR: overlapping wording and main differences (Art 47,1 vs Art 13)

- **Article 47, 1 CFREU - Right to an effective remedy [and to a fair trial]**

"Everyone whose rights and freedoms *guaranteed by the law of the Union* are violated has the right to an **effective remedy** before *a tribunal* in *compliance with the conditions laid down in this Article*."

- **Article 13 ECHR - Right to an effective remedy**

"Everyone whose rights and freedoms as *set forth in this Convention* are violated shall have an **effective remedy** before *a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*."

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(2) The wording of Article 47 CFREU and Articles 6 and 13 ECHR: overlapping wording and main diferences (Art. 47,1 vs. Art 13)

- Article 47,1 Charter
  - Right to bring an action before a *court* (general principle of EU Law)
  - Regards EU institutions and also to MS when implementing EU law: challenge of EU (direct/indirect) and EU MS law and measures
  - Regards access to EU courts according to the system of judicial review laid down in primary law (standing requirements; ratione materiae jurisdiction); and to national courts with use of preliminary rulings)
  - Regards all rights and freedoms guaranteed by (all sources of) EU Law
- Article 13 ECHR
  - Effective remedy before a *national authority* (either non judicial, namely administrative or judicial)
  - Regards States (High Contracting Parties to the ECHR); after the accession of the EU, also the EU (institutions and organs) and MS
  - Regards access to national courts (and authorities) of the States (subject to ECtHR review; subsidiarity)
  - Regards all rights and freedoms guaranteed by the ECHR

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(2) The wording of Article 47 CFREU and Articles 6 and 13 ECHR: overlapping wording and main differences (Art 47,2 vs Art 6,1)

- **Article 47, 2 CFREU - Right to [an effective remedy and to] a fair trial**

"Everyone is entitled to a **fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law**. *Everyone shall have the possibility of being advised, defended and represented.*"

- **Article 6,1 ECHR - Right to a fair trial**

"1. In the *determination of his civil rights and obligations or of any criminal charge against him*, everyone is entitled to a **fair and public hearing within a reasonable time by an independent and impartial tribunal established by law**. Judgment shall be *pronounced publicly but* the press and public may be *excluded* from all or part of the trial in the *interests of morals, public order or national security in a democratic society*, where the *interests of juveniles* or the *protection of the private life* of the parties so require, or to the *extent strictly necessary* in the opinion of the court in special circumstances where *publicity would prejudice the interests of justice.*"

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(2) The wording of Article 47 CFREU and Articles 6 and 13 ECHR: overlapping wording and main diferences (Art. 47,2 vs. Art 6, 1)

- Article 47, 2 Charter
  - Everyone has the right to a fair trial (any trial)
  - Regards EU institutions and also to MS when implementing EU law
  - Regards EU courts according to the system of judicial review laid down in primary law (standing requirements; ratione materiae jurisdiction); and national courts (with use of preliminary ruling)
  - Regards all rights and freedoms guaranteed by (all sources, namely legislative, of) EU Law
- Article 6, 1 ECHR
  - Determination of civil rights and obligations; criminal charges
  - Regards States (High Contracting Parties to the ECHR); in the future, after the accession of the EU, also to the EU and its institutions
  - Regards national courts of the States (subject to ECtHR review)
  - Regards all rights and freedoms guaranteed by the ECHR

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(2) The wording of Article 47 CFREU and Articles 6 and 13 ECHR: overlapping wording and main differences (Art 47,3 vs Art 6, 3, c)

- **Article 47, 3 CFREU - Right to an effective remedy and to a fair trial**

"Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

- **Article 6, 3 (c) ECHR - Right to a fair trial**

"3. Everyone *charged with a criminal offence* has the following minimum rights:

[…]

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

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(2) The wording of Article 47 CFREU and Articles 6 and 13 ECHR: overlapping wording and main differences (Art 47, 2 and 6, 2/3)

- **Article 47, 2 (2nd par.) CFREU - Right to […] a fair trial**

"2. ...*Everyone shall have the possibility of being advised, defended and represented.*" [Right partly overlaps with Art. 48, 2]

- **Article 6, 2 and 3 ECHR - Right to a fair trial (criminal proceedings)**

"2. Everyone *charged with a criminal offence* shall be *presumed innocent* until proved guilty according to law. **[Article 48, 1 Charter]**

3. Everyone *charged with a criminal offence* has the following *minimum rights*:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

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(3)

The added value of Article 47 of the Charter compared to Article 6 and 13 ECHR

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(3) The added value of Article 47 of the Charter compared to Article 6 and 13 ECHR

- Right to an *effective judicial remedy* as a general principle of EU law regarding MS and EU measures ("…the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty." , *Les Verts,* C-224/83, 23; *Johnston,* C-222/84)
- Article 47 as a "reaffirmation" of the general principle of *effective judicial protection* in the EU legal order (*Abdida,* C-562/13, 45)
- The fundamental right to *effective judicial protection* is enshrined in Article 47 of the Charter; The very existence of *effective judicial review* designed to ensure compliance with provisions of EU law *is inherent in the existence of the rule of law* (see, to this effect, judgments in *Les Verts* v *Parliament*, 294/83, EU:C:1986:166, paragraph 23; *Johnston*, 222/84, EU:C:1986:206, paragraphs 18 and 19; *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 14; and *UGT-Rioja and Others*, C-428/06 to C-434/06, EU:C:2008:488, paragraph 80) - (*Schrems,* C-362/14, 95); the right to an effective remedy may have extraterritorial effects.

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(3) The added value of Article 47 of the Charter compared to Article 6 and 13 ECHR

- Article 47 of the Charter: based on Articles 13 and 6,1 ECHR but goes further (higher level of protection / wider scope in comparison with the equivalent right foreseen in the ECHR)
- Right to an **effective remedy before a tribunal** (Art. 47, 1) vs entitlement to a **procedure before a national authority** (Art. 13 ECHR)
- Right (to a fair trial) restricted to the **determination of a person's civil rights and obligations** and or of **any criminal charge** against them (Art. 6, 1 ECHR: wording excludes public law proceedings, tough interpretation by ECtHR may include public law cases under national law)

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(3) The added value of Article 47 of the Charter compared to Article 6 and 13 ECHR *Right to an effective remedy*

- Right of access to *EU courts and to national courts* to ensure correct application of EU law and measures and national law and measures to give effect to EU law and which fall within its scope of application (+ procedural fairness, rights of defence and to legal aid)
- Right of access to EU Courts: restrictive standing requirements in legallity review of EU legislation / acts by individuals and entities (263,4 TFEU)
- Right to an effective remedy most relevant in area where EU adopts acts affecting (directly and individually) individuals and entities (v.g sanctions, restrictive measures, access to and data retention)

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(4)

"Effective remedy" in Luxembourg and Strasbourg case law: analysis

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy - CJEU

- EU restrictive measures following UN 'smart sanctions' for fight against terrorism (*Kadi and Al Barakaat)*

"… 334 (…) in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.

335 According to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle *having furthermore been reaffirmed by Article 47 of the Charter* of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) (see, to this effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37). (…)

337 Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their *applying to the Community judicature* (see, to that effect, *Heylens and Others*, paragraph 15), and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty (…)

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy - CJEU

- EU restrictive measures following UN 'smart sanctions' for fight against terrorism (*Kadi and Al Barakaat)*

"342 In addition, with regard to a *Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism*, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.

343 However, that does not mean, *with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism*."

(*Kadi and Al Barakaat,* C-402/05 P and C-415/05-P*)*

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy

- Claim for damages in respect of loss caused to the EU by a cartel (*Otis)*

"45 When that right [to claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81(1) EC] is exercised, however, the fundamental rights of the defendants, as safeguarded, inter alia, by the Charter, must be observed. The provisions of the Charter are addressed, pursuant to Article 51(1) thereof, both to the institutions, bodies, offices and agencies of the EU and to the Member States when they are implementing EU law.

46 It must be borne in mind in that regard that the *principle of effective judicial protection is a general principle of EU law*, to which expression is now given by Article 47 of the Charter (see Case C-279/09 *DEB* [2010] ECR I-13849, paragraphs 30 and 31; order in Case C-457/09 *Chartry* [2011] ECR I-819, paragraph 25; and Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paragraph 49).

47 *Article 47* of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47 (Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085, paragraph 51).

(Otis, C-199/11*)*

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy

- Claim for damages in respect of loss caused to the EU by a cartel (*Otis)*

"48 The principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented.

49 With regard, in particular, to the right of access to a tribunal, it must be made clear that, for a 'tribunal' to be able to determine a dispute concerning rights and obligations arising under EU law in accordance with Article 47 of the Charter, it must have power to consider all the questions of fact and law that are relevant to the case before it." (…)

71 The principle of equality of arms, which is a corollary of the very concept of a fair hearing (Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-8533, paragraph 88), implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.

72 (…) the aim of equality of arms is to ensure a balance between the parties to proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings. Conversely, the harm which a lack of balance will be likely to cause must, as a rule, be proved by the person who has suffered it.

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis *Right to an effective remedy*

- Freedom of establishment (*Texdata Software*)

"83 As regards (…) the absence of prior notice and the lack of any opportunity for the company concerned to make known its views, it should be noted that, in all proceedings initiated against a person which may well culminate in a measure adversely affecting that person, respect for the rights of the defence is a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions that significantly affect their interests be placed in a position in which they may effectively make known their views on the evidence on which the contested decision is based (Case C-28/05 *Dokter and Others* [2006] ECR I-5431, paragraph 74 and the case-law cited).

84 However, it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, in the light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed (see, to that effect, *Dokter and Others*, paragraph 75, and Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, paragraph 63 and the case-law cited).

(*Texdata Software, C-418/11*)

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis *Right to an effective remedy* - CJEU

- Freddom of movement and residence - security reasons (*ZZ*)

(*duty to give reasons* as as unwritten requirement of Art. 47 – rights of defence)

"53 According to the Court's settled case-law, if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information (Joined Cases C-372/09 and C-373/09 *Peñarroja Fa* [2011] ECR I-1785, paragraph 63, and Case C-430/10 *Gaydarov* [2011] ECR I-11637, paragraph 41), so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question (see, to this effect, Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 337).

54 Admittedly, it may prove necessary, both in administrative proceedings and in judicial proceedings, not to disclose certain information to the person concerned, in particular in the light of overriding considerations connected with State security (see, to this effect, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, paragraph 342)."

(*ZZ*, C-300/11)

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy - CJEU

- Freddom of movement and residence - security reasons (*ZZ*) (duty to give reasons as na unwritten requirement of Art. 47 – rights of defence)

"55 As regards judicial proceedings, the Court has already held that, having regard to the adversarial principle that forms part of the rights of the defence, which are referred to in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them (Case C-450/06 *Varec* [2008] ECR I-581, paragraph 45; Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, paragraph 52; and Case C-472/11 *Banif Plus Bank* [2013] ECR, paragraph 30; see also, as regards Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, the judgment of the European Court of Human Rights in *Ruiz-Mateos v. Spain*, 23 June 1993, § 63, Series A no. 262).

56 The fundamental right to an effective legal remedy would be infringed if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views (*Commission* v *Ireland and Others*, paragraph 52 and the case-law cited)."

(*ZZ,* C-300/11)

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy - CJEU

- EU restrictive measures (*Ipatau/Council)*

"14 First, (…) it neither the right to effective judicial protection nor the right to be heard is undermined by the strict application of EU rules concerning procedural time-limits which, according to settled case-law, meets the requirements of legal certainty and the need to avoid all discrimination or arbitrary treatment in the administration of justice (see order in *Page Protective Services* v *EEAS*, C-501/13 P, EU:C:2014:2259, paragraph 39 and the case-law cited). (…)

42 (…) it should be borne in mind that the effectiveness of the judicial review guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to include a person's name in the list of persons subject to restrictive measures, the Courts of the European Union are to ensure that that decision, which affects that person individually, is taken on a sufficiently solid factual basis. That entails, in this instance, a verification of the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated (see, to that effect, judgments in *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 119; *Council* v *Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776, paragraph 73; *Anbouba* v *Council*, C-605/13 P, EU:C:2015:247, paragraph 45; and *Anbouba* v *Council*, C-630/13 P, EU:C:2015:248, paragraph 46). "

(*Ipatau/Council*, C-535/14P)

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis *Right to an effective remedy* - CJEU

- *Right to an effective remedy of the person holding information which it is ordered to provide by a decision of the competent authority* (*État Luxembougeois/B et al.*)

" 57 (...) it follows from the settled case-law of the Court that the protection of persons, both natural and legal, against arbitrary or disproportionate intervention by the public authorities in the sphere of those persons' private activities constitutes a general principle of EU law (judgments of 21 September 1989, *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 19, and of 13 September 2018, *UBS Europe and Others*, C-358/16, EU:C:2018:715, paragraph 56).

58 That protection may be relied on by a legal person as a right guaranteed by the law of the Union, for the purposes of the first paragraph of Article 47 of the Charter, in order to challenge before a court an act adversely affecting that person, such as an order to provide information or a penalty imposed on the ground of non-compliance with that order (see, to that effect, judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraphs 51 and 52).

59 It follows that a legal person to whom the competent national authority has addressed a decision, of the same sort as those at issue in the main proceedings, ordering that information be provided, must be granted the right to an effective remedy guaranteed by Article 47 of the Charter when confronted with such a decision.

(*État Luxembougeois/B et al.*, C-245/19 e C-246/19)

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis *Right to an effective remedy* - CJEU

- *Right to an effective remedy of the person holding information which it is ordered to provide by a decision of the competent authority* (*État Luxembougeois/B et al.*)

"60 Concerning, in the second place, the question whether the exercise of that right may be limited by national legislation, it follows from the case-law of the Court that a limitation may be placed on the exercise of the right to an effective remedy before a tribunal, enshrined in Article 47 of the Charter, by the EU legislature or, where no relevant EU legislation exists, by the Member States, if the conditions laid down in Article 52(1) of the Charter are satisfied (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraphs 46 and 49). [...]

66 (...) it follows from the case-law of the Court that the essence of the right to an effective remedy enshrined in Article 47 of the Charter includes, among other aspects, the possibility, for the person who holds that right, of accessing a court or tribunal with the power to ensure respect for the rights guaranteed to that person by EU law and, to that end, to consider all the issues of fact and of law that are relevant for resolving the case before it (see, to that effect, judgments of 6 November 2012, *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 49, and of 12 December 2019, *Aktiva Finants*, C-433/18, EU:C:2019:1074, paragraph 36). In addition, in order to access such a court or tribunal, that person cannot be compelled to infringe a legal rule or obligation or to be subject to the penalty attached to that offence (see, to that effect, judgments of 1 April 2004, *Commission* v *Jégo-Quéré*, C-263/02 P, EU:C:2004:210, paragraph 35; of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 64; and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 104)."

(*État Luxembougeois/B et al.*, C-245/19 e C-246/19)

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy

- *Right to an effective remedy of the person holding information which it is ordered to provide by a decision of the competent authority* (*État Luxembougeois/B et al.*)

"69 In those circumstances, it must be held that national legislation, such as that at issue in the main proceedings, which excludes the possibility for a person holding information, to whom the competent national authority addresses a decision ordering that the information in question be provided, of bringing a direct action against that decision, does not respect the essence of the right to an effective remedy guaranteed by Article 47 of the Charter and, consequently, that Article 52(1) thereof precludes such legislation."

(*État Luxembougeois/B et al.*, C-245/19 e C-246/19)

29

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy

- *National decision refusing international protection and return* (*X and Y)*

"28 (…) it is settled case-law of the Court that, when a Member State decides to return an applicant for international protection to a country in which there are substantial grounds for believing that he will be exposed to a real risk of ill-treatment contrary to Article 18 of the Charter, read in conjunction with Article 33 of the Convention relating to the Status of Refugees, as supplemented by the Protocol, or to Article 19(2) of the Charter, the right to an effective remedy provided for in Article 47 of the Charter requires that that applicant must have available to him a remedy enabling automatic suspension of enforcement of the measure authorising his removal (see, to that effect, judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 54 and the case-law cited).

29 The Court has also stated that, in respect of a return decision and a possible removal decision, the protection inherent in the right to an effective remedy and in the principle of non-refoulement must be guaranteed by affording the applicant for international protection the right to an effective remedy enabling automatic suspensory effect, before at least one judicial body. Moreover, it is for the Member States to ensure the full effectiveness of an appeal against a decision rejecting the application for international protection by suspending all the effects of the return decision during the period prescribed for bringing the appeal and, if such an appeal is brought, until resolution of the appeal (see, to that effect, judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraphs 56, 58 and 61 and the case-law cited, and order of 5 July 2018, *C and Others*, C-269/18 PPU, EU:C:2018:544, paragraph 50)."

(*X and Y,* C-180/17)

30

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy

- *National decision refusing international protection and return* (*X and Y*)

" 30 Nevertheless, it is clear from the case-law of the Court that neither Article 46 of Directive 2013/32, nor Article 13 of Directive 2008/115, nor Article 47 of the Charter, read in the light of the safeguards laid down in Article 18 and Article 19(2) of the Charter, requires that there be two levels of jurisdiction. The only requirement is that there must be a remedy before a judicial body (see, to that effect, judgments of 28 July 2011, *Samba Diouf*, C-69/10, EU:C:2011:524, paragraph 69, and of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 57).

31 In this connection, it should also be recalled that, in so far as the Charter contains rights corresponding to rights guaranteed by the ECHR, Article 52(3) of the Charter seeks to ensure the necessary consistency between the rights contained in it and the corresponding rights guaranteed by the ECHR, without thereby adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union (see, to that effect, judgments of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 47, and of 14 September 2017, *K.*, C-18/16, EU:C:2017:680, paragraph 50 and the case-law cited). According to the explanations relating to Article 47 of the Charter, the first paragraph of that article is based on Article 13 of the ECHR. The Court must, accordingly, ensure that its interpretation of the first paragraph of Article 47 of the Charter ensures a level of protection which does not disregard that guaranteed by Article 13 of the ECHR, as interpreted by the European Court of Human Rights (see, by analogy, judgments of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 77, and of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 62).

(*X and Y,* C-180/17)

31

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy - CJEU

- *National decision refusing international protection and return* (*X and Y*)

"32 According to the case-law of the European Court of Human Rights, even with regard to a complaint alleging that the expulsion of the person concerned will expose him to a real risk of suffering treatment contrary to Article 3 of the ECHR, Article 13 thereof does not compel the High Contracting Parties to set up a second level of appeal or to confer, where appropriate, automatic suspensory effect on appeal proceedings (see, to that effect, judgment of the ECtHR of 5 July 2016, *A.M.* v *Netherlands*, CE:ECHR:2016:0705JUD002909409, paragraph 70).

33 It follows that the protection conferred on an applicant for international protection by Article 46 of Directive 2013/32 and Article 13 of Article 2008/115, read in the light of Articles 18, 19(2) and 47 of the Charter, against a decision rejecting an application for international protection and imposing an obligation to return, is confined to the existence of a single judicial remedy."

(*X and Y,* C-180/17)

32

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy - CJEU

- Access to independent and impartial tribunal previously established by law as cornerstone of right to a fair trial

(EU values-Rule of law-effective judicial protection-independence of courts - organization on judicial system and liability of judges)

"194 (…) to ensure that bodies which may be called upon to rule on questions concerning the application or interpretation of EU law are in a position to ensure the effective judicial protection required under that provision [Art. 19,1 TEU], maintaining their independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 115 and the case-law cited).

195 That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraphs 116 and 118 and the case-law cited). "

(*Asociația 'Forumul Judecătorilor din România'*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19)

33

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy - CJEU

- Access to independent and impartial tribunal previously established by law as cornerstone of right to a fair trial

"196 It is settled case-law of the Court that the guarantees of independence and impartiality required under EU law presuppose rules that are such as to dispel any reasonable doubt, in the minds of individuals, as to the imperviousness of the body in question to external factors and its neutrality with respect to the interests before it (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 53 and the case-law cited; of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 117; and of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 53).

197 In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence. The rules applicable to the status of judges and the performance of their duties as judges must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraphs 119 and 139 and the case-law cited). "

(*Asociația 'Forumul Judecătorilor din România'*, Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19)

34

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis *Right to an effective remedy* - CJEU

- Access to independent and impartial tribunal previously established by law as cornerstone of right to a fair trial

(EU values-Rule of law-effective judicial protection-independence of courts – disciplinary regime judges)

"51 (…) compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot, therefore, amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU. The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of judges (judgments of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraphs 63 to 65 and the case-law cited, and in *Asociația 'Forumul Judecătorilor din România' and Others*, paragraph 162).

52 As is provided for by the second subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law. The principle of the effective judicial protection of individuals' rights under EU law thus referred to in the second subparagraph of Article 19(1) TEU is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), and which is now reaffirmed by Article 47 of the Charter (judgment in *Asociația 'Forumul Judecătorilor din România' and Others*, paragraph 190 and the case-law cited)."

(*Commission/Poland*, C-791/19)

35

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis *Right to an effective remedy* - CJEU

- Access to independent and impartial tribunal previously established by law as cornerstone of right to a fair trial

"57 Since the second subparagraph of Article 19(1) TEU requires all Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law, within the meaning in particular of Article 47 of the Charter, that latter provision must be duly taken into consideration for the purpose of interpreting the second subparagraph of Article 19(1) TEU (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 45 and the case-law cited). To ensure that bodies which may be called upon to rule on questions concerning the application or interpretation of EU law are in a position to ensure such effective judicial protection, maintaining their independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy (judgment in *Asociația 'Forumul Judecătorilor din România' and Others*, paragraph 194 and the case-law cited). (…)

58 That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 51 and the case-law cited)."

(*Commission/Poland*, C-791/19)

36

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy

- Access to independent and impartial tribunal previously established by law as cornerstone of right to a fair trial

"59 It is settled case-law of the Court that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 53 and the case-law cited).

60 In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence. The rules applicable to the status of judges and the performance of their duties must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals (judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 197 and the case-law cited)."

(*Commission/Poland*, C-791/19)

37

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy

- Right of accused persons to have their case heard within a reasonable time (*RH)*

"32 First, (…) the right of accused persons to have their case heard within a reasonable time is enshrined in Article 6(1) of the Convention and in the second paragraph of Article 47 of the Charter with respect to the trial procedure. In criminal law, that right must be respected not only during the trial procedure, but also during the first stage of the preliminary investigation, from the moment when the person concerned becomes an accused (see, to that effect, judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraphs 70 and 71 and the case-law cited). […]

48 Article 267 TFEU and Article 47, second paragraph, of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which has the result that the national court is obliged to adjudicate on the legality of a pre-trial detention decision without the opportunity to make a request for a preliminary ruling to the Court of Justice or to wait for its reply."

(*RH,* C-8/19 PPU)

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy - ECtHR

- Art. 13: provides a means for individuals to obtain relief at national level for violations of their ECHR rights - obligation of States to protect HR first within national legal system (*Kudła v. Poland* [GC], 2000, § 152).
- Art. 13: in principle concerns complaints of substantive violations of the ECHR provisions
- Article 13 secures the granting of an effective remedy before a national authority to everyone whose Convention rights and freedoms have been violated
- Article 13 requires a domestic remedy before a "competent national authority" affording the possibility of dealing with the substance of an "arguable complaint" under the Convention and of granting appropriate relief (*Maurice v. France,* [GC], *2005,* 106) Contracting States nevertheless being afforded a margin of appreciation in conforming with their obligations under this provision (*Smith and Grady v. UK,* 1999, 1359

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(3) "Effective remedy" in Luxembourg and Strasbourg case l analysis
Right to an effective remedy - ECtHR

- Removal order and administrative detention

"78. "The Court has reiterated on numerous occasions that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they are secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint. The States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Jabari v. Turkey*, no.40035/98, § 48, ECHR 2000-VIII). However, the remedy required by Article 13 must be "effective" in practice as well as in law (see *Kudła*, cited above, § 157).

79. The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority. Nevertheless, its powers and the procedural guarantees which it affords are relevant in determining whether the remedy before it is effective (see *Klass and Others v. Germany*, 6 September 1978, § 67, Series A no. 28). When the "authority" concerned is not a judicial authority, the Court makes a point of verifying its independence (see, for example, *Leander v. Sweden*, 26 March 1987, §§ 77 and 81-83, Series A no. 116, and *Khan v. the United Kingdom*, no. 35394/97, §§ 44-47, ECHR 2000-V) and the procedural guarantees it offers applicants (see, *mutatis mutandis*, *Chahal v. the United Kingdom*, 15 November 1996, §§ 152-54, *Reports of Judgments and Decisions* 1996-V). Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see *Rotaru v. Romania* [GC], no. 28341/95, § 69, ECHR 2000-V).

40

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis *Right to an effective remedy* - CJEU

"80. In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 112, ECHR 1999-IV).

81. In addition, particular attention should be paid to the speediness of the remedial action itself, since it is not inconceivable that the adequate nature of the remedy can be undermined by its excessive duration (see *Doran v. Ireland*, no. 50389/99, § 57, ECHR 2003-X)."

(*De Souza Ribeiro v. France*, GC, 22689/07)

41

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis *Right to an effective remedy* - ECtHR

- Art. 13: Remedy before national "authority" – judicial or non judicial body (binding decision) ; quase-judicial body such as an ombudsman (*Leander v. Sweden,* 1987), an administrative authority such as a government minister (*Boyle and Rice v. UK,* 1988) or a political authority such as a parliamentary commission (*Klass and o. v. Germany,* 1978)

- Art. 13: Effective remedy – remedy must be capable of directly remedying the impugned situation *(Pine Valley and o. v. Ireland, Commission decision);* efectiveness of the remedy is assessed in relation to each complaint; remedy must encompass the merits of the ECHR complaint (*Glas and Nadezhda EOOD and Elenkov v. Bulgaria, 2007,* 69) as submitted by the applicant; effectiveness is assessed in concreto; remedy must be suficient and accessible, fulfilling the obligation of promptness *(Celik and Imret v. Turkey, 2004, 55, 59);* remedy must not be render innefective due to excessively restrictive requirements *(Camezind v. Switzerland,* 1997, 54); remedy accesible for the person concerned *(Petkov and o. v. Bulgaria,* 2009, 82); remedy effective in practice and law (*Ilhan v. Turkey*, [GC], 2000, 97)

42

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy - ECtHR

- Art. 13: the effectiveness of a remedy does not depen on the certainty of a favourable outcome for the applicant (*Kudła v. Poland* [GC], 2000, § 157)
- Art. 13: aggregate of remedies provided for under domestic law may meeet the requirements of the article even where no single remedy may itself entirely satisfy them (*De Souza Ribeiro v. France,* [GC], 2012, 79)
- Art. 13: Strict approach to the notion of "effective remedy" when rights with fundamental importance such as the right to life (Art. 2), the prohibition of torture and inhuman or degrading treatment (Art. 3) or the right to a lawful arrest or detetion (Art. 5) are at stake - it entails, without prejudice of any other remedy available and in addition to payment of compensation, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and inluding effective access dor the complainant to the investigatory procedure (*Kaya v. Turkey, 1998, 107; Yasa v. Turkey, 1998, 114, Kurt v. Turkey, 1998, 140)*

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy - ECtHR

- Art. 13: distinction between the degrees of effectiveness of the remedies required in relation to the violations of substantive rights by he State or its agentes (negative obligations) and violations due to a failure to protect individuals against acts of third parties (positive obligations) – (Z and others v. the UK, GC, 2001, 109)
- Art 13: its scope may overlap with that of other ECHR provisions that guarantee a specific remedy (Art. 5, pars. 4 and 5 – deprivation of liberty (*Tsirlis and Kouloumpas v. Greece*,1997, 73); Art. 1 of Protocol 7 – right of appeal to aliens in respect of expulsion decisions)

44

(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy - ECtHR

- Art. 13: Acts Covered – acts of the administration or the executive *(Al-Nashif v. Bulgaria,* 2002, 137*)*
- Art. 13: Acts covered: acts of the judiciary, tough not imposing the existence of diferent levels of jurisdiction, not guaranteing a right of appeal (only recognised by Art. 2 of Protocol 7 in a limited number os cases) nor a right to a second level of jurisdiction; nor a right to complaint to a Constitutional Court
- Art. 13: Acts covered – acts of private persons where the State share responsability for such acts or has not taking the necessary measures concerning them (v.g state liability for death of prisoner killed by a mentallly ill cellmate – *Paul and Audrey Edwards vs. UK, 2002, 101)*

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(3) "Effective remedy" in Luxembourg and Strasbourg case law: analysis
Right to an effective remedy - ECtHR

- Art. 13: does not guarantee a remedy allowing a national law to be challenged as such before a national authority on the ground of being contrary to the ECHR nor allows a general polici as such to be challenged (*Hatton and o. vs. UK*, GC, 2003, 138:

"The Court would first reiterate that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws to be challenged before a national authority on the ground of being contrary to the Convention (see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 62, § 40). Similarly, it does not allow a challenge to a general policy as such. Where an applicant has an arguable claim to a violation of a Convention right, however, the domestic regime must afford an effective remedy (ibid., p. 62, § 39).

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(5)

Concluding remarks

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The scope of application and interpretation of the Charter of Fundamental Rights of the EU

Enrique Arnaldos Orts

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Content

1. Introduction and overview
2. The field of application of the Charter
3. The scope and interpretation of rights and principles
4. The issue of direct effect of Charter provisions
5. Main takeaways

2

1 Introduction and overview

URÍA MENÉNDEZ

3

The Charter in action

URÍA MENÉNDEZ

"For the laws of nature, as justice, equity, modesty, mercy, and, in sum, going to others as we would be done to, of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like. And covenants, without the sword, are but words and of no strength to secure a man at all."

T. Hobbes, Leviathan (Book II).

4

Sought answers

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- In what cases does the Charter apply
- When does the action of a Member State fall within the scope of Union Law
- The differences of scope regarding the rights and principles contained in the Charter
- To what extent do Charter provisions have horizontal direct effect

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2 The field of application of the Charter

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Article 51

URÍA MENÉNDEZ

"Field of application

*1. The provisions of this Charter are addressed to the **institutions, bodies, offices and agencies** of the Union with due regard for the principle of subsidiarity and to the Member States **only when they are implementing Union law**. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".

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The Charter applies:

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- To the **institutions, bodies, offices and agencies** of the Union with due regard for the principle of subsidiarity

  (Cfr. C-370/12 - *Pringle* and C-8/15 P - *Ledra Advertising v Commission and ECB*)
- To the Member States **only when they are implementing Union law**.
- **Without extending the field of application of Union law** beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties

8

What does it mean to implement Union Law?

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- Does the reference to "*only when*" entail the need for a restrictive interpretation?
- A look into different versions of the Treaties („*ausschließlich*", "*uniquement*", "*apenas quando apliquem o direito da União*")
- Implementation excludes derogation?

9

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Fundamental rights as general principles of EU Law

(Cfr. Art. 6(3) TEU)

"As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law" (judgment of 13 July 1989, Case 5/88 *Wachauf*).

"In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules" (judgment of 13 April 2000, Case C-292/97 *Kjell Karlsson and Others*)

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The Charter as the shadow of Union Law

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- There can be no situation governed by EU law in which the Charter does not apply
- **Agency situations** (situations where Member states are implementing obligations weighing on them from Union Law) vs. **derogation situations** (whenever a MS derogates from a principle of Union Law availing itself of an provision of EU law)
- Implementation is interpreted broadly, but are these categories sufficient?
- The facts in Akberberg Fransson.

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Case C-617/10 *Åkerberg Fransson*

URÍA MENÉNDEZ

"*In the case in point, it is to be noted at the outset that the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT*".

"*The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union*"

12

Member states act within the scope of EU Law when they...

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- Apply a provision of EU Law other than the Charter itself
- Apply national laws that transpose EU legislation
- Apply provisions of national procedural law to enforce substantive provisions
- Apply a provision of national law intended to pursue the objectives of EU Law
- Apply a provision of national law that refers to EU laws
- Exerce discretion as provided for in EU laws
- Exerce discretion allowed from derogation

13

The situation within different Member states

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- Some Courts have applied the Charter in cases where EU law was not applicable without discussion about the limits (Slovakia, Bulgaria, Slovenia and Czech Republic)
- In some other jurisdictions, an explicit discussion on the application of the Charter is taking place (such as Poland, Germany, Italy and Austria)
- Other jurisdictions, such as the Portuguese, Belgian and Hungarian, tend to perform “tandem” applications of the Charter, seen as a interpretative or confirmatory companion

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3 Rights and principles

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Rights may only be limited... (art. 52)

- When provided for by law
- Respecting the essence of such rights
- When necesary to meet objectives of general interest recoginsed by the Union or to protect others rights
- Respecting the principle of proportionality

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Article 52.5

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"The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality".

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Principles (*e.g.* art. 37)

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"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

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4 Horizontal direct effect of Charter rights

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Horizontal direct effect of EU Law (and, in particular, of the Charter)

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- Possibility to rely on EU law directly before national courts in horizontal situations – between private parties
- Requirements with regards to primary law:
  - Precise
  - Clear
  - Unconditional
  - Do not call for additional measures
- The Charter does not preclude such application...

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Some cases on the horizontal effect of the Charter

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- C-414/16 - Egenberger (Articles 10, 21 and 47)
- C-68/17 - IR (Article 21)
- C-193/17 - Cresco Investigation (Article 21)
- C-684/16 - Max-Planck-Gesellschaft zur Förderung der Wissenschaften (Article 31(2))

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5 Main takeaways

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Answers to our initial questions

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- The application of the Charter leaves a limited space for doubt with regards to institutions
- The Charter is the shadow of EU Law
- The Charter is applicable to Member States when they act within the scope of EU law, which entails agency and derogation situations, but not only
- Principles in the Charter are not judicially cognisable unless applied
- Charter provisions may have horizontal direct effect

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CASE STUDY

Discuss whether, in every one of these cases, the situation at stake could be placed within the scope of Union Law triggering, therefore, the application of the Charter

1. National proceedings concern the legality of a number of Spanish taxes on nuclear energy, challenged by companies devoted to such activity. The referring court asks whether the "poluter pays" principle would referred to in Article 191(2) TFEU, Article 20 and Article 21 of the Charter as well as Directives 2005/89 and 2009/72. A particular high share of the taxes concerned was borne by nuclear power companies in comparison to other undertakings in the electricity sector.

Article 3(1) of Directive 2009/72 states:

"*Public service obligations and customer protection*

1. Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, and shall not discriminate between those undertakings as regards either rights or obligations".

Article 20 of the Charter states:

"*Everyone is equal before the law*".

Article 21 of the Charter states:

"*1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited".

2. The referring Court issues a request for a preliminary reference with regards to the conformity with Union Law of some judicial appointments made on the basis of the constitutional rules contained in the national constitution. The referring Court invokes article 19.1 TEU and article 47 of the Charter:

Article 19.1 TEU:

"*1. 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 47 of the Charter:

"*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

3. In the context of a criminal investigation, the managing directors of undertakings trading and distributing computers were the subject of a criminal investigation following a complaint by the Belgian tax authorities who, in 1995, had started investigations into value added tax ('VAT') carousel fraud. Having obtained authorisation to consult the case file in the criminal proceedings and to make copies thereof, the Belgian tax authorities issued notices of assessment adjusting the personal income tax returns submitted by the appellants in the main proceedings and ordering the payment of tax on profit from industrial and commercial undertakings. The directors brought actions seeking an exemption from the tax imposed on them, claiming that the banking documents had been improperly obtained and therefore could not be used as the basis for a tax decision.

In this regard, the appellants in the main proceedings invoke the judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832), arguing that if, in the context of the levying of income tax, the possibility of using evidence obtained in breach of a fundamental right were to be allowed under Belgian law, this would lead to a difference in treatment, that is unjustifiable from the point of view of the principle of equality and non-discrimination. In that judgment, the Court decided that, in relation to the levying of VAT, evidence obtained in breach of a fundamental right must be disregarded.

The referring court asks whether Article 47 of the Charter in cases of VAT must be interpreted as precluding in all circumstances the use of evidence obtained in violation of the right to respect for private life as guaranteed by Article 7 of the Charter, or does it leave room for a national regulation under which the court which has to decide whether such a piece of evidence can be used as the basis for a VAT assessment has to make an evaluation

The doctrine of effective judicial protection in the European Court of Justice (ECJ) case law

Professor Sophie Robin-Olivier
La Sorbonne School of Law
University Paris 1 Panthéon-Sorbonne

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Structure of the presention

I- The principle of national procedural autonomy

II- Limits to procedural autonomy: The principles of Equivalence and Effectiveness

III- Effective judicial remedy as a fundamental right
and general principle of EU law

I- The principle of national procedural autonomy

Presumption of national competence
in procedural matters and organization of the judiciary

Implementation of EU law is ensured according to national law,
unless EU norms exist

The powers of the EU are limited

«*...in the absence of Community rules on the subject,* ***it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law,***

ECJ, *Emmott*, C-208/90 (1991)

***It is for the Member States to ensure* effective collection of the Union's own resources…**

… to ensure that all VAT revenue is collected, and thereby that the financial interests of the EU are protected, the ***Member States are free to choose the applicable penalties***, which may take the form of administrative penalties, criminal penalties or a combination of the two

CJUE, *M.A.S*, C-42/17 (2017)

- What happens if a Member State omits to exercise its procedural autonomy, and there is no remedy for the protection of rights attributed to the individuals by EU law?

- What must national courts do to remedy such omission?

II- Limits to procedural autonomy: The principles of Equivalence and Effectiveness

Repayment of charges levied by a member state contrary to the rules of community law

« may be sought only within the framework of the conditions as to both substance and form, laid down by the various national laws applicable »…

BUT

« those conditions ***may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights conferred by community law »***

CJCE, *San Giorgio,* 199/82 (1983)

The notion of Equivalence

"Protection of the rights conferred to individuals by EU law must be fundamentally equivalent to the ones that the Member State accords to the rights protected by national law"

= no distinction, where the purpose and cause of action are similar

- Equivalence does not require Member States to extend their most favourable rules

- Equivalence is respected if an objective justification, not linked with the EU or national nature of the remedy questioned, is invoked

What Equivalence means, regarding limitation periods, for instance

Equivalence has not been disregarded if

national rules on the limitation period are applicable both to actions for damages based on EU law and those based on national law

and

their applicability does not depend on whether the right to claim full compensation for the harm results from an infringement of national competition rules or EU competition law »

ECJ, *Cogeco Communications*, C-637/17 (2019)
Compensation for abuse of dominant position

Identification of comparable procedures is not always easy…

It requires full knowledge of (comparable) national procedures…

« With regard to the comparability of actions, ***it is for the national court,*** which has direct knowledge of the detailed procedural rules applicable, to ascertain whether the actions concerned are similar as regards ***their purpose, cause of action and essential characteristics »***

ECJ, *Commissaire général aux réfugiés and aux apatrides*, C-651/19 (2020)
Procedural rules concerning service of decisions relating to applications for international protection (implementation of Directive 2013/32 on common procedures for granting and withdrawing international protection)

⇒ ***In most cases, assessment of equivalence is left to the national court***

See also: ECJ, Câlin, C-676/17 (2019)

The notion of Effectiveness

National law does not satisfy the effectiveness requirement
if it makes ***"virtually impossible or excessively difficult"***
the exercise of right conferred by EU law that national courts must protect

« *any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to community law would be incompatible with community law*

This is the case for « ***presumptions or rules of evidence*** *intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence* »

CJCE, *San Giorgio,* 199/82 (1983)

⇒ **national procedures must allow implementation of EU law**

This requirement goes beyond the principle of non-discrimination /equivalence

Global assessment of effectiveness

The question as to whether a national procedural provision renders the application of EU law impossible or excessively difficult must be analysed by reference to ***the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies***

In that context, it is necessary, inter alia, to take into consideration, the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure

ECJ, *Commissaire général aux réfugiés and aux apatrides*, C-651/19 (2020)

ECJ, *Commissaire général aux réfugiés and aux apatrides*, C-651/19 (2020)

According to the ECJ, notice of decisions at the head office of the national authority responsible for the examination of those applications, for the applicants for international protection who have not specified an address for service in the Member State concerned, passes muster under 2 conditions:

- **the applicants are informed** that they will be deemed to have specified an address for service at the head office of the national authority responsible for the examination of those applications
- **the conditions for access to that head office are not such that their receipt of the decisions concerning them is excessively difficult**

Key topics in the ECJ case law in which Effectiveness was tested

- Standing
- Substantive remedies available to individuals
- Adequacy and appropriateness of the compensation provided for by the national legal system
- Existence of interim reliefs in case of urgent need for redress
- Time limits to activate remedies
- Scope of national courts' authority to consider EU law on their own motion

On interim relief, see *Factortame* (C-213/89, 1990): in the absence of harmonisation measures, Union law does not impose to provide for a particular type of remedy *but* the national court must set aside a national norm, which is the sole obstacle preventing the court to grant interim relief, during a dispute concerning Community law, in order to grant full effectiveness to Community law.

On standing

"Effective judicial protection is not ensured if ***the individual is forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law***"

ECJ, *Unibet*, C-432/05, 2007

On types of remedies

Member states do not have to introduce new or specific remedies

But

Sanctions must be effective and with a deterrent effect

⇒ Inadequacy of a mere reimbursement of the expenses incurred for a work interview
ECJ, Von Colson, C14/83, 1984

⇒ In discrimination cases, when compensation is the chosen remedy, it must be full
ECJ, *McDermott and Cotter*, C-286/85, 1987
ECJ, *Marshall II*, C-271/91, 1993

See also : Obligation to pay interests, taking the effluxion of time in due account (ECJ, *Marshall II*, C-271/91, 1993)

On time limits for bringing proceedings

Reasonable time limits are compatible with the principle of effectiveness ***in the interests of legal certainty*** which protects both the individual and the authorities concerned

The imposition of periods for bringing proceedings ***which start to run only from the date on which the person concerned was aware*** or at least ought to have been aware of the situation is not considered as an excessive difficulty

See namely: ECJ, *Caterpillar Financial Services*, C-500/16, 2017

Importance of context

« ***in the context of competition law*** …

…account must be taken of the ***specificities of competition law cases*** and in particular of the fact that the bringing of actions for damages … requires, in principle, ***a complex factual and economic analysis***.

… ***national legislation laying down the date from which the limitation period starts to run, the duration and the rules for suspension or interruption of that period must be adapted to the specificities of competition law***

ECJ, *Cogeco Communications*, C-637/17 (2019)
Compensation for abuse of dominant position

In *Cogeco*, the Court indicates that a limitation period of three years, … which, first, starts to run from the date on which the injured party was aware of its right to compensation, even if the infringer is not known and, secondly, may not be suspended or interrupted in the course of proceedings before the national competition authority, renders the exercise of the right to full compensation practically impossible or excessively difficult.

Global and contextual assessment of Equivalence and Effectiveness

- Conformity of national law cannot be assessed *in abstracto* but must be evaluated in the particular context of the case

- All relevant aspects of the national measures concerned, and of the legal system within which they apply, must be taken into account

Quiz

Is it possible that effectiveness requires criminal sanctions?

a) Yes

b) No

III- Effective judicial protection as a fundamental right and general principle of EU law

- Constitutional dimension of the right to an effective judicial remedy
- Core elements of the fundamental right
- Substance of the right to an effective remedy and a fair trial (Article 47 CFR)

Constitutional dimension of the right to an effective judicial remedy

- A general principle of EU law (ECJ, *Johnson*, 222/84, 1986) referring to ***constitutional traditions common to the Member States***,

  and to ***Articles 6 & 13 of the ECHR***

- **Article 47 of the EU Charter of fundamental rights (CFR, 2000)**

- **Art 19(1) TUE** (Lisbon)

« Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law »

Article 47 - Right to an effective remedy and to a fair trial

« Everyone whose rights and freedoms guaranteed by the law of the Union are violated has ***the right to an effective remedy*** before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to ***a fair and public hearing within a reasonable time by an independent and impartial tribunal*** previously established by law. Everyone shall have ***the possibility of being advised, defended and represented***.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. »

Core elements of the fundamental right (and general principle)

- A right to activate the necessary judicial control and benefit appropriate remedies for the protection of the rights conferred by Union law

- A right that can never be totally eliminated, not even on grounds of national security

- Direct effect

Direct effect of Article 47 of the Charter

Article 47 « is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order ***to confer on individuals a right on which they may rely as such*** »

ECJ, *Egenberger*, C-414/16, 2018

ECJ, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, 2019

ECJ, *Országos*, C-924/19 PPU and C-925/19 PPU, 2020

Substance of the right to Article 47

EU Directives are interpreted « in the light of Article 47 »

⇒ **Transformations of national procedures and judicial systems may be required**

- ***Right to judicial review and not only to an appeal before an administrative authority***

ECJ, Országos, C-924/19 PPU and C-925/19 PPU (Grand Chamber), 2020

Directive 2008/115 on common standards and procedures for returning illegally staying third-country nationals

- ***The balancing exercise required in cases of discrimination must be achieved by an independent authority, and ultimately by a national court***

ECJ, *Egenberger*, C-414/16, 2018

Directive 2000/78 on equal treatment

See also : ECJ, *Kolev*, C-612/15, 2018

On the right of accused persons to have their case heard within a reasonable time and right to be advised, defended and represented

(interpretation of the Directive 2012/13 on the right to information in criminal proceedings and Directive 2013/48 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings)

- ***The judgment of a court cannot remain ineffective*** because that court does not have any means of securing observance of that judgment

  ECJ, *Torubarov*, C-556/17, 2019

  Directive 2013/32 on common procedures for granting and withdrawing international protection

- A court is allowed (or even obliged) to ***order the coercive detention of office holders involved in the exercise of official authority who are responsible for violation of EU environmental law*** (after balancing the right to an effective remedy and the right to liberty)

  ECJ, *Deutsche Umwelthilfe*, C-752/18, 2019

  Directive 2008/50 on Atmospheric pollution

  …

The right to an annual payed leave based on Directive 2003/88 on working time and **the right to an effective remedy** set out in Article 47 of the Charter preclude the worker having to take his leave first, before establishing whether he has the right to be paid in respect of that leave

CJUE, *King,* C-214/16, 2017

⇒ A reform of procedures before employment tribunals is necessary

Combining article 19(1) TEU and article 47 of the Charter

« …Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law

… every Member State must, under the second subparagraph of Article 19(1) TEU, ***ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection*** »

⇒ ***Independence and impartiality*** of national courts and tribunals are required

ECJ, *Associação Sindical dos Juízes Portugueses*, C-64/16, 2018
ECJ, *Commission v Poland*, C-618/19 (2019)
…

In the same line, se also, more recently: ECJ (Grand Chamber) *European Commission v Poland,* C-791/19, 15 July 2021

Quiz

Does Article 47 replace reference to Article 6 and 13 of the ECHR in the case law of the Court of justice ?

a) Yes
b) No

Conclusion

1/ Procedural autonomy has given way to a rather strict control of EU law on national procedures

2/ EU competences have grown considerably

⇒ Harmonisation has taken place, mostly based on the case law of the ECJ

3/ A fundamental right to effective judicial procedures coexists with the requirement of Equivalence and Effectiveness of national procedures (aiming at ensuring implementation of EU law)

Effective remedy is no longer only a question of enforcement of EU law,
but its remains related to this issue (EU competence)
Link between Art. 19 TEU (enforcement of EU law) and Art. 47 CFR (the rule of law)

Case study

M. M. is a Moroccan worker, who has been employed for more than 10 years as a security officer in a company established in a Member state. In September 2019, he was submitted to a specific procedure, before he could be assigned to a new mission. He had to go through a series of interviews with the managers of the company, where he was asked questions on his personal life. None of his colleagues have been subjected to a similar procedure.

M. M. considered that he was the victim of a discrimination on race, which violates Directive 2000/43 prohibiting discriminations on race and ethnic origin. He decided to claim compensation in court.

However, according to national law, he was obliged to do through the dispute resolution system set up by the national body in charge of combatting discriminations (NBD). Before this administrative body, a settlement was found: the employer accepted to pay M. M. a sum of money (Euros 1 000), but did not recognize the existence of a discrimination. M. M. was not satisfied with the employer's denial of the discrimination he suffered. He felt frustrated by the fact that the administrative body did not examine the substance of the alleged discrimination, and decided to take the case to court.

Before the national court, the employer admitted the claim, once again, and accepted to pay a higher compensation (Euros 5 000), but continued to deny the existence of a discrimination. According to national civil procedure rules, a defendant can indeed decide to admit the applicant’s claim for compensation, without being required to state its reasons or base the decision on a plea in law relied on by the applicant. Accordingly, it is possible for the admission not to be linked to the pleas in support of the applicant’s claim. Such an admission is, in practice, intended to bring the proceedings to an end without there being any need to further examine the case. The court is compelled to allow the admission without an actual examination of the facts or point of law. It is therefore not possible to draw from such a judgment any definitive conclusion as to the merits of the applicant’s arguments relating to the circumstances of the dispute. In a dispute, which involves civil rights and obligations, when the applicant’s claims are admitted, examination of the substance is precluded, and the defendant acceptation to compensate is binding on courts.

I. D., a colleague of M. M., had accepted to testify, and provided elements supporting the claim of discrimination: she indicated, namely, that the company had not hired any worker of foreign origin (or supposedly foreign origin) in the last five years, and that all employees, except M. M. were nationals, of national origin. This contributed to the company preferring to compensate M. M., and settle the case, without trying to contest the existence of a discrimination.

M.M. could still appeal the first instance court’s decision. However, this requires hiring a lawyer, which would be too expensive for him (and contingency fees are prohibited). In addition, since he is not a national, he would have to provide, in order to lodge an appeal, a security for the costs and damages arising from the proceedings which he may be ordered to pay.

Another possibility, he was explained, is to refer his case to the prosecutor, so that it is examined by a criminal court. However, that needs to be done within two years of the offence, which is already too late.

Questions:

1/ Does the obligation to take the case to an administrative body before action in court conflict with Art. 47 of the Charter of fundamental rights of the EU (CFREU)? Or is it possible to consider that it contributes to effective judicial protection?

2/ Can the payment of a sum of money alone, even where it is the sum claimed by the claimant, ensure effective judicial protection for a person who requests a finding that there was a breach of his or her right under EU law? Does it matter that the person wants to obtain a ruling on the reality of the facts alleged against the defendant and their legal classification?

3/ What other aspects of national law conflict with Art. 47 of the Charter of fundamental rights of the EU (CFREU)?

4/ Can criminal procedures remedy the failure of civil law?

5/ Soon after the first instance court's decision, I.D., M. M.'s colleague, was assigned to a mission very far from her home, and felt the decision was an adverse reaction of her employer to her testimony. Can this be considered a violation of the right to Art. 47 CFREU?

6/ Would the answers to the previous questions be different if M. M. claimed he was discriminated against on the ground on this national origin, and not his race?

Access to a lawyer, legal representation and legal aid before Union Courts

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Dr. Amedeo Barletta
amedeo.barletta@studiolegalebarletta.it

Fair trial and Access to Justice are core values of the European Constitutional traditions (very essence of Rule of Law

The European Convention for the protection of human rights and fundamental principles provides at art. 6 and 13 the protection of such principles

In the EU Legal Area those principles are recognised by art. 47 and 48 of the European Union Charter of Fundamental Rights that has the same legal value as the Treaties, according to art. 6 par. 1 TEU

Article 6
(ex Article 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

EU Charter of Fundamental Rights

Article 47 „**Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated **has the right to an effective remedy before a tribunal** in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. **Everyone shall have the possibility of being advised, defended and represented.**

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.“

Art. 48 „**Presumption of innocence and right of defence**

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed".

Art. 48 provides a special guarantee for criminal cases (but do not applies just to criminal proceedings)

There is also a link with human dignity

The EU Charter of Fundamental Rights applies to EU Law or when implementing EU Law (***to all rights and freedoms arising from EU Law***)

The EU Charter principles and rules are mandatory when operating in the field of applicaton of EU LAW

No distinctions regarding criminal cases, civil cases, administrative cases or tax law cases

In the field of EU law the Charter always applies according to the dispositions of the same Charter (see also art. 51)

Article 51 (CFREU)
Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Rights provided by the art. 47 and 48 of the Charter of Fundamental Rights of the European Union are also implemented by derived (secundary) European legislation as directives, mainly for what concerns the field of criminal justice.

General principles of the Charter, as those protected by the European Convention, and relating to access to justice, legal representation and legal aid have a scope of application generally wider than criminal law

For the EU Charter the limitation is to EU Law or to National Law implementing EU Law

The legal basis for those directives is art.83 TFEU

In the field of EU Law in the late 20 years have been adopted many pieces of secundary legislation implementing the right to legal aid and legal representation.

The most relevant part of this legislations regards criminal justice (and the Area of Freedom Security and Justice).

1. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 *on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*.
2. Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 *on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings*.
3. *Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes*

Access to a Lawyer Directive

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

The Directive 2013/48 recognize the right to a fair trial in criminal proceedings, by:

· providing access to a lawyer from the first stage of police questioning and throughout criminal proceedings;

· allowing adequate, confidential meetings with the lawyer for the suspect to effectively exercise their defence rights;

· allowing the lawyer to play an active role during questioning;

· making sure that, where a suspect is arrested, somebody such as a family member is made aware of that arrest and that there is an opportunity for the suspect to communicate with their family;

· allowing suspects abroad to be in contact with their country's consulate and receive visits;

· offering people subject to a European Arrest Warrant the possibility of legal advice in both the country where the arrest is carried out and the one where it was issued.

The Directive applies:

· to persons from the time when they are made aware, by official notification, that they are suspected or accused of having committed a criminal offence, irrespective of whether they are detained and until the conclusion of proceeding;

· to persons upon to European arrest warrant proceedings, from the time of their arrest in the executing State;

· to persons who in the course of questioning by the police or by another law enforcement authority, become suspects or accused.

The right of suspects

In the ECtHR **Nechipourok and Yonkalo v. Ukraine** case dealing with the time from which the rights concerned have to be guaranteed, the Court held that the right to a lawyer should be granted from the moment when a person has been made aware by authorities that he is suspected or accused of having committed a criminal offence. Thus, the **deprivation of liberty is not an essential condition** and the protection of the right of defense has to be assured anyhow.

(EctHR, Section V, Nechiporuk and Yonkalo v. Ukraine, no. 42310/04, Judgement of the 21st of April 2011)

The Directive shall then only apply in the proceedings pending in front of a criminal jurisdiction.

In practice, it was decided that in case of the minor offences, like the traffic ones, it would be unreasonable to require the competent authorities to apply directive (this conclusion has been confirmed by the referral n. 16 of the final text of the Directive), unless the imposition of sanctions may be appealed o referred to a criminal jurisdiction.

The right of access to a lawyer (following "right of access") has to be granted without undue delay, as it has to be prompt and effective.

It applies:

a) before suspects or accused persons are questioned by the police or by a law enforcement or judicial authority. This is to avoid the risk of self-incriminating declarations (see above).

b) upon carrying out of an investigative or evidence-gathering act.

The applicant's lawyer should at least attend the activities such as: 1) identity parades; 2) confrontations; 3) reconstructions of the scene of a crime.

As far as **EAW is concerned** (art. 10), the right of access to a lawyer as well as the other rights covered by the Directive apply, at first, to the subject under European arrest warrant in the executing State.

The lawyer will have the right to participate during a hearing of a requested person by executing judicial authorities.

The issue has been raised if the same right of access had to be granted to a lawyer in the issuing State. The Directive states that the competent authority have to inform requested persons of the right to appoint a lawyer in the issuing Member State.

Truly, the lawyer in the issuing Member State may be important. e.g. in order to obtain the evidence of a previous judgment, which lead to the application of the principle “ne bis in idem”, contained among the grounds for mandatory non-execution of the EAW (Article 3.2 FD aforementioned).

'derogations'

The most debated issue between the Council and the Parliament has been t balance to be struck between the effectiveness of justice system in the MS and t individual' s right of defense.

Apart the first general derogation to the right of access to a lawyer for min offences other specific derogations – in the article 3 paragraph 5 and 6 – have be foreseen in the pre-trial stage and on a temporary bases.

According to these additional rules, MS may derogate:

a) from the application of right to access after the deprivation of liberty in case the geographical remoteness of a suspect or accused persons;

b) from the content of right of access (art. 3 par. 3) that includes the right to me in private and communicate with the lawyer, even prior to questioning and t right of the lawyer to be present during at the same questioning and at t investigative evidence-gathering [Only in case of serious possible adverse consequenc for the life, liberty or physical integrity of a person or to prevent substantial jeopardy criminal proceedings].

The same conditions are needed to derogate to the right to have a third person informed of the deprivation of liberty, even in case that the suspect or accused person is a minor (art. 5.3).

In this latter case, although the derogation is based on the best interest of the child and anyhow MS shall ensure that an authority for the protection or welfare of children will be informed without undue delay of the state of deprivation of liberty of the child.

No exceptions has been made to the right to communicate with consular authorities.

All these derogations applies in case of EAW, but only in the executing State. Nothing has been stated about the derogations in the issuing State.

Moreover, the clause which limits the right to communicate with third persons (article 6), shall be decided only in view of imperative requirements or proportionate operational requirements: indeed this statement seems really too generic and could potentially include a large range of situations left to the discretion of MS.

The principle of proportionality must be respected in any case where derogations are invoked: they shall be proportionate and not go beyond what is necessary, be strictly limited in time and not based only on the type or the gravity of the offence.

The derogations shall be decided by a judicial authority or by another kind of authority, but only if can be subject to a judicial review.

The rights contained in the Directive can be subject to a **waiver**.

The waiver has to be given by the person concerned voluntary and unequivocally.

The Parliament has obtained the modification of the text of the article only in the first part referred to the right of the waiver to receive clear and sufficient information about the content of the right concerned and the consequences of waiving it.

Indeed, the expectation of an official legal advice – as it was written in the original proposal – could cause a delay of the procedure. The Parliament have not obtained the same success about the request to exclude the right of waiving when the suspect or accused person is a child.

Remedies (art. 12).

In order not to interfere with judicial systems of MS, the assessment of evidence obtained and the declarations made by suspects or accused persons, in breach of Directive, shall be made in accordance to the right of defense and to a fair trial.

Indeed, the article seems to **be too broad**: in fact it doesn't provide a specific sanction, leaving to the Member States an excessive discretion, not indicating a minimum standard, as, e.g. limiting the use of the statements and the evidence obtained in breach of the right in question. In this sense, the original proposal foresaw – first of all – as general statement that the remedy should have had the effect "of placing the suspect or accused person in the same position in which he would have found himself had the breach not occurred".

Legal Aid Directive

Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Legal Aid

Subject matter and scope (Art. 1 + 2)

Subject matter: legal aid (no provisional legal aid).

Scope criminal proceedings: if right of access to a lawyer under Directive 2013/48, and

1) deprived of liberty;
2) required by law to be assisted by a lawyer; or
3) required or permitted to attend an investigative or evidence-gathering, as a minimum the following:
    i) identity parades;
    ii) confrontations;
    iii) experimental reconstructions of the scene of crime.

Scope EAW proceedings: if right of access to a lawyer under Directive 2013/48, upon arrest in the executing Member State

Exclusion minor offences, but Directive applies in any case when decision on detention is taken, and during detention

Legal Aid: means and merits test (Art. 4)

Suspects or accused persons who lack sufficient resources to pay a lawyer have right to legal aid when the interests of justice so require (see Art. 6 ECHR)

Member States may apply means test and/or merits test.

Merits text is deemed to be fulfilled when court or judge takes decision on detention, and during detention

Legal aid should be granted without undue delay, and at the latest before questioning by police/other authority, or before carrying out an investigative or evidence gathering act

Legal aid in EAW proceedings (Art. 5)

Executing State: legal aid from arrest until surrender (or when the decision on non-surrender becomes final).

Issuing State: legal aid

- when persons exercise their right to appoint a lawyer in the issuing State;
- when EAW is for the purpose of conducting a criminal prosecution (not: for execution of a sentence);
- if legal aid is necessary to ensure effective access to justice.

Means test may apply

Competence to take decisions (Art. 6)

Decisions on legal aid should be taken by a competent authority.

This can be independent authority (legal aid board) or court/judge; in urgent cases also police/prosecution (rec. 24)

„Without prejudice to provisions of national law concerning the mandatory presence of a lawyer, a competent authority should decide, without undue delay, whether or not to grant legal aid. The competent authority should be an independent authority that is competent to take decisions regarding the granting of legal aid, or a court, including a judge sitting alone. In urgent situations the temporary involvement of the police and the prosecution should, however, also be possible in so far as this is necessary for granting legal aid in a timely manner".

Quality of legal aid services and training (Art. 7)
Member States should take necessary measures – including with regard to funding – to ensure that:
1) there is an effective legal aid system of adequate quality;
2) legal aid services are of a quality adequate to safeguard the fairness of the proceedings.

Training:
1) ensure adequate training for staff involved in legal aid decisions;
2) take appropriate measures to promote provision of adequate training for lawyers providing legal aid services.
Suspects, accused persons and requested persons have the right to have the lawyer providing legal aid services replaced, where the specific circumstances so require.

Remedies (Art. 8) and summary

Should be effective remedy in case of a breach.

See also recital n. 27:

"The principle of effectiveness of Union law requires that Member States put in place adequate and effective remedies in the event of a breach of a right conferred upon individuals by Union law. An effective remedy should be available where the right to legal aid is undermined or the provision of legal aid is delayed or refused in full or in part".

The issue regarding the legal aid for legal entities in EU Law

The European Court of Justice DEB judgement has a specific relevance with respect to the issue of the access to legal aid by legal person. Firstly, the CJEU clarified whether legal persons are amongst the beneficiaries of the right to legal aid under Article 47(3) CFR and if the Charter provision covers both the exemption from court fees and the payment of the costs for legal assistance by a lawyer. Secondly, the CJEU provides some guidance on how national courts shall assess the compatibility with Article 47(3) CFR of national provisions introducing limits to access to legal aid.

Court of Justice of the European Unione, DEB, judgement of 22 December 2010, Case C-279/09

The CJEU paid special attention to the case law of the ECHR on legal aid, quoting several relevant judgements, concerning, in particular the limits that can be legitimately introduced to access to legal aid, referring to both its form: as assistance by a lawyer and exemption from the court fees.

Moreover, the CJEU observed that, on several occasions, the case law of the ECHR, concerning access to legal aid by a legal person, indicated that the grant of legal aid is not in principle impossible.

Thus, the CJEU concluded, in essence, that access to legal aid under the Charter can similarly apply also to legal persons and that is the task of the national court to verify – in case falling within the scope of EU law – whether the conditions foreseen by national law (which limits such an access) fulfils the requirements for limitations to the exercise of the fundamental rights of the Charter, as laid down by Article 52(1) CFR.

Since the CJEU provided some guidance on how the referring national court (and national courts more generally) should conduct the abovementioned assessment, which consists in verifying if the limitation undermines the very core of the right of access to the courts or whether there is a "reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve".

In order to achieve this objective, the national court must take into consideration "the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively". In order to assess the proportionality, the national court should take account of the costs of the proceedings in respect of which advance payment must be made.

Specifically concerning legal persons, the national court may take into consideration their situation and, inter alia, the form of the legal person in question and whether it is a profit-making or non-profit-making; the financial capacity of the partners or shareholders to obtain the sums necessary to institute legal proceedings.

Legal aid in front of EU Courts
General Court and Court of Justice

What happens when proceeding in front of a Unions Court (i.e. General Court or Court of Justice of the European Union)?

Clearly a right to legal aid applies also in those proceedings

Reference is made by the Rules of Procedure:

1) Rules of Procedure of the General Court (of 4 March 2015)

2) Rules of Procedure of the Court of Justice (of 25 September 2012)

A form with instructions has been published in the Official Journal: L 306/61 Official Journal of the European Union of 30.11.2018

Rules of Procedure of the General Court (of 4 March 2015) – art. 146-150 – Chapter 15

Article 146

General

1. Any person who, because of his financial situation, is wholly or partly unable to meet the costs of the proceedings shall be entitled to legal aid.

2. Legal aid shall be refused if it is clear that the General Court has no jurisdiction to hear and determine the action in respect of which the application for legal aid is made or if that action appears to be manifestly inadmissible or manifestly lacking any foundation in law.

Article 147 (3) (5)

Application for legal aid

1. An application for legal aid may be made before the action has been brought or while it is pending.

2. The application for legal aid must be made using a form which is published in the Official Journal of the European Union and available on the Internet site of the Court of Justice of the European Union. An application for legal aid submitted without the application form will not be taken into consideration.

3. The application for legal aid must be accompanied by all information and supporting documents making it possible to assess the applicant's financial situation, such as a certificate issued by a competent national authority attesting to his financial situation.

4. If the application for legal aid is made before the action has been brought, the applicant must briefly state the subject matter of the proposed action, the facts of the case and the arguments in support of the action. The application must be accompanied by supporting documents in that regard.

5. Where applicable, the application for legal aid shall be accompanied by the documents referred to in Article 51(2) and (3) and Article 78(4). In that case Article 51(4) and Article 78(6) shall apply.

6. Where the applicant for legal aid is not represented by a lawyer, the original of the application for legal aid shall be lodged at the Registry in paper form. The original of the application for legal aid must bear the handwritten signature of the applicant for legal aid.

7. The introduction of an application for legal aid shall, for the person who made it, suspend the time limit prescribed for the bringing of an action until the date of service of the order making a decision on that application or, in the cases referred to in Article 148(6), of the order designating the lawyer instructed to represent the applicant.

RULES OF PROCEDURE OF THE GENERAL COURT of 4 March 2015 (OJ 2015 L 105, p. 1) amended on: (1) 13 July 2016 (OJ 2016, L 217, p. 71) (2) 13 July 2016 (OJ 2016, L 217, p. 72) (3) 13 July 2016 (OJ 2016, L 217, p. 73) (4) 31 July 2018 (OJ 2018, L 240, p. 67) (5) 11 July 2018 (OJ 2018, L 240, p. 68)

Article 148 (5)

Decision on the application for legal aid

1. Before giving his decision on an application for legal aid, the President shall prescribe a time limit within which the other main party may submit his written observations unless it is already apparent from the information produced that the conditions laid down in Article 146(1) have not been satisfied or that those laid down in Article 146(2) have been satisfied.

2. The decision on the application for legal aid shall be taken by the President by way of an order.

3. An order refusing legal aid shall state the reasons on which it is based.

4. Any order granting legal aid may designate a lawyer to represent the person concerned if that lawyer has been proposed by the applicant in the application for legal aid and has agreed to represent the applicant before the General Court.

5. If the person concerned has not indicated his choice of lawyer in the application for legal aid or following an order granting legal aid or if his choice is unacceptable, the Registrar shall send a copy of the order granting legal aid and a copy of the application to the competent authority of the Member State concerned mentioned in the Rules supplementing the Rules of Procedure of the Court of Justice. If the person concerned is not resident in the Union, the Registrar shall send a copy of the order granting legal aid and a copy of the application to the competent authority of the State in which the Court of Justice of the European Union has its seat.

6. Without prejudice to paragraph 4, the lawyer instructed to represent the applicant shall be designated by way of an order, having regard to the suggestions made by the person concerned or to the suggestions made by the authority referred to in paragraph 5, as the case may be.

7. An order granting legal aid may specify the amount to be paid to the lawyer instructed to represent the person concerned or fix a limit which the lawyer's disbursements and fees may not, in principle, exceed. It may provide for a contribution to be made by the person concerned to the costs referred to in Article 149(1), having regard to his financial situation.

8. No appeal shall lie from orders made under this Article.

9. Where the applicant for legal aid is not represented by a lawyer, a copy of the document to be served shall be served on him by registered post with a form for acknowledgement of receipt or by delivery of the copy against receipt. Service on other parties shall be effected as provided for in Article 80(1).

Article 149

Advances and responsibility for costs

1. Where legal aid is granted, the cashier of the General Court shall be responsible, where applicable within the limits fixed, for costs involved in the assistance and representation of the applicant before the General Court. At the request of the lawyer designated in accordance with Article 148, the President may decide that an amount by way of advance should be paid to that lawyer.

2. Where, by virtue of the decision closing the proceedings, the recipient of legal aid has to bear his own costs, the President shall fix the lawyer's disbursements and fees which are to be paid by the cashier of the General Court by way of a reasoned order from which no appeal shall lie.

3. Where, in the decision closing the proceedings, the General Court has ordered another party to pay the costs of the recipient of legal aid, that other party shall be required to refund to the cashier of the General Court any sums advanced by way of aid.

4. The Registrar shall take steps to obtain the recovery of the sums referred to in paragraph 3 from the party ordered to pay them. 5. Where the recipient of the legal aid is unsuccessful, the General Court may, in ruling as to costs in the decision closing the proceedings, if equity so requires, order that one or more parties should bear their own costs or that those costs should be borne, in whole or in part, by the cashier of the General Court by way of legal aid.

Article 150

Withdrawal of legal aid

1. If the circumstances which led to the grant of legal aid alter during the proceedings, the President may, of his own motion or on request, withdraw that legal aid, having heard the person concerned.

2. An order withdrawing legal aid shall contain a statement of reasons and no appeal shall lie from it.

2) Rules of Procedure of the Court of Justice (of 25 September 2012)
Art. 115-118 – Chapter 4

Article 115 Application for legal aid

1. **A party to the main proceedings who is wholly or in part unable to meet the costs of the proceedings before the Court may at any time apply for legal aid.**
2. **The application shall be accompanied by all information and supporting documents making it possible to assess the applicant's financial situation, such as a certificate issued by a competent national authority attesting to his financial situation.**
3. **If the applicant has already obtained legal aid before the referring court or Tribunal, he shall produce the decision of that court or tribunal and specify what is covered by the sums already granted.**

Rules of Procedure of the Court of Justice OJ L 265, 29.9.2012, p. 1–42

Article 116 Decision on the application for legal aid

1. As soon as the application for legal aid has been lodged it shall be assigned by the President to the Judge-Rapporteur responsible for the case in the context of which the application has been made.
2. The decision to grant legal aid, in full or in part, or to refuse it shall be taken, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, by the Chamber of three Judges to which the Judge-Rapporteur is assigned. The formation of the Court shall, in that event, be composed of the President of that Chamber, the Judge-Rapporteur and the first Judge or, as the case may be, the first two Judges designated from the list referred to in Article 28(3) on the date on which the application for legal aid is brought before that Chamber by the Judge-Rapporteur.
3. If the Judge-Rapporteur is not a member of a Chamber of three Judges, the decision shall be taken, under the same conditions, by the Chamber of five Judges to which he is assigned. In addition to the Judge-Rapporteur, the formation of the Court shall be composed of four Judges designated from the list referred to in Article 28(2) on the date on which the application for legal aid is brought before that Chamber by the Judge-Rapporteur.
4. The formation of the Court shall give its decision by way of order. Where the application for legal aid is refused in whole or in part, the order shall state the reasons for that refusal.

Article 117 Sums to be advanced as legal aid

Where legal aid is granted, the cashier of the Court shall be responsible, where applicable within the limits set by the formation of the Court, for costs involved in the assistance and representation of the applicant before the Court. At the request of the applicant or his representative, an advance on those costs may be paid.

Article 118 Withdrawal of legal aid

The formation of the Court which gave a decision on the application for legal aid may at any time, either of its own motion or on request, withdraw that legal aid if the circumstances which led to its being granted alter during the proceedings.

Thank You For Your Attention

Amedeo Barletta

amedeo.barletta@studiolegalebarletta.it

The relevance of the EU Charter for criminal lawyers

Case study – fictional scenario

The main proceedings were between the Public prosecutor and Mr Alejandro Frog, concerning proceedings brought against him for aggravated tax fraud.

Mr Frog was accused of having provided, in his tax declarations for the 2009 and 2011 tax years, inaccurate information which exposed the public Treasury to the loss of revenue in the form of income tax and value added tax (VAT).

He was also prosecuted for failing to declare employer's contributions for the reference periods of October 2009 and October 2011, which exposed the social security institutions to the loss of revenue.

In respect of the two tax years at issue, the tax administration had imposed a number of administrative penalties on Mr Frog, namely penalties as regards the income from his economic activity, as regards VAT and as regards employer contributions.

Interest was payable on those penalties and they were not challenged before the competent administrative court.

The reasons for the decision issuing them were the same facts of false declarations as those stated by the public prosecutor in the criminal proceedings.

Moreover the tax administration also relied on some declarations made by Mr Frog during the administrative investigation.

Those declarations were rendered without the assistance of a defence lawyer and Mr Frog was not informed about his rights to be assisted by a lawyer while questioned by the authority.

The declarations rendered by Mr Frog were also recalled by the public prosecutor and are part of the material collected during the criminal investigation.

Moreover has to be added that in 2013 the criminal law of the State providing the penalties for the tax fraud was changed reducing the sanctions to a penalty comprised between 3 and 6 years of imprisonment instead of a penalty comprised between 4 and 8 years as stated by the previous legislation.

Notwithstanding the imposition of severe administrative penalties the prosecutor wants to go on with the criminal trial and would like to make some use of the statements made by Mr Frog while questioned during the administrative procedure.

Questions

1) What a criminal lawyer that is aware of EU Law can argue in the exposed criminal case?

2) Is EU Law relevant for the case?

3) Which are the relevant provisions of the EU Charter in the case?

4) Which are the fundamental principles at stake in the case?

5) Is there some question related to fair trial that can be invoked?

6) Do you have idea of some ECJ case that can be considered relevant ofr the solution of the case?

Handout for participants

Discussion can be opened about whether the action brought should be dismissed on the ground that, in the other proceedings, he had already been penalised for the same facts, which could be seen as contravening the prohibition on double punishment ('ne bis in idem'), set out in Article 4 of Protocol No 7 to the European Convention on Human Rights and Fundamental Freedoms and in Article 50 of the Charter.

In particular has to be analysed whether the principle of ne bis in idem set out in Article 50 of the Charter precludes criminal proceedings for tax fraud being brought against a defendant when he has already been subject to a tax penalty for the same facts of making false declarations.

In this case the tax penalties and the criminal proceedings are connected in part to breaches of obligations to declare VAT.

Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures, indicating in that regard that the European Union's own resources.

Another issue concerns art. 49 and the lex mitius principles. The questioni s the one regarding the retroactive application of a criminal provision where more favourable for the defendant.

The other question emerging from the case is connctd to art. 47 of the Chater and to the principle of fair trial and access to a lawyer.

The relevance of the EU Charter for criminal and *civil* lawyers

Practical exercise – civil case study

Michaela Hájková

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Legal Framework

Regulation No 261/2004

Recitals 1 and 14:

(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

…

(14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

Article 5 (headed 'Cancellation'):

'1. In case of cancellation of a flight, the passengers concerned shall:

…

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

…

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

…'

Article 7 (headed ‘Right to compensation’), provides in paragraph 1:

‘Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1 500 kilometres or less;

(b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;

(c) EUR 600 for all flights not falling under (a) or (b).

…’

Facts

Ms Alberta Brown had booked a seat on a flight from Lisbon to Prague. That flight, which was to be operated by ABC Airlines (‘ABC’) on 29 February 2020, was cancelled on the day of the flight because of a strike by its pilots (‘the strike at issue’).

In the summer of 2019 the workers’ organisations representing ABC pilots (‘the pilots’ trade unions’) decided to terminate the collective agreement concluded with ABC, which was, in the normal course of events, to cover the period 2018-2021. Negotiations with a view to concluding a new collective agreement began in December 2019.

Since the pilots’ trade unions took the view that those negotiations had failed or, at the very least, had not progressed sufficiently, they called on their members to strike. The strike at issue thus began on 26 February 2020 and continued until 3 March 2020. It therefore resulted in ABC cancelling more than 2 000 flights. The strike thus affected approximately 200 000 passengers, including Ms Brown.

On 3 March 2020 a new three-year collective agreement was concluded, which is therefore intended to apply until 2023.

Ms Brown brought proceedings before the District Court for Prague 6, claiming that it should order ABC to pay it the compensation of EUR 400 provided for in Article 5(1)(c) of Regulation No 261/2004, read in conjunction with Article 7(1)(b) thereof.

ABC submits that it was not required to pay the compensation claimed as the strike at issue constitutes an extraordinary circumstance which could not have been avoided even if all reasonable measures had been taken, having regard to the exorbitant nature of the demands for a salary increase made by the pilots’ trade unions. It contends that the strike at issue is an ‘extraordinary circumstance’ within the meaning of Article 5(3) of Regulation No 261/2004, since it is not inherent in the normal exercise of its activity and is beyond its actual control.

Ms Brown disputes the fact that the strike at issue constitutes an ‘extraordinary circumstance’ within the meaning of Article 5(3) of Regulation No 261/2004.

Questions:

- Which fundamental rights laid down in the EU Charter might be relevant for the national court deciding in Ms Brown's case?

- Knowing that according to relevant CJEU's case law, events may be classified as extraordinary circumstances, within the meaning of Article 5(3) of Regulation No 261/2004, if, by their nature or origin, they are not inherent in the normal exercise of the activity of the air carrier concerned and are outside that carrier's actual control, which argumentation, based on the EU Charter, should Ms Brown use in order to win her case?

- Which articles of the EU Charter might be relevant for ABC in order to avoid paying the compensation claimed by Ms Brown? Please prepare ABC's argumentation.

- How could, in the present case, a balance be struck between the opposing interests protected by the fundamental rights laid down in the EU Charter?

- How should the national court interpret relevant provisions of Regulation No 261/2004 in light of the fundamental rights protected by the EU Charter?