



The interpretation of Article 47 of the EU Charter by the Court of Justice of the European Union

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Overview

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The broader context

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.

The broader context

Article 6 (1) ECHR: Right to a fair trial

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.

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.

The broader context: comparison

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.

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.

The broader context: comparison

Article 6 (1) ECHR: Right to a fair trial

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. [...]

Article 47 (2) CFR - Right 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. [...]

The broader context

Article 19 (1) TEU:

The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

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

- broader application than Art 47 CFR (“when implementing Union law”);
- not a rights provision, but an institutional provision;
- addressed at MS only.

Added value of Article 47?

Compared with the ECHR:

- Article 47 CFR updates (and broadens) Articles 6 and 13 ECHR

EU-specific remedies:

1. The Charter comes with the special features of EU law
 - Direct effect: i.e. the Charter is applicable in domestic courts, wherever the MS are ‘implementing Union law’
 - Primacy
 - Duty of consistent interpretation (or indirect effect)
 - Duty of disapplication of domestic law
 - [State liability (damages for violation of EU law)]
2. Article 47 can potentially “create” new remedies

The right to an effective remedy

Article 47 (1) CFR: 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.

= Ubi ius, ibi remedium

or better: Where there is a right in EU law, there must be a remedy (in national or EU law)

Remember: The Charter (and with it Art 47) applies whenever EU law applies.

Context: national procedural autonomy of the Member States
= enforcement of EU law rights in Member State courts applying Member State procedures and remedies, subject to:

- principle of equivalence
- principle of effectiveness

Right to an effective remedy recognised in pre-Charter case law since Case 222/84 *Johnston*

- used as an interpretive aid to give greater effect to an effective remedies provision in a Directive

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The right to an effective remedy

1. Article 47 (1) as an interpretive aid

E.g.: Case C-563/13 *Abdida*

- Article 13 Directive 2008/115:
(1) The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return [...].
(2) The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return [...] including the possibility of temporarily suspending their enforcement [...].
- National law does not allow for suspensive effect of an appeal against a return decision
- Directive had to be interpreted in the light of Article 47 (1) CFR + the ECtHR's case law on the return of seriously ill persons to countries with inadequate healthcare
- Hence national rules incompatible with the Directive.

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The right to an effective remedy

2. What is a “right guaranteed by the law of the Union”?

- No need for this right to have direct effect, see Case C-873/19 *Deutsche Umwelthilfe*
 - German law: standing to challenge administrative acts generally confined to persons claiming a violation of *their own rights*
 - **Exception: environmental associations may challenge authorisation of certain “projects”**
 - Case concerned a challenge to the authorisation of a “product”: exhaust gas recirculation valve on Diesel cars
 - Article 9 (3) Aarhus Convention grants them broader standing, however, “to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment”
 - Aarhus Convention does not have direct effect (Case C-240/09)

The right to an effective remedy

2. What is a “rights guaranteed by the law of the Union?” c’td.

CJEU in *Deutsche Umwelthilfe* – four steps:

- a) Article 9 (3) Aarhus Convention does not have direct effect;
- b) restrictions in German law would, however, deprive Art 9 (3) of all useful effect;
- c) Article 9 (3) is a right guaranteed by Union law: Article 47 (1) CFR thus applies;
- d) hence environmental association has a right to an effective remedy, which national law does not provide for – must be given standing.

Further remedies: Article 47 CFR

3. Article 47 (1) CFR between private parties - Case C-414/16 *Egenberger*
- Ms Egenberger applied for a position to draw up a report for *Evangelisches Werk* (an organization wholly owned by the Protestant churches of Germany engaging in welfare, developmental cooperation, catastrophe relief);
 - She was not a member of the Protestant church (in fact: had no religion) and was rejected on this basis; in her place a member of the Protestant church was hired to draw up the report (on race discrimination);
 - This is direct discrimination on the basis of religion or belief contrary to Directive 2000/78.
 - The employer argued, however, that belonging to the Protestant churches was a “genuine, legitimate and justified occupational requirement” based on the religious ethos of the organization.

Further remedies: Article 47 CFR

EU Law - Directive 2000/78 contains a “religious ethos exception” in Article 4 (2):

- Member States may maintain national legislation in force [...] or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief **constitute a genuine, legitimate and justified occupational requirement**, having regard to the organisation's ethos. [...]

German Law:

- Judicial review of such a decision by a church was severely restricted: a court can only review its **‘plausibility on the basis of the church's self-perception’**.

Further remedies: Article 47 CFR

Question in *Egenberger*: who decides whether belonging to a Protestant church is a genuine, legitimate and justified occupational requirement for the job in question?

- Was German law too narrow?
- CJEU:
 - Article 4 (2) requires a balancing exercise to be undertaken between the right to autonomy of the churches and the right of individuals not to be discriminated against;
 - that balancing must be subject to effective judicial review;
 - this follows from Article 4 (2) of the Directive read in conjunction with Article 47 CFR

Further remedies: Article 47 CFR

- Consequence?
 - interpretation of national law in conformity with Article 4 (2) of the Directive read in light of Article 47 CFR
 - What if not possible?:
 - Directive itself does not have direct effect in horizontal cases (long-standing case law)
 - BUT: the Charter does
 - Article 21 CFR (non-discrimination does) – goes back to Case C-144/04 *Mangold*
 - AND (new) Article 47 (1) CFR does as well: “is sufficient in itself”
 - Hence: national court must disapply the contrary national provision

Right to a fair trial/fair proceedings

Article 47 (2) CFR - Right to a fair trial / fair proceedings

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.

- Right to a fair and public hearing within a reasonable time;
- Access to an independent and impartial tribunal previously established by law;
- Rights of defence;
- Duty to give reasons.

Right to a fair hearing – equality of arms

Case C-169/14 *Sánchez Morcillo*, para 49:

It is settled case-law that the principle of equality of arms, together with, among others, the principle *audi alteram partem*, is no more than a corollary of the very concept of a fair hearing that implies an obligation to offer each party a reasonable opportunity of presenting its case in conditions that do not place it in a clearly less advantageous position compared with its opponent.

Access to an independent & impartial tribunal previously established by law

1. **Independence:** tribunal must be protected from outside intervention or pressure liable to jeopardize the independence of its members as regards proceedings before them (Case C-506/04 *Wilson*)
2. **Impartiality** (Case C-411/11 P *Altner*):
 - Members of the tribunal must be **subjectively impartial**, i.e. none of the members must show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary
 - The tribunal must be **objectively impartial**, i.e. it must offer guarantees sufficient to exclude any legitimate doubt in this respect
3. **Previously established by law**
 - no ad hoc tribunals; but no a “right to a predetermined judge”

Rights of defence

Case C-418/11 *Texdata* , para 83:

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.**

Duty to give reasons

= **unwritten requirement presupposed by Article 47.**

Case C-300/11 ZZ, para 53:

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 [...], 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.

Discussion