

Speakers' contributions



Applying the Charter of Fundamental Rights of the European Union

Focus on the right to a fair trial



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http://ec.europa.eu/justice/grants1/programmes-2014-2020/justice/index_en.htm

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Protecting fundamental rights in the EU: an overview

Mirosław Wróblewski
ERA training, 8th October 2020



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Introduction

- I. General principles of EU law
- II. The EU Charter and its legal value
- III. Application and interpretation of the EU Charter in national legal orders


General principles of EU law

Streisand effect




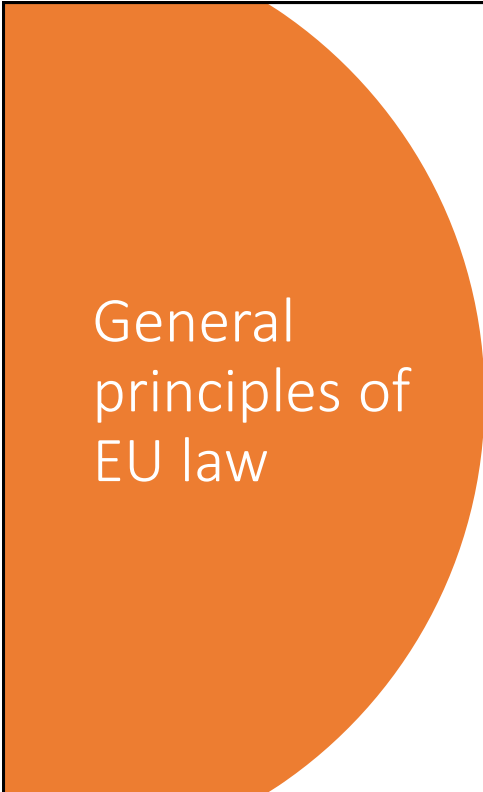
Right to be forgotten

- **Google Spain SL v. Mario Costeja Gonzalez** (case 131/12)
- **As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name.**




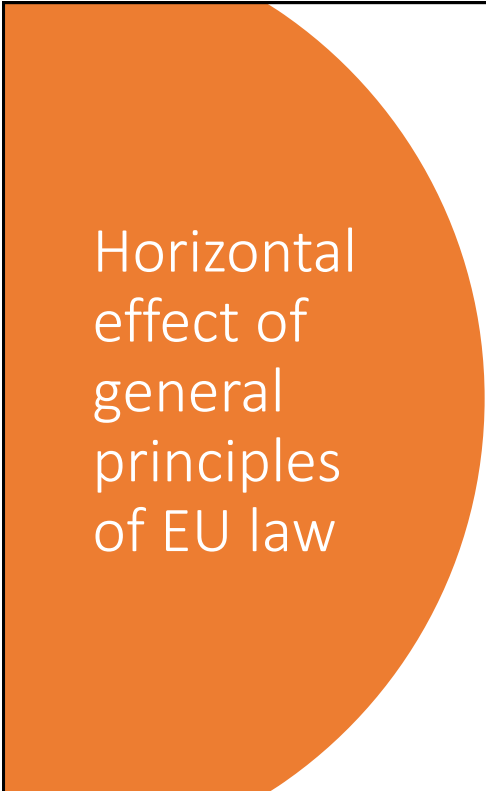
General
principles of
EU law

- 
- **Erich Stauder v. City of Ulm** 1969 (case 29/69): 7. Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court



General
principles of
EU law

- Freedom of expression (ERT, C-260/89)
 - Freedom of religion (Vivien Prais 130/75)
 - Property (Nold 4/74, Hauer 44/79)
 - Effective remedy (Eridiana 230/78)
- 





Horizontal
effect of
general
principles
of EU law

Mangold, C-144/04

- Prohibition of the discrimination on grounds of age as a general principle of EU law

Kücükdeveci, C-555/10


- Reference to Art 21 CFR and non-discrimination as a general principle of EU law
- 



General
principles of EU
law

Article 6 (3) TEU:

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.**



FR as general principles of EU law

Two main sources:

- **European Convention**
- **constitutional traditions common to the Member States**

European Convention

- ECHR as a relevant reference for the CJEU
- Opinion 2/94 and 2/13
- Bosphorus standard (application no. [45036/98](#)): ECHR will step aside as long as there is an effective system of FR protection in the EU

Constitutional traditions common to the Member States

- Mangold (C-144/04) – equal treatment on grounds of age derived from constitutional traditions
- Legal certainty?

The Charter

- Treaty of Lisbon
 - in force since 1.12.2009
- Art 6 (1) TEU
 - determines the same legal value for EU treaties and Charter rights

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 Charter in jurisprudence

The European Commission: “national judges are key actors in giving concrete effect to the rights and freedoms enshrined in the Charter”.

‘Report from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of Regions 2013 Report on the Application of the EU Charter of Fundamental Rights’, COM(2014) 224 final, Brussels, 14.4.2014.

The Charter

- **part of primary law**
- **secondary law scrutinized *vis-à-vis* the Charter**
- **federalisation of the EU?**

Charter as a Living Instrument

- applied by all kinds of EU and national powers
- applied by national courts („EU judges” - 51/89 Tetrapak)
- applied by legal professionals
- applied and interpreted by CJEU

New rights or just re-statement of existing rights?

- This Charta **reaffirms** . . . the rights as they result, . . .
 - from the constitutional traditions and
 - international obligations common to the Member States,
 - the EU Treaties
 - the ECHR,
 - the Social Charters adopted by the Community and by the Council of Europe and
 - the case-law of the Court of Justice of the European Communities and
 - of the European Court of Human Rights.
(preamble of the Charter)

Structure and Content of the Charter

- Rights, Freedoms and Principles

- Dignity
- Freedoms
- Equality
- Solidarity
- Citizens' Rights
- Justice

Rights and principles in the Charter

- ▶ Individually enforceable **rights**
- ▶ **Principles** need implementation
- ▶ According to Article 52 (5) they may
 - ▶ be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union
 - ▶ by acts of Member States when they are implementing Union law
 - ▶ by courts **only in the interpretation of such acts and in the ruling on their legality**

Rights in the Charter

Article 52 (1) GRC: Any limitation on the exercise of the rights and freedoms recognised by this Charter must be:

- provided for by **law** and
- **respect the essence** of those rights and freedoms. Subject to the
- principle of **proportionality**, limitations may be made only if they are
 - **necessary** and
 - genuinely meet **objectives of general interest** recognised by the Union or
 - the need to **protect the rights and freedoms** of others.

Direct effect of Charter provisions?

CJEU established **criteria for direct effect (test)**

Provision must be:

- Intended to confer rights to individuals
- Clear and precise
- Unconditional

Charter – *case by case* approach (e.g. 47)

Protocol No. 30

1. The Charter **does not extend** the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

Protocol No. 30

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

In essence – two protocols?

British protocol

Polish protocol

Declaration No. 62

Declaration by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom **Poland declares** that, having regard to the tradition of social movement of "Solidarity" and its significant contribution to the struggle for social and labour rights, **it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter.**

FRA Fundamental Rights Report 2020

- courts increasingly use the Charter, use by governments and parliaments remains low
- little indication of anyone regularly scrutinizing national legislation that transposes EU law for compatibility with the Charter
- „Legal practitioners who understand the Charter and can put it into practice at national and regional/local levels can help widen its use and improve its implementation”

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The scope of application and interpretation of EU Charter in national legal orders

Miroslaw Wróblewski
ERA training, 8th October 2020



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The Charter in jurisprudence

The European Commission: “national judges are key actors in giving concrete effect to the rights and freedoms enshrined in the Charter”.

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Scope of application of the Charter: EU

- [Article 51 - 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.*
- term „bodies, offices and agencies” is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation
- **but some doubts:** [Article 41 - Right to good administration](#) 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

Who is bound by the right to good administration?

- **NATIONAL ADMINISTRATIONS when they are implementing Union law**
- broader construction was proposed by the Advocates General to the CJEU, f.i. Advocate General Whatelet in Case **C-383/13 PPU M.G. and N.R. v Staatssecretaris van Veiligheid en Justitie** of August 2013:

52. It is clear that, by virtue of Article 51 of the Charter, Article 41(2)(a) thereof applies to competent national authorities when they implement the Return Directive. (...) in order to avoid those rights remaining a dead letter or a pure formality, the persons concerned must be able to rely on them directly before the national courts
- It has also been **confirmed by the CJEU: C-277/11 M.M. v Minister for Justice, Equality and Law Reform, Ireland**

84. (...) as follows from its very wording, that **provision is of general application.**

Who is bound by the Charter?

- **Invalidation of secondary legislation** – CJEU as a *constitutional court of the Union*

e.g.:

- C-293/12 *Digital Rights Ireland*
- C-236/09 *Test Achats*

Scope of application of the Charter:
MS

[Article 51 - 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.**

Member States implementing EU law

Прилагат BG	Stosuję PL	Apliquen EL	Uplatňují CS
Gennemfører DA	Durchführung DE	mettent en œuvre FR	nell'attuazione IT
Vykonávají SK	Izvajajo SL	Apliquem PT	Aplicare RO

The Charter binds Member States and their institutions in:

- case C-5/88 *Wachauf* - **agency situation** (implementing directives, execution of directly applicable EU acts, execution of national provisions enacted in implementing EU law)
- case C-260/89 *ERT* - **derogations** from free movement
- new trend? C-64/16 *Associação Sindical dos Juizes Portugueses/Tribunal de Contas* – **rule of law cases – principle of effective legal protection (Article 19 TEU – Article 47 CFREU)**

The Charter binds Member States and their institutions in:

Article 19 TEU – Article 47 CFREU

- **effective legal (judicial) protection**
- principle of mutual trust – a triangle between CJEU and national courts (*judicial dialogue*)
 - principle of judicial independence
 - risk of political control
 - C-216/18 PPU (ENA), C-192/18 (earlier retirement), C-619/18 (Supreme Court), C-192/18 (independence of common courts)
- C-791/19 R – injunction regarding Disciplinary Chamber of the Supreme Court

The Charter binds Member States and their institutions in:


Member States are obliged to establish new legal tools:

Unibet, C-432/05


Torubarov, C-556/17

El Hassani C-403/16

Extensive intepretation

- C-617/10 **Akerberg Fransson** – tax fraud, including VAT fraud, applicability of Article 50? – *ne bis in idem*
 - CJEU found that the Charter applies – a loss of revenue arising from the failed collection of VAT also entailed a loss of revenue for the EU budget (Article 325 TFEU)
- 

Narrower interpretation

- C-206/13 **Siragusa** – interaction between the public interest in the protection of environment and the private right to property – CJEU found that the Italian legislation in question did not intend to apply EU law – **lack of connection with EU law**
 - the existence of “specific” rules of EU law on the matter
 - Charter rights are not applicable, if Union law does not create any obligations for MS relevant for the concrete case
- 

Narrower interpretation

- C-333/13 **Dano** – conditions for receiving social security benefits did not result from Union law but from that of Member States – **outside the personal scope of EU law**
- C-218/15, *Paoletti*
- C-177/17, *Demarchi Gino*

Scope of application of the Charter – 51.1

- C-483/12 - **Pelckmans Turnhout**: *where a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction*

Applicability of the Charter

Association de médiation sociale C-176/12 (AMS)

Even in cases, where national regulation clearly have been enacted in implementation of Union law and Charter rights applicable:

- in order to become fully effective Charter articles have to be further determined by Union law or by national law
- cannot guarantee a subjective right to an individual as a stand alone provision

No direct horizontal effect for principles

Applying the Charter in national proceedings: its application, scope and interpretation

- *The role of the Charter within the EU legal framework and its relevance for the national legal order: legal nature, legal value, role, judicial remedies within the EU for violations of fundamental rights, relevance of the Charter for the national judge*

Applying the Charter in national proceedings: its application, scope and interpretation

National constitution

European Convention for Human Rights
+ UN instruments

EU Charter

Typical use of the Charter in case of violation at national level

1. Violation of fundamental rights by the Member State
2. Applicability of the EU law (when there is a fundamental rights' issue involving interpretation of EU legislation, e.g. national authority refers to the EU regulation)
3. Appeal against action by national authority to domestic court
4. Courts – preliminary reference to the Court of Justice of the European Union
5. Judgment of the CJEU
6. Resolution of the case by domestic court as a follow up to judgment of the CJEU

Typical use of the Charter in case of violation at national level

- restrictive interpretation: as agents in the application of EU law *and* when transposing a directive
- broader interpretation: as agents in the application of EU law *and* when transposing a directive *and*
- whenever acting within the scope of application of EU law

Limitations on the exercise of the rights and freedoms (Article 52)

Any limitation must:

- be provided by law
- respect the essence of the right
- be necessary to meet objectives of general interest recognized by the Union or to protect others' rights
- respect the principle of proportionality

Interpretation of the rights (Article 52)

- according to their source: rights for which provision is made in the Treaties > under the conditions set out therein
- rights corresponding to ECHR rights > same meaning and scope > ECHR standard is a minimum standard
- rights stemming out of common constitutional traditions > to be interpreted in harmony with those traditions
- national laws and practices > taken into full account
- *Explanations*

CJEU as regards the Charter in preliminary procedure (Article 267 TFEU)

- less than 200 judgment per year
- 1/6 of cases – inadmissible
- key issue – Article 51.1. of the Charter
- New wave of preliminary references: Article 47, Article 8, criminal law

Problems?

- Competence creep into areas of domestic law [despite art. 51.2 of the Charter and art. 6.1 TEU]
- Idea of limitation of public powers – supranational constitutionalism
- Limits of procedural and insitutional autonomy of Member States

Problems?

- *Weiss* (C-493/17) judgment
- *ultra vires* according to the BVerfG's judgment (2 BvR 859/15)
- Czech Constitutional Court in 2012 in the *Landtovà case*
- *Taricco I and II* saga and *Corte costituzionale*
- Heiko Sauer: *BVerfG pretends that it just enforces its well-established ultra vires review while in fact it carries out a substantive EU law review in the place of the CJEU*
- BVerfG vests itself with the power to review EU law in order to prevent violations of the German constitutional identity.
- aim: to prohibit the transfer of 'Kompetenz-Kompetenz' to the EU
- Sauer: CJEU violated EU material law, not extending EU competences

Problems?

- Commission's infringement action (Article 258 TFEU)
- Like against France: C-416/17
- But no action against Czech, Italian, Danish and Spanish quasi ultra vires
- Poland? **CJEU judgment of 19.11.2019 – application of Article 47 CFREU**
- BVerfG ultravires judgment - possible impact of implementation of CJEU judgment of 19.11.2019 (**C-585/18, C-624/18, C-625/18**) in Poland regarding the Disciplinary Chamber of the Supreme Court and the National Council of Judiciary

EU Charter applicability

Mirosław Wróblewski
ERA training, 8th October 2020



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Applicability – Yes or no?

The group of citizens is blocking Brenner motorway, protesting against air pollution in the Alpes. The manifestation, lasting for 12 hours, blocked the TIR transport between Austria, Germany and Italy.

The transportation firms ask for compensations, while the protesters invoke their freedom of assemblies (Article 12 CFREU).

Are Charter rights applicable in this case?

Yes



No



Article 12 CFREU – Freedom of assembly and of association

1. Everyone has the right to **freedom of peaceful assembly** and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

Answer: **YES**

In Schmidberger (case C-282/14) the CJEU stated that

- *fundamental rights form an integral part of the general principles of law the observance of which the Court ensures*
- *measures which are incompatible with observance of the human rights thus recognized are not acceptable in the Community*
- *since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, **justifies a restriction** of the obligations imposed by Community law, **even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.***

Applicability – Yes or no?

An entrepreneur is claiming against an administrative order that prohibits further construction on his piece of land. The order refers to a national law on the road reconstruction which will seize part of his property.

An entrepreneur claims a violation of his right to property guaranteed by the Charter (Article 17).

Is Charter right applicable in this case?

Yes

No

Article 17 CFREU – Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Answer: **NO**

In Stylinart (case C-282/14) the CJEU made clear that

there is no relevant element in the preliminary reference that would call for interpretation of any EU law provision other than the Charter. There is no a minimum of explanation concerning the relatiob between the national law and the Charter in a given case.

As the national law in question was not related to EU law, the Charter is not applicable.

Answer: **NO**

In Siragusa (case 206/13) the CJEU made clear that

*the concept of 'implementing Union law' requires a **certain degree of connection** above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other*

Applicability – Yes or no?

S., a Hungarian national, is accused of having committed burglary. A Hungarian district court issued a European arrest warrant. S. was temporarily arrested in Berlin, but denied responsibility.

The national court cannot state in which prison S. would be held. Hungary was repeatedly convicted by the European Court of Human Rights for the condition of its prisons.

Are Charter rights applicable in this case?

Yes

No

Article 4 CFREU – Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Answer: YES

In Aranyosi/ Caldaru (case 404/14) the CJEU made clear that:

*In that regard, it must be stated that compliance with the Charter, is binding, as is stated in Article 51(1) of the Charter, on the Member States and, consequently, on their courts, **where they are implementing EU law**, which is the case **when the issuing judicial authority and the executing judicial authority** are applying the provisions of national law adopted to transpose the Framework Decision.*

Applicability – Yes or no?

Two women have some drinks in a well-known traditional café in Vienna. They chat and laugh and at some point kiss each other.

When the owner of the café sees this, she asks them to leave the place as such behaviour can not be tolerated in a traditional place like hers.

The couple leaves, but does not want to accept, how they have been treated.

Are Charter rights applicable in this case?

Yes

No

Article 21 CFREU – Non-discrimination

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.

Answer: **NO**

The case is based on a real story that took place in Vienna in January 2015. The owner of the Café has expelled the two women from her place based on the presumption that they were Lesbians and has consequently discriminated them in access and provision of goods and services.

National law, implementing **EU Directive 78/2000**, protects against discrimination on grounds of **sexual orientation in employment** only. Article 21 CFREU prohibits discrimination on grounds of *inter alia* sexual discrimination in implementation of EU law. Charter rights can be referred to in order to scrutinize implementation of EU law but can not be used in order to extend its scope.

Applicability – Yes or no?

A Korean citizen has a valid residence permit in Germany, the country of origin of his daughter and wife.

When the family decides to move to Vienna he claims his right to stay in Germany referring to his family members' right of free movement as EU citizens (Directive 2004/38) and his right to full enjoyment of family rights (Article 7 of the Charter).

Are Charter rights applicable in this case?

Yes

No

Article 7 CFREU – Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Answer: **NO**

In **Iida vs. Ulm** (case C-40/11) the CJEU made clear that:

The purpose of enabling family members of EU citizens to enjoy the free movement within the EU is to accompany or join their family.

The purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions.

The Court does not determine any connection with EU law in this case and therefore the Charter rights are not applicable.

Applicability – Yes or no?

A NGO, being familiar with public reports on secret surveillance of French authorities, challenges the legality of such action before the French Court. The NGO concentrates on the secret control of telecommunications metadata of citizens not suspected of any crime or terrorism.

The NGO invokes Articles 7, 8 and 11 of the Charter.

Are Charter rights applicable in this case?

Yes

No

Article 8 CFREU – Protection of personal data; Article 11 – Freedom of expression and information

8: 1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

11: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers

Answer: **YES**

In *Privacy International* (case C-623/17), judgment of 6th October 2020, the CJEU made clear that:

1. Article 1(3), Article 3 and Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, read in the light of Article 4(2) TEU, must be interpreted as meaning that national legislation enabling a State authority to require providers of electronic communications services to forward traffic data and location data to the security and intelligence agencies for the purpose of safeguarding national security falls within the scope of that directive.

2. Article 15(1) of Directive 2002/58, as amended by Directive 2009/136, read in the light of Article 4(2) TEU and Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation enabling a State authority to require providers of electronic communications services to carry out the general and indiscriminate transmission of traffic data and location data to the security and intelligence agencies for the purpose of safeguarding national security.



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Relationship between the CFR and ECHR

Mag. Nina Betetto
Supreme Court of Slovenia
President of the CCJE

Outline

- Relationship between CJEU and ECtHR
- Relationship between CFR and ECHR
- Special focus on the role of both courts in
this relationship
- Relationship between Article 47 CFR and 6
ECHR

CJEU/ECtHR

- ✦ EU not a party to the ECHR, but all its MS are
 - ✦ 47 parties to ECHR
 - ✦ European Court of Human Rights in Strasbourg (ECtHR)
 - ✦ Direct access to ECtHR for anyone

- ✦ 27 MS of the EU
 - ✦ CJEU in Luxembourg
 - ✦ Access to CJEU mainly via preliminary reference procedure



CJEU

- ✦ **Institution of the EU**
 - ✦ Its function is more integrative – to help build **unity**
- ✦ **CJEU can refer to the EU principles of supremacy, direct effect and state liability** which ensure that national legislation inconsistent with EU law is actually changed

ECtHR

- ✦ Rising from an **agreement** between European states
 - ✦ Aiming at building **community**
- ✦ The implementation of its judgments is much **more dependent on national states discretion**

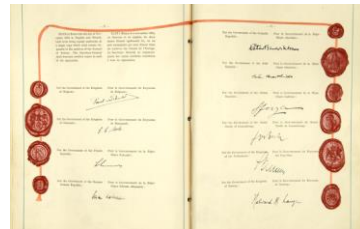
CJEU	ECtHR
<ul style="list-style-type: none"> ➤ Direct access extremely restricted: Only where an EU act is addressed to individuals or it is of direct and individual concern to them, Art. 263 TFEU ➤ Normally access via preliminary reference procedure (part of domestic procedure) 	<ul style="list-style-type: none"> ➤ Direct access, but it will only accept applications where all domestic remedies have been exhausted, Art. 35 (1) ECHR

Is there a remedy to the ECtHR?

<p style="color: #e91e63; text-align: center;">No EU law involved:</p> <ul style="list-style-type: none"> ➤ Apply to domestic courts, exhaust legal remedies and then go to Strasbourg 	<p style="color: #e91e63; text-align: center;">EU law involved</p> <p style="color: #e91e63; text-align: center;">1. Where MS authorities have acted</p> <ul style="list-style-type: none"> ➤ Application to domestic courts (with possible reference to CJEU by domestic courts) ➤ If domestic remedies exhausted: Strasbourg <p style="color: #e91e63; text-align: center;">2. Where EU authorities have acted (e.g. competition law)</p> <ul style="list-style-type: none"> ➤ Apply to General Court of EU (possibility of appeal to CJEU): no way to go to Strasbourg
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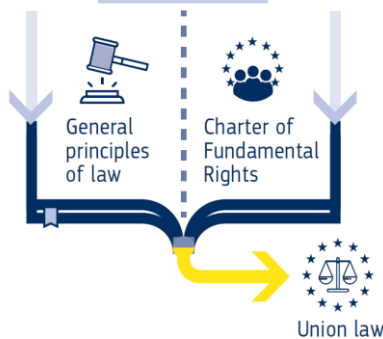
ECHR/CFR

- **ECHR**: human rights instrument with history and case-law
- **CFR**: binding since 1 December 2009 - an incorporation of human rights based on gradually developing case law in the initially economic community



Two sources of human rights protection in EU

EU FUNDAMENTAL RIGHTS



- Before the entry into force of the CFR, CJEU relied on **unwritten general principles of EU law**, such as fundamental rights, proportionality, legal certainty, subsidiarity, equality before the law
- ECHR was an important **source of inspiration** for CJEU when defining these principles
- *TEU explicitly states: "Fundamental rights, as guaranteed by the ECHR as they result from the constitutional traditions common to the MS, shall constitute general principles of the Union's law."*

Source: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf

Articles where both the meaning and the scope are the same as corresponding Articles of the ECHR

- Article 2 (**right to life**) corresponds to Article 2 of the ECHR,
- Article 4 (**prohibition of torture and inhuman or degrading treatment or punishment**) corresponds to Article 3 of the ECHR,
- Article 5(1) and (2) (**prohibition of slavery and forced labour**) corresponds to Article 4 of the ECHR,
- Article 6 (**right to liberty and security**) corresponds to Article 5 of the ECHR,
- Article 7 (**respect for private and family life**) corresponds to Article 8 of the ECHR,
- Article 10(1) (**freedom of thought, conscience and religion**) corresponds to Article 9 of the ECHR,



- Article 11 (**freedom of expression**) corresponds to Article 10 of the ECHR,
- Article 17 (**right to property**) corresponds to Article 1 of the Protocol to the ECHR,
- Article 19(1) (**protection in the event of removal, expulsion or extradition**) corresponds to Article 4 of Protocol No 4,
- Article 19(2) (**prohibition of torture and inhuman or degrading treatment or punishment**) corresponds to Article 3 of the ECHR as interpreted by the ECtHR,
- Article 48 (**presumption of innocence and right of defence**) corresponds to Article 6(2) and(3) of the ECHR,
- Article 49(1) (with the exception of the last sentence) and (2) (**principle of legality**) correspond to Article 7 of the ECHR.



The same meaning but wider scope

- Article 9 (**right to marry and found a family**) covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation,
- Article 12 (1) (**freedom of assembly and association**) corresponds to Article 11 of the ECHR, but its scope is extended to EU level,
- Article 14(1) (**right to education**) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training,
- Article 47(2) and (3) (**right to a fair trial**) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights or criminal charges does not apply as regards Union law,
- Article 50 (**right not to be tried or punished twice in criminal proceedings for the same criminal offence**) corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to EU level between the Courts of the Member States,

Example: Art. 9 CFR v Art. 12 ECHR

- Article 9, CFR:
The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.



- Article 12, ECHR:
Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.



Minimum standard of protection

CFR, Article 52(3) states the **minimum standard of protection**: the floor but not the ceiling

“In so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

This provision shall not prevent Union law providing more extensive protection.”

Level of protection

- Article 53 (**non-regressive clause**) stipulates that no provision may be interpreted as restricting fundamental rights protected by other mechanisms which the EU or its MS are party to, including the ECHR.

- This means **that case law of ECtHR is of great importance.**

- Important for **absolute character of rights:**
e.g. Art. 3 ECHR is absolute, hence Art. 4 CFR must be absolute, too

- Case C-400/10 *J. McB. v L. E.*, para 53:

“Article 7 of the Charter must therefore be given the same meaning and scope as Article 8(1) of the ECHR, as interpreted by the case-law of the ECtHR.”

Traditional position of the ECtHR: “Strasbourg compromise”

- **EU is not a party to the ECHR and cannot be sued in Strasbourg but MS can be held responsible**
- *Matthews v UK* (1999, EU primary law) According to EU’s Act on Direct Elections (primary law), no elections to the European Parliament were held in Gibraltar. Mrs Matthews alleged a breach of her right to vote under Art. 3 Protocol 1 ECHR on account of the fact that the UK has not organised elections.
- ECtHR: *“The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’. MS’ responsibility therefore continues even after such a transfer”* Breach of Art. 3 Protocol 1 ECHR

- **Bosphorus v Ireland** (2005): the application of **the doctrine of equivalent protection**
- The principle of equivalent protection was no invention of the ECtHR, but had already been introduced by other jurisdictions **facing the challenges resulting from overlapping legal systems.**



- A piece of EU legislation (secondary EU law) demanded that Yugoslav aircraft be impounded. Bosphorus Airways had leased an aircraft from Yugoslav National Airways, which was impounded in Ireland. Bosphorus argued violation of its right to property under Art. 1 Protocol 1 ECHR
- ECtHR reaffirmed general responsibility of MS under *Matthews*
- But it introduced new rebuttable presumption: **EU offers protection of human rights which is equivalent to the ECHR**
- If the MS had no discretion, the MS is presumed not to have violated the ECHR if it does nothing more than implement its obligations
- Presumption can be rebutted if in a particular case the protection was 'manifestly deficient'

CJEU: Referring to ECtHR while stepping further

- ✦ In some cases the CJEU seems to have made use of the right provided by Art. 52(3) CFR, granting more extensive rights than those provided by the ECHR. In these “broadening” cases, the CJEU emphasized that its ruling was meant **not in conflict with the ECtHR precedent**, but beyond it. By widely referring to the ECtHR precedents, in several cases it recalled the importance of taking it **as a starting point, allowing itself to expand the right at stake**, but not to depart from it.
- ✦ Case DEB v Bundesrepublik Deutschland involved **an expansion of the right** of effective judicial protection. After having engaged in a thorough analysis of ECtHR case law, the CJEU eventually relied mainly on Art. 47 CFR to expand the right to legal aid also to legal persons and not only to natural persons, thus reaching an outcome that did not clearly emerge from the ECtHR jurisprudence. Also in this case, however, the court devoted wide attention to ECtHR case law: “the meaning and the scope of the guaranteed rights are to be determined **not only by reference to the text of the ECHR, but also, inter alia, by reference to the case law of the ECtHR.**”

Limitations on the exercise of rights and freedoms

- ✦ Article 52 (1) of the CFR says that **any limitation on the exercise of the rights and freedoms** recognized by CFR must be **provided for by law** and **respect the essence of those rights and freedoms**. Subject to the **principle of proportionality**, limitations may be made **only if they are necessary and genuinely meet objectives of general interest** recognized by the Union or the need to protect the rights and freedoms of others.
- No explicit criteria determining the choice between paragraphs 1 and 3 of Article 52 !!!!

Competing legal orders?

- References to the ECHR diminished since the CFR had gained legal force (the CJEU has said in *Europese Gemeenschap v. Otis NV and Others* (CJEU 2012) that since Article 47 CFR secures protection afforded by Article 6 ECHR, it would henceforth refer only to Article 47)
- The CJEU's priority is uniform application of EU law, facilitation of legal co-operation, establishment of an area of freedom, security and justice

- In some cases it has deviated from standards set by the ECtHR case law in order to preserve the autonomy and effectiveness of EU legislative measures. Its approach is based on what the CJEU has repeatedly stressed as “**the particular characteristics of EU law**”
- Sensitive areas: mutual recognition of judicial decisions, e.g. in child abduction cases (Brussels II bis regulation) and cases concerning asylum seekers

- In **Melloni case** the CJEU considered the relationship between the CFR and constitutional guarantees on a domestic level (of which the Convention can be an integral part). The CJEU refused an interpretation of Art. 53 CFR allowing a MS to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the CFR.

Account needs to be taken of **the primacy of EU law**. CJEU stated (Melloni, C 399/11, para 64):

“Charter must be interpreted as not allowing a MS to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing MS, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution”

Opinion 2/13

- **Article 6/2 TEU foresees the accession of the EU to the ECHR**. Following complicated negotiations the negotiators were able to finalise the draft accession agreement in April 2013. The CJEU was asked by the Commission (as per Article 218(11) TFEU) to give its opinion on the competence of the EU to conclude it.
- The CJEU held that the draft Accession Agreement is **incompatible with EU law**. The central theme: the draft Accession Agreement does not sufficiently take into account the autonomy of EU law, the position of the CJEU itself and certain specific features of Union law as they currently exist.

Some reactions

- ✦ Former President of the ECtHR Dean Spielman: *'For my part, the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention's territory, whether the violation can be imputed to a State or to a supranational institution'*.



Or less diplomatic:

- ✦ “A legal bombshell”
- ✦ “Fundamentally flawed [...] and] an unmitigated disaster”



In the aftermath of the Opinion: the CJEU softening the approach?

- ✦ In **Aranyosi case** (C 404/15) a Hungarian investigating magistrate issued two European arrest warrants with respect to Mr Aranyosi, a Hungarian national, so that a criminal prosecution could be brought for two offences of forced entry and theft, allegedly committed in Hungary. The man having been located in Germany, it was the task of the German authorities to examine the warrants.
- ✦ Higher Regional Court of Bremen, which had to decide whether those warrants should be executed, found that the detention conditions to which Mr Aranyosi might be subject were contrary to fundamental rights, in particular the provision of the CFR prohibiting inhuman or degrading treatment or punishment. In judgments of 10 June 2014 and 10 March 2015 the European Court of Human Rights held that Hungary had infringed fundamental rights due to the prison overcrowding which is characteristic of their prisons.
- ✦ The German court sought to ascertain from the CJEU whether, in such circumstances, the execution of European arrest warrants can or must be refused

- The CJEU held that **'in exceptional circumstances' a MS may ignore the principle of mutual trust**. In case of information that is 'objective, reliable, specific and properly updated' pointing to the existence of 'deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention'. That information may be obtained from, inter alia, 'judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing MS, and also decisions, reports and other documents produced by bodies of the CoEurope or under the aegis of the UN'.

Back to the accession of the EU to ECHR

- Negotiations continue...
- EU will be able to act as respondent in Strasbourg
- fields of application: violations of human rights by EU institutions, e.g. EC in cartel proceedings, staff disputes...
- Where MS acted on basis of EU law (Bosphorus-like cases)
- EU accession will not change the ambit of the Charter rights as ECHR is already the minimum standard



Art. 47 CFR/Art. 6 and 13 ECHR

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs) ¹	Other corresponding CoE instruments ²	UN Human rights instruments ³
47 first paragraph	Right to an effective remedy before a tribunal	Art. 13		Art. 2 (3) ICCPR; Art. 13 CRPD; Art. 40 (2)(b) CRC; Art. 6 ICERD
47 second paragraph	Fair and public hearing	Art. 6 (1)		Art. 14 (3)(d) ICCPR ; Art. 40 (2)(b) CRC
47 third paragraph	Legal aid (needs-based)	Art. 6 (1)		Art. 14 (3)(d) ICCPR; Art. 40 (2)(b) CRC

Source: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf Handbook

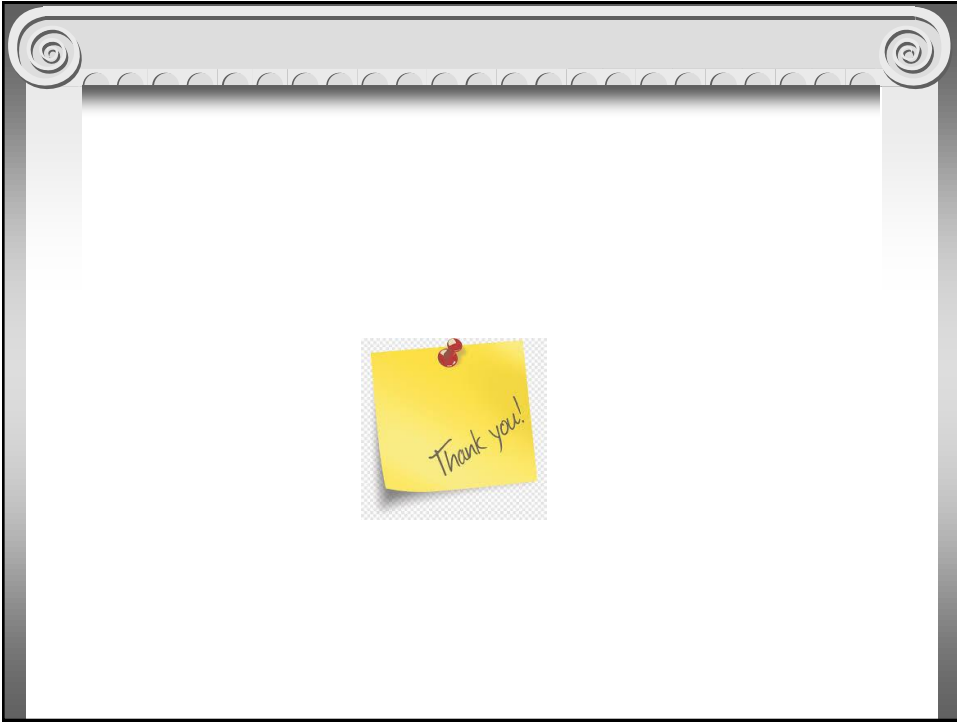
Scope

Right to a fair trial

Article 6 of the ECHR applies to criminal charges, disputes concerning civil rights, and obligations recognised in domestic law.

Article 47 of the EU Charter of Fundamental Rights applies to the rights and freedoms guaranteed by EU law. It applies only when Member States are implementing EU law.

- Article 47 applies to all rights and freedoms arising from EU law
- It corresponds to the rights in Article 6 (1) of the ECHR, without Article 6's limitation on civil rights and obligations
- Article 47 therefore secures, as a minimum, the protection offered by Article 6 of the ECHR, in respect to all rights and freedoms arising from EU law.
- This means that the ECtHR case law as a general rule is also relevant in EU law. However, the CFR applies domestically only when MS are implementing (or derogating from) EU law.





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Independence and impartiality of tribunals in the CJEU case law

Mag. Nina Betetto
Supreme Court of Slovenia
President of the CCJE

The impact of international law on national law - UK

- ↘ National law  international law
- ↘ Concept of judicial independence originates from England (1701):
 - it impacted the thinking of political leaders in the transnational level
 - the international community embodied the principle of judicial independence into international treaties
- ↘ The international law of judicial independence has impacted the domestic law: UK introduced ECHR into the British domestic law (1998; British Constitutional Reform Act, 2005)

Article 47(2), CFR

- Everyone is entitled to a fair and public hearing within a reasonable time by **an independent and impartial tribunal** previously established by law. /.../



Tribunal/court

- CoE and EU law use the term tribunal rather than court. The word 'tribunal' is given an **autonomous meaning**, and the CJEU has applied consistent principles in determining whether a body qualifies as a tribunal.
- Not necessarily a court of classic kind

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Why autonomous interpretation?

Let's think about...

- Who adopts the law?
 - The Council (+ the EP) - qualified majority vote
- Who applies the law?
 - national authorities (courts) all around Europe (27)
- How?
 - In a different (their own) way (?)
- In order to achieve rights and duties deriving from EU measures are applied uniformly and equally across the EU

What defines “tribunal” in the ECtHR case law?

- ✦ established by law
- ✦ the power to issue binding decisions
- ✦ independence and impartiality
- ✦ the ability to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner
- ✦ having full jurisdiction over the case
- ✦ the duration of its members’ terms of office

What defines “tribunal” in the CJEU case law?

The CJEU has addressed the meaning of ‘tribunal’ in the context of deciding whether a particular entity is permitted to refer a case to the CJEU for a preliminary ruling

The body must:

- be permanent
- be established by law
- be independent and impartial
- have compulsory jurisdiction
- include an *inter-partes* procedure
- apply rules of law

CJEU: Examples

- ✦ Does Court of Auditors qualify as a tribunal?
 (CJEU, C-363/11, *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou*, 19 December 2012, paras. 19-31)
- ✦ Does a Commission for Protection against Discrimination qualify as a tribunal? (CJEU, C-394/11 *Valeri Hariev Belov v. CHEZ Elektro Balgaria AD and others*)
- ✦ Does an arbitral body qualify as a tribunal? (CJEU, C-555/13, *Merck Canada Inc. v Accord Healthcare Ltd and Others*, 13 February 2014, paras. 18–25)

Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou

- ✦ The CJEU ruled that the Court of Auditors did not constitute a tribunal because: (i) it had ministerial links, which meant it was not acting as a third party in relation to the interests at stake; (ii) its jurisdiction was limited to *a priori* auditing of the state's expenditure, and did not include making a determination; (iii) its decision did not acquire the force of *res judicata* and its proceedings were not intended to lead to a decision of a judicial nature; and (iv) the beneficiary of the expenditure at issue was not a party to the proceedings before the Court of Auditors.

Merck Canada Inc. v Accord Healthcare Ltd and Others

- “**The jurisdiction** of the *Tribunal Arbitral necessário* does **not stem from the will of the parties, but from Law** No 62/2011 of 12 December 2011. That law confers upon that tribunal compulsory jurisdiction to determine, at first instance, disputes involving industrial property rights pertaining to reference medicinal products and generic drugs. In addition, if the arbitral decision handed down by such a body is not subject to an appeal before the competent appellate court, it becomes **definitive and has the same effects as a judgment handed down by an ordinary court.**”

Why is independence important?

- The **purpose** of independence is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence
- Judicial independence is therefore a **pre-requisite to the rule of law**

Impartiality/independence

- CCJE (Opinion No. 1, 1994): “The judicial independence serves as the guarantee of impartiality.”
- CCJE (Opinion No. 3): “The judicial independence is a pre-condition of the impartiality of the judge, which is essential to the credibility of the judicial system and the confidence that it should inspire in a democratic society.”
- They are tightly **intertwined and functional in character**: they are means protecting the ability of the judge to perform the relevant judicial function
- **Independence**: no outside source, which would prevent the judge from performing his function
- **Impartiality**: individual quality of a decision-maker who is free from irrelevant pressures with regard to the decision to be taken (towards himself, parties, lawyers, public opinion)

Independence

- **Legal** elements: institutional framework establishing legislative provisions and constitutional safeguards of judiciary and judges
- **Ethical** elements: incorporates the qualities necessary to achieve the end - the protection of the rights of citizens
- Independence:
 - of the **judiciary as a body**
 - **individual**
- G. Guillaume: “The judge who wants to be independent is independent.”
- Irmgard Gris: “To be a good judge is a matter of character.”



Is there a potential
threat to judicial
independence if
there is decrease of
salaries of
judges???



Example

Facts:

The Portuguese legislature temporarily **reduced the remuneration** of a series of office holders in the public sector, including the **judges** of the Court of Auditors. The Trade Union of Portuguese Judges, acting on behalf of those judges, brought an action before the Supreme Administrative Court of Portugal seeking the annulment of those budgetary measures. The ASJP contended that the **salary-reduction measures infringed 'the principle of judicial independence'** enshrined not only in the Portuguese Constitution but also in EU law.



Is the organisation of the judiciary in MS the EU's business?

- ✦ CJEU: “To the extent that the Court of Audits may, as a ‘court or tribunal’, rule on questions concerning the application or interpretation of EU law Portugal must ensure that the court meets the requirements essential to effective judicial protection. Maintaining such a court’s independence is essential and inherent in the task of adjudication. It is required not only at EU level, but also at the level of the MS and, therefore, as regards national courts. **It is essential to the proper working of the judicial cooperation system between national courts and the CJEU.**”

- ✦ **The external aspect** of judicial independence presupposes that the court concerned exercises its functions wholly autonomously, **without being subject to any hierarchical constraint or subordinated** to any other body and **without taking orders or instructions** from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

- That essential freedom from such external factors requires certain guarantees appropriate for protecting the person of those who have the task of adjudicating in a dispute, such as **guarantees against removal from office. Their receipt of a level of remuneration commensurate with the importance of the functions that they carry out** also constitutes a guarantee essential to judicial independence (*Associação Sindical dos Juizes Portugueses*, C-64/16, paras. 44-45). “

Epilogue

- However, **the CJEU holds that the salary-reduction measures at issue cannot be considered to impair the independence of the members of the Court of Audits.** Those measures were applied not only to the judges, but, more widely, to various public office holders performing duties in the public sector, including the representatives of the legislature, the executive and the judiciary. **They are, therefore, in the nature of general measures seeking a contribution from all members of the national public administration to the austerity effort dictated by the mandatory requirements for reducing the Portuguese State’s excessive budget deficit.** In addition, **the measures at issue were temporary in nature.**

National courts are to ensure “the full application of European Union law (...) and (...) judicial protection of an individual’s rights under that law” (*Opinion I/09*, § 68). If politicians can influence courts’ decisions, they can use this leverage to pursue sheer protectionism, instead of advancing the interests linked to the EU internal market. In addition, deficiencies of judicial independence in one MS entail problems for the courts in other MS, as the latter are obliged to recognize and enforce judicial decisions coming from other EU MS. Should the courts trust the judgments from the State in which the division of powers is blurred?

MS and their legal orders differ as to the substance and procedures, ways and level of protection of fundamental rights, court organisation and the expediency of proceedings.

These differences are treated as diversity and have not prevented the EU from establishing the European area of justice based on mutual trust and mutual recognition of judgments. **How to find the limits of States’ freedom to organise their judiciary? How to differentiate between a “reorganisation” and a breach of the rule of law?** Is the EU (and if yes, who exactly – Council, CJEU?) legitimized to make such a decision? And what consequences should be drawn if a breach of the rule of law is established?

These issues can be important for all 24 EU acts introducing mutual recognition of judgments (more than 20 instruments with regard to cooperation in civil and criminal matters). The *LM* case arose in the context of one of them – the European Arrest Warrant (EAW) Framework Decision.

Example: LM case (C-216/18 PPU)

- The CJEU was asked by an Irish court to address one of the most serious current legal challenges of the EU: the consequences of restrictions imposed upon judicial independence in one MS for other MS. The sequence of laws adopted in 2015-2018 in Poland has been assessed commonly by various external and internal institutions as “enable(ing) the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice and thereby pos(ing) a grave threat to the judicial independence as a key element of the rule of law”

- According to the judgment, national courts should apply **both steps of the *Aranyosi* test** when judicial independence in the issuing country is endangered. If the executing court possesses a strong evidence of systemic or generalised deficiencies in this respect, it should proceed to the second step – of individual case assessment: “the executing judicial authority must refrain from giving effect to the European arrest warrant” only if there are substantial grounds for believing that that person will run a real risk of a breach of the fundamental right to a fair trial (§ 78 and 59).

Example: Commission v Poland (C 192/18)

Facts:

In 2017, a Polish law lowered the retirement age of judges and public prosecutors, and the age for early retirement of judges of the Supreme Court to 60 years for women and 65 years for men, whereas those ages were previously set at 67 years for both sexes. In addition, that law conferred on the MoJ the power to extend the period of active service of judges of the ordinary courts beyond the new retirement ages thus set. Since the Commission took the view that those rules were contrary to EU law, it brought an action (Article 258 TFEU) for failure to fulfil obligations before the CJEU.



Infringement of Article 19 (2/2) TEU

Judicial independence requires that the court concerned exercise its functions wholly autonomously and in an impartial manner. The fact that an organ, such as the MoJ, is entrusted with the power to decide whether or not to grant an extension to the period of judicial activity beyond the normal retirement age is not sufficient in itself to conclude that the principle of independence has been undermined. However, it finds that the substantive conditions and detailed procedural rules governing that decision-making power are, in the case in point, such as to give rise to reasonable doubts as to the imperviousness of the judges concerned to external factors and as to their neutrality. First, **the criteria on the basis of which the minister is called upon to adopt his decision are too vague and that decision does not need to state reasons and cannot be challenged in court proceedings. Second, the length of the period for which the judges are liable to continue to wait for the decision of the minister falls within the latter's discretion.**

The necessary imperviousness of judges to all external intervention or pressure requires guarantees against removal from office. **The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate**, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. In the case in point, the combination of the measure lowering the normal retirement age of judges and of the measure consisting in conferring upon the MoJ the discretion to authorise them to continue to carry out their duties beyond the new retirement age thus set, for 10 years in the case of female and 5 years in the case of male judges, fails to comply with the principle of irremovability. That combination of measures is such as to create reasonable doubts regarding the fact that the new system might actually have been intended to enable the minister to remove certain groups of judges while retaining other judges in post.

Impartiality



"I'm recusing myself from this case."

- **EU law** has consistently followed the principles established by the ECtHR's case law regarding the two required aspects of impartiality: subjective and objective impartiality.

Impartiality – subjective/objective test

- The **subjective** impartiality (relating to an individual judge's personal prejudices or bias) is presumed as long as the contrary has not been proved
 - **Objective** test: account must be taken of considerations relating to the functions exercised and to internal organisation.
- "Justice must not only be done; it must also be seen to be done".
to be done".

ECtHR: Impartiality – objective test

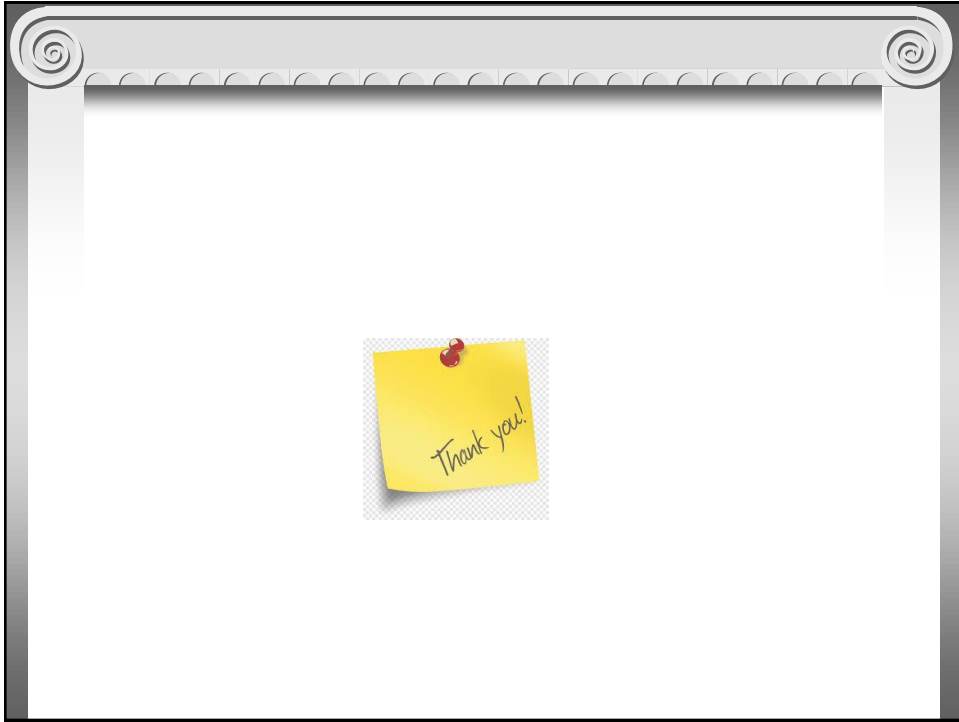
- ✦ **Piersack v. Belgium:** “What is at stake is the confidence which the courts in a democratic society must inspire in the public.”
- ✦ **Hauschildt v. Denmark:** “The fear that the judge or tribunal lacks impartiality must be such that it can be held to be objectively justified; the standpoint of the accused on this matter, although important, is not decisive.”
- ✦ **De Cubber v. Belgium:** One of the three judges of the criminal court who had given judgment on the charges against the applicant had previously acted as investigating judge in the two cases in question. (...) “Even appearances may be important ...”

- ✦ How about this?



CJEU: Example

- ✦ Case *Chronopost SA and La Poste v. Union française de l'express* concerned a claim that infrastructural assistance constituted state aid. The case had twice been before the Court of First Instance, with a different judicial composition but the same Judge-Rapporteur. At the second hearing, the court affirmed its first ruling, namely that there was state aid. The appellants claimed that the second court was not an impartial tribunal because it included the same Judge-Rapporteur and the decision was tainted with bias.
- ✦ The CJEU set out the **test for impartiality** as follows: (i) the members of the tribunal must be subjectively impartial, that is, none must show bias or personal prejudice (there is a presumption of personal impartiality in the absence of evidence to the contrary); and (ii) the tribunal must be objectively impartial by offering guarantees sufficient to exclude any legitimate doubt in this respect. The CJEU dismissed the allegation of bias. The facts did not establish that the Chamber's composition was unlawful.



Article 47 EU Charter: scope of application and interpretation

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Article 47 EU Charter: scope of application and interpretation



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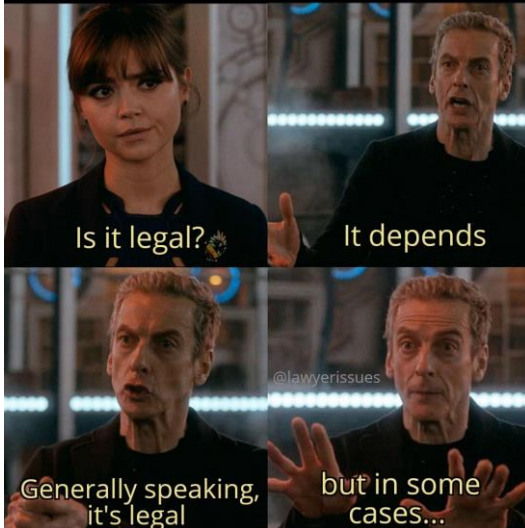
8 October 2020

Purpose of my talk

- To elaborate and reflect on the scope of Article 47 of the EU Charter in everyday judicial practice
- Meanwhile explore some examples and issues from relevant CJEU case law
- To engage & excite, perhaps provoke, and warm you up for the case study session

2

Most common legal conversation



Article 47 EU Charter: scope of application and interpretation

3

Article 47 of the EU Charter: the wordings

TITLE VI JUSTICE

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.

Article 47 EU Charter: scope of application and interpretation

4

Poll question – previous experience

Did you ever apply Article 47 EU Charter in a case at hand?

- a) Yes
- b) No

Why?

Please feel free to explain (no wrong answers possible)

Main summary of my talk:

Article 47 of the EU Charter...

enshrines the right to an effective remedy before a tribunal for everyone whose rights and freedoms guaranteed by EU law are infringed

(judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, paragraph 30 and the case-law cited).

Poll question - scope

Article 47 EU Charter:

- a) is sufficient in itself to confer on individuals a right
- b) needs to be made more specific by provisions of EU or national law to confer on individuals a right to rely on as such

Furthermore:

Article 47 of the EU Charter ...

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 which they may rely on as such

(judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 78)

Furthermore:

Article 47 of the EU Charter ...

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 which they may rely on as such

(judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 78)

Relatively new!

Why apply Article 47 EU Charter?

On EU court level:

- Fundamental rights review in cases relating to the validity of certain acts of secondary EU legislation (*on EU court level*)
- Sometimes provisions of EU law directives must be interpreted in the light of Article 47 EU Charter (*mostly on EU court level, now and then also on the level of national courts*)
- Review of national measures in a context of 'implementation of EU law' in the light of Article 47 EU Charter (*mostly on national court level, now and then – with use of the preliminary reference procedure – also on the EU court level*)

Ex officio application of Article 47 EU Charter?

The role of a judge as canary in the coalmine



(See e.g. in the context of consumer protection, unfair contract terms, and Article 47 EU Charter: *Sánchez Morcillo and Abril García*, C-539/14, 17 July 2014)

Who is “everyone whose rights and freedoms guaranteed by the law of the Union are violated”?

- Union citizens
 - Third-country nationals and/or stateless persons
(under conditions; see e.g. *Torubarov* (Grand Chamber), C-556/17, 29 July 2019)
 - Companies active on EU territory
(for instance: *Olainfarm*, C-104/13, 23 October 2014)
 - EU institutions/ Member State organs?
-
- When? *Provocative*: always!
 - *Safe answer*: There must be at least a connection with the implementation of EU law (ex Article 51 EU Charter)
 - Perhaps topic for discussion during the working groups?

Article 47 EU Charter: scope of application and interpretation

13

In what kind of disputes is Article 47 EU Charter invoked?

- Most often applied in vertical conflicts
e.g. private party vs public authority
- However also relevant for horizontal disputes
e.g. disputes between private individuals

(judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257)

Article 47 EU Charter: scope of application and interpretation

14

Some limits of Article 47 EU Charter (i)



- Article 47 is not precluding national legislation which does not confer suspensory effect on an appeal brought against a decision to further examine a subsequent application for asylum
 - *Tall*, C-239/14, 17 December 2015
- The recognition and enforcement of an civil order issued by a court of a Member State, without a prior hearing of a third person whose rights may be affected by that order, cannot be regarded as manifestly contrary to public policy in the Member State in which enforcement is sought or manifestly contrary to the right to a fair trial, in so far as that third person is entitled to assert his rights before that court.
 - *Meroni*, C-559/14, 25 May 2016

Some limits of Article 47 EU Charter (ii)



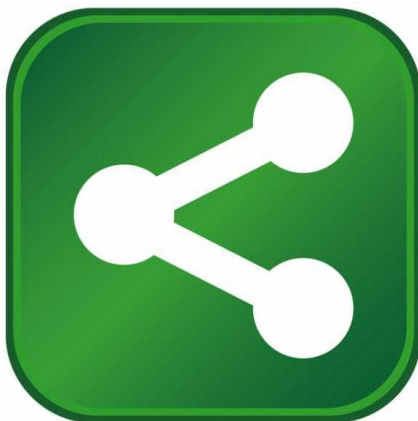
- National legislation setting judicial and registration fees for the lodging of an appeal in employment law cases which governs, in general, certain fees connected with the administration of justice, is not intended to implement provisions of EU law and falls therefore not within the scope of Article 47.
 - *Torralbo Marcos*, C-265/13, 27 March 2014, EU:C:2014:187
- Article 47 is not precluding a national provision, by which the consumer, as a mortgage debtor against whom enforcement proceedings are brought, may bring an appeal against the decision rejecting his objection to the enforcement *only* when the court of first instance has not upheld an objection based on the unfairness of the contractual term upon which the enforcement is based (even though the sellers or suppliers may, by contrast, appeal against any decision terminating proceedings regardless of the ground of objection on which that decision is based)
 - *Sánchez Morcillo and Abril García*, C-539/14, 17 July 2014
- Cases in which only national law is applicable
 - *SC Schuster & Co Ecologic*, C-371/13, 7 November 2013

Poll question – future expectation

Will you ever apply Article 47 EU Charter in a case at hand?

- a) Yes
- b) No

Promoting the right to an effective remedy and to a fair trial is what we share



And undoubtedly much more!

Thank you for your attention and participation!



- If you have any question, please do not hesitate to ask. Feel free to contact me afterwards
- Enjoy the tea break and let's have fun with the working group discussion!

Case study on Article 47 EU Charter: scope of application and interpretation

Suggested structure:

15:45 – 16:45 the time frame for the group work

15:45 – 15:55 individual reading time

15:55 – 16:45 group work on case study (assign chair/reporter organically)

16:45 – 17:15 plenary discussion of case study results

Judge Bumblebee holds office in the District Court of a particular city in the western part of a Member State of the European Union. He hears a variety of cases, mostly civil law cases and now and then he is the judge in criminal as well as administrative law cases. He is very familiar with EU law, the functioning of the EU Charter of Fundamental Rights, and always up-to-date in a judicial sense: he has a keen knowledge of the case law of the Court of Justice of the European Union. However, life is not always easy for judge Bumblebee, and he faces many challenges in his everyday legal practice. From spring 2020 onwards, he will be confronted with a chain of events he has to deal with and respond to.

Look at the following events and discuss with your working group members how the judge in question should act from the perspective of the application and interpretation of Article 47 EU Charter:

How should the court decide? Which elements and arguments are relevant in your opinion?

- a) Together with two other judges, judge Bumblebee hears a couple of criminal cases in which the suspects are accused of breach of their obligation to declare value added tax (VAT). During the combined hearing, the criminal defense lawyers state that Article 47 EU Charter has been violated due to several irregularities in the investigation. The public prosecutor brings forward that Article 47 EU Charter is not applicable in a purely national context.
- b) Another day at the court, in a human trafficking case, a suspect argues that his fundamental right to a fair trial has been infringed as laid down in Article 6 ECHR and Article 47 EU Charter. In the deliberation on the case, one of the fellow judges in the chamber, the oldest and most senior, is not sure if the suspects can independently invoke Article 47 EU Charter. Article 51 EU Charter states that "The provisions of this Charter are addressed [...] to the Member States only when they are implementing Union law", and he is not convinced the case at hand concerns implementing Union law.
- c) In an employment law case, a dismissed worker argues that the judicial and registration fees of starting a court case against her former employer are far too high and therefore in violation of Article 47 EU Charter.
- d) A collective of concerned citizens lodges an administrative law appeal after the competent public authority has renewed the environmental permits for an energy company for running a coal-fired power station. The citizens invoke European environmental law directives and breach of Article 6 ECHR Article 47 EU Charter. The law clerk who prepared a notice on the case for judge Bumblebee writes that Article 6 ECHR is not applicable because its limitation to the determination of civil rights or criminal charges.
- e) An appellant seeks the annulment of a tax assessment and a decision ordering measures to secure enforcement of the claim against his assets. The appellant's right to a fair hearing may have been infringed.

- f) Judge Bumblebee is one of the judges in a state liability case, concerning the payment of sums, due to excessively lengthy (earlier) legal proceedings. The private parties are annoyed by the national requirements to carry out a series of complex administrative operations in order to obtain a fair compensation. They bring forward that Article 47 EU Charter, read in conjunction with Articles 67, 81 and 82 TFEU, must be interpreted as precluding such national legislation that requires persons having suffered harm as a result of the excessive duration of legal proceedings, regarding a matter falling within the sphere of judicial cooperation, to carry out a series of complex administrative operations in order to obtain a fair compensation.

- g) A holder of a market authorisation for a medicinal product, used as the reference product in an application for a market authorisation for a generic product of another manufacturer, wants to challenge the decision of the competent authority which granted the market authorisation for the generic product.

- h) Another day, judge Bumblebee has to decide on a new appeal of a stateless person. In an earlier decision his court has found that she must be granted international protection under the criteria laid down by Directive 2011/95/EU. However, after the previous judgment the administrative authority adopted a contrary decision, without establishing that new elements have arisen that justify a new assessment of the international protection needs of the applicant.

- i) According to the migration authority, Mr Trump, a third-country national who is suffering from a serious illness, is no longer legally staying in the Member State. The migration authority takes a return decision in respect of him. Mr Trump launches an action for annulment and suspension of that decision. The hearing in a dispute on social assistance in which judge Bumblebee sits may influence the possible suspension of the effects of the return decision taken, but national legislation does not provide for automatic suspension of the decision.



Right to an effective remedy under Art. 47 CFR

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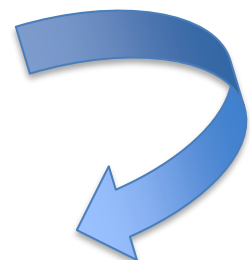


An X-ray of Article 47

Effective remedy for breaches of EU-law rights (para. 1)



Features of fair proceedings (para. 2)



Legal aid (para.3)





Scope of application: the shortcut

The controlling element is **the existence of EU-derived rights** with direct effect (wider than ECHR)



- Don't think too hard about who can invoke it (anyone!)
- Don't think too hard about who can enforce it (every EU court and domestic court handling EU-law)



Warning: Article 47 CFR's two functions

Ensure that **EU courts** work fairly, that **EU acts** are reviewable.

But also:

That **national courts** work fairly, that **national acts** are reviewable (if EU law is at stake)

Remedy against what?

Article 47 CFR provides a remedy against:

- A MS's mishandling of EU law rights (against a standard found in EU law at large), or
- Measures of EU institutions





Access to EU courts?

- Standing in annulment very restrictive (Art. 263.4 TFEU), to challenge EU measures in EU courts.
- All-inclusive possibility to obtain annulment through the preliminary reference system of Art. 267 TFEU.
 - A complete system?

Remedies against EU decisions?

Entire issue about fairness of antitrust proceedings before the Commission → appeal before GC, then CJEU

Trickier with sanctions required by the UN (for supporting terrorism).

Ultimately, the EU said that they must be reviewable.





Remedies against MS decisions*

Right to submit any MS measure to full and fair judicial review. If it is court decisions, move to check of due process. If it is administrative, right to judicial review.

Of course, most domestic systems already includes a system of judicial review. For starters, ***principle of equivalence***.

* An EU-derived right must be at stake

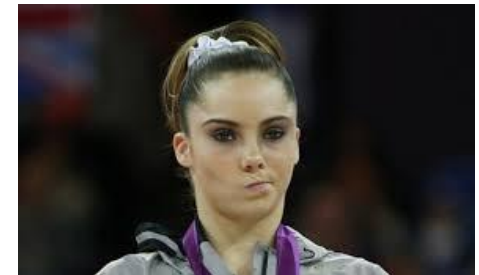




Beyond autonomy and equivalence

“EU law does not, in principle, require MS to establish before their national courts, in order to ensure the safeguarding of the rights which individuals derive from EU law, remedies other than those established by national law”
→ principle of equivalence.

Not enough!



After all, Art. 47 CFR applies primarily to EU institutions (so equivalence is not the starting point). In certain cases, **effectiveness** might be secured only *expanding* the domestic remedies.



Zoom-in: going beyond equivalence

Example: lack of judicial review for asylum board decision that modifies previous decision.

If individual lacks an effective remedy against a possible infringement of their EU-derived rights
→ the domestic court must grant a remedy, even if domestic law does not provide for it (*existence* of the remedy)

→ the appeal must have suspensive effects (*effectiveness* of the remedy)



What is the EU-based right?

Right to have application admitted. Turning on Art. 33(2)(d) of Directive 32/2013.

What is a “new element”?

2. Member States may consider an application for international protection as **inadmissible** only if: (d) the application is a subsequent application, where no **new elements or findings** relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant

MS courts required to affirm competence

143 ... if it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law.

144 It is therefore for the national courts to declare that they have jurisdiction to determine the action brought by the person concerned in order to defend the rights guaranteed to him by EU law if the domestic procedural rules do not provide for such an action in such a case. [FMZ, FNZ](#)





Remedy must be effective

Appeal must have suspensive effects

Appeal is not precluded by *res judicata*

Compliance with other EU-based rights:
if *non refoulement* was not examined,
remedy was not effective.

→ Re-examination possible even without
new facts.



Effectiveness: procedural standards

Time-limits are ok, if reasonable (C-583/11 *Inuit*)

Fair length of procedure (C-238/12 P, *FLSmidth*) → claim against GC itself!

Right to seek interim protection (C-278/13 P(R), *Pilkington Group*)



Procedural fairness

Equality of arms (always dubious with regard to Commission proceedings and Advocate General's opinions)

Fair and public hearings

Right to defence (default judgments and summons by public notice)

Right to know reasons (i.e., duty to give reasons)



Zoom-in: duty to provide reasons

...Article 47 of the Charter also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person ... 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. ... judicial review ... must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated. [C-584/10 P Kadi, GC, 2013](#)



Legal aid – a sketch

Both with respect to court and legal fees.

Not just natural persons (C-279/09, DEB), obvious consequence of it being a safeguard for EU-derived rights.

A right conditioned on effectiveness requirements: refusal to provide legal aid might be justified because they do not harm excessively the individual's right to defence.





Zoom-in: legal aid reasoning

Need to check: '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 may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts'. [DEB](#)





Thanks – questions?



EU law procedural rights standards in practice, limits and balancing

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Funded by the European Union's Justice Programme (2014-2020).

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Outline of presentation

- ▶ Focus on practical application: limits and balancing (article 52 (1) of the Charter)
- ▶ Interaction with other provisions of the Charter: Articles 41 and 48
- ▶ Specific examples on obstacles
 - ▶ fees, procedural deadlines
- ▶ Practical aspects
 - ▶ Right to be defended and represented
 - ▶ Service, Information and language
 - ▶ Victims' rights
- ▶ Caveats: only some illustrative examples, from the perspective of the application of article 47 to the Member States (mostly preliminary rulings and infringement actions). Of course, only my personal opinion.

Procedural provisions of the Charter : scope

▶ Article 41 – administration

- ▶ Applicable to EU Institutions concern covered by **general principle** of good administration
- ▶ Specific to administration (adverse decisions?); enforceable through its components which partly overlap with content of 'rights of the defence'
 - ▶ Discussion, Opinion AG in *Ispas* – C-298/16

▶ Article 47 – Access to court and Fair Trial

- ▶ Judicial proceedings of all kinds
- ▶ EU and MS (with regard to EU rights?) > discussion, *Berlioz Investment Fund*, C-682/15, Article 48 – Rights of the defence
- ▶ Criminal Justice, content > ECHR 6(2) and (3)
- ▶ Development through secondary EU law

Article 41 of the Charter: Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 48 of the Charter: presumption of innocence and rights 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.

Article 6 CEDH Right to a fair trial

- 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 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.

Article 47 right to an effective remedy and 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.

Article 6 CEDH 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.

Examples of obstacles to the right of access to court

- ▶ Point of departure: principle of institutional and procedural autonomy of the Member States (C-33/76, *Rewe*)
- ▶ Pre-Charter Case-law : focus on the principles of effectiveness and equivalence.
 - ▶ Effectiveness - Impossible or excessively difficult
 - ▶ 222/84- *Johnston* – effective judicial remedy
 - ▶ C-213/89 *Factortame*, interim relief
 - ▶ 199/82 *San Giorgio* – remedies >repayment of illegal tax levies
 - ▶ C-6/90 and 9/90 *Francovich*- Damages
 - ▶ C-312/93 *Peterbroeck* and C-430/93 *Van Schijndel*
 - ▶ C-432/05 *Unibet* – availability of legal remedies

Examples of obstacles to the right of access to court

- ▶ Post-Charter case-law
 - ▶ Progressive evolution of framework of reference: from procedural autonomy > effectiveness to right to effective judicial protection (47) and admissible limitations (52(1))
- ▶ Examples:
 - ▶ Right to a remedy: *Aziz*; C-49/14 *Finanmadrid*
 - ▶ Res judicata: C- 2/08 *Fallimento Olimpiaclub*; C-69/14 *Târșia*
 - ▶ Jurisdictional considerations: C-317/18, *Alassini*; C-93/12 *Agrokonsulting*
 - ▶ Ius standi: C-510/13 *E.ON Földgáz Trade Zrt*; C-243/15 *Lesoochránárske zoskupenie VLK*
 - ▶ remedy (powers of courts and application by administration): C-556/17 *Torubarov*; *Alheto* C-585/16
 - ▶ Suspensive effect of appeals (asylum): C-181/16 *Gnadi*

Article 47 of the Charter and limitations

- ▶ Limitations / Balancing
 - ▶ With other legal principles:
 - ▶ Legal certainty (see above, case law on res judicata, or below, case law on time limitations)
 - ▶ Good administration of Justice; judicial economy; procedural considerations: *Trade Agency C-619/10; C-73/16 Puškár ; C-685/15 Online Games*
 - ▶ With other fundamental rights
 - ▶ Liberty and security: *C-752/18 Deutsche Umwelthilfe*
 - ▶ Other interests, values
 - ▶ Public safety: *C-300/11 – ZZ*
 - ▶ Financial interests of the Union – (See saga *Taricco; M.A.S; Kolev; Dzivev*)

Article 52 of the Charter Scope and interpretation of rights and principles

- ▶ 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be **provided for by law** and respect the **essence** of those rights and freedoms. Subject to the principle of **proportionality**, limitations may be made only if they are **necessary** and **genuinely** meet objectives of general interest recognised by the Union or the need to protect the **rights and freedoms of others**.
- ▶ 2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within **the limits defined by those Treaties**.
- ▶ 3. In so far as this Charter contains rights which correspond to rights guaranteed by the **Convention for the Protection of Human Rights and Fundamental Freedoms**, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
- ▶ 4. In so far as this Charter recognises fundamental rights as they result from **the constitutional traditions** common to the Member States, those rights shall be interpreted in harmony with those traditions.
- ▶ ...

Time limitations

- ▶ Pre Charter case law:
 - ▶ C-208/90 *Emmot* // C-338/91 *Steenhorst-Neerings*
 - ▶ C- 349/08 *Sopropé*
- ▶ Post – Charter examples:
 - ▶ C-429/15 *Danqua*; C-651/19 *Commissaire général aux réfugiés et aux apatrides* (Asylum)
 - ▶ C-280/18 *Flausch and Others* (environmental law)
 - ▶ C-637/17 *Cogeco Communications* (competition law)
 - ▶ C-676/17 *Călin* (tax law)

Legal fees / legal aid

- ▶ C- 61/14 *Orizzonte salute* (in principles, legal fees contribute to the proper functioning of the Justice system).
- ▶ C-205/15 *Toma* (exception of public authorities from certain legal costs-equality of arms)
- ▶ C-470/16 - *North East Pylon Pressure Campaign and Sheehy* (rule of not prohibitively expensive procedure – Aarhus)
- ▶ C-279/09 *DEB* and C-156/12 *GREP* (Access of legal persons to legal aid)

- ▶ **The Legal Aid Directive 2016/1919**

Other practical aspects: criminal procedure

- ▶ Right to be advised, defended and represented
 - ▶ Generally under Article 47
 - ▶ Directive 2013/48 on the right of access to a lawyer in criminal proceedings
 - ▶ Importance of fundamental rights conform interpretation of directives : C-659/18 *WV* (right to a lawyer in absentia)
 - ▶ Joint interpretation > C-467/18 - *Rayonna prokuratura Lom*
- ▶ Service, Information and language
 - ▶ Specific standards in EU Criminal law
 - ▶ Directive 2010/64 Right to interpretation and translation
 - ▶ Directive 2012/13 Right to information > see discussion on interpretation in accordance with the Charter in Opinion of AG C-646/17 *Moro*
 - ▶ Directive 2016/343 on the presumption of innocence and the right to be present at trial (in absence of specific guidance > art 48 + ECHR) C-377/18 - *AH and Others*

Victims' rights

- ▶ Importance of secondary law
- ▶ Access to remedies:
 - ▶ C-186/87 *Cowan*
 - ▶ Directive 2004/80 - Right to Compensation... of Cross – border ? Victims
 - ▶ C-601/14 *Commission / Italy*
 - ▶ C-129/19 *Presidenza del Consiglio dei Ministri* (Opinion of AG and relevance of right to dignity)
- ▶ Procedural standards
 - ▶ Framework Decision 2001/220 >C-105/03 *Pupino*; C- 507/19 *X*
 - ▶ The Victims' rights Directive 2012/29
 - ▶ Right to effective remedy of victims
 - ▶ Balance with rights of the defence: C-38/18 *Gambino and Hyka*



Thanks for your
attention !

Case Study: EU law procedural rights standards in practice, limits and balancing

Sara Iglesias Sánchez

Facts:

Conwinway is a company established in Frontaly (an EU Member State). Its main activity is trading in raw materials at large scale all across the EU.

Following several inspections, the tax authorities found that Conwinway had not complied with its VAT obligations. The tax authorities considered that Conwinway had unlawfully deducted VAT. They arrived to that conclusion because, in parallel investigations, the tax authorities had found that the suppliers of Conwinway were involved in fraud. Relying on those findings, the tax authorities found that Conwinway knew or should have known that the transactions which it carried out with its suppliers were involved in VAT fraud. Those authorities adopted a decision ordering Conwinway to pay EUR 3 000 000 by way of VAT and a penalty for late payment amounting to EUR 200 000.

Conwinway paid the amount requested (the tax and the penalty). Afterwards, it filed first an administrative appeal against that decision, which was unsuccessful. Then, it took the matter to the Administrative Court of Region 1 of Frontaly, which is the court at first instance, asking for the tax decision to be annulled. It also asks for the repayment of the sums amounting to the tax and the penalty paid, plus legal interests, as well as for damages to be awarded, since due to the costs of legal proceedings and the fact that it had to pay a high fine, it went out of business.

In support of that action, Conwinway maintains that the tax authorities breached the right to a fair hearing of Article 47 of the Charter, as well as the rights of the defence. First, Conwinway did not have access to the file relating to the criminal or tax proceedings brought against the suppliers, to which it was not a party. Second, since its own fine relies on the findings in another administrative procedure to which it was not a party, it could not be properly heard nor defend itself. Third, after having paid the tax and the fine, it ran out of business and it could not afford proper legal representation, because in Frontaly, legal persons are excluded from legal aid. Conwinway explains that the Constitution of Frontaly limits the right to legal aid to natural persons, and that in cases such as this one, this contravenes EU fundamental rights. It therefore asks for the award of 'Francovich' remedies.

The legal framework and the position of the national court

The Administrative Court of Region 1 of Frontaly is considering referring the case to the Court of Justice for a preliminary ruling. It considers that the case falls within the scope of the Charter, because the decision of the tax authorities concerns the right to deduct VAT, which is a fundamental principle of the common system of VAT. Moreover, the fine imposed on Conwinway is an implementation of EU law, in particular, of the obligation imposed by Article 325 TFEU on EU Member States to fight against fraud and to protect the financial interests of the Union.

The Administrative Court explains that, under the code of fiscal procedure of Frontaly, tax authorities are bound by the findings set out in the decisions which they adopted following inspections carried out in respect of the taxable person's suppliers and which have become final. According to the Frontalian Government, the purpose of that provision is to ensure legal certainty, so the same conclusions are drawn from the same transaction, as well as to economize resources of the tax administration. The Administrative Court is however doubtful whether that provision is contrary to the Charter of fundamental rights, and whether the objective advanced by the government is sufficient to justify the potential limitation to the procedural rights contained in the Charter.

Moreover, the Administrative Court explains that there is a final criminal decision against the suppliers, with the force of *res judicata*, from which it appears that they committed fraud in its transactions with several traders, including Conwinway.

The Administrative Court also explains, with regard to the request of Conwinway to obtain repayment of the tax and the amount of the fine, that even if it were to find that the decision of the tax authority was adopted in violation of the rights of the defence, that would not mean that there was no violation of the provisions of the VAT Directive on the right to deduct. Therefore, it is unsure about whether repayment (of the tax amounts, and the fine, plus interests) in such a case would not contravene the obligations of Article 325 TFEU, which imposes on the Member States the duty to fight fraud and other illegal activities which adversely affect the financial interests of the Union, through effective and dissuasive sanctions.

Furthermore, the Administrative Court states that under national procedural law, it is not possible, in the framework of administrative procedures such as the ones at issue in the present case, to ask for the award of damages, since that procedure is reserved for civil courts through a different procedure.

Questions for discussion:

1. Identification of problems and applicable rules:
 - a) Which provisions of the Charter are relevant with regard to the different "problematic aspects" of the case?
 - b) Why may those aspects pose problems with regard to the standards of the Charter?

2. Justification and balancing:
 - a) Which are the different interests/principles at issue, to be taken into account in the assessment of the potential limitations of Charter rights and the balancing exercise?
 - b) How could the tax authority and eventually the Frontalian government try to justify the national procedural rules at issue?
 - c) Would any of those justifications be admissible and what would be your normative framework for assessing those justifications?
 - d) Would there any difference if we analyse those issues/questions from the point of view of the relevant Charter rights, or from the point of view of the 'principle of equivalence'?

3. Articulating the legal problems: Which questions could the Administrative Court pose to the Court of Justice? (Each group to propose at least 3 questions)

4. Remedies and practical solution to the case:

- a) How would you resolve the case?
- b) Which role would EU law have regarding the interpretation of national rules?
- c) Would you leave any of the national provisions disapplied, and on the basis of which rule of EU law?



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