

Speakers' contributions



Applying the Charter of Fundamental Rights of the European Union

Focus on the Right to a Fair Trial



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SEMINAR FOR LAWYERS IN PRIVATE PRACTICE



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The Charter of Fundamental Rights – general principles

Academy of European Law, Trier

Prof. Adam Bodnar, SWPS University of Social Sciences and Humanities
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12 April 2021

General framework for legal protection

- theory of multilevel constitutionalism – system of divided power
- every level of government = constitutional document guaranteeing rights and freedoms of an individual (“sword and shield” for an individual)
- two-tier system: national constitution (level of Member State) and the EU Charter of Fundamental Rights (EU level)
- three-tier system: 1) regional level (e.g. federal units, autonomous regions), 2) level of Member States, 3) the EU level
- system of remedies corresponding to each level; resolutions of conflicts between levels of protection
- supervisory character of the European Convention on Human Rights over the national and EU level (role of other international human rights’ treaties)

Multi-level system of protection of rights

National constitution

EU Charter

European Convention for
Human Rights
+ UN instruments

EU Charter – legal status

- since Treaty of Lisbon - legally binding – art. 6 TEU
- limitations on the use of Charter
 - scope of applicability (EU + implementation of EU law by Member States) (Article 51 Section 1); no new competences (Art. 51 Section 2)
 - limitations on use of rights and freedoms (Art. 52 Section 1) – “provided by law”, protection of essence of rights, principle of proportionality
- interpretation in accordance with the ECtHR (Art. 52 Section 3) - but see also the practice of ECtHR quoting ECJ (e.g. *Schalk and Kopf v. Austria*)
- interpretation in accordance with constitutional traditions of Member States (Art. 52 Section 4)
- the EU Charter as primary law (compare: status of fundamental rights before entry into force of the Lisbon Treaty)
- duplication of certain rights in the Charter and in the Treaties (e.g. related to EU citizenship)
- status of explanations to the Charter (Art. 52 Section 7)

Typology of rights

- directly enforceable rights and freedoms
- rights and freedoms referring to the EU law or domestic law – their interpretation depends on
 - national laws governing the use of rights (e.g. Art. 9 of the Charter), or
 - Community law and national laws and practices (e.g. Art. 27 of the Charter)
- principles („the Union recognizes and respects...”) – see Art. 52 Section 5 of the Charter:
 - may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers
 - judicially cognisable only in the interpretation of such acts and in the ruling on their legality
- aspirational norms („Union policies shall ensure...”)
- rights of EU citizens

Social rights in the EU

- wide scope of secondary legislation concerning social rights in the EU
- „social rights” defined in the Charter as „rights” or „principles”; question of justiciability of principles (Art. 52 Section 5 of the Charter)
- Art. 12 – freedom of trade unions, Art. 21 – non-discrimination principle and its applicability to social rights
- reliance on international law standards (such as European Social Charter) in interpretation of rights (before Lisbon Treaty); now - possibility of direct interpretation from the Charter
- impact on legislative making and on adjudication of certain rights by domestic and CJEU
- European Pillar of Social Rights, solemn proclamation by the European Parliament, the Council and the European Commission, 2017

Different dimensions of the Charter use

- control of legislation at the EU level and international treaties ratified by the EU in light of the Charter
- use of certain Charter provisions for internal EU policies (e.g. non-discrimination policy, right to good administration)
- the Commission acting as guardian of Treaties (article 258 TFEU)
- application interpretation of the Charter by EU courts
- domestic use of the Charter – reference to the Charter by domestic courts when implementing the EU law

Typical use of the Charter in case of violation of fundamental rights at a 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 national court
4. Courts – preliminary reference to the Court of Justice of the European Union
5. Judgment of the Court of Justice of the European Union – interpretation of EU law (including the EU Charter of Fundamental Rights)
6. Judgment of the national court as a follow up to judgment of the EU Court of Justice

Example - right to vacation

- *C-539/12, Z.J.R. Lock v. British Gas Trading Limited*
- Remuneration for vacation – should it be based on regular basic remuneration (in case of applicant approx. 1.220 GBP) or should it include premiums earned during regular work (2350 GBP)?
- Reference by the CJEU to fundamental right to vacation – art. 31 Section 2 of the Charter
- Art. 7 of the Directive 2003/78 should be interpreted taking into account its context and the contemplated effect (para. 15)
- Detering effect of the current practice in a company for possibility to take vacation (para. 21)

Charter and EU legislation – example of anti-discrimination laws

- Article 19 TFEU - EU competence to adopt anti-discrimination laws and policies (EU anti-discrimination policies)
- selected protected grounds of discrimination
- Art. 20 and 21 of the Charter – „constitutional” non-discrimination and equality clauses in the Charter
 - verification of the legislation (e.g. C-528/13, *Leger* - Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components (OJ 2004 L 91, p.25).
 - strengthening the EU anti-discrimination legislation (e.g. C-555/07, *Seda Küçükdevici* – discrimination due to age as a general principle of EU law)
- Art. 22 of the Charter – equality between men and women

Interpretation of EU directives in light of the Charter – some examples

- Definition of disability – C-335/11, *Jette Ring*
- Obesity as disability – C-354/13, *Kaltoft*
- Privacy, data retention and bulk surveillance - C-623/17, *Privacy International*
- Discrimination by association – C-303/06, *Coleman*
- Retirement age for judges – C-286/12, *Commission v. Hungary*
- Homophobic remarks made by the patron of football club – C-81/12, *Accept Romania*
- Maximum age for recruitment of a police officer, C-416/13, *Vital Pérez v Ayuntamiento de Oviedo*
- Freedom of movement of EU citizens in same-sex relationship, C-673/16, *Coman*
- Judicial independence - *Associação Sindical dos Juízes Portugueses*, C-64/16

Scope of application of the EU Charter

- 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
- C-64/16 *Associação Sindical dos Juizes Portugueses* – **rule of law cases – principle of effective legal protection (Article 19 TEU – Article 47 CFREU)**
- C-617/10 *Åkerberg Fransson*
- Criminal proceedings concerning tax fraud, but previously Mr. Fransson was punished with tax fines; applicability of ne bis in idem principle (article 50 of the Charter). Is the Charter applicable? EU law requires to adopt measures necessary to collect VAT tax, but the EU law does not harmonize penalties and criminal proceedings. Are such administrative and criminal rules „implementation of EU law“?

Scope of applicability of the EU Charter

- C-617/10 Åkerberg Fransson
- *„fundamental rights guaranteed in the legal order of the EU are applicable in **all situations governed by European Union law, but not outside such situations**. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation **falls within the scope of European Union law**, the Court [...] must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures*
- *„national authorities and courts remain free to apply national standards [...], provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised”*
- C-399/11 Melloni – higher standard of protection of rights at the national level? Such approach would undermine effectiveness and primacy of the EU law. But – if issue is not fully regulated by the EU law, such approach could be possible

Summary

- The EU Charter of Fundamental Rights is a „living instrument”
- due to the multi-level system of governance (or federalization of the European Union) it could be compared to national constitutions’ chapters on fundamental rights (or bills of rights)
- CJEU jurisprudence provides guidance on interpretation of the Charter
- growing EU secondary legislation on issues related to fundamental rights (procedural rights, asylum and migration, data protection, privacy, judicial cooperation, consumer rights, non-discrimination) creates an opportunity for the development of the Charter interpretation
- importance of the Charter is annually analysed in reports by the Commission and the EU Agency for Fundamental Rights

Thank you for your attention

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

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12 April 2021

Article 47 of the EU Charter

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

Development of secondary legislation concerning right to fair trial

Stockholm Programme: Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings

- Directive 2010/64/EU on the **right to interpretation and translation** in criminal proceedings
- Directive 2012/13/EU on the **right to information** in criminal proceedings
- Directive 2013/48/EU on the **right of access to a lawyer** in criminal proceedings
- Directive 2016/343 on strengthening of certain aspects of the **presumption of innocence** and of the right to be present at the trial in criminal proceedings
- Directive 2016/800 of the European parliament and of the Council of 11 May 2016 on **procedural safeguards for children** who are suspects and accused in criminal proceedings
- Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on **legal aid for suspects and accused persons** in criminal proceedings and for requested persons in European arrest warrant proceedings

Compare handbooks on applicability of directives at Fair Trials International:
www.fairtrials.org

Article 6 and 13 of the European Convention on Human Rights

- **Right to fair trial (Article 6.1):** 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. [...]
- **Presumption of innocence (Article 6.2):** Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- **Minimum procedural rights in criminal proceedings (Article 6.1):** for example: Everyone charged with a criminal offence has a right to free assistance of an interpreter if he cannot understand or speak the language used in court.
- **Right to effective remedy:** Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity

Development of the ECtHR case-law

- Article 6 case-law guide (civil limb):
https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf
- Article 6 case-law guide (criminal limb):
https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf
- Article 13 case-law guide:
https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf
- ECHR case-law factsheets (more than 50, in different languages), e.g.
 - Independence of the justice system:
https://www.echr.coe.int/Documents/FS_Independence_justice_ENG.pdf
 - Derogation in times of emergency:
https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf
 - Work-related rights: https://www.echr.coe.int/Documents/FS_Work_ENG.pdf
- Handbook on European Law relating to access to justice, joint publication of the EU Agency for Fundamental Rights and the ECHR,
https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf

Other standards

- Article 14 of the International Covenant on Civil and Political Rights
 - case-law of the UN Human Rights Committee
 - General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)
 - The Basic Principles on the Independence of the Judiciary, endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
- Venice Commission
 - Opinions on draft legislation prepared by different countries
 - Rule of Law Checklist
 - [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)
- OSCE ODIHR Kiev Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia; Magna Carta of Judges (Fundamental Principles) adopted by Consultative Council of European Judges in 2010
- Supplementary role – jurisprudence of the Inter-American Court of Human Rights (e.g. *Lopez Lone v. Honduras*, concerning whether a judge may take part in demonstrations aimed to defend judicial independence)

When the CJEU and Article 47 of the Charter might be helpful? Some examples

- Interpretation of „Stockholm Programme” directives, e.g. C-305/05, *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres*
- Family cases (including mutual recognition of judgments), e.g. Case C-403/09 PPU, *Detiček*, 23.12.2009
- Use of the European Arrest Warrant – e.g. C-216/18 PPU (*Celmer* case)
- Access to remedies, e.g. possibility to review a project in light of the environmental impact, C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus v. Région wallonne*
- Access to legal aid in civil cases, e.g. C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*
- Definition of „tribunal”, e.g. CJEU, C-363/11, *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou*
- Standards of mandatory mediation proceedings, e.g. *Joined cases C-317/08 to C-320/08, Rosalba Alassini v. Telecom Italia SpA*

The relevance of the European Court of Human Rights in practice (as compared to CJEU)

- application to the ECtHR is an ultimate remedy to any victim of human rights' violation, provided exhaustion of domestic remedies
- therefore, Art. 6 and Art. 13 ECHR is usually interpreted in different contexts than Art. 47 of the Charter. It is not just a general assessment of domestic regulations, but also they practical use, e.g.
 - Access to courts (court fees, legal aid); access to a lawyer (*Salduz v. Turkey*)
 - standards of proceedings (fair trial)
 - Disciplinary sanctions against judges, removal from judicial positions (*Volkov v. Ukraine*)
 - Length of proceedings and existence of domestic remedies (e.g. *Kudła v. Poland*)
- Due to the expansion of the EU legislation and rule of law issues, the case-law of the CJEU is more and more interlinked with Article 6 ECHR

Right to an effective remedy

- remedy must be effective and practical, and not illusory and theoretical – general legal standard (e.g. Polish access to legal abortion cases)
- right to compensation for violation of law (including deprivation of liberty)
- it is responsibility of the EU Member States to create a system of remedies, when the EU does not regulate it, e.g. C-583/11 P, *Inuit Tapiriit Kanatami Others v. European Parliament and Council of the European Union* (case concerning marketing of seal products in the EU's internal market)
- remedy should be provided in case of violation of EU law by domestic authorities (long-standing case-law of the CJEU)
- specific performance, including injunctions, C-314/12, *UPC Telekabel Wien*

Judicial independence standards in the CJEU

- Article 19 of the Treaty on European Union – principle of effective legal protection
- C-64/16, *Associação Sindical dos Juizes Portugueses*, judgment of 27 February 2018

In order for [the effective legal protection] to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy.

The guarantee of independence, which is inherent in the task of adjudication [...] is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, but also at the level of the Member States as regards national courts.

CJEU case-law in Polish judicial independence cases

- C-192/18, independence of ordinary courts
- C-619/18, early retirement for Supreme Court judges
- C-791/19, operation of the Disciplinary Chamber of the Supreme Court (including the interim measure of 8 April 2020), case is pending
- C-824/18, lack of judicial review from decisions of the National Council of Judiciary concerning appointment of judges (so-called „kamikaze judges”)
- C-585/18, C-624/18 and C-625/18, status of judicial nominations made by the new National Council of Judiciary
- European Arrest Warrant cases (recent judgment of 17 December 2020, C-354/20 PPU and C-412/20 PPU)
 - No general prohibition due to systemic deficiencies, but in case of individual situation of the person concerned, the nature of the offence in question and the factual context in which that European arrest warrant has been issued, there are substantial grounds for believing that, on account of those deficiencies, that person will run a real risk of breach of his or her right to a fair trial once he or she is surrendered to those authorities

Simpson case – standard for the EU

- Joined Cases C-542/18 RX-II and C-543/18 RX-II, Erik Simpson
 - *Judicial independence standards „require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. As regards appointment decisions specifically, it is in particular necessary for the substantive conditions and detailed procedural rules governing the adoption of those decisions to be such that they cannot give rise to such reasonable doubts with respect to the judges appointed”*
 - *Article 47 of the Charter and Article 6 ECHR: “organisation of the judicial system does not depend on the discretion of the executive, but that it is regulated by law emanating from the legislature in compliance with the rules governing its jurisdiction. [It] covers not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case and any other provision of domestic law which, which, if breached, would render the participation of one or more judges in the examination of a case irregular, including, in particular, provisions concerning the independence and impartiality of the members of the court concerned.”*



March of 1000 Gowns in Warsaw

Photo by Kacper Pempel, Reuters

Astradsson standard

- ECHR judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, application no. 26374/18 [Grand Chamber]
- Three-level test of evaluation whether the Court is independent (from the executive branch):
 1. There must, in principle, be a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable as such.
 2. The breach in question had to be assessed in the light of the object and purpose of the requirement of a “tribunal established by law”, namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers.
 3. The review conducted by national courts, if any, as to the legal consequences – in terms of an individual’s Convention rights – of a breach of a domestic rule on judicial appointments played a significant role in determining whether such breach amounted to a violation of the right to a “tribunal established by law”, and thus formed part of the test itself.
- *Jan Grzęda v. Poland* case (pending) – what should be the level of independence of the judicial member of the National Council of Judiciary (hearing on 19 May 2021)

Conclusions

- CJEU and ECtHR are in a constant dialogue as regards shaping standards of right to fair trial, access to tribunal and legal aid
- The European Union is significantly involved into shaping minimum procedural rights in criminal matters
- The principle of mutual trust and recognition of judgments require common standards concerning judicial independence in different Member States
- Rule of law crisis in Poland and Hungary opened the gate for shaping standards of judicial independence that should be applicable to courts in Member States
- Recent ECtHR judgment in *Astradsson* case (and upcoming *Grzęda v. Poland* hearings) – stronger role of the ECtHR in upholding rule of law guarantees

Thank you for your attention

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The scope of application and interpretation of the CFREU

Academy of European Law (ERA)
Seminar Applying the Charter of Fundamental Rights of the European Union
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Overview

I. Scope of application and effects of the Charter

- Invocation against EU institutions
- Invocation against Member States
- Invocation against private parties

II. Relationship between the Charter and national norms protecting fundamental rights

Scope of application and effects of the Charter

Article 51 Charter

“ 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 “

Scope of application and effects of the Charter

Addressees (I) : EU Institutions, bodies, offices and agencies

The Charter may be invoked against the EU institutions, bodies, offices and agencies (including the Court of Justice), in the context of the judicial remedies provided for by the treaties

“Direct actions” against the institutions of the EU: annulment (263 TFEU), failure to act (265 TFEU), non-contractual liability (268 TFEU), disputes between the Union and its civil servants (270 TFEU), contractual liability (272 TFEU)

Appeal against decisions of the Tribunal (Article 256(2) TFEU)

Opinion on the compatibility of an international agreement signed by the EU with the EU Treaties (Art. 218, §11 TFEU)

Preliminary reference on the validity of EU secondary law, referred by a national court to the CJEU (Art. 267 TFEU)

Scope of application and effects of the Charter

Addressees (II) : Member States - Scope

“Member States” = each and every national public authority

“ The provisions of this Charter are addressed to (...) the Member States only when they are implementing Union law ” (= “where national legislation falls within the scope of European Union law” ; C-617/10, Åkerberg Fransson)

Not binding on all MS actions / not relevant for every “national” situation (// EU law) <> National constitutions and ECHR

Direct or indirect effect of each provision

Scope of application and effects of the Charter

Addressees (II) : Member States

Poll: Have you ever had to ascertain whether the Charter / EU law was applicable to a particular situation in your daily practice ?

Scope of application and effects of the Charter

Addressees (II) : Member States - Hypotheses

[Fact Sheet Court of Justice \(December 2017\)](#) ; [e-Booklet on the Use of the Charter of Fundamental Rights of the EU \(May 2020\)](#)

A/ A national authority adopts a decision on the basis of a Union law norm, applying the said norm (e.g. C-4/11, NS - Decision to examine or not an asylum application; C-404/15, Aranyosi)

B/ A national authority enacts and/or applies national rules implementing or transposing Union law: primary law (C-617/10, Åkerberg Fransson) or secondary law (C-396/17, Leitner)

C/ A national authority enacts and/or applies national rules *prima facie* prohibited by Union law (C-390/12, Pflieger - Internal Market / C-165/14, Rendon Marin - Citizenship)

Scope of application and effects of the Charter

Addressees (II) : Member States - Judicial remedies

Infringement procedures brought against a MS by the European Commission (Article 258 TFEU) or by another MS (Article 259 TFEU). Act or omission to be linked to the scope of Union law (C-66/18, Commission v Hungary (Higher Education))

Dispute before a national court with PR on interpretation referred to the CJEU. National court must demonstrate that the situation falls within the scope of EU law (C-206/13, Siragusa ; C-198/13, Julian Hernández and others)

Dispute before a national court applying the Charter without a PR to the CJEU, without necessarily having regard to its scope of application (e.g. BE Constitutional Court Cour const.: Judgment No. 31/2018 of 15 March 2018)

Scope of application and effects of the Charter

Addressees (III) : Private persons - Hypotheses

Identified provisions of the Charter may be directly invoked in an horizontal setting (*i.e.* a dispute between two individuals before a national court)

Direct exclusionary effect of national norms contrary to the Charter (trade-off for the lack of direct horizontal effect of directives; regarding situations covered by the scope of a directive and, hence, EU law)

Prohibition of discrimination on grounds of religion or belief (C-414/16, Egenberger) or age (C-441/14, D.I.)

Right to an effective remedy (C-414/16, Egenberger)

Right to paid annual leave (C-569/16, Bauer)

Right to information and consultation of workers (C-176/14, AMS)

Indirect horizontal effect for all provisions of the Charter

Scope of application and effects of the Charter

Addressees (III) : Private persons - Judicial remedies

Dispute before a national court applying the Charter with or without a PR to the CJEU

Relationship between the Charter and national norms protecting fundamental rights

Invocation of the Charter against the EU, without prejudice to other standards binding on the EU (general principles of EU law, international law <> ECHR)

Relationship between the Charter and national norms protecting fundamental rights

Invocation of the Charter against MS – Articulation with national standards

Situations outside the scope of EU law: unrestricted margin of appreciation of each MS to apply national and international standards (from an EU law perspective)

Situations falling within the scope of EU law: Charter provides rules for (i) consistent interpretation (Art. 52) and (ii) identification of the norm which must prevail (Art. 53)

Relationship between the Charter and national norms protecting fundamental rights

Poll: have you ever had to articulate the protection granted by the Charter and the protection granted by other norms in your daily practice?

Relationship between the Charter and national norms protecting fundamental rights

Art. 53 CFREU	Art. 53 ECHR
<p>Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.</p>	<p><i>Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.</i></p>

Relationship between the Charter and national norms protecting fundamental rights

BUT Any "higher" protection deriving from national law may only be admitted if it does not undermine the primacy and full effectiveness of EU law (C-399/11, Melloni) (Art. 53 Charter <> Art. 53 ECHR)

“ 60. It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised ”.

Group 1	<i>Melloni</i> C-399/11
Group 2	<i>Åkerberg Fransson</i> C-617/10
Group 3	<i>F.</i> C-168/13 PPU
Group 4	<i>X and X / Belgium</i> C-638/16 PPU

What are the relevant facts and the relevant legal background ?

What is the reasoning of the Court to establish that a particular situation fall within/outside the scope of EU law ?

Why is a another norm potentially foreseeing an “higher level of protection” than EU law relevant in the case ?

Does the Court allow the application of the said norm foreseeing an “higher level of protection” ?

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

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Structure of the presentation

I- The principle of national procedural autonomy

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

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

I- The principle of national procedural autonomy

Presumption of national competence

in procedural matters and organization of the judiciary

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

The powers of the EU are limited

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

(... provided that such conditions are not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by Community law »)

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

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

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

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

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

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

Repayment of charges levied by a member state contrary to the rules of community law
« may be sought only within the framework of the conditions as to both substance and form, laid down by the various national laws applicable »...

But

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

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

The notion of Equivalence

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

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

- Equivalence does not require Member States to extend their most favourable rules
- Equivalence is respected if an objective justification, not linked with the EU or national nature of the remedy questioned, is invoked

What Equivalence means, regarding limitation periods

Equivalence has not been disregarded if

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

and

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

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

Identification of comparable procedures is not always easy...

It requires full knowledge of (comparable) national procedures...

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

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

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

The notion of Effectiveness

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

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

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

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

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

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

Global assessment of effectiveness

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

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

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

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

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

On standing

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

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

On types of remedies

Member states do not have to introduce new or specific remedies

But

Sanctions must be effective and with a deterrent effect

⇒ Inadequacy of a mere reimbursement of the expenses incurred for a work interview

ECJ, Von Colson, C14/83, 1984

⇒ In discrimination cases, when compensation is the chosen remedy, it must be full

ECJ, McDermott and Cotter, C-286/85, 1987

ECJ, Marshall II, C-271/91, 1993

On time limits for bringing proceedings

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

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

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

Importance of context

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

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

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

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

Global and contextual assessment of Equivalence and Effectiveness

- Conformity of national law cannot be assessed *in abstracto* but must be evaluated in the concrete context of the case
- All relevant aspects of the national measures concerned, and of the legal system within which they apply, must be taken into account

Quiz

Is it possible that effectiveness requires criminal sanctions?

- a) Yes
- b) No

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

Constitutional dimension of the right to an effective judicial remedy

Core elements of the fundamental right

Substance of the right to an effective remedy and a fair trial (Article 47 CFR)

Constitutional dimension of the right to an effective judicial remedy

- A general principle of EU law (ECJ, *Johnson*, 222/84, 1986) referring to ***constitutional traditions common to the Member States***,
and to ***Articles 6 & 13 of the ECHR***

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

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

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

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

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

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

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

Core elements of the fundamental right (and general principle)

- A right to activate the necessary judicial control and benefit appropriate remedies for the protection of the rights conferred by Union law
- A right that can never be totally eliminated, not even on grounds of national security
 - Direct effect

Direct effect of Article 47 of the Charter

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

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

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

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

Substance of the right to Article 47

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

⇒ Transformations of national procedures and judicial systems may be required

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

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

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

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

ECJ, Egenberger, C-414/16, 2018

Directive 2000/78 on equal treatment

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

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

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

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

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

Directive 2008/50 on Atmospheric pollution

...

The right to an annual payed leave based on Directive 2003/88 on working time and **the right to an effective remedy** set out in Article 47 of the Charter

preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave

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

⇒ A reform of procedures before employment tribunals is necessary

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

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

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

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

ECJ, *Associação Sindical dos Juizes Portugueses*, C-64/16, 2018

ECJ, *Commission v Poland*, C-618/19 (2019)

...

Quiz

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

- a) Yes
- b) No

Conclusion

1/ A major transformation of EU law

From procedural autonomy to EU law substantial impact on national procedures

2/ A tremendous extension of EU competences

⇒ Harmonisation of the law, mostly based on the case law of the ECJ

3/ **The fundamental right/general principle of law coexists with the requirement of Equivalence and Effectiveness of national procedures** to ensure implementation of EU law

4/ **A human right dimension was added to the requirement of effectiveness of national procedures**

Effective remedy is not only a question of enforcement of EU law

The right to an effective remedy has gained the value and legal force of a fundamental right

RIGHTS OF THE DEFENCE IN EU LAW

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Rights of the defence in EU law

- **Focus: EU legislation regulating rights of the defence →**
 - **The most important legislative provisions;**
 - **The respective CJEU case-law.**

& additional aspects of the overall framework of protection

→ Article 47(2) of the Charter,

in combination with Article 47(3) and Article 48 of the Charter

Rights of the defence in EU law

I. Which are these EU legislative acts?

- European Commission on the right to a fair trial:
 1. **Directive 2010/64/EU** of the European Parliament and of the Council of 20 October 2010 on the **right to interpretation and translation in criminal proceedings**
 2. **Directive 2012/13/EU** of the European Parliament and of the Council of 22 May 2012 on the **right to information in criminal proceedings**
- European Union Agency for Fundamental Rights (FRA) on the right to a fair trial:
 3. **Directive 2013/48/EU** of the European Parliament and of the Council of 22 October 2013 on the **right of access to a lawyer** in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty
 4. **Directive (EU) 2016/343** of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the **right to be present at the trial** in criminal proceedings
 5. **Directive (EU) 2016/800** of the European Parliament and of the Council of 11 May 2016 on **procedural safeguards for children who are suspects or accused persons** in criminal proceedings
 6. **Directive (EU) 2016/1919** of the European Parliament and of the Council of 26 October 2016 on **legal aid** for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Rights of the defence in EU law

II. General background

Article 47(2) Charter: “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. **Everyone shall have the possibility of being advised, defended and represented.**”

Article 47(3) Charter: “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 48(2) Charter: “Respect for the rights of the defence of anyone who has been charged shall be guaranteed.”

Article 82(2)(b) TFEU: “To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

(b) the rights of individuals in criminal procedure;”

Directive 2010/64/EU: right to interpretation & translation in criminal proceedings

- **It applies:**

- **To** suspects and accused persons in criminal proceedings, and persons subject to proceedings in execution of a European Arrest Warrant,
 - who do not speak or understand the language of the criminal proceedings;
 - **From** the time they are made aware by a competent authority that they are suspected or accused of having committed a criminal offence
 - **Until** the conclusion of the proceedings
 - = final determination of whether they committed the offence, including sentencing and the resolution of any appeal
- ❖ **C-25/15, 9 June 2016: procedure for the recognition of a final judicial decision handed down by a court of another Member State**
- ❖ **C-216/14, 15 October 2015: penalty order – pending right to lodge an objection**
- In **minor** offences [where sanctions are imposed by a non-criminal authority and there is right to appeal to a criminal court]: *only* before the criminal court
- The **costs** of interpretation and translation must be covered by the MSs

Directive 2010/64/EU: right to interpretation & translation in criminal proceedings

• **Right to interpretation (Art. 2)**

- Interpretation must be provided, without delay, before investigative and judicial authorities
 - *police questioning, court hearings, necessary interim hearings*
- Interpretation must be available for communication with legal counsel
 - *in connection with questioning or hearing, the lodging of an appeal, other applications*
 - *explain their version of the events; disagree; facts to be used in their defence.*

• **Right to translation (Art. 3)**

- Within a reasonable period of time, translation of all documents which are **essential** to ensure the rights of defence and the fairness of the proceedings must be provided; as a minimum, of:
 - *Decisions on deprivation of liberty;*
 - *Charge or indictment;*
 - *Judgments;*
 - *AND any other document considered essential by the competent authority; the individual may submit a relevant reasoned request.*

Directive 2010/64/EU: right to interpretation & translation in criminal proceedings

❖ C-278/16, 12 October 2017

Penalty order imposing sanctions for minor offences, after a simplified unilateral procedure = **'essential document'**

→ there must be a translation of the order as a whole, not just of the requirements for lodging an objection

❖ C-216/14, 15 October 2015

Objection that must be lodged **against a penalty order**, so that the person concerned can secure a trial *inter partes* = **not an essential document by definition**

→ the court may consider it as such in the light of the proceedings concerned and the circumstances of the case;

→ if not so, national legislation requiring the individual to lodge the objection in writing *in the language of the proceedings*, even if that individual does not have a command of this language, is permitted by the Directive.

Directive 2010/64/EU: right to interpretation & translation in criminal proceedings

• **Procedural safeguards**

- Mechanism to **ascertain** whether the suspect or accused person **understands** the language of the proceedings and **needs** an interpreter/translator;
- Procedure to challenge a decision finding that there is no such need;
- Procedure to complain that the quality of the interpretation / translation is not sufficient to ensure the fairness of the proceedings.
 - **Quality = the suspects/accused persons:**
 - **Must have knowledge of the case against them; and**
 - **Must be able to exercise their right of defence.**

• **Waiver**

A waiver [only] of the right to translation is allowed, as long as:

- The individual has obtained full knowledge of the consequences of the waiver &
- The waiver was unambiguous and given voluntarily.

Directive 2012/13/EU: right to information in criminal proceedings

- **It applies:**

- **To** suspects and accused persons in criminal proceedings, and persons subject to proceedings in execution of a European Arrest Warrant,
- **From** the time they are made aware by a competent authority that they are suspected or accused of having committed a criminal offence
- **Until** the conclusion of the proceedings [= final determination of whether they committed the offence, including sentencing and the resolution of any appeal]
- In **minor** offences [where sanctions are imposed by a non-criminal authority and there is right to appeal to a criminal court]: *only* before the criminal court
- ❖ **C-467/18**, 19 September 2019: ‘criminal proceedings’ within the meaning of the Directive also cover **proceedings for committal to a psychiatric hospital** which result in deprivation of liberty, for persons who have committed criminal offences and their mental state justifies to be confined in a psychiatric hospital rather than serve a prison sentence.
- ❖ **C-216/14**, 15 October 2015: penalty order – pending right to lodge an objection

Directive 2012/13/EU: right to information in criminal proceedings

- **Right to information about rights (Arts 3 and 4)**
- Information concerning at least the following procedural rights:
 - a) the right of access to a lawyer;
 - b) entitlement to free legal advice and the conditions for obtaining it;
 - c) the right to be informed of the accusation;
 - d) the right to interpretation and translation;
 - e) the right to remain silent;

→ must be provided **promptly**, orally or in writing, in a simple language, taking into account any needs of vulnerable suspects/accused persons.

Preamble: at the latest before the first official interview by a competent authority

- ❖ **C-467/18, 19 September 2019: persons of unsound mind** must therefore be considered **vulnerable persons** for the purposes of this provision, since, because of a serious mental disorder, they may not be capable of understanding the information provided to them about their rights.

Directive 2012/13/EU: right to information in criminal proceedings

- **Right to information about rights (Arts 3 and 4)**
- *If arrested or detained, Letter of Rights, with information about:*
 - a) to e)
 - f) the right of access to the materials of the case;
 - g) the right to have consular authorities and one person informed;
 - h) the right of access to urgent medical assistance;
 - i) the maximum deprivation of liberty before being brought to a judicial authority; and
 - j) any possibilities of challenging the lawfulness of the arrest, or obtaining a review of the detention, or making a request for provisional release;
- must be provided **promptly**, to read and to keep, in a simple language they understand, maybe orally first and written without delay.
- ❖ **C-467/18, 19 September 2019: suspects must be informed as soon as possible of their rights from the moment of suspicions which justify the restriction of their liberty by coercive measures and, at the latest, before first officially questioned by the police**

Directive 2012/13/EU: right to information in criminal proceedings

- **Right to information about rights (Art. 5)**
- *If arrested in execution of a European Arrest Warrant:*
 - Letter of Rights with information on their rights according to the law implementing Framework Decision 2002/584/JHA in their MS
 - ❖ **C-649/19, 28 January 2021:** when a person is arrested in execution of European Arrest Warrant, they have the rights especially referring to this situation; they enjoy the rights of persons arrested/detained, after they are surrendered and thus acquire the status of 'accused persons'
- **Right to information about the accusation (Art. 6)**
- Information about the criminal act
- ***If arrested or detained***, also about the reasons for their arrest or detention
- Detailed information on the accusation (including the nature and the legal classification of the offence) and the nature of participation by the accused person is provided at the latest when the case is submitted to court.

Directive 2012/13/EU: right to information in criminal proceedings

❖ **C-612/15**, 5 June 2018

Disclosure of detailed information on the charges to the defence after initiation of the trial stage of proceedings, but before the court begins to examine the merits of the charges and before the commencement of hearing of arguments

❖ **C-704/18**, 12 February 2020

Obligation of a court to refer a case back to the prosecutor, after the trial phase, for procedural irregularities committed during the pre-trial phase to be remedied

Penalty order – **duration of the period to lodge an objection, when the order was served to a person authorised by the accused person**

❖ **C-216/14**, 15 October 2015

❖ **Joined Cases C-124/16, C-188/16 and C-213/16**, 22 March 2017

❖ **C-615/18**, 14 May 2020

Directive 2012/13/EU: right to information in criminal proceedings

- **Right to information about the accusation (Art. 6)**
- Information about any changes in the information already provided
 - ❖ **C-612/15**, 5 June 2018 [even before the stage of deliberation]
 - ❖ **C-646/17**, 13 June 2019 [includes modification in the legal classification of the acts on which the accusation is based]
- **Right of access to the materials of the case (Art. 7)**
- *If arrested or detained:*
 - documents essential to challenging effectively the lawfulness of the arrest or detention
 - at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to prepare the defence
 - ❖ **C-612/15**, 5 June 2018 [Access to the case material is granted at the latest upon submission of the accusation to the judgment of a court]
- **Procedural safeguards**
- Providing information must be noted
- Procedure to challenge any failure or refusal of the authorities

Directive 2013/48/EU: right of access to a lawyer in criminal proceedings

- **It applies:**

- **To** suspects and accused persons in criminal proceedings, and persons subject to proceedings in execution of a European Arrest Warrant,
- **From** the time they are made aware by a competent authority that they are suspected or accused of having committed a criminal offence
- **Until** the conclusion of the proceedings [= final determination of whether they committed the offence, including sentencing and the resolution of any appeal]
- ❖ **C-467/18, 19 September 2019: 'criminal proceedings' within the meaning of the Directive also cover proceedings for committal to a psychiatric hospital which result in deprivation of liberty, for persons who have committed criminal offences and their mental state justifies to confined in a psychiatric hospital rather than serve a prison sentence.**
- In **minor** offences [sanctions are imposed by a non-criminal authority and there is right to appeal to a criminal court, or deprivation of liberty cannot be imposed]: only before the criminal court
- **To individuals who become suspects during questioning (witnesses)**
- **It fully applies where the suspect or accused person is deprived of liberty**

Directive 2013/48/EU: right of access to a lawyer in criminal proceedings

- **Right of access to lawyer (Art. 3)**
- in such time and manner so as to be able to exercise their rights of defence practically and effectively
 - without undue delay, and in any event from whichever of the following points in time is the earliest:
 - before being questioned by the police/other law enforcement/judicial authority
 - when an investigative or other evidence-gathering act is carried out;
 - without undue delay after deprivation of liberty;
 - when they have been summoned to appear before a court having jurisdiction in criminal matters.
- It entails that the persons have the right:
 - to meet in private and communicate with the lawyer representing them;
 - for their lawyer to be present and participate effectively when questioned;
 - for their lawyer to attend the following investigative acts, if the person is required or permitted to attend them: identity parades; confrontations; reconstructions of the scene of a crime.
- ❖ **C-612/15, 5 June 2019 [same lawyer for two defendants – statement of one incriminating the other who remains silent – conflict of interest]**
- ❖ **659/18, 12 March 2020 [derogation]**

Directive 2013/48/EU: right of access to a lawyer in criminal proceedings

- **Confidentiality (Art. 4)**

- of communication between suspects or accused persons and their lawyer [meetings, correspondence, telephone conversations]

Preamble:

- When detained: responsibility of the state to ensure;
- Cases where suspicion of criminal activity of the lawyer are not covered;
- Right to have a third person informed of the deprivation of liberty (Art. 5)
- Right to communicate, while deprived of liberty, with third persons (Art. 6)
- Right to communicate with consular authorities (Art. 7)
- Right of access to a lawyer in European arrest warrant (Art. 10)
 - *Includes right to appoint a lawyer in the issuing Member State, to assist the lawyer in the executing Member State by providing information and advice*
- **Waiver:** allowed, except when the presence of a lawyer is mandatory
 - *oral or written, clear and sufficient information about the consequences of the waiver & the waiver was unambiguous and given voluntarily*
- **Procedural safeguards:** effective remedy & legal aid

Directive (EU) 2016/343: right to be present at the trial in criminal proceedings

- **It applies:**

- **To** natural persons who are suspects or accused persons in criminal proceedings
- **From** the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence
- **Until** the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive
- ❖ **C-416/20 PPU, 17 December 2020:** regarding a European arrest warrant issued for the purpose of executing a sentence concerning a person who did not appear in person at the trial resulting in the decision imposing that sentence, the provisions of Framework Decision 2002/584/JHA apply; non-execution cannot be based on Directive 2016/343

- **Right to be present at the trial (Art. 8)**

- Suspects and accused persons have the right to be present at their trial.

Preamble: the right is not absolute. Under certain conditions, they should be able, expressly or tacitly, but unequivocally, **to waive that right.**

Directive (EU) 2016/343: right to be present at the trial in criminal proceedings

- **Right to be present at the trial (Art. 8)**
- Decision on the guilt or innocence in the absence of the accused is possible:
 - If the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance;
 - If the suspect or accused person, having been informed of the trial, is represented by a lawyer;
 - If the suspect or accused person can't be located, despite reasonable efforts [+ remedies]
- ❖ **C-688/18, 13 February 2020** [Statement of person that they would not question the lawfulness of the steps taken on the basis of their absence and they did not want the steps to be repeated in their presence = clear waiver of the right to be present]
- **Right to a new trial (Art. 9)**
- Persons who were not present at their trial and the conditions art. 3 are not met:
 - **C-688/18, 13 February 2020** [Statement of person that they would not question the lawfulness of the steps taken on the basis of their absence and they wished the steps to be repeated in their presence and was given the opportunity to participate in these = cannot be regarded absent from their trial]
- **Procedural safeguards:** effective remedy

Rights of the defence in EU law

❖ *Other rules:*

• **General**

1. *Procedural safeguards for children who are suspects or accused persons in criminal proceedings [Directive (EU) 2016/800]*
2. *Presumption of innocence and right to be silent [Directive (EU) 2016/343]*
3. *Procedural safeguards for vulnerable adults in criminal proceedings [project]*
4. *Legal aid [Directive (EU) 2016/1919]*

• **Special**

- *Framework decision on the European Arrest Warrant; confiscation / EPPO Regulation: reference to the Directives*

• **Beyond criminal law**

- *CJEU case-law and legislative provisions*
- *procedure to the Member States*

- **ECtHR:** *Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb)*

❖ **Concluding remarks**

Thank you for your attention

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Case study

Three customs officers, A, B and C, are accused of having participated in a criminal organisation, in the period from 1 March 2016 to 30 November 2016, on the ground that they demanded bribes from drivers crossing the border in order not to carry out customs inspections and not to document any irregularities identified. B is also accused of receiving the bribes, while C is also accused of corruption.

On 15 December 2016, these individuals were arrested. They were informed of the charges against them immediately after their arrest. Within the following months, the charges were stated in more detail and disclosed to those individuals. They were also informed of the evidence gathered.

At the beginning of 2019 the investigation was not concluded yet. The fact that two years had passed had a practical effect on the case, because, according to national law, a special procedure could be set in motion. In particular, based on this special procedure, the court would have to refer the case back to the prosecutor, giving the latter a period of three months to conclude the investigation and to bring to an end the pre-trial stage of the criminal proceedings, either by halting the prosecution or by bringing the case for trial. If the prosecutor chose the second option, he had a period of an additional 15 days to issue and to submit an indictment to the court. If the prosecutor did not comply with those further time limits, the court was to take charge of the case and close the criminal proceedings. A, B and C filed an application requesting that the court would apply this procedure.

The court accepted the application and referred the case back to the prosecutor, giving the latter a period of three months to conclude the investigation, to draw up new charges, to disclose those charges and the investigation file to the accused and to bring to an end the pre-trial stage of the criminal proceedings, the prosecutor then having fifteen additional days to issue an indictment and submit it to the court.

The prosecutor drew up new charges and submitted an indictment to the court within the period prescribed. However, he did not disclose those charges and the contents of the investigation file to A, B and C or their lawyers, as they had stated that they were unable to appear on the dates set for that disclosure for medical and professional reasons.

Subsequently, the court held that infringements of essential procedural requirements of the national law had been committed, while the parts of the indictment concerning what C was alleged to have done were vitiated by contradictions. Consequently, in accordance with the provisions on this special procedure, that court again ordered the case to be referred back to the prosecutor, giving the latter a period of one month to cure the infringements of procedural requirements identified.

However, although the public prosecutor summoned the individuals on several occasions, he did not succeed in making proper disclosure of the charges drawn up and of the investigation file. Those three individuals and their lawyers again stated that they could not appear on the set dates for a variety of reasons, including travel abroad, medical and professional reasons and a failure by the prosecutor to comply with the legal period of three days prior notice with respect to the disclosure of the investigation file. Consequently, the court held that the prosecutor had not cured the infringements of essential procedural requirements previously identified and had

committed further infringements, and that the contradictions in the indictment had not been entirely removed.

The court also stated that it was possible that those three individuals and their lawyers had abused their rights and had engaged in no more than delaying tactics in order to prevent the prosecutor from bringing to an end the pre-trial stage of the criminal proceedings and from curing the infringements within the period prescribed. Even so, the court held that the conditions for the closure of those proceedings were met and that those individuals therefore had a right to have those proceedings closed. Nonetheless, the court decided to suspend the case rather than order the closure of the criminal proceedings.

The prosecutor, who claimed that no infringement of essential procedural requirements had been committed, and C, who considered that the court had made a mistake in not closing the criminal proceedings concerned, lodged appeals against that order. The appeal court held that the court ought to have closed the criminal proceedings in accordance with the special provisions of the national law and, for that purpose, referred the case back to it.

However, the court was uncertain whether closing the proceedings in this manner was compatible to EU law, in particular with the obligation of Member States to ensure the effective prosecution of offences affecting the financial interests of the European Union. For this reason it referred to the CJEU and, indeed, the latter ruled that Article 325(1) TFEU precludes national legislation that establishes a procedure for the termination of criminal proceedings, such as the one of the case concerned, with regard to serious illegal activities affecting the financial interests of the European Union in customs matters. In addition, it called the national court to give full effect to Article 325(1) TFEU, by disapplying the special national legislation, where necessary, while also ensuring respect for the fundamental rights of the persons accused. In addition, the CJEU ruled on whether and how the referring court could cure the infringements to the rights of the individuals in accordance with EU law.

Following the judgment of the CJEU, the court decided to disapply a national provision in order to comply with the preliminary ruling. However, the accused persons lodged an appeal against this decision; the decision was then annulled by the appeal court. As a result, the case was sent back to the court, requesting it to refer the case back to the prosecutor. Because of this, the court held it is no longer in position to cure the procedural infringements in the way indicated by the CJEU, since the public prosecutor is to take over.

Questions – issues:

1. Identify points of the case which are relevant to the rights of the defence as regulated in EU legislation, in particular provisions of Directive 2012/13/EU and Directive 2013/48/EU
2. Identify violation of rights. Which violations can be cured at the stage reached so that there is compatibility with the Directives?
3. Does the abuse of rights by the accused person have an effect on these estimations?
4. Suppose that A and C have the same lawyer. A is making arguments incriminating C, while C remains silent. Does this present a problem? Is it acceptable by the Directives for a national provision to oblige the court to dismiss this lawyer? Would it be the same if they both made incriminating statements for one another?

5. Suppose that D, a driver, had gone to the police and accused B of asking him for a bribe. The police, who had just started investigating B, took into account the accusations of D but at the same time became suspicious of him. Because of this, and having discovered certain notes implying illegal transactions kept by B, they questioned D on the basis of information that had derived from the notes, without revealing this to D. The combination of the notes and the questioning later indicated that D had in fact given money to B several times in the past. If the criminal proceedings included D along with the other three individuals with regard to bribery, would there be a violation of D's rights? Would it be possible to charge him and ensure respect of his rights?
6. Suppose that E, another driver and third country national, is also arrested for bribery in the case. Under which conditions would he be entitled of receiving translation of documents of the case and which documents should that include based on EU law? [Directive 2010/64/EU]

Applying the Charter of Fundamental Rights of the European Union

RESTRICTIONS ON ARTICLE 47 OF THE EU CHARTER (TIME LIMITS, COURT FEES, LEGAL REPRESENTATION, EFFECTS OF THE FINAL JUDICIAL DECISION)



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Article 47 of the Charter

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.

Limitations of the rights

Article 52 - Scope and interpretation

- 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.

Elements of the test

- Provided by law?
- Respects the essential content of the rights?
- Meets the objective of general interest?
- Compliance with the principle of proportionality (does not exceed what is appropriate and necessary to attain the objectives legitimately pursued) ?

Legal Aid

DEB

C-279/09

22 December 2010

- Application for legal aid to bring action for damages against Germany (delay in implementing two directives)
- A legal person in principle not qualifying for legal aid under national law
- Precluded by principle of effective judicial protection enshrined in Article 47 of the Charter? [33]
- Absence of common principle across the MSs
- For the national court to ascertain whether the conditions constitute a limitation on the right of access to the courts which undermines the *very core* of that right, whether they pursue a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim [60]

“Good conduct guarantee”

Star Storage

C-439/14

15 September 2016

- „Good conduct guarantee“ as a precondition to challenge public procurement decisions
- Remedies directives for public sector/utilities sector requiring effective and rapid review but no further conditions of the review procedure
- **MMs must ensure compliance of those procedures with Article 47 of the Charter**
- The guarantee = a limitation on the right to an effective remedy before a tribunal, justified under conditions of Article 52(1) of the Charter [49]

Obligatory administrative action

Pušár

C-73/16

27 September 2017

- Alleged breach of rights guaranteed by the legislation applicable to processing of personal data
- Judicial remedy guaranteed by Art. 22 of Directive 95/46 (now GDPR)
- Possibility to file an action before a court made conditional on the previous exhaustion of administrative remedies
- Must be consistent with Article 47 of the Charter [60]
- Additional step: additional delay and costs → limitation to the right to an effective remedy before a court [62]
- Assessed under Art. 52(1) of the Charter

Procedural autonomy

Rewe

C-33/76

16 December 1976

- “5. Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.
- Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.”

Procedural autonomy

Rewe

C-33/76

16 December 1976

- „5..... In the absence of ... measures of harmonisation the right conferred by Community law must be exercised before national courts in accordance with the conditions laid down by national rules.
- The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.
-“

Procedural autonomy

- „ 46 ... in the absence of EU rules governing the matter, it is for each Member State, **in accordance with the principle of the procedural autonomy** of the Member States, to lay down the detailed rules of administrative and judicial procedures governing actions for safeguarding rights which individuals derive from EU law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (**principle of equivalence**) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (**principle of effectiveness**).“
- Orizzonte Salute, C-61/14, 6 October 2015 (example)

Time limits

E.g.

Danqua C-429/15

20 October 2016

TDC C-327/15

21 December 2016

Valoris C-677/19

14 October 2020

- Setting of reasonable time limits in principle satisfies the requirement of effectiveness since it constitutes an application of the fundamental principle of legal certainty which protects both the person and the administration concerned, even though the passing of such time limits is, by its nature, liable to prevent the persons concerned from asserting their rights in whole or in part (Valoris C-677/19, 25)
- In respect of national legislation which comes within the scope of EU law, it is for the Member States to establish those periods in the light of, inter alia, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration. (TDC C-327/15, 98)
 - A period of 15 working days for the submission of an application for subsidiary protection (following the notification of the rejection of the application for asylum) (Danqua C-429/15)
 - A three-month time limit (running from the expiry of the period within which the operator responsible for a universal service must send an annual report to the competent national authority), for the submission of an application for compensation for the loss in the previous financial year (TDC C-327/15)
 - One year (running from the entry into force of the legislation aiming to remedy the infringement of EU law) in which applications for the reimbursement of taxes held to be incompatible with EU law must be lodged (Valoris C-677/19)

Court fees

Orizzonte
Salute

C-543/14

6 October 2015

- Court fees higher in procurement cases compared to ordinary administrative cases (2000 vs 650 eur)
- Remedy directive for public sector requiring effective and rapid review but no further conditions incl. on fees
- In the absence of EU rules on the matter, it is for each MS to lay down detailed rules subject to principles of equivalence and effectiveness

Res iudicata

- EU law does not require a national court to disapply domestic rules of procedure conferring the authority of res iudicata on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law
- EU law does not require a national judicial body, in order to take account of the interpretation of a relevant provision of EU law adopted by the Court, automatically to revisit a decision that has acquired the authority of res iudicata
- In the absence of EU legislation in this area, the rules for the implementation of the principle of the authority of res iudicata are a matter for the domestic legal order of the Member States
- However, it appears that the autonomy of the Member States ends where national law attributes such effects to a decision of a national court which frustrate the future application of EU law
 - C-119/05, Lucchini, 18 July 2007
 - C-370/17 and 37/18 Vueling, 2 April 2020

Wrap up

- **Facts**
 - GN, C-532/18, 19 December 2019, interpretation of the term accident (Article 17 (1) of the Montreal Convention)
- **Powers of the national courts**
 - Torubarov (GC) C-556/17 29 July 2019
- **Mediation and out of court settlements**
 - Menini and Rampanelli, C-75/16, 14 June 2017
 - Alassini and Others, C-317/08 to C-320/08, 18 March 2010
- **Legal representation**
 - ✦ Joined Cases C-515/17 P and C-561/17 P, Uniwersytet Wrocławski and Republic of Poland v Research Executive Agency, 4 February 2020

Article 19 of the Statute of the Court of Justice

- The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.
- The States, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in same manner.
- **Other parties must be represented by a lawyer.**
- **Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.**
-
- → concept of lawyer
- → requirement of independence

Legal representation

Kolev C-612/15

5 June 2018

VW - Right of access to a lawyer in case of non-appearance

C-659/18

12 March 2020

Criminal proceedings against EP C-467/18

19 September 2019

- **Right to be advised, defended and represented**
 - By any lawyer ? Exclusion and replacement of the lawyer who represented another defendant, where the defence was in mutual conflict
 - Reward for appearance in the courtroom? Access to a lawyer conditional upon the absconding person appearing before the court
 - In what proceedings? Judicial proceedings authorising the committal to psychiatric hospital of persons having committed acts representing a danger to society

Directive 2013/48/EU (Access to Lawyer Directive)

(Note: All names are fictional and so are the facts of the case.)

Legal Framework:

International Law

Article 17(1) of the Montreal Convention¹ provides:

‘The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.’

EU Law

Recitals 5 to 7 of Regulation (EC) No 889/2002² amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents are worded as follows:

‘(5) The Community has signed the Montreal Convention indicating its intention to become a party to the agreement by ratifying it.

(6) It is necessary to amend Council Regulation (EC) No 2027/97³ of 9 October 1997 on air carrier liability in the event of accidents in order to align it with the provisions of the Montreal Convention, thereby creating a uniform system of liability for international air transport.

(7) This Regulation and the Montreal Convention reinforce the protection of passengers and their dependants and cannot be interpreted so as to weaken their protection in relation to the present legislation on the date of adoption of this Regulation.’

According to Article 1 of Regulation No 2027/97, as amended by Regulation No 889/2002 (‘Regulation No 2027/97’), ‘this Regulation implements the relevant provisions of the Montreal Convention in respect of the carriage of passengers and their baggage by air and lays down certain supplementary provisions.’

National Law of Lumburk

Article 20 of the Code of Civil Procedure of Lumburk (‘CCP’) states that the action for damages must be filed within a time limit of 18 months from the moment when the event giving rise to the damage occurred or from the moment when the injured party became aware of the harm (whichever takes place first).

Article 25 of the Code of Civil Procedure of *Lumburk* (‘CCP’) states:

‘The appeal court may not vary the following decisions of the first-instance courts:

¹ Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38) (‘the Montreal Convention’), which entered into force, so far as the European Union is concerned, on 28 June 2004.

² Regulation of the European Parliament and of the Council of 13 May 2002 (OJ 2002 L 140, p. 2).

³ Council Regulation of 9 October 1997 (OJ 1997 L 285, p. 1).

(...)

(j) decisions concerning the damages in transport.’

Article 35 of the CCP submits the admissibility of the judicial action for damages to a prior mandatory mediation. The judicial action becomes admissible only if mediation fails.

Article 52 of the CCP states: In appeal procedures, each party must be represented by a lawyer. Only a lawyer admitted to a national bar may represent the applicant. When that condition is not satisfied, the action may be declared inadmissible.

Article 2 of the Mediation Law of Lumburk provides that the mediator should use his best efforts to conclude the process of mediation in each case in the time limit of 12 months.

Facts

In 2015, Ms. T, the appellant, travelled on board an aircraft. The journey between Priga (Priga Republic) and Lumburk (Lumburk; Lumburk and Priga Republic being EU Member States) was operated by QuickandSafeAirlines. During the flight, Ms. T was served a cup of hot coffee which, while it was placed upon the tray table in front of her tipped over onto her right thigh. That was perhaps due to a defect in the folding tray table or perhaps due to vibration of the aircraft. The spilled coffee caused Ms. T second-degree scalding.

Due to that accident, Ms T had to be hospitalized during several days and missed an important business meeting and the anniversary party organized for her son. She filed a claim on the basis of Article 17(1) of the Montreal Convention seeking that the carrier be ordered to pay compensation for the harm caused to her, estimated at EUR 100 000.

Although Ms. T is herself a successful lawyer and a partner in a law firm established in Lumburk, she chose to be represented by Mr. Coca, who works as employed lawyer in the very same law firm. Mr. Coca has been repeatedly recognized as one of the leading experts in damages actions.

Ms. T filed the action without fulfilling the obligation to resort to mediation first. She explains in her claim that she considers that that step delays the delivery of justice.

Ms T’s action was dismissed by an order of the court of the first instance. That court did not consider the merits of the claim because it concluded that the failure to respect the prior use of the mediation rendered the action inadmissible.

Ms T appealed the order. The appeal court annulled the first-instance decision and remitted the case to the first-instance court for a new decision. In the statement of reasons, the appeal court explained that the requirement of prior use of mediation hampered the effective delivery of justice. That, in its view, resulted from Article 47 of the Charter.

The first-instance court adopted a new decision in which it once again dismissed Ms. T’s action as inadmissible due to the failure to respect the prior mediation obligation.

Ms. T filed again a new appeal. The appeal court, before which that appeal is now pending, considers that due to the limits that Article 25(j) of the CCP imposes on its powers, it can only annul again the first instance decision and remit the case to a new decision. However, it notes that it is unlikely that its new decision will be respected. The appeal court notes that there is no provision in the national law that would provide it with the necessary means to ensure that its final decision will be respected by the first-instance court. It wonders whether it could rely on EU law to derive the power to replace the first-instance decision.

Moreover, the appeal court considers that Ms T's representation does not satisfy the requisite standards under national law. More specifically, it is of the view that under the national interpretation of Article 52 of the CCP, Mr. Coca does not qualify as a lawyer within the meaning of that provision. That is because he cannot be considered as sufficiently independent. His independence from the represented party (Ms T) is prevented by his status as employee of the law firm co-owned by Ms. T. That being said, the appeal court harbors doubts about the compatibility of such a rule with the requirement of effective judicial remedy.

In those circumstances, the appeal court decided to suspend the proceedings and refer to the Court the following preliminary questions:

1. Are Article 47 of the Charter, Article 6 ECHR and principle of effectiveness to be interpreted as meaning that the national courts have the power to vary a first-instance decision of the competent court and to decide the merits of the case when the clear assessment contained in a judicial decision annulling a previous first-instance decision has been disregarded by the first-instance court?
2. Does Article 47 of the Charter prevent a rule of national law such as the one contained in Article 35 of the CCP which makes the admissibility of appeals in proceedings concerning damages arising under the Montreal Convention conditional on an attempt to settle the dispute out of court?
3. Does Article 47 of the Charter prevent a rule of national law such as the one contained in Article 52 of the CCP which makes the legal representation mandatory and which makes the admissibility of an appeal, in an action for damages arising under the Montreal Convention, conditional upon the legal representative's independence?