

# 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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# Protecting fundamental rights: an overview

Enrique Arnaldos Orts

IE Law School

Luxembourg, 11 February 2021



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## Rights in Europe: a crowded house

- The constitutional traditions of Member States
- The ECHR and the ECtHR

### Art. 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*

## The origin of fundamental rights in the EU legal order

- Main takeaway: they existed as general principles of EU law
  1. Dignity (Omega, C-36/02)
  2. Freedom of expression (ERT, C-260/89)
  3. Freedom of religion (Prais/Council, 130/75)
  4. Property (Nold, 4/73)
  5. Effective remedy (Eridiana, 230/78)

Then... why the Charter?

## Because...

- Legal certainty
- Application to the EU Institutions (and also to MS)
- Judicial control
  - The accession attempts to the ECHR (art. 6(2) TEU)
  - Opinions 2/94 and 2/13
  - Bosforus

## The Charter

- Preamble
- Title I - Dignity
- Title II - Freedoms
- Title III - Equality
- Title IV - Solidarity
- Title V – Citizen’s rights
- Title VI – Justice
- Title VII – General provisions governing the interpretation of application of the Charter

## Legal value of the Charter

*“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties” (article 6(1) TEU)*

## The Charter in action

- Situation determined by EU Law
  - Charter trumps national law
- Situation not determined by EU Law
  - National court chooses applicable law
  - Except: national law does not compromise “the primacy, unity and effectiveness of EU law”

## Scope of application of the 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.** They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*
2. *The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*

## Enforceability (if applicable)

- Individually enforceable **rights**
- **Principles** need implementation (article 52(2) of the Charter)

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

## But, what does it mean to implement EU Law?

- EU Law places one or several specific obligations on the MS or the national situation is covered by a specific rule of EU Law
- Obstacle to or restriction of an EU right or denial of the genuine enjoyment thereof

## THE FIELD OF APPLICATION OF THE CHARTER

### CASE 1

Mr. A was accused of having provided, in his tax declarations for the 2004 and 2005 tax years, inaccurate information which exposed the public Treasury to the loss of revenue in the form of income tax and value added tax (VAT). He was also prosecuted for failing to declare employer's contributions for the reference periods of October 2004 and October 2005, which exposed the social security institutions to the loss of revenue. In respect of the two tax years at issue, the tax administration had imposed a number of penalties on Mr A., namely penalties as regards the income from his economic activity, as regards the VAT and as regards the employer's contributions. Interest was payable on those penalties and they were not challenged before the administrative court. The reasons for the decision issuing them were the same facts of false declarations as those stated by the public prosecutor in the criminal proceedings.

The principle of ne bis in idem set forth in article 50 of the Charter is applicable?

Group 1 and 2 argue why it should not be applicable. Group 3 why it should.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=134202&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4664700>

### CASE 2

A number of third country nationals who had claimed asylum in the United Kingdom or in Ireland while having previously transited through Greece. They objected to their transfer to Greece, the Member State normally responsible for examining their asylum claims by application of Regulation (EC) No 343/2003 8 ('the Dublin II Regulation').

They argued that such a transfer would infringe their fundamental rights or that the procedures and conditions for asylum seekers in Greece are inadequate and that the Member State in whose territory they were at the time was required to exercise its power under Article 3(2) of the Dublin II Regulation to accept responsibility for examining and deciding on their asylum claims.

Article 3(2) of the Dublin II Regulation grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the Treaty on the Functioning of the European Union and developed by the Union legislature.

Group 1 and 3 argue why it should not be applicable. Group 2 why it should.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4664888>



### CASE 3

A requested, before a national court, the performance of the conciliation settlement which he had concluded with the defendant company which had dismissed him. That settlement stated in particular that, for the purposes of reaching a settlement, the defendant company acknowledged that the dismissal was unfair and undertook to pay compensation to the appellant. However, the defendant company was subject to a recovery plan.

Although the referring court ordered the enforcement of the conciliation settlement, its execution had immediately been stayed on the ground that the defendant company was under a recovery plan and there were no assets capable of seizure which existed before that plan. By a second order, the referring court dismissed the appeal brought by the appellant seeking variation of the first order, on the ground that the first order remained in force while the recovery plan had not been closed. Before the referring court, the appellant, who intended to appeal, disputed the request made to him to produce a certificate of payment of a fee laid down in national law for authorisation to lodge an appeal.

Article 47 of the Charter is of application, given that the national law requires employees to pay a judicial fee for lodging an appeal in enforcement proceedings with a view to obtaining a legal declaration of the insolvency of the employer in order to allow access to the competent guarantee institution, in accordance with Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer?

Group 1 argues why it should not be applicable. Group 2 and 3 why it should.

<http://curia.europa.eu/juris/document/document.jsf?text=fogasa&docid=149921&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4665097#ctx1>

### CASE 4

Gaming machines, that operated without authorisation and thus allegedly used to organise prohibited games of chance, were provisionally seized following controls carried out in various places in Austria. Those machines had in fact been used without prior authorisation from the administrative authorities, required by the Austrian Federal Law on games of chance.

The owners of the gaming machines claim that the seizure goes against the freedom to provide services guaranteed in Article 56 TFEU and Articles 15 to 17, 47 and 50 of the Charter.

The field of games of chance is not harmonized.

Place your bets!

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=151521&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4665308>

# Applying the Charter of Fundamental Rights of the European Union: focus on the right to a fair trial

## The Relationship between the Charter and the ECHR

Prof. dr. Rick Lawson – Thursday 11 February 2021



Universiteit  
Leiden



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1

## Article 47 EU Charter ... what about Article 6 ECHR?

- differences, similarities – historic context, text
- practical use – the roles of the ECtHR and CJEU



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2

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- differences, similarities – historic context, text
- practical use – the roles of the ECtHR and CJEU
- [the principle of equivalent protection; mutual recognition of foreign judgments]




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- differences, similarities – historic context, text
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## historic context



**Council of Europe**


Strasbourg

47 Member States


human rights, democracy, rule of law

intergovernmental treaties and recommendations  
European Convention on Human Rights

European Court of Human Rights, Strasbourg



## historic context



**European Union**


Brussels, Luxembourg, Strasbourg

27 Member States

economic integration → gradual expansion

supranational treaties and secondary law (Regulations, Directives, Decisions ...)

Court of Justice, Luxembourg



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human rights, democracy, rule of law

intergovernmental treaties and recommendations  
European Convention on Human Rights



European Court of Human Rights, Strasbourg



## historic context – underlying logic of human rights protection

European Union	Council of Europe
Brussels, Luxembourg, Strasbourg	Strasbourg
27 Member States	47 Member States
economic integration → gradual expansion	human rights, democracy, rule of law
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 Court of Justice, Luxembourg <i>protection against the EU</i>	 European Court of Human Rights, Strasbourg <i>protection against the State</i>


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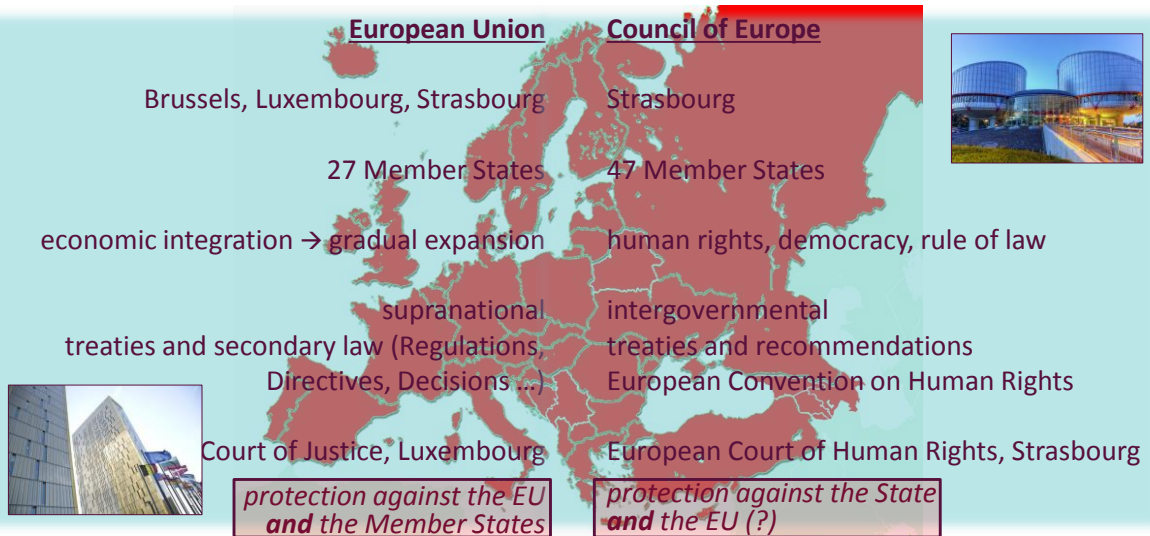
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<i>protection against the EU and the Member States</i>	<i>protection against the State</i>

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<i>protection against the EU and the Member States</i>	<i>protection against the State and the EU (?)</i>

## historic context – underlying logic of human rights protection



## Article 6 ECHR & Article 47 EU Charter FR



## Preliminary remarks

### Charter of Fundamental Rights of the EU (2000)

#### Title VII – General Provisions Governing the Interpretation and Application of the Charter

##### *Article 52 – Scope and interpretation of rights and principles*

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.

## Preliminary remarks

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## Article 6 ECHR – right to a fair trial

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

§ 1: guarantees applicable to both “civil” and “criminal” cases

- [everyone is entitled to] a fair ...
- and public hearing
- within a reasonable time
- by an independent
- and impartial
- tribunal established by law
- judgment pronounced publicly, unless...

### Article 6 – right to a fair trial

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§§ 2 and 3: guarantees applicable to “criminal” cases only

- presumption of innocence
- defence rights (legal assistance etc.)

## Article 6 ECHR – right to a fair trial – basic structure

§ 1: guarantees applicable to both “civil” and “criminal” cases

- [everyone is entitled to] a fair ...
- and public hearing → *Ramos Nunes de Carvalho e Sá v. Portugal* (2018, 55391/13)
- within a reasonable time → *Unión Alimentaria Sanders SA v. Spain* (1989, 11681/85)
- by an independent → *Baka v. Hungary* (2016, no. 20261/12); *Kövesi v. Romania* (2020, no. 3594/19)
- and impartial → *Kyprianou v. Cyprus* (2005, no. 73797/01)
- tribunal established by law → *Ástráðsson v. Iceland* (2020, no. 26374/18)
- judgment pronounced publicly, unless... → *Pretto a.o. v. Italy* (1983, no. 7984/77)

§§ 2 and 3: guarantees applicable to “criminal” cases only

- presumption of innocence → *Saunders v. the United Kingdom* (1996, no. 19187/91)
- defence rights (legal assistance etc.) → *Kostovski v. the Netherlands* (1990, no. 11454/841)

## Article 6 ECHR – right to a fair trial – basic structure

§ 1: guarantees applicable to both “civil” and “criminal” cases

- [everyone is entitled to] a fair ... → equality of arms, adversarial proceedings, duty to state reasons...
- and public hearing → *Ramos Nunes de Carvalho e Sá v. Portugal* (2018, 55391/13)
- within a reasonable time → *Unión Alimentaria Sanders SA v. Spain* (1989, 11681/85)
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- judgment pronounced publicly, unless... → *Pretto a.o. v. Italy* (1983, no. 7984/77)  
→ access to court, right to have a judgment enforced

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## Article 6 ECHR – right to a fair trial – basic structure

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and so, *a contrario*, Article 6 ECHR does *not* apply to “administrative law” cases, that is: to disputes in the areas of

- migration law
- taxation
- hiring/promotion/dismissal of civil servants

(→ exceptions, reformulations...)

## Article 6 ECHR – right to a fair trial – basic structure

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

compensated, to some extent, by Article 13 ECHR:  
 “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority ...”

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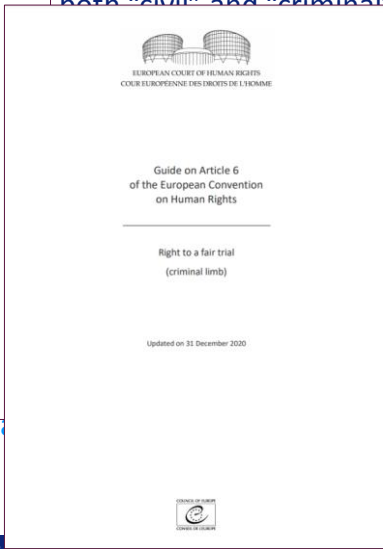
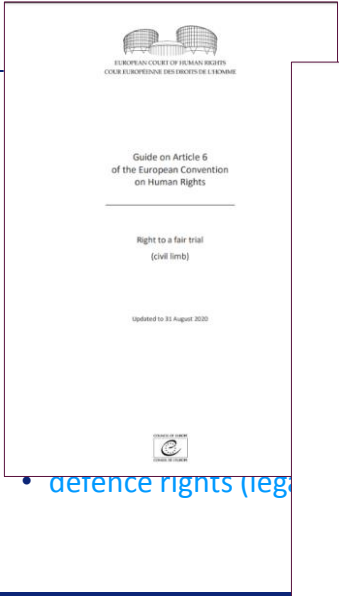
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# Article 6 ECHR – right to a fair trial – basic structure

§ 1

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*Portugal* (2018, 55391/13)  
*SA v. Spain* (1989, 11681/85)  
 2); *Kövesi v. Romania* (2020, no. 3594/19)  
 20, no. 26374/18)  
*and Others v. Italy* (2020, no. 26374/18)

§§

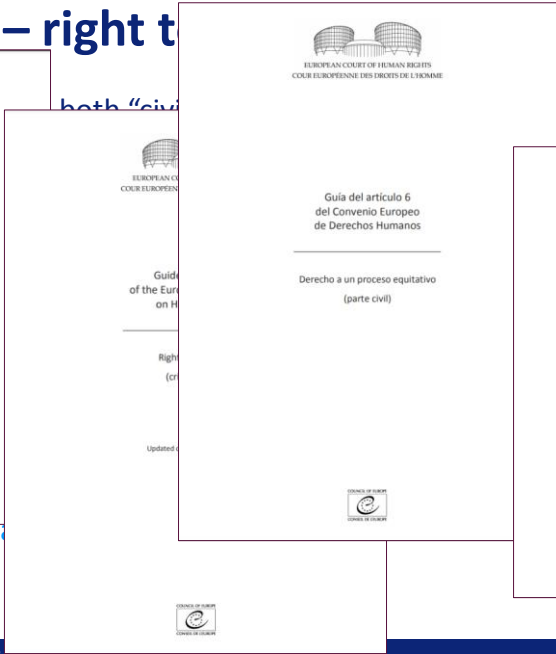
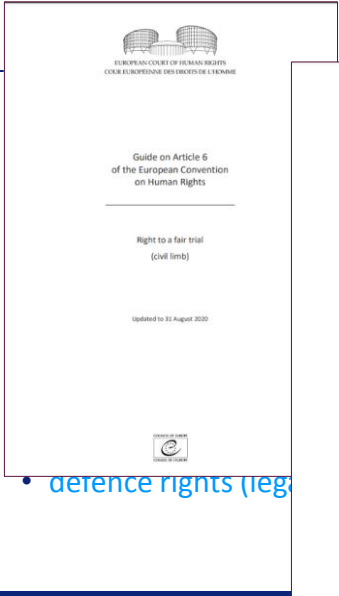
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only

# Article 6 ECHR – right to a fair trial – basic structure

§ 1

both “civil”



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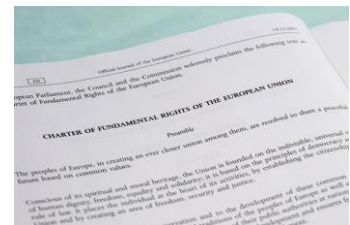
# Article 6 ECHR – right to a fair trial

# Public structure

# Article 47 EU Charter

## Right to an effective remedy and to a fair trial

1. 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.
2. 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.
3. 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

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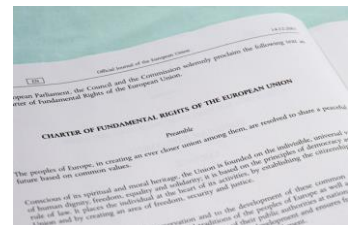
### Article 48 – Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

## Article 47 EU Charter

### Right to an effective remedy and to a fair trial

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### Explanations relating to the Charter of Fundamental Rights

The first paragraph is based on Article 13 of the ECHR:

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.

However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 Johnston [1986] ECR 1651 ...)

## Article 47 EU Charter

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### Explanations relating to the Charter of Fundamental Rights

The first paragraph is based on Article 13 of the ECHR:

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.

However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 Johnston [1986] ECR 1651 ...)

next session:  
Joined cases C-245/19 & C-246/19  
*État luxembourgeois*  
6 October 2020



# Article 47 EU Charter

## Right to an effective remedy and to a fair trial

1. 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.
2. **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.**
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## Explanations relating to the Charter of Fundamental Rights

The second paragraph corresponds to Article 6(1) of the ECHR which reads as follows: [...]

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, *Les Verts v European Parliament* (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

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## Explanations relating to the Charter of Fundamental Rights

The second paragraph **corresponds** to Article 6(1) of the ECHR which reads

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### Preliminary remarks

Charter of Fundamental Rights of the EU (2000)

Title VII – General Provisions Governing the Interpretation and Application of the Charter

#### Article 52 – Scope and interpretation of rights and principles

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.

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## Explanations relating to the Charter of Fundamental Rights

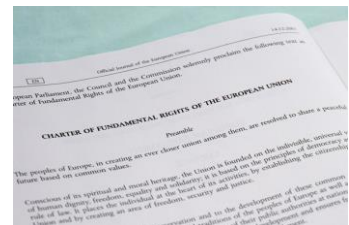
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With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, *Airey*, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the Court of Justice of the European Union.

## Article 6 ECHR & Article 47 EU Charter FR: conclusion



## Article 6 ECHR & Article 47 EU Charter FR: conclusion

Article 6 ECHR – right to a fair trial

Article 13 ECHR – right to an effective remedy



## Article 6 ECHR & Article 47 EU Charter FR: conclusion

Article 6 ECHR – right to a fair trial

Article 13 ECHR – right to an effective remedy

Article 47 Charter – right to an effective remedy and to a fair trial

Article 48 Charter – Presumption of innocence and right of defence



## Article 6 ECHR & Article 47 EU Charter FR: conclusion



Article 6 ECHR – right to a fair trial

Article 13 ECHR – right to an effective remedy

more or less the same guarantees

Article 47 Charter – right to an effective remedy and to a fair trial

Article 48 Charter – Presumption of innocence and right of defence

## Article 6 ECHR & Article 47 EU Charter FR: conclusion



Article 6 ECHR – right to a fair trial

Article 13 ECHR – right to an effective remedy

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Article 47 Charter – right to an effective remedy and to a fair trial

Article 48 Charter – Presumption of innocence and right of defence

Art. 47 Charter somewhat broader:

- effective remedy before 'a tribunal'
- not limited to 'civil' and 'criminal cases'

## Article 6 ECHR & Article 47 EU Charter FR: conclusion



Article 6 ECHR – right to a fair trial

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Article 47 Charter – right to an effective remedy and to a fair trial

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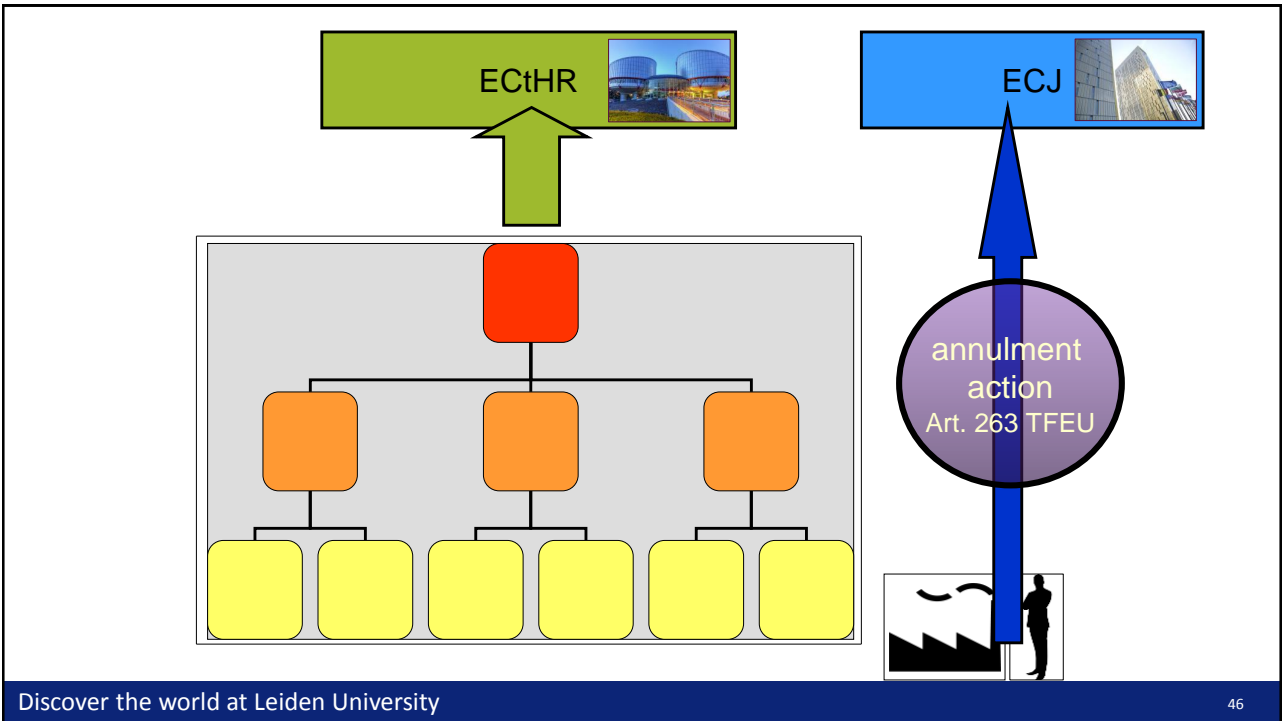
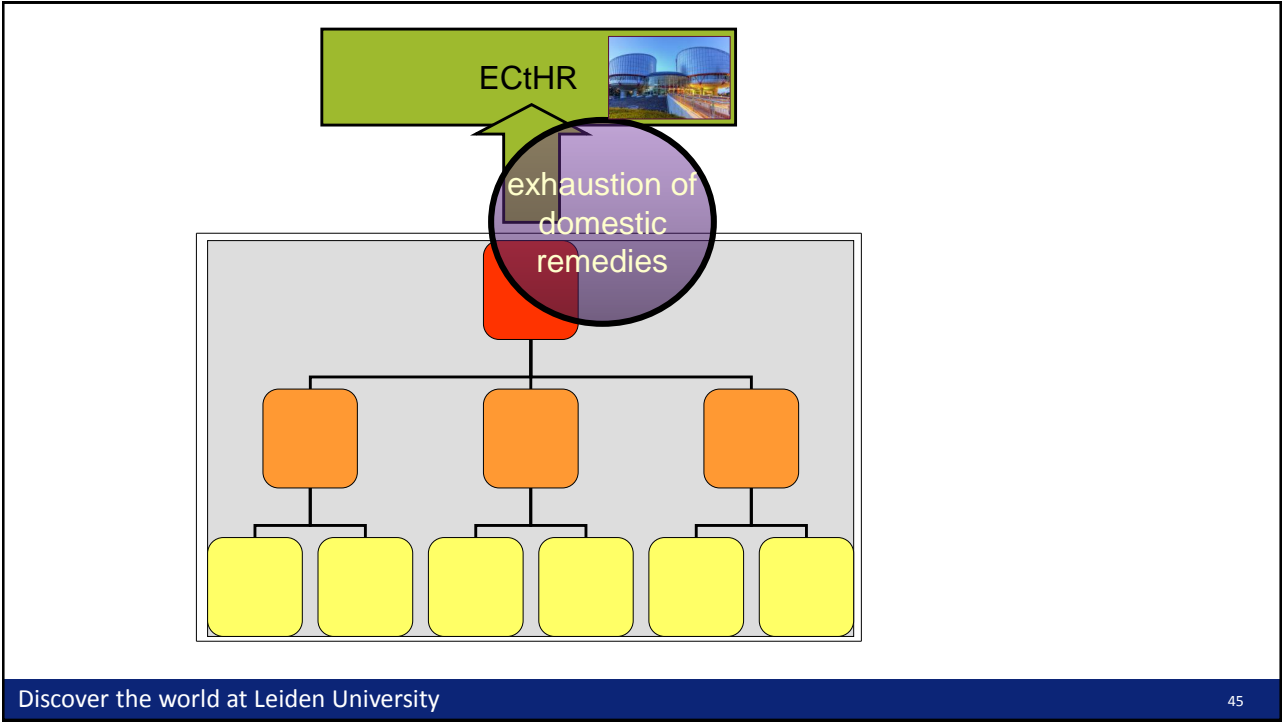
Art. 47 (1) Charter has a different scope than Art. 13 ECHR:

- rights and freedoms guaranteed by the law of the Union (Charter)
- rights and freedoms as set forth in this Convention (ECHR)

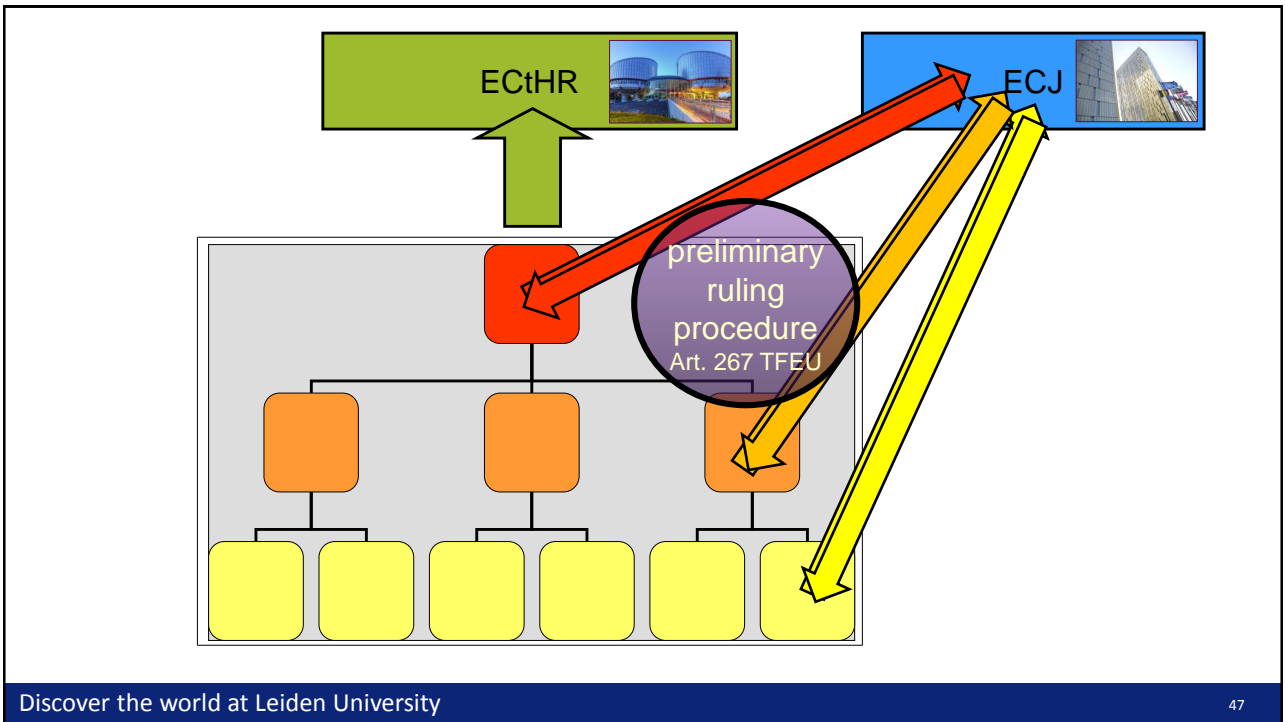
## Article 47 EU Charter ... what about Article 6 ECHR?

- differences, similarities – historic context, text
- practical use – the roles of the ECtHR and CJEU
- [the principle of equivalent protection; mutual recognition of foreign judgments]









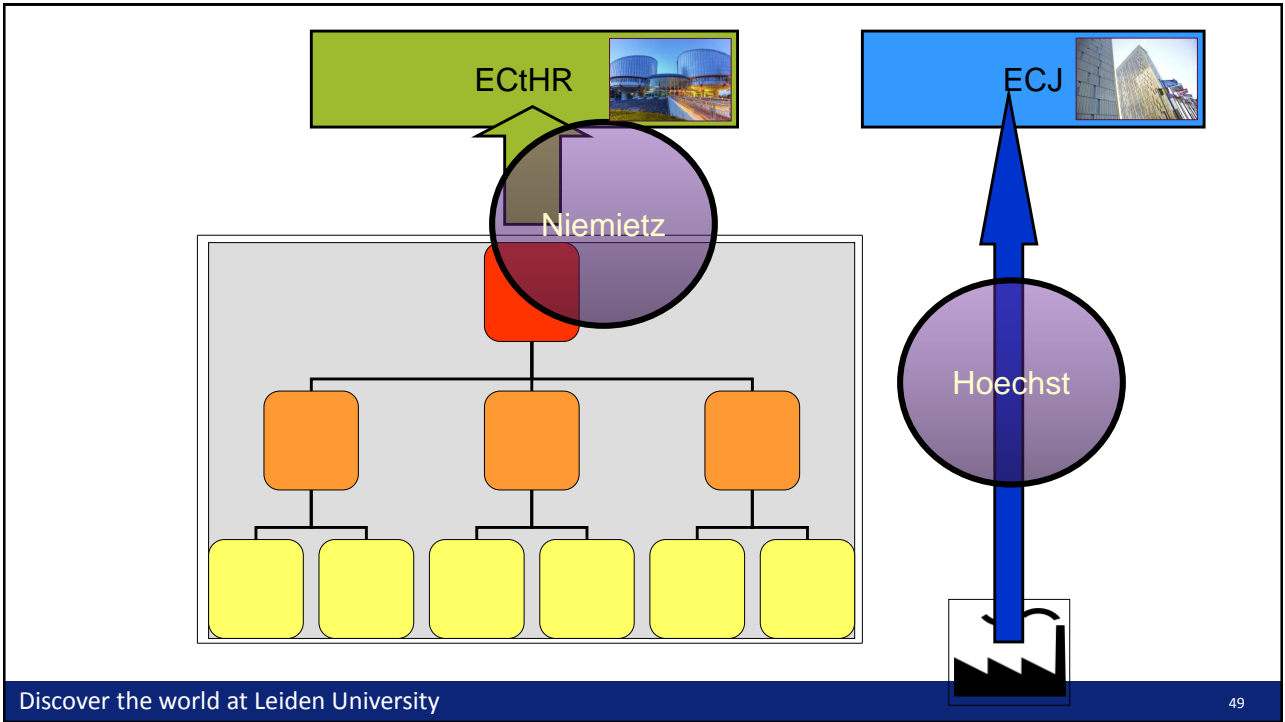
## Remember ...

### Charter of Fundamental Rights of the EU (2000)

#### Title VII – General Provisions Governing the Interpretation and Application of the Charter

##### *Article 52 – Scope and interpretation of rights and principles*

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.



## ‘spirit of mutual recognition’

### Charter of Fundamental Rights of the EU (2000)

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#### Article 52 – Scope and interpretation of rights

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ECtHR, *Ástráðsson v. Iceland*  
(1 December 2020, no. 26374/18)  
ECtHR refers to CJEU case-law

next session:  
CJEU, DB  
(Case C-481/19, 2 February 2021)  
CJEU refers to ECtHR case-law

## Article 47 EU Charter ... what about Article 6 ECHR?

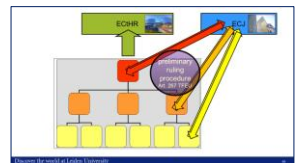
- differences, similarities – historic context, text
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## *Bosphorus v. Ireland* (2005, no. 45036/98)

### facts

- Bosphorus leases airliner from JAT
- civil war in Yugoslavia
- UN sanctions → EC measures → national implementation
- Irish authorities seize aircraft leased by Bosphorus
- measure challenged before Irish courts
- Irish court: preliminary question to ECJ
- ECJ: compliance with sanctions regime is necessary
- Irish court decided accordingly



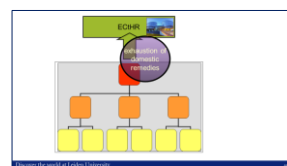
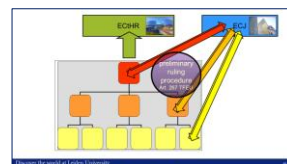
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### claim before ECtHR

- protection of property rights (Art.1 Prot. 1)
- complaint addressed against ...
- Ireland



## Bosphorus

### Essence of Court ruling:

1. international integration is important
2. but the ECHR should not be undermined
3. compromise: 'equivalent protection test'
4. if, in general, an international organisation offers equivalent protection of human rights → rebuttable presumption that the international organisation did not violate human rights in the instant case → the member state can safely implement the IO's decisions
5. EC legal order, in general, offers 'equivalent protection' (substance + procedures)
6. in this case no manifest errors
7. so Ireland could presume that EC sanctions did not violate human rights → and safely implement them



## Bosphorus

155. ... State action taken in compliance with such legal obligations is justified as long as the relevant **organisation is considered to protect fundamental rights**, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least **equivalent** to that for which the Convention provides (...).

156. If such equivalent protection is considered to be provided by the organisation, the **presumption** will be that a State has **not departed from the requirements of the Convention** when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such **presumption can be rebutted** if, in the circumstances of a particular case, it is considered that the protection of Convention rights was **manifestly deficient**.

## Michaud v. France (2012, no. 12323/11)

Obligation on lawyers to report suspected money laundering by clients

- EU directive 2005/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing
- France: implementation via Monetary and Financial Code

Mr. Michaud: violation of Article 8 ECHR

France: only implementing EU law → follow *Bosphorus* → presumption → ECtHR should not review French measures

ECtHR:

- directive leaves discretion (*Bosphorus*: “no more than implementing”)
  - no preliminary questions asked
- so *Bosphorus* presumption does not apply



## ECtHR and co-operation between EU Member States

- *Avotiņš v. Latvia* (2016, no. 17502/07) – recognition of foreign judgment
- *Pirozzi v. Belgium* (2018, no. 21055/11) – execution of EAW
- *Romeo Castaño v. Belgium* (2019, no. 8351/17) – refusal of EAW

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### *Avotiņš v. Latvia*

- judgment delivered in Cyprus in the debtor's absence
- enforcement in Latvia (Regulation 44/2001 of 22 December 2000 - Brussels I)
- ECtHR:
  - (a) Article 6 § 1 applicable
  - (b) presumption of equivalent protection: Latvian court had done no more than implement legal obligations arising out of EU membership
  - (c) manifestly deficiency? the principle of mutual recognition not to be applied automatically and mechanically to the detriment of fundamental rights – “mutual trust is not blind trust”



## Adv. LLM programmes

- European and international human rights law
- European and international business law
- public international law
- law & digital technologies
- ...




Ministerie van Buitenlandse Zaken


## Article 47 EU Charter

Mielle Bulterman  
11 February 2021

ERA Seminar – Applying the Charter:  
Focus on the right to a fair trial




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

➤ The percentage of ECJ arrests in preliminary cases including a reference to Article 47 Charter in 2020, is:

- a. 5 %
- b. 10 %
- c. 15 %
- d. 20 %



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2





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- Legal aid shall be made available to those who lack sufficient resources, where this is necessary, to ensure effective access to justice.

Joined cases C-245/19 & C-246/19  
*État luxembourgeois*  
6 October 2020

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## *État luxembourgeois* (C-245/19 & C-246/19)

- Request for information from Spanish tax administration under Directive 2011/16 on administrative cooperation in the field of taxation.
- LUX decisions to provide documents and information addressed to SPA taxpayer and Bank.
- No action available under LUX law to challenge these decisions
- Compatible with Article 47 EU Charter?
- ECJ (p. 55): Person invoking Article 47 must be relying on rights or freedoms guaranteed by EU law.
- Examples: Protection against arbitrary or disproportionate intervention by the public authorities in the sphere of private activities (general principle EU law), private life (7 Charter), protection of personal data (8 Charter).

9-2-2021



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- *Cases C-556/17  
Torubarov  
29 July 2019*

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## *Torubarov (C-556/17)*

- Directive 2013/32/EU on common procedures for granting and withdrawing international protection
- Successful appeal (twice!) of Torubarov against rejection of application for international protection, but no compliance with judgments by administration.
- No power judge to order the administration to grant international protection to the applicant concerned or to impose a penalty for the failure by the administration to comply with its judgment.
- Compatible with Article 47 Charter?
- ECJ (p. 74): court or tribunal must vary decision which does not comply with its previous judgment and substitute its own decision for it as to the application for international protection, disapplying as necessary the national law that would prohibit it from proceeding in that.

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Joined Cases C-585/18, C-624/18, C-625/18  
A.K.  
19 November 2019

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## AK (C-585/18, C-624/18, C-625/18)

- POL law lowering retirement age judges Supreme Court
- Directive 2000/78 establishing a general framework for equal treatment in employment and occupation
- Judges invoking Article 47 with respect to competent court (Disciplinary Chamber)
- ECJ (p. 120): Requirement that courts be independent forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.

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## Article 48 Charter

### Presumption of innocence and right of defence

- 1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
- 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

11



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Case C-481/19  
*DB*  
2 February 2021

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## DB (C-481/19)

- Penalties imposed on DB for failure to cooperate with IT
- Regulation 596/2014 on market abuse
- Compatibility with the right to silence (Article 47 and Article 48 EU)
- ECJ follows ECHR case law concerning Article 6 ECHR (*Saunders, Corbet*)
- Distinguishes from ECJ case law concerning competition law (*Okrem*)

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## Article 41 EU 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.

14



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Joined Cases C-225/19 & C-226/19  
*Minister van Buitenlandse Zaken*  
 24 November 2020

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## *Minister van Buitenlandse Zaken (C-225/19 & C-226/19)*

- Article 41 of the Charter is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union.
- Article 41 of the Charter reflects a general principle of EU law, which is applicable to Member States when they are implementing that law, to the effect that the right to good administration encompasses the obligation of the administration to give reasons for its decisions.

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Thank you for your attention

[Mielle.bulterman@minbuza.nl](mailto:Mielle.bulterman@minbuza.nl)



# Applying the Charter of Fundamental Rights of the European Union: Restrictions on Article 47 EU Charter

Miguel Muñoz Pérez  
Partner PwC Tax&Legal, Madrid

11 February 2020



Fundamental,  
but not  
unlimited,  
rights

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

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

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

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

## Article 52 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.

## Corner Stone: Institutional and procedural autonomy of the Member States

- C-33/76 - Rewe/Landwirtschaftskammer für das Saarland

"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"

## Autonomy? Yes, but ...

- C-33/76 - Rewe/Landwirtschaftskammer für das Saarland

"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.**"

- C-651/19, JP

"It must be recalled that, in accordance with the Court's settled case-law, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy, on condition, however, that those rules are not less favourable than those governing similar domestic situations (**the principle of equivalence**) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (**the principle of effectiveness**)"

## Case by case ... or provision by provision

- C-312/93. Peterbroeck

For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to **the role of that provision** in the procedure, its **progress** and its **special features**, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.

## Some limits in relation to procedural prerequisites and judicial organization

### Prior exhaustion of administrative remedies

- C-73/16, Puškár. Protection of personal data. List of front-men

Article 47 of the Charter does not preclude national legislation, which makes the exercise of a judicial remedy subject to the prior exhaustion of the available administrative remedies, provided that the practical arrangements for the exercise of such remedies do not disproportionately affect the right to an effective remedy before a court referred to in that article. It is important, in particular, that the prior exhaustion of the available administrative remedies does not lead to a substantial delay in bringing a legal action, that it involves the suspension of the limitation period of the rights concerned and that it does not involve excessive costs.

### Determination of the court with jurisdiction

- C-93/12 - Agrokonsulting-04. Agricultural aid

The requirements stemming from the principles of equivalence and effectiveness apply both to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on European Union law and to the definition of the procedural rules governing such actions

Article 47 of the Charter, does not preclude a national rule of jurisdiction, which results in conferring on a single court all disputes relating to certain decisions of a national authority, provided that the principle of equivalence is respected, and that jurisdiction rule does not cause individuals procedural problems in terms, inter alia, of the duration of the proceedings, assessing evidence, ...

## Limitations in relation to legitimate general interests

- **C-300/11, ZZ** Right to be informed of the grounds of an administrative decision and State security

If the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information.

However, if, in exceptional cases, a national authority opposes precise and full disclosure to the person concerned of the grounds which constitute the basis of a decision taken under Article 27 of Directive 2004/38, by invoking reasons of State security, the court with jurisdiction in the Member State concerned must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle

## Limitations in relation to other fundamental rights

- **C-752/18, Deutsche Umwelthilfe eV** Refusal of a regional government to comply with an injunction and right to liberty

where it is unable to interpret national law in compliance with the requirements of EU law, the national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 21, and of 24 June 2019, *Poptawski*, C-573/17, EU:C:2019:530, paragraphs 58 and 61).

Nevertheless, that case-law of the Court cannot be understood as meaning that the principle of effectiveness of EU law and observance of the right, guaranteed by the first paragraph of Article 47 of the Charter, to effective judicial protection oblige the national court to disapply a provision of national law or not to follow the only interpretation of that provision which seems to it to accord with the national constitution if, in so doing, it infringes another fundamental right guaranteed by EU law.

It is accordingly necessary, in the third place, to weigh against one another the fundamental rights at issue in the light of the requirements laid down in the first sentence of Article 52(1) of the Charter.

Need for provisions of domestic law contain a legal basis for ordering such detention which is sufficiently accessible, precise and foreseeable in its application and provided that the limitation on the right to liberty, guaranteed by Article 6 of the Charter, that would result from so ordering complies with the other conditions laid down in that regard in Article 52(1) of the Charter. On the other hand, if there is no such legal basis in domestic law, EU law does not empower that court to have recourse to such a measure.

## Locus standi EU level

- **C-583/11P, Inuit Tapiriit. Action for annulment Regulation on Trade in seal products**

The TFEU has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union. Possibility to plead illegality of implementing measures at EU or national level

Article 47 CFREU is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union. **Explanation on art 47**

The conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU must be interpreted in the light of the fundamental right to effective judicial protection, **but such an interpretation cannot have the effect of setting aside the conditions expressly laid down in that Treaty**

It is therefore for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection

Neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law. The position would be otherwise only if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully

## Locus standi National level

- **C-510/13, E.ON Foldgaz Trade. Regulation 1775/2005. Capacity allocation mechanisms and congestion management procedures. Right to bring an action against the decision of a regulatory authority**

Whilst it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, EU law nevertheless requires, in addition to observance of the principles of equivalence and effectiveness, that **the national legislation should not undermine the right to effective judicial protection**, as provided for in Article 47 of the CFREU.

Article 5 of Regulation No 1775/2005, read in conjunction with the Annex to that regulation, and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation concerning the exercise of rights of action before the court or tribunal having jurisdiction to review the lawfulness of acts of a regulatory authority, which, in circumstances such as those at issue in the main proceedings, does not make it possible to confer on an operator *locus standi* for the purpose of bringing an action against a decision of that regulatory authority relating to the network code.

Legal  
certainty:  
  
res iudicata

C-2/08, Fallimento Olimpiclub; C-213/13, Pizzarotti; C-64/14, Tàrsia

In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that decisions of courts or tribunals which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question

EU law does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law

Therefore, Nevertheless, if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of *res iudicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue is brought back into line with EU law

In the absence of Community legislation in this area, the rules implementing the principle of *res iudicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions

Every case in which the question arises as to whether a national procedural provision makes the application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure

Legal  
certainty:  
  
res iudicata

C-119/05, Lucchini. Res iudicata and competence of national jurisdiction. State aid

It should be noted that it is for the national courts to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of Community law.

It also follows from settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation

**The assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission**, subject to review by the Community Courts. That rule applies within the national legal order as a result of the principle of the primacy of Community law.

The answer to the questions referred must therefore be that **Community law precludes the application of a provision of national law**, such as Article 2909 of the Italian Civil Code, **which seeks to lay down the principle of *res iudicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final.**

## Legal certainty: time limits

C-470/99, *Universale-Bau AG*; C-500/16, *Carterpillar Financial Services*; C-637/17, *Cogeo Communications*; C-676/17, *Călin*; C-280/18, *Alain Flausch*

The Court has recognised that it is compatible with the principle of effectiveness to lay down reasonable time limits for bringing proceedings in the interests of legal certainty which protects both the individual and the authorities concerned, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought.

A limitation period for bringing an action is reasonable in so far as it enables the individual to assess whether there are grounds to bring the action and, where relevant, to prepare it.

**Dies a quo:** It would, on the other hand, be incompatible with the principle of effectiveness to rely on a period against a person if the conduct of the national authorities in conjunction with the existence of the period had the effect of totally depriving him of the opportunity to enforce his rights before the national courts, that is to say, if the authorities, by their conduct, were responsible for the delay in the application

As regards the rules for the application of that time limit, it should be borne in mind that the principle of legal certainty, the corollary of which is the principle of protection of legitimate expectations, requires, first, that rules of law must be clear and precise and, second, that their application must be foreseeable by those subject to them

## Court expenses / Legal aid

C-279/09, *DEB*; C-156/12, *GERP*; C-61/14, *Orizzonte salute*; C-543/14, *Ordre des barreaux francophones*; C-470/16, *North East Pylon Pressure Campaign*;

The imposition of costs arising from legal proceedings can be challenged in the light of the right to an effective remedy guaranteed by Article 47 of the Charter only where those costs represent an insurmountable obstacle (see, by analogy, judgment of 22 December 2010 in *DEB*, C-279/09, EU:C:2010:811, paragraph 61, and order of 13 June 2012 in *GREP*, C-156/12, not published, EU:C:2012:342, paragraph 46) or where they make it in practice impossible or excessively difficult to exercise the rights conferred by the EU legal order

The principle of equality of arms does not entail the obligation to put the parties on an equal footing in terms of the financial costs incurred in connection with legal proceedings. **The ability of a party to a dispute to pay lawyers' fees which are higher than those paid by his opponent does not necessarily translate into better legal representation**

The requirement that certain judicial procedures not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings. The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned

The principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle

## Court expenses / Legal aid

C-279/09, DEB; C-156/12, GERP; C-61/14, Orizzonte salute; C-543/14, Ordre des barreaux francophones; C-470/16, North East Pylon Pressure Campaign;

It is for the national court to ascertain whether the conditions for granting legal aid 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 which it is sought to achieve.

In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court 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.

With regard more specifically to legal persons, the national court may take account of their situation. The court may therefore take into consideration, inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.

# THANK YOU



# Rights of the defence in criminal and other proceedings in EU law

Dominik Düsterhaus

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## Right to be advised, defended and represented

- The normative foundations
- ECJ Case-law on the right to be ADR in (non-)criminal procedures
- The right to be advised, defended and represented in criminal matters
- **Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings**
  - Choice and quality of legal assistance
  - Adequate time and facilities to prepare one's defence
  - Waiver of the right to be advised, defended and represented
- **Directive 2012/13/EU on the right to information in criminal proceedings**
- Legal aid (Directive 2016/919/EU)
- **Victims of crime (Directive 2012/29/EU)**

## The normative foundations (I)

### Article 47 CFR - 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 48 – Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

## The normative foundations (II)

### Article 6 ECHR – Right to a fair trial

1. In the determination of his civil rights or 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. ... .
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;

...

## ECJ case-law on the right to be advised, defended and represented (I)

- Very little mention in the ECJ case-law of the right to be advised, defended and represented, which Article 47 CFR specifically provides for in both criminal and other proceedings. With regard to the reasons, one may distinguish between cases dealing with this right in national procedures and in direct actions against EU institutions.
- The scarce references to this right in ECJ case-law dealing with national procedures appear to be largely due to the Charter's limited scope of application and the lack of common procedural rules, which the Court could be called upon to interpret.
- A growing body of minimum common standards in criminal matters nevertheless provides an opportunity for harmonizing interpretation
- Beyond this legislative achievement, infusing national procedures with a common, Charter-compliant standard is a tedious task by means of more or less case-specific guidance with the general proviso that, in principle, Member States are entitled to lay down the procedures they deem appropriate.
- As regards the field of civil judicial cooperation, which would be a prime matter for harmonization, few instruments actually concern genuine procedural issues and, where necessary, refer to national law instead, thus leaving room for procedural autonomy and fundamental rights pluralism.

## ECJ case-law on the right to be advised, defended and represented (II)

Large chunks of domestic (civil) litigation do not meet the condition of "implementing" EU law within the meaning of Article 51 CFR. Under this requirement, Article 47 CFR matters in national (civil) proceedings only

- *where substantive EU law is the subject of the litigation;*
- *where substantive EU law frames procedural obligations;*
- *where EU law sets out common/specific procedural rules;*
- *where jurisdiction is examined on the basis of EU law;*
- *where service of the writ is (to be) effected pursuant to EU law;*
- *where a judgment is to be certified for the purpose of cross-border enforcement;*
- *where such enforcement is contested;*
- *where evidence is gathered abroad or*
- *where EU law makes specific procedural provision for the domestic adjudication of cross-border disputes.*

Conversely, in direct actions before the EU Courts, the right under Article 47 CFR to be advised, defended and represented can always apply, but seldomly matters and has not yet been found to be infringed.

It indeed appears that even in the few cases touching upon the right to be advised/represented the ECJ has not yet had to delve too deep into it.

## ECJ case-law on the right to be advised, defended and represented (III)

- In actions brought against the EU institutions, claimants sometimes put forward arguments touching upon the right to be advised, defended and represented.
  - One issue is the obligation under Article 19 of the CJEU Statute, according to which parties other than the institutions, EU EEA and EFTA States 'must be represented by a lawyer'. According to some claimants, an interpretation of this provision as requiring that even a lawyer cannot represent himself violates their right under Article 47 CFR to do so. The Court does not agree and notes that in the EU legal order and the constitutional traditions of the Member States, a lawyer acting on behalf of a party should be independent of the latter. (**ECJ, C-535/12 P, *Faet Oltra*, 6 June 2013, para. 19**).
- May a lawyer legally receive payment for his services from a client whose funds are frozen under an EU sanctions regime?
  - The requirement imposed by Article 19 of the Statute of the Court of Justice is based on a view of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs (...).
  - Moreover, ... as no provision is made in the Statute or Rules of Procedure of the Court of Justice for a derogation from or exception to that obligation, an application signed by the applicant himself is insufficient for the purposes of instituting proceedings (...).
  - When taking a decision on whether to grant a derogation for the release of funds and economic resources ..., the competent national authority ... must exercise its powers in a manner which upholds the rights provided for in the second sentence of the second paragraph of Article 47 of the Charter and, in a situation such as that in the main proceedings, observes the indispensable nature of legal representation in bringing an action challenging the lawfulness of restrictive measures. (**ECJ, C-314/13, *Peftiev*, 12 June 2014, paras. 28 and 29**)

## Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings

Spot question:

Have you ever relied on Directive 2013/48/EU in court ?

Yes / No

## Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings

- lays down minimum rules concerning the rights of suspects or accused persons in criminal and European arrest warrant proceedings. The directive applies to suspects or accused persons in criminal proceedings from the “time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence” until the “conclusion of the proceedings” (that is, the final determination of the offence, including sentencing and appeal), article 2(1).
- The directive also applies to individuals who are not suspects but become suspects in the course of an interview, article 2(3). However, different standards of protection apply to individuals who have not been deprived of their liberty; although they are free to contact, consult or be assisted by a lawyer through their own arrangements, Member States are not obliged “to take active steps” to ensure that they are assisted by a lawyer.
- The directive nevertheless excludes “minor offences” from its scope of protection, art. 2(4).
- Article 3 (1) of the directive requires that access to a lawyer is provided in such time and manner to allow the persons concerned to exercise their rights of defence practically and effectively. Article 3 (3) gives suspects or accused persons the right to meet in private and communicate with the lawyer representing them. Article 3 (4) requires EU Member States to make available general information to facilitate the obtaining of a lawyer by suspects or accused persons.

## Quality of legal assistance

- The right to legal assistance is a right to effective assistance and representation (**ECtHR, *Imbrioscia v. Switzerland*, No. 13972/88, 24 November 1993, para. 43**).
- The presence of a lawyer who has no opportunity to intervene to ensure respect for the accused or suspected person’s rights is of no benefit to the accused or suspected person (**ECtHR, *Aras v. Turkey (No. 2)*, No. 15065/07, 18 November 2014, para. 40**).
- **Under EU law, Directive 2013/48/EU on the right of access to a lawyer confirms that a suspect or an accused person have the right for his/her lawyer to “be present and participate effectively”. The lawyer’s participation must be “in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned”, article 3(3)(b).**

## Legal assistance of one's own choosing

- Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to a lawyer of one's own choosing is not absolute. It is notably subject to regulation where free legal aid is concerned because the state controls the criteria and financing for legal assistance (ECtHR, *Croissant v. Germany*, No. 13611/88, 25 September 1992, para. 29; see also ECtHR, *Correia de Matos v. Portugal*, No. 48188/99, 15 November 2001 ).
- The right may also be subject to restrictions by way of professional regulation; for example, different qualifications may be required for different levels of jurisdiction. Additionally, the special nature of proceedings may justify using specialist lawyers (ECtHR, *Meftah and Others v. France* [GC], Nos. 32911/96, 35237/97 and 34595/97, 26 July 2002).
- Directive 2013/48/EU refers in a recital (28) to "arrangements" by Member States which "could imply", inter alia, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the suspect or accused person could choose.

## Restrictions on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings (I)

- The right to speak to a lawyer in confidence may be restricted, but restrictions require substantial justification (ECtHR, *Sakhnovskiy v. Russia* [GC], No. 21272/03, 2 November 2010, para. 97).
- "Weighty reasons" are required to override this right; for example, surveillance of an applicant's contacts with his/her lawyer may be justified where the applicant is suspected of being a gang member and this is necessary to catch the other gang members (ECtHR, *George Kempers v. Austria*, No. 21842/93)
- Article 3 of Directive 2013/48 provides that a temporary derogation from the right of access to a lawyer laid down in the directive is possible in three sets of circumstances, referred to, respectively, in Article 3(5), Article 3(6)(a) and Article 3(6)(b) thereof. See also Article 8 and Recital 38.

## Restrictions on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings (II)

*Undue delay* in granting access to a lawyer after deprivation of liberty permissible at the pre-trial stage where the geographical remoteness of a suspect or accused person makes it impossible to ensure that right (Article 3(5))

*Temporary no access* permissible where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person (Article 3(6)(a))

or where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings (Article 3(6)(b))

## Adequate time and facilities to prepare one's defence

- Under the ECHR and EU law, the accused or suspected person is entitled to adequate time and facilities to prepare his/her defence because a lawyer's ability to provide effective legal assistance may be undermined by the circumstances of meeting or communicating with a client.
- This right is set out in Article 6 (3) (b) of the ECHR and inherent in Article 48 (2) in conjunction with Article 47 (2) CFR.

• See Article 3 and Recital 23 of Directive 2013/48/EU

"... Member States may make practical arrangements concerning the duration, frequency and means of such communication, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place. Such practical arrangements should not prejudice the effective exercise or essence of the right of suspects or accused persons to communicate with their lawyer"

## Waiver of the right to legal assistance

The right to legal assistance is of such fundamental importance that the accused or suspected person may only waive it in limited circumstances (**ECtHR, *A.T. v. Luxembourg*, No. 30460/13, 9 April 2015, para. 59**). The ECtHR has strictly restricted such waiver and emphasises the importance of safeguards (**ECtHR, *Pishchalnikov v. Russia*, No. 7025/04, 24 September 2009, paras. 77–78**).

**Under EU law, Article 9 of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings specifies three conditions for a valid waiver:**

- the suspect or accused person must be provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it;
- the waiver must be given voluntarily and unequivocally;
- it must be recorded in accordance with the law of the Member State.

## Directive 2012/13/EU on the right to information in criminal proceedings

**imposes obligations to inform suspects and accused persons on their rights in criminal proceedings, including, for example, their right to access case materials to prepare their defence**

Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

the right of access to a lawyer - any entitlement to free legal advice and the conditions for obtaining such advice - the right to be informed of the accusation - the right to interpretation and translation - the right to remain silent (article 3)



## Legal aid

- **Directive (EU) 2016/1919 on legal aid** seeks to ensure the effectiveness of the right of access to a lawyer provided for under Directive 2013/48/EU by making available the assistance of a lawyer funded by the Member State for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings.
- ‘According to its Art. 1(2), nothing in the Directive should be interpreted as limiting the rights provided for in Directive 2013/48/EU. This is meant to take account of the smaller scope of the legal aid Directive. The same applies with regard to the Directive on procedural safeguards for children, which provides a self-standing right for children to be granted legal aid in certain circumstances.

## Victims of crime

- Following Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, **Directive 2012/29/EU (the Victims’ Rights Directive)** establishes minimum standards on the rights, support and protection of victims of crime.
- Article 2 defines the term “victim” broadly: (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person’s death.
- The Victims’ Rights Directive obliges Member States to provide support services (Articles 8 and 9) and certain fair trial rights – the right to be heard (Article 10) and the right to legal aid (Article 13) – to victims. It also contains new provisions on a right to review in the event of a decision not to prosecute (Article 11) and expanded provisions on specific protection needs (Articles 22–24).
- Victims must be given practical support to enable them to access justice. This includes providing victim support, raising victims’ awareness of their rights, and sufficient training of law enforcement personnel.
- EU law also provides for compensation for crime victims: Article 16 of the Victims’ Rights Directive addresses compensation, and the EU Compensation Directive 2004/80/EC established a system of cooperation to facilitate access to compensation for victims of crimes in cross-border situations.

## Finally, a remark on the scope of the different Directives and guarantees

- Recitals 11, 40 and 54 of, respectively, Directives 2012/29, 2012/13 and 2013/48 underline that these directives lay down minimum rules and that the Member States, bound by the ECHR, may always upgrade the guarantees laid down
- Where such guarantees stem directly from Articles 47 and 48 CFR, the limited scope of the directives cannot lead to a person coming within the scope of the Charter guarantees not benefitting from them
- This is why it is always necessary to examine whether these guarantees apply at the same time, or instead of, one of the directives
- As regards this question, see already slide no 6, as well as, inter alia, **ECJ, C-481/19, *Consob*, 2 February 2021, paras. 42-45**

## This is (not) the end

Thank you very much for your attention until now,  
let us move on to the case studies

[dominik@duesterhaus.org](mailto:dominik@duesterhaus.org)



## Case studies

**I. (Please refer to directives 2012/13 and 2013/48 as well as, where appropriate, to Articles 47 and 48 CFR when answering the questions)**

At the end of an investigation into stock operations undertaken by A, a chartered accountant with in-depth knowledge of the companies whose stock he traded, has received a fine of EUR 200 000 from the national market surveillance authority for the offence of insider trading, to be sanctioned pursuant to an EU Directive on market abuse.

A, who has been interviewed twice in the course of the investigation, seeks to have the fine annulled, arguing that he should have been given an opportunity to seek legal assistance before his first interview, at the end of which the investigators concluded, based on his answers, that he had the level of knowledge which made his operations acts of insider trading. As regards legal assistance during his second interview, during which the investigators unsuccessfully tried to obtain a confession, A claims that his lawyer could not effectively and appropriately advise him, given that he only obtained a summary of the investigation file at the beginning of the interview and could not discuss it with A in order to prepare for the interview.

How would you assess his claims?

Would the answers be different if A's acts were the object of formal prosecution and the fine of EUR 200 000 imposed in criminal proceedings?

## II. (Please refer to directives 2012/29 and 2013/48)

V, born in March 2004, has been raised there by his single mother, Y, with the occasional help from X, a neighbor and on-and-off boyfriend of Y. Following the arrest and detention of his mother in 2017, who has since been sentenced to 3 years in prison for organized drug trafficking, V has been living with his grandmother, Z. Having learned from V about acts of sexual abuse inflicted upon him, with the consent of Y, by X in 2015 and 2016, Z has filed a complaint with the local police in 2019. V has since refused to talk to the police about the facts, but agreed to share with them a confirmative expertise established, at the police's request, by child psychologist P on the basis of conversations with him. The police is unsure how to proceed.

- a) Could X be convicted of the alleged acts, which the prosecution considers to have taken place, without any formal testimony from V, either during the investigation or during a trial ?
- b) Could V, whose decision not to testify stems from the wish not to contribute to a conviction of his mother, be lawfully guaranteed that his mother's role will not be investigated/prosecuted/sanctioned?
- c) Should V agree to testify during the police investigation and/or before the investigating judge, could he be exempt from doing so again at the trial?
- d) Should V agree to testify at the trial, could X be lawfully prevented from being present?
- e) If V testifies at the trial which has to be adjourned later on because of COVID-19 before having to be reassigned, due to the retirement, in the meantime, of two judges, to a differently composed chamber, can it lawfully proceed to judgment without V having to testify again?

In March 2020, Y is released from prison and starts seeing X again. One morning, X and Y are woken up in X's apartment by police investigators I and J, who confront them with the allegations. X immediately and explicitly denies ever having done anything improper to V, while Y spontaneously admits her role in X's acts.

- f) Can her testimony, which she later retracts, be used to convict both ?
- g) What if they have been apprised of their rights to remain silent and to be assisted by a lawyer and Y nevertheless decided to speak out before choosing to remain silent throughout formal prosecution and trial?

*Alternative scenario:* Imagine that police and prosecutor decide not to present charges against X in view of the fact that, in the absence of testimony from either V or Y, the only evidence is the psychological expertise. What course of action, if any, would grandmother Z have to nevertheless bring X to trial? Does it matter in this connection whether she has custody of V? Could V possibly ensure that X is tried and convicted without ever testifying?



# The Right to Interpretation and Translation in EU Law

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## The Right to Interpretation and Translation in EU Law



Emergence and context



Legal sources



Content of the Right



Practical problems encountered by practitioners

# The Context

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A component of the access to justice and courts

Less protected when discussing civil proceedings

Roadmap 2009: measure A

## Do you ever require the assistance of an interpreter/translator for a case?

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- A) Yes, on a regular basis
- B) Yes, from time to time
- C) Rarely
- D) Never

## II. Legal sources

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International  
law

EU Law

Domestic  
Law

### A. International Law

➤ **International Covenant on Civil and Political Rights – art. 14.3 (f)**

*“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...]*

*(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court”*

## A. International Law

➤ **European Convention on Human Rights** – art. 6.3(e)

*“Everyone charged with a **criminal offence** has the following minimum rights: [...]*

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

- Enshrine the right to interpretation and translation for the suspect/accused person in MS.
- ECtHR case law used as reference for the implementation and interpretation of EU Law

## B. EU Law

➤ **The Charter of Fundamental Rights** – art. 47 (fair trial) and art. 48 (2) (respect of the right of defence)

Shall be interpreted in accordance with ECtHR standards



## B. EU Law

➤ **Directive 2010/64/EU of 20 October 2010**

- aim of the directive: to facilitate the application of the right as protected by the Charter and the ECHR. (Recitals 5 and 14)
- Transposition date: 27 October 2013
- Globally implemented (Denmark opted out)



## Are you familiar with the Directive ?

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- A) Yes, very
- B) Yes, I know of it
- C) Not really
- D) Which Directive?

## C. Domestic legislation

- Implementation of Directive 2010/64: a minimum standard
- Can't fall below the standard of the ECtHR and the Charter (art. 8 of the Directive)
- Some MS enshrined or interpreted the right more extensively

## II. The Content of the Right in the Directive

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Apply to :

*"person from the time they are made aware by the competent authorities of a MS by official notification (...) that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings" Art 1(2)*

- includes : sentencing and appeal, pre-trial investigation (police station interview)
- does not apply to procedure for the recognition of foreign judgment of conviction (*Balogh, C-25/15*)

## Art 2 Interpretation (oral translation)

- Goes beyond court interaction – art. 2.1
- Includes consultation with lawyer – art. 2.2
- Includes sign and language interpretation – art. 2.3
- MS shall have a system to assess the need for interpretation – art. 2.4
- Includes the right for the suspect/accused to make oral statement in his own language (*Covaci*, C-2016/14)
- Oral/written appeal (*Covaci*, C-2016/14)

## Art 3 – Translation of essential documents (Written translation)

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- All documents essential for the exercise of the suspect/accused right of defence + safeguard fairness of proceedings
- Essential documents: decision depriving a person of liberty, any charge/indictment and any judgment
  - Minimum standard list (*Covaci*, C-2016/14)
  - (*Sleutjes*, C-278/16 – penal order imposing sanctions for minor offences)
- Partial translation (art. 3.4)
- Right for the authorities to decide if any other document is essential
  - List of essential documents in domestic legislation
  - Case by case approach
- The exception that became a rule: oral translation of written documents (art. 3.7)
- Does not include the right to lodge a written appeal on his/her own language (*Covaci*, C-2016/14)

# Safeguards and remedies

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MS shall have a mechanism in place to challenge refusal of interpretation/translation and of its quality (art. 2.5 and 3.5)



MS have an obligation to ensure the quality of interpretation/translation (art.5.1)



Register of independent and qualified interpreters/translators (art.5.2)



Costs of interpretation supported by MS

## IV. Practical issues encountered by practitioners

1/3

- Assessment of the need for an interpreter
- Independence and confidentiality
  - right to interpretation/translation of communication between lawyer and client not enshrined by law in all jurisdiction
  - use of the same interpreter at police station, in court, for consultation with lawyer
- Quality of interpretation/translation
  - safeguards in the directive not implemented or difficult to operate (register/challenge of the refusal/quality)
  - lower standard when dealing with rare language

## IV. Practical issues encountered by practitioners 2/3

- Appreciation of the communication to interpret (art.2.2 “*in direct connection with any questioning or hearing*”)
- Determination of documents to be translated
  - case by case approach
  - oral translation in lieu of written translation as a common practice
  - partial translation

## IV. Practical issues encountered by practitioners 3/3

- Access to remedies
  - no requirement for separate mechanism to challenge a refusal to provide interpretation or translation, the extend of the documents to be translated or the quality of the interpretation, translation
- Costs : to be borne by the MS but sometime MS recovers them from accused

# Useful Resources

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[CCBE Reference Guide to Assist EU Defence Practitioners 2020](#)

FRA (EU Agency for Fundamental Rights) Case Law [Database](#) on the Charter

FRA [Handbook on Rights of Suspected and accused persons across the EU: translation interpretation and information](#)

Thank you !

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## Case study

### The right to Interpretation and Translation in criminal proceedings

*The aim of the case study is to provide the participants with insights of the practices in neighbouring jurisdictions and put in practice Directive 2010/64.*

Mr Renard, a French citizen who moved in Ireland recently, is arrested in Ireland for suspicion of drug traffic and money laundering. For the purposes of the investigation he is brought to Dundalk police station to be detained and interviewed. Mr Renard has very limited English and the local accent makes difficult for him to understand what is happening. Mr Renard is provided with a lawyer and an interpreter.

During the interview the lawyer notes that after lengthy questions the interpreter only speaks few words to his client and does not take notes of the questions. Similarly, during the private consultation with his client the interpreter only speaks few words when his clients pronounces long sentences. During a break between a private consultation and the interview the interpreter is seen to be in the police station breakroom reserved to officers.

After the 2<sup>nd</sup> interview the lawyer raises the issue of quality of the interpretation. The policewoman in charge refuses to provide another interpreter.

During one of the interviews the suspect is asked to comment on documents written in English. The lawyer objects that his client cannot comment on the document as it is written in English. The policeman requests the interpreter to read the document to the suspect. Ultimately, the suspect makes a “no comment” interview.

- In your own jurisdiction, would Mr Renard been entitled to an interpreter if he had been resident in the MS for 5 years and had a good grasp of the language?
- Was MR Renard entitled to have the documents shown to him during the interview in English translated in French?

- Describe how it is possible in your own jurisdiction to challenge a decision to refuse to change the interpreter.

Later, Mr Renard is charged with drug traffic and money laundering. He is brought to court where his lawyer applies for an interpreter to be present at each court appearance, consultation and for translation of documents. The Court grant the order for interpretation and translation.

The proceedings move to the next stage, Mr Renard is sent forward for trial before the Circuit Court. The book of evidence (all evidence relied on by the prosecution + statement of the charges) is served on him in English. His lawyer obtains a French translation. Further written evidence is served on the defence including invoices and bank statements. English translation of these documents is refused by the court as it is deemed non necessary.

On the first day of the trial Mr Renard's lawyer applies for the memo of interviews to be excluded from the case arguing that the interpretation was not appropriate. The application is denied. The Court deems that as the interpreter was sent by an agency it was proof enough of his qualification<sup>1</sup>.

Later, when the prosecution starts to rely on documents only available in English (the ones the lawyer attempted to get translated in English) Mr Renard 's lawyer applies for the prosecution to be prevented to do so. The Court orders the interpreter present in court to read the documents to the accused and allows a short time for the lawyer to discuss them with his client.

Mr Renard is found guilty and convicted by the jury.

- What argument could the lawyer advance in court to challenge the quality and independence of the interpretation who assisted during the interviews?
- Can the lawyer allege a breach of fair trial rights if the documents are simply read in French and not translated?

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<sup>1</sup> Please note that in Ireland interpretation is outsourced to private company after a tender process



Mr Renard appeals the decision.

The 1st ground of appeal is that he had not been provided appropriate interpretation in the garda station and failure of the trial judge to have the tape of interview reviewed by an independent interpreter.

A second ground of appeal is based on the fact that the written judgment has not been provided in French to Mr Renard.

The Court of Appeal allows the appeal on the 1st ground and an independent expert interpreter reviews the tape of interview. It appears that the interpretation was wholly inadequate. The interpreter summarised the questions, missing details, and did not translated the caution. The Court of Appeal finds that the interpretation was inadequate therefore the memo of interview ought to have been excluded. A re-trial is ordered.

- In your own jurisdiction, would the Court exclude the memo of interview after finding that the interpretation did not meet the minimum standard?
- Comment on the written judgment not available in French. Would it be furnished in your own jurisdiction?

At the re-trial Mr Renard is found not guilty. Following his acquittal Mr Renard decides to move back to France. Few years later, he is arrested for various tax offences. The prosecution alleges that Mr Renard did not declare incomes linked to sell of homemade cider and did not pay the appropriate taxes. Mr Renard's defence is based on the fact that cider making is a hobby and the bottles were gifts to his friends. He intends to call his friends as witness at his trial. Ms Bonemine express the wish to give evidence in Breton, a local French language, with the assistance of an interpreter. The Court refuses on the basis that French is the only official language of the Court.

- Is Ms Bonemine entitled to give evidence in an *ethnic minority language*?

Following heated debates Mr Renard is acquitted. To celebrate his success in court Mr Renard decides to visit his cousin, Mr Senna, who recently moved to Lithuania. Mr Senna learning about his experience with the criminal system asks him advice about his own case.

Few months ago Mr Senna has been served with a penalty order from the local court imposing a fine for a small road traffic offence. The penalty order was accompanied by a notice of instruction in French explaining the appeal process. Mr Senna had the option to appeal in writing or by oral declaration at the registry.

Unsure of the content of the penalty notice Mr Senna instructed a lawyer to act on his behalf. An appeal was lodged in time. Mr Senna's lawyer argued that the penalty notice should have been notified to his client in French. The prosecution objected that as it only concerns a minor offence and therefore is excluded from the scope of the right.

- In which language Mr Senna could have lodged his appeal?
- His Mr Senna entitled to a French translation of the penalty notice?

## I

(Legislative acts)

## DIRECTIVES

## 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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular point (b) of the second subparagraph of Article 82(2) thereof,

Having regard to the initiative of the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden <sup>(1)</sup>,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure <sup>(2)</sup>,

Whereas:

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the Presidency Conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in civil and criminal matters within the Union because enhanced mutual recognition and the necessary approximation of legislation would facilitate cooperation between competent authorities and the judicial protection of individual rights.

(2) On 29 November 2000, the Council, in accordance with the Tampere Conclusions, adopted a programme of measures to implement the principle of mutual recognition of decisions in criminal matters <sup>(3)</sup>. The introduction to the programme states that mutual recognition is 'designed to strengthen cooperation between Member States but also to enhance the protection of individual rights'.

(3) The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. The extent of mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspected or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.

(4) Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States' rules, but also trust that those rules are correctly applied.

(5) Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter) enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the right of defence. This Directive respects those rights and should be implemented accordingly.

<sup>(1)</sup> OJ C 69, 18.3.2010, p. 1.

<sup>(2)</sup> Position of the European Parliament of 16 June 2010 (not yet published in the Official Journal) and decision of the Council of 7 October 2010.

<sup>(3)</sup> OJ C 12, 15.1.2001, p. 10.

- (6) Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.
- (7) Strengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter.
- (8) Article 82(2) of the Treaty on the Functioning of the European Union provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. Point (b) of the second subparagraph of Article 82(2) refers to 'the rights of individuals in criminal procedure' as one of the areas in which minimum rules may be established.
- (9) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the fields of interpretation and translation in criminal proceedings.
- (10) On 30 November 2009, the Council adopted a resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings<sup>(1)</sup>. Taking a step-by-step approach, the Roadmap called for the adoption of measures regarding the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communication with relatives, employers and consular authorities (measure D), and special safeguards for suspected or accused persons who are vulnerable (measure E).
- (11) In the Stockholm programme, adopted on 10 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme (point 2.4). The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further elements of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area.
- (12) This Directive relates to measure A of the Roadmap. It lays down common minimum rules to be applied in the fields of interpretation and translation in criminal proceedings with a view to enhancing mutual trust among Member States.
- (13) This Directive draws on the Commission proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings of 8 July 2009, and on the Commission proposal for a Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings of 9 March 2010.
- (14) The right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the European Court of Human Rights. This Directive facilitates the application of that right in practice. To that end, the aim of this Directive is to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial.
- (15) The rights provided for in this Directive should also apply, as necessary accompanying measures, to the execution of a European arrest warrant<sup>(2)</sup> within the limits provided for by this Directive. Executing Member States should provide, and bear the costs of, interpretation and translation for the benefit of the requested persons who do not speak or understand the language of the proceedings.
- (16) In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authority ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal.

<sup>(1)</sup> OJ C 295, 4.12.2009, p. 1.

<sup>(2)</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

- (17) This Directive should ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of the proceedings.
- (18) Interpretation for the benefit of the suspected or accused persons should be provided without delay. However, where a certain period of time elapses before interpretation is provided, that should not constitute an infringement of the requirement that interpretation be provided without delay, as long as that period of time is reasonable in the circumstances.
- (19) Communication between suspected or accused persons and their legal counsel should be interpreted in accordance with this Directive. Suspected or accused persons should be able, inter alia, to explain their version of the events to their legal counsel, point out any statements with which they disagree and make their legal counsel aware of any facts that should be put forward in their defence.
- (20) For the purposes of the preparation of the defence, communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings, or with the lodging of an appeal or other procedural applications, such as an application for bail, should be interpreted where necessary in order to safeguard the fairness of the proceedings.
- (21) Member States should ensure that there is a procedure or mechanism in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter. Such procedure or mechanism implies that competent authorities verify in any appropriate manner, including by consulting the suspected or accused persons concerned, whether they speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.
- (22) Interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of the proceedings.
- (23) The respect for the right to interpretation and translation contained in this Directive should not compromise any other procedural right provided under national law.
- (24) Member States should ensure that control can be exercised over the adequacy of the interpretation and translation provided when the competent authorities have been put on notice in a given case.
- (25) The suspected or accused persons or the persons subject to proceedings for the execution of a European arrest warrant should have the right to challenge the finding that there is no need for interpretation, in accordance with procedures in national law. That right does not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such finding may be challenged and should not prejudice the time limits applicable to the execution of a European arrest warrant.
- (26) When the quality of the interpretation is considered insufficient to ensure the right to a fair trial, the competent authorities should be able to replace the appointed interpreter.
- (27) The duty of care towards suspected or accused persons who are in a potentially weak position, in particular because of any physical impairments which affect their ability to communicate effectively, underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore ensure that such persons are able to exercise effectively the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to follow the proceedings and to make themselves understood, and by taking appropriate steps to ensure those rights are guaranteed.
- (28) When using videoconferencing for the purpose of remote interpretation, the competent authorities should be able to rely on the tools that are being developed in the context of European e-Justice (e.g. information on courts with videoconferencing equipment or manuals).
- (29) This Directive should be evaluated in the light of the practical experience gained. If appropriate, it should be amended so as to improve the safeguards which it lays down.

(30) Safeguarding the fairness of the proceedings requires that essential documents, or at least the relevant passages of such documents, be translated for the benefit of suspected or accused persons in accordance with this Directive. Certain documents should always be considered essential for that purpose and should therefore be translated, such as any decision depriving a person of his liberty, any charge or indictment, and any judgment. It is for the competent authorities of the Member States to decide, on their own motion or upon a request of suspected or accused persons or of their legal counsel, which other documents are essential to safeguard the fairness of the proceedings and should therefore be translated as well.

(31) Member States should facilitate access to national databases of legal translators and interpreters where such databases exist. In that context, particular attention should be paid to the aim of providing access to existing databases through the e-Justice portal, as planned in the multiannual European e-Justice action plan 2009-2013 of 27 November 2008 <sup>(1)</sup>.

(32) This Directive should set minimum rules. Member States should be able to extend the rights set out in this Directive in order to provide a higher level of protection also in situations not explicitly dealt with in this Directive. The level of protection should never fall below the standards provided by the ECHR or the Charter as interpreted in the case-law of the European Court of Human Rights or the Court of Justice of the European Union.

(33) The provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights, as interpreted in the relevant case-law of the European Court of Human Rights and the Court of Justice of the European Union.

(34) Since the objective of this Directive, namely establishing common minimum rules, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the

Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(35) In accordance with Article 3 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States have notified their wish to take part in the adoption and application of this Directive.

(36) In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

#### *Article 1*

##### **Subject matter and scope**

1. This Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest warrant.

2. The right referred to in paragraph 1 shall apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.

3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.

<sup>(1)</sup> OJ C 75, 31.3.2009, p. 1.

4. This Directive does not affect national law concerning the presence of legal counsel during any stage of the criminal proceedings, nor does it affect national law concerning the right of access of a suspected or accused person to documents in criminal proceedings.

#### Article 2

##### Right to interpretation

1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

2. Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.

3. The right to interpretation under paragraphs 1 and 2 includes appropriate assistance for persons with hearing or speech impediments.

4. Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

6. Where appropriate, communication technology such as videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.

7. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide persons subject to such

proceedings who do not speak or understand the language of the proceedings with interpretation in accordance with this Article.

8. Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

#### Article 3

##### Right to translation of essential documents

1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.

4. There shall be no requirement to translate passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them.

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings.

6. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European arrest warrant is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document.

7. As an exception to the general rules established in paragraphs 1, 2, 3 and 6, an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.

8. Any waiver of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily.

9. Translation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

#### Article 4

##### **Costs of interpretation and translation**

Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings.

#### Article 5

##### **Quality of the interpretation and translation**

1. Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9).

2. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevant authorities.

3. Member States shall ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided under this Directive.

#### Article 6

##### **Training**

Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication.

#### Article 7

##### **Record-keeping**

Member States shall ensure that when a suspected or accused person has been subject to questioning or hearings by an investigative or judicial authority with the assistance of an interpreter pursuant to Article 2, when an oral translation or oral summary of essential documents has been provided in the presence of such an authority pursuant to Article 3(7), or when a person has waived the right to translation pursuant to Article 3(8), it will be noted that these events have occurred, using the recording procedure in accordance with the law of the Member State concerned.

#### Article 8

##### **Non-regression**

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

#### Article 9

##### **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 October 2013.

2. Member States shall transmit the text of those measures to the Commission.

3. When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

#### Article 10

##### **Report**

The Commission shall, by 27 October 2014, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

#### Article 11

##### **Entry into force**

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.



*Article 12***Addressees**

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Strasbourg, 20 October 2010.

*For the European Parliament*  
*The President*  
J. BUZEK

*For the Council*  
*The President*  
O. CHASTEL

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