

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 THE MEMBERS OF THE JUDICIARY



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

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Practical exercise

Fundamental Rights in national courts when applying EU legal acts.

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1

Charter of the Fundamental Rights of the European Union

- Article 51 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.** [..].
- Article 52 of the Charter: [..] 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.** [..]
- 1. Any **limitation** on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are **necessary** and genuinely **meet objectives of general interest** recognised by **the Union** or the need to protect the rights and freedoms of others.

2

European Convention on Human Rights

- Absolute rights – qualified rights
- Restriction provided by law, pursues legitimate aim, is necessary in a democratic society and proportionate to a pressing social need

The Court has also emphasised that, under the terms of Article 19 and Article 32 § 1 of the Convention, **it is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention.** More generally, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law or, in a case such as this, EEA law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention (see, in relation to Article 8 of the Convention, *Jeunesse v. the Netherlands* [GC], no. [12738/10](#), § 110, 3 October 2014).

3

European Convention on Human Rights

- Even when implementing their **obligations under EU or EEA law**, the Court observes that Contracting Parties should ensure that restrictions imposed on Article 11 rights **do not affect the essential elements of trade union freedom**, without which that freedom would become devoid of substance.

4

European Convention on Human Rights

- From the perspective of Article 11 of the Convention, EEA freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration **in the assessment of proportionality** under Article 11, paragraph 2. The risk just referred to is one which, while ensuring full compliance with their obligations under EEA or EU law, domestic courts must seek to avoid.

5

Secondary EU law and fundamental rights

- When a **Member State implements EU law**, within the meaning of Article 51(1) of the Charter, and it is therefore **required to respect the fundamental rights guaranteed by the Charter**, including in particular those enshrined in Article 21.
- That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to **confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law**.
- [limitation] is objectively justified by a **legitimate aim** relating to maintaining treatment capacity or medical competence, and is **an appropriate and necessary** means of achieving that aim, which it is for the referring court to determine.

6

To consult in detail

Case C-243/19, judgment of 29.10.2020 (A case)

29 Oct. 2020

10 June 2021

CASE OF NORWEGIAN CONFEDERATION OF TRADE UNIONS
(LO) AND NORWEGIAN TRANSPORT WORKERS' UNION
(NTF) v. NORWAY, judgment of 10.6.2021.

THE ECHR AND THE CFREU.

The case of the right to a fair trial and to a remedy



ERA Trier, 20 June 2021

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Points of discussion / learning objectives

1. The 2 systems: Comparing **CFREU** and **ECHR**
2. Intro to the right to a **fair trial**
3. Intro to the right to **efficient remedy**
4. The CFREU's **field of application**, including the available FRA tools in that regard (prepares for the case study - group work in the second presentation)

A little quiz: Question 1

- How often does the CJEU use the Charter in a year?
 - A) In around 90 cases
 - B) In around 35 cases
 - C) In over 300 cases

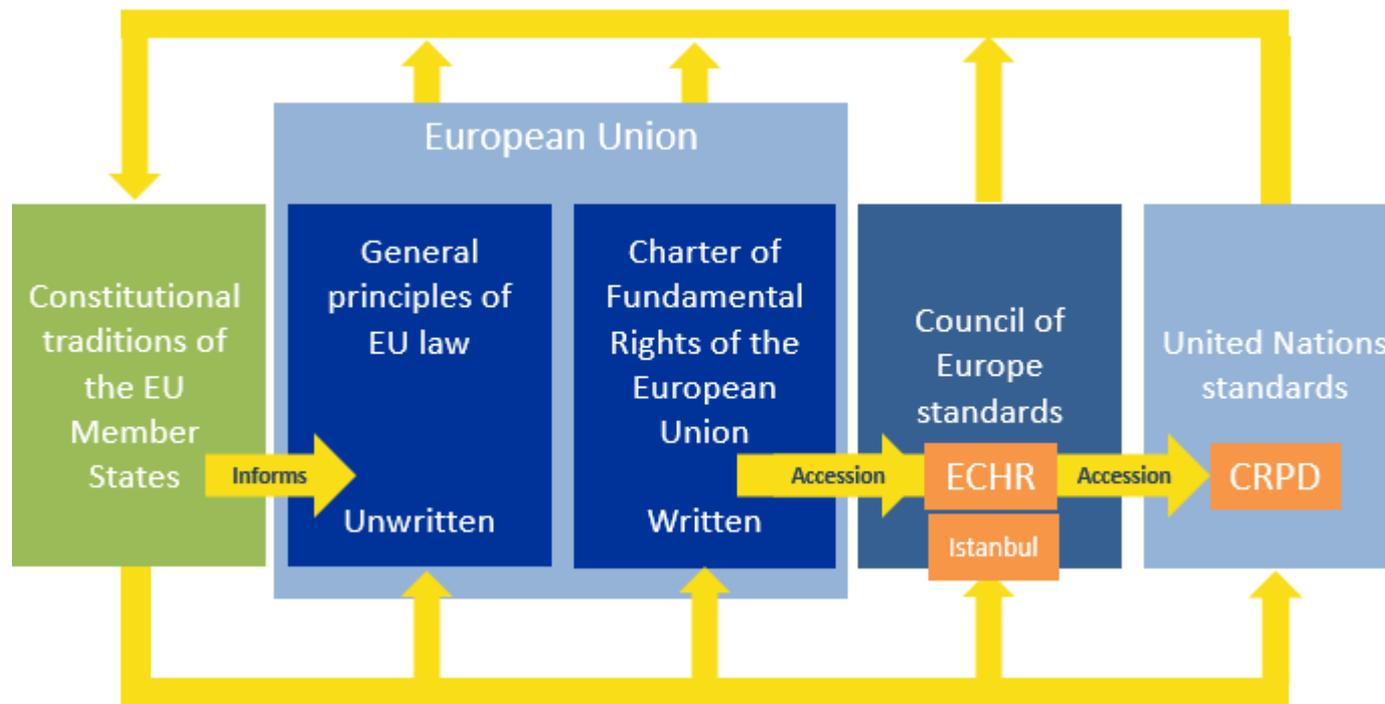
A little quiz: Question 2

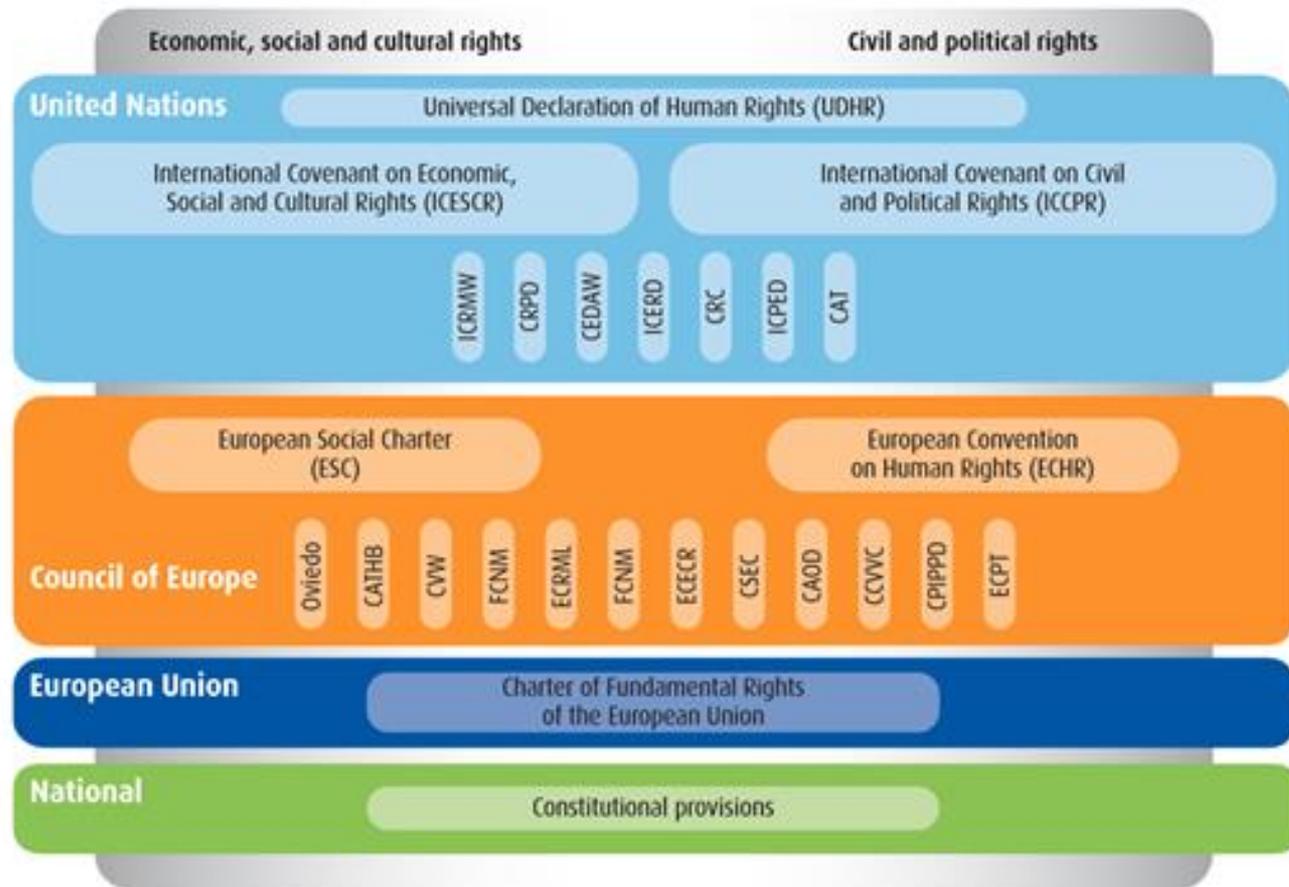
- How many of the provisions in the CFREU are NOT also reflected in the text of the ECHR?
 - A) 40 per cent of the CFREU provisions
 - B) 10 per cent of the CFREU provisions
 - C) 0 per cent because all Charter provisions are available either in ECHR or in its many protocols

A little quiz: Question 3

- In some EU MS national judges may request the ECtHR to give advisory opinions for instance on Art. 6 ECHR. In how many MS is that the case?
A) 3
B) 13
C) 9

EU FR system: no ‘splendid isolation’





Article 8 UDHR:

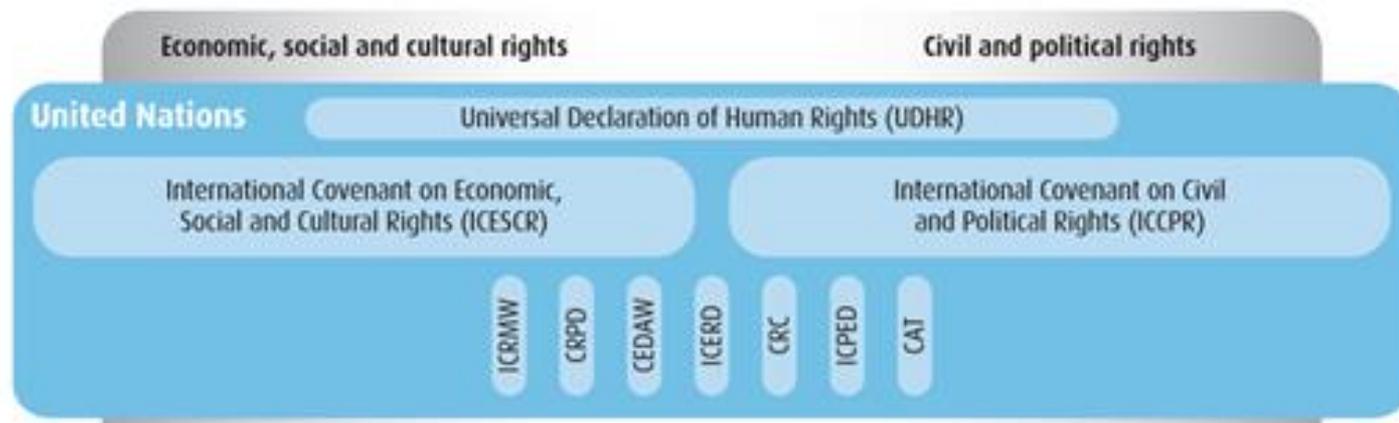
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights

Art 2(3) ICCPR:

(a) ... any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...;

(b) ...any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) ... competent authorities shall enforce such remedies when granted.



on Access to justice:

States shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of

Art. 6(1) TEU: the relevance of the Charter

EU “recognises the rights, freedoms and principles” set out in the Charter . The latter:

- “shall have the **same legal value as the Treaties**”
- “shall not extend in any way” the **EU competences**.
- shall be interpreted in accordance with the general provisions in Title VII and with “due regard” to the “**explanations**”.

Art. 6 (2) and (3) TEU: the relevance of the ECHR

- The Union **shall accede** to the ECHR without this affecting its competences.
- Fundamental rights, as guaranteed by ECHR “and as they result from the constitutional traditions common to the Member States, shall **constitute general principles of the Union's law**”

Article 52 CFREU and the Explanations

- Art 52 (3) CFREU: *In so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*
- Explanations: around 90 references to the ECHR

CoE	EU
<ul style="list-style-type: none">• Human Rights Organisation	<ul style="list-style-type: none">• Not a specialised Human Rights Organisation, BUT:<ul style="list-style-type: none">○ Specific legislative competences○ Increasingly developing HR-strategies○ Increasing investment in HR
<ul style="list-style-type: none">• 47 MS	<ul style="list-style-type: none">• 27 MS
<ul style="list-style-type: none">• Intergovernmental (Conventions)	<ul style="list-style-type: none">• Supranational (full-fledged governance system), BUT:<ul style="list-style-type: none">○ Principle of enumerated powers

ECtHR - Strasbourg	CJEU - Luxembourg
<ul style="list-style-type: none">• Specialised human rights court	<ul style="list-style-type: none">• All fields of law covered
<ul style="list-style-type: none">• 47 judges	<ul style="list-style-type: none">• 76 (27 at CJEU plus 49 at GC) plus 11 GAs
<ul style="list-style-type: none">• Staff: over 640	<ul style="list-style-type: none">• Staff: 2.235
<ul style="list-style-type: none">• Budget for 2021: 74 million EUR	<ul style="list-style-type: none">• Budget for 2021: 444 million Eur
<ul style="list-style-type: none">• Languages: EN/FR	<ul style="list-style-type: none">• 24 official EU languages, 45% of staff, 552 language combinations, over 1 mio pages per year

ECtHR - Strassbourg	CJEU - Luxembourg
<ul style="list-style-type: none"> Mainly individual applications; requests for advisory opinions so far limited to EST, FI, FR, EL, LITH, LUX, NL, SK, SI 	<ul style="list-style-type: none"> Individual access restricted Mainly preliminary rulings via national courts
<ul style="list-style-type: none"> New applications in 2020: 41.700 	<ul style="list-style-type: none"> New cases in 2020: 1.582
<ul style="list-style-type: none"> Seperate opinions and dissent; Public deliberations, votes disclosed Clerks are professional staff of the Court, independent from judges, work on rotating basis for different judges – preparatory work is centralised Open approach to external legal sources 	<ul style="list-style-type: none"> One voice Secret deliberations, votes not disclosed Clerks recruited by the judges (GAs) themselves – preparatory work carried out in personal cabinets under supervision of judges Rather reserved (different for GA opinions)

CFREU and ECHR

LEGEND

No ECHR equivalent

More extensive
than ECHR

EU context-specific

Equivalent
protection to ECHR

I Dignity (Articles 1–5)	1 Human dignity	2 Life	3 Integrity of the person	4 Torture; inhuman, degrading treatment	5 Slavery and forced labour		
II Freedoms (Articles 6–19)	6 Liberty and security	7 Private and family life	8 Personal data	9 Marry and found family	10 Thought conscience and religion		
	11 Expression and information	12 Assembly and association	13 Arts and sciences	14 Education	15 Choose occupation and engage in work		
	16 Conduct a business	17 Property	18 Asylum	19 Removal, expulsion or extradition			
III Equality (Articles 20–26)	20 Equality before the law	21 Non-discrimination	22 Cultural, religious and linguistic diversity	23 Equality: men and women	24 The child	25 Elderly	26 Integration of persons with disabilities
IV Solidarity (Articles 27–38)	27 Workers right to info. and consultation	28 collective bargaining and action	29 Access to placement services	30 Unjustified dismissal	31 Fair and just working conditions		
	32 Prohibition of child labour; prot. at work	33 Family and professional life	34 Social security and assistance	35 Health care	36 Access to services of economic interest	37 Environmental protection	38 Consumer protection
V Citizens' rights (Articles 39–46)	39 Vote and stand as candidate to EP	40 Vote and candidate at municipal elections	41 Good administration	42 Access to documents	43 European ombudsman	44 Petition (EP)	45 Movement and residence
	46 Diplomatic and consular protection						
VI Justice (Articles 47–50)	47 Effective remedy and fair trial	48 Presump. innocence; right of defence	49 Legality and prop. of offences and penalties	50 <i>Ne bis in idem</i>			
VII General provisions (Articles 51–54)	51 Application	52 Scope and interpretation	53 Level of protection	54 Prohibition of abuse of rights			

The **CFREU** being more “narrow” than the **ECHR**: scope of application MS

Art. 51 CFREU: MS are only bound by CFREU “when implementing Union law”

ECHR: MS are always bound by ECHR

The **CFREU** being “wider” than the **ECHR**: scope of application MS

Art 6 (1) ECHR : “civil rights and obligations or of any criminal charge”

Art. 47 CFREU: all procedures covered, including administrative, tax, asylum procedures

Is the Member States bound by the Charter in the sense of Article 51 of the Charter?

The Member States acts within the scope of EU law?



YES



The Charter applies

The Member States acts in a purely national situation; no other piece of EU law applies?



NO



The Charter does not apply

Rights vs Principles

- The explanations are of limited value
 - Principles: Artt. 25 (elderly people), 26 (PWD, confirmed in C-356/12) and 37 (env. protection).
 - Example of hybrid provisions: Artt. 23 (gender equ.), 33 family and prof. life), 34 (social security).
- Relevant factors for the determination:
 - Individual right or political aim?
 - Dependent on national or EU legislation?
 - Large margin of appreciation?
 - Reference to national law?

Rights v. Principles: Art. 52(5)

LEGEND	
Rights	Undefined
Principles	

NB: this only refers to the language used in the Charter text
Ellipses: qualification in Explanations

I Dignity (Articles 1–5)	1 Human dignity	2 Life	3 Integrity of the person	4 Torture; inhuman, degrading treatment	5 Slavery and forced labour			
II Freedoms (Articles 6–19)	6 Liberty and security	7 Private and family life	8 Personal data	9 Marry and found family	10 Thought conscience and religion			
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Direct horizontal effect?

- Not the rule, but “*the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals*”
- Conditions:
 - Mandatory nature and
 - “*sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such*”
- So far recognised for:
 - Art. 21: prohibition to discriminate,
 - Art. 47: right to an effective remedy and a fair trial
 - Art. 31 (2): right to annual period of paid leave

Order of the General Court in Case T-600/15

- “47 In that regard, in so far as the applicants rely on Article 37 of the Charter of Fundamental Rights, it suffices to observe that that article only **contains a principle providing for a general obligation on the European Union in respect of the objectives to be pursued in the framework of its policies, and not a right to bring actions** in environmental matters before the Courts of the European Union.
- 48 ...The Explanations provide moreover Accordingly, those **principles become significant for the courts only when such acts are interpreted or reviewed but, on the other hand, do not give rise to direct claims for positive action by the European Union’s institutions or Member States’ authorities.** This is consistent both with the case-law of the Court of Justice and with the approach of the Member States’ constitutional systems to ‘principles’. In that regard, those Explanations cite, inter alia, by way of illustration, Article 37 of the Charter of Fundamental Rights.”

Fair trial elements:

The right to a fair trial relates to the administration of justice in civil and criminal contexts. It has two aspects:

- institutional (e.g. independence and impartiality of the tribunal; definition of a tribunal); and
- procedural – a fair and public hearing (includes a series of individual rights ensuring the proper administration of justice – e.g. rights of defendants, incl. right to legal assistance and victims’ rights in criminal proceedings)

Fair trial and effective remedy

ECHR	CFREU
<p>Fair trial: Article 6</p> <ul style="list-style-type: none"> ○ Para 1: key entitlements re tribunal, hearing, timing ○ Para 2: presumption of innocence ○ Para 3: procedural rights 	<p>Fair trial: Article 47</p> <ul style="list-style-type: none"> ○ Para 2: key entitlements re tribunal, hearing, timing; right to be defended ○ Para 3: Legal aid <p>Presumption of innocence: Article 48</p>
<p>Effective Remedy: Article 13</p> <p>Everyone whose Convention rights are violated shall have an effective remedy before a national authority</p>	<p>Effective Remedy: Art. 47 Para 1</p> <p>Everyone whose rights guaranteed by EU law has the right to an effective remedy before a tribunal</p>

CFREU (also civ+admin I):

-Art. 47 (plus r.e.r.)

-Art. 48 (1)

-Art. 48 (2): general ref. to
“rights of defense”

-Art. 47 (2): right to
defended, represented

Right to a fair trial: Article 6 ECHR

- Para 1: Key entitlement in civil and criminal procedures:
 - 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
- Para 2: **Presumption of innocence.**
- Para 3: **5 minimum rights in criminal procedure**

Art. Para 3 ECHR: 5 minimum rights in criminal procedure

- (a) **informed promptly, in a language he understands** and in detail, of the nature and cause of the accusation;
- (b) adequate **time and facilities for the preparation of defence**;
- (c) **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) free assistance of an **interpreter**

CFREU (also civ+admin law):
-Art. 47 (2): **right to be adv., def., represented**
-Art 47 (3): **free legal aid**

Right to an effective remedy:

- No overall definition
- According to ECtHR effective remedy must
 - Be accessible
 - Be capable of providing redress (re applicants complaints)
 - Offer reasonable prospects of success
- EU law: principles of effectiveness and equivalence:
 - requires national law not to make it impossible or excessively difficult to enforce EU rights
 - conditions are not less favourable than those for similar claims of domestic nature
 - Explanations: EU law provides more extensive protection since it guarantees the right to an effective remedy before a court (established by CJEU as a cpl in case 222/84 Johnston)

What is a “tribunal”?

- established by law
- permanent
- compulsory jurisdiction
- inter-partes procedure
- applies rules of law
- independent and impartial

When is a tribunal independent?

- Factors impacting on independence:
 - manner of appointment of judges,
 - duration of terms of office,
 - guarantees against outside pressure
- stable terms of office
- protection against removal during term

When is a tribunal impartial?

- subjective impartiality:
 - free of prejudices/bias
- objective impartiality:
 - no appearance of bias (family links, professional relations of the judges to the case)

Fair hearing

- Adversarial character (both civil and criminal):
 - Right to have knowledge of and comment on all evidence
 - Right to have sufficient time to familiarise oneself with evidence
 - Right to produce evidence
- EU law: right to information, including ‘letter of rights’ harmonised (Dir 2012/13/EU)
- Right to reasoned decision
- whole procedure needs to be considered
- Right to an appeal only in criminal cases (AP7). However Art. 6 ECHR applies to all appeal procedures

Public hearing

- includes oral hearing with presence of defendant
- But oral hearing not necessary where: no issues of credibility and no contested facts; limited nature or of exclusively technical nature
- Art 6(1) ECHR explicitly allows for exclusion of public:
 - in the interest of morals, public order, national security
 - Required by interest of juveniles or protection of private life of parties
 - Where publicity would prejudice the interest of justice

EU Directives on criminal procedural rights

- interpretation and translation (2010/64/EU),
- information (2012/13/EU),
- access to a lawyer (2013/48/EU),
- legal aid (2016/1919/EU),
- presumption of innocence (2016/343/EU),
- procedural safeguards for children suspected or accused in criminal proceedings (2016/800/EU).

The Charter: scope of application and interpretation



ERA Trier, 20 June 2021

Gabriel N. Toggenburg
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Article 51: The Charter’s “field of application”

- “1. The provisions of this Charter are addressed to the... Union ... 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. “

What does “implementing EU law mean”?

- the same as ‘acting within the scope of EU law’ and covers a wide range of situations
- minimum requirement: there must be **some connection with Union law (other than the Charter)**
- this connection is sufficiently concrete if Member States act **as agents** for the EU or in situations in which they need to **rely on some kind of authorization** of EU law

National acts meant to transpose EU law

- Covers **all kind of** legislative or regulatory measures
- **All levels** of national measures qualify as implementation
- Also, national measures using the **margin of appreciation** granted by EU law (directives) qualify as “implementing Union law” in the sense of Art. 51: in exercising the discretion granted by the EU legislator, MS have to respect the Charter

Pre-existing national legislation

- Where pre-existing national provisions can ensure that EU law is implemented there is **no need for new** legislation transposing e.g. an EU directive
- Such national provisions **qualify** as ‘implementing Union law’
- Once such norms change from purely internal measures to measures implementing EU law, they **have to conform** with the Charter

Concepts of national law referred to in EU law

- National concepts/terms can imply ‘implementation’ in the sense of Article 51 if used in the context of the EU provisions at issue (see e.g. CJEU, Rodriguez Caballero, Case C-442/00)
- An EU directive refers to national law; it is for national law to specify these terms and to define them. **If these national legal concepts are used in context of that directive, the EU fundamental rights apply, regardless whether** it concerns new national legislation specifically made to transpose the directive or whether it are existing national legal concepts (e.g. by virtue of employment law).

National law using discretionary powers granted by the EU

- Qualifies as ‘implementing EU law’, regardless of whether it concerns **mandatory or optional exercise of discretionary powers** (CJEU, Sabou, Case C-276/12 or Milkova, Case C-406/15)
- This does **not apply** if EU law simply recognises existing MS powers to take more favourable provisions (**gold plating**). Gold plating falls in the scope of EU law if the EU law act makes this explicit: see Art 4(1) AMSD

National provision concerning remedies, sanctioning and enforcement

- If such provisions are **used to guarantee the application of EU law** they qualify as implementation in the sense of Art. 51
- This applies **also if EU law does not establish a respective obligation** (as in Art 9 Dir 2000/78). Principle of sincere cooperation (Art. 4(3) TEU).
- Such acts qualify as implementation **irrespective** of whether they are adopted in order to transpose EU law (e.g. Case C-218/15, *Paoletti*; Case C-405/10, *Garenfeld*)

National measures falling under a prohibition and needing EU law authorisation

- Where Member States risk to discriminate based on nationality, to **restrict fundamental freedoms or deprive Union citizens of the genuine enjoyment of their citizens rights** they may invoke exceptions: but then they have to respect EU fundamental rights
- Case C-98/14, *Berlington*; Case C-368/95, *Familiapress*; Case C-165//14, *Rendon Marin*;

Voluntary references in national law to (concepts of) EU law

- Per se such references do not bring national law within the scope of EU law (Case C-482/10, Teresa Cicala)
- However **CJEU might have jurisdiction** to interpret these terms (and hence the Charter may play a role) if the national law makes them applicable directly and unconditionally in order to ensure that internal situations and situations governed by EU law are treated in same way

National measures falls in an area in which the EU has legislative powers

- **Not** sufficient to trigger application of Charter
- Two additional criteria need to be fulfilled:
 - the **EU has exercised** these powers
 - the **national measure falls in the exact scope of application of** these legislative measures

Criteria to determine field of application

24 “requires a **certain degree of connection above and beyond the matters covered being closely related** or one of those matters having an indirect impact on the other”.

25 “...some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the **nature of that legislation** and whether it pursues **objectives other than those** covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are **specific rules of EU law on the matter or capable of affecting it ...**”.

26 “In particular, the Court has found that fundamental EU rights could not be applied in relation to national legislation because the provisions of EU law in the subject area concerned did not **impose any obligation on Member States with regard to the situation at issue** in the main proceedings”

CJEU, Case C-206/13, *Cruciano Siragusa*

Within and beyond the Charter's scope

STATE AS EU AGENT

New legislation
formally
transposing

Old legislation
substantially
transposing

Discretion
granted by EU
secondary law

Remedies,
sanctions,
enforcement

EU AUTHORISATION

Exceptions
granted by EU
primary law

OTHERWISE WITHIN SCOPE

Legislation falling
within scope of
EU legislation

OUTSIDE SCOPE

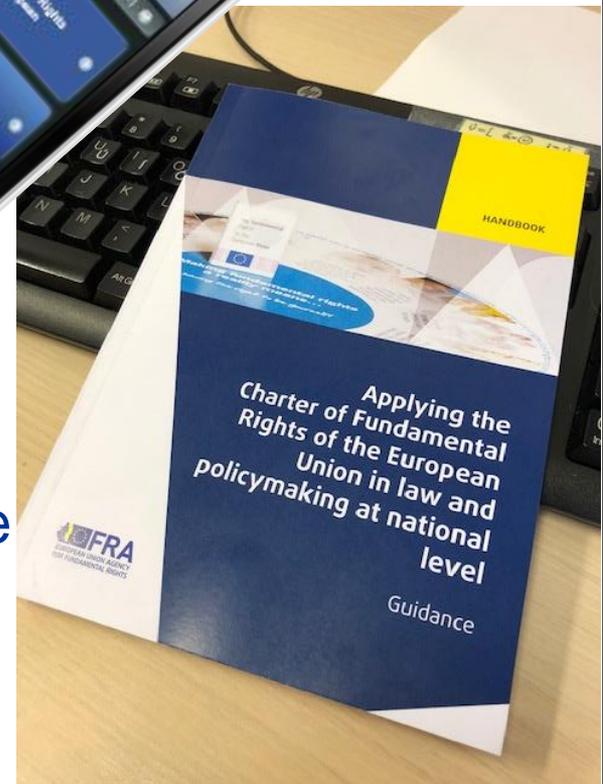
National legislation
voluntarily using EU
law concepts

“Goldplating”

National legislation uses
national legal concepts
referred to by EU
legislation

How can FRA assist?

- Charterpedia:
case law & other info
- Checklist for applicability of Charter
- Checklist for Charter compliance
- Annual FRR Charter chapter on national use
- Charter training



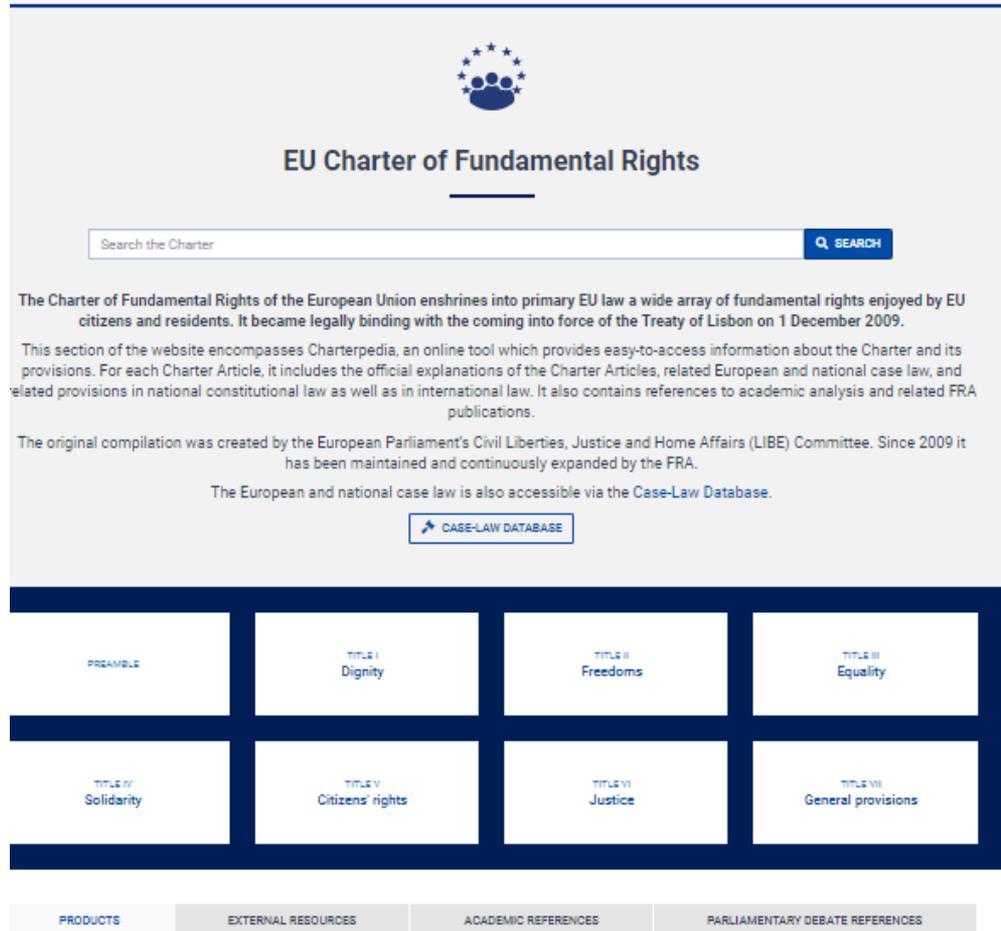
FRA and ECtHR: Analysis of case law – handbooks



Charterpedia

- National and European case law
- Relevant national constitutional provisions, EU law, international law
- Parliamentary debates
- Academic references

and more to come ...



The screenshot shows the homepage of the Charterpedia website. At the top, there is a navigation bar with links for 'WORK ON RIGHTS', 'EU CHARTER OF FUNDAMENTAL RIGHTS', 'TOOLS', and 'PRODUCTS', along with a search icon. Below the navigation bar, the page title 'EU Charter of Fundamental Rights' is displayed in a large, bold font, accompanied by a logo featuring a circle of stars and a group of people. A search bar with the placeholder text 'Search the Charter' and a 'SEARCH' button is positioned below the title. The main content area contains three paragraphs of text: the first paragraph states that the Charter enshrines fundamental rights into primary EU law; the second paragraph describes Charterpedia as an online tool providing information about the Charter and related provisions; the third paragraph mentions the original compilation by the LIBE Committee and its maintenance by the FRA. Below the text, there is a button labeled 'CASE-LAW DATABASE'. At the bottom of the page, a grid of eight white boxes with blue borders lists the sections of the Charter: PREAMBLE, TITLE I Dignity, TITLE II Freedoms, TITLE III Equality, TITLE IV Solidarity, TITLE V Citizens' rights, TITLE VI Justice, and TITLE VII General provisions. A footer at the very bottom contains four categories: 'PRODUCTS', 'EXTERNAL RESOURCES', 'ACADEMIC REFERENCES', and 'PARLIAMENTARY DEBATE REFERENCES'.



Article 8 - Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

[EXPLANATIONS](#)

[CASE LAW REFERENCES](#)

[NATIONAL CONSTITUTIONAL LAW](#)

[EU LAW](#)

[INTERNATIONAL LAW](#)

[PRODUCTS](#)

Text:

This Article has been based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31) as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member States. Article 286 of the EC Treaty is now replaced by Article 16 of the Treaty on the Functioning of the European Union and Article 39 of the Treaty on European Union. Reference is also made to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1). The above-mentioned Directive and Regulation contain conditions and limitations for the exercise of the right to the protection of personal data.

Source:

Official Journal of the European Union C 303/17 - 14.12.2007

Preamble - Explanations relating to the Charter of Fundamental Rights:

These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.

Case Law Database

Here you can find case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) with direct references to the EU Charter of Fundamental Rights, as well as a selection of national case law with direct references to the Charter from all EU Member States.

☰ FILTER BY:

EU Charter of fundamental rights

None selected ▾

ECHR Article(s) referenced

None selected ▾

Deciding bodies

None selected ▾

Countries

None selected ▾

Keyword Search

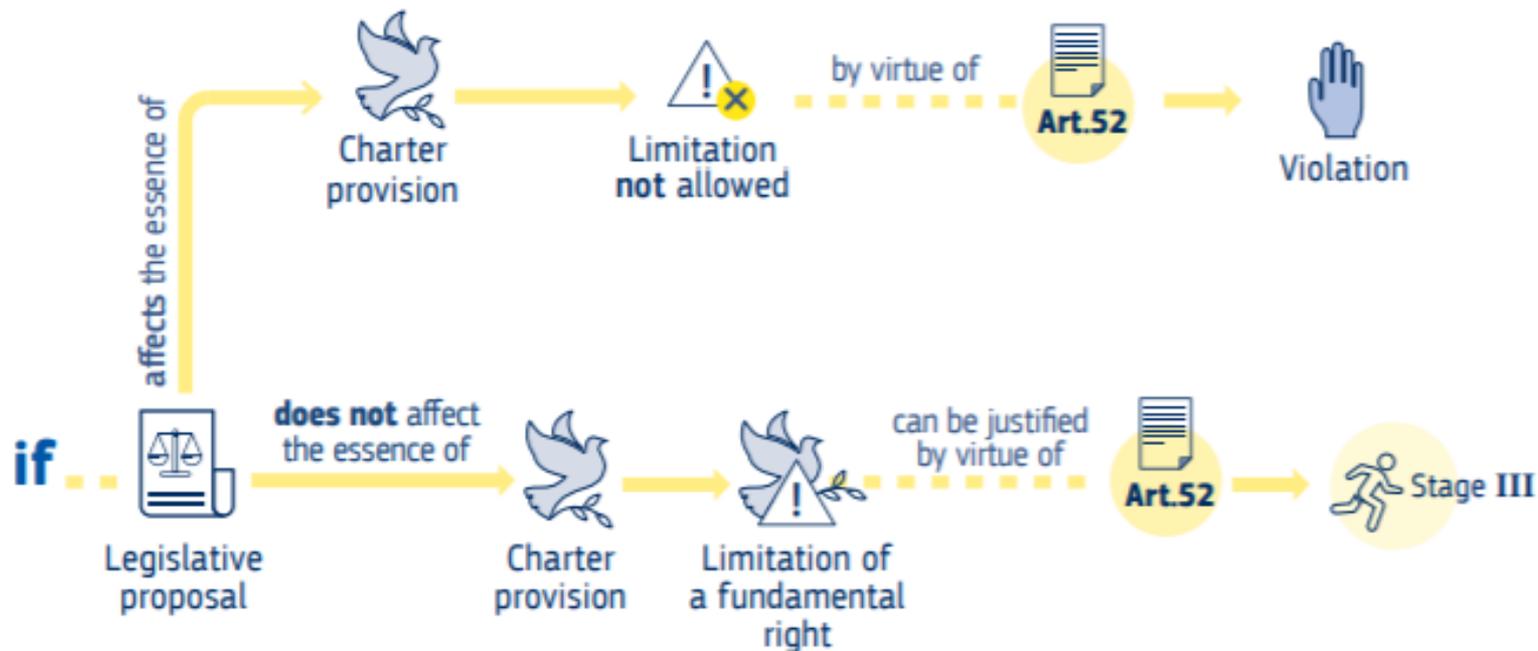
Q SEARCH

1431 case law references found

Sort by date ▾ Sort by name ☰

1 2 3 4 5 6 7 8 9 ... » ▾

Charter Handbook p.67: Compliance checklist



Charter Handbook p.47: Applicability checklist



transposing



a new national measure is introduced to transpose specific requirements laid down in a Union legal act. [A.1](#)

the current national law already fulfils (parts of) the EU legal act at issue. [A.2](#)

existing or newly introduced national legislation uses discretion granted by an EU legal act. [A.3](#)

existing national remedies or sanctions are used to enforce EU law or such mechanisms are newly created. [A.4](#)

national legal concepts are used by the EU legislature. [A.5](#)

New Charter e-guidance



Charter e-guidance

[Log in \(europa.eu\)](https://europa.eu)



The Charter e-guidance consists of the following two components:

- **Step-by-step guidance**

allowing you to run a specific case through a series of questions, including the relevant replies – all concerning the applicability of the Charter;

- **Concrete examples**

of cases allowing to test and exercise your knowledge.

- ✓ Introduction
- ✓ Tips for use
- ✓ Scope of the step-by-step guidance
- ✓ Acronyms and abbreviations
- ✓ **Step-by-step guidance**
- ✓ Preliminary step: link to EU law
- ✓ What national act is involved?
- ✓ **Step 1. Based on a provision of EU law**
 - Step 2. Based on discretionary EU powers**
 - Step 3. Within the scope of EU secondary law**
 - Step 4. National concepts used in EU law**

Step-by-step guidance

Introduction

The Step-by-step guidance

- Provides guidance on the field of application of the Charter of Fundamental Rights of the European Union by giving a practical interpretation of the assessment framework under Article 51(1) of the EU Charter;
- Can be used for resolving a specific case by running through the various steps thereby gaining insight and practical experience in dealing with the assessment framework for the applicability of the Charter as laid down in its Article 51 (1);
- Is based on step-by-step questions with explanations and comes with examples from the case-law of the Court of Justice of the European Union;
- Offers to national judges key elements for judgments;
- Benefits from first reading the “Field of application” and “What is the rationale of Article 51 of the Charter” sections of the **FRA Handbook ‘Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level’**;
- Is next to the concrete examples of cases a key component of the agency’s Charter e-guidance;

✓ Step-by-step guidance

✓ Preliminary step: link to EU law

✓ What national act is involved?

✓ Step 1. Based on a provision of EU law

✓ Step 2. Based on discretionary EU powers

✓ Step 3. Within the scope of EU secondary law

✓ Step 4. National concepts used in EU law

Step 5. EU aid or subsidies

Step 6. Remedies, sanctioning or enforcement of EU law

Step 7. Authorisation situation: free movement

Step 8. Authorisation situation: deprivation of the substance of Union citizenship rights (Article 20 TFEU)

Step 9. Other authorisation situations

✓ Insufficient links

Step 10. More favourable or stringent national measure (gold-plating)

Step 11. EU standstill clauses

Step 12. Existence of EU powers

Step 13. Closely related to EU law

Step 14. Voluntary references to EU law

Step 15. Voluntary compensation for damage

Step 16. Cross-border elements

Step 17. Citizen from another Member State or candidate country

✓ Step 18. Other kind of EU link

End

- ✓ Introduction
- ✓ Tips for use
- ✓ Scope of the step-by-step guidance
- ✓ Acronyms and abbreviations
- ✓ Step-by-step guidance
- ✓ Preliminary step: link to EU law
- ✓ What national act is involved?
- ✓ Step 1. Based on a provision of EU law
- ✓ Step 2. Based on discretionary EU powers
 - Rationale
 - Examples
 - Please note
 - Obligation to exercise discretion
 - Obligation not to exercise

Step-by-step guidance

Key elements for judgment

If EU fundamental rights **are applicable** to this variant of implementation of Union law under Article 51(1) of the Charter:

- Consideration can be given to the fact that, under Article 51(1) of the Charter, EU fundamental rights apply only to measures that implement Union law.
- It must be found that this case relates to a national act that exercises discretionary powers granted by EU law.
- The fact that Member States are not required to maintain or adopt measures such as those provided for under that provision, but have discretion in that regard, does not permit the conclusion that rules adopted by Member States fall outside the scope of EU law. The Member States must exercise their discretion in accordance with EU fundamental rights. It follows that the applicable national legislation falls within the implementation of EU law, implying that fundamental rights under EU law are applicable. **reference ✚**
- Reference can, for instance, be made to:
 - CJEU, C-276/12, *Sabou*, 22 October 2013, EU:C:2013:678, para. 26.
 - CJEU, C-406/15, *Milkova*, 9 March 2017, ECLI:EU:C:2017:198, paras 52-53.

close

See, by analogy

- CJEU, C-276/12, *Sabou*, 22 October 2013, para. 26
- CJEU, C-406/15, *Milkova*, 9 March 2017, paras 52-53.

Example C – Holiday leave

By virtue of an EU directive, the Member States are required to provide workers with at least 4 weeks of paid leave. The EU directive explicitly allows the Member States to adopt more favourable measures. Member State X prescribes a minimum of 5 weeks of paid leave.

You have already answered this question. Starting a new attempt removes your previous answer.

Start new attempt

Is it possible to invoke the Charter in legal proceedings related to the right to holiday leave of the 5th week of paid leave?

- Yes
- No

✔ The correct answer is 'no'. In principle, if the Member State opts for further protection in addition to the minimum under EU law, the Charter does not apply to national extras ('gold plating').

Example C – Holiday leave

By virtue of an EU directive, the Member States are required to provide workers with at least 4 weeks of paid leave. The EU directive explicitly allows the Member States to adopt more favourable measures. Member State X prescribes a minimum of 5 weeks of paid leave.

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Is it possible to invoke the Charter in legal proceedings related to the right to holiday leave of the 5th week of paid leave?

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- No

✘ The correct answer is 'no'. In principle, if the Member State opts for further protection in addition to the minimum under EU law, the Charter does not apply to national extras ('gold plating').



Thank you!

Gabriel.Toggebburg@fra.europa.eu

The Charter's scope of application and interpretation, practical exercise and group work by Gabriel N. Toggenburg, FRA

ERA seminar 20 June 2021: Applying the Charter of Fundamental Rights of the European Union

1. Check out the “Charter e-guidance” at <https://e-learning.fra.europa.eu/>. Create your own free account at <https://e-learning.fra.europa.eu/local/customlogin/> and explore the tool which guides you through and advises you on the questions related to the application of the Charter in the national legal systems.
2. Prepare a practical exercise and group work. Groups will work on the Charter's (scope of) application and interpretation by discussing the below case.

Case Study - Retirement age

Handout for participants

The facts of the case

Ms Sanchez, a farmer, wishes to apply for support for early retirement from farming, which is financed by the European Union. The requirements for allocating such support are contained in EU Regulation No. 1257/1999 concerning the granting of support for early retirement from farming.¹ This regulation was an instrument of the common agricultural policy. Early retirement support acts as an economic incentive that seeks (i) to encourage elderly farmers to definitively stop farming, earlier than they would do under normal circumstances, and (ii) to thus facilitate structural change in the agriculture sector, with a view to better ensuring the economic viability of holdings. The process of allocating support is run by EU Member States.

Ms Sanchez failed to obtain the support. One of the conditions imposed by the relevant Union regulation is that the applicant should not yet have reached the “normal retirement age”. This must be determined based on national pension provisions: in this case national pension law. In the relevant provisions, there is a distinction between men and women in terms of the establishment of the pension age.

This regulation is intended to be to the advantage of women but has a negative impact on Ms Sanchez in the context of the allocation of the EU support funding. Based on this national regulation, she, as a mother

¹ Council Regulation (EC) No. 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations, OJ 1999 L 160, p. 80.

of two children, had already reached the pension age at the time of application, and therefore her request for Union support was rejected. If she had been a man, she would not have reached the pension age at the time of the request and would have been eligible for support for early retirement.

Ms Sanchez argues that the Czech pension system violates the EU prohibition of discrimination on the grounds of sex. However, in an earlier case, the European Court of Human Rights (ECtHR) dealt with the issue of differential treatment based on sex in the same national pension system and ruled that it is compatible with the European Convention on Human Rights (ECHR).

Which pieces of EU Law are relevant here?

Charter of Fundamental Rights of the European Union (the Charter)

Article 21 – Non-discrimination:

“1. Any discrimination based on any ground such as [...] sex [...] shall be prohibited.”

Regulation No. 1257/1999

In Chapter IV entitled ‘Early Retirement’, Article 10 (1) is worded as follows:

“Support for early retirement from farming shall contribute to the following objectives:

- “to provide an income for elderly farmers who decide to stop farming,
- “to encourage the replacement of such elderly farmers by farmers able to improve, where necessary, the economic viability of the remaining agricultural holdings,
- “to reassign agricultural land to non-agricultural uses where it cannot be farmed under satisfactory conditions of economic viability.”

Article 11 (1) provides the following:

“A transferor of a farm shall:

- “stop all commercial farming activity definitively; he may, however, continue non-commercial farming and retain the use of the buildings,
- “be not less than 55 years old but not yet of normal retirement age at the time of transfer,
- “and
- “have practised farming for the 10 years preceding transfer.”

Based on the case law of the CJEU, the definition of “normal retirement age” within the meaning of the second indent of Article 11 (1), in the absence of harmonisation at EU level, falls within the competences of the Member States.

Which provisions of national law apply?

Article 5 of the national law on retirement sets the pension age as such, for social and historical reasons. The retirement age of men and women is different, with the latter being determined by the number of children a woman has raised (while men can go to pension at the age of 60, women can do so at the age of 53, if they raised at least 5 children, at 54 if they raised 3 or 4 children, at 55 if they raised 2 children, etc).

“(1) Retirement age shall be:

“(a) for men, 60 years;

“(b) for women:

“1. 53 years, if they have raised at least five children,

“2. 54 years, if they have raised three or four children,

“3. 55 years, if they have raised two children,

“4. 56 years, if they have raised one child, or

“5. 57 years, if the insured persons reached that age by 31 December 1995.”

Questions

Please answer question 1 before moving on to the next questions.

Question 1: Does the Charter apply to Article 5 of the national law on retirement?

Choose one or more responses:

- a) No, pension law is a national matter and is within Member State sovereignty.
- b) No, the ECtHR has dealt with the matter already and found it compatible with the ECHR.
- c) Yes, it is about providing EU agricultural subsidies.
- d) No, the regulation refers to national law for the definition of the pension age. The Union legislature therefore wishes to leave this matter to the Member States.
- e) Yes, the Charter has the status of primary law and, in principle, always applies.

Notes

Assuming that the Charter applies:

Question 2: Does the CJEU need to follow the ECtHR, which has already found that the differential treatment is compatible with the ECHR?

Notes

Question 3: How would you assess Article 5 of the national law on retirement in the light of the Union principle of non-discrimination based on sex (Article 21 (1) of the Charter)?

Notes

Question 4: If this provision is contrary to the Union principle of non-discrimination based on sex, what should the national court do? How should it determine the “normal retirement age” at the time of transfer of a farm under Article 11 of Regulation No. 1257/1999?

Notes

A large, empty rectangular box with a thin black border, intended for the student to write their notes in response to the question above.



**Maynooth
University**
National University
of Ireland Maynooth

The doctrine of effective judicial protection in CJEU case law

Academy of European Law, 21 June 2021

Prof Tobias Lock, Jean Monnet Chair in EU Law and Fundamental Rights

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Overview

1. Effective judicial protection in EU law
2. Principle of equivalence
3. Principle of effectiveness
4. Case study I: Asylum
5. Case study II: European Arrest Warrant
6. Case study III: Legal aid

Right to an effective remedy: pre-Lisbon

Right to an effective remedy = a general principle of EU Law:

“It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”. (Case 294/83 *Les Verts*, para 23)

It follows - a right to effective judicial protection:

- against measures of the EU institutions
- against MS measures



Case 294/83 *Les Verts* dealt with the question of access to the Court of Justice for the review of a decision adopted by the European Parliament (on the reimbursement of expenses). The case was brought under (what is now) Article 263 (4) TFEU, which at the time did not expressly provide for a judicial review of measures adopted by the European Parliament, but only of Council and Commission measures. Hence it was questionable whether the case was admissible. The CJEU noted that the Treaties provide for a complete system of legal remedies and that the EEC (now EU) is based on the rule of law, which means that all measures of the EU institutions (if they have legal effect) must be open to challenge before the courts. This either happens via a direct challenge (Art 263 TFEU, if the natural or legal person is directly and individually affected) or via an indirect challenge in the national courts, which can then request a preliminary ruling from the CJEU (Article 267 TFEU).

In Case 222/84 *Johnston v Chief Constable of the RUC* the CJEU confirmed that the right to an effective remedy was a general principle of EU law (para 18). Here women police officers were excluded from receiving fire arms training. Under Northern Irish law, this was permissible sex discrimination if it happened for the purpose of ‘safeguarding national security or of protecting public safety or public order’. The labour courts in Northern Ireland had to accept as conclusive evidence of this (i.e.

that the measure was adopted for the above purpose) a certificate issued by the Secretary of State (government minister). This meant that in practice such discrimination – if certified by the Secretary of State – could not be challenged. The CJEU decided that this was contrary to the general principle of effective judicial protection as it would exclude the exercise of any power of review by the courts, so that the national court to treat the certificate as conclusive evidence.

In Case 222/86 *Heylens* the CJEU applied the right to an effective remedy to the area of free movement law. Under French law, a person practising the occupation of football trainer in France must be the holder of a French football trainer's diploma or of a foreign diploma recognised as equivalent by the Government after consulting a committee. That committee refused the recognition of Heylens' diploma as equivalent, but did not give reasons. French law did not provide for a judicial review of the decision to refuse recognition. It held: "Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right".

Effective remedy against MS measures

Case 222/84 *Johnston v Chief Constable of the RUC* (direct sex discrimination)

- A provision in Northern Irish sex discrimination legislation that courts had to accept as conclusive evidence a justification based on 'safeguarding national security or of protecting public safety or public order' as conclusive evidence amounted to an exclusion of judicial review and was contrary to the right to an effective remedy.

see notes on previous slide.

Effective remedy against MS measures

Case 222/86 *Heylens* (free movement of workers)

- A decision that a Belgian football trainer's licence was not equivalent to a French licence, so that a trainer could not work as a football trainer in France, was given without reasons and could not be challenged in the courts.
- CJEU: "Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right".

see notes on previous slide.

Right to an effective remedy post-Lisbon

Article 47 (1) CFR: Everyone whose rights and freedoms guaranteed by the law of the Union are violated **has the right to an effective remedy** before a tribunal in compliance with the conditions laid down in this Article.

Article 51 (1) CFR: 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.**



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The right to an effective remedy applies only where the Charter applies: i.e. it applies always against the EU, but against the Member States only when they are implementing Union law, i.e. when they are acting within the scope of EU law (Case C-617/10 *Akerberg Fransson*). This means it only applies where a Member State institution (e.g. a court) applies EU law (e.g. in a case dealing with an EU law right, such as non-discrimination rights under Directive 2000/78; or where a MS executes a European Arrest Warrant) or where a MS restricts fundamental freedoms (e.g. where a MS refuses entry of goods from another MS on its market for reasons of public policy/health etc; on the latter see Case C-390/12 *Pfleger*).

The right to an effective remedy is also found in the ECHR. According to Article 13 ECHR there is a right to an effective remedy so far as violations of ECHR rights are concerned. According to the European Court of Human Rights' case law on Article 6 ECHR, an individual has a broader right to an effective remedy, so that Article 6 ECHR – as interpreted by the ECtHR – should be regarded as the minimum standard under the Charter as well (see Article 52 (3) CFR, which guarantees that). Note, however, that the CJEU rarely refers to Article 6 ECHR given that “Article 47 of the Charter secures in EU law the protection afforded by Article 6 (1) ECHR. It is necessary therefore to refer only to Article 47” (Case C-396/11 *Radu*, para 32).

Poll

Have you ever been confronted with Article 47 CFR in your judicial practice?

- 1) Yes
- 2) No

National procedural autonomy

- EU law rights are mostly enforced through national courts
- National courts apply national procedural law, such as
 - time limits
 - rules on standing
 - max. amount of damages that can be awarded
 - rules of evidence
 - appeals
 - and so on
- EU law respects national procedural autonomy, but there are **tensions with the aim of ensuring an equal application** of EU law in all EU MS
- **Limits therefore:**
 - principle of equivalence
 - principle of effectiveness

Principle of equivalence

Case 33/76 *Rewe Zentralfinanz*

- Applicant company had paid charges for inspections in connection with the importation of French apples to Germany
- Company is seeking to recover those charges as they had been levied contrary to EU law
- However: national time limit for contesting the charges (and thus claiming back the money) had passed

Court:

- In the absence of common rules, it is for national rules to determine the procedural conditions for actions at law ...
- ... provided that such conditions cannot be less favourable than those relating to similar actions of a domestic nature

Principle of equivalence

Equivalence therefore means:

- there must not be a less favourable procedure at national law for EU law claims compared with domestic claims (= a principle of non-discrimination)
 - AND it means that MS are not under an obligation to create new remedies
- Background: it is for the Union legislator to create new remedies, not for the Court

Principle of effectiveness

- Remedies available under national law must be 'effective'
 - this is potentially very intrusive
- *Case 14/83 von Colson and Kamann*
 - if a MS chooses to penalise breaches of the equal treatment directive then it must ensure that any compensation 'is effective and that it has deterrent effect'
- *Case C-177/88 Dekker*
 - refusal by an employer to employ a pregnant woman
 - under Dutch law: fault requirement
 - **Court:** a fault requirement for a claim for redress would undermine the Directive (i.e. national court cannot apply it)



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Additional cases abound, e.g.:

Case C-377/89 Cotter and McDermott

Social security benefits for married men: automatic increase (to cover wife and children) without needing to prove that these were dependent on him
married women claiming benefits had to show dependency
furthermore: women were paid less unemployment benefit and for a short period

Evidently contrary to Directive 79/7/EEC on equal treatment for men and women in matters of social security

Ireland had implemented this Directive late, so that the applicants missed out on certain payments

Irish argument:

If benefits were paid out to these women as well, then they would be doubly covered: their husbands would have received benefits and the women the same amount again: contrary to principle of unjust enrichment in Irish law

Court

this would allow national authorities to benefit from their own unlawful conduct and deprive the Directive of its full effect, hence Ireland cannot rely on limitations in domestic law in this case

high water mark: Case 208/90 Emmott

applicant sought retrospective payment of disability benefit for the period while sex discrimination directive remained unimplemented in Ireland

Department had told her to wait for the outcome of *Cotter and McDermott*

when she applied after that case had been handed down, she was told that her claim was time-barred

Court:

a MS cannot invoke against an individual a time limit for bringing proceedings until the directive has been properly implemented

Principle of effectiveness

Possible consequences:

- **procedural hurdles**, e.g. time-limits, may need to be disregarded (e.g. to give full effect to a directive – Case C-208/90 *Emmott*)
- **procedural bar on the amount of compensation** that can be awarded by a court may have to be disapplied (Case C-271/91 *Marshall II*)
- **remedies may need to be adjusted** so they can be granted against bodies otherwise immune from such remedies (e.g. in England no injunctions could be made against the Crown (=the state) until Case C-213/89 *Factortame*)



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Case C-208/90 *Emmott*

applicant sought retrospective payment of disability benefit for the period while sex discrimination directive remained unimplemented in Ireland

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when she applied after that case had been handed down, she was told that her claim was time-barred

Court:

a MS cannot invoke against an individual a time limit for bringing proceedings until the directive has been properly implemented

Case C-271/91 *Marshall II*

claimant asked for compensation for lost earnings following a successful sex discrimination challenge

her loss amounted to £18,405 including interest

procedural bar that the Industrial Tribunal (competent court) could only award up to £6,250 in damages

Court:

cannot apply: 'where financial compensation is the measure adopted in order

to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good'

Case 213/89 *Factortame*

UK Merchant Shipping Act 1988

75% nationality requirement for directors and shareholders of UK fishing companies

P: contrary to freedom of establishment

case brought in English courts and interim relief was sought (otherwise Factortame would have gone bust)

no injunctions against the Crown (=the state) in English law

Court:

any provision of a national legal system which might impair the effectiveness of EU law by withholding from the national court the power to do everything necessary to set aside national legislative provisions which might prevent – even temporarily – EU rules from having full force and effect is incompatible with those requirements

Principle of effectiveness

Current approach: context-specific and balancing the interests

Cases C-430 and 431/93 *van Schijndel*

- challenge to a compulsory pension fund
- argument: national court should have – on its own motion – considered compatibility of the national rule with EU competition law
- **Question to ECJ:**
 - must a national court consider questions of EU law even if none of the parties to the proceedings have raised them?
 - not the case under Dutch procedural law
- **ECJ recognised that in civil procedure the national courts are given a passive role**
 - and they are not required by EU law to raise of their own motion an issue concerning the breach of EU law where examination of that issue would oblige them to abandon their passive role assigned to them by national procedural law
- **What is decisive:** specific circumstances of the case



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Further case that might be of interest:

Res judicata and legal certainty

Case C-453/00 *Kühne&Heitz*

customs tariff classification case

what tariff must be paid on a chicken leg with a bit of back attached?

national court had decided and a subsequent ECJ judgment contradicted the national court

claimant therefore ended up paying too much: now asking for a refund

national administration has to reopen a decision that has become final following a national court ruling which was based on a misunderstanding of EU law

here national administrative body **had the power to reopen** the case provided that no third parties would be affected

Poll

Do you think the CJEU's case law strikes the right balance between national procedural autonomy and the right to an effective remedy under EU law?

- 1) Yes
- 2) No

Case study I: asylum cases

Case C-562/13 *Abdida*:

- applicant with serious illness to be returned to a third country
 - danger that he may not receive appropriate medical treatment
 - in exceptional cases – where serious and irreparable harm would result – this may amount to a violation of Article 4 CFR (inhuman & degrading treatment)
- hence it follows *inter alia* from Art 47 CFR that an appeal must have suspensive effect

However:

Case C-239/14 *Tall*

- lack of suspensory effect an appeal against a decision to not further examine an application for asylum is compatible with Art 19 (2) and 47 CFR because that decision does not remove the applicant from the country



Case 562/13 *Abdida*

Facts:

- Third country national had applied for leave to remain in Belgium because of his medical condition, which he claims cannot be treated in his country of origin
- Belgium refused to grant him leave to remain citing Belgian legislation (which allows for such leave only if the applicant “suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no appropriate treatment in his country of origin or in the country in which he resides”)
- Applicant appealed against this decision, but under Belgian law this appeal does not have suspensive effect
- At the same time, Belgium cut the applicant’s social assistance, against which the applicant lodged an appeal, which he won; and the government lodged a further appeal in the matter. The court concerned with that appeal referred *inter alia* the question to the CJEU whether the lack of suspensive effect of the applicant’s appeal in the asylum/immigration matter was compatible with EU law.
- This was relevant because if it did, the applicant would still be entitled to social assistance.

Decision

- The Court (in paras 46-53) first reiterated the case law of the ECtHR on the return of persons with a serious illness to a third country. This may in exceptional cases amount to inhuman and degrading treatment (contrary to Art 3 ECHR=Art 4 Charter) and thus a violation of the non-refoulement principle (Article 19 (2) CFR) if appropriate treatment is not available.
- It held that “in order for the appeal to be effective in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health, that third country national must be able to avail himself, in such circumstances, of a remedy with suspensive effect”

Case C-239/14 *Tall*

- applicant for asylum in Belgium had first application for asylum rejected; appeals were unsuccessful
- then made a second application presenting new facts; Belgian authorities refused to consider that second application
- subsequently, applicant’s social assistance payments were stopped and he was served with an order to leave Belgium
- Question by the referring court (which dealt with the social assistance question)
 - does EU law require the appeal against the decision to not examine the second application for asylum to have suspensory effect?
- Court (para 56-57)
 - The lack of suspensory effect of an appeal brought against such a decision is, in principle, compatible with Articles 19(2) and 47 of the Charter. Although such a decision does not allow a third-country national to receive international protection, the enforcement of that decision cannot, as such, lead to that national’s removal.
 - By contrast, if, in the context of the examination of an application for asylum which pre-dates or post-dates a decision such as the one at issue in the main proceedings, a Member State adopts a return decision against the third-country national concerned pursuant to Article 6 of Directive 2008/115, that national must be able to exercise his right to an effective remedy against that decision in accordance with Article 13 of that directive.

Case study II: European Arrest Warrant

Case C-648/20 PPU *PI*

- Framework Decision on the EAW to be interpreted in light of Article 47 CFR
- result: if both the national arrest warrant and the European Arrest Warrant are issued by a public prosecutor, then the principle of effective judicial protection requires that judicial review of either the EAW or the decision on which it is based must be possible **before** the EAW is executed.

Case C-414/20 PPU *MM*

- if under national procedural law in the requesting MS the issuing of an EAW cannot be challenged, then Art 47 CFR requires that a court called upon to give a ruling at a later stage must be able to carry out an indirect review of the conditions under which the EAW was issued



Case C-648/20 PPU *PI*

- EAW issued by a Bulgarian prosecutor. PI arrested in England.
- Question whether the EAW is compatible with the Framework Decision 2002/584 on the European Arrest Warrant
 - According to Article 8 (1) (c) of the FD, a EAW must contain “evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect”
 - Here: there was such evidence
 - however: the question was whether the fact that the EAW had been issued by the public prosecutor and could not be challenged in court before a surrender of that person to Bulgaria had taken place means that the EAW is incompatible with the requirements of the Framework Decision. Must Art 8 (1) (c) of the FD be read in light of Article 47 CFR?
- Public prosecutor qualifies as an issuing judicial authority (Art 6 FD) & the national arrest warrant in this case (ordering detention for up to 72 hours) issued by the same public prosecutor is an ‘enforceable judicial decision’ under Article 8 (1) (c) FD
- Background: in Case C-241/15 *Bob-Dogi* the CJEU had held that the EAW FD

provides a dual level of protection;

- first, against the national decision (in this case the national arrest warrant)
- second, against the decision to issue an EAW
- According to the CJEU in Case C-508/19 and 82/19 PPU *OG and PI* a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that protection
 - hence either the national decision or the EAW must be made by a court (i.e. must be a judicial decision)
 - NB: one of the two can thus be taken by a public prosecutor without any issues for the validity of the EAW
- here, however: both decisions adopted by the public prosecutor and no opportunity to get either reviewed before surrender
- CJEU: not possible: '[effective judicial protection] presupposes, therefore, that judicial review of either the European arrest warrant or the judicial decision on which it is based is possible before that warrant is executed (Case C-648/20, para 48)

Case C-414/20 PPU *MM*

Facts:

- Bulgarian public prosecutor issued EAW; however there was no national arrest warrant. National decisions were of a less intrusive character (decision to inform the applicant of the charges levied against him).
- Applicant had fled to Spain and was arrested there. Surrendered to Bulgaria and then placed in pre-trial detention.
- Appeal against placement in pre-trial detention: argument was that EAW itself had been unlawful. The appeal court did not consider that issue and upheld the decision to place him in pre-trial detention.
- subsequent fresh application for review of the lawfulness of the decision to place him in pre-trial detention; resulted in referral to CJEU.
- CJEU held *inter alia* that a EAW issued on the basis of a national decision that does not involve detention of the person requested, is invalid.

Question now: what happens if national law does not provide for a review of the EAW decision in the requesting MS?

- CJEU, para 72: Accordingly, where the procedural law of the issuing Member State does not provide for a separate legal remedy allowing a court to review the conditions under which the European arrest warrant was issued and its proportionality, whether before, after, or at the same time as its adoption, Framework Decision 2002/584, read in the light of the right to effective judicial protection enshrined in Article 47 of the Charter, must be interpreted as meaning that a court which is called upon to give a ruling at a stage in the criminal proceedings which follows the surrender of the requested person must be able to

carry out an indirect review of the conditions under which that warrant was issued where the validity of that warrant has been challenged before it.

- NB: para 80: the consequence is not that the person must be released even if the EAW was unlawful because at the point where the requested person has been surrendered the EAW has exhausted its legal effect; neither Article 47 nor the FD require that the person be released from detention in the requesting MS

Case study III: legal aid

Case C-279/09 DEB

Does the right to an effective remedy imply a right to legal aid (to enforce EU-derived rights) for legal persons?

CJEU: this is for the national court to decide

Criteria:

“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”.



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Case C-279/09 DEB

Facts:

- DEB is seeking state liability damages (under EU state liability rules, see Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*) for non-transposition of Directive 98/30/EC, which intended to make non-discriminatory access to gas networks possible
- DEB claimed that because of the late transposition it was unable to access the gas networks of German network operators and thus had to forgo profits of EUR 3.7 billion!
- DEB is unable to make necessary advance payment of court costs (EUR 274, 368) and cannot pay for lawyers, whose instruction is compulsory as the proceedings are before the Regional Court (Landgericht)
- The national court ruled at first instance that the conditions for legal aid were not met: under German civil procedure, according to which legal aid for legal persons is subject to a public interest test. In this case neither the Regional Court nor on appeal the Higher Regional Court considered that the public interest test was met (in accordance with the case law of the Federal Court of Justice).
- Question however: does EU law (principle of effectiveness) require ‘public interest’

to be interpreted in a different manner, so that legal aid has to be granted and that the advance payment of court costs must be waived?

Court of Justice:

- In essence the national court asks whether the denial of legal aid renders the exercise of the claimant's right impossible/
- Court established – in its interpretation of Art 47 CFR – that legal aid may cover both assistance by a lawyer and dispensation from payment of costs of court proceedings; also that legal persons can be covered, but that it “must be assessed in the light of the applicable rules and the situation of the company concerned”
- It concluded that in assessing whether

But: (paras 61-62)

- 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.

**It's time
for
Q&A**



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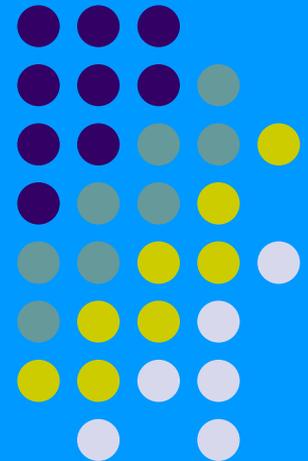
Limitations on Article 47 EU Charter in CJEU case law

- Public interest
- Other fundamental rights
- Procedural considerations

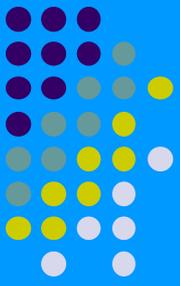
Dragoş Călin



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Limitations on Article 47 EU Charter in CJEU case law

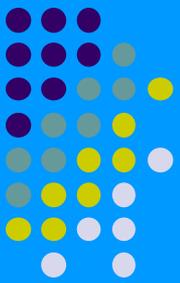


Article 47 Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. **(based on Article 13 of the ECHR)**

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. **(corresponds to Article 6(1) of the ECHR)**

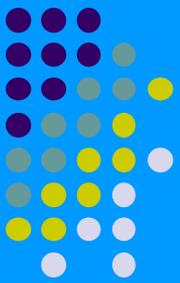
Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.



Limitations on Article 47 EU Charter in CJEU case law

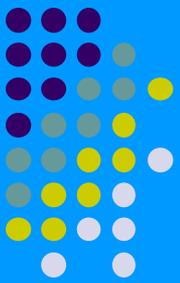
Article 52 Scope and interpretation of rights and principles

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.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.



Limitations on Article 47 EU Charter in CJEU case law. Guidelines

- Like most other fundamental rights, the right to effective judicial protection can be limited.**
- Fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.**
- The limitation must be provided by law; it must respect the essence of the right or freedom at stake; it must be justified either by an objective of general interest recognized by the Union or by the need to protect the rights and freedoms of others; and, finally, the principle of proportionality has to be respected.**



Limitations on Article 47 EU Charter in CJEU case law. Guidelines

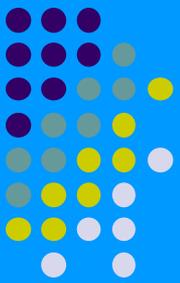
- The intensity of the review to be applied by a court depends, *inter alia*, on the specific area of law concerned, the nature of the right at issue and on the extent and seriousness of the interference with that right. A serious interference with a fundamental right may therefore mean a stricter review.
- There is a difference in the review of a limitation of a fundamental right for reasons of an objective of general interest, on the one hand, and in order to protect the rights and freedoms of others on the other. Indeed, in both situations a balance has to be struck between the fundamental right and either the general interest or the ‘other’ right concerned. While in the first situation the test would seem a traditional one, i.e. in particular a strict test of proportionality, what is at issue in the second situation is the need to reconcile the requirements of the protection of the different rights. Finding a fair balance between two fundamental rights is arguably a different issue than balancing the protection of a right and an objective of general interest.

Limitations on Article 47 EU Charter in CJEU case law

Public interest



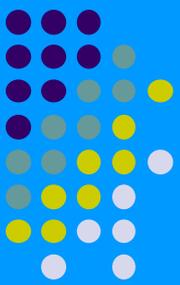
- Right to be informed of the grounds of an administrative decision and State security If the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading 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 on Article 47 EU Charter in CJEU case law

Public interest

- **If the national court considers that State security does not stand in the way of precise and full disclosure, it proceeds to examine the legality of such a decision on the basis of solely the grounds and evidence which have been disclosed.**
- **If State security does stand in the way of disclosure, the person concerned must, in particular, be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based.**
- **The national court must assess whether and to what extent the restrictions on the rights of the defence are such as to affect the evidential value of the confidential evidence.**

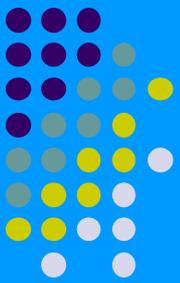


Limitations on Article 47 EU Charter in CJEU case law

Public interest

- Article 52(1) of the Charter nevertheless allows limitations on the exercise of the rights enshrined in the Charter, subject to the conditions that the limitation concerned respects the essence of the fundamental right in question and, subject to the principle of proportionality, that it is necessary and genuinely meets objectives of general interest recognised by the European Union.
- Further, the question whether there is an infringement of the rights of the defence and of the right to effective judicial protection must be examined in relation to the specific circumstances of each particular case, including, the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question.

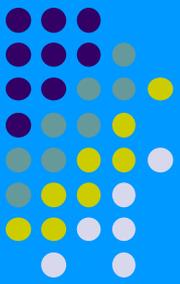
C-584/10 P, *Commission and Others v Kadi*



Limitations on Article 47 EU Charter in CJEU case law

Public interest

- The EU courts may base their decision solely on the material which has been disclosed to them and the competent EU authority bears the burden of proving that the reasons relied on against the person concerned are well founded.
- It is the task of the EU Courts, before whom the secrecy or confidentiality of that information or evidence is no valid objection, to determine whether the reasons relied on by that authority as grounds to preclude that disclosure are well founded.
- If not the EU Courts shall examine the lawfulness of the contested measure solely on the basis of the material which has been disclosed to that person.
- If those reasons do indeed preclude such disclosure, they must assess whether and to what extent the failure to disclose confidential information or evidence to the person concerned and his consequential inability to submit his observations on them affect the probative value of the confidential evidence.

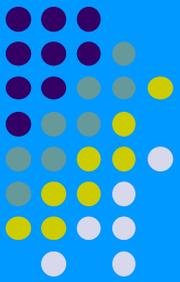


Limitations on Article 47 EU Charter in CJEU case law

Public interest

- With regard to the review of the lawfulness of a decision adopting restrictive measures, having regard to their preventive nature, if the Courts of the European Union consider that, at the very least, one of the reasons mentioned is sufficiently detailed and specific, that it is substantiated and that it constitutes in itself sufficient basis to support that decision, the fact that the same cannot be said of other such reasons cannot justify the annulment of that decision. Furthermore, the effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that the Courts of the European Union ensure that the decision, which affects the person or entity concerned individually, is taken on a sufficiently solid factual basis. That entails a verification of the allegations factored in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.

Case C-348/12 P, *Council of the European Union v Manufacturing Support & Procurement Kala Naft Co., Tehran*

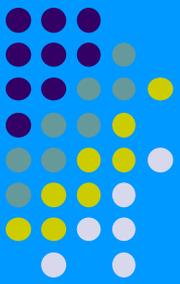


Limitations on Article 47 EU Charter in CJEU case law

Public interest

- Article 57(1) and Article 61 ter(1) of the Belgian Code of Criminal Procedure enshrine the principle of investigative confidentiality, while stipulating that exceptions to that principle are provided for by law. The fact that the person concerned was not heard can, as a general rule, be objectively justified by investigative confidentiality, pursuant to Article 52 of the Charter. It is moreover appropriate to examine whether the fact that the person concerned was not heard appears to be necessary and proportionate to the objective to be attained, that is, that of preserving investigative confidentiality and, ultimately, ensuring the proper conduct of the criminal proceedings. In that regard, it should be noted that, as a general rule, omitting to hear the person concerned before waiving his immunity preserves investigative confidentiality. if, in duly justified cases, a national authority opposes precise and full disclosure to the person concerned of the grounds which constitute the basis of a request to waive immunity, by invoking reasons of investigative confidentiality, the Commission must, together with the national authorities in accordance with the principle of sincere cooperation, implement measures that are intended to accommodate legitimate considerations of investigative confidentiality and the need to ensure sufficient compliance with the person's fundamental rights, such as the right to be heard.

Case C-831/18 P, *Commission v RQ*

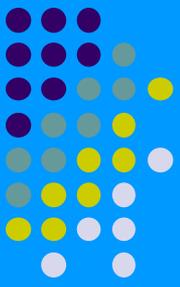


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- The extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference.
- In view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by Directive 2006/24, the EU legislature's discretion is reduced, with the result that review of that discretion should be strict.

Joined Cases C-293/12 and C-594/12, *Digital rights*

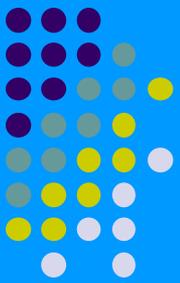


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- The European Union legislature was required to strike a balance between the freedom to conduct a business, on the one hand, and the fundamental freedom of citizens of the European Union to receive information and the freedom and pluralism of the media, on the other.
- Where several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them.

Case C-283/11, Sky Österreich

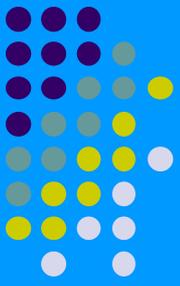


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- Having regard to the protection conferred by Article 47 of the Charter, it must be observed that that article 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, as is apparent also from the Explanation on Article 47 of the Charter.
- The protection conferred by Article 47 of the Charter does not require that an individual should have an unconditional entitlement to bring an action for annulment of European Union legislative acts directly before the Courts of the European Union.

C-583/11 P, Inuit Tapiriit Kanatami and Others v Parliament and Council

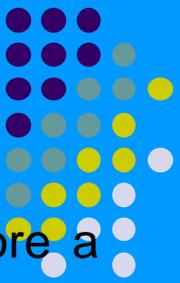


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- The mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its request for the production of documents already in existence cannot constitute a breach of the fundamental principle of respect for the rights of the defence set out in Article 48(2) of the Charter of Fundamental Rights or impair the right to fair legal process laid down in Article 47 of the Charter of Fundamental Rights, which offer, in the specific field of competition law, protection equivalent to that guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

T-297/11, *Buzzi Unicem v Commission*, Judgment of the General Court

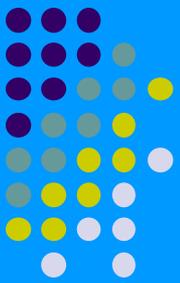


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

Article 47 of the Charter enshrines the right to an effective remedy before a tribunal for every person whose rights and freedoms guaranteed by EU law are infringed. Thus, the recognition of that right, in a given case, presupposes, as is apparent from the first paragraph of Article 47 of the Charter, that the person invoking that right is relying on rights or freedoms guaranteed by EU law.

The second subparagraph of Article 19(1) TEU must be interpreted as meaning that it may be applied in a case in which a national court is seised of an action provided for by national law and seeking a ruling on the conformity with EU law of national provisions governing the procedure for the appointment of members of the judiciary of the Member State to which that court belongs. Article 47 of the Charter must be duly taken into consideration. National provisions of a Member State which confer on the Prime Minister a decisive power in the appointment of members of the judiciary, while providing for the involvement of an independent body responsible for assessing candidates and providing an opinion, are not contrary to EU law.

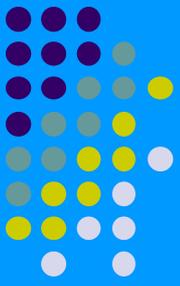


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- An irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system.

- **Réexamen Simpson v Council**
Case C-542/18 RX-II (Joined Cases C-542/18 RX-II, C-543/18 RX-II)



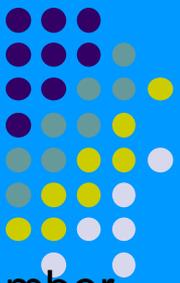
Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- The mere fact that the Council used the list drawn up following the public call for applications of 3 December 2013 to fill the third post is not sufficient to establish an infringement of a fundamental rule of the procedure for appointing judges to the Civil Service Tribunal that is of such a kind and of such gravity as to create a real risk that the Council made unjustified use of its powers, undermining the integrity of the outcome of the appointment process and thus giving rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge appointed to the third post, or of the Chamber to which that judge was assigned.

Réexamen Simpson v Council

Case C-542/18 RX-II (Joined Cases C-542/18 RX-II, C-543/18 RX-II)



Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- The Council's disregard for the public call for applications of 3 December 2013 does not constitute an infringement of the fundamental rules of EU law applicable to the appointment of judges to the Civil Service Tribunal that entailed an infringement of the applicants' right to a tribunal established by law, as guaranteed by the first sentence of the second paragraph of Article 47 of the Charter.
- Consequently, and since the judgments under review do not contain anything else that might cast doubt on compliance with the first sentence of the second paragraph of Article 47 of the Charter, it must be held that the General Court made an error of law in ruling, in those judgments, that that provision had been infringed. The irregularity referred to in the preceding paragraph could not, therefore, by itself justify the setting aside of a judicial decision adopted by the panel of judges to which the judge appointed to the third post was assigned.

● **Réexamen Simpson v Council**
Case C-542/18 RX-II (Joined Cases C-542/18 RX-II, C-543/18 RX-II)

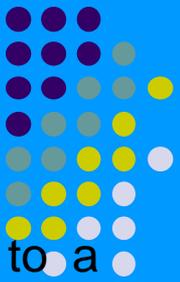
Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- There is no EU law requirement as to the specialisation of judges or of judicial panels that could be embodied in Article 47 of the Charter, whether it be in cases of corruption, in relation to the protection of the financial interests of the Union, or in other fields of EU law for that matter.
- From the EU point of view, and in close connection to the approach taken by the ECtHR on that matter, it does not appear that *any infringement* of national rules governing the composition of a judicial panel would automatically lead to an infringement of Article 47 of the Charter. Indeed, as it appears from *Simpson*, irregularities may entail an infringement of the first sentence of the second paragraph of Article 47 of the Charter ‘particularly when that irregularity is of *such a kind and of such gravity* as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and impartiality of the judge or judges concerned ...’

**Opinion of Advocate General Bobek, Joined Cases C-811/19 and C-840/19,
*Ministerul Public – Parchetul de pe lângă Înalta Curte de Casație și
Justiție – Direcția Națională Anticorupție***

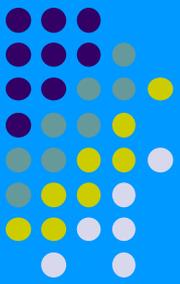




Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- The requirement as to the specialisation of judges does not amount to a fundamental rule of a judicial system, for the purposes of the application of the standard arising from the second paragraph of Article 47 of the Charter, which would have to always be present in order for the requirements of Article 47 of the Charter to be satisfied.
- Article 47 of the Charter of Fundamental Rights of the European Union is to be interpreted as not encompassing the requirement of the specialisation of judicial panels. However, the second paragraph of Article 47 of the Charter does not preclude a decision of a national constitutional court which declares that, in application of a genuine and reasonable national standard of protection of the right to effective judicial protection, and on the basis of its interpretation of the national provisions applicable, the composition of a judicial panel is unlawful on the basis of the infringement of a national legal requirement of specialisation of judicial panels.



Limitations on Article 47 EU Charter in CJEU case law

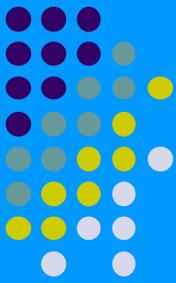
Other fundamental rights

- The second paragraph of Article 47 of the Charter does not preclude that, in a situation which generally falls within the scope of EU law but which is not fully determined by it, a national constitutional court declares, in application of a genuine and reasonable national standard of protection of constitutional rights and on the basis of its interpretation of the applicable national provisions, that judicial panels within the national supreme court have not been established in accordance with the law.

**Opinion of Advocate General Bobek, Joined Cases C-811/19 and C-840/19,
*Ministerul Public – Parchetul de pe lângă Înalta Curte de Casație și
Justiție – Direcția Națională Anticorupție***

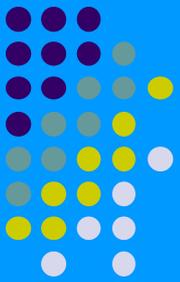
Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights



Article 56 TFEU and Article 4(3) TEU, read in conjunction with Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which does not provide for the *ex officio* examination of the proportionality of measures restricting the freedom to provide services within the meaning of Article 56 TFEU and which puts the burden of proof on the parties to the proceedings.

Case C-3/17, *Sporting Odds*

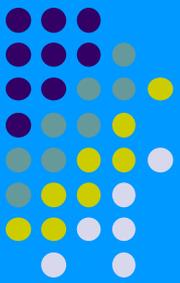


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- 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.

C-752/18, *Deutsche Umwelthilfe*

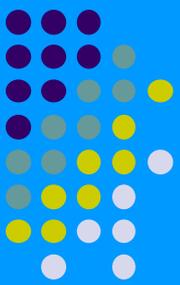


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- The right of access to a court, which it derives from Article 6 of the ECHR, affirmed by Article 47 of the Charter of Fundamental Rights, it should be borne in mind, first of all, that the interest in bringing proceedings is an essential and fundamental prerequisite for any legal proceedings. While the requirement of an interest in bringing proceedings may appear to be a limitation on the right to a court, that condition clearly does not constitute an impairment to the very essence of that right, since the requirement that the applicant has, at the time the action is brought and until the final judgment, an interest in bringing proceedings against a measure allegedly adversely affecting him pursues a legitimate aim which is ultimately to prevent, in the interest of the proper administration of justice, the Courts of the European Union from having to deal with purely hypothetical questions, the answer to which is not capable of giving rise to legal consequences or, as in the present case, of procuring an advantage for the applicant.

T-19/06, *RENV - Mindo v Commission*

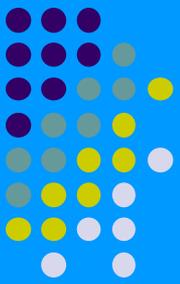


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- It follows from the case-law of the European Court of Human Rights that compliance with Article 47 of the Charter of Fundamental Rights of the European Union does not exclude that, in proceedings of an administrative nature, a "penalty "be imposed first by an administrative authority. It presupposes, however, that the decision of an administrative authority not itself fulfilling the conditions of this article, undergo the subsequent control of a "judicial body of full jurisdiction". A judicial body must, in order to be qualified as a judicial body with full jurisdiction, in particular have the competence to examine all questions of fact and of law relevant to the dispute before it, which implies, in the case of " a disciplinary sanction, that it has in particular the power to assess the proportionality between the fault and the sanction.

Case T-184/11 P, *Nijs v Court of Auditors of the European Union*



Limitations on Article 47 EU Charter in CJEU case law

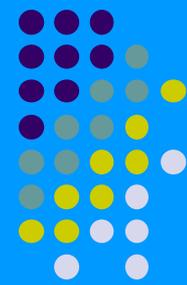
Other fundamental rights

- A civil action for damages, such as the action before the referring court, requires, as can be seen from the order for reference, not only that a harmful event be found to have occurred, but also that loss and a direct link between the loss and that harmful event be established. Whilst it is true that, because of its obligation not to take decisions running counter to a Commission decision finding an infringement of Article 101 TFEU, the national court is required to accept that a prohibited agreement or practice exists, the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court.
- Article 47 of the Charter of Fundamental Rights of the European Union does not preclude the European Commission from bringing an action before a national court, on behalf of the European Union, for damages in respect of loss sustained by the Union as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC or Article 101 TFEU.

Case C-199/11, *Otis and Others*

Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights/The requirement that the limitation must be provided by law

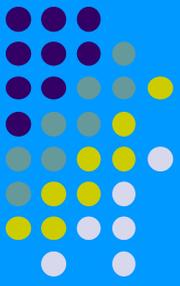


- Since there was no legal remedy against the rejection of an application for subsidy and the lack of a remedy was due to a provision in a programme manual adopted by a committee, the limitation of the right to an effective remedy could not be considered as being provided by law.
- Consequently, it must be found that, in so far as it provides that a decision of the Seirekomitee rejecting an application to aid cannot be subject to an appeal, the programme manual does not comply with the principle of effective judicial protection laid down in the first paragraph of Article 47 of the Charter.
- Furthermore, it must be borne in mind that the requirement for judicial review of any decision of a national authority constitutes a general principle of EU law. Pursuant to that principle, it is for the national courts to rule on the lawfulness of a disputed national measure and to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case.

C-562/12, *Liivimaa Lihaveis*

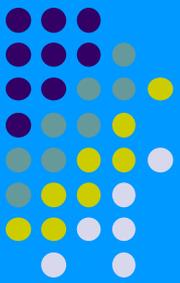
Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights



- Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding proof of origin of imported goods adduced by the customs authorities on the basis of national procedural rules resting on the results of an examination carried out by a third party, with regard to which that third party refuses to disclose further information either to the customs authorities or to the customs declarant, as a result of which it is made difficult or impossible to verify or disprove the correctness of the conclusions reached, provided that the principles of effectiveness and equivalence are upheld. It is for the national court to ascertain whether that is so in the main proceedings.

Case C-437/13, *Unitrading*

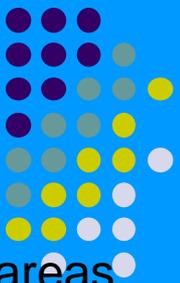


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- The fact that an official qualifies as a voter during elections to the staff committee and that he, like any voter, has an interest in seeing his representatives elected under regular conditions is therefore not sufficient to establish a risk of serious and irreparable damage capable of justifying the suspension of operation of the contested decision.
- Moreover, if the right to an effective judicial remedy is guaranteed to everyone by Article 47 of the Charter of Fundamental Rights of the European Union, this right lends itself to limitations which are implicitly admitted, since it by its nature requires even a regulation and cannot therefore lead to rule out the provisions of Article 278 TFEU, from which it follows that a stay of execution cannot be ordered without a risk of serious and irreparable damage being established.

F-94/15, *Wolff v EEAS*, Judgment of the Civil Service Tribunal

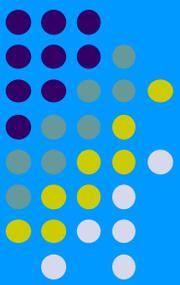


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- However, according to the case-law of the Court, relating to several areas other than VAT law, the imposition of such costs 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 or where they make it in practice impossible or excessively difficult to exercise the rights conferred by the EU legal order. Since the amount of VAT at issue in the main proceedings is far from constituting the largest part of the costs of legal proceedings, the Court cannot hold that the charging of VAT on the services supplied by lawyers creates, by itself, an insurmountable obstacle to access to justice or that it makes it in practice impossible or excessively difficult to exercise the rights conferred by the EU legal order. In those conditions, the fact that such a charge could eventually lead to increased costs cannot call into question, as regards the right to an effective remedy guaranteed by Article 47 of the Charter, that charge to VAT.

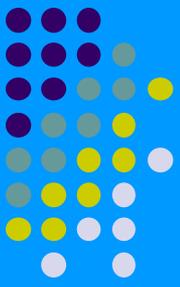
Case C-543/14, *Ordre des barreaux francophones et germanophone and Others*



Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- It should be noted in that regard that the principle of effective judicial protection is a general principle of EU law, which is now set out in Article 47 of the Charter of Fundamental Rights. That principle comprises various elements, including the right of access to a tribunal. With regard to the right of access to a tribunal, it must be made clear that, for a ‘tribunal’ to be able to determine a dispute concerning rights and obligations arising under EU law in accordance with Article 47 of the Charter of Fundamental Rights, it must have power to consider all the questions of fact and law that are relevant to the case before it.
- In the present case, it must be stated that, following the partial reclassification carried out, the General Court is examining, in the same action, both the legality of the contested decision and the merits of the Commission’s contractual claim against the applicant, which underlies the adoption of that decision. To the extent that all questions of fact and law relevant for the dispute at issue are being examined by the Court, it must be concluded that the present action constitutes an effective remedy within the meaning of Article 47 of the Charter of Fundamental Rights.

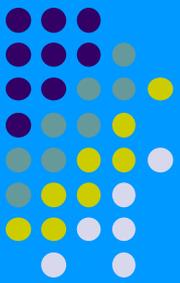


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that it does not preclude national legislation, which makes the exercise of a judicial remedy by a person stating that his right to protection of personal data guaranteed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, has been infringed, subject to the prior exhaustion of the remedies available to him before the national administrative authorities, 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 remedies before the national administrative authorities 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.

Case C-73/16, *Puškár*



Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- With regard to the principle of effective judicial protection, it is a general principle of law which is now reaffirmed by Article 47 of the Charter. That article secures in EU law the protection afforded by Article 6(1) and Article 13 of the ECHR. The first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by EU law are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.
- The principle of effective judicial protection cannot prevent the Council from reinstating a person or entity on the lists of persons and entities whose assets are to be frozen on the basis of reasons other than those on which the initial listing of that person or that entity was based. The purpose of that principle is to ensure that an act adversely affecting an entity may be challenged before the courts, and not to prevent the adoption of a new act adversely affecting that entity, based on different reasons.

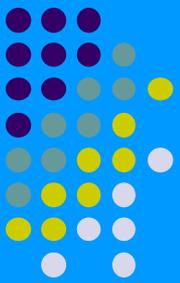


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- Nor do the principles of equivalence and effectiveness or the principle of effective judicial protection preclude national legislation which imposes, in respect of actions relating to electronic communications services between end-users and providers of those services, prior implementation of an out-of-court settlement procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.
- It is common ground in the cases before the referring court that, by making the admissibility of legal proceedings concerning electronic communications services conditional upon the implementation of a mandatory attempt at settlement, the national legislation introduces an additional step for access to the courts. That condition might prejudice implementation of the principle of effective judicial protection.

Case C-317/08, Alassini and Others

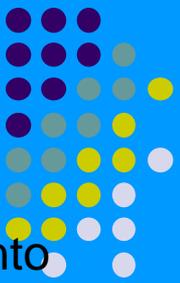


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.
- In that connection, 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.

Case C-279/09, DEB

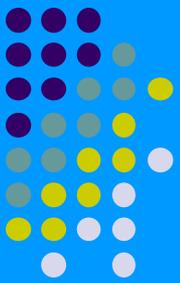


Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights

- 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 relevant 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.

Case C-279/09, DEB



Limitations on Article 47 EU Charter in CJEU case law

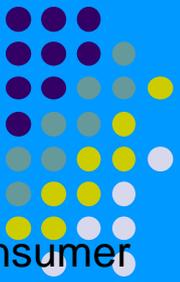
Other fundamental rights

- European Union law, in particular the principles of equivalence and effectiveness and Article 47 of the Charter of Fundamental Rights of the European Union, does not preclude a national rule of jurisdiction such as that in Article 133(1) of the Code of Administrative Procedure (Administrativnoprotsesualen kodeks), which results in conferring on a single court all disputes relating to decisions of a national authority responsible for the payment of agricultural support under the European Union common agricultural policy, provided that actions intended to ensure the safeguarding of the rights which individuals derive from European Union law are not conducted in less advantageous conditions than those provided for in respect of actions intended to protect the rights derived from any aid schemes for farmers established under national law, and that jurisdiction rule does not cause individuals procedural problems in terms, inter alia, of the duration of the proceedings, such as to render the exercise of the rights derived from European Union law excessively difficult, which it is for the referring court to ascertain.

Case C-93/12 Agrokonstulting-04

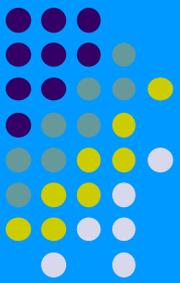
Limitations on Article 47 EU Charter in CJEU case law

Other fundamental rights



- Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in conjunction with Articles 47, 34(3) and 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a national provision of the kind at issue in the main proceedings, by which the consumer, as a mortgage debtor against whom enforcement proceedings are brought, may bring an appeal against the decision rejecting his objection to the enforcement only when the court of first instance has not upheld an objection based on the unfairness of the contractual term upon which the enforcement is based even though the sellers or suppliers may, by contrast, appeal against any decision terminating proceedings regardless of the ground of objection on which that decision is based.
- 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.

C-539/14, *Sánchez Morcillo and Abril García*

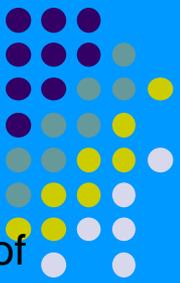


Limitations on Article 47 EU Charter in CJEU case law

Procedural considerations

- Article 47 of the Charter of Fundamental Rights of the European Union and the principles of equivalence and effectiveness must be interpreted as not precluding legislation such as that at issue in the main proceedings which exempts legal persons governed by public law from judicial stamping fees when they lodge an objection to the enforcement of a judicial decision relating to the repayment of taxes levied in breach of EU law and exempts those persons from the obligation to lodge a security at the time of bringing an application for a stay of such enforcement proceedings, while the applications submitted by legal and natural persons governed by private law in the context of such procedures remain, in principle, subject to court costs.

C-205/15, *Toma*

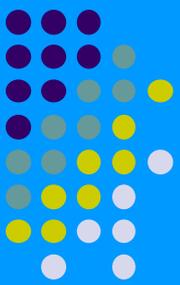


Limitations on Article 47 EU Charter in CJEU case law

Procedural considerations

- Does not violate the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union the procedure which has been followed in a competition case before the General Court of which the duration has been more than 4 years and 3 months, but which is justified in consideration of the specific circumstances of the said case and, in particular, the factual and legal complexity of the latter, the behavior of the parties and the absence of unexplained period of inactivity during each of the stages of the proceedings in this case.
- It follows that the total length of the proceedings in Case T-385/06 is justified having regard to the circumstances specific to that case and, in particular, its factual and legal complexity, the conduct of the parties and the absence of any unexplained period of inactivity at any stage of the proceedings in that case.
- Having regard to all the foregoing considerations, it is necessary to rule out the existence of an infringement of the second paragraph of Article 47 of the Charter of Fundamental Rights in Case T-385/06 and, more specifically, of an infringement of the obligation to adjudicate within a reasonable time in that case.

Case T-725/14, Aalberts Industries v European Union

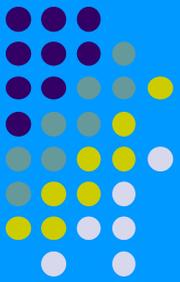


Limitations on Article 47 EU Charter in CJEU case law

Procedural considerations

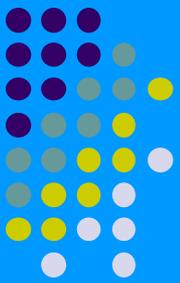
- Articles 49 and 56 TFEU, read in light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a national procedural system according to which, in administrative offence proceedings, the court called upon to rule on the compliance with EU law of legislation restricting the exercise of a fundamental freedom of the European Union, such as the freedom of establishment or the freedom to provide services within the European Union, is required to examine of its own motion the facts of the case before it in the context of examining whether administrative offences arise, provided that such a system does not have the consequence that that court is required to substitute itself for the competent authorities of the Member State concerned, whose task it is to provide the evidence necessary to enable that court to determine whether that restriction is justified.

Case C-685/15, *Online Games*



Conclusions

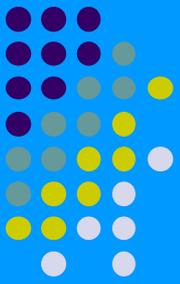
- **Fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.**
- **The limitation must be provided by law; it must respect the essence of the right or freedom at stake; it must be justified either by an objective of general interest recognized by the Union or by the need to protect the rights and freedoms of others; and, finally, the principle of proportionality has to be respected.**



Conclusions

- If the national court considers that State security does not stand in the way of precise and full disclosure, it proceeds to examine the legality of such a decision on the basis of solely the grounds and evidence which have been disclosed.
- With regard to recent case law trends, Article 47 of the Charter has become a benchmark for references for a preliminary ruling on the rule of law. As it appears from *Simpson*, irregularities may entail an infringement of the first sentence of the second paragraph of Article 47 of the Charter ‘particularly when that irregularity is of *such a kind and of such gravity* as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and impartiality of the judge or judges concerned ...’

Many thanks!



Judge **Dragoș Călin**,

Bucharest Court of Appeal

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Legal Fees and Legal Aid in EU Law

*'Applying the Charter of Fundamental Rights of the European
Union', ERA Seminar, 22 June 2021*

Pekka Pohjankoski
Faculty of Law, University of Helsinki

Structure

1. Basic principles in the Charter
 - Right to a fair trial
 - Access to a court, equality of arms
2. Legal fees
 - Lawyers' fees, court fees, and the Charter
 - Prohibitively expensive procedure in environmental litigation
3. Legal aid in EU law
 - EU directives on legal aid
 - Legal aid for corporations



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Injury Law Firm on
Unsplash

1. Basic principles in the Charter

Right to a fair trial

Art 47(2) Charter

- ~ Art 6(1) ECHR
 - See Art 52(3) and Explanations
 - Charter covers not only 'civil rights and obligations' but all EU law
- Right of access to a court and the principle of equality of arms
 - See eg C-199/11, *Otis*, para 48

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

Art 52(7): 'The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.'

Explanations relating to the Charter of Fundamental Rights, O.J. 2007, C303/17

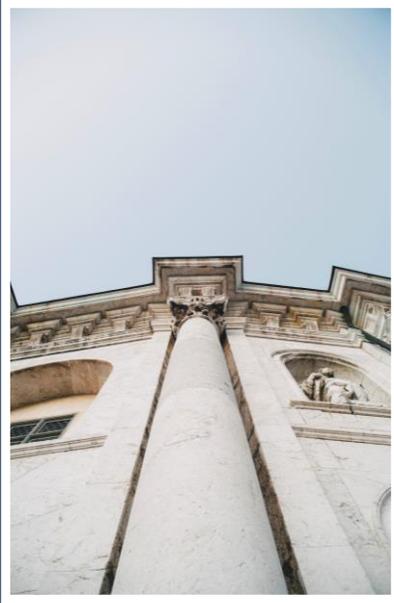


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Access to a court

Art 6§1 ECHR

- ECtHR, *Golder v. United Kingdom*
- Not absolute, may be restricted; however, must be 'practical and effective'

In EU law: Art 47(2)
Charter

ECtHR, *Golder v. United Kingdom*, 21 Feb 1975, (4451/70) §34 ('[I]n civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.')



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Equality of arms

In medieval judicial duel:
requirement that swords be
of equal length

In EU law, Art 47(2)
Charter:

- 'an obligation to offer each party a reasonable opportunity to present its case in conditions that do not place it in a clearly less advantageous position by comparison with its opponent'
- See eg C-189/18, *Glencore Agriculture Hungary*, para 61



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2. Legal fees



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Lawyers' fees

Lawyers' fees, combined with the 'loser pays' rule, may hinder access to a court.

An issue under the Charter?

Lawyers' fees and equality of arms

Principle's aim: procedural balance between parties (bringing of evidence, adversarial hearing, right to bring an action)

-> No obligation to 'put the parties on an equal footing in terms of the financial costs incurred in connection with legal proceedings'

C-543/14, *Ordre des barreaux francophones et germanophone*, paras 41-42

Case C-543/14, *Ordre des barreaux francophones et germanophone and Others*, concerned a challenge to a Belgian law abrogating the value added tax (VAT) exemption for the supply of services by lawyers on grounds that it violated, among others, the principle of equality of arms since it did not take account of whether or not a client, who does not qualify for legal aid, is subject to VAT.

Remedy to lawyers' fees: legal aid

- Legal fees challengeable under Art 47 Charter only if an 'insurmountable obstacle' to access to justice
- Obstacles posed by legal fees primarily remedied with appropriate legal aid
- See C-543/14, *Ordre des barreaux francophones et germanophone*, paras 31 and 37

C-543/14, *Ordre des barreaux francophones et germanophone*:

- ... 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 ... (para 31)
- In that case, 'account would have to be taken of this by framing the right to legal aid appropriately, in accordance with the third paragraph of Article 47 of the Charter' (para 37)

If no legal aid available -> possible inequality of arms

However, holistic assessment of all elements, see eg

- ECtHR, *Airey v. Ireland*
- ECtHR, *Steel and Morris v. United Kingdom*
- Cf. simple cases

- ECtHR, *Airey v. Ireland*, 9 Oct 1979 (6289/73) (holding Art 6§1 ECHR may sometimes compel State to provide for legal aid either because legal representation is rendered compulsory or by reason of the complexity of procedure or case)
- ECtHR, *Steel and Morris v. United Kingdom*, 15 Feb 2005 (68416/01) (violation of Art 6§1 ECHR where no legal aid was available for poor defendants in complex and voluminous defamation proceedings against McDonald's)



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Court fees

Fees to institute proceedings limit access to court

Not incompatible *per se* with Art 47(2) Charter

Can court fees be an issue under the Charter?

Court fees and Art 47(2) Charter

Fees must not impair the 'very essence' of the right of access to a court

Need to balance interests of 1) state in collecting fees and 2) applicant in vindicating claim through courts

Factors to consider:

- Individual's ability to pay, object and purpose of fee, stage of proceedings, determination of fee (automatic or with judicial discretion)

See eg ECtHR in

- *Kreuz v. Poland*, 19 June 2001 (28249/95) (violation of Art 6§1 where court fee equal to average annual salary in Poland, applicant's claim only loosely related to his business activity, and insufficient consideration of applicant's financial position)
- *Stankov v. Bulgaria*, 12 July 2007 (68490/01) (violation of Art 6§1 where court fee of 940e was calculated as percentage of dismissed part of applicant's claim for damages for wrongful detention, no judicial discretion possible, fee imposed at end of procedure with consequent 'loss' of almost all of 1050e awarded as compensation)
- *Bakan v. Turkey*, 12 September 2007 (50939/99) (violation of Art 6§1 where court fee of 170e, equal to two months' minimum salary in Turkey, imposed on applicants with no financial resources at beginning of procedure)
- *Reuther v. Germany*, 5 June 2003 (74789/01) (inadmissibility since manifestly no violation of Art 6§1 – court fee of 750e required by constitutional court as advance of costs in case of prima facie appearance of claim as inadmissible and/or manifestly ill-founded)
- *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995 (18139/91) (no violation of Art 6§1 where £124,900 required as security for opposing party's costs to bring proceedings at Court of Appeal taking account of all circumstances)

'Prohibitively expensive procedure' in environmental litigation

Aarhus Convention (Dir. 2003/35): access to justice in environmental matters

- Procedures shall be 'not prohibitively expensive'

Factors to consider include:

- Interests of claimant and of the environment, financial situation of the person concerned and objective reasonableness of the costs, and available legal aid
- ECJ in C-260/11, *Edwards and Pallikaropoulos*, paras 35 ff.

Convention on access to information, public participation in decision-making and access to justice in environmental matters, O.J. 2005, L124/4

Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, O.J. 2003, L156/17

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3. Legal aid in EU law

Legal aid in the Charter

Article 47(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.’

But also:

Art 47(2) (legal aid in civil matters, cf. ECHR Art 6§1) and Art 48(2) (free legal assistance in criminal matters, cf. ECHR Art 6(3)(c))

- Under ECHR Art 6§1, states may sometimes be compelled to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court, see *Airey v. Ireland*, 9 October 1979 (6289/73), §26.
- Under ECHR Art 6§3(c) free legal assistance is to be granted where the ‘interests of justice so require’ to a person who lacks ‘sufficient means to pay for legal assistance’.

EU legal aid legislation

1. Legal aid in cross-border civil disputes:

- Directive 2003/8

2. Legal aid in criminal prosecutions and European Arrest Warrant proceedings:

- Directive 2016/1919

- Council directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, O.J. 2003, L26/41
- Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, O.J. 2016, L297/1

Legal aid in cross-border civil disputes

Directive 2003/8

- Approximation of minimum legal aid rules in Member States
- Applicable in
 - Cross-border disputes
 - Art 2: 'where party applying for legal aid ... is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced'
 - In 'civil and commercial' matters ('civil and commercial dispute')

Legal aid in criminal proceedings

Directive 2016/1919

Approximation of minimum legal aid rules in Member States in criminal proceedings – part of broader criminal procedure harmonization (esp. Dir. 2013/48)

Art 2: Scope

Art 3: Definition of 'legal aid'

Art 4: Content of legal aid (see Art 48(2) Charter)

Art 5: Legal aid in European arrest warrant proceedings

Specific rules on legal aid/free legal assistance

Maintenance obligations:

- Regulation 4/2009, Chapter V ('Access to justice')

Asylum procedures:

- In determining responsible Member State: 'Dublin III' Regulation 604/2013, Art 27 'Remedies'
- In granting and withdrawing international protection: 'Procedures' Directive 2013/32, Arts 19-21
- In deportation procedures: 'Returns' Directive 2008/115, Art 13

- Council Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations O.J. (2009), L7/1
- Regulation (EU) 604/2013 of the European parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), O.J. 2013, L180/31
- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, O.J. 2013, L180/60
- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, O.J. 2008, L348/98

Legal aid and corporations

Art 47(3) Charter: applicable to legal persons

Case C-279/09, *DEB*

- Criteria include: subject-matter of litigation, prospect of success, importance for applicant, complexity, applicant's capacity to self-representation, form of legal person, financial capacity of members
- 'proceduralization' of legal aid

See also Case C-156/12, *GREP*, and ECtHR in *VP Diffusion Sarl v. France*

C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (holding legal persons may benefit from right to legal aid under Art 47(3) Charter)

C-156/12, GREP GmbH v. Freistaat Bayern (holding that proceedings brought by corporation to contest enforceability of decision under Brussels I regulation entailing conservatory attachment measures constitutes implementation of EU law and, hence, come within the scope of Art 47 Charter)

VP Diffusion Sarl v. France, 26 Aug 2008 (14565/04) (holding no violation of Art 6§1 where French legislation treated differently profit-making companies, on the one hand, and natural persons and non-profit making legal persons, on the other)

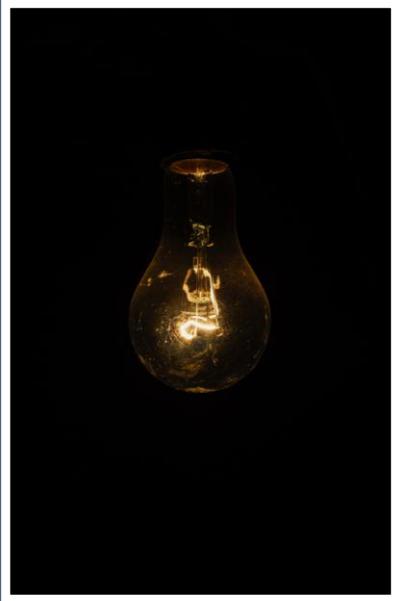


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Conclusions

- Arts 47-48 Charter: autonomous, but inspired by ECHR
- Primary remedy to high legal fees: legal aid
- Specific EU legislation on legal aid
- Availability of legal aid to corporations



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Questions?

Thank you for your attention.

Workshop exercise: Access to a court in EU law

Marius runs a local electronics shop, “The Great TV Shop LLC”. Its business consists mainly of after-sale maintenance of TVs sold to hotels. The business has not been doing well during the Covid-19 pandemic, but recently Marius signed a consequential maintenance deal with an Alpine hotel chain in a neighbouring EU member state. Marius hopes this order will allow him to pay off his debts and save his business.

To Marius’ chagrin, the hotel informs him that the local authorities require that foreign TV maintenance service providers obtain a business permit for a fee of 5,000 euros. Marius considers that since he is providing a service within the EU, requiring such a certificate is contrary to EU law. Marius contacts a lawyer who agrees that the requirement likely violates the freedom to provide services, as codified in Directive 2006/123 on services in the internal market (O.J. 2006, L376/36). Convinced of the prospect of success, the lawyer agrees to bring a case against the local authority.

The case is brought in the name of The Great TV Shop LLC, which is however without funds. The lawyer makes a legal aid application for the benefit of Marius’ company. However, the judge hearing the application considers the application unfounded.

Indeed, the judge explains that the national legislation on legal aid does not foresee legal aid for corporations, such as Marius’ company. In fact, legal aid is traditionally seen as a measure of social assistance and connected to ensuring human dignity. Such rationale is absent in the case of legal persons, especially ones which are profit-making. It is also apparent, according to the judge, that the EU directives on legal aid only apply to civil and criminal proceedings. Similarly, the judge estimates that the European Convention on Human Rights only guarantees legal aid in criminal proceedings and, exceptionally, in civil cases. However, the present claim against the public authority being of an administrative nature, he concludes that none of these instruments is applicable. The judge dismisses the application for legal aid.

The judge’s decision can be appealed under the applicable national procedural law. How should the following issues be argued on appeal:

- (a) Is the Charter of fundamental rights of the European Union (Charter) applicable in the circumstances of the case?
- (b) If yes, which Article(s) of the Charter is/are pertinent?
- (c) Can The Great TV Shop LLC rely on the Charter to claim legal aid?
- (d) If The Great TV Shop LLC has a right to legal aid under the Charter, how should the judge take this into account in the application/interpretation of national rules on legal aid?

Answer key:

(a) The dispute is about whether a EU member state is unlawfully restricting Marius' right to provide services across borders under the Services Directive 2006/123. The question is whether the member state in question is acting in breach of EU law which it is obliged to implement. The Charter can be relied on in this dispute since its provisions bind member states when they are implementing EU law (see Article 51).

(b) Legal aid is regulated in Articles 47(2)-(3) and 48(2) of the Charter. However, Article 48(2) concerns legal assistance in criminal prosecutions, so it is not applicable here. By contrast, Article 47(2) is applicable in proceedings before an administrative court. Regardless of whether Article 6§1 ECHR could be applied [probably yes: see by analogy eg ECtHR, *Ringeisen v. Austria*, 16 July 1971, (2614/65) §94], the Charter is broader in its scope in that it is 'not confined to disputes relating to civil law rights and obligations' (see Charter Explanations). Similarly, Article 47(3), which specifically concerns legal aid, applies to the legal aid issues in the proceedings.

(c) Since the Charter is applicable to the proceedings, the question is whether The Great TV Shop LLC is eligible to legal aid *ratione personae*. On the level of principle, this is possible. Under the case law of the ECJ (see Case C-279/09, *DEB*), legal persons are eligible for legal aid if the legal costs would otherwise constitute an insurmountable obstacle to access the courts.

(d) In Case C-279/09, *DEB* (operative part of judgment), the ECJ noted the following:

'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 and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.

In that connection, 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 relevant 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.' [Underlined here.]

The national law at issue does not permit granting legal aid to corporations. If the judge nonetheless considers that The Great TV Shop LLC should be awarded legal aid under the Charter, he must interpret the national legislation using all the available means of interpretation to achieve the result which enables due access to the courts. If he considers it impossible to interpret the national law in this way, he is required to disapply it to give full effect to Article 47 of the Charter (a provision of EU law with direct effect) in his ruling (see eg Case C-30/19, *Braathens Regional Aviation*).

CJEU case law on Articles 47, 48 and 50 of the Charter



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Ministry of Justice of Latvia

**Expert for different Justice
projects**

Seminar Objectives



Charter

Relevant articles



Fundamental Rights

Behind the text



Case-law of the CJEU

Broadening and
cuting

47

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

50

**Right not to be tried or
punished twice in criminal
proceedings for the same
criminal offence**

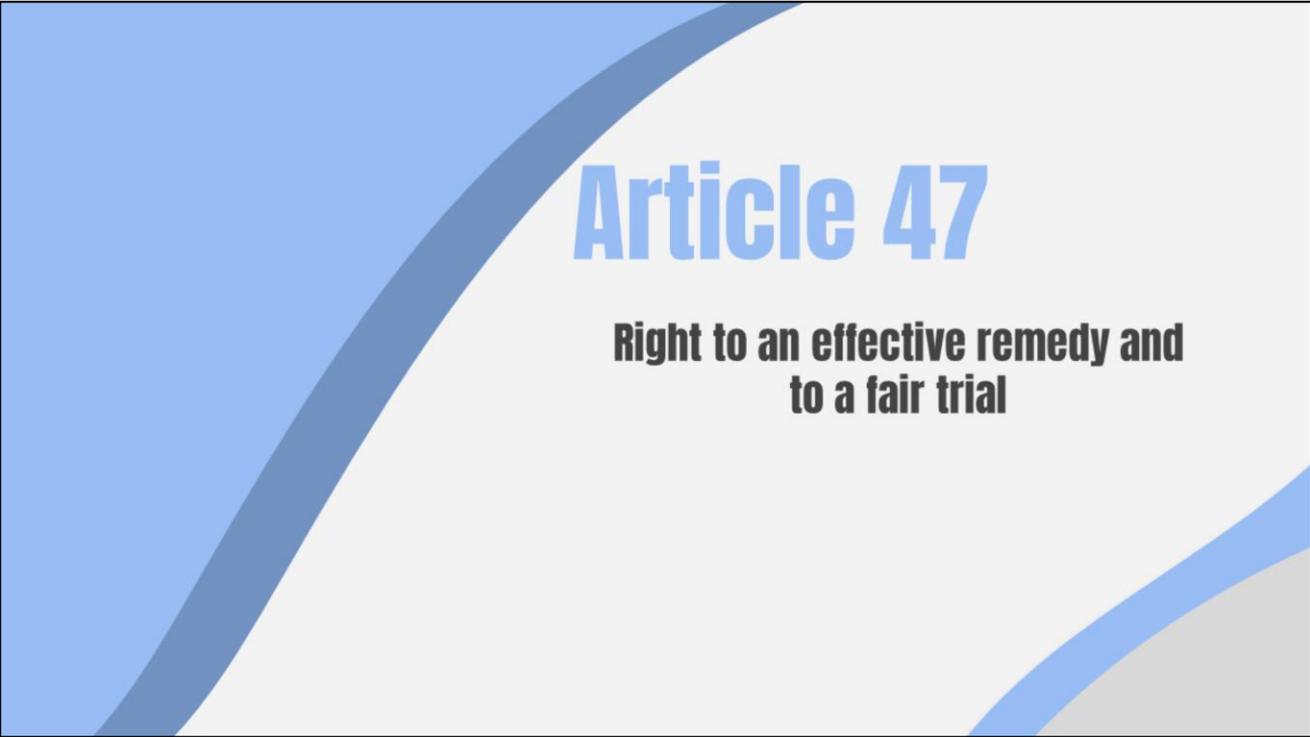
48

**Presumption of innocence
and right of defence**

CJEU

Jurisprudence

Preliminary questions



Article 47

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

Question:

How many rulings of the CJEU in preliminary proceedings interpret Art. 47 of the Charter?

- a. 10-20
- b. 40-50
- c. 90-100
- d. 120-130

Yesterday night there were 94 cases.

Last one from C-83/19 - Asociația "Forumul Judecătorilor din România» (18.05.2021.)

and oldest one **C-279/09 – DEB**
(22.12.2010.)

Effective judicial protection in consumer cases

In order for the consumer to be able to give free and informed consent, it is for the national court to indicate to the parties, in the context of national procedural rules and in the light of the principle of equity in civil proceedings, objectively and exhaustively the legal consequences which the removal of the unfair term may entail, irrespective of whether or not they are represented by a professional representative. (para 97)

CJEU: C-19/20, *Bank BPH*, 29.04.2021.

(Novation of mortgage loan agreement with deterrent effect)

Just to start by well-known *maxims*: The national court has the duty to verify unfairness of terms in a contract concluded by a seller or service provider with a consumer. It has even duty to disapply unfair terms. The consumer shall be provided a right to object that a term of a contract will be disqualified. Similarly, with free and informed consent the consumer may waive his rights to rely on the unfairness of a contractual term. But only if the consumer was duly informed that he or she is waiving right to contest the unfair term, because unfair term is invalid from the beginning and restitution means repayment of the same amounts. Unfair terms or only unfair element of a term shall be excluded and not

altered in substance. At the same time the contract shall continue as it would be without such unfair term. Tricky part is that it is for the national law to determine how and it is for the national court to assess it by its own motion.

The novelty regards representation of the consumer.

Question in this particular case was whether there is change in situation if the consumer has had legal advice?

The CJEU points that the „effective individual protection of an individual’s rights under EU law” requires to apply principle of listening to other party in this judgment using Latin term *audi alteram partem* as part of the rights of defence, especially in situation when dispute is decided on a ground which is identified of its own motion. There it is for the national court to indicate to the parties, in the context of national procedural rules and in the light of the principle of equity in civil proceedings, objectively and exhaustively the legal consequences which the removal of the unfair term may entail, irrespective of whether or not they are represented by a professional representative.

Right to an effective remedy

Protection of persons, both natural and legal, against arbitrary or disproportionate intervention by the public authorities in the sphere of those persons' private activities constitutes a general principle of EU law. (para 57)

Thus, such a person must be granted the right to an effective remedy guaranteed by Article 47 of the Charter.

CJEU: C-245/19, *État luxembourgeois (Droit de recours contre une demande d'information en matière fiscale)*, 6.10.2020.

(Right to object the request for exchange of information from the competent authority of another Member State)

Request came from Luxembourg, Higher Administrative Court.

Situation concerns administrative cooperation in the field of taxation and more particularly cross-border requests for information. Responsible tax administration may request a foreign national to provide certain information about taxpayer under investigation. In these cases Spanish tax authorities approached tax administration of Luxembourg. The conclusion: Art 47 read in conjunction with Art. 7 and 8 and Art 52(1) requires that a person who is requested to provide information shall be granted right to bring an action against a decision by which he or she has been ordered to provide information, but taxpayer under investigation may be prevented from challenging such

decision.

Article 48

**Presumption of innocence and
right of defence**

Art. 48 Presumption of innocence and right of defence

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

Art. 6 ECHR Right to a fair trial

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights: [listed rights a)-e)]

ECHR is used as reference in the case-law of the CJEU therefore it becomes integral part of the exercises on the Charter.

According to the Explanations relating to the Charter of Fundamental Rights, Article 48 of the Charter is 'the same' as Article 6(2) and (3) of the ECHR. When interpreting the rights guaranteed by the Article 48 of the Charter, the Court must, therefore, take account of the corresponding rights guaranteed by Article 6 of the ECHR, as interpreted by the European Court of Human Rights, as the minimum threshold of protection

CJEU: C-481/19, *DB*, 2.02.2021., para 37

For the application of the Charter, the Convention serves as minimum standard even for the articles which are the same.

When issuing an EIO the issuing authority should pay particular attention to ensuring full respect for the rights as enshrined in Article 48 of the Charter. The presumption of innocence and the rights of defence in criminal proceedings are a cornerstone of the fundamental rights recognised in the Charter within the area of criminal justice. Any limitation of such rights by an investigative measure ordered in accordance with this Directive should fully conform to the requirements established in Article 52 of the Charter with regard to the necessity, proportionality and objectives that it should pursue, in particular the protection of the rights and freedoms of others.

Directive 2014/41 regarding the European Investigation Order in criminal matters , recital 12

Art. 48

interpreting case-law for point 1 - presumption of innocence

- C-709/18 (28.05.2020.)
- C-614/14 (5.07.2016.)

For the notes: list of judgments where relevant rights on presumption of innocence have been interpreted in the operative part of the judgments.

Art. 48

interpreting case-law for point 2 - rights of the defence

- C-83/19 (18.05.2021.)
- C-488/19 (17.03.2021.)
- C-481/19 (2.02.2021.)
- C-358/16 (13.09.2018.)
- C-3/17 (28.02.2018.)*
- C-399/11 (26.02.2013.)

For the notes: list of judgments where relevant rights of defence have been interpreted in the operative part of the judgments.

Presumption of innocence

criminal proceedings brought against two persons, only one pleads guilty:

- reference to the second person as co-perpetrator of the alleged offences is necessary to the characterisation of the legal liability of the person who pleaded guilty
- clearly stating that the guilt of the second person has not been legally established and will be the subject of separate taking of evidence and a separate judgment

CJEU: C-377/18 , *AH and Others ((presumption of innocence), 5.09.2019.;*

C-709/18, *UL and VM, 28.05.2020.*, (procedural aspects of the guilty plea of one of two co-accused – Directive (EU) 2016/343)

- Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings

Article 4(1) of the same directive, that article being headed ‘Public references to guilt’, states: ‘Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. This shall be without prejudice to acts of the

prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.’

Case C-377/18 is based on interpretation of the Directive 2016/343 and more particularly whether an agreement with the prosecutor, in which the accused admitted his guilt in exchange for a reduced sentence may contain references to participation of other persons undergoing trial in other proceedings for the purposes of qualification of the offence.

Case C-709/18 decided by an order because is basically based on the case C-377/18. The same conclusions, with an exception that the CJEU is explicitly mentioning Art. 47 and Art 48 paragraph two of the Charter.

The right to silence is a generally recognised international standard which lies at the heart of the notion of a fair trial

- Natural person
- Obligation to testify under threat of sanctions
- Does not justify every failure to cooperate (refusal to appear)
- Does not conflict with case-law on the EU competition rules

CJEU: C-481/19, *DB*, 2.02.2021., (Market abuse – Administrative sanctions of a criminal nature – Failure to cooperate with the competent authorities)

The refereeing court is Italian Constitutional court. In this case appeals went up to the Supreme Court which referred interlocutory questions to the Constitutional Court. The Constitutional Court referred preliminary questions to the CJEU.

Necessity to sanction violations of obligations deriving from the EU law. - The Court of Justice answers that in accordance with a general principle of interpretation, the wording of secondary EU legislation must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter. Thus, if such wording is open to more than one interpretation, preference should be given to the interpretation which

renders the provision consistent with primary law rather than to the interpretation which leads to its being incompatible with primary law.

In this judgment you will also find detailed reasoning of the CJEU on relations with the ECHR and case-law of the European Court of Human Rights (paras 35-43).

Conclusion: it is prohibited to impose on natural person a penalties for refusing to provide information which might establish its liability for an offence punishable by administrative sanctions of a criminal nature or even criminal liability. Additionally: CJEU explains the difference when there are sanctions imposed in similar situations on legal persons, as that is a widely used practice by competent competition authorities both EU and national.

Rights of the defence

Article 4a(1) of Framework Decision 2002/584 does not disregard either the right to an effective judicial remedy and to a fair trial or the rights of the defence guaranteed by Article 47 and Article 48(2) of the Charter of Fundamental Rights respectively and that it is therefore compatible with the requirements set out in those provisions (with reference to C-399/11, *Melloni*)

CJEU: C-416/20 PPU, 7R, 17.12.2020., (Surrender – Sentence handed down in absentia – Absconding of the accused person)

Trial *in absentia* and use of EAW.

„According to law” (Art 49 of the Charter)

An individual shall know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him or her criminally liable;

Not prohibited is gradual clarification of rules of criminal liability by means of interpretations in the case-law, provided that those interpretations are reasonably foreseeable.

CJEU: C-634/18, *Prokuratura Rejonowa w Słupsku*, 11.06.2020., paras 48-50 (Minimum provisions on the constituent elements of criminal acts and penalties involving illicit drug trafficking)

Case-law of the ECHR shall be substituted by references to case-law of the CJEU when applying EU law. So the law has to be clear, but there is space for developments and it may be completed by the case-law.

Article 50

**Right not to be tried or punished
twice in criminal proceedings for
the same criminal offence**

Art. 50 Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

Art. 4 of Protocol No 7 ECHR

- 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*
- 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*
- 3. No derogation from this Article shall be made under Article 15 of the Convention.*

Article 50 is partially corresponding article to the Article 4 of Protocol 7 of the ECHR .

Question:

Does your national constitution contain legal norm prohibiting double punishment for the same act?

- Yes, it contains
- No, there isn't such legal norm
- I don't know

In the publication prepared by FRA *Applying the Charter in law and policymaking at national level* it is stated that there are more than 15 MS which do not have equivalent and explicit provisions.

Article 3(2) TEU

The European Union is to offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with regard to, amongst other matters, the prevention and combating of crime.

Ne bis in idem principle serves not only of the need to ensure the free movement of persons but also of the need to promote the prevention and combating of crime within the area of freedom, security and justice.

(para 47)

CJEU: C-486/14, *Kossowski*, 29.06.2016., (Accused prosecuted in a MS after criminal proceedings brought against him in another MS have been terminated by the public prosecutor's office without a detailed investigation)

Ne bis in idem principle and fundamental right of free movement.

Art. 50

interpreting case-law

- C-857/19 (25.02.2021.)
- C-617/17 (3.04.2019.)
- C-234/17 (24.10.2018.)
- C-596/16 (20.03.2018.)
- C-537/16 (20.03.2018.)
- C-524/15 (20.03.2018.)
- C-217/15 (15.04.2017.)
- C-486/14 (29.06.2019.)
- C-129/14 PPU (27.05.2014.)
- C-617/10 (26.02.2013.)

For the notes.

Åkerberg Fransson

The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter. (para 21 *in fine*)

Tax penalties and criminal proceedings in particular case are connected in part to breaches of the obligations to declare VAT which is part of EU law. (paras 24, 27)

CJEU: C-617/10, *Åkerberg Fransson*, 26.02.2013., (Charter – Field of application - National system involving two separate sets of proceedings, administrative and criminal, to punish the same wrongful conduct)

Key-case in this area and for the application of the Charter.

It is only if the [first] tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person. (para 34 *in fine*)

Three criteria relevant for the purpose of assessing whether tax penalties are criminal in nature:

- 1) legal classification of the offence under national law;
- 2) the very nature of the offence;
- 3) the nature and degree of severity of the penalty that the person concerned is liable to incur. (para 35)

CJEU: C-617/10, Åkerberg Fransson, 26.02.2013., (Charter – Field of application - National system involving two separate sets of proceedings, administrative and criminal, to punish the same wrongful conduct)

Answers correspond to referred questions.

For further reading, **C-537/16, Garlsson Real Estate**, (20.03.2018.) **Market manipulation — Penalties — National legislation which provides for an administrative penalty and a criminal penalty for the same acts**

Cross-border *ne bis in idem*

A decision which does not, under the law of the Contracting State which instituted criminal proceedings against a person, definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State. (para 35)

Particular decision without examination of the merits of the case shall not be regarded as obstacle. (para 48)

CJEU: C-486/14, ROSSOWSKI, 29.06.2016. (Accused prosecuted in a MS after criminal proceedings brought against him in another MS have been terminated by the public prosecutor's office without a detailed investigation)

Preliminary reference from German court.

Prosecution discontinued in one MS because of lack of evidence which apparently was not available due to a cross-border aspect.

The CJEU concluded that such particular situation shall not be regarded as it would have covered criminal proceedings terminated by a formal decision on substance.

Complementary objectives covering different aspects of the same unlawful conduct

Article 50 of the Charter precludes the bringing of proceedings for an administrative fine of a criminal nature without prejudice to the possibility of reopening, where appropriate, criminal proceedings where there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the criminal judgment. (para 45)

CJEU: C-596/16, *Di Puma*, 20.03.2018., (Insider dealing - *Res judicata* attached to a final criminal judgment relating to administrative proceedings — Final criminal judgment ordering acquittal)

Questions referred by Italian Court of Cassation.

How national procedural autonomy is affected in such situations.

Bringing of proceedings for an administrative fine of a criminal nature, based on the same facts, constitutes a limitation of the fundamental right guaranteed by Article 50 of the Charter. Even if the person was acquitted by the final decision. Unless, the objective of protecting the integrity of financial markets and public confidence in financial instruments is such as to justify a duplication of proceedings and penalties of a criminal nature such as that provided for by the national legislation at issue in the main proceedings, where those proceedings and penalties have, for the purpose of achieving such an objective, additional

complementary objectives covering, as the case may be, different aspects of the same unlawful conduct at issue. The CJEU examines the proportionality instead of referring the examination to the national court and clearly states that Article 50 of the Charter precludes such double punishment. At the same time leaving open possibility to reopen proceedings if such necessity would arise.

Competition cases and *ne bis in idem*

CJEU: C-857/19, *Slovak Telekom*, 25.02.2021.: Division of competences between the European Commission and the national competition authorities

CJEU: C-617/17, *Powszechny Zakład Ubezpieczeń na Życie*, 03.04.2019.: Decision of a national competition authority to impose one fine on the basis of national law and another on the basis of EU law

Cases concerning competition law.

What to remember

Charter is applicable when EU law is applicable

Art. 47 has broader scope than Art.6.(1) and Art.13 ECHR

Art. 48 has similar scope as Art.6.(2) and (3) ECHR

Art. 50 has broader scope than Art.4 Prot.7 ECHR

Right to fair trial and prohibition of double criminality is broader, because of broader scope of EU law itself and taking into account cross border aspects. The right to defence is generally the same as granted in the ECHR.

Questions for discussion

Which cases of the CJEU discussed today you would find relevant for your daily duties as judge / prosecutor?

Have you had a case where application of the chapter Justice of the Charter would be possible?

Thank you!

Thanks!

Do you have any questions?
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Application of EU Directives in the lights of the Charter procedural provisions and formulation of questions for a reference for a preliminary ruling before the CJEU

Situation and facts of the case:

You are recently appointed judge of the first instance court.

You receive an application where an applicant (Mr. A.) is contesting decision of the tax authorities regarding his VAT duties (Value added tax), because there is stated that one of his transactions has not taken place. Taxation authorities rely on judicial decision in proceedings with a company (B. Ltd) in which the court decided that there was a fraud and that all services provided by this company didn't take place (were illegal). Especially in the judgement is mentioned also the service provided to the applicant in this case. The applicant was neither a party, nor third party to those proceedings. This decision has become *res judicata*. According to the national procedural regulation which is supported by strong case-law of the cassation instance in situations (like in your case) where in substance by the application is contested *res judicata* judgment, such applications are inadmissible.

The applicant states that his right to have the case examined by the court is based on Art. 6 + Art.13 of the European Convention of Human Rights. The applicant requests preliminary questions to be send to the Court of Justice of the European Union.

You have to decide on admissibility of the case within 3 working days and your decision on admissibility is final.

The applicant was placed in custody, undergoing trial in another court for murder. This case attracts media interest because the victim was a rock-star and investigation has taken too long before it was sent to the court. So, press is contacting your court and asking about your proceedings.

Task for the group work exercise

1.Study the situation

2.Draft preliminary questions to the CJEU – you will send them in using chat after we come back to the main room

3.Discuss

a. necessity to refer preliminary questions to the CJEU and possible reaction of the court to the request to refer questions, possible procedural aspects on urgency

b. what would be your explanation, why you need those question to be answer

c. provide your view on the possible answers

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

Article 167 'A right of deduction shall arise at the time the deductible tax becomes chargeable.'

Article 168 'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable

to pay: (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person; [..]

First paragraph of Article 273 ‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.’

European Convention on Human Rights

Article 6 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. [..]

Article 13 Right to an effective remedy

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

Charter of Fundamental Rights of the European Union

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.