

Chapter VI – Justice



Article 47

Article 47

Right to an Effective Remedy and to a Fair Trial

1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
3. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Text of Explanatory Note on Article 47

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

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

However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 *Johnston* [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 *Heylens* [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 *Borelli* [1992] ECR I-6313). According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The European Convention has considered the Union’s system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected in Articles 251 to 281 of the Treaty on the Functioning of the European Union, and in particular in the fourth paragraph of Article 263. Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.

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

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

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, *Les Verts* v *European Parliament*

(judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

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

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A. Field of Application

Article 47 of the Charter applies wherever EU law guarantees ‘rights and freedoms’, a concept which does not appear to have any independent meaning (see section D.II below). Given its wide scope, the question of whether Article 47 is applicable to a particular dispute is indistinguishable from the question of whether (pursuant to Article 51 of the Charter) the Charter applies in the first place. Therefore, once there is a sufficient link to EU law for the Charter to apply at all, in accordance with the case law on Article 51, an effective remedy and a fair trial (as further defined in Art 47) has to be ensured.¹ 47.01

B. Interrelationship with Other Provisions of the Charter

While Article 47 is obviously interrelated to all of the remaining provisions of the Charter, it has a particularly strong connection with certain of those provisions. First of all, Article 8 of the Charter provides for specific remedies: a right of access and rectification as regards personal data, plus an obligation on Member States to establish an independent supervisory authority to ensure the effective application of data protection rights. 47.02

Secondly, the general principle of equality set out in Article 20 overlaps with the rule that remedies for breach of EU law rules should be the same as those for the breach of comparable rules of national law.² 47.03

Thirdly, Article 41 provides for partly overlapping protection in the context of *administrative procedure*, expressly as regards the EU institutions and other EU bodies and implicitly, at least to some extent, with respect to Member State administrative entities. Article 41 protection includes damages. However, damages liability also arises under Article 47, although in a different context. Thus damages liability will also be addressed in the following commentary on Article 47.³ 47.04

Fourthly, again as regards the EU institutions et al, Article 43 provides for possible complaints to the EU Ombudsman, Fifthly, Article 44 sets out the right to petition the European Parliament. Finally, Article 48 provides for specific protection for the rights 47.05

Au: The contributions identified in nn 2 and 3 (and in later notes also) should be referenced by section numbering (eg section B.II etc).

¹ On the outer limit of Art 47, and the types of initiative falling beyond its reach, see most notably the judgment of the Court of 27 November 2012 in Case C-370/12 *Thomas Pringle v Government of Ireland*, and the View of Advocate General Kokott of 26 October 2012. For a commentary on this case, see S Adams and FJ Parras, ‘The European Stability Mechanism through the legal meanderings of Union’s constitutionalism: Comment on *Pringle*’ (2013, forthcoming) *European Law Review*.

² For a detailed discussion of the principle of equivalence, see the contribution by Elina Paunio in section D.IV of this chapter.

³ See the contributions in this chapter by Pekka Aalto (section D.V) and Herwig Hofmann (section D.III).

of the defence, overlapping with the second sentence of Article 47(2). The rights of the defence will therefore be addressed in the chapter in this volume on Article 48, rather than here in the commentary on Article 47.

C. Sources of Article 47 Rights

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- 47.06** The Article 47 guarantees of an effective remedy and a fair trial are well established in global and regional human rights law. This corpus of international human rights law forms an important source of law for the application and development of Article 47.⁵ The relevant rules as elaborated by international human rights bodies will be considered in this section, by way of introduction to an analysis of the principles that have been elaborated by the Court of Justice on the various elements of Article 47.
- 47.07** As noted above in section A, Article 47 does more than guarantee an effective remedy for breach of the Charter of Fundamental Rights. Rather, it is broadly concerned with ensuring effective enforcement of EU law guaranteed ‘rights and freedoms’. Nonetheless the focus of international human rights law has been on the provision of remedies for breaches of human rights. That development will be detailed in this section.
- 47.08** The right to an effective remedy under international law when human rights have been breached will first be addressed, followed by discussion of the relevant international human rights principles concerning three of the substantive elements of Article 47, namely the right to a ‘fair and public hearing’ by ‘an independent and impartial tribunal previously established by law’ and the right to ‘legal aid’.
- 47.09** Under international law, the enforcement of all human rights is first and foremost the responsibility of each state, which is bound to comply in good faith with norms of customary international law and with the treaties in force to which the state is a party (*pacta sunt servanda*).⁶ Indeed, the Vienna Declaration and Program of Action affirmed that ‘the promotion and protection of human rights and fundamental freedoms is the first responsibility of government’.⁷ If a state fails, by an act or omission attributable to it, to comply with any international obligation, the law of state responsibility requires the cessation of the breach and generates a new legal duty to afford reparation for any harm caused by the violation.

I. An ‘Effective Remedy’

- 47.10** The right to a remedy, or the obligation of states to provide a remedy, when human rights are violated is expressly guaranteed by most global and regional human rights instruments. These texts guarantee the same two requisites of a remedy that are set

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⁵ Case 11/70 *International Handelsgesellschaft* [1970] ECR 125.

⁶ Vienna Convention on the Law of Treaties, Art 26 (1969) 1155 UNTS 331.

⁷ Vienna Declaration and Program of Action, UN Doc A/CONF.157/23 (1993), para 1.

forth in Article 47: the procedural right of effective access to a fair hearing, and the substantive right to adequate redress. These elements have been further developed in the case law of human rights bodies. Although no definition of the term ‘remedy’ is found, the European Court of Human Rights has been clear in finding that it does not cover discretionary actions or matters of grace, such as the British ‘petition to the Queen’.⁸

Au: monarch

A state that breaches its human rights obligations has the primary duty to afford redress to the victim of the violation. The role of international tribunals is subsidiary, but the authority of human rights tribunals to afford remedies is uncontested. Judicial bodies have inherent power to remedy breaches of law in cases within their jurisdiction. In addition, human rights treaties sometimes explicitly confer competence to afford redress on the organs they create to hear cases. Where states fail to provide the necessary remedies for human rights violations, international institutions are the forum of last resort.

47.11

In general, the reparation provided through an effective remedy should be proportional to the gravity of the violations and damages suffered. The measures taken should include restitution, whenever possible, to restore the victim to the situation existing before the violation occurred. These can involve restitution of property or money, release of detainees, reinstatement of an individual wrongfully or arbitrarily discharged, or other measures to eliminate the wrong.⁹ Rehabilitation should include medical and psychological care as well as legal and social services. Increasingly, human rights bodies include a right to know the truth among the required measures of redress, under the heading of satisfaction. Other measures of satisfaction include apologies, acknowledgement of responsibility, and commemoration memorials to the victims. Compensation is required for pecuniary and moral damages in most cases. In addition, human rights bodies consistently insist on measures to guarantee non-repetition of the violation.

47.12

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Given this widespread recognition of the right to a remedy in law and practice, many consider it to be a norm of customary international law.

47.13

The Universal Declaration of Human Rights¹⁰ provides that ‘[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws.’ At the regional level, the European Convention on Human Rights modelled its general remedial provision—Article 13—on Article 8 of the Universal Declaration of Human Rights.

47.14

The European Court of Human Rights has interpreted Article 13 as guaranteeing an effective remedy ‘to everyone who *claims* that his rights and freedoms under the Convention have been violated’.¹¹ The remedy provided must be ‘as effective as can be having regard to the restricted scope for recourse inherent’ in the case.¹²

47.15

With respect to the denial of the right to life, deemed to be ‘one of the most fundamental in the scheme of the Convention’, the remedies must be guaranteed for the benefit of the relatives of the victim. Where those relatives have an arguable claim that

47.16

⁸ *Greece v The United Kingdom* App no 299/57, YB II (1958–1959) 186, 192. On the meaning of the right to an effective remedy in EU law, see the contribution by Herwig Hofmann in section D.III of this chapter.

⁹ See M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd edn (Place, NP Engel, 2005) 70–71.

¹⁰ GA Res 217A (III), UN Doc A/810, 10 Dec 1948.

¹¹ *Klass v Germany* (1979) ECHR Series A no 28.

¹² *Ibid* [31], [69].

the victim has been unlawfully killed by agents of the state, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure. Other human rights tribunals are equally insistent that there is a general duty of governments in all case of gross human rights violations, such as torture, arbitrary executions and enforced disappearances, to conduct thorough criminal investigations in order to bring the perpetrators to justice, deriving from the right to an effective remedy.

47.17 In case of ‘serious doubt’, the respondent state has the burden of proving that existing remedies are effective.¹³ The notion of an effective remedy may require, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access by the complainant to the investigative procedure.¹⁴ In other instances, the possibility of obtaining compensation may constitute an adequate remedy.¹⁵ In contrast, a remedy is ineffective if, considering well-established case law, it does not offer any real chance of success.¹⁶

47.18 The requirements of Article 13 are broader than the procedural obligation under Article 2 to conduct an effective investigation. Because of the high standard of proof at the European Court, the conclusion on the merits does not dispense with the requirement that the government conduct an effective investigation into the substance of the allegation. The Council of Europe’s Committee of Ministers reinforced Article 13 with a recommendation adopted in 1984 that calls on all Council of Europe member states to provide remedies for governmental wrongs.¹⁷ Judicial remedies are not necessarily required under international human rights law to enforce substantive breach of human rights. The European Court of Human Rights indicates that if judicial remedies are not provided the powers and procedural guarantees of the alternative remedies are relevant factors for determining the effectiveness of the remedy provided.¹⁸ Moreover, it may be possible to cumulate remedies to indicate that even if no single remedy is effective, the aggregate of remedies will be.

47.19 In addition to Article 13, European Convention Article 5(5) requires compensation for breach of the right to be free from arrest in violation of the provisions of Article 5. When applicable, it requires a legally binding award of compensation.¹⁹ The state may require proof of damage resulting from the breach and probably has a wide margin of appreciation in regard to the quantum:²⁰ Article 3 of Protocol 7 provides for compensation in cases of a reversed criminal conviction. Article 4 of Protocol 7 provides for the

¹³ *Akdivar v Turkey* (Judgment of 16 Sept 1996) [68].

¹⁴ *Dogan and Others v Turkey* (Judgment of 29 June 2004) [106]–[108].

¹⁵ *Frederiksen and Others v Denmark* App no 127/97, Reports 56 (1988) 237.

¹⁶ *Costell-Roberts v The United Kingdom* App no 13134/87, Reports 67 (1991) 216.

¹⁷ Recommendation No R (84) 15 on Public Liability, adopted by the Committee of Ministers on 18 September 1984.

¹⁸ *Klass* (n 11) [67]; *Silver and Others v United Kingdom* (1983) ECHR Series A no 61 [113].

¹⁹ *Brogan v United Kingdom* (1988) ECHR Series A no 145B and *Fox, Campbell and Hartley v United Kingdom* (1990) ECHR Series A no 182.

²⁰ *Wassink v Netherlands* (1990) ECHR Series A no 185A.

possibility of reopening the case following a fundamental defect during the criminal proceeding.

While the principle of full redress applies in domestic proceedings, the European Court of Human Rights has held that it is not the regional body's role 'to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties'. Rather, it held that 'its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances'.²¹ 47.20

Among global instruments, the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 contains three separate articles on remedies. The first, Article 2(3), obliges the States Parties to the Covenant to afford an effective remedy to a victim notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that claims are heard by competent judicial, administrative or legislative authorities; and to ensure that the competent authorities shall enforce such remedies when granted. Articles 9(5) and 14(6) add that anyone unlawfully arrested, detained, or convicted shall have an enforceable right to compensation or be compensated according to law. 47.21

The Human Rights Committee has identified the kinds of remedies required, depending on the type of violation and the victim's condition. The Committee has indicated that a state that has engaged in human rights violations, in addition to treating and compensating the victim financially, must undertake to investigate the facts, take appropriate action, and bring to justice those found responsible for the violations. The Committee's recommended actions have included: public investigation to establish the facts; bringing to justice the perpetrators; paying compensation; ensuring non-repetition of the violation; amending the offending law; providing restitution; and providing medical care and treatment. In the case of *Hugo Rodriguez v Uruguay*,²² the Committee affirmed that amnesties for gross violations of human rights are incompatible with the duty to provide effective remedies to the victims of those abuses. Nor are purely disciplinary and administrative remedies adequate and effective within the meaning of Article 2(3) for particularly serious violations. 47.22

Several texts require compensation be paid to victims. The United Nations Convention against Torture, (adopted 10 December 1984, in force 26 June 1987) 1465 UNTS 85, Article 14, specifies as follows: 'Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.' Among treaties adopted by the specialised agencies, the ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries²³ also refers to 'fair compensation for damages' (Art 15(2)), 'compensation in money' (Art 16(4)) and full compensation for 'any loss or injury' (Art 16(5)).²⁴ 47.23

²¹ *Case of Varnava and others v Turkey* [GC] (merits and just satisfaction) App no 16064/90 (18 September 2009) [2009] Reports and Judgments and Decisions 2009.

²² *Rodríguez v Uruguay* Communication No 322/1988, UN Doc CCPR/C/51/D/322/1988 (1994).

²³ Adopted 27 June 1989, in force 5 September 1991 (1989) 28 ILM 1382.

²⁴ With regard to damages for breach of the EU Charter of Fundamental Rights see the contribution by Pekka Aalto in section D.V of this chapter.

47.24 Non-monetary remedies may be specified. In General Recommendation No 5²⁵ the Committee on the Elimination of Discrimination against Women announced that States Parties should make more use of temporary special remedial measures such as positive action, preferential treatment, or quota systems to advance women's integration into education, the economy, politics and employment. The Working Group on Involuntary or Enforced Disappearances also made reference to non-monetary remedies in a commentary to Article 19 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance. The Working Group noted that the Declaration imposes a primary duty to establish the fate and whereabouts of disappeared persons as an important remedy for victims. There is also a right to adequate compensation. Compensation is deemed 'adequate' if it is 'proportionate to the gravity of the human rights violation (eg the period of disappearance, the conditions of detention, etc) and to the suffering of the victim and the family'. Amounts shall be provided for any damage, including physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation, and costs required for legal or expert assistance. In the event of the death of the victim, as a result of an act of enforced disappearance, the victims are entitled to additional compensation. Measures of rehabilitation should be provided, including medical and psychological care, rehabilitation for any form of physical or mental damage, legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to the place of residence, and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance.

47.25 The United Nations has elaborated texts that indicate required or appropriate remedies for specific kinds of violations. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power²⁶ contains broad guarantees for those who suffer pecuniary losses, physical or mental harm, and 'substantial impairment of their fundamental rights' through acts or omissions, including abuse of power. Victims are entitled to redress and to be informed of their right to seek redress. The Declaration specifically provides that victims of public officials or other agents who, acting in an official or quasi-official capacity, violate national criminal laws, should receive restitution from the state whose officials or agents are responsible for the harm inflicted. Abuse of power that is not criminal under national law but that violates internationally recognised norms relating to human rights should be sanctioned and remedies provided, including restitution and/or compensation, and all necessary material, medical, psychological, and social assistance and support. In 2005 the General Assembly adopted the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.²⁷ The text did not create any new substantive international or domestic legal obligations, but instead identified mechanisms, modalities, procedures and methods for implementing existing legal obligations. The various forms of reparation identified are restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition.

²⁵ 7th Sess 1988, UN Doc A/43/38.

²⁶ UN GA Res 40/34, 29 Nov 1985.

²⁷ UN GA Res A/RES/60/147, 16 Dec 2005.

The European Court of Human Rights (ECtHR) has inferred the right to know the truth as part of the right to be free from torture or ill-treatment, the right to an effective remedy and the right to an effective investigation and to be informed of the results.²⁸ The Court has held that a state's failure to conduct an effective investigation 'aimed at clarifying the whereabouts and fate' of 'missing persons who disappeared in life-threatening circumstances' constitutes a continuing violation of its procedural obligation to protect the right to life.²⁹ In cases of enforced disappearances, torture and extrajudicial executions, the ECtHR has highlighted that the notion of an effective remedy for the purposes of Article 13 of the European Convention on Human Rights entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure. 47.26

Humanitarian law also contains norms relating to remedies in case of a breach. Article 3 of the Hague Convention Regarding the Laws and Customs of Land Warfare obliges contracting parties to indemnify for a violation of the regulations. Similarly, Protocol I to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts states that any party to a conflict who violates the provisions of the Geneva Conventions or the Protocol 'shall ... be liable to pay compensation'. 47.27

II. A 'Fair and Public Hearing'

Beginning at least from the Magna Charta (1215), concepts of fair trial and due process of law have been foundational in domestic and, later, international law. The International Covenant on Civil and Political Rights (ICCPR) states that in the determination of 'rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing'.³⁰ This requirement forms the core of due process of law. It requires states to take positive measures to set up by law independent and impartial tribunals, providing them with competence to hear and decide on redress for victims of human rights violations. 47.28

The right of a fair hearing includes the principle of equality of arms between the parties. In addition, other procedural rights concerning evidence and finality and enforcement of judgments are protected under international human rights law.³¹ 47.29

In the case of *Golder v United Kingdom*³² the European Court of Human Rights interpreted the right to a fair hearing in Article 6 as including the right of access to justice. 47.30

²⁸ *Tas v Turkey* App no 24396/94 (ECtHR, 14 November 2000); *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001).

²⁹ *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) [136].

³⁰ International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Arts 9–14, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976), Art 14(1) [ICCPR]. On the meaning of the right to a fair and public hearing under the law of the ECHR and in EU law, see the contribution by Debbie Sayers in section D.VIII of this volume.

³¹ On equality of arms, see, eg *Ivcher Bronstein v Peru*, Inter-AmCtHR Series C no 74 [107]; *Dombo Beheer VB v Netherlands* (ECtHR, 18 February 1997); *Niderost-Huber v Switzerland* ECHR 1997-I 107–08 [23]. On finality and enforcement of judgments, see, eg *Taskin and Others v Turkey* App no 46117/99 (ECtHR, 10 November 2004) 621.

³² *Golder v United Kingdom* (1975) ECHR Series A no 18.

In addition to this general provision, Article 5(4) guarantees a right of habeas corpus. The nature of the hearing required depends on the type of violation. In the face of torture, the ECtHR held in *Krastanov v Bulgaria*, that civil and administrative proceedings are inadequate; criminal prosecution of the perpetrator is required.³³ According to the Court, there should be no hindrance in law or fact to the ability to institute proceedings, unless the action is justified by and proportionate to a legitimate aim. Similarly, in *Isayeva and Others v Russia* it was held that, in light of the gravity of the breach of Article 2, Article 13 required effective prosecution of the persons responsible for the attack, full access by the victims to the investigation and appropriate compensation for the loss and damage suffered. This case also set forth criteria for testing the effectiveness of a remedy. They were (1) the investigation must be public and not left to the initiative of the victims; (2) the investigating body must be independent; (3) the inquiry must be carried out in a manner such as to lead to a determination whether the use of deadly force was justified under the circumstances, and (4) the investigation must be prompt.

47.31 In general, an individual applicant ‘must have a bona fide opportunity to have his case tested on its merits and, if appropriate, to obtain redress.’³⁴ On the modalities of judicial procedure, states may impose reasonable restrictions, including statutes of limitations or a requirement of legal representation, to ensure the proper administration of justice.³⁵ The right of access thus may be subject to limitations, particularly regarding the conditions of admissibility of an appeal; however, limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired.³⁶ Any restrictions must pursue a legitimate aim and there must be reasonable proportionality between the means employed and the aim sought to be achieved.³⁷

47.32 Neither the ICCPR nor the ECHR include due process and access to justice among the list of non-derogable rights, but the Human Rights Committee in General Comment No 29, States of Emergency (Art 4)³⁸ asserts that states parties may ‘in no circumstances’ invoke Article 4 for deviating from ‘fundamental principles of fair trial, including the presumption of innocence’ (para 11). General Comment 32 (2007) provides further detail on the right to a fair and public hearing by a competent independent and impartial tribunal.³⁹ The right to equality before courts and tribunals and to a fair trial is called a key element of human rights protection and a procedural means to safeguard the rule of law. As such, the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.⁴⁰ The ‘requirement of competence, independence and impartiality of a tribunal in the

³³ *Krastanov v Bulgaria* (Judgment of 30 September 2004) 458 [43].

³⁴ *Leander v Sweden* (1987) ECHR Series A no 116.

³⁵ *Cf Stubbings v United Kingdom* (1997) 23 EHRR 213, *Hennings v Germany* (1992) ECHR Series A no 251A.

³⁶ *Ashingdane v United Kingdom* (1985) ECHR Series A no 93, 24–25 [57].

³⁷ *FE v France* (Judgment of 30 October 1998); *Fayed v United Kingdom* (1994) ECHR Series A no 294-B, 49–50 [65]; *Bellet v France* (1995) ECHR Series A no 333-B, 41 [31]; and *Levages Prestations Services v France* ECHR 1996–V 1543 [40]. On the meaning of right of access to a court in EU law, see the contribution by Laurent Pech and Angela Ward in section D.VI of this chapter.

³⁸ CCPR/C/21/Rev 1/Add 11, 31 Aug 2001.

³⁹ CCPR/C/GC/32, 23 Aug 2007.

⁴⁰ Comm. No 64/1995, *Lindon v Australia* [19].

sense of article 14, para 1, is an absolute right that is not subject to any exception.⁴¹ The notion of fair trial includes the guarantee of a fair and public hearing.

Equality before courts includes equality of access, that parties to proceedings are treated without any discrimination. No distinction permitted regarding access to courts and tribunals that are not based on law and justified on objective and reasonable grounds.⁴² 47.33

III. ‘Within a Reasonable Time’

The speed with which a remedy can be exercised may be relevant in assessing its effectiveness.⁴³ A hearing within a reasonable time is required by Article 6(1) ECHR and Article 8(1) of the ACHR, as well as ICCPR Article 14(3)(c). The European Court of Human Rights has interpreted Article 6(1) to require not only a fair trial but also a judgment within a reasonable time. What constitutes a reasonable time depends upon the circumstances and the complexity of the case, taking into account the conduct of all parties to the case. At the ICCPR, the burden of proof for justifying any delay and showing that a case was particularly complex rests with the State Party. 47.34

IV. ‘By an Independent and Impartial Tribunal Previously Established by Law’

Some international agreements explicitly call for the development of judicial remedies for the rights they guarantee, although effective remedies may also be supplied by non-judicial bodies. Article 2(3)(b) of the ICCPR defines the general obligation to provide an effective remedy by specifying that all persons have a right to a decision by a competent domestic authority, if possible a judicial body. General Comment No 3 issued by the Committee on Economic, Social and Cultural Rights, concerning the nature of state obligations pursuant to Covenant Article 2(1), proclaimed that appropriate measures to implement the Covenant might include judicial remedies with respect to rights that may be considered justiciable. It specifically pointed to the non-discrimination requirement of the treaty and cross-referenced to the right to a remedy in the Covenant on Civil and Political Rights. A number of other rights also were cited as ‘capable of immediate application by judicial and other organs’ 47.35

Access to justice may require affording individuals recourse to tribunals to obtain preventive measures when a violation is threatened. The Convention on the Elimination of Racial Discrimination⁴⁴ Article 6, requires that States Parties assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other state institutions, against any acts of racial discrimination in violation of the Convention, as well as the right to seek from such tribunals 47.36

⁴¹ Comm. No 262/1987, *Gonzalez del Rio v Paru* [5.2], [25].

⁴² Comm. No 202/1986, *Ato del Avellanal v Peru* [10.2].

⁴³ *Selmouni v France* App no 25803/94, Reports 88B (1997) 55. On the meaning of a ‘reasonable time’ in EU and ECHR law, see the contribution by Debbie Sayers in section D.VIII of this chapter.

⁴⁴ Adopted 21 December 1965, entered into force 4 January 1969, 660 UNTS 195.

just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination. The language of this provision anticipates the use of injunctive or other preventive measures against discrimination, as well as compensation or other remedies for consequential damages. A similar provision requiring effective protection of women from discrimination is found in Article 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women.⁴⁵ The Universal Declaration of Human Rights and several global and regional treaties similarly refer to the right to legal protection for attacks on privacy, family, home or correspondence, or attacks on honour and reputation.

- 47.37** The European Convention requires a fair hearing before an independent tribunal for determination of all civil rights and obligations and any criminal charge. According to the European Court of Human Rights, Article 13 does not necessarily require judicial remedies. See for example *Klass and Others v Germany*,⁴⁶ where it was held that Article 13 guarantees an effective remedy ‘to everyone who claims that his rights and freedoms under the Convention have been violated’. See also *Silver v United Kingdom*,⁴⁷ where the Court stated that ‘[a]n individual who has an arguable claim to be the victim of a violation of one of the rights in the Convention is entitled to a national remedy in order to have his claim decided and if appropriate to obtain redress.’
- 47.38** The European Court tests whether a tribunal is ‘independent’ for the purposes of Article 6(1), by examining, inter alia, the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence. As to the condition of ‘impartiality’ within the meaning of that provision, there are two tests applied: the first seeks to determine the personal conviction of a particular judge in a given case and the second to ascertain whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. When applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. Appearances may be of some importance and in deciding whether there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important. It is not, however, decisive; what is decisive is whether the fear can be held to be objectively justified.⁴⁸
- 47.39** Where investigations are required as part of the requirement of effective remedies, the persons responsible for and conducting the investigation must be independent from those implicated in the violation. This means more than the mere absence of an institutional link; it requires ‘practical independence’.⁴⁹
- 47.40** The criminally accused are also guaranteed a ‘fair and public hearing by an independent and impartial tribunal’. The International Convention on Civil and Political Rights adds that the court must be ‘competent’, ‘established by law’, and open to the public. The European Court of Human Rights holds that fair trial rights include the

⁴⁵ Adopted 18 December 1979, in force 3 September 1981, 1249 UNTS 13.

⁴⁶ N 11 above.

⁴⁷ N 18 above [113].

⁴⁸ See *Gautrin and others v France* ECHR 1998–III [58]. On the meaning of judicial impartiality under EU and ECHR law, see the contribution by Laurent Pech in section D.VII of this chapter.

⁴⁹ *Ergi v Turkey* (Judgment of 28 July 1998) [83]–[84].

principle of equality of arms, which ensures that the proceedings afford the parties equal opportunity to present their case.⁵⁰ Criminal defence rights also include the right to legal counsel,⁵¹ to examine witnesses and evidence,⁵² against self-incrimination,⁵³ to interpretation,⁵⁴ and to appeal.⁵⁵ In addition to criminal defence rights, the right to a ‘fair and public hearing by a competent, independent and impartial tribunal established by law’ applies also to a civil ‘suit at law’.⁵⁶

V. Legal Aid for Indigents

Most human rights tribunals have held that the failure to provide legal aid interferes with the right to pursue legal remedies and is itself a human rights violation. The UN Human Rights Committee did so in finding a violation of ICCPR Article 14(3)(d) in conjunction with Article 2(3).⁵⁷ The requirement of legal aid to indigents has developed in the jurisprudence of the European Court of Human Rights.⁵⁸ The Court held in *Airey* that a lawyer must be provided where legal representation is compulsory or where the law and procedures involved are of a complexity to make legal advice indispensable. In the Inter-American system, the Court has advised that the requirement to exhaust local remedies will not apply if the complainant is indigent and was not afforded legal aid in a case where it was required in order for the proceeding to be fair.⁵⁹

47.41

Au: fn 58 - Airey v ?

D. Analysis

I. General Remarks

Apart from Article 51, which determines whether the Charter applies in the first place, Article 47 is perhaps the most important provision of the Charter. Its significance parallels that of Article 6 ECHR, which has generated more case law than any other provision of that Convention, along with Article 13. Indeed, Article 47 of the Charter may have even greater relative importance in the context of the Charter than Article 6 ECHR has

47.42

⁵⁰ *Ruiz-Mateos v Spain* (1993) ECHR Series A no 262, (1993) 16 EHRR 505 [63]; *Benedau v France* (1994) ECHR Series A no 248A, (1994) 18 EHRR 54 [53]; cited in Zappalà (n 3), 112.

⁵¹ ICCPR, Art 14(3)(a); ECHR, Art 6(3)(c).

⁵² ICCPR, Art 14(3)(e); ECHR, Art 6(3)(d).

⁵³ ICCPR, Art 14(3)(g).

⁵⁴ ICCPR, Art 14(3)(a); ECHR, Art 6(3)(a).

⁵⁵ ICCPR, Art 14(5), Protocol No 7 to the Convention on the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, 1525 UNTS 195, ETS No 117, Art 2.

⁵⁶ ICCPR Art 14(1). See also, ECHR Art 6(1).

⁵⁷ Comm No 532/19993 (*Thomas v Jamaica*), Views of 3 Nov 1997, II Rep of the Human Rights Committee, GAOR, 53rd Sess, Supp No 40, UN Doc A/53/40, 1 (1998). For a commentary on legal aid under the EU Charter, see the contribution by Liisa Holopainen in section D.IX of this chapter.

⁵⁸ *Airey* (1979) ECHR Series A no 32, 11.

⁵⁹ Advisory Opinion OC-11/90, Exhaustion of Remedies (1990) 11 Inter-AmCtHR Series A. On legal aid under the law of the ECHR and Art 47 of the EU Charter, see the contribution by Liisa Holopainen in section D.IX of this chapter.

in the context of the Convention, given that the limitations on the scope of Article 6 do not apply to the Charter (see section D.II below).

- 47.43** Article 47 is relevant to both the EU institutions and the Member States, the latter having the main role as regards the implementation and enforcement of EU law. This means that much of the case law concerning Article 47 (including the pre-Charter case law on the equivalent general principles of EU law) concerns the impact of the rights set out in Article 47 upon access to national courts and the remedies available before such courts.

II. Scope of Application

- 47.44** As made clear in the explanations to Article 47 of the Charter, that provision is wider in scope than the parallel provisions of the ECHR (Art 13 ECHR, as regards Art 47(1), and Art 6(1) ECHR, as regards Art 47(2)). Article 6(1) of the ECHR provides, inter alia, that 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.’ By contrast, Article 47(2) is not limited to disputes relating to civil rights and obligations or criminal proceedings. For example, it should also be effective in ‘pure’ administrative law proceedings even though these do not fall within the ambit of Article 6(1) ECHR for want of the status of a civil right.⁶⁰ In addition, the EU right to a fair and public hearing by an independent and impartial tribunal may be relied upon by individuals alleging a violation of any right conferred on them by the law of the EU, and not only in respect of the rights guaranteed by the Charter. According to the Explanations, this is ‘one of the consequences of the fact that the Union is a community based on the rule of law’ as made clear by the Court of Justice in the case of *Les Verts*.⁶¹ As far as Article 47(1) is concerned, it reflects a mixture of the Court’s case law on Member State remedies and procedural rules, and the obligation on national courts to respect the principles of effectiveness and non-discrimination, and the obligation incumbent on both these courts and the Court of Justice to provide effective judicial protection (see discussion in section E below). Article 47(3) is of course devoted to the discrete area of legal aid.
- 47.45** So, for the purposes of Article 47, the only question as regards its scope is whether there is a link to ‘rights and freedoms guaranteed by’ EU law. While this term only

⁶⁰ The case law of the European Court of Human Rights does betray, however, a willingness to interpret the scope of Art 6(1) ECHR broadly so as to cover ‘administrative’ proceedings as much as possible. See eg *Pellegrin v France* App no 28541/95 (8 December 1999), ECHR 1999-VIII [66] (the *only* disputes excluded from the scope of Art 6(1) of the ECHR are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the state or other public authorities), and see also *Vilko Eskelinen v Finland* App no 63235/00 (Judgment of 19 April 2007), where the ECtHR significantly revised the ‘Pellegrin standard’ by holding that two conditions must be fulfilled when a state party wishes to rely before the Court on the applicant’s status as a civil servant in excluding the protection embodied in Art 6 (para 62): ‘Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion [of judicial review under domestic law] must be justified on objective grounds in the State’s interest.’

⁶¹ Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, cited in Explanations, 2007/C 303/30.

appears in the first paragraph of that Article it is logical, in the absence of any wording to the contrary, to apply it to the two following paragraphs also.

It seems implicit in the case law that there is no special meaning for the term ‘rights and freedoms guaranteed by EU law’. In other words, the question of whether EU law guarantees any particular ‘rights and freedoms’, therefore invoking the application of Article 47, is a matter of interpretation of the particular EU law concerned. As already noted, since EU law guarantees many rights and freedoms besides those in the ECHR, and has a broader scope than the notion of ‘civil law rights and obligations’ defined in the ECHR, then Article 47 applies to many issues not within the scope of the ECHR, ie free movement rights guaranteed by EU law and disputes over tax or immigration issues regulated by EU law. Put another way, Article 47 has the same scope as Article 51 of the Charter (see section A above). **47.46**

III. Specific Provisions (Meaning)

HERWIG CH HOFMANN⁶²

(a) Context

The following analysis looks at the right to an effective judicial remedy—as a right arising from general principles of EU law, as well as being explicitly listed in Article 47 of the Charter of Fundamental Rights. It is considered in relation to the principle of effectiveness—a sub-principle of the Member State obligation of sincere cooperation under Article 4(3) TEU. This brief overview looks at the right’s constitutional context, the scope of protection recognised by it, as well as the extent to which it can be limited. The section ends with a discussion of open issues and central problems for effective judicial protection in today’s EU. **47.47**

The right to an effective judicial remedy⁶³ is a general principle of EU law that exists within the context of the multi-level constitutional system of the EU. This means that the following aspects need to be taken into account in its interpretation. **47.48**

First, it is a right which is an essential requirement for ensuring the rule of law within the Union (Art 2 TEU).⁶⁴ This right is applicable to Member States when acting in the scope of Union law and thus implementing its provisions into national law (Art 51(1) **47.49**

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⁶³ The Court of Justice has repeatedly found this right to be a fundamental right of individuals resulting from the common constitutional traditions of the Member States and recognised Arts 6 and 13 of the ECHR. The fundamental rights arising from this are thus also protected as General Principles of EU law under Art 6(3) TEU. See eg: Case 222/84 *Johnston* [1986] ECR 1651 [18], [19]; Case 222/86 *Heylens and Others* [1987] ECR 4097 [14]; Case C-424/99 *Commission v Austria* [2001] ECR I-9285 [45]; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 [39]; Case C-467/01 *Eribrand* [2003] ECR I-6471 [61]; Case C-432/05 *Unibet* [2007] ECR I-2271 [37]; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351 [335]; Case 12/08 *Mono Car Styling* [2009] ECR I-6653 [47]; Joined Cases C-317/08 to C-320/08 *Allassini* (n 63) [61].

⁶⁴ The recognition of which in the Union legal system famously going back to Case 294/84 *Les Verts* (n 61) [23], [24]. The relation between the right to an effective judicial remedy and the rule of law is outlined in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 [38], [39].

TFEU).⁶⁵ However, the specific extent of the application of the principles reflected in Article 47 within the Member States also arises from its nature as a principle which results from and ensures the existence of the direct effect and primacy of EU law,⁶⁶ in so far as Article 47 requires that ‘everyone whose rights and freedoms are guaranteed by the Law of the Union’, be given the possibility to obtain a ‘remedy to set aside national measures which are in conflict therewith’.⁶⁷ Given that the EU is a legal system with multiple levels, it has been held that in the absence of judicial remedies on the Union level, it is for the Member States to establish a sufficiently complete ‘system of legal remedies and procedures which ensure respect for the right to effective judicial protection’ of Union law.⁶⁸ The degree to which Member State courts are bound by the right to an effective judicial remedy is defined by the Court of Justice’s jurisprudence on the compatibility of national procedural and substantive rules which have an actual or potential effect on the existence, degree and enforceability of remedies to enforce rights arising from EU law.⁶⁹ Accordingly, Court of Justice case law has held that Member States are obliged to ensure that their courts provide ‘direct and immediate protection’ of rights arising from the Union legal order.⁷⁰ This, over time, has evolved into a general principle requiring rights arising from EU law to be ‘effectively protected in each case’.⁷¹

Au: fn 68 Inuit case cited later in chapter as C-883/11. All instances in chapter highlighted

47.50 Secondly, this general principle of law has been restated in Article 47 of the Charter as the right to an ‘effective remedy before a tribunal’. This Treaty article must, under Article 52(2) of the Charter, be interpreted and exercised ‘under the conditions and within the limits’ defined by relevant Treaty articles which make provision for it. These include Article 19(1) TEU, which establishes that Member States ‘shall provide the remedies sufficient to ensure effective legal protection in the fields covered by Union law’.⁷² This provision makes it clear that national judges are judges of Union law. It is a specification of the general obligation under the principle of sincere cooperation (Art 4(3) TEU) obliging Member States to ‘take any appropriate measure, general or particular, to ensure

⁶⁵ Case C-617/10 *Åkerberg* [2013] I-nyr, [20]. The explanations to the Charter under Art 6(1) TEU and Art 52(7) TFEU are to be used as interpretative aids to the Charter. The explanations by reference to Case C-260/89 *ERT* [1991] ECR I-2925 indicate that the term ‘implementation’ in Art 51(1) TFEU is to be understood in a broad sense including Member State action when limiting or balancing fundamental freedoms or fundamental rights and general principles recognised by EU law. For a detailed analysis of Art 51, see the contribution by Angela Ward in this commentary.

⁶⁶ Case 26/62 *Van Gend en Loos* [1963] ECR I [10], [12], [13]; Case 6/64 *Costa v ENEL* [1964] ECR 1141; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629 [17].

⁶⁷ W van Gerven, ‘Of Rights, Remedies and Procedures’ (2000) 37 *Common Market Law Review* 501–36, 509; Case C-213/89 *Factortame* [1990] ECR I-2433 [18]–[21].

⁶⁸ Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 [40], [41]; Case C-97/91 *Oleificio Borelli* [1992] ECR I-6313 [15]. See more recently the judgment of the Court of Justice of 3 October 2013 in Case C-583/11 P *Inuit Tapiriit Kanatami* [100].

⁶⁹ AG Trstenjak offered an extensive interpretation of this expression in her Opinion in Case C-411/10 *NS* [2011] ECR-nyr [149]–[177], also including infringements of the Geneva Convention and the ECHR.

⁷⁰ Case 13/68 *Salgoil* [1968] ECR 453, 463.

⁷¹ Case 179/84 *Bozzetti* [1985] ECR 2301 [17]; Case 222/84 *Johnston* [1986] ECR 1651 [18]. Understood in that sense, Art 47 CFR requires a broad interpretation of Art 51(1) CFR. However, the right to an effective judicial remedy is also, next to its recognition under Art 47 CFR recognised as General Principle of EU law (Art 6(3) TEU), the application of which to Member States is limited by the case law and is not subject to Art 51 CFR.

⁷² Note that Advocate General Kokott in her Opinion of 17 January 2013 in Case C-583/11 P *Inuit Tapiriit Kanatami*, noted at para 39 that the authors of the Treaty of Lisbon intended, with the second subpara of Art 19(1) TEU, ‘to strengthen individual legal protection in the fields covered by Union law before national courts.’

fulfilment of the obligations arising from EU law. The Court of Justice has repeatedly held that the principle of sincere cooperation includes the obligation of judicial enforcement of EU law before national courts.⁷³ The obligations of the Member States under Articles 4(3) and 19 TEU are thus mirrored by the individual right to effective judicial review, recognised also by Article 47 of the Charter.

Third, the right to an effective judicial remedy under Article 52(3) of the Charter also needs to be interpreted to at least the same level of protection as the relevant rights under the ECHR as interpreted by the European Court of Human Rights. In fact, Union Courts, ever since recognising the right to an effective judicial remedy as general principle of EU law, have referred to its origins *inter alia* in Articles 6 and 13 of the ECHR.⁷⁴ In the case law of the European Court of Human Rights, Article 6 is regarded as *lex specialis* to Article 13 ECHR in that the requirements of Article 13 are ‘absorbed by more stringent requirements of Article 6’ ECHR.⁷⁵ The effect of Article 13 ECHR is ‘to require the provision of a domestic remedy to deal with ... an “arguable complaint” under the Convention and to grant appropriate relief.’⁷⁶ The formulation of Article 13 ECHR is more limited than that of Article 47 of the Charter in that grants the right to an effective remedy only before national courts. In any case, the right to an effective judicial remedy must at least offer the level of protection which Articles 6 and 13 ECHR would have guaranteed. 47.51

(b) *Scope of Protection*

The case law of the Court of Justice of the European Union created a link between substantive rights and the existence of a remedy in *Johnston*, where it found that the ‘right to obtain an effective remedy in a competent court’⁷⁷ is a general principle of European law. Effective judicial protection must be offered by courts and tribunals recognised as 47.52

⁷³ See too the relation between the principle of sincere cooperation and the right to an effective judicial remedy, eg: Case 33/76 *Rewe* [1976] ECR 1989 [5]; Case 45/76 *Comet* [1976] ECR 2043 [12]; Case 106/77 *Simmmenthal* [1978] ECR 629 [21], [22]; Case C-213/89 *Factortame and Others* (n 67) [19]; Case C-312/93 *Peterbroeck* [1995] ECR I-4599 [12]; Case C-432/05 *Unibet* [2007] ECR I-2271 [38]; ‘Under the principle of cooperation laid down in Article 10 EC [now Art 4(3) TEU], it is for the Member States to ensure judicial protection of an individual’s rights under Community law’. The Court regularly recites the formulation according to which ‘it is settled case-law that in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness).’ See: Case C-63/01 *Evans* (n 73) [45] with reference also to Case C-120/97 *Upjohn* [1999] ECR I-223 [32].

⁷⁴ M Poelemans, *La sanction dans l’ordre juridique communautaire* (Bruxelles, Bruylant, 2004), 621. See eg: Case 222/84 *Johnston* [1986] ECR 1651 [18], [19]; Case 222/86 *Heylens and Others* [1987] ECR 4097 [14]; Case C-424/99 *Commission v Austria* [2001] ECR I-9285 [45]; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 [39]; Case C-467/01 *Eribrand* [2003] ECR I-6471 [61]; Case 12/08 *Mono Car Styling* [2009] ECR I-6653 [47]; Joined Cases C-317/08 to C-320/08 *Alassini* (n 63) [61].

⁷⁵ See eg *Efendiyeva v Azerbaijan* App no 31556/03 (ECtHR, 2007) [59]; *Titarenko v Ukraine* App no 31720/02 (ECtHR, 2012) [80].

⁷⁶ *Vilho Eskelinen and Others v Finland* App no 63235/00 (ECtHR, 2007) [80].

⁷⁷ Case 222/84 *Johnston* [1986] ECR 1651 [19]. For a broader background see HCH Hofmann, GC Rowe, AH Türk, *Administrative Law and Policy of the European Union*, (Oxford, Oxford University Press, 2011) 139–42, 691–98.

such by EU law. Judicial protection of rights arising from EU law are protected on the EU level by the CJEU, encompassing the General Court and the Court of Justice. Article 19(1) TEU recalls that also national courts ensure compliance with the right to an effective judicial remedy. In reality it is primarily the national courts which are required to apply EU law as first Union judge. The relevant definition of a national court or tribunal under the Union right to an effective judicial remedy is the same as has been laid down by the Court in the definition of bodies entitled to make a preliminary reference under Article 267 TFEU.⁷⁸ A tribunal, by analogy with the case law under Article 267 TFEU, is thus to be assessed in the sense of Article 47 of the Charter by taking into account factors such as ‘whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law’,⁷⁹ and its independence and impartiality.⁸⁰

47.53 Remedies need to be supplied to individuals that are suitable for ensuring that where there is a right under Union law, there is a remedy to ensure its enforcement (the principle known as *ubi ius ibi remedium*). Such remedies, by analogy with Article 13 ECHR ‘must be ‘effective’ both in law and in practice.’⁸¹ The ‘form and extent’ of remedies supplied by the Member States to enforce EU rights, as well as the procedural rules to make them operational are, however, in principle within national competence,⁸² except for matters where the Treaties have explicitly granted jurisdiction to the Court of Justice. These national and European competences are interpreted in the light of the obligations arising from the principle of sincere cooperation and—more specifically—from the right to an effective judicial remedy.

47.54 The obligation of sincere cooperation (Article 4(3) TEU) obliges Member States to offer remedies subject to the principles of equivalence and effectiveness. Under the principle of equivalence, in the absence of applicable EU law, Member States must grant at least equivalent protection for violation of EU law to that available against violation of national law.⁸³ A rule must ‘be applied without distinction, whether the infringement

⁷⁸ Case C-506/04 *Wilson* [2006] ECR I-8613 [48] with reference (by analogy) to Joined Cases C-238/99 P, C-244–245/99P, C-250/99P, C-252/99P, C-254/99P *Limburgse Vinyl Maatschappij and Others* [2002] ECR I-8375 [180]–[205], [223], [234].

⁷⁹ Case C-54/96 *Dorsch Consult* [1997] ECR I-4961 [23]; Joined Cases C-110/98 to C-147/98 *Gabalfrija and Others* [2000] ECR I-1577 [33]; Case C-17/00 *De Coster* [2001] ECR I-9445 [10]; C-506/04 *Wilson* [2006] ECR I-8613 [48].

⁸⁰ Case 14/86 *Pretore di Salò* [1987] ECR 2545 [7]; Case 338/85 *Pardini* [1988] ECR 2041 [9]. For a full analysis of the meaning of ‘court or tribunal’ in EU law, see the contribution by Laurent Pech in section D.VII of this chapter.

⁸¹ *Kudla v Poland* ECHR 2000-XI [157]. Art 13 ECHR is, however, more limited than the right to an effective judicial review under EU law. Art 13 ECHR protects only rights arising from the Convention—therefore only fundamental rights and freedoms. The General Principle of EU law, by contrast, protects all rights arising from EU law in both a vertical and a horizontal level. For further explanation, see below in this commentary.

⁸² This is sometimes referred to as the principle of national procedural autonomy. It would appear that under the principle of sincere cooperation Member States are under the obligation to provide for procedural provisions to enforce EU law and in doing so have enjoy a margin of discretion—the limits of which also circumscribe the degree of the national procedural autonomy. For further debate and analysis see eg D-U Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Heidelberg, Springer, 2010) with further references.

⁸³ Case C-205–15/82 *Deutsche Milchkontor* [1983] ECR 2633 [17]; Case C-453/99 *Courage* [2001] ECR I-6297 [29].

alleged is of Community law or national law⁸⁴ and Member States are prohibited under the principle of equivalence from offering conditions that are less favourable than those governing similar domestic actions.⁸⁵ The similarity of a situation is subject to detailed case-by-case analysis, the Court looking at the purpose and effect of a national measure in question and exists ‘where the purpose and cause of action are similar’,⁸⁶ or where the case concerns ‘the same kind of charges or dues’.⁸⁷

The right to an effective judicial remedy is an accessory right, in that it requires another right arising from EU law to be protected before it will become operative. Article 47 of the Charter, however, is formulated in a slightly confusing manner. The accessory right has been explicitly recognised under Article 13 ECHR, which requires the existence of an ‘arguable claim’ of a violation to be made out before Article 13 can apply.⁸⁸ 47.55

Initially, the case law of the Court of Justice stated that the right to effective judicial review ‘was not intended to create new remedies’,⁸⁹ but the concept has rapidly evolved due to the case law of the Court on the principle of effectiveness. Under the *Factortame*-formula, the right to an effective remedy offers protection against ‘any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness’ of Union law.⁹⁰ That means that Member States should also ‘not render virtually impossible or excessively difficult the exercise of rights conferred by Community law’.⁹¹ Thus, national courts are required to offer active protection of rights arising from Union law and are obliged to ‘guarantee real and effective judicial protection’,⁹² even in cases such as *Factortame* where there was no equivalent form of protection of rights under national law. Anything which ‘might prevent, even temporarily, Community rules from having full force and effect’ is therefore incompatible with Union law.⁹³ 47.56

However, in more recent times the Court of Justice has taken a more nuanced approach. In Case C-883/11 P *Inuit Tapiriit Kanatami*⁹⁴ the Court took the opportunity to reassert that ‘neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law’,⁹⁵ while adding that the position would ‘be 47.57

Au: or C-583/11?

⁸⁴ Case C-231/96 *Edis* [1998] ECR I-4951 [36]; Joined Cases 66/79, 127/79 and 128/79 *Salumi* [1980] ECR 1237 [21].

⁸⁵ Case C-261/95 *Palmisani* (n 85) [27]; C-453/99 *Courage* [2001] ECR I-6297 [29].

⁸⁶ Case C-326/96 *Levez* [1998] ECR I-7835 [41].

⁸⁷ Case C-231/96 *Edis* (n 84) [36]; Joined Cases 66/79, 127/79 and 128/79 *Salumi* [1980] ECR 1237 [21]. For a detailed commentary on the principle of equivalence see the contribution by Elina Paunio in section D.IV of this chapter.

⁸⁸ Hofmann, Rowe and Türk, *Administrative Law and Policy* (n 77) 203–16; A Eser, ‘Artikel 47’ in J Meyer (ed) *Charta der Grundrechte der Europäischen Union*, 3rd edn (Baden-Baden, Nomos, 2011) 572 [4]. The leading case under the ECHR appears to be *Silver and Others* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 1975) [113].

⁸⁹ Case 158/80 *Rewe II* [1981] ECR 1805, summary [6].

⁹⁰ Case C-213/89 *Factortame* (n 67) [19], [20].

⁹¹ See eg Case C-128/93 *Fischer* [1994] ECR I-4583 [37]; Case C-261/95 *Palmisani* (n 85) [27]; Case C-453/99 *Courage* [2001] ECR I-6297 [29]; Case C-78/98 *Preston and Others* [2000] ECR I-3201 [39]; Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741 [57]; Case C-30/02 *Recheio-Cash & Carry* [2004] ECR I-6051 [17], [18]; Case C-212/04 *Adeneler and Others* [2006] ECR I-6057 [95]; Joined Cases C-231/06 to C-233/06 *Jonkman and Others* [2007] ECR I-5149 [28].

⁹² Case 14/83 *Van Colson* [1984] ECR 1891 [23].

⁹³ Case C-213/89 *Factortame* (n 67) [19], [20].

⁹⁴ Case C-883/11 P *Inuit Tapiriit Kanatami* (Judgment of 3 October 2013).

⁹⁵ *Ibid* [103].

otherwise only if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law, or ... of the sole means of access to a court was available to parties who were compelled to act unlawfully.⁹⁶ This means, therefore, that a global assessment of the Member State legal system needs to be made by a national before the last resort measure of crafting a new remedy is taken.⁹⁷

47.58 Compliance with the right to an effective remedy then depends both on whether the Member State offers procedural rules granting fair prospects for a case to be instituted and provides admissibility criteria allowing actual access to a court. It also requires provision of a remedy which is capable of addressing the violation of the right.⁹⁸ Since *Peterbroeck* and *Van Schijndel*, these criteria have been combined into one standard formulation. The right to an effective judicial remedy means that Member State law must not render the application of Union law ‘impossible or excessively difficult’.⁹⁹ Whether that is the case must be analysed

by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.¹⁰⁰

⁹⁶ Ibid [104].

⁹⁷ For a detailed analysis of the limits on the powers of Member State courts to craft new remedies see the Opinion of 14 March 2013 of Advocate General Jääskinen in Case C-509/11 *OBB-Personenverkehr AG* (Judgment of 26 September 2013) [68]–[78]. At para 77 the Advocate General pointed out that, moreover, ‘it is established that, when a Member State, in the exercise of its discretion “to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law” has left room for argument of a compliance failure appertaining to the principle of effectiveness, the obligation imposed by EU law on national courts is merely “to interpret the domestic the jurisdictional rules in such a way that, wherever possible, they contribute to the attainment of the objective of ensuring effective judicial protection of an individual’s rights under Community law”’ (emphasis in original). See further Case C-268/06 *Impact* [2008] ECR I-2483 [54], Joined Case C-444/09 and C-456/09 *Gavieiro* [2010] ECR I-14031 [95], [96] and Case C-240/09 *Lesoochranske zoskupenie* [2011] ECR I-1255 [51].

⁹⁸ See by comparison the approach to Art 13 ECHR in *MSS v Belgium and Greece* App no 30696/09 (ECtHR 2011) [289], [290]: ‘The “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so. In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State’ (with references to *Gebremedhin [Gaberamadhien] v France* ECHR 2007-V [53] and *Çakıcı v Turkey* ECHR 1999-IV [112]). Regarding the EU legal system, see: S Alber, ‘Recht auf einen wirksamen Rechtsbehelf und ein unparteiisches Gericht—Art 47’ in P Tettinger and K Stern (eds), *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta* (München, Verlag C.H. Beck, 2006) 734 para 34.

⁹⁹ Case C-312/93 *Peterbroeck* (n 72) [14] and Joined Cases C-430 and 431/93 *Van Schijndel* [1995] ECR I-4705 [19].

¹⁰⁰ Ibid. More recently the Court has held that it is ‘apparent from the Court’s case law that situations in which the question arises as to whether a national procedural provision makes the exercise of rights conferred on individuals by the European Union legal order impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure as a whole and to the progress and special features of the procedure before the various national bodies’. See Case C-249/11 *Hristo Bykanov* (Judgment of the Court of Justice of 4 October 2012) [75].

The consequences of this analysis are best illustrated by the cases that have considered both procedural remedies in the sense of individual rights of access to a court as well the substantive remedies available where a claim is successful.¹⁰¹ Both of these have been addressed in disputes in which individuals claim that rights arising from EU law have been violated by public authorities, either of the EU or the Member States, and in disputes between individuals. It is to these developments to which I will now turn. 47.59

Effective Judicial Remedies in Disputes Between Individuals and Public Authorities

Under the right to an effective judicial remedy as general principle of EU law, as restated in Article 47 of the Charter, Member States and their courts may be obliged to develop forms of judicial remedies in order to protect Community rights even where such protection did not pre-exist in national law. 47.60

Consequently, the Court has, in several high-profile cases, held that Member States and their courts are under the obligation to create remedies additional to those already existing under national procedural law, if it is necessary to guarantee the relation between rights and remedies under EU law. Examples can be found in *Borelli*,¹⁰² which concerned the protection of individuals in composite procedures with input from Union and Member State administrations into a final administrative decision; as well as *Factortame*,¹⁰³ regarding the establishment of a system of interim relief to effectively protect a right under EU law. 47.61

However, as explained above, the most recent case law of the Court of Justice has placed emphasis on the caveat *if necessary*. It is only when the structure of the domestic legal system, taken as whole, fails to provide an effective remedy, or the remedy available requires the law to be breached before access can be gained to a court, that national judges are bound under EU law to craft a new sanction.¹⁰⁴ 47.62

Nonetheless, there remains a vast swathe of case law on the compliance of national sanctions and procedural rules with the obligation on Member State courts to provide an effective remedy. Statutory limits defining limitation periods for bringing actions before national courts do not necessarily run contrary to Union law.¹⁰⁵ Generally, 47.63

the conditions, in particular time-limits, for reparation of loss or damage laid down by national law must not be less favourable than those relating to similar domestic claims (principle of equivalence) and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness).¹⁰⁶

¹⁰¹ This appears to be the interpretation of the Courts, which would be more in line with the notion of remedy in the context of the German and English language versions of the text of Art 47 CFR than of the French wording speaking more procedurally of a *droit à un recours effectif* than the broader notion of *eg einen wirksamen Rechtsbehelf* or an ‘effective remedy before a tribunal’.

¹⁰² Case C97/91 *Oleificio Borelli* [1992] ECR I-6313.

¹⁰³ Case C-213/89 *Factortame* (n 67). See recently on interim relief in the context of a discrete provision of environmental claims Case C-416/10 *Jozef Krizan and Other* (CJEU, 15 October 2013).

¹⁰⁴ Case C-883/11 *P Inuit Tapiriit Kanatami* (Judgment of 3 October 2013) [104]. For an example of a case in which the Court held that a Member State court was not required to issue the remedy requested, see Case C-91/08 *Wall AG v Stadt Frankfurt am Main*, (CJEU, 13 April 2010).

¹⁰⁵ A Ward, *Judicial Review and the Rights of Private Parties in EU Law*, 2nd edn (Oxford, Oxford University Press, 2007) 113–27; Case C-30/02 *Recheio-Cash & Carry SA v Fazenda Pública/Registo Nacional de Pessoas Colectivas, and Ministério Público* [2004] ECR I-6051 [21]–[22], [26].

¹⁰⁶ Case C-261/95 *Palmisani* (n 85) [27].

- 47.64 In *Peterbroeck*,¹⁰⁷ the Court of Justice accepted, in principle, the application of time limits and statutory limitations barring an applicant from bringing a case or requesting a remedy in an on-going procedure as long as their application did not make access to courts ineffective in reality. The *Pontin* case has established that ‘a fifteen-day limitation period applicable to an action for a declaration of nullity and for reinstatement ... does not appear to meet’ the conditions required this principle.¹⁰⁸ The same holds true in principle for statutory limits to initiate complaint proceedings before administrative bodies when these are a pre-condition for obtaining standing before a court. Time-bar rules of this kind are, in principle, capable of complying with EU law, but they may fail to satisfy the principle of effectiveness, due to specific circumstances of a case.¹⁰⁹
- 47.65 Undue delays in providing remedies due to lengthy procedures have been addressed by the European Court of Human Rights. It has been found that since remedies under Article 13 ECHR must be ‘effective’ both in law and in practice. An appeal can be rendered practically ineffective by the length of proceedings,¹¹⁰ and thus be in breach of Article 13 ECHR.¹¹¹ The same applies, by analogy, to the right to an effective judicial remedy under EU law and under Article 47 of the Charter of Fundamental Rights.
- 47.66 The application of *res judicata*, a general principle of EU law, is not amongst the elements making an application impossible, and thus does not prejudice the right to an effective remedy before a tribunal for the purposes of Article 47 CFR.¹¹² The CJEU case law has established that *res judicata* ‘extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question.’¹¹³ In order to achieve this, the concept and scope of *res judicata* of a judgment under EU law attaches primarily to the operative part of a judgment in question, but for that also needs to take into account its *ratio decidendi*—especially in order to establish whether the facts and the points of law are the same.¹¹⁴ However, ‘the force of *res judicata* extends only to the ground of a judgment which constitute the necessary support of its operative part.’¹¹⁵

¹⁰⁷ Case C-312/93 *Peterbroeck* (n 72) [15].

¹⁰⁸ Case C-63/08 *Pontin* [2009] ECR I-10467 [62], [69]. Compare however Case C-69/10 *Diouf v Ministre du Travail, de l’Emploi et de l’Immigration* (Judgment of 28 July 2011), where it was held at para 67 that ‘a 15-day time limit for bringing an action does not seem, generally, to be insufficient in practical terms to prepare and bring effective action and appears reasonable and proportionate in relation to the rights and interests involved.’ See similarly Case C-418/11 *Texdata Software GmbH* (Judgment of 26 September 2013) [80] and [81]. Compare also Case C-339/12 RX II *Oscar Orlando Arango Jaramillo* (Judgment of 28 February 2013), in which no time-limit had been set to challenge measures taken by the European Investment Bank.

¹⁰⁹ With regard to public procurement procedures eg Case C-241/06 *Lämmerzahl GmbH v Freie Hansestadt Bremen* [2007] ECR I-8415 [57]. In such a case a national time-bar rule may not be applied in such a way that a tenderer is refused access to review concerning the choice of procedure for awarding a public contract.

¹¹⁰ *Eskelinen ea v Finland* App no 63235/00 (ECtHR, 19 April 2007) [29], with reference to Art 47 CFR; *Kudla v Poland* App no 30210/96 (ECtHR, 26 October 2000). For a detailed analysis of the question of delay in proceedings under EU and ECHR law, see [the contribution by Debbie Sayers](#) in section D.VIII of this chapter.

¹¹¹ See eg in this respect: *Bottazzi v Italy* ECHR 1999-V 22; *Ci Mauro v Italy* ECHR 1999-V 23; *AP v Italy* App no 35265/97 (ECtHR, 28 July 1999) [18].

¹¹² Case T-341/07 *Sison v Council* [2011] ECR I-nyr [23].

¹¹³ Case C-526/08 *Commission v Luxembourg* [2010] ECR I-XXX [27] and the case law cited; Case C-529/09 *Commission v Spain* [2013] ECR I-nyr [66]; Case C-462/05 *Commission v Portugal* [2008] ECR I-4183 [23].

¹¹⁴ Case C-456/11 *Gothaer and others v Samskip* [2012] ECR I-nyr [40] with reference to, inter alia, Joined Cases C-442/03 P and C-471/03 P P & O *European Ferries* [2006] ECR I-4845 [44]; Case C-221/10 P *Artegoda v Commission* [2012] ECR I-nyr [87].

¹¹⁵ Joined Cases C-539/10 P and C-550/10 P *Stichting Al-Aqsa* [2012] ECR I-nyr [49] with further references.

The right to effective judicial review also contains procedural obligations which are incumbent on the legislative and executive branch of powers. The ‘requirements of good administration and legal certainty and the principle of effective legal protection’ are thereby linked.¹¹⁶ An example is the obligation on public bodies to reason their acts. This is positively formulated for EU institutions, bodies and agencies in Article 296 second paragraph TFEU and Article 41(2)(c) of the Charter, as well as in numerous provisions of secondary legislation. The European Courts have held that the obligation to reason acts also arises from the right to an effective judicial remedy. In that context, the obligation to give reasons is both an obligation of national bodies applying national law as well as one applicable to EU legal acts.¹¹⁷ In that sense, the right to an effective judicial remedy ‘requires statement of reasons in order to enable the entity concerned to exercise its right to bring an action’,¹¹⁸ to ‘decide, with full knowledge of the relevant facts, whether it is worth applying to the courts’¹¹⁹ and to enable the person concerned ‘to defend his rights under the best possible circumstances.’¹²⁰ 47.67

Amongst the practically most important substantive remedies capable of effectively enforcing rights under EU law is the obligation of Member States to make good damages which have arisen from their non-compliance with Union law. Such non-compliance can result from violation of primary law obligations which have direct effect, as well as from violation of secondary law obligations. In the landmark case of *Francovich*,¹²¹ the Court of Justice held that a Member State may be liable to pay damages in the case of faulty transposition of a directive if there are no possibilities for using the remedy of exceptionally granting the directive direct effect. 47.68

Even though the claim for damages arises from EU law,¹²² the procedures for obtaining damages are subject to national law which, under the principle of equivalence, may not provide for procedures for obtaining reparation that are ‘less favourable than those relating to similar domestic claims.’¹²³ In *Brasserie du Pêcheur* the Court of Justice applied this approach to breach by Member States of provisions of primary law contained in the EU Treaty.¹²⁴ Liability of the Member States was famously expanded in 47.69

¹¹⁶ Case C-362/09 P *Athinaiki Techniki v Commission* [2010] ECR I-13275 [70]. For an example of a case in which an obstructive administrative practice was held to be in breach of the principle of effectiveness see Case C-378/10 *VALE Epittiesi kft* (CJEU, 12 July 2012).

¹¹⁷ T-461/08 *Evropaiki Dynamiki* [2011] ECR II-nyr [118]–[124] which in a public procurement case held that ‘in order to ensure the right to an effective remedy enshrined inter alia in Article 47 CFR, the contracting authority must comply with its duty to give reasons; in so far as the tendering procedure failed to satisfy those requirements, the applicant’s right to an effective remedy was infringed.’

¹¹⁸ Joint Cases T-439/10 and T-440/10 *Fulmen* [2012] ECR II-nyr [87]; Case T-181/08 *Tay Za v Council* [2010] ECR II-1965 [145]; Case T-390/08 *Bank Mellat v Council* [2009] ECR II-3967 [35]–[37]; Cases C-402/05 P and C-415/05 P *Kadi v Council and Commission* [2008] ECR I-6351 [335]–[353].

¹¹⁹ Joined Cases C-372/09 and C-373/09 *Josep Penaraja Fa* [2011] ECR I-nyr [63].

¹²⁰ Case 222/86 *Heylens and Others* [1987] ECR 4097 [15] and [17]. See recently on the link between the obligation to give reasons and effective judicial review Case C-430/10 *Hristo Gaydarov* (CJEU, 17 November 2011).

¹²¹ Case C-6/90 *Francovich* [1991] ECR I-5357.

¹²² *Ibid* [40]–[43].

¹²³ *Ibid* [43].

¹²⁴ Joined Cases C-46 and 48/93 *Brasserie du Pêcheur* [1996] ECR I-1029. In parallel to the case law relating to Art 340 TFEU (eg Case 5/7 *Zuckerfabrik Schöppenstedt* [1971] ECR 975) the Courts require a ‘sufficiently serious’ breach of the rule of law which confers rights on individuals. The Court of justice might have applied an ‘inverse’ principle of equivalence in that the Member States would be held liable under EU law under the same conditions as the Union institutions and bodies.

*Köbler*¹²⁵ and *Traghetti*¹²⁶ to make good damages due to violation of EU law by any of its authorities including the judiciary.¹²⁷ National legislation limiting the liability of courts in these circumstances may be in violation of EU law because of the potential violation to the right to an effective remedy.¹²⁸

47.70 The right to an effective remedy before a tribunal also includes the obligation for Member State courts to order repayment of unduly levied sums by Member State in breach of EU law,¹²⁹ or to order the administration to reopen a final administrative decision,¹³⁰ especially if there is an equivalent possibility of reopening a final administrative decision for violation under national law.¹³¹ In the context of enforcement of EU environmental law, Article 47 includes a right for costs not to be prohibitively expensive,¹³² although, in the domain of criminal law, it does not guarantee to the victim of a criminal offence a right to require criminal proceedings to be brought against a third party in order to secure his or her conviction.¹³³

47.71 While there is no right under EU law to effective judicial review of preparatory decisions,¹³⁴ and nor does the right to an effective remedy entail access to a number of levels of jurisdiction,¹³⁵ final decisions on the implementation by Member State bodies of EU law must be capable of being subject to thorough review by the national courts.¹³⁶ Nor do the rights protected by Article 47 necessarily preclude the designation, by Member States, of specialised tribunals to adjudicate over discrete areas of EU law. This is subject to the proviso that the relevant jurisdictional rules do not cause individuals

¹²⁵ C-224/01 *Köbler* [2003] ECR I-10239 [31]–[36], [53]–[55].

¹²⁶ C-173/03 *Traghetti* (n 126).

¹²⁷ *Ibid* [43]; although liability, under these cases, is incurred ‘only in exceptional cases where the national court adjudicating at last instance has manifestly infringed’ the law, such manifest infringement is presumed where the ‘decision involved is made in manifest disregard of the case-law of the Court on the subject.’

¹²⁸ *Ibid* [37]–[45]. It was held that ‘although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of Community law’, ‘under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law, as set out in paragraphs 53 to 56 of the *Köbler* judgment.’ See also on the preclusion of national concepts of fault, and the interaction of the principles of effectiveness and non-discrimination with state liability rules Case C-429/09 *Gunter FuB* (CJEU, 25 November 2010). For further discussion of damages under Art 47 of the EU Charter, see [the commentary by Pekka Aalto](#) in this chapter.

¹²⁹ Eg Case C-309/06 *Marks & Spencer plc* [2008] ECR I-2283 [41]–[44]. See with further discussion: Ward, *Judicial Review and the Rights of Private Parties in EU Law* (n 105) 127–39.

¹³⁰ Case C-249/11 *Hristo Byankov* (CJEU, 4 October 2012).

¹³¹ Case C-453/00 *Kühne & Heitz* [2004] ECR I-837 [23]–[27].

¹³² Case C-260/11 *The Queen on the Application of David Edwards* (Judgment of 11 April 2013) [33]. See also the Opinion of Advocate General Kokott of 18 October 2012 in the same case, in which the Advocate General observed at para 39 that ‘legal protection under the Aarhus Convention [on access to justice in environmental matters] goes further than effective legal protection under Article 47 of the Charter of Fundamental Rights’. See further on effective judicial review in the context of EU environmental law Case C-416/10 *Jozef Krizan and Others* (CJEU, 15 October 2013) and the Opinion of Advocate General Kokott of 19 April 2012, and Case C-201/02 *The Queen on the Application of Delena Wells* [2004] ECR I-723 (environmental impact assessment).

¹³³ Case C-507/10 *X and Y* (Judgment of 21 December 2011) [43].

¹³⁴ Case C-69/10 *Diouf* (n 108) [55], [56].

¹³⁵ *Ibid* [69]. See also, in the context of the European arrest warrant, Case C-168/13 PPU *Jeremy F v Premier minister* (Judgment of 30 May 2013) [44].

¹³⁶ Case C-69/10 *Diouf* (n 108) [56]; Case C-506/04 *Wilson* [2006] ECR I-8613 [62].

procedural problems in terms; inter alia, of the duration of proceedings, such as to render the exercise of the rights derived from European Union law excessively difficult.¹³⁷

Effective Judicial Remedies in Disputes between Individuals

The right to an effective judicial remedy is not limited to disputes between individuals and Member States or EU institutions and bodies. It is also applicable in view of the protection of rights arising from EU law in ‘horizontal’ disputes between individuals.¹³⁸ Cases which have confirmed this indirect horizontal effect of the right to an effective judicial remedy have so far been decided by the Court especially with respect to rights arising from EU legislative acts—both in the form of directives or regulations. The policy area of non-discrimination, consumer protection and health and safety provisions have been particularly productive. In addition to this, there have been some recent and interesting developments in the horizontal enforcement of EU competition law between private parties which demonstrate the link between this type of litigation and the Article 47 right to an effective remedy. 47.72

Amongst the leading cases in this field are *Von Colson*¹³⁹ and *Dekker*.¹⁴⁰ There the Court established that a Member State implementing a Directive on equality between the sexes should do so in a way granting sanctions for violation of such rights which would dissuade violation and should guarantee real and effective judicial protection by inter alia having ‘a real deterrent effect’ on a person breaching the objectives of the Directive.¹⁴¹ In the absence of a specific provision in the Directive, the Member States were free to establish whichever sanctions regime—public or private, administrative or criminal—would be adequate. The Court has developed the following principles that are applicable when a Union regulation does not specifically provide any penalty for an infringement, or refers for that purpose to national laws, regulations and administrative provisions: 47.73

Article 4(3) [TEU] requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalties remains within their discretion, the Member States must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.¹⁴²

Guidance on the application of these criteria was given in *Pontin*. There, the Court held that a Member State would violate the principle of equivalence if its legislation withheld a remedy generally existing under national law for the implementation of a Directive (in *Pontin*: damages and interest). *Pontin* had brought a case against dismissal whilst being 47.74

¹³⁷ Case C-93/12 *ET Agroconsulting-04-Velko Stoyanov* (CJEU, 27 June 2013), and the Opinion of Advocate General Bot of 14 March 2013. On the scope of the duties of specialised tribunals to provide effective judicial protection, see Case C-268/06 *Impact* (Judgment of 15 April 2008).

¹³⁸ See eg Case C-231/96 *Edis* (n 84) [36], [37].

¹³⁹ Case 14/83 *Van Colson* (n 92).

¹⁴⁰ C-177/88 *Dekker v Stichting voor Jonge Volwassenen (VJV) Plus* [1990] ECR I-3941.

¹⁴¹ Case 14/83 *Van Colson* (n 92) [23].

¹⁴² Case C-186/98 *Nunes et de Matos* [1999] ECR I-4883 [9]–[11] with reference to Case 68/88 *Commission v Greece* [1989] ECR 2965 [23].

pregnant. The applicable law of the Grand Duchy of Luxembourg provided only for the remedy of annulment of the dismissal, but denied the claim for damages for wrongful dismissal that was otherwise available under Luxembourg law. The Court found this to be in violation of the principle of equivalence.¹⁴³ Additionally, Member States, under the principle of effectiveness and the right to an effective judicial remedy, were bound to develop an effective remedy for violations of rights established in the Directive.¹⁴⁴

47.75 National courts, in fact all public bodies of Member States, are thus obliged to disapply Member State law which would jeopardise or make ineffective a right arising from EU law. In *Fuss v Stadt Halle*,¹⁴⁵ for example, the Court of Justice held that the right to effective judicial review would be breached if a Member State court failed to sanction retaliatory measures which ‘might deter workers who considered themselves the victims of a measure taken by their employer from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the directive.’¹⁴⁶

47.76 Questions of jurisdiction of national courts in civil disputes will also be assessed in view of the right to an effective judicial remedy.¹⁴⁷ In that context, Member States tribunals are specifically under the obligation to avoid situations of denial of justice in cases involving rights under EU law.¹⁴⁸ As a consequence, national courts need to take into account, when deciding about jurisdiction, whether such a decision might lead to a situation where no judicial remedy exists. Such an outcome would violate the right to an effective judicial review under EU law.

47.77 A related issue of denial of justice is generated by the question of whether national judges in ongoing procedures may be obliged to raise issues of EU law of their own motion (ex officio). This may be necessary to ensure that a remedy before a national tribunal for breach of EU law is actually effective. This question arises most frequently, but not exclusively, in disputes between individuals. Under the principle of equivalence, a Member State court will be obliged to apply EU law of its own motion, if it would be obliged to do so with regard to disputes involving national legal provisions.¹⁴⁹ Whether the conditions of equivalence exist is assessed on a case-by-case basis¹⁵⁰ and ‘must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.’¹⁵¹

47.78 Where a national court is bound by the pleadings of the parties as to the type of relief and the remedies, but not as to the law applicable to the case, it might therefore be obliged

¹⁴³ Case C-63/08 *Pontin* (n 108) [72]–[76].

¹⁴⁴ *Ibid.*

¹⁴⁵ C-243/09 *Fuß v Stadt Halle* [2010] ECR I-9849.

¹⁴⁶ *Ibid* [66], with reference, by analogy, to Case C-185/97 *Cooté* [1998] ECR I-5199 [24], [27].

¹⁴⁷ C-327/10 *Lindner* [2011] ECR-nyr [49].

¹⁴⁸ See also Case C-292/10 *de Visser* [2012] ECR I-nyr [59].

¹⁴⁹ Case C-431/93 *Van Schijndel* (n 99) [17]; Case C-126/97 *Eco Swiss* [1999] ECR I-3055 [37]; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421 [35].

¹⁵⁰ See critically with further discussion eg G de Bürca, ‘National procedural rules and remedies: The Changing Approach of the Court of Justice’, in J Lonbay and A Biondi (eds) *Remedies for Breach of EC Law* (London, Wiley, 1997) ch 4.

¹⁵¹ Case C-312/93 *Peterbroeck* (n 72) [14] with further references.

to apply EU law on its own motion.¹⁵² It was established by the Court in *Cofidis*,¹⁵³ and followed in subsequent cases on the implementation of EU consumer protection Directives, that a national rule which in effect prohibits the national court from raising points of EU law of its own motion renders the ‘application of the protection intended to be conferred on them by the Directive excessively difficult.’¹⁵⁴ It follows, the Court stated, that even in absence of specific pleadings by the consumer, ‘effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.’¹⁵⁵ This obligation may further exist, where a national court reviews the enforceability of an arbitration award made in the context of a consumer contract.¹⁵⁶ Similarly, in *Peterbroeck*,¹⁵⁷ a tax case involving a complex set of national procedural rules, the Court of Justice held that the general principle of the right to an effective judicial remedy may require a national court to ex officio raise an issue under EU law.

A limitation on the obligation on national tribunals to raise issues of EU law of their own motion can arise from the principle of *res judicata* and the prohibition on raising new arguments because of the expiry of procedural time limits.¹⁵⁸ *Van Schijndel*¹⁵⁹ offers a good illustration of that approach. In that case the dispute concerned the compatibility of a contract with EU competition law. Under applicable national law, the cassation-level court was under national law empowered only to address questions of law, not of fact. The Court of Justice held that a national superior court, which generally only deals with pleas in law and not in fact, could refuse to hear new pleas on whether or not there had been compliance with EU law. The Court held that a breach of the right to

Au: fn 155 – ERPL in full please. Where does the quotation beginning ‘a court... end?’

47.79

¹⁵² This will depend on whether the procedural provisions are designed to allow for the principles of *iura novit curia* (the court knows the law) or under the concept of *da mihi facta, dabo tibi ius* (give me the facts and I will give you the law).

¹⁵³ Case 473/00 *Cofidis SA v Fredout* [2002] ECR I-10875.

¹⁵⁴ *Ibid* [36]–[38], requiring taking into ‘account of each case’s own factual and legal context as a whole, which cannot be applied mechanically in fields other than those in which they were made.’

¹⁵⁵ Joined Cases C-240/98 to C-244/98 *Océano Grupo and Others* [2000] ECR I-4941 [26]; Case C-243/08 *Pannon* [2009] ECR I-4713 [32]; Case C-227/08 *Martín Martín* [2009] ECR I-11939 [29]; Case C-137/08 *Pénzügyi Lízing* [2010] ECR I-10847 [48], [51]–[53]; Order of the Court in Case C-76/10 *Pohotovost* [2010] ECR I-11557 [40]–[43]; Case C-32/12 *Soledad Duarte Hueros* (Judgment of 3 October 2013). See also M Ebers, ‘From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata’ (2010) *ERPL* 823–46. See also Case C-472/11 *Banif Plus Bank Zrt v Csaba Csipai* (Judgment of 21 February 2013), in which the Court of Justice elaborated the connection between national judges raising points of EU law of their own motion and the rights of the defence. It was held at para 33 that where ‘a court establishes of its own motion the unfairness of a contractual term, the obligation to notify the parties and to give them the opportunity to set out their views cannot, moreover, be regarded as being, in itself, incompatible with the principle of effectiveness which governs the implementation, by the Member States, of rights conferred by European Union law. It is undisputed that that principle must be applied by taking into account, inter alia, the basic principles of the domestic judicial system, such as protection of the rights of the defence, of which the principle of *audi alteram partem* is an element (see, to that effect, *Asturcom Telecomunicaciones* (n 158) [39]).’

¹⁵⁶ Case C-168/05 *Mostaza Claro* [2006] ECR I-10421 [30]; Order of the Court in Case C-76/10 *Pohotovost* (n 155) [53], [54].

¹⁵⁷ Case C-312/93 *Peterbroeck* (n 72).

¹⁵⁸ Such rules are applicable under the principle of equivalence if they ‘are no less favourable than those governing similar domestic actions’. With further details, Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579 [33]–[47]; Order of the Court in Case C-76/10 *Pohotovost* (n 155) [47].

¹⁵⁹ Case C-431/93 *Van Schijndel* (n 99). The case concerned a contractual dispute between two parties where one party raised the question of compatibility of a contract with EU competition law under what are now Arts 101 and 102 TFEU.

effective judicial review would not arise if, prior to reaching the cassation-level (superior court) neither the parties nor the lower courts acting of their own motion had raised the relevant points of EU law.¹⁶⁰

47.80 On the other hand, a Member State court, especially the first-level courts, which have the right to refer a preliminary question to the Court of Justice, cannot be barred by national procedural rules from accepting an argument by parties on the incompatibility of a national decision with EU law. Nor can they be precluded from raising the rights of the individual under EU law of their own motion. National procedural rules that have had the effect of doing so have, as in *Peterbroeck*, been held to be in violation of the principle of effective judicial protection and thus in violation of obligations under EU law.¹⁶¹

47.81 Finally, it has long been established that the right to effective enforcement of EU law includes a right for one private party to bring proceedings against another for breach of EU competition law.¹⁶² There have been further developments on the scope of the effectiveness principle, in the context of competition law, in that it is now clear that the principle precludes a provision of Member State law which entails an absolute ban on access to a (public law) competition proceedings file, absent the consent of the parties to those proceedings, when such access is sought to secure the effective judicial enforcement of Article 101 TFEU through a private law damages claim. What the principle of effectiveness requires is for the national judge to weigh up all the relevant factors, including the protection of both business secrets and the traders who have cooperated with the public authorities in the course of a leniency programme, in deciding which documents can be released. Such action may be necessary to ensure that the right of individuals to obtain compensation from other individuals who breach EU competition law is not rendered nugatory through want of evidence.¹⁶³

(c) *Limitations on the Right to Effective Remedy Before a Court or Tribunal of the Member State*

47.82 The Court of Justice has held as follows with respect to the right to an effective judicial remedy:

it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact 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.¹⁶⁴

¹⁶⁰ Case C-431/93 *Van Schijndel* (n 99) [17]–[22].

¹⁶¹ Case C-312/93 *Peterbroeck* (n 72) [14]–[21].

¹⁶² Joined Cases C-295/04 and C-29XX/04 *Manfredi and Others* [2006] ECR I-6619, and Case C-453/99 *Courage and Crehan* [2001] ECR I-6279.

¹⁶³ See judgment on Case C-536/11 *Donau Chemie AG* (CJEU, 6 June 2013) which built on principles established in Case C-360/09 *Pfleiderer* [2011] ECR I-5161. Note that while the Court of Justice made no reference to Art 47 of the Charter in *Donau Chemie*, and was rather confined to discussion of the right to an effective remedy as a general principle of law, Art 47 was referred to extensively in the Opinion of Advocate General Jääskinen of 7 February 2013 in that case.

¹⁶⁴ Joined Cases C-317/08 to C-320/08 *Alassini* (n 63) [63] with reference to Case C-28/05 *Doktor and Others* [2006] ECR I-5431 [75] and the case law cited. See eg more recently Case C-418/11 *Textdata Software GmbH* (Judgment of 26 September 2013). See also the judgment of the ECHR in *Fogarty v United Kingdom* ECHR 2001-XI 33 (extracts).

In line with this general principle on the limitation of fundamental rights in EU law, courts reviewing whether the right to an effective judicial remedy should be restricted will need, first, to review whether the proposed limitation touches the essence of the right or only an element protected at the periphery of the scope of protection. Limitations touching the periphery may be permissible if they pursue a legitimate public policy objective and are proportionate.¹⁶⁵ The measure limiting the right must not only be capable of achieving the objective of the measure challenged. Where several appropriate measures exist which are more or less equally capable of achieving the objective, ‘recourse must be had to the least onerous.’¹⁶⁶ The notion of ‘least onerous’ requires a clear definition of the rights in question, which need to be balanced with the public interest in achieving the regulatory objective. The ‘least onerous’ requirement might also be aimed at protecting Member State competencies if the balancing takes place between the exercise of powers on the EU level, as opposed to that on the Member State level.

Finally, the overall balance between the objective and the means chosen must not be wholly unreasonable.¹⁶⁷ By applying this framework, the requirement of ‘effective’ protection that arises from the principle of sincere cooperation (Art 4(3) TEU) is fitted into the overall conceptual framework for limitation of general principles and fundamental rights recognised by the EU legal order.¹⁶⁸ The approach under EU law is very close to that taken by the European Court of Human Rights in establishing limitations to the right corresponding to Article 47 of the Charter in ECHR law; namely Articles 6 and 14 ECHR.¹⁶⁹ 47.83

The Court of Justice has held that it is not a disproportionate limitation if Member State procedural rules require satisfaction of additional steps before access to a Court can be granted. Such legitimate steps include, for example, ‘making the admissibility of legal proceedings concerning electronic communications services conditional upon the implementation of a mandatory attempt at settlement.’¹⁷⁰ 47.84

¹⁶⁵ See Art 52(1) CFR.

¹⁶⁶ See for many eg Case C-343/09 *Afton Chemical* [2010] ECR I-7027 [45].

¹⁶⁷ The most explicit and detailed discussion of proportionality to date seems to have been undertaken in Case C-283/11 *Sky Österreich* [2013] ECR I-nyr (Grand Chamber) [52]–[67].

¹⁶⁸ See as a restatement of the general approach eg Joined Cases C-317/08 to C-320/08 *Allassini* (n 63) [63]. With further discussion: J Engström, ‘The Principle of Effective Judicial Protection after the Lisbon Treaty’ (2011) 4 *Review of European Administrative Law* 53–68, 61 et seq; S Prechal and R Widdershoven, ‘Redefining the Relationship between “Rewe-effectiveness” and Effective Judicial Protection’ (2012) *Review of European Administrative Law* 31–50.

¹⁶⁹ In this sense the ECtHR in *Bellet v France* (n 37) recalls that in the *Fayed v United Kingdom* judgment (n 37), 49–50 [65], citing *Lithgow and Others v United Kingdom* (1986) Series A no 102, 71 [194], and *Ashingdane v United Kingdom* (n 36), 24–25 [57], it was held that ‘since establishing the principle of the right of access to a court in its judgment of 21 February 1975 in the case of *Golder v the United Kingdom* ((n 32) 18 [36]) the Court has clarified its scope in the following terms: ‘(a) The right of access to the courts secured by Article 6 para. 1 is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals. (b) In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. (c) Furthermore, a limitation will not be compatible with Article 6 para. 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.’

¹⁷⁰ Joined Cases C-317/08 to C-320/08 *Allassini* (n 63) [62].

- 47.85** Similarly, the case of *Evans* is an instructive example of the operation of the general limitations principle in the context of the right to an effective judicial remedy.¹⁷¹ In that case, the United Kingdom had implemented a directive on compensation of victims' damage or injury caused by unidentified or insufficiently insured vehicles in traffic accidents by delegating the assessment of damages to an agency. Appeal against agency decisions were to be made to an independent arbitrator whose decisions were, on limited grounds only, subject to review by a national Court. The Court of Justice was satisfied that those arrangements did not 'render it practically impossible or excessively difficult to exercise the right to compensation.'¹⁷² The difference to the later case *Wilson*, is most likely the independence of the awards arbitrator by comparison to an internal review by a decision-making body, the former deemed insufficient by the Court.¹⁷³
- 47.86** A further limitation of the right to an effective judicial remedy has been recognised in the context of competition law. The Court of justice has acknowledged that the right of access to a tribunal can be misused by dominant market participants as a strategy to harass competitors. Restricting such harassment might not only be an option but an obligation, in order to enforce the prohibition of misuse of a dominant position under Article 102 TFEU. The General Court, in *Promedia*, held that, since the right to an effective judicial remedy was a fundamental right, 'it is only in wholly exceptional circumstances that the fact that legal proceedings are brought' 'could be viewed as constituting an abuse of a dominant position within the meaning of Article 86 [now Art 102] of the Treaty.'¹⁷⁴
- 47.87** Member States need 'to protect the essential interests of its security and the guarantee of the procedural rights enjoyed by Union citizens'¹⁷⁵ when deciding whether a restriction on the right to an effective remedy is proportionate. Thus restrictions 'must be counterbalanced by appropriate procedural mechanisms capable of guaranteeing a satisfactory degree of fairness in the procedure.'¹⁷⁶
- 47.88** Overall, the principle of effective judicial protection, recognised under Article 47 of the Charter, imposes restrictions and obligations on Member States that are parallel to and developed from the well-entrenched concepts of equivalence and effectiveness reflected in Article 4(3) TEU.¹⁷⁷ However, in more recent cases, as for example in *DEB*, the Court of Justice has not looked at whether individual rights might arise from obligations on Member States resulting the principle of sincere cooperation and the notions of equivalence and effectiveness, as formulated under the classical *Rewe* definition. Instead it looks directly at the interpretation of individual rights in the context of the right to 'effective judicial protection' under Article 47 of the Charter.¹⁷⁸ This approach is not without risks. 'Disassociating' obligations of EU institutions and Member States established by the Treaties, on one hand, with rights of individuals, on the other, could contribute to undermining one of the core elements of the 'constitutionalisation' of the

¹⁷¹ Case C-63/01 *Evans* (n 73).

¹⁷² *Ibid* [54].

¹⁷³ *Ibid*.

¹⁷⁴

¹⁷⁵ AG Bot Opinion of 12 September 2012 in Case C-300/11 ZZ [2013] ECR-nyr [3].

¹⁷⁶ *Ibid* [83].

¹⁷⁷ Case C-286/06 *Impact* [2008] ECR I-2483 [47], [48]; J Engström, 'The Principle of Effective Judicial Protection after the Lisbon Treaty' (2011) 4 *Review of European Administrative Law* 53–68, 61 et seq.

¹⁷⁸ C-279/09 *DEB* [2010] ECR I-13849 [33].

EU legal system: it has been based, since the seminal cases of the 1960s, on granting individual rights to enforce Treaty based obligations against Member States.¹⁷⁹

(d) *Open Issues and Central Problems for Effective Judicial Protection in Today's EU*

Over the past six decades in the development of the European Union, the right to an effective judicial remedy has been continuously adapted to the Union's changing constitutional circumstances and evolving modes of implementation. The central trends in the approach to integration, which have required adaptation in the context of remedies, have diversified the implementation of EU through law through a rise in the forms of cooperative enforcement employed by organisationally separate but procedurally linked administrations. This has taken place in parallel with an intense 'Europeanisation' of many policy areas, which has led to more EU initiated regulation. **47.89**

Amongst the issues which might require further clarification in the future is the question of the intensity of judicial review. So far, the case law interpreting the right to effective judicial review, while acknowledging that that right is linked to the intensity of judicial review, has only rarely addressed this issue. In *Wilson*, for example, it was held that review by an independent tribunal that was limited to questions of law, and did not extend to a review of the facts, was insufficient.¹⁸⁰ To date, the Court of Justice has always held that its own standards of review of legality, especially under the action for annulment (Art 263 TFEU), satisfy the demands of the principle of effective judicial review, without giving any further explanation as to why that might be so.¹⁸¹ For its part, the European Court of Human Rights has established important standards with regard to the scale of judicial review required under Article 6 ECHR.¹⁸² The Court of Justice will join the Member States' courts in being accountable to this case law once the EU acceded to the ECHR.¹⁸³ **47.90**

Au: fn 183 – which case is the high-lighted citation?

The problem of compliance with the rule on effective judicial remedies in multi-jurisdictional situations is yet to be considered in detail in Court of Justice case law. So far, case law has been restricted to situations in which next to the Union legal order, only one Member State is involved in an administrative procedure. Implementation procedures in an increasing number of policy areas involve actors from several jurisdictions, both national and European. The identification of the one or several jurisdictions which might have the competence to grant effective judicial review of acts adopted on **47.91**

¹⁷⁹ See for example the 'classic' Case 26/62 *Van Gend en Loos* [1963] ECR 1, which was based on the right of an individual plaintiff to rely before a national court on the Treaty-prohibition of Member States to raise customs duties.

¹⁸⁰ Case C-506/04 *Wilson* [2006] ECR I-8613 [62].

¹⁸¹ See eg Cases C-272/09P *KME* [2011] ECR I-nyr [91]–[94]; C-386/10 P *Chalkor* [2011] ECR I-nyr [45]–[57]; T-390/08 *Bank Mellī Iran v Council* [2009] ECR II-3967 [35]–[37].

¹⁸² See for example *Hatton and Others v United Kingdom* App no 36022/97 (8 July 2003) [141]–[142].

¹⁸³ See eg *Engel and Others v Netherlands* (1976) ECHR Series A no 22; *Société Stenuit v France* (1992) ECHR Series A no 232-A; *Janosevic v Sweden* App no 34619/97 (21 May 2003); No 73053/01; *Jussila v Finland* ECHR 2006-XIII; *Menarini v Italy* App no 43509/08 (27 September 2011). See also Cases C-279/09 *DEB* [2010] ECR I-13849 [30], [31]; C-457/09 *Charty* [2011] ECR I-nyr [25]; C-272/09P *KME* [2011] ECR I-nyr [92]–[94]; C-386/10 P *Chalkor* [2011] ECR I-nyr [51]–[54]. With further explanations: H-P Nehl, 'Kontrolle kartell-rechtlicher Sanktionsentscheidungen der Kommission durch die Unionsgerichte', in T Körber, F-J Säcker and M Schmidt-Preuss (eds), *Kartell und Regulierungsrecht*, Vol II (Baden-Baden, Nomos, 2012) 113–52.

the basis of such ‘composite’ procedures is not always easy.¹⁸⁴ Input into a final decision may result from various jurisdictions, with each applying their national law.

- 47.92** Review of such by the Court of the jurisdiction which adopted the final measure may not do justice to the requirements of effective judicial review of other jurisdictions involved, for example, in the promulgation of preparatory acts which preceded the measure. There is, therefore, in these multi-jurisdictional areas a potential mismatch between procedural integration of organisationally decentralised administrations across the Member States, on one hand, and a clear separation of judicial competencies among the same Member States, on the other. These gaps between dispersed decision-making powers and judicial review are detrimental to the application of the right to an effective judicial remedy.¹⁸⁵ Examples for such multi-jurisdictional decision-making procedures are for example the areas in which alert systems exist on the basis of which executive bodies from one Member State act implementing the warning of another. These exist for example in areas of regulation of the single market in the area of food safety or medicines. Alert systems also exist in the field of visa and immigration matters for example in the context of the Schengen Information System (SIS). Composite procedures also exist in the field of planning, in environmental law, emissions trading, transport and energy and many other fields.

IV. Effective Remedies before Member State Courts and the Principle of Non-Discrimination

ELINA PAUNIO¹⁸⁶

- 47.93** The twin requirements of effectiveness and equivalence embody the general obligation of the Member States to ensure that individuals have an effective remedy for rights derived from EU law. In the absence of EU rules in the field concerned, it is for the domestic legal system of each Member State to designate, in accordance with the principle of procedural autonomy, the competent courts and tribunals, and to lay down procedural rules governing actions for safeguarding rights which individuals derive from EU law. However, in exercising its discretion in this area, the Member State must ensure that these rules are not less favourable than those governing similar domestic actions.¹⁸⁷ It is through this imperative of equivalence that the principle that likes should be treated alike extends its reach to the area of procedural rules and, more generally, the field of remedies.
- 47.94** Although the principle of non-discrimination is intimately bound up with the right to an effective remedy guaranteed in Article 47 of the Charter, the case law has yet

¹⁸⁴ HCH Hofmann, ‘Composite decision making procedures in EU administrative law’, in HCH Hofmann and A Türk (eds) *Legal Challenges in EU Administrative Law* (Cheltenham, Elgar Publishing, 2009) 136–67; H-P Nehl, ‘Legal Protection in the Field of EU Funds’ (2011) *European State Aid Law Quarterly* 629–52, 648; HCH Hofmann and M Tidghi, ‘Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks’ (2014) 20 Issue 1 *European Public Law* (forthcoming).

¹⁸⁵ See with further descriptions: HCH Hofmann and M Tidghi, ‘Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks’ (2014) 19 *European Public Law* (forthcoming).

¹⁸⁶ Legal secretary to Advocate General Nils Wahl, Court of Justice of the European Union. All views expressed are solely those of the author.

¹⁸⁷ Case C-310/09 *Accor nyr* [79] and Case C-392/04 *i-21 Germany* [2006] ECR I-8559 [57].

to clarify its impact within that context. However, the recent *Agrokonsulting*¹⁸⁸ case constitutes a cautious step towards this direction. Unfortunately, given that that judgment is silent on the substantive issues involved in making explicit the confluence of the requirements of the principle of equivalence and the right to an effective remedy under the Charter, the case sheds only limited light on the interrelationship between those parameters of judicial protection.¹⁸⁹

Closely tied to *effet utile*, the principle of equivalence obliges domestic procedural law to operate in the same way for rights which derive from domestic law and their EU law counterparts. Compliance with the principle of equivalence therefore presupposes that the principle of non-discrimination is observed in the application of national procedural provisions. A clear expression of the requirements set by the principle of non-discrimination appeared recently in the *Bulicke* case.¹⁹⁰ Here the Court was called upon to assess, for compliance with the principle of non-discrimination, a national rule pursuant to which a victim of discrimination in recruitment on grounds of age was required to introduce a claim within two months to obtain compensation. More particularly, the question raised by the referring court was whether the time-limit at issue was in accordance with primary EU law and Directive 2000/78,¹⁹¹ which establishes a general framework for equal treatment in employment and occupation. With regard to the principle of non-discrimination, the Court reiterated the foundational rule governing the application of the principle of equivalence, as expressed already in *Edis*¹⁹² and *Levez*¹⁹³ as follows:

The principle of equivalence requires that the national rule in question be applied without distinction, whether the infringement alleged is of European Union law or national law, where the purpose and cause of action are similar.¹⁹⁴

As the above expression of the principle of equivalence clearly illustrates, the Court has opted for a markedly inclusive approach in describing the content of the rule expressed by the principle of equivalence. However, it has limited the reach of that rule so that Member States are not obliged to extend their most favourable rules to actions deriving from EU law.¹⁹⁵ Thus, the rule simply entails an obligation to ensure that rights derived from EU law are offered equal protection on the procedural plane with rights originating from domestic law. To encompass the entire sphere of procedural law, the requirements stemming from the principles of equivalence apply not only to the designation of

¹⁸⁸ Case C-93/12 *Agrokonsulting* (n 137).

¹⁸⁹ In fact, it emerges from the Court's reasoning that the protection afforded by Art 47 of the Charter operates more closely with the principle of effectiveness. See in particular para 60 of the judgment. In more general terms, it can be observed that Advocate General Cruz Villalón has also briefly touched on this issue in point 114 of his opinion in Case C-617/10 *Åkerberg Fransson* nyr.

¹⁹⁰ Case C-246/09 *Bulicke* [2010] ECR I-7003.

¹⁹¹ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

¹⁹² Case C-231/96 *Edis* (n 84).

¹⁹³ Case C-326/96 *Levez* (n 86).

¹⁹⁴ Case C-246/09 *Bulicke* (n 190) [26]. See similarly for earlier expressions of this rule, Case C-326/96 *Levez* (n 86) [41]; Case C-78/98 *Preston and Others* (n 91) [55]; and Case C-63/08 *Pontin* (n 108) [45]. See also Case C-231/96 *Edis* (n 84) [36].

¹⁹⁵ Case C-246/09 *Bulicke* (n 190) [27].

the courts and tribunals possessing jurisdiction to rule on actions based on EU law but also to the definition of the procedural rules governing such actions.¹⁹⁶

47.97 As the application of the principle of equivalence bites within the delicate area of Member State procedural autonomy, the Court has in principle delegated the task of its application to national courts.¹⁹⁷ However, the Court insists on maintaining authority to interpret EU law, and thus provides helpful guidance to national courts on the meaning of the principle.¹⁹⁸ By doing so it attempts to assist the national court in undertaking the examination of relevant domestic rules.¹⁹⁹

47.98 Although the Court insists on the above division of labour, it occasionally ventures into making its own findings on compliance with the principle in the particular circumstances of the case on the basis of the information provided by the national court.²⁰⁰ Thus, in practice, although guidelines provided by the Court are intended to simply assist the national court in its task, they may sometimes leave the referring court with little or no discretion in the application of the principle.²⁰¹

47.99 But in most cases it is left to the national court ‘to determine whether the procedural rules intended to ensure that the rights derived by individuals from EU law are safeguarded under domestic law comply with that principle and to consider both the purpose and the essential characteristics of allegedly similar domestic actions.’²⁰² According to the Court, this approach is warranted because the national court alone possesses direct knowledge of national procedural rules which govern similar actions in domestic law.²⁰³ This knowledge is undoubtedly of particular significance for determining with sufficient precision whether the principle of equivalence has been complied with.²⁰⁴

47.100 In its assessment of national procedural rules under the principle of equivalence, the national court is first required to ‘consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics’.²⁰⁵ In accordance with principles laid down in the *van Schijndel*²⁰⁶ case in relation to the principle of effectiveness, the Court consistently advises national courts to measure similarity by establishing ‘objectively, in the abstract, whether the rules at issue are similar taking into account the role played by those rules in the procedure as a whole, the conduct of that procedure and any special features of those rules’.²⁰⁷

¹⁹⁶ Case C-93/12 *Agrokonsulting* (n 137). See also Case C-268/06 *Impact* (n 177) [47] and Case C-317/08 *Alassini and Others* (n 63) [49].

¹⁹⁷ Case C-246/09 *Bulicke* (n 190) [28] and [33]–[34]. See also Case C-261/95 *Palmisani* (n 85) [38].

¹⁹⁸ Case C-326/96 *Levez* (n 86) [40].

¹⁹⁹ Case C-78/98 *Preston and Others* (n 91) [104]. However, for an example of a case in which the Court decided whether a Member State rule complied with the principle of equivalence, see Case C-378/10 *VALE Eptiesi kft* (Judgment of 12 July 2012).

²⁰⁰ Point 64 of the Opinion of Advocate General Trstenjak in Case C-618/10 *Banco Español de Crédito*, nyr.

²⁰¹ Case C-63/08 *Pontin* (n 108) [59]; Case C-591/10 *Littlewoods Retail and Others*, nyr [32]–[34]; Case C-118/08 *Transportes Urbanos* [2010] ECR I-635 [43]–[46]. For a different reading of the Court’s role in the application of the principle of equivalence, see A Arnull, *The European Union and Its Court of Justice*, 2nd edn (Oxford, Oxford University Press, 2006) 333.

²⁰² Case C-591/10 *Littlewoods Retail and Others*, nyr [31].

²⁰³ *Ibid* [45].

²⁰⁴ See to that effect, Case C-317/08 *Alassini* (n 63) [50]–[51]; Case C-177/10 *Rosado Santana* nyr [91].

²⁰⁵ Case C-63/08 *Pontin* (n 108) [45].

²⁰⁶ Case C-430/93 *van Schindel* (n 99) [19].

²⁰⁷ Case C-63/08 *Pontin* (n 108) [46]; Case C-445/06 *Danske Slagterier* [2009] ECR I-2119 [41] and Case C-78/98 *Preston and Others* (n 91) [63].

In order for the principle of non-discrimination—and consequently that of equivalence—to take effect, it is of particular significance to identify national measures which function as relevant comparators and yardsticks against which compliance with the principle of non-discrimination ought to be assessed. Indeed, as is the case in all areas of non-discrimination law, the issue of identifying an appropriate comparator is also relevant here. In this respect, the case law offers a number of general criteria on the basis of which the equivalence of national legal protection with regard to the safeguarding of rights stemming from EU law can be examined. The actual assessment essentially consists in an evaluative comparison of the relevant procedural rules.²⁰⁸

In *Bulicke*,²⁰⁹ the age discrimination case, other situations in which workers were required to assert their rights within short time-limits were proposed as comparators, which the Court examined in its judgment. These included rules linked to discrimination in recruitment on grounds of sex, wrongful dismissal and claims made to have fixed-term employment contracts declared invalid, as well as limitation period clauses contained in collective agreements.²¹⁰ After careful analysis, the Court held that, subject to a contrary finding by the referring court in applying the principle of equivalence, the case-file contained no evidence suggesting infringement of the principle. 47.101

The *Transportes Urbanos*²¹¹ case reviewed a national rule which set as a precondition for bringing an action for damages against the state—following a breach of EU law by national legislation established by a judgment of the Court pursuant to Article 226 EC—the exhaustion of all domestic remedies, when such a rule did not apply to an action for damages against the state alleging breach of the Constitution by national legislation which had been established by the competent national court. Here, defining the appropriate comparator in the national setting was straightforward. The Court took the view that the two actions concerned could not be distinguished since they had exactly the same purpose, namely compensation for the loss suffered by the person harmed as a result of an act or an omission of the state.²¹² The only difference between the two actions that could be identified related to their divergent legal basis. Holding that the national rule at issue did not comply with the principle of equivalence, the Court observed that in the absence of other factors demonstrating the existence of further differences, no distinction between the two actions compared in the light of the principle could be established.²¹³ 47.102

The *Pontin*²¹⁴ case assessed national legislation, which, specifically in connection with the prohibition of dismissal of pregnant workers and workers who have recently given birth or are breastfeeding laid down in Article 10 of Directive 92/85,²¹⁵ restricted 47.103

²⁰⁸ Point 63 of the Opinion of Advocate General Trstenjak in Case C-618/10 *Banco Español de Crédito* (n 200).

²⁰⁹ Case C-246/09 *Bulicke* (n 190).

²¹⁰ *Ibid* [31]–[34]. See also Case C-63/08 *Pontin* (n 108) [45] and Case C-591/10 *Littlewoods Retail and Others* nyr [31]. For discussion of the role of national time-limits, see Ward, *Judicial Review and the Rights of Private Parties in EU Law* (n 105) 188–89. She suggests that in the field of national time-limits for bringing proceedings, the Court’s case law reveals a tendency towards conserving the relevant domestic rule. See also Case C-542/08 *Barth* [2010] ECR I-3189 [21]–[27].

²¹¹ Case C-118/08 *Transportes Urbanos* [2010] ECR I-635.

²¹² *Ibid* [43].

²¹³ *Ibid* [44]–[46].

²¹⁴ Case C-63/08 *Pontin* (n 108).

²¹⁵ Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (10th individual Directive within the meaning of Art 16(1) of Directive 89/391/EEC) [1992] OJ L348/1.

the remedies available to them to an action for nullity and reinstatement. Of particular significance for reviewing the national measure in light of the principle of equivalence was that the action was subject to particular time-limits and excluded an action for damages. More particularly, in the context of the obligation to observe the principle of non-discrimination, the issue was whether the particular remedy was comparable to other actions in employment matters, namely an action for damages and an action available in the event of dismissal on account of marriage. The Court examined these two actions available under national law as possible comparators. Although it left the final application of the principle to the referring court, the Court held, after considering the two actions in domestic law referred to in the order for reference from the standpoint of applicable time-limits and forum rules, that, at the outset, there was evidence suggesting that the procedural rules governing an action for nullity and reinstatement did not to comply with the principle of equivalence.²¹⁶ Doubts regarding compliance with the principle were raised in particular because of very short time-limits and strict forum rules applicable to an action for nullity and reinstatement.

47.104 In the specific context of consumer protection, the *Banco Español de Crédito*²¹⁷ case addressed the question whether the protection of consumers against unfair terms in commercial practices under Directive 93/13²¹⁸ has the same procedural guarantees at national level as the protection of consumers against infringements of similar rights protected under domestic law. In that regard, a breach of the principle of equivalence could be taken to exist only in the case of comparatively unfavourable procedural rules governing enforcement of claims stemming from the Directive.²¹⁹ However, making assertions that could arguably be interpreted as stepping into the area belonging to the national court's monopoly over findings of fact and application, the Court could find no evidence in the case-file suggesting that in the context of the national order for payment procedure, the applicable domestic law of civil procedure would lay down less favourable rules governing the review of unfairness of terms in consumer credit agreements, in accordance with Directive 93/13, than for the review of the compatibility of such consumer credit agreements with national law.²²⁰

47.105 In the *Agrokonsulting*²²¹ case, the Court was asked to rule on the compatibility with the principles of equivalence (and with the principle of effectiveness as well as Article 47 of the Charter) of a Bulgarian jurisdictional rule, which conferred on a single court all disputes concerning decisions of a national authority responsible for the payment of agricultural aid under the Common Agricultural Policy. Given that the Court was unable to identify more favourable treatment relating to rights stemming from national law, it did not find a breach of the principle of equivalence in the case. In fact, it considered—based on the information provided by Bulgarian authorities and subject to verification by the referring court—that the comparable rights deriving from national law were governed by the same procedural rules as those governing the application of

²¹⁶ Case C-63/08 *Pontin* (n 108) [59].

²¹⁷ Case C-618/10 *Banco Español de Crédito* (n 200).

²¹⁸ Council Directive on unfair terms in consumer contracts [1993] OJ L 95/29.

²¹⁹ Case C-618/10 *Banco Español de Crédito* (n 200), point 62 of the Opinion of Advocate General Trstenjak.

²²⁰ *Ibid* [48] and point 65 of the Opinion of Advocate General Trstenjak in the case.

²²¹ Case C-93/12 *Agrokonsulting* (n 137).

rights deriving from EU law.²²² Notwithstanding this conclusion, however, it cannot be ruled out that in subsequent case law, the Court will identify a breach of the principle of equivalence in circumstances which will, by the same token, allow it to cast more light on the requirements of the right to an effective judicial remedy under the Charter that ought to equally inform the application of the principle of equivalence.

At this juncture, it is also interesting to note that in that case, Advocate General Bot suggested that the questions put to the Court ought to be solely examined under Article 47 of the Charter. According to the Advocate General this was so because the principles of equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law.²²³ By contrast with the approach suggested by the Advocate General, however, the Court also attached particular importance to the principle of loyal cooperation enshrined in Article 4(3) TFEU on which those twin principles are founded.²²⁴ Clearly, the described difference in approaches does not affect the actual outcome of the analysis. However, it cannot be ruled out, as one commentator has suggested, that this difference signals a certain willingness by the Court to clearly demarcate between, on the one hand, the principle of equivalence (and that of effectiveness) and Article 47 of the Charter, on the other.²²⁵ **47.106**

More fundamentally, as the Court observed in *Pasquini*,²²⁶ the imperative of equivalence constitutes a concrete expression of the general requirement of equal treatment.²²⁷ **47.107** A clear articulation of this connection appeared recently in the above *Pontin* case, where the specific remedy in case of dismissal available to pregnant women also came under scrutiny with regard to the requirement of equal treatment provided for in Articles 2 and 3 of Directive 76/207.²²⁸ While the Court left formal verification of compliance to the referring court, it held that EU law precludes national legislation which denies a pregnant employee who has been dismissed during her pregnancy the option to bring an action for damages while such an action is available to any other dismissed employee, where such a limitation on remedies constitutes less favourable treatment of a woman related to pregnancy.²²⁹ As this case illustrates, the imperative of equivalent procedural rules is of particular significance for the realisation of the right to non-discrimination in more general terms. In this respect, an intimate link can be observed between the principle of equivalence and Article 20 of the Charter, which contains the umbrella provision on equal treatment.²³⁰

Indeed, taking account of the protection afforded to both the right to an effective remedy and equal treatment under the Charter, the Court now possesses a rich armoury of tools for tackling problems caused by discriminatory national remedies for the realisation of the individual right to an effective remedy. **47.108**

²²² Case C-93/12 *Agrokonsulting* (n 137) [46], [47].

²²³ *Ibid* points 29 and 30 of the Opinion of Advocate General Bot.

²²⁴ *Ibid* [36].

²²⁵ F Gazin, 'Droit à un recours effectif. Principe d'effectivité et principe d'équivalence' (2013) *Europe. Actualité du droit de l'Union européenne* 16–17, 16.

²²⁶ Case C-34/02 *Pasquini* [2003] ECR I-6515.

²²⁷ *Ibid* [70]. See also Case C-65/95 *Shingara and Radiom* [1997] ECR I-3343 [25]–[26].

²²⁸ Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40, as amended by Directive 2002/73/EC [2002] OJ L269/15.

²²⁹ Case C-63/08 *Pontin* (n 108) [70]–[76].

²³⁰ For detailed discussion on Art 20 of the Charter, see the contribution of Mark Bell in this volume.

- 47.109** Lastly, similarly to a number of other Charter provisions, we can observe a connection to the ECHR, which enjoys special significance in the interpretation of EU law. Here, Articles 13 and 14 ECHR which contain the Convention equivalents of Articles 47 and 20 of the Charter are of particular relevance. While Article 47 of the Charter appears to offer more robust protection than Article 13 ECHR, since the right to an effective remedy extends to courts and not merely to national authorities, it cannot be ruled out that both Articles 13 and 14 ECHR may function as useful parameters for demarcating the contours of the principle of equivalence also in the context of Article 47 of the Charter.²³¹
- 47.110** With regard to Article 13 ECHR, the Strasbourg Court has consistently held that the *raison d'être* of Article 13 stems from the need to guarantee the availability of a remedy to enforce the substance of the rights and freedoms enshrined in the Convention.²³² The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the ECHR and to grant appropriate relief. Undoubtedly, a remedy found to be discriminatory would not satisfy the requirements of the Strasbourg Court's case law. However, given that the test employed by the Strasbourg Court turns, in the final analysis, on whether remedies available are 'adequate' and 'effective' in order to remedy the alleged violation of the substantive Convention right at issue, it seems to translate with relative ease into the principle of effectiveness in the EU context.
- 47.111** The importance of Article 14 is, on the other hand, played down by the fact that it does not enjoy a self-standing status in the Convention architecture.²³³ Although the application of Article 14 does not presuppose breach of another Convention provision, its application requires that the facts at issue fall within the ambit of one or more of the substantive provisions of the Convention.²³⁴ That said, given the growing attention it receives in the case law,²³⁵ it may have lateral bearing on the interpretation of Charter rights, including the principle of equivalence. This is so, more particularly, because Article 14 ECHR is now reinforced by Protocol 12, which introduces a general prohibition of discrimination also to the Convention architecture.²³⁶ More specifically, and in light of the fact that the Court does not apply a justification test in applying the principle of equivalence (in the context of Art 47 of the Charter), the Strasbourg case law may provide helpful guidance for, *inter alia*, identifying appropriate comparators for the application of the principle of equivalence.

²³¹ T Tridimas, *General Principle of EU Law*, 2nd edn (Oxford, Oxford University Press, 2006) 72–73. However, as Mark Bell notes in this volume, it may be more accurate to draw parallels between Art 14 ECHR and Art 21 of the Charter, which contains an arguably non-exhaustive list of prohibited grounds of discrimination. In fact, the Explanations attached to the Charter clearly link Art 14 ECHR to Art 21, but not Art 20.

²³² See, recently, *Kuri and others v Slovenia* App no 26828/06 (26 June 2012) [369]–[372].

²³³ See R O'Connell, 'Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR' (2009) 29(2) *Legal Studies: The Journal of the Society of Legal Scholars* 211–29.

²³⁴ See, to that effect, *inter alia*, *Zarb Adami v Malta* ECHR 2006-VIII [42].

²³⁵ See, in particular, C Danesi, 'How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its nondiscrimination jurisprudence' (2011) 9 (3–4) *International Journal of Constitutional Law* 793–807, and M Cartabia, 'The European Court of Human Rights: Judging nondiscrimination' (2011) 9 (3–4) *International Journal of Constitutional Law* 808–14.

²³⁶ See, on the application and scope of the general prohibition on discrimination contained in Protocol 12, *Sejdic and Finic v Bosnia and Herzegovina* App nos 27996/06 and 34836/06 (22 December 2009) [53]–[56].

V. Damages for Breach of the Charter

PEKKA AALTO²³⁷

(a) Damages as a Remedy for Breach of the Charter

Article 47 of the Charter does not expressly mention damages as a remedy. Some authors consider the availability of damages for breaches of the Charter under Article 47 as an obvious fact,²³⁸ while some, otherwise detailed, commentaries on the Charter limit the discussion of this topic to mentioning damages liability only in the context of judicial wrongs (as established in *Köbler* and subsequent case law).²³⁹ 47.112

Yet damages liability in general in the EU seems to play an ever-increasing role. Its absence can be fatal. In fact, the Court of Justice took the view in its Opinion on the European Community Patent Court system²⁴⁰ that the system was incompatible with EU law because there was no damages liability available in the event that a decision of the envisaged patent court were in breach of EU law. 47.113

Of course, the prospect of obtaining compensation for breach of fundamental rights is no new issue: it has long been available for the breach of the ECHR,²⁴¹ and damages have also been made available for such breaches at national level by the various states party to the ECHR.²⁴² Damages liability of breaches of the Charter can be an essential element of the remedies to be made available to protect Charter rights.²⁴³ In the EU system of remedies, liability in damages can be perceived as a remedy of last resort. If other remedies are available, such as an action for annulment of the act causing damage, or enforcement of an EU measure through the doctrine of direct effect, then recourse should first be made to these remedies. They should be called on first to avoid and mitigate loss. The same principles apply to breach of Charter rights. 47.114

Therefore, it is submitted that, on its proper construction, Article 47 of the Charter encapsulates a remedy in damages. In fact, it is inherent in the dual system of public liability in EU law, namely: 47.115

- the liability of the European Union and its institutions to pay damages for breaches of EU law (EU liability), which was established as far back as the Treaty of Rome and is currently re-stated in Article 340(2) TFEU; and

²³⁷ Legal Secretary, Chambers of Advocate General Niilo Jääskinen, Court of Justice of the European Union. All views expressed are personal to the author.

²³⁸ P Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford, Oxford University Press, 2010) 242.

²³⁹ J Meyer (ed), *Charta der Grundrechte der Europäischen Union*, 3rd edn (Baden-Baden, Nomos, 2011) 576.

²⁴⁰ Opinion 1/09 *Draft Agreement on the creation of a European and Community Patent Court* [2011] ECR I-0000 [86]–[89].

²⁴¹ See J-P Costa, ‘The Provision of Compensation under Article 41 of the European Convention on Human Rights’, in D Fairgrieve and M Andenas, et al (eds), *Tort Liability of Public Authorities in Comparative Perspective* (London, BIICL, 2002).

²⁴² See in general D Shelton, *Remedies in International Human Rights Law* 2nd edn (Oxford, Oxford University Press, 2006).

²⁴³ A Ward, ‘Damages under the EU Charter of Fundamental Rights’ (2011) *ERA Forum* 589–611.

- the liability of the Member States to pay damages for breaches of EU law (Member State liability), which has been established in Court of Justice case law since 1991. This occurred most notably in *Francovich*,²⁴⁴ and was further developed in *Brasserie du Pêcheur and Factortame*²⁴⁵ and *Bergaderm*.²⁴⁶

47.116 Even though these two different forms of liability entail separate procedural rules—including those appertaining to jurisdiction—the three fundamental criteria for substantive damages liability are the same. They were unified relatively recently into a single thread of legal principle in *Bergaderm*.²⁴⁷ Since that case, both EU damages liability and Member State damages liability require fulfilment of three conditions: namely that there is a rule of law granting rights to individuals, that this rule has been breached in a sufficiently serious manner that there is a causal link between the damage and the action/inaction by EU²⁴⁸ or Member State.²⁴⁹

Au: it reads more like two conditions - also you refer to only two key criteria in the next para

47.117 I will first address the role of the Charter in the context of EU institutional liability. The focus will be on the potential effects of the Charter on the two key criteria of the damages liability, namely the rights infringed ('granting of rights to individuals') and the requisite seriousness of such breach ('sufficiently serious breach of EU law').²⁵⁰ Relevant case law will be discussed, to the extent that it has been elaborated. I will then turn to Member State damages liability. It will be concluded that the Charter carries the potential to expand the scope of rights available for invoking damages liability, and that it may be used to fill the gaps in the existing remedial system. In other words, it is a remedy in the making.

(b) *The Role of the Charter in EU Institutional Liability*

Scope of Application

47.118 With respect to EU institutional liability in general,²⁵¹ it is important to recall that the Charter is fully applicable to all the EU institutions (Art 51(1)) and its offices, bodies and agencies. For EU damages liability under the Charter, there is even a specific

²⁴⁴ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* (n 121).

²⁴⁵ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* (n 124).

²⁴⁶ Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291.

²⁴⁷ *Ibid.*

²⁴⁸ Joined Cases C-6/90 and C-9/90 *Francovich and Others* (n 121) [35]; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* (n 124) [31], [51]; and Case C-445/06 *Danske Slagterier* [2009] ECR I-2119 [19], [20]; Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635 [30]; Case C-429/09 *Fuß* [2010] ECR I-12167 [47] and Case C-420/11 *Leth* [2013] ECR I-0000 [41].

²⁴⁹ Case C-352/98 P *Bergaderm and Goupil v Commission* (n 246) [41], [42]; Case C-282/05 P *Holcim (Deutschland) v Commission* [2007] ECR I-2941 [47]; and Joined Cases C-120/06 P and C 121/06 P *FIAMM and Others v Council and Commission* [2008] ECR I-6513 [172], [173] and Case T-2/07 *Spain v Commission* [2013] ECR II-0000 [60].

²⁵⁰ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* (n 124) [XX].

²⁵¹ For EU institutional damages liability in general, see eg P Aalto, *Public Liability in EU law: Brasserie, Bergaderm and beyond* (Oxford, Hart Publishing, 2011); A Biondi and P Farley, *The Right to Damages in European Law* (Alphen aan der Rijn, Kluwer Law International, 2009); F Fines, *Étude de la responsabilité extra-contractuelle de la Communauté économique européenne* (Paris, LGDJ, 1990); K Gutman, 'The evolution of the action for damages against the European Union and its place in the system of judicial protection' (2011) *Common Market Law Review* 695–750; and J Wakefield, 'Retrench and Reform: The Action for Damages', in P Eeckhout and T Tridimas (eds), *28 Yearbook of European Law 2009* (Oxford, Oxford University Press, 2010).

provision in Article 41(3) of the Charter, which at first sight seems to repeat the Treaty based rule on EU damages liability, already laid down in Article 340(2) TFEU. While its presence may seem superfluous, it emphasises the importance of damages liability in the EU institutional context.

Only the EU Courts are competent to hear damages actions against EU institutions.²⁵² 47.119 The action must be brought, in first instance, before the General Court.²⁵³ An appeal lies to the ECJ. EU Courts are solely competent, and EU law is the sole body of legal rules applicable in determining the damages liability of EU bodies. A large number of damages actions have been brought against the EU institutions since the 1950s, but successful ones have been rather rare.

Granting of Rights to Individuals

The first condition to be satisfied in establishing EU damages liability is identification by 47.120 the applicant of a norm of EU law to which damages liability attaches. In the context of the Charter, this means a rule of law enshrined in the charter that grants rights to individuals.

There is a structural or historical issue that may facilitate the ‘invocability’ of Charter 47.121 rights in the context of damages. For a very long period of time, the test for damages liability of the EU with respect to legislative measures involving choices of economic policy required proof of ‘a sufficiently serious breach of a superior rule of law for the protection of the individual’.²⁵⁴ This requirement created a considerable body of case law in which the existence of such a rule and its breach was shown. It could well be argued that the rights protected by the Charter in themselves amount to superior rules of law for the protection of the individual.

But in practice this burden of proof was very difficult to satisfy, so most cases were 47.122 lost. Yet, given the status of the Charter as forming part of the primary law of the European Union (see Art 6(1) TEU) the pre-*Bergaderm* formula is a useful starting point for exploring the circumstances in which breach of the Charter might attract a claim in damages. Further, there are a range of rights which are now enshrined in the Charter, and which have already been invoked in damages liability cases against the EU institutions. The right to good administration is one of them (see below).

Sufficiently Serious Breach

Before *Bergaderm* the decisive question entailed identifying the type of the norm that 47.123 was said to have been breached. If it was an administrative decision a simple breach was enough. If however, it was a legislative measure, or even a legislative measure involving choices of economic policy, the threshold sky-rocketed.

In *Bergaderm*, the Court set aside the hitherto applied dichotomy between 47.124 administrative and legal acts, and stated that it was no longer the decisive criterion. Instead the decisive criterion, both for EU and Member State liability, was whether the EU body or national authority had a large or narrow discretion when adopting the act

²⁵² Case C-103/11 P *Commission v Systran and Systran Luxembourg* [2013] ECR I-0000 [60].

²⁵³ In staff cases, all actions, including damages actions, are in first instance brought before the Civil Service Tribunal. An Appeal lies to the General Court.

²⁵⁴ Case 83/76 *Bayerische HNL and Others v Council and Commission* [1978] ECR 1209 [4].

in question. Thus, if it had a large margin of discretion, a sufficiently serious breach of EU law was required.²⁵⁵ In contrast, if it had only reduced discretion, on perhaps no discretion at all, a mere infringement would suffice.

- 47.125** How does this work in the context of the Charter? In comparison with the rights invoked in post-*Bergaderm* case law on EU liability, the Charter, due to its very nature, is a more general instrument. Restrictions may potentially be placed on many rights, thus leaving leeway for discretion, because sometimes they are to be enjoyed in accordance with Union law and national laws and practices. Generally worded rights of this kind, such as, for example, the Article 30 right to protection against unjustified dismissal may therefore struggle to support a damages claim. On the other hand, other rights in the Charter are much more precisely defined, and leave less margin for discretion. An example is the Article 5 prohibition on slavery and forced labour. Thus, a damages case for infraction of this right is more likely to prosper.

Case Law

- 47.126** Clear-cut cases in which the EU courts address EU damages liability in the context of the Charter are still in the pipeline. However, the following examples may provide an indication of how the principles might develop.

Lengthy Proceedings

- 47.127** The first sentence of Article 47(2) of the Charter states that ‘[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.’ The Court of Justice has thus far considered whether a reduction of a fine imposed by the Commission had to be granted due to excessive length of proceedings before the EU courts. Thus in *Baustahlgewebe*²⁵⁶ the ECJ reduced the fine imposed on the applicant by EUR 50,000 due to the excessive length of the proceedings before the General Court.²⁵⁷
- 47.128** Excessive duration of administrative proceedings before the Commission may lead to damages liability. This occurred in a staff case, *A and G v Commission*, before the Civil Service Tribunal, although the Charter was not cited in the judgment.²⁵⁸

Right to Good Administration

- 47.129** Article 41(1) and (2) of the Charter now enshrines the right to good administration. Breach of this principle had already been examined in the damages context prior to its

²⁵⁵ Case T-31/07 *Du Pont de Nemours (France) and others v Commission* [2013] ECR II-0000.

²⁵⁶ Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417.

²⁵⁷ This issue was also addressed in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375 and Case C-385/07 P *Der Grüne Punkt—Duales System Deutschland v Commission* (appeal dismissed) [2009] ECR I-6155. See also Opinion of Advocate General Sharpston of 30 May 2013 in Case C-58/12 P *Groupe Gascogne SA* [pending] ECR I-0000 (appeal against case T-72/06 *Groupe Gascogne v Commission*).

²⁵⁸ Joined Cases F-124/05 and F-96/06 *A and G v Commission* [2010] ECR (Judgment of 13 January 2010) [393]: ‘The reasonableness of the duration of the proceedings must be assessed in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (see, to that effect, Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 29 and the case-law cited).’

inscription into the Charter. Infraction of the principle of ‘sound administration’ had been found, and led in some cases to a payment of compensation. Two examples are *AFCOn Management Consultants and others v Commission*²⁵⁹ and *Agraz and others v Commission*, where damages were awarded only in the third judgment in this series of litigation.²⁶⁰ However, the case law is not fully coherent.²⁶¹

Unsuccessful Cases

There is an ever-growing number of cases where the Charter has been invoked in the damages context against the Union, but unsuccessfully (see eg *Fahas v Council*²⁶²). Two types of cases can be distinguished. The first category comprises the cases where the relevance of the Charter in general has not been established. The second relates to cases where the relevance of the Charter has been made out, but where the Court has dismissed the damages action in relation to the Charter because the conditions for liability have not been fulfilled.²⁶³

(c) The Role of the Charter in Member State Liability

Scope of Application

For Member State liability,²⁶⁴ the limitation prescribed by the scope of application of the Charter plays an important role, and one which is not pertinent to EU institutional liability. The starting point here is that the Charter is only applicable to the Member States in a limited manner.²⁶⁵ As the Court recalled in *Pringle*, pursuant to Charter Article 51(1) of the Charter, the provisions of the Charter ‘are addressed to the Member States only when they are implementing Union law. Under Article 51(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.’²⁶⁶ In the absence of this link, the Court will declare that it manifestly lacks jurisdiction to hear an EU damages claim against a Member State.²⁶⁷

As mentioned above, EU damages liability is based on express provision laid down in the Lisbon Treaty, namely Article 340(2). However, the foundations of the Member State liability were laid exclusively by the case law of the Court of Justice. They were later merged in *Bergaderm*.

²⁵⁹ Case T-160/03 *AFCOn Management Consultants and others v Commission* [2005] ECR II-981.

²⁶⁰ Case T-285/03 *Agraz and others v Commission (No 1)* [2005] ECR II-1063; Case C-243/05 P *Agraz v Commission* [2006] ECR I-10833 (referred back to CFI) and Case T-285/03 *Agraz and others v Commission (No 2)* [2008] ECR II-285*, Summ.pub. (Judgment of 26 November 2008).

²⁶¹ For further discussion, see Aalto, *Public Liability in EU Law* (n 251), p 121 et seq.

²⁶² Case T-49/07 *Fahas v Council* [2010] ECR I-0000.

²⁶³ Case T-333/10 *ATC and others v Commission* [2013] ECR II-0000 [188].

²⁶⁴ On Member State liability, see eg Aalto, *Public Liability in EU law* (n 251) and Biondi and Farley, *The Right to Damages in European Law* (n 251).

²⁶⁵ H Kaila, ‘The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States’, in P Cardonnel and A Rosas, et al (eds), *Constitutionalising the EU Judicial System. Essays in Honour of Pernilla Lindh* (Oxford, Hart Publishing, 2012). See also the chapter on Art 51 by Angela Ward in this commentary.

²⁶⁶ Case C-370/12 *Pringle* [2012] ECR I-0000 [179].

²⁶⁷ Case C-369/12 *Corpul Național al Polițiștilor* [2012] ECR I-0000 [14].

- 47.133** National courts are solely competent to hear the initiation of EU damages actions against Member States. Thus if any attempt were made to bring a direct damages action before the Court of Justice of the European Union, it would be met with a declaration that the Court manifestly lacked jurisdiction to hear the case.²⁶⁸ The Court of Justice can only become involved in damages actions against Member States through the Article 267 TFEU preliminary rulings procedure.²⁶⁹ To date there have been some 30–40 cases where conditions relating Member State liability have been interpreted before the ECJ.
- 47.134** Further, with respect to Member State liability, national law plays an important complementary role. For examples, national procedural rules are to govern EU damages claims against Member State authorities, provided that they do not render the pursuit of a damages claim impossible in practice or excessively difficult, and there is no infringement of the principle of equivalence.²⁷⁰ In contrast, the procedural aspects of damages claims against EU institutions is governed by the Statute of the Court of Justice, its rules of procedure, and the case law elaborated by the Court of Justice with respect to these instruments.

Granting of Rights to Individuals

- 47.135** The EU provisions invoked against Member States have typically been those contained in Treaty provisions, legislation (directives perhaps more commonly than regulations) or a combination of the two. General principles of EU law are rarely invoked with a view to claiming damages, perhaps because they are less concrete than legislative measures. Again, despite this general trend, there have been some exceptions. An example is found in *Eman and Sevinger*,²⁷¹ where the right to vote in European Parliament elections was invoked prior to the passage of the Charter. This right is now protected by Charter Article 39. Therefore, the fact that the Charter, in many respects, is a reflection of general principles of EU law in no way rules it out as an instrument on which a damages claim against a Member State may be based.

Sufficiently Serious Breach

- 47.136** In the context of Member State liability, the Court has held that a restrictive approach to damages is warranted when Member States have a wide discretion.²⁷² For example, in the context of a directive vesting such a discretion, the Court of Justice observed that the relevant provision was ‘imprecisely worded’,²⁷³ and was ‘reasonably capable’ of being given the interpretation afforded by the Member State.²⁷⁴ The Court observed that the Member State had acted in ‘good faith’ and on the basis of arguments that were not ‘entirely devoid of substance’.²⁷⁵ The interpretation given was not ‘manifestly contrary

²⁶⁸ Case T-354/09 *Goldman Management v Commission and Bulgaria* [2009] ECR (order of 19 November 2009) [12]–[16].

²⁶⁹ Case 283/81 *CILFIT* [1982] ECR 3415 and Case C-617/10 *Åkerberg Fransson* [2013] ECR I-0000 [47].

²⁷⁰ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* (n 124) [70].

²⁷¹ Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055.

²⁷² Case C-392/93 *British Telecommunications (No 1)* [1996] ECR I-1631 [40].

²⁷³ *Ibid* [43].

²⁷⁴ *Ibid*.

²⁷⁵ *Ibid*.

to the wording of the directive or to the objective pursued by it²⁷⁶ and no guidance was available either from the case law of the Court or objection by the Commission as to the interpretation of the provision in question.²⁷⁷

It is to be expected that the Court of Justice will undertake a similar exercise if it is ever called on to determine whether a Member State breach of the Charter has been sufficiently serious. All of the above-mentioned factors will be taken into account to determine whether breach of a Charter provision vesting individuals with rights has been sufficiently serious to merit an award of damages. **47.137**

Conclusion

The development of damages liability under the charter, both for EU institutions and Member States, will be a thrilling exercise. There is ample scope for the case law that has been elaborated pursuant to Article 340(2) TFEU with respect to damages liability of EU institutions, and that that is applicable to Member States through the rule on state liability, to be further adapted to ensure that damages are available for breach of the Charter in the appropriate cases. But while the contours of the established principles are clear, there is much legal terrain yet to be traversed. **47.138**

VI. Effective Judicial Remedies before the Court of Justice

LAURENT PECH²⁷⁸ AND ANGELA WARD²⁷⁹

It is impossible to assess the actual or potential impact of Article 47 on the judicial remedies available before the Court of Justice without first mapping the avenues of redress and remedies that are provided under the Lisbon Treaty. In contrast with the relative silence in primary EU law on the remedial scheme for challenging EU law, or seeking its enforcement, through the national courts of the Member States, the Lisbon Treaty sets out in detail of both the avenues for challenging EU measures before the General Court, and the remedies and core procedural rules that are applicable to such actions. Remaining key principles are set out in the Statute of the Court of Justice and in its rules of procedure.²⁸⁰ The principle elements of this legal architecture are as follows. **47.139**

The first paragraph of Article 263 TFEU vests the Court of Justice of the EU²⁸¹ with jurisdiction to review the legality of acts, other than recommendations and opinions, of the Council, the Parliament, the Commission, and bodies, offices and agencies of the Union intended to produce legal effects vis-à-vis third parties, with the fifth subparagraph of Article 263 adding that acts ‘setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought **47.140**

²⁷⁶ Ibid

²⁷⁷ Ibid [44].

²⁷⁸ Professor of European Law, Middlesex University London.

²⁷⁹ Référendaire, Court of Justice of the European Union; Visiting Professor, Birkbeck College, University of London.

²⁸⁰ [2012] OJ L265/1.

²⁸¹ Pursuant to Art 19(1) TEU, the ‘Court of Justice of the European Union shall include the Court of Justice, the General Court, and specialised courts.’

by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.²⁸²

47.141 The second paragraph of Article 263 TFEU lays out the grounds on which such challenge can be brought, but these have been comprehensively expanded in the case law.²⁸³ In considering the scope of the judicial review which the Court of Justice is able to afford, it is important to be mindful of the attenuation of this jurisdiction appearing in Articles 275 and 267 TFEU.²⁸⁴ With regard to the former, the Court of Justice has no ‘jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions’, although it does, pursuant to the second paragraph of Article 275, retain jurisdiction with respect to Article 40 TEU (implementation of the CFSP not to impinge on EU competences)²⁸⁵ and the review the legality of decisions providing for the restrictive measures against natural and legal persons adopted by the Council on the basis of Chapter 2 of Title V of the TEU.²⁸⁶

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47.142 With regard to the latter, Article 276 preserves some of the restriction on judicial review of measures taken under the auspices of the area of freedom security and justice which existed prior to the Lisbon Treaty.²⁸⁷ Article 276 states that in

exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

47.143 This applies to policing and criminal law measures.

47.144 The entities entitled to institute Article 263 review are also laid out in that provision. They are the Member States, the European Parliament, the Council and the Commission, while the third sub-paragraph of Article 263 adds that the Court ‘shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives’.

47.145 As is well known, a facility for individuals (or private parties) to challenge, before the General Court, acts ‘addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures’ is provided by the fourth paragraph of

²⁸² Some agencies have already adopted such principles. For example, the decisions of the European Chemicals Agency that are appealable to its Board of Appeal are set out in Art 91 of the REACH Regulation and Art 77 of the Biocidal Products Regulation. See (i) Regulation 1907/2006 and (ii) Regulation (EU) 528/2012 concerning the making available on the market and use of biocidal products [2012] OJ L167/1.

²⁸³ For the definitive word see T Tridimas *The General Principles of EU Law* (n 231).

²⁸⁴ For further discussion and references, see L Pech, ‘A Union founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’ (2010) 6 *European Constitutional Law Review* 359.

²⁸⁵ See eg Case C-91/05 *Commission v Council* [2008] ECR I-3651.

²⁸⁶ Case C-584/10 P *Commission and Others v Kadi* (Judgment of 18 July 2013).

²⁸⁷ For more detailed discussion see eg A Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford, OUP, 2009); S Douglas-Scott, ‘The Rule of Law in the European Union: Putting the Security into the Area of Freedom, Security and Justice’ (2004) 29 (2) *European Law Review* 219.

Article 263.²⁸⁸ It complements the indirect routes of challenge to the validity of EU measures which is set out in Article 267 TFEU, and the plea of illegality provided by Article 277. The latter allows individuals to collaterally contest the legality of an act of general application adopted by an institution, body, office, or agency of the Union, if it arises in the context of challenge to another (subordinate) measure, either before the General Court in Article 263 nullity proceedings, or in Article 267 validity review via a request for a preliminary ruling. Collateral challenge via Member State courts is only permissible if ‘it is not obvious’²⁸⁹ that the measure collaterally challenged could have been attacked through Article 263 nullity proceedings, due to the applicant being directly and individually concerned by it.²⁹⁰

The fifth sub-paragraph of Article 263 sets the time limit for bringing proceedings under that provision. They are to be instituted ‘within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.’ Further definition is given to this rule in Chapter 3 of the Court’s rules of procedure.²⁹¹ 47.146

A description of the scheme for accessing the Court of Justice would be incomplete without reference to the following. Article 265 TFEU establishes the action for failure to act. It allows the EU institutions, the Member States, and individuals in prescribed circumstances, to bring an ‘action for failure to act’ against the European Parliament, the Council, the Commission, the European Central Bank, and bodies offices and agencies of the Union. Litigation of this kind is relatively rare, and can only arise in the event of the failure of the relevant EU body to meet a positive obligation imposed on it by EU law. 47.147

Pursuant to Article 269 TFEU, the Court of Justice has jurisdiction to rule on the legality an act adopted by the European Council or the Council under Article 7 TEU but ‘solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.’ This jurisdiction has never been exercised, and appertains to suspension, under Article 7 TEU, of Member State rights for ‘clear risk of a serious breach’ or ‘the existence of a serious and persistent breach by a Member State of the values referred to in Article 2’ of the TEU.²⁹² 47.148

More rigorous recourse has been made to Article 270 TFEU, and the jurisdiction of the Court of Justice to rule on disputes between the EU and its servants,²⁹³ Article 271 TFEU and the Court’s jurisdiction over disputes concerning the European Investment 47.149

²⁸⁸ The classical test for individual concern was established in Case 25/62 *Plaumann v Commission* [1963] ECR 95, and remains good law to date. See most recently the judgment of the Court of Justice of 3 October 2013 in Case C-583/11P *Inuit Tapiriit Kanatami v Parliament and Council*, and the Opinion of AG Kokott of 17 January 2013. For a comprehensive analysis of the Court’s case law on direct and individual concern, see Ward *Judicial Review and the Rights of Private Parties in EU Law* (n 105) ch 6 and references cited therein.

²⁸⁹ Case C-408/95 *Eurotunnel SA and Others* [1997] ECR I-6315 [29].

²⁹⁰ The leading case on this remains Case C-188/92 *TWD Textilwerke Deggendorf v Germany* [1994] ECR I-833.

²⁹¹ See recently Joined Cases I-478/11 P to I-482/11 P *Laurent Gbagbo* (Judgment of 23 April 2013). For a discussion of the rules relating to this time-limit and its compliance with rights now encompassed by Art 47 see A Ward, ‘National and EC Remedies under the EU Treaty; Limits and the Role of the ECHR’ in C Barnard and O Odudu (eds), *The Outer Limits of the Treaty* (Oxford, Hart Publishing, 2011) 229, 347 to 350.

²⁹² For more detailed discussion W Sadurski, ‘Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jorg Haider’ (2010) 16 *Columbia Journal of European Law* 385.

²⁹³ This jurisdiction is primarily exercised by the European Union Civil Service Tribunal.

Bank, and Article 272 TFEU and its jurisdiction over arbitration clauses contained in contracts brought on behalf of the Union.²⁹⁴

- 47.150 As far as remedies are concerned, the Lisbon Treaty lays out a complete scheme, and one which the Court of Justice has ruled it has no jurisdiction to supplement.²⁹⁵ Under Article 264 TFEU the Court of Justice has authority to declare acts of the EU void, while under the first sub-paragraph of Article 266 the ‘institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment’ of the Court. However Article 278 TFEU vests the Court of Justice of the EU with a discretion to ‘order that the application of the contested act be suspended’, which it can exercise either in cases brought from national Courts under Article 267 TFEU or by way of direct action.
- 47.151 The Court of Justice is empowered, under Article 279 TFEU to prescribe interim measures, and this facility is further addressed in Chapter 10 of the Court’s Rules of Procedure.²⁹⁶ It can award damages against EU institutions, and indeed its agencies²⁹⁷ due to Articles 268 and 340 TFEU, and, as has been explained in other parts of this chapter,²⁹⁸ the condition for the award of compensation against EU institutions have largely been merged with the conditions for State liability of Member States for breach of EU law, as developed in the *Brasserie du Pêcheur* line of case law.²⁹⁹
- 47.152 With regard to the enforcement of judgments of the Court of Justice, this occurs, in Article 267 reference proceedings, by the grace of the enforcement of the judgment issues by the national Court which referred an Article 267 question. Otherwise, the conditions for the enforcement of the Court’s judgments are governed by Articles 280 and 299 TFEU. Pursuant to Article 260(1) TFEU, if the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the state shall be required to take the necessary measures to comply with the judgment of the Court. Pursuant to sub-paragraphs (2) and (3) of Article 260, the Court may, in proceedings instituted directly to it by the Commission, order a lump sum payment for failure of a Member State to comply with EU law.³⁰⁰
- 47.153 How then, might Article 47 of the Charter influence the interpretation of these principles in the light of the established case law that has already interpreted them?
- 47.154 The most widely discussed concern in academic literature and elsewhere,³⁰¹ is that the rigorous test of ‘direct and individual concern’ that individuals have traditionally been required to satisfy in order to institute Article 263 nullity review breaches the

²⁹⁴ Art 273 TFEU further states that the ‘Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.’

²⁹⁵ See Case C-50/00 *UPA v Council* [2002] ECR I-6677 [44]–[45]. Compare the Opinion of Advocate General Jacobs in that case, who took the view that at para 75 of his Opinion ‘the wording of the fourth paragraph of Article 230’ did not exclude the Court from ‘re-considering its case law on individual concern.’

²⁹⁶ For a discussion of the compatibility of these rules with the rights now enshrined in Art 47 see Ward ‘National and EC Remedies under the EU Treaty; Limits and the Role of the ECHR’ (n 291) 350–53.

²⁹⁷ Case T-411/06 *Sogelma v EAR* [2008] ECR II-2771 [33]–[57].

²⁹⁸ See in particular the contribution by Pekka Aalto in section D.V of the chapter.

²⁹⁹ Case C-48/93 *Brasserie du Pêcheur and Factortame* (n 124).

³⁰⁰ For a discussion see S Peers, ‘Sanctions for Infringement of EU Law after the Treaty of Lisbon’ 18 *European Public Law* (2012) 31.

³⁰¹ See notably the Opinion of Advocate General Jacobs in Case C-50/00 *UPA v Council* [2002] ECR I-6677.

right of access to a Court, long recognised in the EU legal order due to Articles 6 and 13 ECHR³⁰² and now part of Article 47 of the EU Charter.³⁰³ The test has been denounced in some circles as ‘unacceptable’.³⁰⁴

Under the case law of the Strasbourg Court, for matters affecting ‘civil rights and obligations’ and ‘criminal charges’ under Article 6(1) ECHR, states parties are precluded from imposing barriers that impair the ‘very essence’ of right of access to a Court; restrictions must pursue a legitimate aim, and comply with the principle of proportionality.³⁰⁵ This standard will be breached, for example, when an applicant is prevented in a ‘practical manner’ from bringing their claim in the domestic courts.³⁰⁶ Even a hindrance of a temporary nature can breach the right of access to a court.³⁰⁷ **47.155**

Article 6(1) ECHR requires schemes of judicial review to be ‘sufficiently coherent and clear’ so as to afford ‘a practical, effective right of access’ to courts.³⁰⁸ Thus, if rules of administrative and constitutional review are of ‘such complexity’ that they create ‘legal uncertainty’, then infringement of Article 6(1) will result.³⁰⁹ Judicial remedies must be ‘sufficiently attenuated by safeguards to prevent a misunderstanding as to the procedures for making use of available remedies.’³¹⁰ Finally, it is established that an ‘unreasonable construction of a procedural requirement’ by a Court can result in breach of right of access to a Court.³¹¹ **47.156**

Pursuant to Article 13 ECHR, states parties to the ECHR are not bound to supply a judicial remedy to enforce Convention rights.³¹² But if judicial means are chosen, they must supply ‘appropriate relief’ and ‘adequate redress’ for breach of the ECHR.³¹³ Remedies must be effective both ‘in practice and in law’.³¹⁴ **47.157**

In the EU context, the case law is far less highly evolved. However, it is established that the limitation on right of access to a Court that applies under the ECHR is equally pertinent to the same right as protected by Article 47.³¹⁵ While neither a rule on national law requiring the parties to first make recourse to a mandatory out of Court settlement procedure before gaining a judicial determination of a dispute,³¹⁶ nor requiring individuals to petition a specialised Court to enforce their rights under EU law (when there **47.158**

³⁰² See classically Case 84/222 *Johnston v Chief Constable of the RUC* [1986] ECR 1651.

³⁰³ See eg Case C-93/12 *ET Agroconsulting-04-Velko Stoyanov* (n 137) and the Opinion of Advocate General Bot of 14 March 2013; Case C-320/08 *Alassani* [2010] ECR I-2213. The right of access to a Court is closely bound up with the right to effective judicial review. See eg Case C-168/13 *PPU Jeremy F* (Judgment of 30 May 2013).

³⁰⁴ JV Louis, ‘The Rule of Law’ in M Westlake (ed) *The European Union Beyond Amsterdam* (London, Routledge, 1998) 112.

³⁰⁵ See eg *Pérez de Rada Cavanilles v Spain* App no 116/1997/1900/1112 (28 October 1998) [44]; *Tinnelly and Sons Ltd and Others v United Kingdom* App no 62/1997/846/1052–1053 (10 July 1998) [72].

³⁰⁶ *TP and KM v United Kingdom* App no 28945/95 (10 May 2001) [100].

³⁰⁷ *Golder v United Kingdom* (Judgment of 21 February 1975) [20].

³⁰⁸ *Geouffre de la Pradelle v France* App no 12964/87 (16 December 1992) [35].

³⁰⁹ *Ibid* [33].

³¹⁰ *Bellet v France* (n 37) [37].

³¹¹ See eg *Melnyk v Ukraine* App no 23436/03 (28 June 2006) [23]; *Beles v The Czech Republic* App no 47273/99 (12 February 2003) [50], [51].

³¹² *Kudla v Poland* App no 30210/96 (26 October 2000) [151].

³¹³ *Ibid* [57], [58].

³¹⁴ *Metropolitan Church of Bessaruba and Others v Moldova* App no 45701/199 (27 March 2002) [137].

³¹⁵ Joined Cases I-317/08 to I-320/08 *Alassani* (n 303) [63]. See also the discussion in the contribution by Herwig Hofmann in section D.III of this chapter.

³¹⁶ Joined Cases I-317/08 to I-320/08 *Alassani* (n 303).

were practical difficulties associated with so doing),³¹⁷ were held by the Court of Justice to necessarily entail breach of right of access to a Court, an absolute ban on litigating EU rights was found to breach it,³¹⁸ and the Court has also confirmed that there will be circumstances in which the absence of legal aid will precipitate violation of Article 47.³¹⁹

47.159 The concerns, in terms of access to justice, of limiting the right of individuals to petition the General Court to challenge decisions addressed to them, and measures of direct and individual concern to them, have been well document elsewhere.³²⁰ The key concerns are as follows.

47.160 Rendering Member State courts, and Article 267 validity review, the primary route for challenging EU measures is said to be disadvantageous from the point of view of individuals for several reasons. It is argued that access to the Court of Justice is discretionary, in the sense that the national judge has no jurisdiction to declare the relevant EU measure invalid, and will only refer an Article 267 question to the Court of Justice if he or she has ‘serious doubts’ as to the validity of the measure.³²¹ The Article 267 validity procedure is often criticised for being cumbersome, lengthy, and fraught with risk, all of which is compounded by the fact that the Court of Justice has held that individuals will be precluded from exercising validity review if they could ‘without any doubt’ have instituted an Article 263 nullity challenge to the relevant EU measure within the two-month time-limit set by that provision.³²² Given the complexity of the case law on direct and individual concern, determining whether this is the case will no always be easy. As one Advocate General has observed, ‘it is surely indisputable that access to the Court is one area above all where it is essential that the law itself should be clear, coherent, and readily understandable.’³²³

47.161 As far back as 1986, Advocate General Mancini was arguing that, wherever required in the interests of judicial protection, the Court should be ‘prepared to correct or complete rules which limit its power in the name of the principle that defines its mission’,³²⁴ while Advocate General Jacobs later described in detail why a ‘complete system’ of remedies established by the EC Treaty, as it then was, might not always provide an effective remedy.³²⁵

47.162 However, these concerns are yet to penetrate Court of Justice case law. Indeed, the traditional position was recently reaffirmed in Case C-583/11P *Inuit Tapiriit Kanatami v*

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³¹⁷ Case C-93/12 *ET Agroconsulting-04-Velko Stoyanov* (n 137), Opinion of Advocate General Bot of 14 March 2013.

³¹⁸ See classically Case 84/222 *Johnston v Chief Constable of the RUC* [1986] ECR 1651.

³¹⁹ Case C-279/09 *DEB* (n 183). On prohibitive costs in the enforcement of EU environmental law, see Case C-260/11 *The Queen on the Application of David Edwards* (Judgment of 11 April 2013) and the Opinion of Advocate General Kokott of 18 October 2012. For detailed discussion of legal aid in EU and ECHR law, see the contribution by Liisa Holopainen in section D.IX of this chapter.

³²⁰ See most comprehensively, and pithily, Opinion of Advocate General Jacobs in Case C-50/00 *UPA v Council* [2002] ECR I-6677.

³²¹ Case C-314/85 [1987] ECR 4199. See subsequently, eg Case C-344/04 *The Queen on the Application of IATA and European Low Fares Airline Association v Department of Transport* [2006] ECR I-403.

³²² The test established in Case C-188/92 *TWD v Germany* [1994] ECR I-833.

³²³ See notably the Opinion of Advocate General Jacobs in Case C-50/00 *UPA v Council* [2002] ECR I-6677 [100].

³²⁴ See the Opinion of Advocate General Mancini Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, 1350.

³²⁵ See notably the Opinion of Advocate General Jacobs in Case C-50/00 *UPA v Council* (n 323).

*Parliament and Council*³²⁶ and the Opinion of AG Kokott of 17 January 2013. That case concerned the interpretation of the ‘tail’ of the fourth paragraph of Article 263 that was added by the Treaty of Lisbon. Under its terms, individuals can be granted standing before the General Court to challenge any ‘regulatory act’ which is of direct concern to them and which ‘does not entail implementing measures’. In other words, the test for individual concern does not apply to this type of challenge.³²⁷

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However, in Case C-583/11P *Inuit Tapiriit Kanatami v Parliament and Council*, the Court of Justice issued what might be described as a conservative interpretation of the notion of regulatory act not entailing implementing measures, and took the opportunity to reaffirm its traditional case law. With regard to the former, it was held that the General Court had not erred in finding that the term ‘regulatory’ act did not include EU legislative acts passed under the ordinary legislative procedure laid out in Article 294 TFEU, so that the applicant was still required to prove individual concern before being awarded standing under Article 263. Secondly, the Court came to the following important conclusions on the impact Article 47 of the Charter was to have for the ‘complete system of remedies’ provided by the Lisbon Treaty for challenging EU measures: **47.163**

it can be seen that the second limb of the fourth paragraph of Article 263 TFEU corresponds, as stated in paragraph 55 of this judgment, to the second limb of the fourth paragraph of Article 230 EC. The wording of that provision has not been altered. Further, there is nothing to suggest that the authors of the Treaty of Lisbon had any intention of altering the scope of the conditions of admissibility already laid down in the fourth paragraph of Article 230 EC. Moreover, it is clear from the *travaux préparatoires* relating to Article III-365(4) of the proposed treaty establishing a Constitution for Europe that the scope of those conditions was not to be altered (see, inter alia, Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice of 25 March 2003, CONV 636/03, paragraph 23).

In those circumstances, it must be held that the content of the condition that the act of which annulment is sought should be of individual concern, as interpreted by the Court in its settled case-law since *Plaumann v Commission*, was not altered by the Treaty of Lisbon. It must therefore be held that the General Court did not err in law in applying the assessment criteria laid down by that case-law ...

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, which must, in accordance with the third subparagraph of Articles 6(1) TEU and Article 52(7) of the Charter, be taken into consideration for the interpretation of the Charter (see the judgment of 22 January 2013 in Case C-283/11 *Sky Österreich* [2013] ECR I-0000, paragraph 42, and the judgment of 18 July 2013 in Case C-426/11 *Alemo-Herron and Others* [2013] ECR I-0000, paragraph 32).

Accordingly, the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU must be interpreted in the light of the fundamental right to effective judicial protection,

³²⁶ Judgment of the Court of 3 October and the Opinion of Advocate General Kokott of 17 January 2013.

³²⁷ On the problems that can arise for private parties who wish to bring validity challenge against an EU rule when there is no national implementing measure see Case T-177/01 *Jego Quere v Commission* [2002] ECR II-2365. For a commentary on the Lisbon amendment, see eg S Balthasar, ‘Locus Standi Rules for Challenge to Regulatory Acts by Private Applicants: the New Article 263 (4) TFEU’ 35 *European Law Review* (2010) 542.

but such an interpretation cannot have the effect of setting aside the conditions expressly laid down in that Treaty (see, to that effect, *Unión de Pequeños Agricultores v Council*, paragraph 44, and *Commission v Jégo-Quéré*, paragraph 36).³²⁸

47.164 However, the locus standi problems associated with Article 263 nullity review is not the only problem that might be raised before the Court on whether or not the remedial architecture for challenging the legality of EU measures complies with Article 47 of the Charter, the exclusion of the Court of Justice from reviewing measures taken under the auspices of the Common Foreign and Security Policy (CFSP) that appears in Article 275 TFEU (subject to the proviso in the second paragraph of that provision), and the restriction on Court of Justice review with respect to the area of freedom, security and justice (FSJ), and which applies with respect to policing and criminal measures under chapters 4 and 5) may also be susceptible for challenge by reference to Article 47 of the Charter. With respect to Article 275, the failure to grant the Court of Justice an unrestricted jurisdiction to review CFSP acts would seem ‘wholly unjustified in the light of the developing content of the Union’s foreign policy’, and may be seen as ‘patently insufficient from the perspective of the rule of law.’³²⁹ Furthermore, and pragmatically speaking, the Court of Justice’s lack of jurisdiction seems rather futile as the European Court of Human Rights will be in a position to review the compatibility of CFSP acts with ECHR standards when the EU becomes party to the ECHR. As Advocate General Jacobs once observed, ‘no matter should be automatically a priori excluded from judicial review.’³³⁰ By contrast, the Lisbon Treaty positively extended the EU courts’ jurisdiction over all FSJ acts. Reform had become inescapable as most found difficult to accept the limited jurisdiction of the CJEU concerning acts that are generally liable to directly affect the fundamental rights of the individuals. The President of the Court of Justice himself publicly regretted the development of ‘a situation in which the mechanisms for judicial protection vary by reference to the different pillars of the Union’ and ‘the development of such inconsistencies in judicial review within the Union’ since the transition from the EC to the EU in 1993.³³¹ By finally bringing together pre-Lisbon first and third pillar FSJ matters into a new Treaty Title and extending the Court of Justice’s ‘normal’ jurisdiction to all aspects of the area of FSJ (external borders, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation), the Lisbon Treaty significantly remedied the shortcomings previously denounced. The newly acquired general jurisdiction of the CJEU over FSJ measures nevertheless remains subject to a series of traditional and novel restrictions which unnecessarily undermine the progress made in terms of the rights to access to a court and to an effective remedy. For instance, the Court of Justice continues to be precluded from reviewing national measures dealing with law and order or internal security matters under Article 276 TFEU. One may also question the compatibility with Article 47 of

³²⁸ Case C-583/11P *Inuit Tapiriit Kanatami v Parliament and Council* (CJEU, 3 October 2013) [70]–[71] and [97]–[98].

³²⁹ P Eeckhout, *Does Europe’s Constitution Stop at the Water’s Edge? Law and Policy in the EU’s External Relations* (Walter van Gerven Lectures, Europa Law Publishing, 2005) 27 and 28.

³³⁰ Cited in House of Lords, Select Committee on the EU, *The Future Status of the EU Charter of Fundamental Rights* (HL 2002–03, HL 48) 36 para 144.

³³¹ ‘The European Convention’, Oral presentation by M Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the EC, to the ‘discussion circle’ on the Court of Justice on 17 February 2003, CONV 572/03, 10 March 2003, pp 1–2.

the Charter of the several opt-out/opt-in arrangements laid down in the EU Treaties,³³² as they create gaps in judicial protection.

In addition, it might be queried whether the remedies that the General Court and the Court of Justice are empowered to issue in Article 263 nullity proceedings are always effective. This is so because, aside from awarding interim relief and damages, the range of orders the General Court are entitled to issue is limited to declaring the relevant measure void, leaving it to the institution concerned to take the necessary measures to comply with the judgment of the Court (Arts 264 and 266 TFEU). There is no authority for the General Court to issue, for example, compelling orders against the relevant EU institution to take specific action, even if an order of this kind might be warranted by the specific circumstances of a case.³³³ The question might therefore be asked as to whether this range of orders renders EU law impossible in practice or excessively difficult to enforce, the standard that has consistently been applied to Member State Courts enforcing EU law, and/or the case law elaborate by the European Court of Human Rights with respect to Article 13 ECHR.³³⁴ 47.165

Finally, another recurrent source of criticism, and one that was not addressed in the Lisbon Treaty, was the absence of a special remedy for the protection of EU fundamental rights. Multiple proposals to confer on individuals the right to appeal directly to the Court of Justice on fundamental rights grounds have been made since 1976.³³⁵ This idea was again debated when the European Convention began working on the draft text of the EU Constitutional Treaty. However, because a majority of its members had reservations, the idea of establishing a special remedy was not recommended by the relevant working group.³³⁶ It has been argued that given that ‘issues of fundamental rights already arise in connection with the application of the ordinary remedies, often in combination with other issues (e.g. equal treatment, proportionality, etc)’ it has been argued that such issues ‘can and should continue to be dealt with in principle within 47.166

³³² See generally M Fletcher, ‘Schengen, the European Court of Justice and Flexibility under the Lisbon Treaty: Balancing the United Kingdom’s “Ins” and “Outs”’ (2009) 5 *European Constitutional Law Review* 71.

³³³ See eg Case T-468/93 *Frinil-Frio Naval e Industrial SA v Commission* [1994] ECR II-33, a request for a declaration that a sum calculated in a specific manner was owed under the European Social Fund; Case T-2/04 *Korkmaz v Commission* [2006] ECR II-32.

³³⁴ For a detailed discussion, see Ward ‘National and EC Remedies under the EU Treaty; Limits and the Role of the ECHR’ (n 291) 331 and 341 to 343. Indeed, the Court of Justice held in Case C-402/05 P *Kadi* [2008] ECR I-6351 [351]–[352] that the principle of effective judicial protection applied to remedies supplies by the Treaties and was not confined to Member State courts. For an example of the results that can follow when the General Court is empowered to issue only declaratory orders, see Case C-8/99 P *Carmen Gomez de Enterría y Sanchez* [2000] ECR I-6033. It is interesting to note that the ECtHR has held that the ‘declaration of incompatibility’, which is issuable under the United Kingdom Human Rights Act, cannot be regarded as an effective remedy under Art 35(1) of the ECHR because it places no legal obligation on the executive or the legislature to amend the law following a declaration of incompatibility. See *Malik* App no 32968/11 (28 May 2013) [27]–[30] and case law cited.

³³⁵ See eg the Report of Mr Tindemans, Prime Minister of Belgium to the European Council, *Bulletin of the European Communities*, Supplement 1/76, pp 26 to 27, where it was noted that ‘the gradual increase in the powers of the European institutions ... makes it imperative to ensure that rights and fundamental freedoms, including economic and social rights, are both recognised and protected’, and proposed that individuals should gain ‘the right of direct appeal to the Court of Justice against an act of an institution in violation of these fundamental rights.’

³³⁶ The European Convention, Final Report of Working Group II, ‘Incorporation of the Charter/accession to the ECHR’, CONV 354/02, 22 October 2002, p 15.

the habitual procedural framework.³³⁷ Nonetheless, it remains an open question as to whether, in the event of a serious breach of human rights by an EU institution, organ, or agency, the Court of Justice would be prepared to relax the test for direct and individual concern, particularly in the light of the standards required, in terms of the provision of effective remedies, by international human rights law.³³⁸

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

LAURENT PECH

(a) *Introduction*

47.167 The Court has held that the part of Article 47(2) of the Charter which provides that everyone ‘is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law’ corresponds to Article 6(1) of the ECHR. For example, in *DEB* the Court stated that ‘according to the explanations relating to that article, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter, the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR.’³³⁹ However, multiple references to Article 6(1) of the ECHR are a rare occurrence. Indeed, in some recent judgments, after holding that Article 47 of the Charter implements in EU law the protection afforded by Article 6(1) of the ECHR, the Court decided that no further reference to this latter provision was therefore required and accordingly, referred only to Article 47.³⁴⁰

(b) *Notion of ‘Tribunal’ under Article 47 of the EU Charter*

47.168 Article 47(2) of the Charter, like Article 6(1) ECHR, refers only to the notion of ‘tribunal’. By contrast, the expression ‘court or tribunal’ can be found in the EU Treaties.³⁴¹ For instance, Article 267 TFEU, which concerns the preliminary ruling jurisdiction of the Court of Justice, provides that any *court or tribunal of a Member State* may, as a rule, refer questions concerning the interpretation of the EU Treaties or the validity and interpretation of EU acts to the Court of Justice when the outcome of the disputes

³³⁷ FG Jacobs, ‘Necessary change to the judicial system of judicial remedies’, Note for the Working Group on the Charter/ECHR, the European Convention, Working Group II, Working Document 20, 27 September 2002, p 3.

³³⁸ See the contribution by Dinah Shelton in section C of this chapter.

³³⁹ Case C-279/09 *DEB* (n 183) [32].

³⁴⁰ Case C-386/10 P *Chalkor v Commission* [2011] *nyr* [51]; Case C-199/11 *Otis* [2012] *nyr* [47].

³⁴¹ In the French version of the EU Treaties, the sole and broad notion of ‘jurisdiction’ is used and it might be therefore that the expression ‘court or tribunal’ was preferred in English to better convey the idea that in addition to ordinary civil and criminal courts, administrative tribunals in the UK and Ireland may also bring matters before the Court of Justice.

before them are governed by provisions of EU law. Because the Court systematically interprets any reference to the notion of ‘court or tribunal’ in the light of its case law relating to Article 267 TFEU,³⁴² one must assume that the meaning of ‘tribunal’ under Article 47(2) of the Charter is the same as the meaning of ‘court or tribunal’ under Article 267 TFEU.³⁴³

The terms ‘court’ and ‘tribunal’, however, are not defined in the Treaties, and it was therefore left to the Court of Justice to clarify their meaning, which it did for the first time in the 1996 *Vaassen-Göbbels* case.³⁴⁴ Faced with the argument that a request for a preliminary ruling submitted by a Dutch industrial arbitration body was inadmissible because the latter would not be a court or tribunal within the meaning of what is now Article 267 TFEU, the Court held the request admissible on the following bases. The Dutch body was properly constituted under Dutch law and provided for by law; its members were appointed by a Minister; it furthermore constituted a permanent body that settled disputes, applied rules of law and was bound by rules of the adversarial procedure similar to those used in ordinary courts of law and finally, relevant workers were legally obliged to bring any disputes between themselves and their insurer to this Dutch body. The case of *Vaassen-Göbbels* therefore established that the expression ‘court or tribunal’ would normally be broadly interpreted by the Court of Justice and could therefore include bodies other than ordinary courts of law if certain conditions were met.

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Subsequent case law provided further clarification by confirming that the ‘status as a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law.’³⁴⁵ In other words, the question of whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU is governed by EU law alone.³⁴⁶ And because the Court tends to favour a flexible understanding of the notion of court or tribunal, numerous bodies that may not be formally part of the judiciaries of their Member States have nevertheless been held to constitute courts or tribunals within the meaning of EU law.³⁴⁷ This is reminiscent of the Strasbourg Court’s case law whereby the notion of ‘tribunal’ has an autonomous meaning. This means that the word ‘tribunal’ in Article 6(1) ECHR is not necessarily to be understood as signifying

³⁴² See eg Case C-506/04 *Wilson* [2006] ECR I-8613 [44] et seq. (where the Court interpreted the notion of ‘court or tribunal’ mentioned in Art 9 of Directive 98/5, which aims to facilitate the exercise of the freedom of establishment for lawyers, by reference to Art 267 TFEU). See also Opinion of Advocate General Bot delivered on 6 September 2012 in Case C-175/11 *HID and BA*, in which Art 39 of Directive 2005/85, which requires that Member States ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, is interpreted with reference to Art 267 TFEU. Art 47 of the Charter is also alluded to before the Advocate General offers the view that Art 39 of Directive 2005/85 and Art 47 of the Charter must be interpreted as meaning that they do not preclude national rules such as those at issue in the main proceedings, under which an appeal against the decision of the determining authority lies to the Irish Refugee Appeals Tribunal and to the High Court of Ireland. The Court similarly answered the applicant’s submission that the Irish Refugee Appeals Tribunal is not a ‘court or tribunal’ within the meaning of Art 267 TFEU: Case C-175/11 *HID and BA* [2013] *nyr* [82] et seq.

³⁴³ See also the interpretation of Art 47(1) above.

³⁴⁴ Case 61/65 *Vaassen-Göbbels* [1966] ECR 261.

³⁴⁵ Court of Justice of the EU, Information note on references from national courts for a preliminary ruling (2009/C 297/01) para 9.

³⁴⁶ See Case C-24/92 *Corbiau* [1993] ECR I-1277 [15].

³⁴⁷ See eg Case C-17/00 *De Coster* [2001] ECR I-9445.

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47.171

a court of law of the classic kind, integrated within the standard judicial machinery of the country.³⁴⁸

The Court of Justice has been faced with some harsh criticism to the effect that its case law on what constitutes a court or tribunal is unclear, chaotic and confusing.³⁴⁹ Nonetheless there has been no modification to the established approach.³⁵⁰ The Court takes into account the following ‘factors’ when determining whether the body making a reference is a court or tribunal for the purposes of Article 267 TFEU: (i) whether the body is established by law; (ii) whether it is permanent; (iii) whether its jurisdiction is compulsory; (iv) whether its procedures are inter partes; (v) whether it applies rules of law; and finally (vi) whether it is independent.³⁵¹ Impartiality is also regularly—but not always—explicitly mentioned immediately after the criteria of independence.³⁵² This list of ‘minimum requirements’, which has been relatively stable since *Dorsch*, although it continues to be applied flexibly, has been further complemented by two conditions, the last of which is relatively ambiguous: the Court can only be requested to give a preliminary ruling by a body if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.³⁵³

47.172

Viewed in this light, the case law of the Strasbourg Court may seem at first relatively straightforward, but as will be shown below, the notion of ‘tribunal’ is also understood as a set of intertwined requirements. That said, for the European Court of Human Rights, a ‘tribunal’ is first and foremost ‘characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner.’³⁵⁴ This means, for instance, that the governing body of the Council of the *Ordre des avocats* in Belgium constitutes a tribunal within the meaning of Article 6(1) ECHR contrary to the view of the applicant who argued that it did not afford the safeguards inherent in the concept of tribunal. For the Court, however, the fact that the Council performs many functions—administrative, regulatory, adjudicative, advisory and disciplinary—‘cannot in itself preclude an institution from being a “tribunal” in respect of some of them.’³⁵⁵ The essential criterion, therefore, is whether the relevant body performs a judicial function in a material sense. To put it differently, the European Court of Human Rights has made

³⁴⁸ *Campbell and Fells v UK* App nos 7819/77 and 7878/77 (28 June 1984) [76] (the Prison Board of Visitors, when carrying out its adjudicatory tasks, is a ‘tribunal established by law’).

³⁴⁹ See in particular the Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster* (n 347) [14].

³⁵⁰ For a recent restatement of the Court’s well-established case law, see Case C-363/11 *Antonopoulos* [2012] *nyr* [18]–[21]. This judgment is also worth noting to the extent that the Court, contrary to the analysis of Advocate General Sharpston, ruled that the Greek Court of Auditors does not constitute a court or tribunal within the meaning of Art 267 TFEU. The Advocate General’s Opinion also offers the interesting and original argument that ‘the Court has steered a judicious middle course between Mediterranean formalism and Anglo-Scandinavian informality’ when confronted with difficult cases, and that it would be appropriate for the Court to clarify whether it adheres to either of these two approaches which have been proposed by its Advocates General, or ‘whether it follows any guiding principle which is different from either or whether, simply, each case must be examined afresh and on its own merits’, Opinion delivered on 20 September 2012 [32].

³⁵¹ Case C-54/96 *Dorsch* [1997] ECR I-4961 [23].

³⁵² See eg Case C-17/00 *De Coster* (n 347) [17].

³⁵³ See in particular Case 138/80 *Borker* [1980] ECR 1975 [4] and Case C-111/94 *Job Centre* [1995] ECR I-3361 [9]. For a more recent judgment, see eg Case C-443/09 *Grillo Star* [2012] *nyr* [20], [21] and case law cited.

³⁵⁴ *Sramek v Austria* (1984) ECHR Series A no 84 [36].

³⁵⁵ *H v Belgium* (1987) ECHR Series A no 127-B [50].

clear that the notion of ‘tribunal’ requires the existence of a power to decide matters ‘on the basis of rule of law, following proceedings conducted in a prescribed manner.’³⁵⁶ That Court, however, has mentioned additional elements, which one may view as principles that are inherent to the exercise of judicial function. For instance, the power to have full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision, is viewed as one of the constituting elements of a the notion of ‘tribunal’.³⁵⁷ Unsurprisingly, considering that Article 6(1) ECHR explicitly refers to the notions of independence, impartiality and being ‘established by law’, the case law of the European Court of Human Rights makes it clear that bodies that do not present these features cannot be regarded as ‘tribunals’ within the meaning of Article 6(1) ECHR. The notions of independence, impartiality and ‘established by law’ shall be further analysed below and as we shall see, the Court of Justice’s understanding of them is in line with the European Court of Human Rights’ case law.

(c) *Meaning and Scope of other Principles Common to Article 47(2) CFR and Article 267 TFEU: Established by Law, Independence and Impartiality*

As previously noted, Article 47(2) of the Charter refers, inter alia, to the right to a fair hearing by an *independent* and *impartial* tribunal *established by law*. The meaning of these notions, which have been to a certain degree clarified by the Court’s case law relating to Article 267 TFEU, will be explored below. The meaning of the other ‘factors’ distinguished by the Court of Justice when it comes to deciding whether a body constitutes a ‘court or a tribunal’ will also be briefly alluded to. 47.173

A Permanent Body *Established By Law*

The Court of Justice first requires that a body, to be regarded as a court or tribunal, must be permanent, in the sense that it must not exercise a judicial function only on an occasional basis, and be established by law, that is, that it exercises a judicial function on the basis of an act adopted by national public authorities, and not on the basis of an agreement between the parties.³⁵⁸ These two factors largely explain why arbitral bodies are normally not considered ‘courts or tribunals.’³⁵⁹ 47.174

The Court of Justice’s understanding of the notion of ‘established by law’ is in line with the case law of the European Court of Human Rights relating to Article 6(1) ECHR. Indeed, for the Strasbourg Court, the concept of ‘established by law’ reflects the principle of the rule of law and essentially implies that legislative statutes must normally regulate the organisation of the judicial branch and the establishment of tribunals.³⁶⁰ 47.175

³⁵⁶ *Sramek v Austria* (n 354) [36].

³⁵⁷ See *Le Compte, Van Leuven and De Meyere v Belgium* (1981) ECHR Series A no 43 [55]; *Fischer v Austria* (1995) Series A no 312 [29]; *Chevol v France* App no 49636/99 (13 February 2003) [83].

³⁵⁸ Opinion of Advocate General Tesaura in *Dorsch* (n 351) [28].

³⁵⁹ According to the Court’s case law, an arbitration tribunal does not constitute ‘a court or tribunal’ where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator. See Case 102/81 ‘*Nordsee*’ *Deutsche Hochseefischerei* [1982] ECR 1095 [10]–[12], and Case C-126/97 *Eco Swiss* [1999] ECR I-3055 [34].

³⁶⁰ *Lavents v Latvia* App no 58442/00 (28 November 2002) [114].

Some judgments also indicate that the Strasbourg Court understands this concept as covering the specific composition of each judicial formation in any particular case,³⁶¹ which means that any tribunal issuing a judgment whereas it is composed in breach of domestic law, in particular of the national provisions relating to the mandates, incompatibilities and disqualifications of judges, cannot be said to have been constituted ‘in accordance with the law’.³⁶²

Compulsory Jurisdiction

- 47.176** This requirement has not been subject to much elaboration in Court of Justice case law. In practice, it is often confused with the question of whether the decisions adopted by the relevant bodies are binding³⁶³ or, on the contrary, may be reviewed by a minister with the power to review the lawfulness of these decisions.³⁶⁴ In a similar fashion, the European Court of Human Rights held that the French *Conseil d’Etat* could not be regarded as a ‘tribunal’ in a case where the *Conseil d’Etat* considered itself bound by the interpretation of an international treaty adopted by the Ministry of Foreign Affairs.³⁶⁵ For the Court, there has accordingly been a violation of Article 6(1) ECHR in that the applicant’s case was not heard by a ‘tribunal’ with full jurisdiction.

The Adversarial Nature of the Procedure

- 47.177** The requirement that the procedure be adversarial is not an absolute criterion³⁶⁶ and it has been loosely interpreted. For instance, bodies with inquisitorial powers have been found to constitute courts, as in the case of *Gabalfrisa* where the Court accepted that the fact that parties concerned may lodge submissions and evidence in support of their fiscal claims and request a public hearing suffices to meet the requirement that the procedure be *inter partes*.³⁶⁷ The European Court of Human Rights has also indicated that it may show some degree of flexibility on this issue, and held, for instance, that in the ‘sensitive domain of family law there may be good reasons for opting for an adjudicatory body that does not have the composition or procedures of a court of law of the classic kind’.³⁶⁸ However, as a matter of general principle, the Court has interpreted the right to a fair—adversarial—trial as requiring ‘the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party’.³⁶⁹

Application of Rules of Law

- 47.178** This factor was first established in the case of *Vaassen-Göbbels* and essentially requires that a body does not apply principles of fairness but rules in accordance with legally

³⁶¹ *Bulut v Austria* ECHR 1996-II 359 [29].

³⁶² *Posokhov v Russia* ECHR 2003-IV.

³⁶³ See eg *Joined Cases C-110/98 to C-147/98 Gabalfrisa* [2000] ECR I-1571 [36].

³⁶⁴ *Case C-53/03 Syfait* [2005] ECR I-4609 [30].

³⁶⁵ *Chevol v France* App no 49636/99 (13 February 2003) [82]–[84].

³⁶⁶ *Dorsch* (n 351) [31].

³⁶⁷ *Gabalfrisa* (n 363) [37].

³⁶⁸ *McMichael v UK* (1995) ECHR Series A no 307-B [80].

³⁶⁹ *Ruiz-Mateos v Spain* (1993) ECHR Series A no 262 [63].

binding rules and give reasons in fact and in law for its decisions.³⁷⁰ Similarly, the case law of the European Court of Human Rights requires that a body cannot be regarded as a ‘tribunal’ if it does not determine ‘matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner.’³⁷¹

Proceedings Intended to Lead to a Decision of a Judicial Nature

A more decisive factor for the Court of Justice than the ones previously examined is whether the body having submitted a request for a preliminary ruling is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature, which means that the Court will refuse to issue a ruling when the proceedings are not of a ‘judicial nature’³⁷² or where a national court is carrying out administrative functions rather than judicial ones.³⁷³ The case law of the European Court of Human Rights betrays a similar idea, as the notion of ‘tribunal’ is understood as implying proceedings that are judicial in nature.³⁷⁴ **47.179**

Independence and Impartiality

Last but not least, the Court of Justice has regularly emphasised the importance of the criterion of independence. The notion of independence itself was first explicitly mentioned in a 1987 judgment known as *Pretore di Salò*: **47.180**

The Court has jurisdiction to reply to a request for a preliminary ruling if that request emanates from a court or tribunal which has acted in the general framework of its task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by law.³⁷⁵

Its fundamental meaning was subsequently made clear in a 1993 ruling where the Court held that the expression ‘court or tribunal’ is a concept of the EU ‘which, by its very nature, can only mean an authority acting as a third party in relation to the authority which adopted the decision forming the subject-matter of the proceedings.’³⁷⁶ This understanding sits well with the one promoted by the European Court of Human Rights, whose case law essentially requires that the judge be independent of the administrative authorities and of the parties.³⁷⁷ **47.181**

The Court of Justice’s emphasis on the concept of independence as a key factor when it comes to deciding whether a body constitutes a court or tribunal is not surprising. On **47.182**

³⁷⁰ *Gabalfrija* (n 363) [38].

³⁷¹ *Sramek v Austria* (n 354) [36].

³⁷² *Borker* (n 353) [4]. For a more recent case, see Case C-363/11 *Antonopoulos* [2012] *nyr* [26]–[28] (the Greek Court of Auditors does not constitute a court or tribunal because the decisions it adopts when carrying out its power to review public expenditure are not part of proceedings intended to lead to a decision of a judicial nature). Contrast with Case C-443/93 *Vougioukas* [1995] ECR I-4033 (the competence of the Greek Court of Auditors to seek a preliminary ruling was not question as it had to determine a legal dispute concerning the granting of a pension to a civil servant).

³⁷³ Case C-182/00 *Lutz* [2002] ECR I-547 [14]. See also *Antonopoulos* (n 372) [29]–[32].

³⁷⁴ *Sramek* (n 354) [36].

³⁷⁵ Case 14/86 *Pretore di Salò* [1987] ECR 2545 [7].

³⁷⁶ Case C-24/92 *Corbiau* [1993] ECR I-1277 [15], and Case C-516/99 *Schmid* [2002] ECR I-4573 [36].

³⁷⁷ *Le Compte et al v Belgium* (1981) ECHR Series A no 43 [55]; *Beaumont v France* A296-B (Judgment of 24 November 1994) [38].

the one hand, ‘the key to the notion of the rule of law is ... the reviewability of decisions of public authorities by independent courts’,³⁷⁸ on the other hand, the criterion of independence is often viewed as ‘the most important distinction between national courts and administrative authorities.’³⁷⁹ In the case of *Wilson*, the Court further clarified that the concept of independence is inherent in the task of adjudication³⁸⁰ and that it had two other aspects:

- The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them.³⁸¹ That essential freedom from such external factors requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office.³⁸²
- The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity³⁸³ and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.³⁸⁴

47.183 The Court of Justice’s reference to freedom from external intervention or outside pressure is reminiscent of the European Court of Human Rights’ case law.³⁸⁵ The same can be said about the Court of Justice’s reference to the notion of impartiality. Indeed, the Strasbourg Court would appear to understand the principles of independence and impartiality as interconnected ones, which may be therefore reviewed together.

47.184 While the case of *Wilson* is not the first EU judgment making an explicit reference to it,³⁸⁶ it is the first one to make clear beyond any doubt that the Court of Justice understands impartiality as an *internal* component of the broader notion of independence—for the Advocate General, there is in fact ‘a functional connection between independence and impartiality, the former being a necessary condition of the latter’³⁸⁷—which may require specific analysis.

47.185 *Wilson* is also particularly significant because it furthermore spells out what the guarantees of independence and impartiality entail according to the Court of Justice. In a few words, the Court indicated, with reference to the case law of the Strasbourg

³⁷⁸ F Jacobs, *The sovereignty of law: The European way* (Cambridge, Cambridge University Press, 2007) 35.

³⁷⁹ Opinion of Advocate General Stix-Hackl in Case C-506/04 *Wilson* [2006] ECR I-8613 [45]. See also the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* (n 347) [17] (the criterion of independence ‘is the most important criterion that a court must display’).

³⁸⁰ *Wilson* (n 379) [49].

³⁸¹ See, to that effect, Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551 [21], and Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539 [36]; see also, to the same effect, *Campbell and Fell v United Kingdom* (1984) ECHR Series A No 80 [78].

³⁸² Joined Cases C-9/97 and C-118/97 *Jokela and Pitkäranta* [1998] ECR I-6267 [20].

³⁸³ See, to that effect, *Abrahamsson and Anderson* (n 381) [32].

³⁸⁴ *Wilson* (n 379) [51]–[52].

³⁸⁵ In addition the case of *Campbell and Fell v UK* cited by the Court of Justice in *Wilson*, see also *Bryan v United Kingdom* (1995) ECHR Series A no 335-A [37]–[38].

³⁸⁶ While the notion of impartiality was first explicitly mentioned in Case C-407/98 *Abrahamsson and Anderson* (n 381) [32] and [36], the Court did not comprehensively review compliance with this principle until the case of *De Coster* (n 347) [17]–[22].

³⁸⁷ Advocate General Stix-Hackl in *Wilson* (n 379) [75].

Court on Article 6 of the ECHR, that it would pay particular attention to the existence of adequate rules with respect to the composition of the body and the status of its members (appointment, length of service and the grounds for abstention, rejection and dismissal of its members).³⁸⁸ In *Wilson*, the Court found that the relevant disciplinary tribunals did not provide a sufficient guarantee of independence and impartiality. Indeed, the first body was composed exclusively of national lawyers while the appeal body was also composed for the most part of such lawyers. One could therefore have reasonable doubt as to the imperviousness of these two bodies to external factors and their neutrality with respect to the interests before it:

In those circumstances, a European lawyer whose registration ... has been refused by the Bar Council has legitimate grounds for concern that either all or the majority, as the case may be, of the members of those bodies have a common interest contrary to his own, that is, to confirm a decision to remove from the market a competitor who has obtained his professional qualification in another Member State, and for suspecting that the balance of interests concerned would be upset (see, to that effect, Eur. Court HR *Langborger v. Sweden*, judgment of 22 June 1989, Series A No 155, § 35).³⁸⁹

This finding led the Court to conclude that the Luxembourg procedure is not compatible with Directive 98/5, which aims to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, and in particular its Article 9 which provides that a remedy shall be available against any decision to refuse registration in the national Bar register before a court or tribunal. **47.186**

Faced with the final argument that the case law of the European Court of Human Rights recognises that the availability of a subsequent review by a court may offset the deficient composition of a non-judicial body such as the ones in the main proceedings, the Court of Justice, again with reference to the case law of the European Court of Human Rights,³⁹⁰ replied that the Luxembourg appeal system in dispute cannot be saved by the possibility to bring the matter before the Court of Cassation of the Grand Duchy of Luxembourg for a final review as its jurisdiction is limited to questions of law. **47.187**

To end this overview of the Court of Justice's case law, one may refer to a more recent and unusual case where the claimant questioned the independence of the Court of Justice itself on the specious ground that the Court, as an institution of the EU, could not objectively review measures adopted by other EU Institutions. Unsurprisingly, the Court found this objection **47.188**

wholly unfounded in the light of all the safeguards laid down in the Treaties, which ensure the independence and impartiality of the Court of Justice, and the fact that all judicial bodies necessarily form part of the State or supranational organisation to which they belong, a fact which on its own is not capable of entailing an infringement of Article 47 of the Charter or Article 6 of the ECHR.³⁹¹

³⁸⁸ *Wilson* (n 379) [53]. See more recently Order in Case C-109/07 *Pilato* [2008] ECR I-3503 [24] and the case law cited.

³⁸⁹ *Wilson* (n 379) [57].

³⁹⁰ *Incal v Turkey* ECHR 1998-IV 1547 [72].

³⁹¹ Case C-199/11 *Europese Gemeenschap* [2012] nyr [64].

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

DEBBIE SAYERS³⁹²

47.189 Article 47(2) guarantees the right to a fair and public hearing within a reasonable time. The Explanations to the Charter note that Article 47(2) ‘corresponds to Article 6(1) of the ECHR’. They also confirm that

in Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, *Les Verts v European Parliament*. (judgment of 23 April 1986, [1988] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

47.190 Thus, as explained above in section D.II, Article 47(2) provides wider protection than the ECHR as it is not restricted to proceedings which examine ‘civil law rights and obligations’. In this way, the Article 47(2) right is also linked to Article 41 of the Charter which states that every citizen has the ‘right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union’. This overlap is further discussed in detail in the chapter on Article 48.

47.191 The rights in Article 47(2) have been the subject of substantial litigation before the European Court of Human Rights and they have also been the subject of consideration by the Court of Justice of the European Union.³⁹³ In EU law, the right to a fair hearing was developed by the Court of Justice, prior to the adoption of the Charter, in order to uphold the rule of law in the Community legal order.³⁹⁴ It constitutes a fundamental principle of EU law.³⁹⁵ The Court of Justice will take particular account of the ECHR, and its jurisprudence, when deciding on the existence and content of fundamental rights.³⁹⁶ It has also noted that the ‘right results from the constitutional traditions common to the Member States and was reaffirmed in the second paragraph of Article 47 of the Charter, which corresponds, as is clear from the explanations relating to that article, to Article 6(1) of the ECHR’.³⁹⁷

47.192 As noted in the Explanations, the rights in Article 47(2) are intended to reflect those in Article 6(1) ECHR—the overarching right to a fair trial—which is a core democratic principle underpinning the rule of law.³⁹⁸ Consequently, the right to a fair trial has

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³⁹³ Case C-17/98 *Emesa Sugar (Free Zone) NV v Aruba* [2000] ECR I-665.

³⁹⁴ Flattery, ‘Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing’ (2010) 7 (1) *Competition Law Review* 53–81, 55.

³⁹⁵ Case C-289/11 P *Legris Industries v Commission* [2012] ECR I-0000.

³⁹⁶ Case C-94/00, *Roquette Frères* [2002] ECR I-9011.

³⁹⁷ Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* (6 September 2012) [52]. The CJEU referred to Case C-279/09 *DEB* (n 183) [32] in this regard.

³⁹⁸ *Golder v UK* (1975) 1 EHRR 524 [35]. The right is also specifically referred to in the Preamble to the ECHR.

‘a position of pre-eminence in the Convention.’³⁹⁹ In *Delcourt v Belgium*, for example, the European Court of Human Rights stated that: ‘In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision.’⁴⁰⁰ Thus, restrictions on the right are limited.

Au: fn 399 – are authorship details correct?

The latter part of Article 47(2) refers to the right to be ‘advised, defended and represented’. This includes the right to participate effectively within proceedings but is also more specifically connected to the rights of the defence which are set out in Article 48(2) of the Charter. Article 48(2) replicates the requirements of Article 6(3) of the ECHR. However, Article 6(3) ECHR deals exclusively with specific protections for those facing criminal charges, it does not cover civil or administrative proceedings. In contrast, Article 6(1) applies to criminal and civil legal proceedings, and it is from this right that guarantees similar to those detailed in Article 6(2) and 6(3) may, under certain circumstances, be inferred in civil proceedings. Detailed discussion on the scope of Article 48 rights is found in the two separate chapters on this Charter right. **47.193**

The following remaining requirements in Article 47(2) are addressed within this chapter: **47.194**

- the right to a fair hearing;
- the right to a public hearing;
- the right to a hearing within a reasonable time.⁴⁰¹

The extent and content of these rights are considered below with reference to the relevant case law. The right of access to a Court, which is an equally important component of Article 47,⁴⁰² has been addressed above in section D.VI. **47.195**

(a) *The Right to a Fair Hearing*

It has been noted that, under Article 52(3) of the Charter, ‘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.’⁴⁰³ Thus, the scope of the right to a fair hearing under Article 47(2) should provide protection which is, at least, equivalent to that prescribed by the ECHR and its case law. **47.196**

The obligation to provide a ‘fair’ hearing is a core component of Article 6. The European Court of Human Rights has approached the question of fairness by considering the whole proceedings, including the appellate proceedings, to see whether any defects in the process have been corrected through the process.⁴⁰⁴ This holistic approach **47.197**

³⁹⁹ Harris, O’Boyle, Bates, and Buckley, Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 2nd edn (Oxford, Oxford University Press, 2009) 202.

⁴⁰⁰ *Delcourt v Belgium* (1970) 1 EHRR 335 [25].

⁴⁰¹ The right of access to a Court is addressed in section D.VI above.

⁴⁰² See recently and notably Case C-93/12 *ET Agroconsulting-04-Velko Stoyanov* (n 137), and the Opinion of Advocate General Bot of 14 March 2013.

⁴⁰³ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17. Art 6(3) of the TEU also confirms that the rights guaranteed by ECHR are also part of the general principles of EU law.

⁴⁰⁴ *Edwards v UK* (1992) 15 EHRR 417.

also means that the early stages of proceedings, such as the police investigation, can infringe on the right if unfair procedures impact on the overall fairness of the trial.⁴⁰⁵ Any conviction obtained in breach of Article 6(1) cannot stand but whether a trial has been fair will depend on the facts of the case. In considering whether the process has been fair, the European Court of Human Rights is not concerned with whether the decision is wrong.⁴⁰⁶ It has stressed that ‘the ultimate guardians of the fairness of the proceedings ... are the domestic courts.’⁴⁰⁷ Additionally, in line with the European Court of Human Rights’ dynamic interpretation of the Convention as a ‘living instrument’, ‘fairness’ will inevitably be determined as an evolving concept.

47.198 In criminal proceedings, the right to a fair hearing, and to participate effectively, is closely linked to the specifically articulated rights in Articles 6(2) and 6(3): for example, the right to access a lawyer or the right to an interpreter.⁴⁰⁸ The close connection between Article 6(1) and 6(3) means that a breach of specific rights under Article 6(3) may also result in a violation of the overarching right to a fair trial as set out in Article 6(1).⁴⁰⁹ This connection is explored in greater depth in the chapter on Article 48.

47.199 In considering the case law on the right to a fair hearing, it is clear that various core aspects have been inferred from Article 6(1), including the right to adversarial proceedings, equality of arms, and the right to a reasoned decision.

Adversarial Proceedings

47.200 Proceedings must be adversarial to be fair. This means that the parties should be able to participate effectively by knowing and understanding the case and by being able to comment on it.⁴¹⁰ The Court of Justice of the European Union has recently reiterated that ‘having regard to the adversarial principle that forms part of the rights of the defence, which are referred to in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them.’⁴¹¹ In *Banif Plus Bank*, the Court of Justice held that, among the requirements of Article 47, is the principle of *audi alteram partem* which ‘does not merely confer on each party to proceedings the right to be apprised of the documents produced and observations made to the court by the other party and to discuss them, but it also implies a right for the parties to be apprised of pleas in law raised by the court of its own motion, on which it intends to base its decision, and to discuss them.’⁴¹² This means that, even when a court is entitled to make a determination of its own motion, it is still, ‘as a general rule, required to inform the parties to the dispute of that fact and to invite each of them to set out their

⁴⁰⁵ *Teixeira de Castro v Portugal* (1998) 28 EHRR 101.

⁴⁰⁶ *Bernard v France* (1998) 30 EHRR 808.

⁴⁰⁷ *Hermi v Italy* App no 18114/02 (18 October 2006) [72]. The ‘fourth instance’ doctrine means that the Court has no power to reopen domestic legal proceedings or to substitute its own findings of fact or national law for the findings of domestic courts, *Bernard v France* (n 406).

⁴⁰⁸ *Panasenko v Portugal* App no 10418/03 (22 July 2008).

⁴⁰⁹ *Ocalan v Turkey* App no 46221/99 (12 May 2005).

⁴¹⁰ *Brandstetter v Austria* (1991) 15 EHRR 378; *Ruiz-Mateos v Spain* (1993) 16 EHRR 505.

⁴¹¹ Case C-300/11 *ZZ v Secretary of State for the Home Department* (4 June 2013) [55]. See also Case C-450/06 *Varec* [2008] ECR I-581 [45]; Case C-89/08 *Commission v Ireland and Others* [2009] ECR I-11245 [52].

⁴¹² C-472/11 *Banif Plus Bank* (21 February 2013) [29]–[31].

views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure.⁴¹³

In criminal proceedings, the right to a fair hearing means that prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.⁴¹⁴ However, this is not an absolute right. For example, it may be legitimate to withhold disclosure on the grounds of national security.⁴¹⁵ Any restriction must be subject to procedural safeguards and be ‘strictly necessary’. The trial court must balance the public interest in non-disclosure against the importance of the materials in question to the defence.⁴¹⁶ The Court of Justice of the European Union has also confirmed that any

failure by the competent national authority to disclose to the person concerned, precisely and in full, the grounds on which a decision ... is based and to disclose the related evidence to him is limited to that which is strictly necessary, and that he is informed, in any event, of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence.⁴¹⁷

The European Court of Human Rights will look at how the breach affected the proceedings and whether any shortcomings were remedied on appeal.⁴¹⁸ The European Court of Human Rights has also held that its role is to consider the procedures involved rather than the question of whether non-disclosure was justified.⁴¹⁹

Fairness is about being able to understand the case against you and to challenge it. Thus, the right also guarantees an individual’s right to the ‘effective participation’ in proceedings. This includes an implied obligation that the parties to a case should be able to attend the hearing in person.⁴²⁰ In EU law, the right to a fair hearing has been recognised as ‘a general rule that a person whose interests are perceptibly affected by a decision taken by a public authority, must be given the opportunity to make his point of view known’.⁴²¹ Additionally, in EU law, the right to a fair hearing applies not only to

⁴¹³ *Ibid* [31].

⁴¹⁴ *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1; *Salduz v Turkey* (2009) 49 EHRR 19.

⁴¹⁵ *Edwards v United Kingdom* (1992) 15 EHRR 417. In this case, the omission was held to have been rectified by the appeal process.

⁴¹⁶ *Chahal v United Kingdom* (1996) 23 EHRR 413.

⁴¹⁷ *C-300/11 ZZ v Secretary of State for the Home Department* (4 June 2013) [69]. The CJEU also held that if, in exceptional cases, a national authority argued that full disclosure was not possible, it must have at its disposal and apply techniques and rules of procedural law which accommodate both legitimate security considerations and the need to ensure sufficient compliance with the person’s procedural rights, such as the right to be heard and the adversarial principle; *ibid* [56]–[57].

⁴¹⁸ *McMichael v United Kingdom* (1995) 20 EHRR 205.

⁴¹⁹ *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1.

⁴²⁰ *Ekbatani v Sweden* (1988) 13 EHRR 504; *Colozza v Italy* (1985) 7 EHRR 516. However, a person may waive their right to attend a hearing if this waiver is established in an unequivocal manner and is attended by minimum safeguards commensurate to its importance *Poitrinol v France* (1993) 18 EHRR 130.

⁴²¹ *Case 17/74 Transocean Marine Paint* [1974] ECR 1063. See also *Case C-277/11, MM v Minister for Justice, Equality and Law Reform, Ireland* (22 November 2012) where the Court of Justice of the European Union confirmed that ‘the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely’ (*ibid* [87]). It ‘also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision’ (*ibid* [88]).

citizens but also to Member States.⁴²² It also attaches to proceedings before the Court of Justice of the European Union but not to the Advocate General’s Opinion.⁴²³

47.204 The overriding requirement of a fair hearing is to place the tribunal under a duty to examine all the submissions and evidence properly.⁴²⁴ The courts may not found their decisions on facts or documents which one of the concerned parties has not been able to examine and comment on.⁴²⁵ This means that fair procedures should be laid down for accessing and admitting evidence. It is, however, primarily for national law to lay down rules on the admissibility of evidence and for the national courts to assess the evidence.⁴²⁶ In a criminal case, it is particularly important that the accused can challenge witnesses at public hearing by way of adversarial procedure. This also involves an opportunity to question witnesses and to comment on their evidence in argument.⁴²⁷ This provision is closely connected to Article 6(3)(d) and is broad enough to cover both witnesses and documentary evidence.⁴²⁸ However, it is not an absolute right, and judicial authorities are granted a wide margin of appreciation.⁴²⁹

47.205 The right to remain silent and the privilege against self-incrimination are also an integral part of the right to a fair trial and an essential protection against the miscarriages of justice. This adversarial procedural protection requires the prosecution to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression, in defiance of the will of the accused.⁴³⁰ The Court has accepted that domestic courts may take into account the silence of the accused in assessing the persuasiveness of the evidence adduced by the prosecution.⁴³¹ However, it would not be consistent with Article 6(1) for a domestic court to base a conviction solely or mainly on an accused’s silence.⁴³²

Equality of Arms

47.206 The principle of equality of arms is closely connected to the requirement for adversarial proceedings. The Court of Justice of the European Union has described it as ‘a corollary of the very concept of a fair hearing’.⁴³³ It seeks to ensure a fair balance between the parties by requiring procedural equality. It has been defined thus: “equality of arms” implies that each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disad-

⁴²² Joined Cases C-48/90 and C-66/90 *Netherlands and PTT Nederland v Commission* [1992] ECR I-565 [44].

⁴²³ Case C-17/98 *Emesa Sugar (Free Zone) v Aruba* (2000) ECR I-665 [12].

⁴²⁴ *Kraska v Switzerland* (1994) 18 EHRR 188.

⁴²⁵ Case C-89/08, *Commission v Ireland and Others* [2009] ECR I-11245 [55].

⁴²⁶ *Schenck v Switzerland* (1988) 13 EHRR 242.

⁴²⁷ *Bricmont v Belgium* (1990) 12 EHRR 217.

⁴²⁸ *Papageorgiou v Greece* (2004) 38 EHRR 30.

⁴²⁹ *Ibid.*

⁴³⁰ *Saunders v United Kingdom* (1996) 23 EHRR 313; *Funke v France* (1993) 16 EHRR 297.

⁴³¹ *John Murray v United Kingdom* (1996) 22 EHRR 29.

⁴³² *Condron v United Kingdom* [2000] ECHR 191.

⁴³³ Case C-199/11 *Europese Gemeenschap v Otis NV and Others* (6 November 2012) [71]. See also the Opinion of Advocate General Cruz Villalon in the *Otis* case delivered on 26 June 2012 at para 58 which confirms that the aim of the principle is to ensure a balance between the parties, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings.

vantage vis-à-vis his opponent'.⁴³⁴ The Court of Justice 'has embraced [the] case-law' of the European Court of Human Rights and it.⁴³⁵

Au: incomplete sentence?

There are no hard and fast rules defining what procedural safeguards are required to guarantee that the principle is respected. What is required will depend on the nature of the case and the importance of what is at issue between the parties. In *Steffensen*, the Court confirmed that 'Article 6(1) ... which requires essentially that the parties be given an adequate opportunity to participate in the proceedings before the court—relates to the proceedings considered as a whole, including the way in which evidence was taken'.⁴³⁶ It also held that 'where the parties are entitled to submit to the court observations on a piece of evidence, they must be afforded a real opportunity to comment effectively on it in order for the proceedings to reach the standard of fairness required by Article 6(1) of the ECHR'.⁴³⁷ Thus, possible safeguards include: an adequate opportunity to adduce evidence, to challenge witnesses and present argument.⁴³⁸ This may require disclosure of evidence relied on by the other party and an entitlement to be present at the hearing.⁴³⁹ It may also require an oral hearing, depending on the facts of the case. This requirement can be breached merely by procedural inequality, without the need for quantifiable unfairness.⁴⁴⁰ The principle of equality of arms also requires equal treatment between witnesses for the defence and witnesses for the prosecution in criminal proceedings.⁴⁴¹ Equality of arms may be violated if there are serious practical obstacles to one party presenting their case.⁴⁴² 47.207

The principle applies to civil and criminal proceedings, but it does not create a duty of the state to provide legal aid to correct a substantial resource imbalance between the parties.⁴⁴³ Any breach of the principle will be judged against the overall context of the proceedings to determine whether they were rendered unfair. The harm which a lack of balance may cause must, as a rule, be proved by the person who has suffered it.⁴⁴⁴ For example, in *Otis*, the Court of Justice of the European Union considered the concept in relation to competition law. It held that Article 47, as regards the right to equality of arms, does not preclude the Commission from bringing an action before a national court, on behalf of the EU, for damages resulting from an agreement or practice which is contrary to EU law. EU law prohibits the Commission from using information (which companies do not have access to) collected in the course of a competition investigation for purposes other than those of the investigation so this did not give it an advantage 47.208

⁴³⁴ *Dombo Beheer BV v Netherlands* (1993) 18 EHRR 213; Case C-199/11 *Europese Gemeenschap v Otis NV and Others* (6 November 2012) [71].

⁴³⁵ Opinion of Advocate General Cruz Villalon at para 59 in Case C-199/11 *Europese Gemeenschap v Otis NV and Others* delivered on 26 June 2012. For further discussion, see the chapter on Art 48, and Flattery, 'Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing' (2010) 7 (1) *Competition Law Review* 53–81.

⁴³⁶ Case C-276/01 *Steffensen* [2003] ECR I-3735 [76].

⁴³⁷ *Ibid* [77].

⁴³⁸ *H v Belgium* (1987) 10 EHRR 339; *Dombo Beheer BV v Netherlands* (1993) 18 EHRR 213 [33].

⁴³⁹ *Edwards v United Kingdom* (1992) 15 EHRR 417.

⁴⁴⁰ *Bulut v Austria* (n 361) 24 EHRR 84.

⁴⁴¹ *Bönisch v Austria* (1985) 13 EHRR 409.

⁴⁴² *Makhfi v France* App no 59335/00 (19 October 2004).

⁴⁴³ *Steel and Morris v United Kingdom* (2005) 41 EHRR 22.

⁴⁴⁴ Opinion of Advocate General Cruz Villalon at para 58 in Case C-199/11 *Europese Gemeenschap v Otis NV and Others* (26 June 2012).

before the national court.⁴⁴⁵ The Court concluded that the burden of proof in demonstrating the harm that may be caused by a breach of equality of arms falls on the person who has suffered it and the defendants had failed to prove such inequality in this case. In any event, the Court concluded that ‘EU law contains a sufficient number of safeguards to ensure that the principle of equality of arms is observed’.⁴⁴⁶

Reasoned Judgment

- 47.209** The right to a fair hearing also requires a court to give reasons for its judgment. This is also linked to the right to a public hearing. The extent of this duty varies according to the nature of the decision and the circumstances of the case: a detailed answer is not required to every argument, but the court must address the essential issues raised.⁴⁴⁷ National courts will be permitted substantial discretion in determining the form of judgments.
- 47.210** A reasoned judgment allows the applicant to understand the decision of the lower court and decide whether to appeal. In *Taxquet v Belgium*, while upholding the nature of and distinction of lay juries, the court held that the specific facts of the case meant that there had been insufficient safeguards in the proceedings for the applicant to be able to understand why he had been found guilty.⁴⁴⁸ Similarly, the Court of Justice of the European Union also requires that ‘all judgments be reasoned to enable the defendant to see why judgment has been pronounced against him and to bring an appropriate and effective appeal against it’.⁴⁴⁹
- 47.211** However, in *Trade Agency Ltd v Seramico Investments Ltd*, the Court of Justice held that ‘the extent of the obligation to give reasons may vary according to the nature of the decision and must be examined, in the light of the proceedings taken as a whole and all the relevant circumstances, taking account of the procedural guarantees surrounding that decision, in order to ascertain whether the latter ensure that the persons concerned have the possibility to bring an appropriate and effective appeal against that decision’.⁴⁵⁰ In *Trade Agency Ltd*, the Court considered the validity of a judgment in default of a defence from an English court which was to be enforced in Latvia under Regulation 44/2001 (the Brussels I Regulation).⁴⁵¹ The Latvian court raised concerns that the debtor may not have been informed of the commencement of the English proceedings, and that the administrative default judgment contained no reasons. The Brussels Regulation sets out limited grounds on which the decision can be refused under Article 34, which include that ‘recognition is manifestly contrary to public policy in the Member State in which recognition is sought’. The Court ruled that the need for reasoned judgments was to be balanced against the benefit of having a fast and cost-effective system of cross border justice. This objective may justify proportionate restrictions on the right to a fair trial. The decision on whether such a restriction was justified was for the referring court

⁴⁴⁵ Case C-199/11 *Europese Gemeenschap v Otis NV and Others* (6 November 2012) [70]–[78].

⁴⁴⁶ *Ibid* [75].

⁴⁴⁷ *Hiro Balani v Spain* (1995) 19 EHRR 566; *Van de Hurk v Netherlands* (1994) 18 EHRR 481.

⁴⁴⁸ *Hadjianastassiou v Greece* (1993) 16 EHRR 219.

⁴⁴⁹ Case C-283/05 *ASML* [2006] ECR I-12041 [28].

⁴⁵⁰ Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* (6 September 2012) [60].

⁴⁵¹ *Ibid*.

to verify ‘in the light of the specific circumstances in the main proceedings, whether the restriction introduced by the procedural system in England and Wales is not manifestly disproportionate as compared with the aim pursued’.⁴⁵²

(b) *The Right to a Public Hearing*

A public hearing is an essential feature of the overarching right to a fair trial.⁴⁵³ If a public hearing is not held in a lower court, the defect may be cured by a public hearing at a higher level, but only if the appeal court is able to consider the merits of the case and is competent to deal with the entirety of the matter.⁴⁵⁴ The right to public pronouncement of the judgment is, however, unqualified.⁴⁵⁵ **47.212**

The right to a public hearing aims to protect litigants ‘from the administration of justice in secret with no public scrutiny’⁴⁵⁶ and to maintain public confidence in the judicial system.⁴⁵⁷ The presence of the press is particularly important in this regard.⁴⁵⁸ This right applies to traditional courts as well as other hearings that come under Article 6, including disciplinary hearings of professionals.⁴⁵⁹ **47.213**

The parties to a case have the right to be present before the court but this can be limited. Further, the European Court of Human Rights has held that Article 6(1) entails entitlement to an oral hearing before a court of first and only instance.⁴⁶⁰ If the first instance hearing is public, it is acceptable to have a private hearing on appeal if it just concerns principles of law.⁴⁶¹ Thus, the right is not absolute.⁴⁶² Domestic criminal courts may try accused persons *in absentia* in certain limited circumstances. However, this will only be permitted where the national authorities can show that they used due diligence to attempt to locate the accused person and inform him of the criminal charges and the details of the trial.⁴⁶³ In *Alder v Orłowska*, the Court of Justice of the European Union confirmed that procedures which aim to improve and expedite the transmission of judicial documents between Member States must not undermine the rights of the defence.⁴⁶⁴ Further, in *Hypoteční banka*, the Court of Justice considered the provisions **47.214**

⁴⁵² Ibid [59].

⁴⁵³ *Axen v Germany* (1984) 6 EHRR 195.

⁴⁵⁴ *Diennet v France* (1995) 21 EHRR 554.

⁴⁵⁵ *Pretto v Italy* (1984) 6 EHRR 182.

⁴⁵⁶ Ibid [21].

⁴⁵⁷ *Diennet v France* (n 454) [33].

⁴⁵⁸ *Axen v Germany* (1984) 6 EHRR 195.

⁴⁵⁹ Ibid.

⁴⁶⁰ *Jacobsson v Sweden* (1990) 12 EHRR 56.

⁴⁶¹ *Axen v Germany* (n 458).

⁴⁶² *Jussila v Finland* (2007) 45 EHRR 39.

⁴⁶³ See Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24. See also Case C-399/11 *Melloni*, [2013] ECR I-0000. The CJEU also considered the question of defence rights guaranteed by Art 48(2), and the Court observed that, although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, this right was not absolute. For further discussion see Lavranos, ‘The ECJ’s Judgments in *Melloni* and *Åkerberg Fransson*: Une Ménage à Trois Difficulté’ (2013) 4 *European Law Reporter* 133–41.

⁴⁶⁴ Case C-325/11 *Alder v Orłowska* (19 December 2012) [35]. The CJEU considered whether Polish law providing that defendants residing abroad were obliged to appoint a local representative for service purposes

of the Brussels I Regulation in respect of cases where a party to proceedings could not be found and the need to observe the rights of the defence.⁴⁶⁵ It confirmed that

[the] provision must be understood as meaning that a court having jurisdiction pursuant to that regulation may reasonably continue proceedings, in the case where it has not been established that the defendant has been enabled to receive the document instituting the proceedings, only if all necessary steps have been taken to ensure that the defendant can defend his interests. To that end, the court seized of the matter must be satisfied that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant.⁴⁶⁶

47.215 The European Court of Human Rights has also held that the accused must have the right to obtain a fresh determination of the case against him/her unless it is proved that s/he had been informed of the criminal proceedings against him/her.⁴⁶⁷

47.216 A waiver of the right to hold a trial in public must be made in an unequivocal manner and must not run counter to any important public interest.⁴⁶⁸ However, Article 6 also contains a specific exception which permits the press and public to be

excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

47.217 Thus, national security concerns or the need to protect witnesses may justify placing limits on the right.⁴⁶⁹ Further, in some types of cases, the European Court of Human Rights will accept general presumptions in favour of private hearings.⁴⁷⁰

(c) The Right to a Hearing within a Reasonable Time

47.218 Justice delayed is justice denied. The requirement for a trial to take place within a reasonable time protects both the individual and the justice system. Delay may violate individual rights, but it may also erode faith in judicial processes and undermine legal certainty. Thus, the right ‘underlines the importance of rendering justice without delays which might jeopardise its effectiveness and credibility’.⁴⁷¹ The European Court of Human Rights has confirmed that Member States are under a duty to organise their legal systems to meet this obligation.⁴⁷² However, despite the importance of this duty, alleged violations of this right account for the largest proportion of cases before the

complied with EU law. The Court ruled that Art 1135[5] of the Polish Code of Civil Procedure was incompatible with Regulation 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. When the Regulation applied, service must be carried out by one of the means of transmission provided by the Regulation. The provision also violated the fundamental rights under Art 47.

⁴⁶⁵ Case C-327/10 *Hypoteční banka* (17 November 2011) [48]–[50].

⁴⁶⁶ *Ibid* [52].

⁴⁶⁷ *Colozza v Italy* (1985) 7 EHRR 516.

⁴⁶⁸ *Håkansson and Stureson v Sweden* (1991) 13 EHRR 1.

⁴⁶⁹ *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165.

⁴⁷⁰ *B and P v United Kingdom* (2001) 34 EHRR 52.

⁴⁷¹ *Stögmüller v Austria* (1979–80) 1 EHRR 155.

⁴⁷² *Sürmeli v Germany* (2007) 44 EHRR 22 [129]. Additionally, in Case C-58/12 *Groupe Gascogne SA* (‘industrial bags cartel’) (30 May 2013), Advocate General Sharpston noted, at para 73, that in light of the legal status of the Charter and the EU’s planned accession to the ECHR, ‘Member States have, in principle, already committed themselves to ensuring that the judicial structures of the European Union are able to meet the

European Court of Human Rights and repeat complaints are often evidence of systemic problems within domestic justice systems.⁴⁷³

In considering the reasonableness of any delay, the European Court of Human Rights identifies the period to be taken into consideration for the purposes of Article 6(1) and then determines whether the length of time involved is ‘reasonable’.⁴⁷⁴ In criminal matters, time starts the moment a person is ‘charged’.⁴⁷⁵ A ‘charge’ is generally defined as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’.⁴⁷⁶ In civil and administrative cases, time commences with the institution of proceedings.⁴⁷⁷ The clock stops when the determination becomes final (eg after all appeals are exhausted and after any judgment has been executed).⁴⁷⁸ **47.219**

The EU Courts have confirmed that proceedings before their lower courts must be completed within a ‘reasonable time’.⁴⁷⁹ However, Advocate General Sharpston recently noted ‘the approach taken thus far to establishing whether proceedings have been unduly lengthy has perhaps been more pragmatic than scientific’.⁴⁸⁰ The Court of Justice of the European Union has held that the Member States’ obligations under the EU Treaties cannot run counter the obligation to resolve judicial proceedings within reasonable time, as required by Article 47(2) of the Charter and Article 6 ECHR.⁴⁸¹ Further, the European Court of Human Rights has held that the stay in domestic proceedings as a result of a request for a preliminary ruling of the Court of Justice of the European Union will not be taken into consideration by the Court when determining the reasonableness of the duration of domestic proceedings.⁴⁸² **47.220**

In determining whether the length of time is ‘reasonable’, neither the Court of Justice nor the European Court of Human Rights will impose fixed time limits. Instead, a case-by-case approach is adopted. However, both Courts will assess the reasonableness of the time elapsed by reference to the following criteria.⁴⁸³ **47.221**

requirements of Article 47 of the Charter and Article 6(1) ECHR and ensure a fair hearing within a reasonable time for matters falling within their jurisdiction’.

⁴⁷³ See Greer, ‘The European Convention on Human Rights: Achievements, Problems and Prospects’ [2006] *Cambridge Studies in European Law and Policy*.

⁴⁷⁴ Cf Art 5(3) which guarantees that ‘everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial’. This applies only to individuals under arrest.

⁴⁷⁵ *Eckle v Germany* (1983) 5 EHRR 1 [73] and *Foti v Italy* [1982] 5 EHRR 313 [52].

⁴⁷⁶ *Eckle v Germany* (n 475) [73].

⁴⁷⁷ *Schouten & Meldrum v The Netherlands* (1994) 19 EHRR 432.

⁴⁷⁸ *Guincho v Portugal* (1984) 7 EHRR 223.

⁴⁷⁹ Case C-185/95 *Baustahlgewebe GmbH v Commission of the European Communities*, 17 December 1998. See also Case C-385/07 *Der Grüne Punkt—Duales System Deutschland v Commission* [2009] ECR I-6155 and Case C-110/10 *Solvay v Commission* [2011] ECR I-0000.

⁴⁸⁰ Opinion of Advocate General Sharpston in Case C-58/12 *Groupe Gascogne SA* (n 472) [80]. See further *ibid* [112], where the Advocate General confirmed ‘I cannot emphasise sufficiently that quantifying delay is not an exact science. Any assessment is approximate.’

⁴⁸¹ Case C-500/10 *IVA* (29 March 2012) [23].

⁴⁸² *Pafitis v Greece* App no 20323/92 (26 February 1998).

⁴⁸³ The Court of Justice of the European Union has confirmed that ‘it is clear from the case-law of both the Court of Justice and the European Court of Human Rights that the reasonableness of the length of proceedings is to be determined in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities’ Case C-270/99 *Z v Parliament* (27 November 2001) [24].

The Complexity of the Case⁴⁸⁴

- 47.222 A more complex case may justify longer proceedings.⁴⁸⁵ Complexity may be the result of a number of factors, for example, the number of defendants and witnesses in a case, the presence of an international connection to the case, complex points of law, the joinder of cases or other reasons. However, the fact that a case is considered very complex does not mean that all delays will be considered reasonable.⁴⁸⁶

47.223 The Behaviour of the Applicant

The Court will examine whether the applicant has contributed to the delay, but this does not curtail an applicant's right to use all procedural avenues of appeal, nor does it require him/her to cooperate actively in expediting the proceedings against him/her.⁴⁸⁷ The applicant's duty is only to 'show diligence in carrying out the procedural steps relevant to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings'.⁴⁸⁸

The Behaviour of the Domestic Authorities

- 47.224 The trial judge is expected to be proactive. Delay attributed to the state can include adjournments for evidence, pending proceedings, the transfer of proceedings, or administrative problems. However, the European Court of Human Rights has rejected arguments that the national courts cannot deal with their workload because of staffing problems. The state is obliged to organise their legal system so as to ensure compliance with the requirements of the Convention.⁴⁸⁹

The Importance of What is at Stake⁴⁹⁰

- 47.225 Some proceedings will need to be pursued more expeditiously than others. For example, a more rigorous standard will apply if the accused is in custody where a delay in proceedings may also cause pre-trial detention to be unlawful under Article 5(3).⁴⁹¹ Additionally, cases concerning children or a life threatening illness merit speedier determination.⁴⁹²

⁴⁸⁴ *Triggiani v Italy* [1991] ECHR 20.

⁴⁸⁵ *Boddaert v Belgium* App no 12919/87 (12 October 1992).

⁴⁸⁶ *Ferantelli and Santangelo v Italy* App no 19874/92 (7 August 1996); cf *Korbely v Hungary* (2010) 50 EHRR 48.

⁴⁸⁷ *Eckle v the Federal Republic of Germany* (1983) 5 EHRR 1.

⁴⁸⁸ *Unión Alimentaria Sanders SA v Spain* App no 11681/85 (7 July 1989) [35].

⁴⁸⁹ *Salesi v Italy* App no 13023/87 (26 February 1993) [24].

⁴⁹⁰ *Gast and Popp v Germany* (2001) 33 EHRR 37; *Pélissier and Sassi v France* (1999) 30 EHRR 715.

⁴⁹¹ *Jablonski v Poland* (2003) 36 EHRR 27.

⁴⁹² *Hokkanen v Finland* [1996] 1 FLR 289; *Damnjanovic v Serbia* App no 5222/07 (18 November 2008); *H v France* (1989) 12 EHRR 74.

IX. 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.

LIISA HOLOPAINEN⁴⁹³

Under the third paragraph of Article 47 of the Charter, legal aid becomes implicitly an ancillary right intended to guarantee the right to an effective remedy and to a fair trial. As such, it is an important component of the principle of effectiveness inherent to the realisation of access to justice. The principle of effective judicial protection is a general principle of European Union law to which expression is now given by Article 47 of the Charter.⁴⁹⁴

A specific provision on legal aid has been included in the fundamental rights project of the European Union from the beginning. Already in its early stages, the Draft Constitution of the European Union included an article on access to the courts, the third paragraph of which stated: ‘Access to justice must be effective. Legal aid is provided for those who lack sufficient resources otherwise to afford legal representation.’⁴⁹⁵

The baseline of the scope of legal aid under Article 47(3) of the Charter is tied to two main aspects: the implementation of European Union law,⁴⁹⁶ and the case law of the European Court of Human Rights. This connection to the European Court of Human Rights is expressly stated in the explanatory document of the Council.⁴⁹⁷ There is no express provision in the European Convention of Human Rights (ECHR) on legal aid in civil proceedings, but the doctrine has been developed in case law, beginning with the judgment in *Airey v Ireland*.⁴⁹⁸ This line of case law is centred on the question of what is deemed necessary for ensuring effective access to justice.

What then has been deemed necessary to ensure access justice under Strasbourg case law? First of all it is to be noted that the Strasbourg case law following the *Airey v Ireland* judgment concerns legal aid in the context of civil proceedings. The right of those charged with a criminal offence to free legal assistance is provided in Article 6(3) (c) of the ECHR. Similarly, legal aid in criminal proceedings is covered by Article 48(2) of the Charter, referring to Article 6(3) of the ECHR.⁴⁹⁹

The second basic issue is that the right of access to a court is not absolute. In *Airey v Ireland*, the European Court of Human Rights stated that the right of effective access to justice does not imply that states must provide free legal aid for every dispute relating to a ‘civil right’.⁵⁰⁰ However, the European Court of Human Rights has insisted that the

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⁴⁹⁴ Case C-389/10 P *KME Germany and others v Commission* [119] and case law cited.

⁴⁹⁵ Draft Constitution of the European Union, Title VIII: Human rights guaranteed by the Union of the [1994] OJ C61/155.

⁴⁹⁶ Art 51 of the Charter.

⁴⁹⁷ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

⁴⁹⁸ *Airey v Ireland* (Judgment of 9 October 1979).

⁴⁹⁹ *McVicar v United Kingdom* (Judgment of 7 May 2002) [47]; and *Granos Organicos Nacionales SA v Germany* (Judgment of 22 March 2012) [46].

⁵⁰⁰ The discretion of states extends to the granting of different kind of legal aid to different types of litigation, such as excluding from national legal aid scheme proceedings wholly or partly in respect of defamation (*A v United Kingdom* (Judgment of 17 December 2002)).

limitations applied to the right of access to courts cannot undermine the very core of the right. Any limitations to the right must pursue a legitimate aim, and there must be a reasonable relationship of proportionality between the limitation and the legitimate aim sought.⁵⁰¹

47.231 The European Court of Human Rights concluded in *Airey*, that whether the provision of legal representation to an individual litigant is required in order to ensure effective access to justice depends on the specific circumstances of the case and, in particular, on whether the individual in question would be able to present his case properly and satisfactorily without the assistance of a lawyer. Circumstances in which legal representation would be necessary for ensuring access to justice could be for example the complexity of the procedure before the court of first instance and complexity of the legal points involved. This assessment must also take into account personal circumstances of the applicant and the form of legal aid in question.⁵⁰²

47.232 In context of the scope of Article 47(3) of the Charter, it should be remembered that although the Strasbourg case law provides the basis, according to Article 52 of the Charter, this does not prevent EU law providing more extensive protection.⁵⁰³

47.233 EU Member States have wide powers of appreciation to determine how they will comply with the obligation to ensure effective access to justice in relation to EU law. Hence, the practices regarding the way in which access to legal aid is organised in the EU Member States varies greatly. What also varies is the understanding of what ‘legal aid’ entails, but in general it can consist of the following elements: exemption from or assistance with all or part of the court costs, and the assistance of a lawyer who will provide pre-litigation advice and will represent you in court, if necessary, either free or for a modest fee.⁵⁰⁴

47.234 The Court of Justice has addressed the scope of Article 47(3) in *C-279/09 DEB*, a case concerning the question whether the effective protection of rights under EU law requires legal aid to be granted to legal persons. The request for legal aid had been made by a company completely lacking income and assets in the context of a procedure for pursuing a claim seeking to establish state liability under EU law. Due to its lack of funds, the company was unable to make an advance payment of court costs required under national law, which also disqualified it from receiving legal aid.⁵⁰⁵

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47.235 The Court of Justice concluded in *DEB* that the guaranteeing of the right to effective access to court of legal persons may under certain circumstances require the grant of legal aid, and that such aid may consist of dispensation from advance payment of court costs, and/or the assistance of a lawyer.⁵⁰⁶

⁵⁰¹ See inter alia *Tolstoy-Miloslavsky v United Kingdom* (Judgment of 13 July 1995) [59]; *Kreuz v Poland* (Judgment of 19 June 2001) [55]; and *Steel and Morris v United Kingdom* (Judgment of 15 February 2005) [62].

⁵⁰² See inter alia *McVicar v United Kingdom* (n 499) [48]–[55], and *Steel and Morris v the United Kingdom* (n 501) [61].

⁵⁰³ Case *C-279/09 DEB* (n 183) [35] and case law cited.

⁵⁰⁴ The European Commission hosts an online portal of information on national legal aid systems, accessible here: http://ec.europa.eu/civiljustice/legal_aid/legal_aid_gen_en.htm.

⁵⁰⁵ For further analysis of *DEB*, see P Oliver, ‘Case *C-279/09 DEB v Germany*’ (2011) 48 *Common Market Law Review* 2023–40, and J Engström, ‘The Principle of Effective Judicial Protection after the Lisbon Treaty: Reflection in the light of case *C-279/09 DEB*’ (*Year*) 4 (2) *Review of European Administrative Law* 53–68.

⁵⁰⁶ Case *C-279/09 DEB* (n 183) [48].

Whether the circumstances require the grant of legal aid to legal persons is a matter 47.236 for the national courts to assess. As to the circumstances to be assessed, the Court of Justice mentioned the subject matter of the litigation, in particular its economic importance; 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.⁵⁰⁷ As stated earlier, these are all criteria also expressed in the case law of the European Court of Human Rights.

For the assessment of proportionality of exclusion of legal persons from legal aid 47.237 consisting of an advance payment of court costs, national courts could also consider the costs of the proceedings in respect of which the advance payment must be made and whether or not these costs would represent an insurmountable obstacle to access to courts.⁵⁰⁸

The European Court of Human Rights has stated that a national legal aid scheme 47.238 accepting only non-profit-making legal persons and natural persons does not violate the right to access to justice of profit-making companies because the differentiation is based on an objective and reasonable justification relating to the possibility of deducting legal costs in taxation.⁵⁰⁹ The Court of Justice also followed this line of reasoning and concluded, that the for the purposes of assessing the financial capacity of a legal person applying for legal aid national courts may take into account their form; whether the legal person is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and their ability to obtain the sums necessary to institute legal proceedings.⁵¹⁰

The Court of Justice confirmed its stance on legal aid and legal persons in an order 47.239 given in Case C-156/12 *GREP*.⁵¹¹ The case concerned a cross-border situation in which an order for enforcement issued by a German court was declared enforceable in accordance with Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁵¹² by an Austrian court. The subject of the order for enforcement, *GREP GmbH*, was refused legal aid because under Austrian law legal persons were excluded from legal aid in enforcement proceedings.

In its decision in *GREP*, the Court of Justice confirmed that the proceedings in the 47.240 case brought under Article 43 of Regulation 44/2001 in order to contest a decision holding that an order for enforcement was enforceable under Articles 38 to 42 of that Regulation and ordering conservatory attachment measures constitutes implementation of EU law for the purposes of Article 51 of the Charter.⁵¹³ The rest of the operative part of the order in *GREP* repeats the operative part of *DEB*.

The nature of the legal aid provision in EU law seems to differ slightly from that 47.241 developed in ECHR case law. Whereas in *Airey v Ireland*, legal aid seemed to be considered to be a right with implications of social or economic nature, and therefore

⁵⁰⁷ Ibid [61].

⁵⁰⁸ Ibid [61].

⁵⁰⁹ *VP Diffusion Sarl v France* (Decision of 26 August 2008).

⁵¹⁰ Case C-279/09 *DEB* (n 183) [62].

⁵¹¹ Case C-156/12 *GREP* (13 June 2012).

⁵¹² [2001] OJ L12/1.

⁵¹³ Para 31.

connected in its development to the financial situation pertaining in a particular state, the legal aid provision of the Charter seems to be of the nature of a procedural principle. In *DEB*, the Court of Justice pointed out that Article 47 is found under Title VI relating to justice together with other procedural principles, and not under Title IV of the Charter relating to solidarity.⁵¹⁴ Classification as a procedural principle makes the right to legal aid less susceptible to arguments concerning budgetary restraints in the provision of legal aid.

47.242 The Court of Justice has its own scheme providing legal aid in cases presented before it⁵¹⁵ to compensate for the particular challenges persons may encounter with litigation at the CJEU. In addition, there is a specific regime for legal aid in cross-border civil cases regulated by Directive 2003/8/EC.⁵¹⁶ According to the Directive, legal aid can be requested by persons who do not live in the Member State in which a case concerning them is heard or a decision concerning them is to be enforced. Legal aid in these cases can consist of access to pre-litigation advice, legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings, including the costs connected with the cross-border nature of the case.

47.243 The scope of legal aid on the level of EU law is further defined by express provisions in Directives and Regulations concerning areas such as maintenance obligations in cross-border situations and immigration. Chapter V of Regulation 4/2009 ('the Maintenance Regulation') titled 'Access to justice' include provisions on the right to legal aid and the content of such aid for parties involved in disputes covered by the Maintenance Regulation.⁵¹⁷ Articles 15 and 16 of Directive 2005/85/EC ('the Asylum Procedures Directive') concern the right to and scope of legal assistance and representation for asylum applicants on matters relating to their asylum applications.⁵¹⁸ In addition, Directive 2008/115/EC ('the Returns Directive') mentions legal assistance and/or representation as an effective remedy to appeal against deportation decisions under certain conditions.⁵¹⁹

E. Evaluation

ANGELA WARD

47.244 Perhaps the most significant feature of Article 47 is its breadth. It encompasses the case law of the Court of Human Rights under Article 6(1) ECHR, and indeed extends it, given that the rights protected under Article 47 apply to everyone suffering a violation

⁵¹⁴ Paras 40 and 41.

⁵¹⁵ See Arts 115 to 118 of the Rules of Procedure of the Court of Justice [2012] OJ L265/1.

⁵¹⁶ Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L026/41. For an account on the issues to which Directive 2003/8 responds, see Commission Green Paper on legal aid in civil matters: *The problems confronting the cross-border litigant*, COM (2000) 51 final.

⁵¹⁷ Council Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L007/1.

⁵¹⁸ Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

⁵¹⁹ Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

of the ‘rights and freedoms guaranteed by the law of the Union’, rather than merely when ‘civil rights and obligations’ are in issue, as is the case under Article 6(1) ECHR (see section D.II above).

The vast body of principle elaborated under Article 6(1) is now reflected in the various components of Article 47, through Article 47(2) which encapsulates the various elements of a fair hearing (see sections D.VII and D.VIII above), while Article 47(1) covers the right to effective judicial protection and remedies, both before the Court of Justice and Member State Courts (see sections D.III to D.VI above). Special status is given in the Charter to legal aid, which, unlike the ECHR, protects this right with its own free-standing paragraph, namely Article 47(3) (see section D.IX above). 47.245

Given that the various elements of the right to a fair hearing and an effective remedy are fairly easily divisible into discrete legal principles, it might be viewed as unfortunate that the process of dividing up its content, once the Charter came to be drafted, stopped at the three part separation of effective judicial protection, from a fair hearing, from legal aid. As can be seen from the manner in which this chapter has been presented, Article 47 could well have been drafted as a provision containing six parts or more. If this route had been taken, the end of legal transparency would have been better served, given that it would have provided easily accessible access to European citizens, and their legal advisors, to the substantive rights protected under Article 47. 47.246

The complexity of the provision is further compounded by the fact that origins of Article 47(1) spring from two different sources. On the one hand, there is the stream of case law developed to assess the compliance of Member State remedies and procedural rules with EU law, through the double-pronged tests of effectiveness and non-discrimination. This test grew up independently of any principles of law developed by the Court of Human Rights, with the effectiveness rule requiring Member State courts to ensure that national remedies and procedural rules did not render EU law impossible in practice or excessively difficult to enforce. On the other hand, Article 47(1) also reflects the *Johnston* line of case law,⁵²⁰ which was wholly inspired by Articles 6(1) and 13 of the ECHR, and which obliges the Court of Justice and the Member State courts to guarantee effective judicial protection.⁵²¹ In principle, therefore, the advent of Article 47 reflects an opportunity to gather and tidy this somewhat fractious case law beneath the umbrella of a single provision. 47.247

To date, however, there is not a great deal to suggest that this is occurring. Occasionally the Court has held that principles of equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual’s rights under Community law, with failure to comply with those principles liable to undermine the principles of effectiveness and non-discrimination.⁵²² However, this has not been done systematically. Indeed, in one prominent case the Court of Justice made a ‘direct shortcut’⁵²³ to effective judicial protection, and reformulated the question referred, 47.248

⁵²⁰ Case 222/84 *Johnston v RUC* [1986] ECR 1651.

⁵²¹ For a detailed and thoughtful analysis see S Prechal and R Widdershoven, ‘Effectiveness or Effective Judicial Protection: A Poorly Articulated Relationship’ in *Today’s Multilayered Legal Order: Current Issues and Perspectives. Liber Amicorium in Honour of Arjen W.H. Meij* (Paris, Legal Publishers, 2011).

⁵²² See the judgment of the Court of Justice in Case I-268/06 *Impact* [2006] ECR I-2483 [47], [48] and the discussion thereof in Prechal and Widdershoven ‘Effectiveness or Effective Judicial Protection’ (n 521).

⁵²³ Prechal and Widdershoven ‘Effectiveness or Effective Judicial Protection’ (n 521) p xxx.

when the national court had inquired whether the pertinent national rule rendered EU law impossible in practice or excessively difficult to enforce.⁵²⁴ Further, notwithstanding the status of Article 47 as a primary provision of EU law, due to Article 6 TEU, in at least cases solely concerned with the compliance of Member State remedies and procedural rules, the Court has continued to resolve the problem by reference to the principles of effectiveness and non-discrimination only, while making no reference to Article 47 of the Charter.⁵²⁵

47.249 From this perspective, the Opinion of Advocate General Bot of 14 March 2013 in Case C-93/12 *ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond ‘Zemedelie’—Razplashtatelna agentsia*⁵²⁶ reflects a welcome departure toward more coherence in the approach to Article 47. In that case the national court referred two questions to the Court of Justice that were designed to determine whether allocation a legal problem connected with agricultural law to a specialised tribunal, when it created practical and other problems for individuals wishing to assert their rights, complied with EU law. More particularly, in the first question, the national referring court asked whether the Member State legal regime complied with both the principle of effectiveness and the principle of effective judicial protection. By its second question, the court queried the compliance of the national measure with the principle of equivalence (see the discussion in section D.IV above). Advocate General Bot approached the problem as follows:

it seems to me to be appropriate to examine this issue solely from the viewpoint of Article 47 of the Charter.

The requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual’s rights under European Union law.

The principle of effective judicial protection, which is a fundamental right, includes the right to an effective remedy. That right is itself embodied in the first paragraph of Article 47 of the Charter, which states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.

Having regard to those matters, it therefore seems to me that the question can be considered only from the viewpoint of that provision.⁵²⁷

47.250 The Court of Justice, however treated the two principles in entirely separate categories. The Court’s findings were principally based on its classical case law on the obligation of Member States to provide effective remedies to enforce EU rights. No reference was made in this part of the judgment to Article 47 of the Charter.⁵²⁸ The right to effective judicial protection was mentioned in a single paragraph of the judgment, as reaffirmed in Article 47 of the Charter, before the Court concluded that it had not been breached.⁵²⁹

⁵²⁴ Case C-279/09 *DEB* (n 183).

⁵²⁵ See eg Case C-91/08 *Wall AG v Stadt Frankfurt am Main* (CJEU, 13 April 2010); Case C-378/10 *VALE Epitesi kft* (CJEU, 12 July 2012). See also Case C-536/11 *Donau Chemie AG* (CJEU, 6 June 2013).

⁵²⁶ N 137 above.

⁵²⁷ *Ibid* [29]–[32].

⁵²⁸ *Ibid* [48]–[58].

⁵²⁹ *Ibid* [59]–[60].

Thus, to date there is little indication that Article 47 of the Charter, read either alone **47.251** or in company with the provisions of the Lisbon Treaty to which it is intimately related, namely Articles 4(3) and 19(2) TEU, will result in either closer or deeper scrutiny of established EU and Member State legal regimes for the enforcement of EU law.⁵³⁰ Perhaps, therefore, the greatest potential for development in the interpretation of the rights reflected in Article 47 lies in recourse to principles of international human rights law, as detailed in section C above, and its obligations to secure effective enforcement of these rules.

Au: fn 526 Inuit case cited elsewhere in chapter as C-583/11

⁵³⁰ See most notably [Case C-883/11 P *Inuit Tapiriit Kanatami*](#) (Judgment of 3 October 2013).

