

# Article 47 of the Charter and the Member States

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X. EU law is applied by Member States and on the Union level alike and accordingly EU law is to be applied by Member State courts as well as the CJEU. Different constellations of implementation and enforcement of EU law on the national and European levels, however, lead to a diverse set of conditions of judicial review. The CJEU aims to ensure that a ‘complete’ system of remedies<sup>2</sup> be provided for all “rights and freedoms protected under Union law” (Article 47 of the Charter).

X. A central tool for realising a ‘complete’ system of remedies is the strengthening of Member State courts as ‘first level EU courts’ as well as

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<sup>2</sup> The CJEU makes frequent reference to this notion, more in the sense of a normative objective than a quantitative description of a reality, e.g. in its judgement of 19 December 2013, *Telefónica v Commission* C-274/12 P, ECLI:EU:C:2013:852 [56-57].

ensuring the CJEU's monopoly of reviewing the validity of acts under EU law. Accordingly, this chapter concentrates on Member State obligations and the links between the national and the EU levels under the right to an effective remedy. The following analysis of the right to an effective remedy within Member State legal systems<sup>3</sup> looks at the right to effective remedies in its constitutional context (a), before analysing the scope of protection of the right to an effective remedy and turning to the concept of the rights and freedoms under Union law as the '*ius*' protected by the right to an effective remedy enshrining the Latin maxime of *ubi ius, ibi remedium* into EU law (b). The commentary then turns to specific obligations in 'vertical' relations between individuals and Member States (c) as well as those in 'horizontal' relations between individuals (d). Part (e) examines the permissible limitations on the right to an effective remedy before looking at some of the main lines of development (f).

### **(a) Constitutional Context of the Right to an Effective Judicial Remedy in Member States**

X. The right to an effective judicial remedy is deeply engrained in the constitutional order of the EU. The CJEU describes the origins and nature of this right as being a provision which is a general principle of EU law. It is linked to obligations in the first subparagraph of Article 19(1) TEU under which European courts, 'shall ensure that in the interpretation and application of the Treaties the law is observed.' Under the second paragraph of the same article, Member States shall through their national courts provide "remedies

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<sup>3</sup> For an analysis of the right to an effective remedy before the EU courts see the contribution by A. Ward in this chapter.

sufficient to ensure effective legal protection in the fields covered by Union law.” The CJEU has described this in one general formula, stating as follows;

“The principle of the effective judicial protection of individuals’ rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, [...], and which is now reaffirmed by Article 47 of the Charter.”<sup>4</sup>

X. The right to an effective judicial remedy has been recognised as being deeply embedded in the EU’s composite constitutional structure. It has seen considerable developments beyond from a predominantly effectiveness-oriented tool towards what the CJEU has addressed as a principle the very existence of which ‘is of the essence of the rule of law.’<sup>5</sup>

X In this context, the CJEU begins the analysis of the right to an effective judicial remedy with an analysis of protection under the general principle of EU

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<sup>4</sup> Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses (ASJP)* C-64/16 ECLI:EU:C:2018:117 [35] with references to judgment of 13 March 2007, *Unibet*, C-432/05, ECLI:EU:C:2007:163 [37], and of 22 December 2010, *DEB*, C-279/09 ECLI:EU:C:2010:811 [29-33]. See also e.g. judgment of 5 December 2019, *Centraal Justitiele Incassobureau (and exécution des sanctions pécuniaires)*, C-671/18 EU:C:2019:1054 [38]; judgment of 19 November 2019, *A.K. and Others v Sąd Najwyższy*, joined cases C-585/18, C-632/18 and C-625/18, ECLI:EU:C:2019:982; judgment of 29 July 2019, *Vethanayagam and Others*, C-680/17, ECLI:EU:C:2019:627; judgment of 24 June 2019, *Commission v Poland* (Indépendance de la Cour suprême), C-619/18 ECLI:EU:C:2019:531.

<sup>5</sup> Judgment of 28 March 2017, *Rosneft e.a. v Council*, C-72/15, ECLI:EU:C:2017:236, [73] with further references; judgment of 25 July 2018, *Minister for Justice and Equality (LM)*, C-216/18 PPU ECLI:EU:C:2018:586 [51]. See also discussion in Koen Lenaerts, ‘New Horizons for the Rule of Law Within the EU’ (2020) 21 German Law Journal 29.

law and the guarantees thereof outlined by Article 47 of the Charter. The general principle of EU law was established in *Johnston*.<sup>6</sup>

(i) Article 19 TEU and the Interpretation of Charter Rights in the Context of Treaty Provisions

X. According to Article 52(2) of the Charter, charter provisions and thus Article 47, must be interpreted and exercised ‘under the conditions and within the limits’ defined by relevant Treaty provisions which make provision for it. As noted above, these include Article 19 TEU, “which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU”<sup>7</sup> and especially Article 19(1) TEU’s second sub-paragraph, which establishes that Member States ‘shall provide the remedies sufficient to ensure effective legal protection in the fields covered by Union law’. That provision clarifies that national judges are also judges of Union law.<sup>8</sup> Today’s Article 19(1) TEU is thus a specification of the general obligation under the principle of sincere

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<sup>6</sup> On the right to effective judicial protection see e.g. the judgments of 15 May 1986, *Johnston*, C-222/84, ECLI:EU:C:1986:206 [19]; of 15 October 1987, *Heylens and Others*, Case 222/86 EU:C:1987:442 [14]; of 27 November 2001, *Commission v Austria*, C-424/99, ECLI:EU:C:2001:642 [45]; of 25 July 2002, *Unión de Pequeños Agricultores v Council*, C-50/00 P, ECLI:EU:C:2002:462 [39]; of 19 June 2013, *Eribrand*, C-467/01, ECLI:EU:C:2003:364 [61]; judgment of 13 March 2007, *Unibet*, C-432/05, ECLI:EU:C:2007:163 [37]; of 3 September 2008, *Kadi and Al Barakaat*, Joined Cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461 [335]; of 16 July 2009, *Mono Car Styling*, C-12/08, ECLI:EU:C:2009:466 [47]; of 18 March 2010, *Allassini*, Joined Cases C-317/08 to C-320/08, ECLI:EU:C:2010:146 [61]. See more recently, e.g., judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses (ASJP)*, C-64/16, EU:C:2018:117 [35]; judgment of 20 June 2019, *Hakelbracht and Others*, C-404/18, ECLI:EU:C:2019:523 [32]; judgment of 21 November 2019, *Deutsche Lufthansa AG*, C-379/18, ECLI:EU:C:2019:1000 [56].

<sup>7</sup> Judgement of 5 November 2019, *Commission v Poland*, C-192/18, ECLI:EU:C:2019:924 [98]. See further judgments of 9 July 2020, *Land Hessen*, C-272/19, ECLI:EU:C:2020:535; of 25 June 2020, *CSEU v KF*, C-14/19 P, ECLI:EU:C:2020:492; of 19 November 2019, *A.K. and Others v Sąd Najwyższy*, C-585/18, ECLI:EU:C:2019:982 [167]; of 24 June 2019, *Commission v Poland (Indépendance de la Cour suprême)*, C-619/18, ECLI:EU:C:2019:531 [47]; and of 25 July 2018, *Minister for Justice and Equality (LM)*, C-216/18 PPU, ECLI:EU:C:2018:56 [50].

<sup>8</sup> For a discussion on the network type of a relationship between the CJEU and the national courts, see Koen Lenaerts, ‘The Court of Justice of the European Union as the Guardian of the Authority of EU Law: A Networking Exercise’ in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe in It?* (Springer 2019).

cooperation (Article 4(3) TEU) obliging Member States to ‘take any appropriate measure, general or particular, to ensure 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.<sup>9</sup> The obligation of the Member States under Articles 4(3) and 19(1) TEU is mirrored by the individual right to an effective judicial review, recognised also by Article 47 of the Charter.<sup>10</sup>

X. However, the obligations contained in Article 19 (1), encapsulating as they do the principle of sincere cooperation and the obligation on Member States to provide effective remedies, can apply, even in circumstances in which Article 47 would be otherwise irrelevant, for absence of any implementation of EU law under Article 51 (1) of the Charter.<sup>11</sup> Member State obligations arising from Article 19 (1) TEU, which speaks of the “*fields covered*” by EU law, exist beyond matters where Member States are implementing Union law, within the meaning

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<sup>9</sup> On the relation between the principle of sincere cooperation and the right to an effective judicial remedy e.g., judgments of 16 December 1976, *Rene*, Case 33/76, ECLI:EU:C:1976:188 [5]; of 16 December 1976, 45/76 *Comet* EU:C:1976:191 [12]; of 9 March 1978, *Simmenthal*, Case 106/77, ECLI:EU:C:1978:49 [21-22]; of 19 June 1990, *Factortame*, C-213/89, ECLI:EU:C:1990:257 [19]; of 14 December 1995, *Peterbroeck*, C-312/93, ECLI:EU:C:1995:437[12]; and of 13 March 2007, *Unibel*, C-432/05, ECLI:EU:C:2007:163 [38]: ‘Under the principle of cooperation laid down in Article 10 EC [now Article 4(3) TEU], it is for the Member States to ensure judicial protection of an individual’s rights under Community law’. See more recently, e.g. judgments of 25 June 2020, *A and Others*, C-24/19, ECLI:EU:C:2020:50 [83]; of 29 January 2020, *GAEC Jeanningros*, C-785/18, ECLI:EU:C:2020:46 [32]; and of 26 June 2019, *Craeynest*, C-723/17, ECLI:EU:C:2019:533 [31]. On the practical consequences arising from this obligation see notably the judgment of 19 November 2019, *A.K. and Others v Sąd Najwyższy*, joined cases C-585/18, C-624/18, C-625/18, ECLI:EU:C:2019:982 [166]. On Member State discretion to designate courts having jurisdiction to decide disputes concerning EU law see paragraph XXXXX.

<sup>10</sup> Such a right also follows from Article 47 of the Charter of Fundamental Rights of the European Union as regards measures taken by the Member States to implement Union law within the meaning of Article 51(1) of that Charter. See e.g. judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission*, C-456/13 P, ECLI:EU:C:2015:284 [50].

<sup>11</sup> At the same time, the obligations contained in Article 19 TEU are also inherent in Article 47. See the judgment of 13 March 2018, *Industrias Químicas del Vallés v Commission*, C- 244/16 P, ECLI:EU:C:2018:177 [107]. ‘That obligation of the Member States was reaffirmed by the second subparagraph of Article 19(1) TEU, which states that Member States ‘shall provide remedies sufficient to ensure effective judicial protection in the fields covered by Union law’.

of Article 51(1) of the Charter”.<sup>12</sup> The latter may result in a scope of obligations arising from Article 19 (1) TEU which are, in certain circumstances, broader than the notion of scope or of implementing EU law as developed by the CJEU under Article 51 of the Charter and the case law on general principles of EU law.<sup>13</sup>

X. This results from the concept of the EU as ‘a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act’.<sup>14</sup>

X. Irrespective of this, the organization of justice, that is the structure of the Courts, the procedural rules applicable, the education, nomination and promotion of judges and other court officials as well as the system of remedies, falls within the competence of the Member States.<sup>15</sup> Such competencies must be exercised in the context of EU law and “the fact remains that, when exercising that competence, the Member States are required to comply with

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<sup>12</sup> Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses (ASJP)*, C-64/16, ECLI:EU:C:2018:117 [29]. See also judgment of 19 November 2019, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)*, C-585/18, ECLI:EU:C:2019:982 [82] judgment of 5 November 2019 *Commission v Poland (Polish judges)*, C-192/18, ECLI:EU:C:2019:924 [101]; judgment of 24 June 2019, *Commission v Poland (Indépendance de la Cour suprême)*, C-619/18, ECLI:EU:C:2019:531 [50].

<sup>13</sup> See e.g. judgment of 17 September 2014, *Liivimaa Libaveis MTÜ v Seirekomitee*, C-562/12, ECLI:EU:C:2014:2229, [62]: “In accordance with the settled case-law of the Court, the concept of ‘implementing Union law’ ... requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.” See also judgment of 29 May 1997, *Kremzow*, C-299/95, ECLI:EU:C:1997:254 [16]. For a more detailed analysis see the contribution of A. Ward on Article 51 in this commentary.

<sup>14</sup> Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses (ASJP)*, C-64/16, ECLI:EU:C:2018:117 [31, 35] with reference to judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, ECLI:EU:C:2013:625, [91, 94] and the case-law cited. See also, in the context of challenge to the validity of EU measures, the judgments of 13 March 2018 in *European Union Copper Task Force v. European Commission*, C-384/16 P, ECLI:EU:C:2018:176 [113], and of 13 March 2018, *Industrias Químicas del Vallés v Commission*, C-244/16 P, ECLI:EU:C:2018:177.

<sup>15</sup> Paul Craig, ‘Remedies II: Member States’, *EU Administrative Law* (Third Edition, Oxford University Press 2018).

their obligations deriving from EU law”.<sup>16</sup> This does not amount to EU law acquiring these competences: It simply means that all courts and tribunals that can potentially be called upon to interpret and apply EU law must comply with the right to effective judicial protection, which entails adherence to the obligations reflected in Article 19(1) TEU and Article 47 of the Charter, particularly when it comes to guaranteeing the independence of the judiciary.

X. In the *Independence of the Supreme Court of Poland* case of 2019, the CJEU concludes that the second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law.” Member States must ensure that its courts or tribunals which decide in fields covered by EU law will ensure “effective judicial protection” as prescribed for by the CJEU.<sup>17</sup>

(ii) The Minimum Level of Protection Defined by the ECHR

X. The right to an effective judicial remedy under Article 47 of the Charter also needs to be interpreted to at least the same level as relevant rights under the European Convention of Human Rights as interpreted by the European Court

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<sup>16</sup> Judgement of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* C-619/18, ECLI:EU:C:2019:531 [52] with reference, by analogy, to judgments of 13 November 2018, *Raugevicius*, C-247/17, ECLI:EU:C:2018:898 [45], and of 26 February 2019, *Rimševičs and ECB v Latvia*, joined cases C-202/18 and C-238/18, ECLI:EU:C:2019:139 [57].

<sup>17</sup> Judgments of 5 November 2019, *Commission v Poland (Polish judges)*, C-192/18, ECLI:EU:C:2019:924 [99] and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, ECLI:EU:C:2019:531 [54-55], with reference to judgments of 14 June 2017, *Online Games and Others*, C-685/15, ECLI:EU:C:2017:452 [54]; of 27 February 2018, *Associação Sindical dos Juízes Portugueses (ASPJ)*, C-64/16, ECLI:EU:C:2018:117 [37] and of 25 July 2018, *Minister for Justice and Equality (LM)*, C-216/18 PPU, ECLI:EU:C:2018:586 [52]. See further the contribution of Laurent Pech in this volume.

of Human Rights.<sup>18</sup> This is so due to the obligation in Article 52 (3) of the Charter for Charter rights which correspond to those in the ECHR to be interpreted in the same way, subject in the facility for the European Union to provide more extensive protection,<sup>19</sup>

X. 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* from Articles 6 and 13 of the ECHR,<sup>20</sup> and especially in cases of criminal law being more specifically addressed by the ECHR provisions, sometimes continue to do. As explained in the introduction to this chapter, the contemporary trend in the case law of the CJEU is to refer only to Article 47 of the Charter when ruling on the rights falling within its ambit, rather than Articles 6 and 13 ECHR but all the while retaining the minimum level of protection in the case law of the European Court of Human Rights as an important source of Article 47 rights.<sup>21</sup>

X. Pursuant to this case law, Article 6 ECHR is regarded as *lex specialis* to Article 13 ECHR in that the requirements of Article 13 are ‘absorbed by more

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<sup>18</sup> For a comparative discussion see e.g. Martin Böse, ‘Judicial Protection in International and EU Law’ in Martin Böse, Maria Bröcker and Anne Schneider (eds), *Judicial Protection in Transnational Criminal Proceedings* (Springer International Publishing 2021).

<sup>19</sup> See, for example, in the context of the second subparagraph of Article 47 the judgment of 22 December 2017, *Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026 [49]. See further above paragraphs XXXXXX of this commentary.

<sup>20</sup> M. Poelmans, *La sanction dans l'ordre juridique communautaire* Bruylant (Bruxelles, 2004), 621. See e.g., judgments of 15 May 1986, *Johnston*, Case 222/84, ECLI:EU:C:1986:206 [18] and [19]; of 15 October 1987, *Heylens and Others*, Case 222/86, ECLI:EU:C:1987:442 [14]; of 27 November 2001, *Commission v Austria*, C-424/99, ECLI:EU:C:2001:642 [45]; of 25 July 2002, *Unión de Pequeños Agricultores v Council*, C-50/00 P, ECLI:EU:C:2002:462 [39]; of 19 June 2013, *Eribrand*, C-467/01, ECLI:EU:C:2003:364 [61]; of 16 July 2009, *Mono Car Styling*, C-12/08, ECLI:EU:C:2009:466 [47]; of 18 March 2010, *Alasini*, joined cases C-317/08 to C-320/08, ECLI:EU:C:2010:146 [61]. See further paragraphs XXXX above.

<sup>21</sup> See paragraphs above.

stringent requirements of Article 6’ ECHR.<sup>22</sup> 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.’<sup>23</sup> The Convention grants a minimum level of protection and covers only those rights protected under the Convention itself. Article 47 of the Charter and the general principle of the right to an effective remedy under EU law, by comparison, goes beyond this minimum standard. One of the most important elements of broader protection granted by Article 47 of the Charter, by comparison to the ECHR, is that it offers protection of any ‘rights and freedoms guaranteed by the law of the Union’<sup>24</sup> not just fundamental rights as does the Convention.

(iii) The Right to an Effective Remedy as an Essential Requirement of the Rule of Law

X. The right to an effective remedy is an essential requirement of ensuring the rule of law (Article 2 TEU) within the Union.<sup>25</sup> The CJEU summarised this in *ASJP* by stating that the EU

‘is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act.’<sup>26</sup>

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<sup>22</sup> See in this context: ECtHR, 25 September 2007, *Efendiyyeva v Azerbaijan* [59]; ECtHR, 20 September 2012, *Titarenko v Ukraine*, [80]; ECtHR, 16 September 2014, *McDonnell v United Kingdom* [90]

<sup>23</sup> ECtHR, 19 April 2007, *Vilho Eskelinen and Others v Finland* [GC] [80].

<sup>24</sup> See for further detail points XXXX in the introduction to the commentary on Article 47 of the Charter in this volume.

<sup>25</sup> The recognition of which in the Union legal system famously going back to the judgment of 25 February 1988, *Les Verts*, C-190/84, [23-24]. The relation between the right to an effective judicial remedy and the rule of law is outlined in the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses (ASJP)*, C-64/16, ECLI:EU:C:2018:117 [38-39]. See recently on the rule of law as a touchstone for limiting the exception to effective judicial protection inherent in the second paragraph of Article 275 TFEU, see the Opinion of Advocate General Hogan of 28 May 2020, *Bank Refah Kargaran v Council*, C-134/19 P, ECLI:EU:C:2020:396 [66–68]. These arguments were adopted by the CJEU at paragraph 39 of the judgment of 6 October 2020, *Bank Refah Kargaran v Council*, C-134/19 P, ECLI:EU:C:2020:793.

Article 19 TEU, in this context

‘gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals.’<sup>27</sup>

Therefore, as the CJEU now has repeatedly underlined, that the “very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.”<sup>28</sup>

(iv) Procedural and Organizational Autonomy of Member States

X. Although 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 in principle within national competence,<sup>29</sup> such autonomy needs to be exercised in the context of conditions set by EU law for all courts that may be called upon to adjudicate EU law. To the extent that a national court or

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<sup>26</sup> Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses (ASJP)*, C-64/16, ECLI:EU:C:2018:117 [31]; judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625 [91, 94]. For application of the same right to the context of validity review see the judgment of 13 March 2018, *European Union Copper Task Force v. Commission*, C-384/16 P, ECLI:EU:C:2018:176 [113] and of 13 March 2018, *Industrias Químicas del Vallés v Commission*, C-244/16 P, ECLI:EU:C:2018:177 [103].

<sup>27</sup> Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses (ASJP)*, C-64/16, ECLI:EU:C:2018:117 [32], with further references. See further judgment of 9 July 2020, *Land Hessen*, C-272/19, ECLI:EU:C:2020:535; judgment of 25 June 2020, *CSEU v. KF*, C-14/19 P, ECLI:EU:C:2020:492; judgment of 19 November 2019, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)*, C-585/18, ECLI:EU:C:2019:982 [167]; judgment of 24 June 2019, *Commission v Poland (Indépendance de la Cour suprême)*, C-619/18, ECLI:EU:C:2019:531 [47]; judgment of 25 July 2018, *Minister for Justice and Equality (LM)*, C-216/18 PPU, ECLI:EU:C:2018:586 [50].

<sup>28</sup> Judgment of 25 July 2018, *Minister for Justice and Equality (LM)*, C-216/18 PPU, ECLI:EU:C:2018:586 [51]; Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses (ASJP)*, C-64/16, ECLI:EU:C:2018:117 [36] with further references. Volker Roeben, ‘Judicial Protection as the Meta-Norm in the EU Judicial Architecture’ (2020) 12 Hague Journal on the Rule of Law 29.

<sup>29</sup> This is known as the principle of national procedural autonomy. It would appear that under the principle of sincere cooperation Member States are under obligation to ensure that its national procedural provisions enforce EU law and in doing so enjoy a margin of discretion – the limits of which also circumscribe the degree of the national procedural autonomy. See also D-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?*, Springer (Heidelberg 2010) with further references.

tribunal may rule “on questions concerning the application or interpretation of EU law”, it must be ensured that those courts meet “the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU”.<sup>30</sup>

X. This is *inter alia* a reason why national competencies were initially interpreted in the light of the obligations under the sincere cooperation principle before the more specific Article 47 of the Charter and Article 19 TEU were included in the Treaties. Accordingly, much of the case law on the right to effective remedies concerns questions of access to national courts and the remedies available before them.<sup>31</sup>

X. The notion of autonomy is a concept developed in the context of Article 4 TEU within which the obligation of sincere cooperation (Article 4(3) TEU) obliges Member States to offer remedies subject to the principles of equivalence and effectiveness. In fact, the CJEU has held that the “requirements stemming from the principles of equivalence and effectiveness apply both to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on European Union law and to the definition of the procedural rules governing such actions.”<sup>32</sup>

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<sup>30</sup> Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses (ASJP)*, C-64/16, ECLI:EU:C:2018:117 [40]; judgment of 25 July 2018, *Minister for Justice and Equality (LM)*, C-216/18 PPU, ECLI:EU:C:2018:586. <sup>30</sup> Judgment of 25 July 2018, *Minister for Justice and Equality (LM)*, C-216/18 PPU, ECLI:EU:C:2018:586 [51]. See further points XXX to XX above.

<sup>31</sup> On the distinction between the right to effective judicial review, on the one hand, and the first of the two principle tempering Member State remedial and procedural autonomy, namely the principle of effectiveness (the second being the principle of equivalence) see the discussion at points XXX of this commentary. See also Sacha Prechal and Rob Widdershoven, ‘Redefining the Relationship between “Rewe-Effectiveness” and Effective Judicial Protection’ (2011) 4 *Review of European Administrative Law* 31; Jasper Krommendijk, ‘Is There Light on the Horizon? The Distinction between “Rewe Effectiveness” and the Principle of Effective Judicial Protection in Article 47 of the Charter after Orizzonte’ (2016) 53 *Common Market Law Review* 1395.

<sup>32</sup> Judgments of 24 October 2018, *XC and Others*, C-234/17, ECLI:EU:C:2018:853 [23]; of 27 June 2013, *ET Agroconsulting-04-Velko Stoyanov*, C-93/12, ECLI:EU:C:2013:432 [37]; of 18 March 2010, *Alasini*, joined

X. Under the principle of equivalence, in the absence of applicable EU law, Member States must grant ‘the detailed rules governing actions for safeguarding an individual’s rights under European Union law must be no less favourable than those governing similar domestic actions’ - thus grant at least equivalent protection for violation of EU law to that available against breach of national law.<sup>33</sup> A rule must ‘be applied without distinction, whether the infringement alleged is of Community law or national law’.<sup>34</sup> The similarity of a situation is subject to detailed case-by-case analysis. The Court looks at the purpose and effect of the national measure in question and checks whether ‘the purpose and cause of action are similar’,<sup>35</sup> or whether the case concerns ‘the same kind of charges or dues’.<sup>36</sup> Finally,

‘every case in which the question arises as to whether a national procedural rule governing actions based on EU law is less favourable than those governing similar domestic actions must be analysed by the national court taking into account the role played by the rules concerned

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cases C-317/08 to C-320/08, ECLI:EU:C:2010:146 [49]; of 15 April 2008, *Impact*, C-268/06, ECLI:EU:C:2008:223 [47]; of 10 July 1997, *Palmisani*, C-261/95, ECLI:EU:C:1997:351 [27]; of 20 September 2001, *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:465 [29].

<sup>33</sup> Judgment of 21 September 1983, *Deutsche Milchkontor*, C-205/82, ECLI:EU:C:1983:233 [17]; judgment of 20 September 2001, *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:46529; judgments of 27 June 2013, *ET Agroconsulting-04-Velko Stoyanov*, C-93/12, ECLI:EU:C:2013:432 [35-36] with further references. See recently e.g. judgment of 9 September 2020, *Commissaire general aux réfugiés et aux apatrides*, C-651/19, EU:C:2020:681[36] and following; judgment of 26 September 2018, *Belastingdienst v. Toeslagen*, C-175/17, ECLI:EU:C:2018:776. For a detailed analysis of the principle of equivalence see the contribution by E. Paunio in this commentary.

<sup>34</sup> E.g. judgments of 15 September 1998, *Edis*, C-231/96, ECLI:EU:C:1998:401 [36]; and of 27 March 1980, *Salumi*, Joined Cases 66/79, 127/79 and 128/79, ECLI:EU:C:1980:101 [21].

<sup>35</sup> Judgment of 1 December 1998, *Levez*, C-326/96, ECLI:EU:C:1998:577 [41].

<sup>36</sup> Judgment of 15 September 1998, *Edis*, C-231/96, ECLI:EU:C:1998:401 [36]; judgment of 15 September 1998, *Edis*, C-231/96, ECLI:EU:C:1998:401 [21].

in the procedure as a whole, as well as the operation and any special features of those rules before the various national bodies'.<sup>37</sup>

X. The notion of effectiveness of remedies will be discussed below. The effectiveness requirement for judicial remedies was initially developed from the as part of the obligation of sincere cooperation under Article 4(3) TEU (and its predecessors).<sup>38</sup> This is now more specifically enshrined in the notion of effective remedies under Article 47 of the Charter. In fact, given its status as accessory 'meta right' of protection, the right to an effective remedy under Article 47 of the Charter is one of the rights of the Charter most cited fundamental in the case law of the CJEU.<sup>39</sup> It is invoked and adjudicated in the context of almost any 'field covered by EU law' as the formulation of Article 19(1) TEU aptly describes its scope of application.

### **(b) Scope of Protection of the Right to an Effective Remedy**

X Originally developed as general principle of EU law by the CJEU in mid-seventies of the past century from case law specifying Member State obligations to sincere cooperation and the more general notion of effectiveness,<sup>40</sup> the right to an effective remedy, has seen a particularly dynamic development of its scope of protection.<sup>41</sup> This results from the fact that the individual right to an

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<sup>37</sup> Judgment of 9 September 2020, *Commissaire general aux réfugiés et aux apatrides*, C-651/19, ECLI:EU:C:2020:681 [39], referring to judgment of 26 September 2018, *Staatssecretaris van Veiligheid en justitie (Suspensory effect of the appeal)*, C-180/17, ECLI:EU:C:2018:775 [40].

<sup>38</sup> On the principle of sincere cooperation and the principles of effectiveness and equivalence see e.g. the judgment of 4 October 2018, *Kantarev*, C-571/16, ECLI:EU:C:2018:807.

<sup>39</sup> Simona Demková, Herwig C.H. Hofmann, General Principles of Procedural Justice, in: Katja Ziegler (ed.) *Constructing Legal Principles in Europe – the General Principles of EU Law* (Springer, Berlin-New York 2021) (forthcoming).

<sup>40</sup> The foundational ruling is the judgment of 16 December 1976, *Comet*, Case 45/76, ECLI:EU:C:1976:191 [12-13].

<sup>41</sup> See the Opinion of Advocate General Øe of 14 May 2020 in *Braathens Regional Aviation*, C-30/19, ECLI:EU:C:2020:374, 'That freedom of the Member States is subject to the principles of equivalence and

effective remedy is directly linked to ensuring compliance by Member States with basic constitutional provisions of EU law such as notions of primacy, direct effect, and principles enshrined in Article 2 TEU such as the rule of law.<sup>42</sup> One of the more consequential recent development of the case law on Article 47 of the Charter is the affirmation that the right to an effective remedy is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right a right on which they may rely as such.<sup>43</sup> This will be discussed further below.

X. Less developed, on the other hand is the case law on rights to effective remedies by Member States themselves, which although in protected by the right to an effective remedy,<sup>44</sup> are generally less vulnerable due to their position as being amongst the privileged actors under Article 263 first paragraph 263 TFEU.

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effectiveness, that is to say, first, the requirement to ensure that those procedural rules are no less favourable than those governing similar domestic actions and, secondly, the requirement that those rules do not render impossible or excessively difficult the exercise of rights conferred by EU law...The Court has gradually found it necessary, in many cases, to apply another test, that of effective judicial protection, now guaranteed in Article 47 of the Charter. That test consists in examining whether the national law concerned ensures effective judicial protection by allowing the person concerned to assert before a court his or her rights under EU law. That test is regarded as being a more restrictive one. It allows limitations only pursuant to Article 52(1) of the Charter, that is to say, on condition that those limitations are provided for by law and respect the essence of the rights and freedoms recognised by the Charter as well as the principle of proportionality...One and/or the other test will normally be applied depending on whether or not the rules examined concern the right to effective judicial protection for the purposes of Article 47 of the Charter.

<sup>42</sup> Laurent 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. Theodore Konstadinides, ‘Conceptualising the EU Rule of Law’, *The Rule of Law in the European Union: The Internal Dimension* (1st ed., Hart Publishing 2017).

<sup>43</sup> Judgment of 6 October 2020, *Etat Luxembourgeois v B and Others*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 [54]; judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU, ECLI:EU:C:2020:367 [140], referring to the judgment of 17 April 2018, *Egenberger*, C-414/16, ECLI:EU:C:2018:257 [78]; judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626 [56]; judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, joined cases C-585/18, C-624/18, and C-625/18, ECLI:EU:C:2019:982 [160-161].

<sup>44</sup> Judgement of 5 December 2017, *Germany v Council (COTIF)* C-600/14, ECLI:EU:C:2017:935 [108].

X. The CJEU develops the notion of effective remedies with respect to questions in at least four directions: First the ‘rights and freedoms’ which need to be afforded protection (i); second, what qualifies as protection by a court or tribunal of a Member State (ii), third, what makes for *de jure* and *de facto* ‘effective’ protection in the context of procedural and substantive safeguards (iii). Finally, the discussion of scope of protection requires some discussion about the notion of the ‘essence’, which cannot be limited, and about possible limitations of the right (iv).

### **(i) Obligation to Protect ‘Rights or Freedoms Guaranteed by the Law of the Union’**

X. As explained above at paragraphs XXXX to XXXX, the right to an effective remedy under Article 47 of the Charter entails broader protection than guaranteed under Articles 6 and 13 ECHR in that Article 47 of the Charter grants protection against violation of any right or freedom arising under EU law – not just ‘fundamental rights’ explicitly enshrined within the Charter or the Convention. This broad notion thus includes protection of rights arising from Treaty provisions and legislative as well as non-legislative acts of the institutions and bodies of the EU. It equally includes rights arising from general principles of EU law such as rights to non-discrimination, for example where Member State law is in breach of it.<sup>45</sup>

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<sup>45</sup> Such was for example the case in *Dansk Industri* where the CJEU required that “where national courts are called on to give judgment in proceedings between individuals in which it is apparent that the national legislation at issue is contrary to EU law, it is for those courts to provide the legal protection which individuals derive from the provisions of EU law and to ensure that those provisions are fully effective.” See: judgment of 19 April 2016, *Dansk Industri*, C-441/14, ECLI:EU:C:2016:278 [29], [42] with reference to judgments of 5 October 2004, *Pfeiffer and Others*, joined cases C-397/01 to C-403/01, ECLI:EU:C:2004:584 [111], and of 19 January 2010, *Kücükdeveci*, C-555/07, ECLI:EU:C:2010:21 [45].

X. 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 in that Article 47 of the Charter requires ‘violation’ of a right whereas under Article 13 ECHR it is explicitly recognised that the existence of an ‘arguable claim’ of a violation of a convention right suffices to make a claim under Article 13 ECHR.<sup>46</sup> This same common-sense standard is also to be applied to the interpretation of the unfortunate wording of Article 47 of the Charter.

X. The concept of ‘rights and freedoms guaranteed by the law of the Union’ is an autonomous concept.<sup>47</sup> Remedies need to be supplied to individuals suitable to ensure that where there is a right under Union law, there is a remedy to ensure its enforcement.<sup>48</sup> Thus, importantly, the identification of what constitutes a right to be protected is a matter of EU law, is to be decided under criteria arising from EU law. That requires Member States to apply their procedural provisions to protect rights arising under EU law, even if under a purely national situation, the legal system would not recognise such rights.

X. For example, Member States are barred from applying approaches under national law that require criteria for the recognition of a right in addition to those required under EU law – often simply requiring that an obligation to be sufficiently clear, precise and unconditional and an individual having an interest

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<sup>46</sup> The seminal case under the ECHR appears to be ECtHR, 25 March 1983, *Silver and Others* [113]. See: 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].

<sup>47</sup> See with further in-depth discussion especially, Catherine Warin, *Individual rights under European Union Law* (Nomos, Baden-Baden 2019).

<sup>48</sup> See Walter van Gerven, ‘Of Rights, Remedies and Procedures’ (2000) 37 *Common Market Law Review* 501, 511.

in compliance with that. One example is *Danske Slagterier*.<sup>49</sup> There the CJEU found that where a directive prohibits the Member States from preventing importation of properly inspected meat, this provision must be seen as granting “individuals the right to market in another Member State fresh meat that complies with the Community requirements” and thus obliging the Member State to afford the individual protection under the right to an effective remedy within the Member State.<sup>50</sup>

X. Equally, *Olainfarm*<sup>51</sup> concerned the question whether a particular article of an EU directive on admission of medicines to the single market contained an individual right which would give rise to an effective judicial remedy.<sup>52</sup> In searching for a right under the EU legal system, the CJEU focussed on the nature of the obligation imposed by the directive on one party instead of looking at whether the EU legislature had explicitly intended to create a subjective right in the directive. The CJEU held that where a directive imposes an unconditional and sufficiently precise obligation on a Member State, it is then for EU law to identify whether such directive “confers a concomitant right” on individuals,<sup>53</sup> which is to be protected by the Member States courts, even if under their national procedural law the Member State would not have recognised the protection of such ‘concomitant right’ in a purely national context.<sup>54</sup> The CJEU took the same approach in *Bund für Umwelt und*

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<sup>49</sup> Judgment of 24 March 2009, *Danske Slagterier*, C-445/06, ECLI:EU:C:2009:178.

<sup>50</sup> Judgment of 24 March 2009, *Danske Slagterier*, C-445/06, ECLI:EU:C:2009:178 [24] explicitly refuting the Opinion of AG Trstenjak in *Danske Slagterier*, C-445/06, ECLI:EU:C:2008:464, arguing for an ‘intentionalist’ approach to identifying individual rights under EU law.

<sup>51</sup> Judgment of 23 October 2014, *Olainfarm*, C-104/13, ECLI:EU:C:2014:2316.

<sup>52</sup> Ibid. Judgment of 23 October 2014, *Olainfarm*, C-104/13, ECLI:EU:C:2014:2316 [22].

<sup>53</sup> Ibid. Judgment of 23 October 2014, *Olainfarm*, C-104/13, EU:C:2014:2316 [36-37], concerning the right to refuse access to information contained in the dossier used to register a medicinal product. See also Judgment of 12 May 2011, *Bund für Umwelt und Naturschutz*, C-115/09, ECLI:EU:C:2011:289 [54].

<sup>54</sup> Ibid. Judgment of 23 October 2014, *Olainfarm*, C-104/13, ECLI:EU:C:2014:2316 [36-37]. That case concerned the right to refuse access to information contained in a regulator’s dossier to register a competing medicinal product.

*Naturschutz*<sup>55</sup> - a preliminary reference to the CJEU for interpretation of a directive on environmental impact assessments and the Habitats directive. The German legal provisions implementing the directives had been interpreted by German courts as excluding standing for environmental NGOs. The CJEU by contrast held that the provisions of the directive allowing standing in court for NGOs to defend the interests protected by the directives being “unconditional and sufficiently precise”,<sup>56</sup> NGOs may therefore rely on these provisions “even where (...) the rules relied on protect only the interests of the general public and not the interests of the individuals.”<sup>57</sup>

X. Slightly more limiting, on the other hand, is the judgment in *Gruber* where the CJEU recognised that in the context of the principles of effectiveness and equivalence, Member States nonetheless ‘have a significant discretion to determine what constitutes “sufficient interest” or “impairment of a right” under their national procedural rules for granting access to courts.’<sup>58</sup> However, the Court finds that this discretion can be limited by specific EU legislation.<sup>59</sup>

X. Generally, however, under the case law of the CJEU any regulatory limitation of individual freedoms is protected as a ‘right’ in the context of

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<sup>55</sup> Judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein Westfalen*, C-115/09, ECLI:EU:C:2011:289.

<sup>56</sup> Ibid. [54].

<sup>57</sup> Ibid [59]. See also judgments of 16 April 2015, *Gruber*, C-570/13, ECLI:EU:C:2015:231 [41], and of 15 October 2015, *Commission v Germany*, C-137/14, ECLI:EU:C:2015:683 [90-94]. The application of the German *Schutznorm* could therefore not override the obligation to protect rights allocated under EU law. Direct effect remains the touchstone for an entitlement of individuals to rely on directives against organs under the authority or control of the state. See for example the judgment of 19 December 2019, *Pensions-Sicherungs-Verein*, C-168/18, ECLI:EU:C:2019:1128 [48]; judgments of 10 October 2017, *Farrell*, C-413/15, ECLI:EU:C:2017:745 [34], and of 6 September 2018, *Hampshire*, C-17/17, ECLI:EU:C:2018:674 [55].

<sup>58</sup> Judgment of 16 April 2015, *Gruber*, C-570/13, ECLI:EU:C:2015:231, [37-39] with reference to judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein Westfalen*, C-115/09, ECLI:EU:C:2011:289[55]; judgment of 7 November 2013, *Gemeinde Altrip and Others*, C-72/12, EU:C:2013:712 [50].

<sup>59</sup> In that case, citing Article 11(3) of Directive 2011/92 and the second paragraph of Article 9(2) of the Aarhus Convention.

Article 47 Charter. This was established by the CJEU in the development of a general defense right, protected as general principle of EU law giving “protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person.”<sup>60</sup> This fundamental right under EU law that can be limited only under the conditions restated for Charter rights in Article 52(1) of the Charter, i.e. on the basis of law, respecting the essence of the right and complying with the principle of proportionality.<sup>61</sup>

X. Next to the general defense right protecting against interventions by public authorities, any right or freedom arising from EU law, either from the Charter, the Treaties, legislative or non-legislative acts of the institutions and bodies of the EU or as arising from general principles of EU law, such as the right to the protection of legitimate expectations can be subject to requirement of protection. This does however not mean that the claim of violation or limitation of a right, in and of itself, is sufficient to ensure standing in any particular type of action.<sup>62</sup>

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<sup>60</sup> Judgment of 6 October 2020, *Etat Luxembourgeoise v B and others*, joined cases C-245/19 and 246/19, ECLI:EU:C:2020:795 [100]; Judgment of 16 May 2017, *Berlioz Investment Fund SA*, C-682/15, ECLI:EU:C:2017:373 [51]; judgment of 17 November 2005, *Minoan Lines v Commission*, C-121/04 P ECLI:EU:C:2005:695 [30]; judgment of 22 October 2002, *Roquette Frères*, C-94/00, ECLI:EU:C:2002:603 [27]; judgment of 21 September 1989, *Hoechst v Commission*, joined cases 46/87 and 227/88, EU:C:1989:337 [19].

<sup>61</sup> Judgment of 7 August 2018, *Chateau du Grand Bois*, C-59/17, ECLI:EU:C:2018:641 [30]; Opinion of Advocate General Kokott of 2 July 2020, *Etat Luxembourgeoise v B and others*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:516 [52-57], and the following judgment of 6 October 2020, ECLI:EU:C:2020:795 [54 – 59].

<sup>62</sup> As discussed in paragraph XXX, damage claims might be the only option. According to the Court, ‘it is apparent from the case-law of the Court that the possibility, for a given individual, of bringing proceedings before a court in order to obtain a finding that the rights, which are guaranteed to that individual by EU law have been infringed and to obtain compensation for the harm suffered as a result of that infringement ensures that the individual has effective judicial protection ...’ Judgment of 6 October 2020, *Etat Luxembourgeoise v B and others*, C-245 and 246/19, EU:C:2020:795 [101]; judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163 [58].

## (ii) A Remedy Before a Court or Tribunal

X. The CJEU has drawn a link between substantive rights and the existence of a remedy in its early cases such as *Johnston*, where it identified the “right to obtain an effective remedy in a competent court”<sup>63</sup> as a general principle of European law. Effective judicial protection must be offered by courts and tribunals recognized as such by EU law.

X. In reality, it is primarily the national courts, which are required to apply EU law as first-order ‘Union judges’ in the context of Article 19(1) TEU. The notion of a competent court includes the CJEU where a reference must be undertaken. The CJEU has reconfirmed this in *Commission v France* concerning the wrongful refusal of the French Conseil d’Etat to submit a question on the interpretation of EU law as court of last instance under Article 267 TFEU.<sup>64</sup>

X. Union law has set up a series of criteria for the recognition of a court or tribunal, most of which are linked to criteria of independence and impartiality.<sup>65</sup> Basic guarantees of judicial independence and impartiality are of cardinal importance *inter alia* for the values set out in Article 2 TEU, notably rule of

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<sup>63</sup> Judgments of 15 May 1986, *Johnston*, Case 222/84, ECLI:EU:C:1986:206 [19]. For a broader background see HCH Hofmann, GC Rowe and AH Türk, *Administrative Law and Policy of the European Union*, (Oxford, Oxford University Press, 2011) 139–42, 691–98.

<sup>64</sup> Judgment of 4 October 2018, *Commission v France (Précompte mobilier)*, C-416/17, ECLI:EU:C:2018:811 [113]. In this case, the CJEU implicitly endorsed the concept known in German and Austrian law as the right to a specific judge, predetermined by the law, as an essential element of the rights to judicial remedies under the rule of law. This concept is known as “gesetzlicher Richter”. See discussions in e.g. Sicard, Flora: *Commission v. France (case C-416/17)* : How a tax dispute gave the ECJ the opportunity to add a new piece to its Cilfit (case 283/81) puzzle, 59 *European Taxation* 2019, pp.123-128; Iliopoulou-Penot, Anastasia: La sanction des juges suprêmes nationaux pour défaut de renvoi préjudiciel, 2019 *Revue française de droit administratif*, pp. 139-147. See most recently on the consequences flowing failure of a Member State court to make a reference under Article 267 TFEU, the judgment of 30 January 2019, *Belgium v Commission* C-587/17 P, ECLI:EU:C:2019:75.

<sup>65</sup> Judgment of 11 June 1987, *Pretore di Salò*, Case 14/86, ECLI:EU:C:1987:275 [7]; judgment of 21 April 1998, *Pardini*, Case 338/85, ECLI:EU:C:1988:194 [9]. For a full analysis of the meaning of ‘court or tribunal’ in EU law, see points XXXXX of this commentary.

law.<sup>66</sup> A violation of these Member State obligations under Article 19(1) TEU can result in a violation of the individual right to an effective remedy. Difficult as they are to define in each individual case, the elements of independence as they are discussed in the literature and the case law are detailed at paragraphs XXX of this commentary. Suffice it to state here, that a delicate balance must be drawn, between, on one hand ensuring the rule of law, whilst, on the other hand, the rights of Member States to organize their judicial system. Member States however, remain Member States of the EU. Accordingly their powers may not be misused to violate basic principles of Article 2 TEU and thereby hollow-out guarantees of the rule of law in the fields covered by EU law.

X. The right to an effective remedy further requires that an action before Member State courts cannot be limited by the fact that an individual could also have a direct remedy against such acts, for example by an action for annulment under Article 263 TFEU.<sup>67</sup> National courts may, in order to ensure that effective remedies are granted and to assess whether there are doubts about the interpretation or validity of EU law in the context of a preliminary ruling under Article 267 TFEU concerning the interpretation or validity of Union acts, also request EU institutions to provide “specific information and evidence” considered essential by the national court.<sup>68</sup>

X. This obligation arises from the link between Articles 19 TEU and 47 of the Charter. The obligation imposed on the Member State under Article 19(1) TEU corresponds to the right of the individual to an effective remedy including

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<sup>66</sup> Judgment of 5 November 2019, *Commission v Poland (Polish judges)*, C-192/18, ECLI:EU:C:2019:924 [106]; judgment of 25 July 2018, *Minister for Justice and Equality (LM)*, C-216/18 PPU, ECLI:EU:C:2018:586 [48, 63]; judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, ECLI:EU:C:2019:531 [58].

<sup>67</sup> Judgment of the Court of 3 July 2019 *Eurobolt*, C-644/17, ECLI: EU:C:2019:555 [25].

<sup>68</sup> Judgment of the Court of 3 July 2019, *Eurobolt*, C-644/17, ECLI:EU:C: 2019:555 [26].

regarding the interpretation or validity of an EU act relevant in decision-making.<sup>69</sup>

### **(iii) Remedies Sufficient to Ensure Effective Legal Protection**

X. 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 with EU law of national procedural and substantive rules that have an actual or potential effect on the existence, degree and enforceability of remedies to enforce rights arising from EU law.<sup>70</sup> Once an impediment is established, even rules of national constitutional law are to be set aside if they are the source of disturbance to the right to an effective remedy,<sup>71</sup> provided that disturbance cannot be justified.<sup>72</sup>

X. It is also worth noting that the CJEU's case law in this field is predicated on the absence in the relevant EU measures of procedural rules and remedies to secure the effective enforcement of EU law. A right contained in EU legislation can be in implementation of the right to an effective remedy<sup>73</sup> and such measures require to be interpreted in conformity with Article 47 of the Charter.<sup>74</sup> Similarly, procedural gaps in Directives are to be governed by

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<sup>69</sup> Opinion of AG Hogan of 28 February 2019 in *Eurobolt*, C-644/17, ECLI:EU:C:2019:164 [29].

<sup>70</sup> AG Trstenjak offered an extensive interpretation of this expression in her Opinion of 22 September 2011 in *N.S.*, C-411/10, ECLI:EU:C:2011:611 [149-177], also including infringements of the Geneva Convention and the ECHR.

<sup>71</sup> Judgment of 19 December 2019, *Deutsche Umwelthilfe eV Bayern*, C-752/18, ECLI:EU:C:2019:1114 [42].

<sup>72</sup> *Ibid.*, [44].

<sup>73</sup> See e.g. the judgment of 9 July 2020, *Constantin Film Verleih*, C-264/19, ECLI:EU:C:2020:542 [35].

<sup>74</sup> See e.g. judgment of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides*, C-651/19, ECLI:EU:C:2020:681 [27]; judgment of 20 June 2019, *Hakelbracht*, C-404/18, ECLI:EU:C:2019:523 [31-32]; judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU, ECLI:EU:C:2020:367 [127]; judgment of 18 October 2018, *E.G.*, C-662/17, ECLI:EU:C:2018:847 [47]; judgment of 19 September 2019, *Rayonna prokuratura Lom*, C-467/18, ECLI:EU:C:2019:765 [57- 63]; judgment of 10 September 2019, *Chenchooliab*, C-94/18, ECLI:EU:C:2019:693 [84].

Member State law, subject also to the principles of effectiveness and equivalence.<sup>75</sup>

X. The extent of the guarantee of “real and effective judicial protection”<sup>76</sup> was developed by the CJEU as a defence right *against* “any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness” of Union law<sup>77</sup> in cases such as *Van Colson* and *Factortame*. The key obligation of Member States was not to “render virtually impossible or excessively difficult the exercise of rights conferred by Community law”.<sup>78</sup> Under the established case law of the CJEU. Whether a national

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<sup>75</sup> See e.g. judgment of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides*, C-651/19, ECLI:EU:C:2020:681[35]; judgment of 27 June 2018, *Diallo*, C-246/17, ECLI:EU:C:2018:499 [45]. Similarly, matters left open in EU harmonising measure are left to the discretion of Member States, subject to the principles of effectiveness and equivalence. See e.g. the judgment of 3 September 2020, *Delfly*, C-356/19, ECLI:EU:C:2020:633 [33].

<sup>76</sup> Judgment of 10 April 1984, *Van Colson*, Case 14/83, ECLI:EU:C:1984:153 [23].

<sup>77</sup> Judgment of 19 June 1990, *Factortame*, C-213/89, ECLI:EU:C:1990:257 [19-20].

<sup>78</sup> See e.g. judgments of 28 September 1994, *Fisscher*, C-128/93, ECLI:EU:C:1994:353 [37]; of 10 July 1997 *Palmisani*, C-261/95, ECLI:EU:C:1997:351 [27]; of 20 September 2001, *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:465; of 16 May 2000, *Preston and Others*, C-78/98, ECLI:EU:C:2000:247 [39]; of 20 March 2003, *Kutz-Bauer*, C-187/00, ECLI:EU:C:2003:168 [57]; of 17 June 2004, *Recheio-Cash & Carry*, C-30/02, ECLI:EU:C:2004:373 [17-18]; of 4 July 2006, *Adeneler and Others*, C-212/04, ECLI:EU:C:2006:443 [95]; and of 21 June 2007, *Jonkman and Others*, joined cases C-231/06 to C-233/06, ECLI:EU:C:2007:373 [28]. Subsequent elaborations of this principle are considered below at paragraphs XXXXx. See notably the judgment of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides*, C-651/19, ECLI:EU:C:2020:681; judgment of 9 July 2020, *Vueling Airlines*, C-86/19, ECLI:EU:C:2020:538; judgment of 12 February 2020, *Kolev and Others*, C-704/18, ECLI:EU:C:2020:92; judgment of 12 December 2019, *Aktiva Finants*, C-433/18, ECLI:EU:C:2019:1074; judgment of 19 March 2020, *PG v Bevándorlási és Menekültügyi Hivatal*, C-406/18, ECLI:EU:C:2020:216; judgment of 11 September 2019, *Călin*, C-676/17, ECLI:EU:C:2019:700; judgment of 16 July 2020, *Addis*, C-517/17, ECLI:EU:C:2020:579; judgment of 27 June 2018, *Diallo*, C-246/17, ECLI:EU:C:2018:499; judgment of 24 October 2018, *XC and Others*, C-234/17, ECLI:EU:C:2018:853; judgment of 22 October 2018, *INEOS Köln*, C-572/16, ECLI:EU:C:2018:100; judgment of 4 October 2018, *Kantarev*, C-571/16, ECLI:EU:C:2018:807; judgment of 17 May 2018, *Specializquotas transportas*, C-531/16, ECLI:EU:C:2018:324; judgment of 7 March 2018, *Santoro*, C-494/16, ECLI:EU:C:2018:16; judgment of 19 October 2017, *Raimund*, C-425/16, ECLI:EU:C:2017:776; judgment of 13 December 2017, *El Hassani*, C-403/16, ECLI:EU:C:2017:960; judgment of 9 November 2017, *Ispas*, C-298/16, ECLI:EU:C:2017:843; judgment of 8 June 2017, *Vinyls Italia*, C-54/16, ECLI:EU:C:2017:433; judgment of 8 March 2017, *Euro Park Service*, C-14/16, ECLI:EU:C:2017:177; judgment of 26 April 2017, *Farkas*, C-564/15, ECLI:EU:C:2017:302; judgment of 20 October 2016, *Danqua*, C-429/15, ECLI:EU:C:2016:789; judgment of 21 December 2016, *TDC*, C-327/15, ECLI:EU:C:2016:974; judgment of 15 October 2015, *Nike European Operations the Netherlands*, C-310/14, ECLI:EU:C:2015:690; judgment of 30 June 2016, *Câmpean*, C-200/14, ECLI:EU:C:2016:494; judgment of 26 November 2015, *MedEva*, C-166/14, ECLI:EU:C:2015:779; judgment of 21 January 2016, *Eturas*, C-74/14, ECLI:EU:C:2016:42; judgment of 6 October 2015, *East Sussex County Council*, C-71/14, ECLI:EU:C:2015:656; judgment of 6 October 2015, *Târşia*, C-69/14, ECLI:EU:C:2015:662.

procedural provisions renders the exercise of an individual's rights under EU law "impossible in practice or excessively difficult" is to be analysed "by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary, inter alia, to take into consideration, where relevant, the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure."<sup>79</sup>

X. However, it is long established in CJEU case law that Member States have a *positive* obligation to grant and ensure that their courts provide "direct and immediate protection" of rights arising from the Union legal order,<sup>80</sup> and, in the context of Article 19(1) TEU, more generally to offer "effective legal protection in the fields covered by Union law".<sup>81</sup> Under the notion of effectiveness, by analogy with Article 13 ECHR "must be 'effective' both in law and in practice"<sup>82</sup> This has been specifically confirmed in recent case law of the CJEU.<sup>83</sup>

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<sup>79</sup> E.g. judgment of 9 September 2020, *Commissaire general aux réfugiés et aux apatrides*, C-651/19, ECLI:EU:C:2020:681 [42]. See also e.g. judgment of 9 July 2020, *Raiffeisen Bank*, C-698/18, ECLI:EU:C:2020:537 [60]; judgment of 12 December 2019, *Aktiva Finants*, C-407/18, ECLI:EU:C:2019:115 [32]; judgment of 26 June 2019, *Addiko Bank*, C-407/18, ECLI:EU:C:2019:115 [48]; judgment of 7 March 2018, *Santoro*, C-494/16, ECLI:EU:C:2018:166; judgment of 1 October 2015, *Erste Bank Hungary*, C-32/14, EU:C:2015:637; judgment of 27 June 2013, *ET Agroconsulting-04-Velko Stoyanov*, C-93/12, ECLI:EU:C:2013:432 [48]; judgment of 29 October 2009, *Pontin*, C-63/08, ECLI:EU:C:2009:666 [47] with further references. This formulation has its roots in the rulings of the CJEU in judgments of 14 December 1995, *Peterbroeck*, C-312/93, ECLI:EU:C:1995:437 [14] and j of 14 December 1995, *Van Schijndel*, joined cases C-430 and 431/93, ECLI:EU:C:1995:441 [19]. It is also worth noting that national procedural rules cannot affect the powers which a national court derives from Article 267 TFEU, nor can they release the court from its obligations under that provision. See judgment of 15 March 2017, *Aquino*, C-3/16, ECLI:EU:C:2017:209 [47].

<sup>80</sup> Judgment of 19 December 1968, *Salgoil*, Case 13/68, ECLI:EU:C:1968:54 [463].

<sup>81</sup> Judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses (ASJP)*, C-64/16, ECLI:EU:C:2018:117; of 15 May 1986, *Johnston*, Case 222/84, ECLI:EU:C:1986:206 [18]; of 9 July 1985, *Bozzetti*, Case 179/84, ECLI:EU:C:1985:306 [17].

<sup>82</sup> See, e.g., ECtHR, of 5 April 2018, *Zubac v. Croatia* CE:ECHR:2018:0405 [77, 97 to 99]; and of 10 September 2010, *MacFarlane v. Ireland* CE:ECHR:2010:0910 [112], each with further references.

<sup>83</sup> Judgment of 16 July 2020, *BMM v. Belgian State*, C-133/19, ECLI:EU:C:2020:577 [54]; judgment of 29 July 2019, *Torubarov*, C-556/17, ECLI:EU:C:2019:626 [57].

X. Real effectiveness thus covers matters of procedural and substantive law: It includes matters of admissibility of bringing cases and of the concept of standing,<sup>84</sup> the existence of interim protection<sup>85</sup> and (now explicitly recognised in Article 47 paragraph 2) the existence of legal aid and the conditions of its disbursement.<sup>86</sup> Member State rules of evidence are also subject to review by reference to the Article 47 right to an effective remedy.<sup>87</sup> The same holds for national laws governing the onus or burden of proof, if and in so far as such rules of evidence have the potential to render EU law in practice impossible or excessively difficult to enforce. The latter would be potentially inconsistent with the principle of effectiveness.<sup>88</sup> Next to these general issues, case law has been developed regarding a host of specific matters such as:

#### - Time Limits

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<sup>84</sup> Judgment of 19 March 2015, *Eon Folgasz*, C-510/13, ECLI:EU:C:2015:189 [47-50], referring to the judgment of 16 July 2009, *Mono Car Styling*, C-12/08, ECLI:EU:C:2009:46 [47-50]. See also e.g. judgment of 23 October 2014, *Olainfarm*, C-104/13, ECLI:EU:C:2014:2316 [35-40]. On the right to bring proceedings in environmental litigation, as provided for in Article 9 (3) of the Aarhus Convention, see notably the Opinion of Advocate General Bobek of 2 July 2020, *Stichting Varkens in Noord and Others*, C-826/18, ECLI:EU:C:2020:514; the judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and Others*, C-197/18, ECLI:EU:C:2019:824 [34]; and the judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, ECLI:EU:C:2017:987 [45-46].

<sup>85</sup> Judgment of 19 June 1990, *Factortame*, C-213/89, ECLI:EU:C:1990:257 [19-20]; judgment of 13 March 2007, *Unibet*, C-432/05, ECLI:EU:C:2007:163. See more recently e.g. judgment of 14 March 2013, *Mohamed Aziz*, C-415/11, ECLI:EU:C:2013:164 [59]. Two examples of reasoning in which effective judicial protection is linked to interim measures can be found in the judgments of 11 January 2001, *Kofisa Italia*, C-1/99, ECLI:EU:C:2001:10, and of 11 January 2001, *Siples*, C-226/99, EU:C:2001:14. See discussion in the Opinion of Advocate General Pikamäe of 23 April 2020 in *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, joined cases C-924/19 PPU and C-925/19 PPU*, ECLI:EU:C:2020:294 [189].

<sup>86</sup> See notably the judgment of 22 December 2010, *DEB*, C-279/09, ECLI:EU:C:2010:811 [59-62]. See further the commentary by L. Holpainen in this commentary.

<sup>87</sup> Judgment of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832 [86-87]. See further the judgment of 9 July 2020, *Vueling Airlines*, C-86/19, ECLI:EU:C:2020:538. For an example of review of the standard of proof in the context of public procurement see the judgment of 17 May 2018, *Specializuoatas transportas*, C-531/15, ECLI:EU:C:2015:324. On the standard of proof in the context of agreements, decisions and concerted practices in the field of competition law see e.g. judgment of 21 January 2016, *Eturas*, C-74/14, ECLI:EU:C:2016:42.

<sup>88</sup> E.g. judgment of 21 June 2017, *W and Others*, C-621/15, ECLI:EU:C:2017:484 [34] referring to judgment of 9 November 1983, *San Giorgio*, Case 199/82, ECLI:EU:C:1983:318 [14]. See further e.g. judgments of 8 June 2017, *Vinyls Italia*, C-54/16, ECLI:EU:C:2017:433 [25-26] and of 15 October 2015, *Nike European Operations Netherlands*, C-310/14, ECLI:EU:C:2015:690.

X. The ‘compatibility with EU law of reasonable time limits for bringing proceedings, laid down in the interests of legal certainty’ is generally accepted but only provided that ‘such time limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law.’

X. The CJEU has also held that, in respect of national legislation that comes within the scope of EU law, it is for the Member States to establish time limits in the light of, inter alia, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration’.<sup>89</sup>

X. National time limits for bringing proceedings are thereby also subject to review by reference to the principle of equivalence (a sub-principle of loyal cooperation under Article 4(3) TEU),<sup>90</sup> and in all events are to ‘be sufficient in practical terms to enable an effective remedy to be prepared and submitted’.<sup>91</sup> Thus, if the individual wishing to institute proceedings is not in a position to

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<sup>89</sup> Judgment of 9 September 2020, *Commissaire general aux réfugiés et aux apatrides*, C-651/19, ECLI:EU:C:2020:681 [53], referring to judgment of 29 October 2009, *Pontin*, C-63/08, ECLI:EU:C:2009:666 [48]. See further e.g. judgments of 9 July 2020, *Raiffeisen Bank*, C-698/18, EU:C:2020:537 (consumer protection); of 7 September 2019, *Flausch and Others*, C-280/18, ECLI:EU:C:2019:928 (environmental protection); of 2 May 2019, *Sea Chefs Cruise Service*, C-133/18, ECLI:EU:C:2019:354; of 23 April 2020, *Sole-Mizo*, C-13/18, ECLI:EU:C:2020:292 (VAT); of 11 September 2019, *Călin*, C-676/17, ECLI:EU:C:2019:700; judgment of 19 December 2019, *Cargill Deutschland*, C-360/18, ECLI:EU:C:2019:1124 (unlawfully levied charges); of 20 October 2016, *Danqua*, C-429/15, ECLI:EU:C:2016:789 and of 9 September 2020, *Commissaire general aux réfugiés et aux apatrides*, C-651/19, *ibid* (immigration and asylum) ; judgment of 12 March 2015, *eVigilo Limited*, C-538/13, ECLI:EU:C:2015:166 (public procurement). On time limits for bringing appeals and Article 47 see e.g. judgment of 19 September 2019, *C.E. and N.E.*, C-325/18 PPU, ECLI:EU:C:2018:374. On Member State time limits for adjudication by a court see the judgment of 19 March 2020, *PG v Bevándorlási és Menekültügyi Hivatal.*, C-406/18, ECLI:EU:C:2020:216.

<sup>90</sup> E.g. Judgment of 9 September 2020, *Commissaire general aux réfugiés et aux apatrides*, C-651/19, ECLI:EU:C:2020:681 [36-41].

<sup>91</sup> [57], referring to the judgment of 26 September 2013, *Texdata Software*, C-418/11, ECLI:EU:C:2013:588 [80].

know of the unlawfulness of the act which triggers the running of the time-limit, EU law will be impossible in practice or excessively difficult to enforce.<sup>92</sup>

X. All of this is, however, subject to one established exception. The CJEU has held that ‘EU law does not preclude a national authority from relying on the expiry of a reasonable limitation period unless the conduct of the national authorities combined with the existence of a limitation period result in totally depriving a person of the opportunity to enforce his rights before the national courts’.<sup>93</sup> Member State courts are equally precluded from applying national limitation periods if, in all the circumstances, this results in the practical impossibility of enforcing the right claimed under EU law.<sup>94</sup>

X. In the context of subjecting Member State time limits for the taking of decisions concerning EU law to review by reference to the principles of effectiveness and equivalence,<sup>95</sup> the CJEU however also confirmed that, in the absence of EU rules and applicable principles, it is within the procedural autonomy of the Member States to set time-limits for applications for compensation for non-compliance with EU law, subject to the principles of effectiveness and equivalence.<sup>96</sup> Thus, under the CJEU approach, the notion of procedural autonomy of the Member States could be seen to function more like a principle than a ‘general principle’ of EU law and be possibly more

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<sup>92</sup> Judgment of 26 November 2015, *MedEval*, C-166/14, ECLI:EU:C:2015:779 [41]. See similarly judgment of 1 December 1998, *Levez v. Jennings Ltd*, C-326/96, ECLI:EU:C:1998:557.

<sup>93</sup> Judgment of 21 December 2016, *TDC*, C-327/15, ECLI:EU:C:2016:974 [104], referring to the judgment of 8 September 2011, *Q-Beef and Bosschaert*, joined cases C-89/10 and C-96/10, ECLI:EU:C:2011:555 [51]. See further e.g. judgments of 15 April 2010, *Barth*, C-542/08, ECLI:EU:C:2010:193, and of 19 May 2011, *Iaia and Others*, C-452/09, ECLI:EU:C:2011:323. This exception to the application of reasonable time limits for bringing proceedings is rooted in the ruling of the CJEU of 25 July 1991, *Emmott*, C-208/90, ECLI:EU:C:1991:333.

<sup>94</sup> See the judgment of 19 December 2019, *Cargill Deutschland*, C-360/18, ECLI:EU:C:2019:1124.

<sup>95</sup> Judgment of 22 January 2018, *INEOS*, C-572/16, ECLI:EU:C:2018:100 [45].

<sup>96</sup> E.g. judgment of 12 December 2016, *TDC*, C-237/15, ECLI:EU:C:2016:974 [90].

precisely characterized as a factor distinguishing which procedural rules are to be set by national law as opposed to those arising from EU law.

- Defense Rights and the Notion of ‘Equality of Arms’

X. One set of procedural rights inherent in Article 47 of the Charter is referred to as ‘equality of arms’, an approach initially developed in the CJEU case law in the context of competition law.<sup>97</sup> The principles summarised under the notion of equality of arms are

‘an integral part of the principle of effective judicial protection of the rights that individuals derive from EU law, enshrined in Article 47 of the Charter, in that it is a corollary, like, in particular, the principle *audi alteram partem*, of the very concept of a fair trial, implies an obligation to offer each party a reasonable opportunity to present its case in conditions that do not place it in a clearly less advantageous position by comparison with its opponent’.<sup>98</sup>

X. The aim of the principles referred to under the notion of equality of arms especially in regulatory procedures following an investigation by a public body,

‘is to ensure a procedural balance between the parties to judicial proceedings, guaranteeing the equality of rights and obligations of those parties as regards, inter alia, the rules that govern the taking of evidence

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<sup>97</sup> This is related to the adversarial principle and the right of the parties to view and comment upon all documents influencing a judicial decision. See e.g. the judgment of 23 October 2014, *Unitrading*, C-437/13, ECLI:EU:C:2014:2318 [20] and the contribution by D. Sayers above at XXX chapter.

<sup>98</sup> Judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, ECLI:EU:C:2019:861 [61], referring to judgments of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, ECLI:EU:C:2014:2099 [49] and of 16 May 2017, *Berlioz Investment Fund SA*, C-682/15, ECLI:EU:C:2017:373[96]. See further e.g. judgment of 30 June 2016, *Toma*, C-205/15, ECLI:EU:C:2016:499 [47-59].

and the adversarial hearing before the court and also those parties' rights to bring an action [...] In order to satisfy the requirements associated with the right to a fair hearing, it is important for the parties to be apprised of, and to be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings'.<sup>99</sup>

X. The procedural notions protected by Article 47 of the Charter thereby are to some extent judicial procedural equivalents to rights protected under the principles of good administration for the administrative procedure. The protection of these rights took place by judicial review but with the advent of good administration as a set of rights explicitly formulated in Article 41 of the Charter, the distinction between procedural rights in the pre-litigation phase and those in litigation has been sharpened.

X. Accordingly, the CJEU sets out increasingly clear distinctions e.g. in *Oz v EIB* that challenges to administrative decisions for absence of compliance with procedural or substantive rights protected by Article 47, fall within the purview of Article 41 of the Charter when taken by EU institutions and bodies,<sup>100</sup> as well as under the general principle of good administration concerning action by Member State administrations in the scope of EU law.<sup>101</sup>

#### - Creation of Additional Remedies

X. The notion of effectiveness can entail positive obligations. Although the Court of Justice initially stated in *Rewe* that the right to effective judicial review

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<sup>99</sup> Ibid [62] referring to judgments of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others*, C-543/14, ECLI:EU:C:2016:605 [41] and of 2 December 2009, *Commission v Ireland and Others*, C-89/08 P, EU:C:2009:742 [56].

<sup>100</sup> Judgment of 4 April 2019, *Oz v. EIB*, C-558/17 P, ECLI:EU:C:2019:289 [47-54]. See the chapter on Article 41 in this commentary.

<sup>101</sup> Judgment of 5 November 2014, *Mukarubega*, C-166/13, ECLI:EU:C:2014:2336.

‘was not intended to create new remedies’,<sup>102</sup> the concept rapidly evolved due to the case law of the Court on the principle of effectiveness. Pursuant to this case law, national courts are required to offer active protection of rights arising from Union law and are obliged to ‘guarantee real and effective judicial protection’<sup>103</sup> even in cases such as *Factortame* where it was held that a Member State court was *obliged* to set aside a Member State rule precluding the availability of interim relief. Anything which ‘might prevent, even temporarily, Community rules from having full force and effect’ therefore must be held to be incompatible with Union law.<sup>104</sup>

X. Although the Court also took the opportunity in *Inuit* to reassert that in principle “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”,<sup>105</sup> the CJEU in *Inuit* was equally at pains to recall that the right to an effective remedy can very well require, exceptionally, the Member State bodies to create new remedies,

‘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.’<sup>106</sup>

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<sup>102</sup> Judgment of 7 July 1981, *Rewe II*, Case 158/80, ECLI:EU:C:1981:163, summary point 6.

<sup>103</sup> Judgment of 10 April 1984, *Van Colson*, Case 14/83, ECLI:EU:C:1984:153 [23].

<sup>104</sup> Judgment of 19 June 1990, *Factortame*, C-213/89, ECLI:EU:C:1990:257 [19-20].

<sup>105</sup> Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, ECLI:EU:C:2013:625 [103]. At paragraph 97 the CJUE also held that ‘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’. See also e.g. the judgment of 30 April 2020, *Izba v. Commission*, C-560/18, ECLI:EU:C:2020:330 [62]; judgment of 25 October 2017, *Romania v Commission*, C-599/15 P, ECLI:EU:C:2017:801 [68].

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<sup>106</sup> Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11,

X. This means 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<sup>107</sup> and is reflected in a recent finding of the CJEU, to the effect that the principle of effective judicial protection

‘does not require it to be possible, as such, to bring a free-standing action which seeks primarily to dispute the compatibility of national provisions with EU law, provided one or more legal remedies exist, which make it possible to ensure, indirectly, respect for an individual’s rights under EU law.’<sup>108</sup>

X. Member State courts must ‘interpret the procedural rules governing actions brought before them, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the

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ECLI:EU:C:2013:625[104].

<sup>107</sup> 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 *OBB-Personenverkehr AG*, C-509/11, ECLI:EU:C:2013:167 [68-78]. For the judgment of 26 September 2013, *OBB-Personenverkehr AG*, C-509/11, ECLI:EU:C:2013:613. At paragraph 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, judgments of 15 April 2008, *Impact*, C-268/06, ECLI:EU:C:2008:223; of 22 December 2010 [54], of 22 December 2010, *Gavieiro*, joined cases C-444/09 and C-456/09, ECLI:EU:C:2010:819 [95-96] and of 8 March 2011, *Lesoochbranarske zoskupenie*, C-240/09, ECLI:EU:C:2011:125 [51].

<sup>108</sup> Judgment of 21 November 2019, *Deutsche Lufthansa AG*, C-379/18, ECLI:EU:C:2019:1000 [61]. That said, the CJEU has equally concluded that ‘the principle of primacy of EU law and the right to effective judicial protection, guaranteed by Article 47 of the Charter, require the referring court to declare that it has jurisdiction to hear and determine the appeal referred to’ in the dispute before it ‘if no other court has, under national law, jurisdiction to hear and determine it (judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, joined cases C-924/19 and 925/19 PPU, ECLI:EU:C:2020:367 [299]) and depending on the circumstances, a restricted form of review by civil court may be an insufficient guarantee of judicial remedies inherent in Article 47 of the Charter (judgment of 21 November 2019, *Deutsche Lufthansa*, C-379/18, ECLI:EU:C:2019:1000).

objective of ensuring effective judicial protection of an individual's rights under EU law.<sup>109</sup> 'In addition, a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law'.<sup>110</sup> Whether in future the CJEU would take heed of such requests made in respect of national law also when asked to interpret provisions on standing of EU law such as contained in Article 263 TFEU including the *Plauman* formula in light of the principles contained in Article 47 of the Charter remains to be seen.<sup>111</sup> Consistent past interpretation of the law by Courts should not hinder a later review in light of evolving general principles of law.

X. 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.<sup>112</sup> An example is *Liivimaa Lihaveis* in which a national court was obliged to hold an action brought against a decision by a national agency admissible, even if the national rules of procedure did not provide for this in such a case.<sup>113</sup>

X. Compliance with the right to an effective remedy also requires provision of a remedy which is capable of addressing the violation of the right.<sup>114</sup> In the

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<sup>109</sup> Ibid [[63] referring to the judgments of 13 March 2007, *Unibet*, C-432/05, ECLI:EU:C:2007:163 [44], and of 11 September 2018, *IR*, C-68/17, ECLI:EU:C:2018:696 [65].

<sup>110</sup> Ibid [[63] referring to the judgments of 13 March 2007, *Unibet*, C-432/05, ECLI:EU:C:2007:163 [44], and of 11 September 2018, *IR*, C-68/17, ECLI:EU:C:2018:696, [65].

<sup>111</sup> See the discussion of the

<sup>112</sup> On right of access to a court see further below paragraphs XXXX.

<sup>113</sup> Judgment of 17 September 2014, *Liivimaa Lihaveis MTÜ v Seirekomitee*, C-562/12, ECLI:EU:C:2014:2229 [60-61].

<sup>114</sup> See by comparison the approach to Art 13 ECHR in ECtHR, 21 January 2011, *MSS v Belgium and Greece* CE:ECHR: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

context of social policy, the CJEU has held that this requires nullification of the ‘consequences of the breach of EU law’.<sup>115</sup>

X. 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’.<sup>116</sup>

X. As explained above, whether a Member State measure renders EU law impossible in practice or excessively difficult to enforce is assessed by reference to “the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary, inter alia, to take into consideration, where relevant, the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure”.<sup>117</sup>

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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 further references). Regarding the EU legal system, see: Siegbert Alber, ‘Recht auf einen wirksamen Rechtsbehelf und ein unparteiisches Gericht—Art 47’ in P. Tettinger, K. Stern (eds.), *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta* (Munich, Verlag CH Beck, 2006) 734, para 34.

<sup>115</sup> Judgment of 8 May 2019, *Rosato*, C-494/17, ECLI:EU:C:2019:237 [28], referring to judgments of 3 July 2014, *Fiamingo and Others*, joined cases C-362/13, C-363/13 and C-407/13, ECLI:EU:C:2014:2044 [64]; of 26 November 2014, *Mascolo and Others*, joined cases C-22/13, C-61/13 to C-63/13 and C-418/13, ECLI:EU:C:2014:2401 [79]; and of 7 March 2018, *Santoro*, C-494/16, ECLI:EU:C:2018:166 [31].

<sup>116</sup> Judgment of 14 December 1995, *Peterbroeck*, C-312/93, ECLI:EU:C:1995:437, [14], and judgment of 14 December 1995, *Van Schijndel*, joined cases C-430 and C-431/93, ECLI:EU:C:1995:441 [19]. “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.” 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 judgment of 4 October 2012, *Bykanov*, C-249/11, ECLI:EU:C:2012:608 [75].

<sup>117</sup> See references above note XXX.

X. 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 as the substantive remedies available where a claim is successful. 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 (the ‘vertical’ relation), and in disputes between individuals (the ‘horizontal’ relation). It is to these developments to which I will turn in the following.

**(c) Specific Obligations in Disputes between Individuals and Public Authorities – The ‘vertical’ Relation**

X. Specific obligations arising in the vertical disputes in which individuals claim rights and freedoms under EU against a public body arise both in the context of individuals challenging acts of public bodies (i) as well as, in specific situations, individuals requiring specific public authorities to fulfil their mandate to protect individuals (ii).

(i) Individuals Challenging Public Acts

X. The obligation of Member States may be imposed on their courts, which are obliged to develop forms of judicial remedies in order to protect rights even where such protection did not pre-exist in national law. The CJEU 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.<sup>118</sup> Well known examples include *Borelli*,<sup>119</sup> which concerned the protection of individuals in composite procedures, i.e. procedures with input from Union and Member State administrations into a final administrative decision. Another example is *Factortame*,<sup>120</sup> regarding the establishment of a system of interim relief to effectively protect a right under EU law.

X. However, as explained above, the more 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 a 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.<sup>121</sup>

X. Thus, in consequence of the ruling in *Borelli*, the Grand Chamber held recently in *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*,<sup>122</sup> and in the context of rejection of asylum applications, that the absence in the laws of the Member State concerned of a judicial remedy permitting a review of the lawfulness of an administrative return decision ‘cannot relieve the national

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<sup>118</sup> See above paragraphs XXX and XXX.

<sup>119</sup> Judgment of 3 December 1992, *Oleificio Borelli v Commission*, C-97/91, ECLI:EU:C:1992:491. See more recently on composite decision making and Article 47 rights the in-depth discussions of AG Campos Sánchez-Bordona in his Opinion of 26 September 2019 in *Icrea Banca*, C-414/18, ECLI:EU:C:2019:574, and his Opinion of 9 July 2019 in *GAEC Jeanningros*, C-785/18, ECLI:EU:C: 2019:789, as well as the judgment of 29 January 2020, *GAEC Jeanningros*, C-785/18, ECLI:EU:C:2020:46.

<sup>120</sup> Judgment of 19 June 1990, *Factortame*, C-213/89, ECLI:EU:C:1990:257. See more recently on interim relief in the context of a discrete provision of environmental claims see e.g. judgment of 15 October 2013, *Jozsef Krizsan and Others*, C-416/10, ECLI:EU:C:2013:8.

<sup>121</sup> Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, ECLI:EU:C:2013:625 [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 judgment of 13 April 2010, *Wall AG v Stadt Frankfurt am Main*, C-91/08, ECLI:EU:C:2010:182. See further above paragraph X.

<sup>122</sup> Judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU, ECLI:EU:C:2020:367 [145].

court of its obligation to ensure the full effectiveness' of EU law.<sup>123</sup>

X. This is especially the case, when such EU law has direct effect and 'may constitute in itself a directly applicable basis for jurisdiction' including, 'when it has not been properly transposed into the national legal order.'<sup>124</sup> The Court reaffirmed, as it had in past cases, that it is thus 'for the national courts to declare that they have jurisdiction to determine the action brought by the person concerned in order to defend the rights guaranteed to him by EU law if the domestic procedural rules do not provide for such an action in such a case'.<sup>125</sup>

#### - Obligation to Adjudicate in Reasonable Time

X. Undue delays in providing remedies due to lengthy procedures have been addressed by the European Court of Human Rights,<sup>126</sup> and by the CJEU within the purview of Article 47 of the Charter. 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,<sup>127</sup> and thus be in breach of Article 13 ECHR.<sup>128</sup> This applies to the right to an effective judicial remedy under EU law and under Article 47 of the Charter,<sup>129</sup> specifically its second paragraph.<sup>130</sup> In EU law, it is termed breach of the

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<sup>123</sup> Article 13(1) of Directive 2008/115.

<sup>124</sup> Ibid [144]. C.f the judgment of 24 September 2020, *Y.S.*, C-223/19, ECLI:EU:C:2020:753 [96-97].

<sup>125</sup> Ibid [144]. C.f the judgment of 24 September 2020, *Y.S.*, C-223/19, ECLI:EU:C:2020:753 [96-97].

<sup>126</sup> ECtHR Application no 30210/96 *Kudla v Poland Kudla v Poland* of 26 October 2000 [147].

<sup>127</sup> ECtHR Application 63235/00 *Vilho Eskelinen and Others v Finland* of 19 April 2007. For a detailed analysis of the question of delay in proceedings under EU and ECHR law, see paragraph XXXX.

<sup>128</sup> See e.g. in this respect: judgment of...., *Bottazzi v Italy*, CE:ECHR:1999 22; judgment of/ECtHR, 28 July 1999, *Ci Mauro v Italy* [23]; judgment of 28 July 1999, *AP v Italy*[18].

<sup>129</sup> Accordingly, the General Court has held with regard to the violation of the second paragraph of Article 47 CFR that the duration of a procedure to adjudicate a case exceeding 20 months, could be considered to give rise to a claim for damages (judgment of 10 January 2017, *Gascogne Sack Deutschland v EU*, T-577/14, ECLI:EU:T:2017:1.

<sup>130</sup> See paragraphs XXXX below.

obligation to adjudicate in a reasonable time.<sup>131</sup>

- Res Judicata

X. The application of *res judicata*, a general principle of EU law, is not amongst the elements making the application of EU law impossible in practice or excessively difficult. *Res judicata*, in the absence of European rules on the matter, can also be an element of national procedural autonomy.<sup>132</sup> Therefore, in order to ensure both stability of the law and legal relations as well as the sound administration of justice, requires ‘that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question.’<sup>133</sup>

X. This does not, in and of itself, prejudice the right to an effective remedy before a tribunal for the purposes of Article 47 of the Charter since EU law

‘does not require a judicial body automatically to go back on a judgment having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court after delivery of that judgment’.<sup>134</sup>

X. CJEU case law on *res judicata* is strongly linked to principles of effectiveness and equivalence. On matters of effectiveness, the CJEU’s case law has established that

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<sup>131</sup> Judgments of 13 December 2018, *European Union v ASPLA and Armando Alvarez*, C-174/17 P, ECLI:EU:C:2018:1015 [24] and of 13 December 2018, *European Union v Kendrion*, C-150/17 P, ECLI:EU:C:2018:1014 [53]. See most recently the judgment of 5 September 2019, *European Union v Guardian Europe*, joined cases C-447/17 and C-449/17 P, ECLI:EU:C:2019:672.

<sup>132</sup> Judgment of 9 July 2020, *Vueling Airlines*, C-86/19, ECLI:EU:C:2020:538 [91].

<sup>133</sup> Judgment of 24 October 2018, *XC and Others*, C-234/17, ECLI:EU:C:2018:853 [52].

<sup>134</sup> Ibid [54]. See also judgment of 10 July 2014, *Impresa Pizzarotti*, C-213/13, ECLI:EU:C:2014:2016, of 6 October 2015, *Társia*, C-69/14, ECLI:EU:C:2015:662: The principle of *res judicata* does not extend, however, to administrative decisions. See judgment of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe*, C-620/17, ECLI:EU:C:2019:630 [57-64], where the CJEU clarified its judgment of 13 January 2004, *Kühne & Heitz*, C-453/00, ECLI:EU:C:2004:17 [57-64].

the scope of *res judicata* ‘extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question’<sup>135</sup> and ‘only to the grounds of a judgment which constitute the necessary support of its operative part’.<sup>136</sup> But because a judgement’s *ratio decidendi* also has to be taken into account, especially in order to establish whether the facts and the points of law are the same,<sup>137</sup> the CJEU has qualified its statements in respect to certain policy fields.

X. For instance, where the decision of a criminal court that has become final it is based on a finding of specific facts and crimes. If such finding undertaken with no attention whatsoever given to pertinent and determinative provisions of EU law, the incorrect application of EU law would be repeated in every decision adopted by the civil courts and tribunals concerning the same facts, and there would be no possibility of correcting a finding and an interpretation that were in breach of EU law. In those circumstances, it was held that “such obstacles to the effective application of the rules of EU law [...] cannot reasonably be justified by the principle of legal certainty and must therefore be considered to be contrary to the principle of effectiveness.”<sup>138</sup>

X. The links of the principle of *res judicata* to the principle of equivalence have been addressed in paragraphs XXXX. The CJEU held that

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<sup>135</sup> Judgment of 29 June 2010, *Commission v Luxembourg*, C-526/08, ECLI:EU:C:2010:379 [27] and the case law cited; judgment of 24 January 2013, *Commission v Spain*, C-529/09, ECLI:EU:C:2013:31 [66]; judgment of 12 June 2008, *Commission v Portugal*, C-462/05, ECLI:EU:C:2008:337, [23]. See most recently the judgment of 17 September 2020, *Rosneft e.a. v Council*, C-732/18 P, ECLI:EU:C:2020:727 [52].

<sup>136</sup> Judgment of 15 November 2012, *Stichting Al-Aqsa*, joined cases C-539/10 P and C-550/10 P, ECLI:EU:C:2012:711 [49] with further references.

<sup>137</sup> Judgment of 15 November 2012, *Gothaer and Others v Samskip*, C-456/11, ECLI:EU:C:2012:719, [40] with reference to, inter alia, judgment of 1 June 2006, *P & O European Ferries*, joined cases C-442/03 P and C-471/03 P, ECLI:EU:C:2006:356 [44]; judgment of 19 April 2012, *Artegoda v Commission*, C-221/10 P, ECLI:EU:C:2012:216 [87].

<sup>138</sup> Judgment of 9 July 2020, *Vueling Airlines*, C-86/19, ECLI:EU:C:2020:538 [95, 96]; judgment of 2 April 2020, *CRPNPAC*, C-370/17, ECLI:EU:C:2020:260 [95]. The CJEU referred by analogy to the judgment of 3 September 2009, *Fallimento Olimpclub*, C-2/08, ECLI:EU:C:2009:506 [30].

‘if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue is brought back into line with EU law’.<sup>139</sup>

- Reopening of Administrative Procedures

X: In contrast with judicial decisions, Member States are obliged to order the administration to reopen a final administrative decision,<sup>140</sup> *res judicata* being no bar to it.<sup>141</sup> This is especially if there is an equivalent possibility of reopening a final administrative decision for violation under national law.<sup>142</sup>

- Reasoning

X. 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.<sup>143</sup> An example is the obligation on public bodies (including the CJEU) to reason their acts.<sup>144</sup> This is positively formulated for EU institutions, bodies and agencies in Article 296 second

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<sup>139</sup> Judgment of 16 July 2020, *UR (Assujettissement des avocats à la TVA)* C-424/19, ECLI:EU:C:2020:581 [26], referring to judgment of 11 September 2019, *Călin*, C-676/17, ECLI:EU:C:2019:700 [29]. See also the judgment of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe*, C-620/17, ECLI:EU:C:2019:630 [60-64].

<sup>140</sup> Judgment of 4 October 2012, *Byankov*, C-249/11, ECLI:EU:C:2012:608.

<sup>141</sup> Judgment of 29 July 2019, *Hochtief Solutions AG Magyarországi Fióktelepe*, C-620/17, ECLI:EU:C:2019:630[58].

<sup>142</sup> Judgment of 13 January 2004, *Kühne & Heitz*, C-453/00, ECLI:EU:C:2004:17 [23–27].

<sup>143</sup> Judgment of 16 December 2010, *Athinaiiki Techniki v Commission*, C-362/09 P, ECLI:EU:C:2010:783 [70]. For an example of a case in which an obstruce administrative practice was held to be in breach of the principle of effectiveness in the context of company law, see judgment of 12 July 2012, *VALE Epitiasi keft*, C-378/10, ECLI:EU:C:2012:440.

<sup>144</sup> E.g. judgment of 7 June 2018, *Ori Martin*, C-463/17, ECLI:EU:C:2018:411 [26-29].

paragraph TFEU and Article 41(2)(c) of the Charter,<sup>145</sup> as well as in numerous provisions of secondary legislation. But the obligation to reason acts also arises from the right to an effective judicial remedy - both an obligation of national bodies applying national law as well as one applicable to EU legal acts.<sup>146</sup> 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’,<sup>147</sup> to ‘decide, with full knowledge of the relevant facts’, whether it is worth appealing to the courts<sup>148</sup> and to enable the person concerned ‘to defend his rights under the best possible circumstances’.<sup>149</sup>

X. Thus, the CJEU has held that, ‘if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based’.<sup>150</sup>

X. The full formula by the CJEU now is that the reasoning must be clear ‘either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to

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<sup>145</sup> See paragraphs XXX above.

<sup>146</sup> Judgment of 20 September 2011, *Evropaïki Dynamiki*, T-461/08 ECLI:EU:T:2011:494 [118–124] - a public procurement case – in which the Court 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.’

<sup>148</sup> Judgment of 17 March 2011, *Josep Peñarroja Fa*, joined cases C-372/09 and C-373/09, ECLI:EU:C:2011:156 [63].

<sup>149</sup> Judgment of 15 October 1987, *Heylens and Others*, Case 222/86, ECLI:EU:C:1987:442, [15, 17]. On the link between the obligation to give reasons and effective judicial review, judgment of 17 November 2011, *Hristo*, C-430/10, ECLI:EU:C:2011:749.

<sup>150</sup> Judgment of 4 June 2013, *ZZ*, C-300/11, ECLI:EU:C:2013:363 [53] referring to judgment of 17 March 2011, *Peñarroja Fa*, joined cases C-372/09 and C-373/09, ECLI:EU:C:2011:156 [63], and judgment of 17 November 2011, *Gaydarov*, C-430/10, ECLI:EU:C:2011:749 [41], judgment of 15 October 1987, *Heylens and Others*, Case 222/86, ECLI:EU:C:1987:442 and judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, joined cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, [337]. See also judgment of 8 May 2019, *PI*, C-230/18, ECLI:EU:C:2019:383 [78], judgment of 5 December 2019, *Centraal Justitieel Incassobureau (and exécution des sanctions pécuniaires)*, C-671/18, ECLI:EU:C:2019:1054 [39] and the judgment of 26 April 2018, *Donnellan*, C-34/17, ECLI:EU:C:2018:282 [58].

require the authority concerned to provide that information ..., so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question'.<sup>151</sup>

- Access to Documents

X. Equally, the right of access to documents (now specifically protected under Article 42 of the Charter<sup>152</sup> and, with respect to one's own file also by Article 41(2)b of the Charter is a right directly linked to the notion of effective remedies in that access to files will in reality often be a necessary pre-condition for successful litigation in the context of enforcing "rights and freedoms guaranteed by the law of the Union."<sup>153</sup> Further, the right to a fair hearing in a pre-litigation administrative phase has been linked to the requirements under the right to an effective protection, as have many other rights of the defence listed in Article 41 and 48 of the Charter.<sup>154</sup>

- Damages

X. Amongst the most important substantive remedies, in practical terms, capable of effectively enforcing rights under EU law is the obligation of

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<sup>151</sup> Judgment of 4 June 2013, ZZ, C-300/11, ECLI:EU:C:2013:363 [53] whilst with reference to *Kadi* (referring to *Kadi and Al Barakaat International Foundation v Council and Commission*, *ibid* [342]) finding that at 'it may prove necessary, both in administrative proceedings and in judicial proceedings, not to disclose certain information to the person concerned, in particular in the light of overriding considerations connected with State security'.

<sup>152</sup> See paragraphs XXXX.

<sup>153</sup> See, for example judgment of 6 June 2013, *Donau Chemie*, C-536/11, ECLI:EU:C:2013:366.

<sup>154</sup> See especially judgments of 11 December 2014, *Boudjlida*, C-249/13, ECLI:EU:C:2014:2431[ 41-42] and of 5 November 2014, *Mukarubega*, C-166/13, ECLI:EU:C:2014:2336, [51-52]. See further on access to documents and files and the rights of the defence the contribution by D. Sayers in this commentary.

Member States to make good damages which have arisen from their non-compliance with Union law vesting individuals with rights.<sup>155</sup>

X. Non-compliance with EU law can result from violation of primary law obligations which have direct effect, as well as from violation of secondary law obligations vesting individuals with rights. In the landmark case of *Francovich*,<sup>156</sup> 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.<sup>157</sup> The three criteria established in *Francovich* state that

‘individuals who have been harmed have a right to reparation for damage caused by breaches of EU law attributable to a Member State when three conditions are met, namely, the rule of EU law infringed must be intended to confer rights on individuals, the breach of that rule must be sufficiently serious,<sup>158</sup> and there must be a direct causal link between the breach and the loss or damage sustained by those individuals’.<sup>159</sup>

X. AG Hogan observed that ‘once the three conditions elaborated in *Francovich* for a Member State to incur liability are met, any individual who

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<sup>155</sup> This question is distinct from the right to obtain damages for breach of the fundamental rights reflected in the Charter, which is addressed at paragraphs XXXXXXXXXXXX.

<sup>156</sup> Judgment of 19 November, 1991, *Francovich*, C-6/90, ECLI:EU:C:1991:428.

<sup>157</sup> For a more recent and comprehensive expositions of the impact of Directives in Member State law see e.g. the judgment of 24 June 2019, *Poplawski*, C-573/17, ECLI:EU:C:2019:530; judgment of 10 October 2017, *Farrell*, C-413/15, ECLI:EU:C:2017:745; judgment of 19 April 2016, *DI*, C-441/14, ECLI:EU:C:2016:278.

<sup>158</sup> See judgment of 29 July 2019, *Hochtief Solutions Magyarországi Fioktelepe*, C-620/17, ECLI:EU:C:2019:630 [41-42] referring to the judgments of 13 June 2006, *Traghetti*, C-173/03, ECLI:EU:C:2006:391, and of 30 September 2003, *Köbler*, C-224/01, ECLI:EU:C:2003:513.

<sup>159</sup> Judgment of 16 July 2020, *Presidenza de Consiglio dei Ministri*, C-129/19, ECLI:EU:C:2020:566 [34], referring to the judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, joined cases C-46/93 and C-48/93, ECLI:EU:C:1996:79 [51]; judgment of 30 September 2003, *Köbler*, C-224/01, ECLI:EU:C:2003:513 [51]; and of 28 July 2016, *Tomášová*, C-168/15, ECLI:EU:C:2016:602 [22]. See also e.g. judgment of 4 December 2018, *The Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, ECLI:EU:C:2018:979 [34-35].

suffers damage caused by a breach of EU law is entitled to full compensation. This does not mean, however, that a Member State cannot incur liability on the basis of less strict conditions imposed by national law.<sup>160</sup> Also, the grant of something at least close to full compensation is necessary to ensure the full effectiveness of EU law as required by the principle of the primacy of that law and on account of the fundamental right to effective judicial protection enshrined in the first paragraph of Article 47 of the Charter.<sup>161</sup>

X. Even though the claim for damages arises from EU law,<sup>162</sup> the procedures for obtaining damages, and the conditions for reparation<sup>163</sup> are subject to national law. Under the principle of equivalence, Member States may not provide for procedures for obtaining reparation that are ‘less favourable than those relating to similar domestic claims’, and under the principle of effectiveness, they must not render state liability for damages impossible in practice or excessively difficult to enforce. This maxime was questioned by AG Kokott in the case known as *Berlioz II* or *Shakira*. There she held that where an individual is affected by a measure which is not directed at them has no legal remedy to protect their rights, ‘an indirect remedy in the context of subsequent State liability proceedings is not an effective remedy within the meaning of Article 47 of the Charter either.’<sup>164</sup> More limited the CJEU stating that it

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<sup>160</sup> Judgment of 29 July 2019, *Hochtief Solutions Magyaroszági Fioktelepe*, C-620/17, ECLI:EU:C:2019:630 [37-38].

<sup>161</sup> See the Opinion of Advocate General Hogan of 11 September 2019, *Sole-Mizo*, C-13/18, ECLI:EU:C:2019:708 [49]. Advocate General Hogan relied on the judgment of 4 December 2018, *The Minister for Justice and Equality and Commissioner of the Garda Síochána* C-378/17, ECLI:EU:C:2018:979 [39]. It is established in CJEU case law that reparation has to be commensurate with the loss and damage sustained so as to secure effective protection of rights. See e.g. judgment of 29 July 2019, *Hochtief Solutions Magyaroszági Fioktelepe*, C-620/17, ECLI:EU:C:2019:630 [46].

<sup>162</sup> *Ibid.*, [40-43]. See also e.g. judgment of 4 October 2018, *Kantarev*, C-571/16, ECLI:EU:C:2018:807.

<sup>163</sup> Judgment of 29 July 2019, *Hochtief Solutions Magyaroszági Fioktelepe*, C-620/17, ECLI:EU:C:2019:630 [45].

<sup>164</sup> Opinion of Advocate General Kokott of 2 July 2020 in *Etat Luxembourgeois v B and Others*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:516 [101].

‘is apparent from the case-law of the Court that the possibility, for a given individual, of bringing proceedings before a court in order to obtain a finding that the rights which are guaranteed to that individual by EU law have been infringed and to obtain compensation for the harm suffered as a result of that infringement ensures that the individual has effective judicial protection, where the court hearing the dispute has the possibility of reviewing the act or measure which has given rise to that infringement and that harm.’<sup>165</sup>

X. In *Brasserie du Pêcheur* the Court of Justice applied this approach to a sufficiently serious breach by Member States of provisions of primary law contained in the EU Treaty.<sup>166</sup> Liability of the Member States was famously expanded in *Köbler*<sup>167</sup> and *Tragbetti*<sup>168</sup> to make good damages due to violation of EU law by any of its authorities including the judiciary.<sup>169</sup> 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.<sup>170</sup> But

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<sup>165</sup> Judgment of 6 October 2020, *Etat Luxembourgeois v B and Others*, C-245/19 and C-246/19, EU:C:2020:795 [100] with reference to judgment of 13 March 2007, *Unibet*, C-432/05, ECLI:EU:C:2007:163 [58].

<sup>166</sup> Judgment of 5 March 1996, *Brasserie du Pêcheur*, Joined Cases C-46 and 48/93, ECLI:EU:C:1996:79. In parallel to the case law relating to Art 340 TFEU. E.g. judgment of 2 December 1971, *Zuckerfabrik Schöppenstedt*, Case 5/71, ECLI:EU:C:1971:116 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.

<sup>167</sup> Judgment of 30 September 2003, *Köbler*, C-224/01, ECLI:EU:C:2003:513 [31–36] and [53–55].

<sup>168</sup> Judgment of 13 June 2006, *Tragbetti*, C-173/03, ECLI:EU:C:2006:391.

<sup>169</sup> *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.’

<sup>170</sup> *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’ referring to the judgment of 30 September 2003, *Köbler*, C-224/01, ECLI:EU:C:2003:513 [53 to 56]. 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, judgment of 25 November 2010, *Gunter Fuß*, C-429/09, ECLI:EU:C:2010:717. For further discussion of damages under Art 47 of the EU Charter, see section D.V. See more recently judgment of 29 July 2019,

such damage can only arise, however, in the event of manifest infringement of EU law.<sup>171</sup>

X. As explained at paragraphs XXXX, individuals will have such right to damages also in the context of violations of the rights under Article 47 Charter, since ‘individuals cannot be deprived of the possibility of rendering the state liable in order to obtain legal protection of their rights.’<sup>172</sup>

- Repayment

X. 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. This obligation is subject to an exception grounded in unjust enrichment,<sup>173</sup> and must be exercised in accordance with procedural rules governing actions for the repayment, while respecting the requirements of equivalence and effectiveness.<sup>174</sup>

- Access to a Court or Tribunal

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*Hochtief Solutions Magyarországi Fioktelepe*, C-620/17, ECLI:EU:C:2019:630, and the judgment of 28 July 2016, *Tomasova*, C-168/15, ECLI:EU:C:2016:602.

<sup>171</sup> See recently judgment of 29 July 2019, *Hochtief Solutions Magyarországi Fioktelepe*, C-620/17, ECLI:EU:C:2019:630 [41-42] referring to the judgment of 13 June 2006, *Traghetti*, C-173/03, ECLI:EU:C:2006:391 and judgment of 30 September 2003, *Köbler*, C-224/01, ECLI:EU:C:2003:513.

<sup>172</sup> Judgment of 6 October 2015, *Társia*, C-69/14, ECLI:EU:C:2015:662 [40].

<sup>173</sup> Judgment of 1 March 2018, *Petrotel-Lukoil and Georgescu*, C-76/17, ECLI:EU:C:2018:139 [33-34] referring to judgments of 9 November 1983, *San Giorgio*, Case 199/82, ECLI:EU:C:1911183:318; of 14 January 1997, *Comateb and Others*, joined cases C-192/95 to C-218/95, ECLI:EU:C:1997:12; and of 6 September 2011, *Lady & Kid and Others*, C-398/09, ECLI:EU:C:2011:540. On Article 47 of the Charter and unjust enrichment more broadly see judgment of 4 July 2020, *Czech Republic v. Commission*, C-575/18 P, ECLI:EU:C:2020:530.

<sup>174</sup> E.g. *Társia* *ibid* [26-27].

X. Right of access to a court is a well-established element of Article 47 of the Charter,<sup>175</sup> just as it is under Article 6 (1) ECHR.<sup>176</sup> This is unsurprising, given that, under the settled case-law, ‘the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law.’<sup>177</sup> Where *DPC v Facebook* and *Schrems* concerned a Commission decision, also EU legislation not providing for any possibility for an individual to pursue legal remedies in the field regulated by that legislation, touches upon ‘the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter’.<sup>178</sup> The same holds true for Member State legislation.<sup>179</sup>

X. The right of access to a court, has had particular pertinence in the CJEU’s case law concerning environmental protection, due to Article 9 of the Aarhus Convention entitled ‘access to justice’.<sup>180</sup> Article 9(3) of the Convention, as well as the implementing rules in the EU’s Aarhus Regulation are to be read in

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<sup>175</sup> See e.g. the Opinion of the Court of 30 April 2019, Opinion 1/17 *Accord ECG UE-Canada*, EU:C:2019:341 [201]; judgment of 16 May 2017, *Berlioz Investment Fund SA*, C-682/15, ECLI:EU:C:2017:373; judgment of 27 June 2013, *Agrokonsulting 04*, C-93/12, ECLI:EU:C:2013:432.

<sup>176</sup> E.g. ECtHR/judgment of 7 May 2002 *Bourdiv v. Russia*, CE:ECHR:2002:0507JUD005949800 ; judgment of 6 September 2005, *Săcăleanu v. Romania*, CE:ECHR:2005:0906JUD007397001.

<sup>177</sup> Judgment of 16 July 2020, *DPC v Facebook Ireland and Schrems*, C-311/18, EU:C:2020:559 [187], referring to judgment of 6 October 2015, *Schrems v DPC (Schrems I)*, C-362/14, EU:C:2015:650 [95] and the case-law cited.

<sup>178</sup> Judgement of 16 July 2020 *DPC v Facebook and Schrems*, C-311/18, ECLI:EU:C:2020:559 [187]. See further the Opinion of Advocate General Øe of 14 May 2020 in *Braathens Regional Aviation*, C-30/19, EU:C:2020:374 [110 – 116].

<sup>179</sup> Judgment of 6 October 2020, *Etat Luxembourgeois v B and Others*, joined cases C-245/19 and C-246/19, EU:C:2020:795 [64].

<sup>180</sup> See especially Article 9(3) of the Aarhus Convention which states that ‘each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.’ Article 9 (4) of the Aarhus Convention states that procedures provided by Member State law ‘shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this Article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.’

conjunction with Article 47 of the Charter.<sup>181</sup> Review procedures in respect of public participation in decision-making’ in the assessment of the effects of certain projects on the environment must be protected<sup>182</sup> *inter alia* by precluding categories of the public concerned, such as environmental organizations, from the right to bring proceedings.<sup>183</sup> In this context, ‘in order to ensure effective judicial protection in the fields covered by EU environmental law [...] it is for the national court to interpret its national law in a way which, to the fullest extent possible, is consistent both with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention and with the objective of effective judicial protection of the rights conferred by EU law’.<sup>184</sup> Similarly, in the field of environmental law additional obligations exist to ensure that are non-prohibitive.<sup>185</sup>

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<sup>181</sup> Judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and others*, C-197/18, ECLI:EU:C:2019:824 [33].

<sup>182</sup> Judgment of 7 November 2019, *Flansch*, C-280/18, EU:C:2019:928 [57]; judgment of 17 October 2018, *Klobn*, C-167/17, ECLI:EU:C:2018:833 [35].

<sup>183</sup> Judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and others*, C-197/18, ECLI:EU:C:2019:824 [53]; see also the judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, ECLI:EU:C:2017:987. See further on access to justice, Article 9(3) of the Aarhus Convention, and right of access to a court, and the Opinion of Advocate General Bobek of 2 July 2020, *Stichting Varkens in Nood and Others* C-826/18, ECLI:EU:C:2020:514.

<sup>184</sup> Judgment of 19 December 2019, *Deutsche Umwelthilfe eV*, C-752/18, ECLI:EU:C:2019:1115 [39] referring to the judgment of 8 March 2011, *Lesoochránárske zoskupenie*, C-240/09, ECLI:EU:C:2011:125 [50-51]. In the circumstances arising in *Deutsche Umwelthilfe*, the right to an effective remedy under Article 47 was held oblige Member State courts to issue coercive detention orders against a national authority which persistently refused to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from EU law, and which concerned ambient air quality, if such remedy was available under Member State law. See further on effective judicial review in the context of EU environmental law, judgment of 15 January 2013, *Jozef Krizjan and Others*, C-416/10, ECLI:EU:C:2013:8, the Opinion of Advocate General Kokott of 19 April 2012, ECLI:EU:C:2012:218, and the judgment of 7 January 2004, *The Queen on the Application of Delena Wells*, C-201/02, ECLI:EU:C:2004:12.

<sup>185</sup> Judgment of 11 April 2013, *The Queen on the Application of David Edwards*, C-260/11, ECLI:EU:C:2013:221 [33]. See also the Opinion of Advocate General Kokott of 18 October 2012 in the same case, in which the Advocate General observed at [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 costs in environmental cases, e.g. the judgments of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy*, C-470/16, ECLI:EU:C:2018:185; and of 13 February 2014, *Commission v. UK*, C-530/11, ECLI:EU:C:2014:67.

X. Policy specific interpretations of Article 47 of the Charter also exist regarding criminal law, where occasionally, and most likely in response to specific questions for preliminary references by national criminal law courts, the CJEU also relies, sometimes exclusively, on Article 6 ECHR.<sup>186</sup> This has been relevant in the interpretation of obligations e.g. under the European Arrest Warrant,<sup>187</sup> and with respect to obligations of public bodies such as prosecutors to bring cases.<sup>188</sup>

- Recourse to Higher-Level Courts

X. The right to an effective remedy does not entail access to a specific number of levels of jurisdiction,<sup>189</sup> the only requirement being that there must be a remedy before a judicial body.<sup>190</sup> 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.<sup>191</sup>

- Allocation of Specialised Courts

X. The rights protected by Article 47 of the Charter do not *per se* preclude the designation, by Member States, of specialised tribunals to adjudicate over

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<sup>186</sup> E.g. Judgment of 22 December 2012, *Ardic*, C-571/17 PPU ECLI:EU:C:2017:1026 [73-74].

<sup>187</sup> E.g. Judgment of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198 [77-78]. That said, there are also cases where the CJEU relies purely on secondary law when assessing judicial review of warrants despite arguments being made about Article 47 of the Charter. E.g. Judgment of 10 November 2016, *Polorak*, C-452/16 PPU, ECLI:EU:C:2016:858 [16]; judgment of 1 June 2016, *Bob-Dagi*, C-241/15, ECLI:EU:C:2016:385 [56-57].

<sup>188</sup> Judgment of 21 December 2011, *X and Y*, C-507/10, ECLI:EU:C:2011:873 [43], referring to ECtHR/judgment of 29 March 2001, *Asociación de Víctimas del Terrorismo v Spain*.

<sup>189</sup> *Ibid.*, 69. See more recently See also, in the context of the European arrest warrant, judgment of 30 May 2013, *Jeremy F v Premier minister*, C-168/13 PPU, ECLI:EU:C:2013:358 [44].

<sup>190</sup> Judgment of 26 September 2018, *Belastingdienst v Toeslagen*, C-175/17, ECLI:EU:C:2018:776, referring to judgment of 19 June 2018, *Gnandi*, C-181/16, ECLI:EU:C:2018:465 [57]. See recently the judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, joined cases C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367 [128-129, 290].

<sup>191</sup> Judgments of 28 July 2011, *Diouf v/ Ministre du Travail, de l'Emploi et de l'Immigration*, C-69/10, ECLI:EU:C:2011:524 [56]; of 19 September 2006, *Wilson*, C-506/04, ECLI:EU:C:2006:587 [62]. See also e.g. Judgment of 3 December 2019, *Icrea Banca*, C-414/18, ECLI:EU:C:2019:1036 [39].

discrete areas of EU law. Obviously, specific EU legislation might provide for different rules.<sup>192</sup> This is subject to the provision that the relevant jurisdictional rules do not cause individuals 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.<sup>193</sup>

X. Under the settled case law of the CJEU, although it is for the domestic legal system of every 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 EU law, the Member States are, however, responsible for ensuring that those rights are effectively protected in every case, compliance with the right to effective judicial protection of those rights as enshrined in Article 47 of the Charter.<sup>194</sup> The CJEU has equally confirmed that, in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, the requirements of the principles of effectiveness and equivalence apply both to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on EU law and to the definition of the procedural rules governing such actions.<sup>195</sup>

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<sup>192</sup> See recently, the judgment of 19 November 2019, *A.K. (Indépendance de la Cour suprême)*, C-585/18, EU:C:2019:982 [115].

<sup>193</sup> Judgment of 27 June 2013, *ET Agroconsulting-04-Velko Stoyanov*, C-93/12, ECLI:EU:C:2013:432, and the Opinion of Advocate General Bot of 14 March 2013, ECLI:EU:C:2013:172. On the scope of the duties of specialised tribunals to provide effective judicial protection, see judgment of 15 April 2008, *Impact*, C-268/06, ECLI:EU:C:2008:223.

<sup>194</sup> The judgment of 19 November 2019, *A.K. (Indépendance de la Cour suprême)*, C-585/18, ECLI:EU:C:2019:982 [115] referring to (see, to that effect, judgments of 22 October 1998, *IN. CO. GE. '90 and Others*, joined cases C-10/97 to C-22/97, ECLI:EU:C:1998:498 [14] and the case-law cited; of 15 April 2008, *Impact*, C-268/06, ECLI:EU:C:2008:223, [44 and 45]; and of 19 March 2015, *E.ON Földgáz Trade*, C-510/13, ECLI:EU:C:2015:189 [49 and 50] and the case-law cited).

<sup>195</sup> Judgment of 24 October 2016, *XC and Others*, C-234/17, ECLI:EU:C:2018:853 [23] referring to the judgments of 15 April 2008, *Impact*, C-268/06, ECLI:EU:C:2008:223 [4] and of 27 June 2013, *Agroconsulting-04*, C-93/12, ECLI:EU:C:2013:432 [37].

X. However, Member States are barred from removing whole areas of law from its courts and tribunals in violation of Article 19(1) TEU and, implicitly, removing whole areas of law from the protection offered under the right to an effective judicial remedy by Member State and EU courts. In *Achmea*, the CJEU held that arbitration proceedings in which “Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law” are illegal under EU law. Member States are thus barred from removing disputes which may concern the application or interpretation of EU law from courts provided for under Article 19(1) TEU.<sup>196</sup>

X. Several Member States legal systems, for instance the German, Czech and Austrian Constitutional Courts, have developed the notion that individuals have a constitutional right to a ‘lawful judge’ or ‘statutory court’<sup>197</sup> (*gesetzlicher Richter*) decide about the case in a proper forum.<sup>198</sup> In EU law, that right is protected under Article 47 of the Charter referred to as the notion of the ‘lawful judge’<sup>199</sup> or ‘natural forum’.<sup>200</sup> This guarantees that an individual has the

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<sup>196</sup> Judgment of 6 March 2018, *Achmea*, C-284/16, ECLI:EU:C:2018:158 [55]. The fact that Member States remove from their courts disputes concerning EU law distinguishes these specific arbitration agreements often contained in Bilateral Investment Agreements from ordinary commercial arbitration based on contractual freedom of the contracting parties, discussed below. For further reflections on the judgment see amongst many commentators e.g. Jens Hillebrand Pohl, ‘Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?’ (2018) 14 *European Constitutional Law Review* 767, Sonsoles Centeno Huerta and Nicolaj Kuplewatzky, ‘On Achmea, the Autonomy of Union Law, Mutual Trust and What Lies Ahead’ (2019) 2019 4 *European Papers - A Journal on Law and Integration* 6178.

<sup>197</sup> Opinion of AG Geelhoed of 6 February 2003, in *Rinke*, C-25/03, ECLI:EU:C:2003:77 [15].

<sup>199</sup> Judgment of 26 March 2020, *Simpson v Council*, joined cases C-542/18 RX-II and C-543/18 RX-II, ECLI:EU:C:2020:232 [50, 69, 87]; of 23 January 2018, *FV v Council*, T-639/16 P, EU:T:2018:22; judgment of 19 July 2018, *HG v Commission*, T-693/16 P, ECLI:EU:T:2018:492. See also for the French and German versions of this term, judgment of 13 December 2012, *Guido Strack*, T-199/11P, ECLI:EU:T:2012:691 [22].

<sup>200</sup> Opinion of AG Sharpston of 28 March 2019 in *Vetbanayagam and Others*, C-680/17 ECLI:EU:C:2019:278 [65, 81]; Opinion of AG Sánchez-Bordona of 27 February 2018, *Georgsmarienhütte* C-135/16, ECLI:EU:C:2018:120 [45]; Judgment of 4 February 1998, *Laga v Commission*, T-93/95, ECLI:EU:T:1998:22 [28].

right to have his or her claims addressed by a judge pre-defined under objective criteria. For matters of EU law that is the CJEU to be addressed the preliminary reference procedure.

**(ii) Effective Judicial Remedies Protected by Independent Agencies**

X. In order to ensure that the principle effective judicial remedies is *de facto* complied with, the CJEU has been creative in deducting obligations from Article 47 of the Charter. For instance, it held that Member States must ensure that their independent supervisory authorities, which are tasked with protecting individual rights, have to access to courts to request interpretation or to question the validity of acts of EU institutions and bodies.

X. This type of declaratory action did not exist in many Member States but nonetheless, the CJEU has in *Schrems I* obliged Member States to introduce such an option to ensure effective protection of individuals. In *Schrems I*, the CJEU established this obligation in the context of the protection of personal data, a policy in which Article 8(3) of the Charter explicitly states that compliance with the rules on the protection of personal data “shall be subject to control by an independent authority.” That authority, the CJEU held, must be able to engage in legal proceedings and it is thus “incumbent upon the national legislature to provide for legal remedies enabling the national supervisory authority concerned to put forward the objections which it considers well founded before the national courts in order for them, if they share its doubts as to the validity of the Commission decision, to make a reference for a preliminary ruling for the purpose of examination of the decision’s validity.”<sup>201</sup> The first reported preliminary reference of this kind,

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<sup>201</sup> Judgment of 6 October 2015, *Schrems v DPC (Schrems I)*, C-362/14, ECLI:EU:C:2015:650 [64-65].

following on from *Schrems I*, was referred to the CJEU by the High Court of Ireland in a procedure initiated by the Irish Data Protection Commissioner.<sup>202</sup>

(iii) Effective Remedies in Composite Procedures

X. The right to an effective judicial remedy has been continuously adapted to EU law's changing modes of implementation. In the course of the past centuries, forms of joint multi-jurisdictional 'composite' procedures have become increasingly prevalent.<sup>203</sup> In such procedures EU law provides for the cooperation in one procedure either of several Member State authorities or of a combination of Member State and EU authorities. The requirement to ensure effective judicial remedies in multi-jurisdictional composite procedures has been, after long debate in the literature, also explicitly recognised by the CJEU.<sup>204</sup>

X. Since in the EU administrative procedures are generally regulated in a policy specific approach, in lieu of a general administrative procedure regulation of the EU,<sup>205</sup> the case law has to date been evolving on a case-by-case basis non-

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<sup>202</sup> Judgment of 16 July 2020, *DPC v Facebook Ireland and Schrems*, C-311/18, ECLI:EU:C:2020:559 [187] holding inter alia that a Commission decision leading to a situation where an individual is submitted to "legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him or her, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter (judgment of 6 October 2015, *Schrems v DPC (Schrems I)*, C-362/14, ECLI:EU:C:2015:650, paragraph 95)."

<sup>203</sup> Herwig CH Hofmann and Morgane Tidghi, 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks' (2014) 20 *European Public Law* 147; Marek Safjan and Dominik Dürsther, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU' (2014) *Oxford Yearbook of European Law* 3.

<sup>204</sup> Judgment of 19 December 2018, *Berlusconi (Fininvest)*, C-219/17, ECLI:EU:C:2018:1023 [44, 46]. See also Herwig CH Hofmann, 'Multi-Jurisdictional Composite Procedures - the Backbone to the EU's Single Regulatory Space' [2019] *University of Luxembourg Law Working Paper* No. 003-2019 26.

<sup>205</sup> See Article 298 TFEU. See the in-depth discussions of AG Campos Sánchez-Bordona in his Opinion of 26 September 2019 in *Icrea Banca*, C-414/18, EU:C:2019:574, and his Opinion of 9 July 2019 in *GAEC Jeanningros*, C-785/18, EU:C:2019:789, as well as the judgment of 29 January 2020, *GAEC Jeanningros*, C-785/18, ECLI:EU:C:2020:46.

exhaustively addressing individual constellations only.<sup>206</sup> This case law recognizes that in an increasing number of policy areas, implementing procedures for EU law 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 the basis of such ‘composite’ procedures is central to the exercise.<sup>207</sup> Input into a final decision may result from various jurisdictions, with each applying their national law.<sup>208</sup> 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.

X. 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 can be

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<sup>206</sup> Opinion of AG Sanches Bordona of 27 June 2018 in *Berlusconi (Fininvest)*, C-219/17, ECLI:EU:C:2018:502 [58-79], with a full review of the case law pre-dating *Berlusconi* and the literature on the matter.

<sup>207</sup> Giacinto Della Cananea, G., ‘I procedimenti amministrativi composti dell’Unione europea’, in F. Bignami, F., S. Cassese, (eds.), *Il procedimento amministrativo nel diritto europeo* (Milano, Giuffrè, 2004); H.C.H. 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; H.C.H. Hofmann and M. Tidghi, ‘Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks’ (2014) 20 (1) *European Public Law*, 147-164; Mariolina Eliantonio ‘Judicial Review in an Integrated Administration: The Case of “Composite Procedures”’ (2014) *Review of European Administrative Law*, 65-102; Brito Bastos ‘Derivative illegality in European composite administrative procedures’ (2018) *Common Market Law Review*, 101-134.

<sup>208</sup> Sergio Alonso de León, *Composite Administrative Procedures in the EU*, Iustel (Madrid, 2017). Examples for such multi-jurisdictional decision-making procedures arise in areas in which alert systems exist on the basis of which executive bodies from one Member State act implementing the warning of another such as in 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.

potentially detrimental to the application of the right to an effective judicial remedy.<sup>209</sup>

X. Four basic constellations can be identified. First, where the relevant procedures establish an EU institution or body as author of a final decision on the basis of non-binding input from national actors, it is for the CJEU to ensure effective judicial protection against the act and to review “any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision.”<sup>210</sup>

X. Article 47 of the Charter does not require judicial review of preparatory decisions.<sup>211</sup> Rather, the CJEU has held that ‘where EU law prescribes that an EU body, office or agency is to have an exclusive decision-making power, it falls to the EU Courts, by virtue of their exclusive jurisdiction to review the legality of EU acts on the basis of Article 263 TFEU, to rule on the legality of the final decision adopted by the EU body, office or agency concerned and to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision’.<sup>212</sup>

X. The CJEU however, does not explain how it will be capable of undertaking judicial review of compliance of national procedural law of Member State

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<sup>209</sup> 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*, 147-164.

<sup>210</sup> Judgment of 19 December 2018, *Berlusconi (Fininvest)*, C-219/17 ECLI:EU:C:2018:1023 [44].

<sup>211</sup> Judgment of 28 July 2011, C-69/10 *Dionf v Ministre du Travail, de l’Emploi et de l’Immigration* ECLI:EU:C:2011:524 [55-56].

<sup>212</sup> Judgment of 3 December 2019, *Icrea Banca*, C-414/18, ECLI:EU:C:2019:1036 [39] referring to judgment of 19 December 2018, *Berlusconi (Fininvest)*, C-219/17, ECLI:EU:C:2018:1023 [44].

preparatory acts to final EU decisions in situations where no national court has initiated the preliminary reference procedure under Article 267 TFEU and has previously ruled on the legality of an act under national law.<sup>213</sup> In an action for annulment under Article 263 TFEU the General Court therefore cannot authoritatively establish the correct standard under national law. An ‘inverse preliminary reference procedure’ allowing references from an EU Court to a competent national Court, which could serve to such end, does not exist.<sup>214</sup>

X. Second, where the EU procedural rules establish that the final decision is taken by a national authority, either because an EU institution or body has only given input into the decision-making procedure or because the EU institution is bound by a national act and has ‘only limited or no discretion’<sup>215</sup> it is for national courts to ensure effective judicial remedies of the act, ‘even if the national rules of procedure do not so provide.’<sup>216</sup> Here the possibility of a preliminary reference under Article 267 TFEU is the means to ensure incidental control of the validity or interpretation of preparatory acts of EU institutions.<sup>217</sup>

X. A third constellation consists of composite procedures where several Member State authorities act together in one procedure in the scope of EU law. An example for this is the constellation discussed by the CJEU in *Berlioz I*

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<sup>213</sup> This was the constellation under judgment of 21 March 2000, *Greenpeace France and Others*, C-6/99 ECLI:EU:C:2000:148 [57]. See with further discussion: Miro Prek, Silvère Lefèvre, ‘The EU Courts as “National” Courts: National Law in the EU Judicial Process’, 54 *Common Market Law Review* (2017) 369-402.

<sup>214</sup> See for that discussion H.C.H. 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.

<sup>215</sup> Judgment of 19 December 2018, *Berlusconi (Fininvest)*, C-219/17, ECLI:EU:C:2018:1023 [45].

<sup>216</sup> Judgment of 19 December 2018, *Berlusconi (Fininvest)*, C-219/17, ECLI:EU:C:2018:1023 [46].

<sup>217</sup> Judgment of 3 December 1992, *Oleificio Borelli v Commission*, C-97/91, EU:C:1992:491 [9-13] as well as the judgment of 6 December 2001, *Carl Kühne and Others*, C-269/99, EU:C:2001:659 [58]; judgment of 2 July 2009, *Bavaria and Bavaria Italia*, C-343/07, EU:C:2009:415 [57].

where it held that right to an effective judicial remedy under Article 47 CFR requires that one national administration, and subsequent judicial review of that national administration's decision, must be able to review another Member State administration's decision.

X. In *Berlioz I*, the CJEU established for the first time that the basis of that review will not be compliance with the other Member State's law, but its compliance with the requirements established by the EU directive establishing the possibility of a composite procedure linking various national administrations.<sup>218</sup> This solution allows for a review by the courts and tribunals of one Member State of the actions of another Member State's administration against an EU standard, which constitutes a central innovation for ensuring effective remedies in an integrated but decentrally administered EU.

X. In *Berlioz II / Shakira*, the CJEU clarified that the right to an effective review required that the criteria of mutual review is not only the specific legislative act, such as e.g. an EU directive, but also the compliance with EU fundamental rights and general principles including the 'general principle of Union law relating to the protection of natural or legal persons against arbitrary or

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<sup>218</sup> Judgment of 16 May 2017, *Berlioz Investment Fund SA*, C-682/15, ECLI:EU:C:2017:373 [56, 78-89]. In paragraph 89 the CJEU states that «Consequently, the answer to the third and fifth questions is that Article 1(1) and Article 5 of Directive 2011/16 must be interpreted as meaning that verification by the requested authority to which a request for information has been submitted by the requesting authority pursuant to that directive is not limited to the procedural regularity of that request but must enable the requested authority to satisfy itself that the information sought is not devoid of any foreseeable relevance having regard to the identity of the taxpayer concerned and that of any third party asked to provide the information, and to the requirements of the tax investigation concerned. Those provisions of Directive 2011/16 and Article 47 of the Charter must be interpreted as meaning that, in the context of an action brought by a relevant person against a penalty imposed on that person by the requested authority for non-compliance with an information order issued by that authority in response to a request for information sent by the requesting authority pursuant to Directive 2011/16, the national court not only has jurisdiction to vary the penalty imposed but also has jurisdiction to review the legality of that information order. As regards the condition of legality of that information order, which relates to the foreseeable relevance of the requested information, the courts' review is limited to verification that the requested information manifestly has no such relevance.»

disproportionate intervention by the public authorities in their private sphere of activity.<sup>219</sup>

X. A fourth constellation of composite procedures consists of cases where a Member State act has an effect not only under national law but also under EU law. An example case for this constellation is addressed in *Rimševičs* and *ECB v Latvia*,<sup>220</sup> a case which addresses the fact that the Governors of national central banks of Member States are appointed to office and relieved from office under national law of the Member State but the Statute of the European System of Central Banks and the ECB sets certain conditions for their appointment and dismissal because the Governors of national central banks are equally the members of the European Central Bank's (ECB) Governing Council. Therefore, although it is for national Courts to decide on the legality of appointment or removal from office, where EU law establishes conditions for such acts, it is for the Member States courts to apply them and take them into account.<sup>221</sup>

X. Similarly, the CJEU held in *Rottman*, in the context of a preliminary reference procedure with respect to withdrawal of national citizenship having the effect of the loss of EU citizenship that Member States Courts must assess the matter under national law also in the context of EU law.<sup>222</sup> The same result

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<sup>219</sup> Judgment of 6 October 2020, *Etat Luxembourgeois v B and Others*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 [111].

<sup>220</sup> See Order of the Vice-President of the Court of 20 July 2018 in *ECB v Latvia*, C-238/18, ECLI:EU:C:2018:581 and Opinion of AG Kokott of 19 December 2018, in *Rimševičs and ECB v Latvia*, joined cases C-202/18 and C-238/18, ECLI:EU:C:2018:1030.

<sup>221</sup> In the case C-238/18 *ECB v Latvia*, however, a specific provision in the Statutes of the ESCB and ECB granting under Article 14.2. the CJEU powers to review (national) decisions or decisions of the ECB to relieve a Governor from office. "A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application."

<sup>222</sup> Judgment of 2 March 2010, *Rottmann v Freistaat Bayern*, C-135/08 [41-55] with further references. See more recently the judgment of 12 March 2019, *Tjebbes*, C-221/17, EU:C:2019:189. For further discussion on the

was reached in the action for annulment (Article 263 TFEU) in the case *Le Pen* where the General Court held that an action of an Member of the European Parliament (MEP) who in the context of criminal proceedings under national law inter alia was held to be incapable of holding office, has an effect on his status as MEP. However, it is for the national Courts to review the legality of such sanctions and to take into account the effect on EU law – in this case the effect on the status as MEP under EU law.<sup>223</sup>

(iii) Courts' Obligations to Substitute Administrative Decisions

X. Under the settled case law of the CJEU, Member State courts must “set aside national legislative provisions that might prevent EU rules which have direct effect...from having full force and effect” since such rules are incompatible with “the very essence of EU law.”<sup>224</sup> In order to guarantee effective judicial remedy under Article 47 of the Charter, as well as under the principle of sincere cooperation enshrined in Article 4(3) TEU, “a national court or tribunal seised of an appeal is required to vary a decision of the administrative or quasi-judicial body ... that does not comply with its previous judgment and to substitute its own decision on the application by ... disapplying, if necessary, the national law that prohibits it from proceeding in that way”.<sup>225</sup> Rendering judicial remedies by administrative non-compliance ineffective is not permissible under Article 47 of the Charter.<sup>226</sup>

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citizenship case-law see Marek Safjan and Dominik Dürsterhaus, ‘The EU Citizens’ Right to Have Rights and the Courts’ Duty to Protect It’ in Koen Lenaerts and others (eds), *An Ever-Changing Union?: Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart Publishing 2019).

<sup>223</sup> Judgment of 10 April 2003, *Jean-Marie Le Pen*, T-353/00, ECLI:EU:T:2003:112 [91].

<sup>224</sup> Judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, referring to judgments of 9 March 1978, *Simmenthal*, Case 106/77, ECLI:EU:C:1978:49 [22], and of 24 June 2019, *Popławski*, C-573/17, ECLI:EU:C:2019:530 [52 to 62].

<sup>225</sup> *Ibid.* Judgment of 29 July 2019 C-556/17, *Torubarov*, ECLI:EU:C:2019:626 [74] with reference, by analogy, to judgment of 5 June 2014, *Mahdi*, C-146/14 PPU, ECLI:EU:C:2014:1320 [62].

<sup>226</sup> *Ibid.* Judgment of 29 July 2019 *Torubarov*, C-556/17, ECLI:EU:C:2019:626 [72].

X. This is in fact a very far reaching case-law in the interest of effectiveness of EU law in general and the right to an effective judicial remedy specifically. Whether under provisions in national law analogous to Article 47 of the Charter, courts have the power to amend administrative decisions themselves, instead of simply reviewing the legality of such decision and referring the matter back is, in fact, addressed quite differently in various EU Member States as well as between various policy areas as to the distribution between the role of the court or tribunal and the other branches of public powers.

***(d) Specific Obligations in Disputes between Individuals – The ‘horizontal’ Relation***

X. 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, either by means of ‘direct horizontal effect’ or what is known as ‘indirect’ effect.<sup>227</sup> The difference is that indirect horizontal effect influences the interpretation of national law applicable in a dispute. Direct horizontal effect creates rights and obligations directly between individuals in a dispute.

**(i) Direct Horizontal Effect**

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<sup>227</sup> For a recent analysis by reference to the doctrine of ‘positive obligations’ as elaborated in the case law of the European Court of Human Rights see the Opinion of Advocate General Øe of 14 May 2020 in *Braathens Regional Aviation*, C-30/19, ECLI:EU:C:2020:374 [92-93].

X. It is important to recall that “even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons”.<sup>228</sup> Therefore, the Court will examine whether fundamental rights protected under EU law may in and as of themselves have horizontal direct effect in disputes between parties *inter se* with the effect of precluding the application of national law contrary to such provisions.<sup>229</sup>

X. In *Egenberger*, a case on discrimination on the basis of religious affiliation, the Court held that “Article 47 of the Charter on the right to an effective remedy is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.”<sup>230</sup> Consequently, the Court held, that where national law cannot be interpreted in compliance with a directive, the national court may be “required to ensure within its jurisdiction the judicial protection for individuals” flowing from Article 47 of the Charter, if need, by dis-applying contrary national law.<sup>231</sup> Under this case law, when protecting the right under Article 47 of the Charter a national Court will have to undertake in many cases a balancing exercise in compliance with the principle of proportionality in order to ensure that competing rights are fully complied with. However, this will need to be done by “taking into consideration the balance struck between those interests by the EU legislature” in the relevant directive in case.<sup>232</sup> Arguably, any EU directive will

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<sup>228</sup> Judgment of 6 November 2018, *Bauer and Others*, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 [77]; judgment of 7 August 2018, *Smith*, C-122/17 ECLI:EU:C:2018:631 [43].

<sup>229</sup> Judgment of 6 November 2018, *Bauer and Others*, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 [79].

<sup>230</sup> Judgment of 17 April 2018, *Egenberger*, C-414/16, ECLI:EU:C:2018:257 [78].

<sup>231</sup> *Ibid.* Judgment of 17 April 2018, *Egenberger*, C-414/16, ECLI:EU:C:2018:257 [79].

<sup>232</sup> *Ibid.* Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257[81].

in and of itself need to be interpreted both by the national court and by the CJEU in compliance with ensuring the rights under Article 47 of the Charter.

X. The CJEU then found in *Bauer* that rights “guaranteed in the legal order of the European Union are applicable in all situations governed by EU law”.<sup>233</sup> That means that even where a right arises from a provision of the Charter of Fundamental rights and is implemented by a directive, such rights may have an effect between the parties and thus require protection by the national court.<sup>234</sup>

X. This is a central development which allows for horizontal effect of rights arising from the Charter or from general principles of EU law also in a horizontal relation, to be protected then by the right to an effective remedy.<sup>235</sup> Which Charter provisions, however, confer rights, as opposed to amounting only to principles, is decided on a case by case basis.<sup>236</sup>

(ii) Indirect Horizontal Effect of the Right to Effective Remedies

X. Cases which have confirmed this indirect horizontal effect of the right to an effective judicial remedy have so far been decided by the CJEU especially with respect to rights arising from EU legislative acts—both in the form of

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<sup>233</sup> Judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, ECLI:EU:C:2014:2 [42], with further references.

<sup>234</sup> Judgment of 6 November 2018, *Bauer and Others*, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 [53] stating that “since the national legislation at issue in the main proceedings is an implementation of Directive 2003/88, it follows that Article 31(2) of the Charter is intended to apply to the cases in the main proceedings” with reference, by analogy, to the judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, ECLI:EU:C:2014:2[43].

<sup>235</sup> For further discussion see e.g. Anthony Arnall, ‘Article 47 CFR and National Procedural Autonomy’ (2020) 45 *European Law Review* 681, Eleni Frantziou, ‘Case C-176/12 *Association de médiation sociale*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union’ (2014) 10 (2) *European Constitutional Law Review* 332.

<sup>236</sup> See e.g. judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, ECLI:EU:C:2014:2. On the distinction between rights and principles under the Charter see the contribution by XXXXX in this commentary.

directives or regulations. The policy area of non-discrimination, consumer protection and health and safety provisions have been particularly productive. Case law can be categorised into various sets of obligations arising from Article 47 of the Charter for national courts.

*- Provision of sufficient sanctions for non-compliance*

X. The foundational cases in this field are *Von Colson*<sup>237</sup> and *Dekker*<sup>238</sup> where 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.<sup>239</sup> 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.

X. The CJEU frequently referred to the original cases<sup>240</sup> and from there 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:

“Article 4(3) [TEU] requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that

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<sup>237</sup> Judgment of 10 April 1984, *Van Colson*, Case 14/83, ECLI:EU:C:1984:153.

<sup>238</sup> Judgement of 8 November 1990 C-177/88 *Dekker v Stichting voor Jonge Volwassenen (VJV) Plus* ECLI:EU:C:1990:383.

<sup>239</sup> Judgment of 10 April 1984, *Van Colson*, Case 14/83, ECLI:EU:C:1984:153 [23].

<sup>240</sup> See e.g. judgment of 19 April 2016, *Dansk Industri*, C-441/14, ECLI:EU:C:2016:278 [30]; judgment of 17 December 2015, *María Auxiliadora Arjona Camacho v Securitas Seguridad España SA*, C-407/14, ECLI:EU:C:2015:831 [31], on equal treatment in social policy; judgment of 26 October 2016, *Canal Digital Danmark A/S*, C-611/14, ECLI:EU:C:2016:800, [30] in the field of unfair commercial contracts

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.”<sup>241</sup>

X. 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 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.<sup>242</sup> 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.<sup>243</sup>

- *Disapply conflicting national law*

National courts, and in fact all public bodies of Member States, are thus obliged to dis-apply Member State law which would jeopardise or make ineffective a

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<sup>241</sup> Judgment of 8 July 1999, *Nunes and de Matos*, C-186/98, ECLI:EU:C:1999:376, [9-11] with reference to the judgment of 21 September 1989, *Commission v Greece*, Case 68/88, ECLI:EU:C:1989:339 [23].

<sup>242</sup> Judgment of 29 October 2009, *Pontin*, C-63/08, ECLI:EU:C:2009:666 [72-76].

<sup>243</sup> *Ibid.* Judgment of 29 October 2009, *Pontin*, C-63/08, ECLI:EU:C:2009:666 [72-76].

right arising from EU law. The CJEU has held that the obligations following from direct effect, and notably the duty to disapply national provisions which appear to be contrary to provisions of EU law having direct effect, “fall on all competent national authorities, not only on judicial authorities.”<sup>244</sup>

X In *Fuss v Stadt Halle*,<sup>245</sup> 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.”<sup>246</sup>

This has led in *Cresco* to the court finding that a national court would be obliged to guarantee individuals legal protection, set aside in the interest of primacy of EU law including of the Charter provisions of national law that is incompatible with EU law. “That obligation persists regardless of whether or not the national court has been granted competence under national law to do so.”<sup>247</sup>

- *Interpretation of jurisdictional rules in light of Article 47 CFR*

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<sup>244</sup> Judgment of 21 January 2020, *Banco de Santander*, C-274/14, ECLI:EU:C:2020:17 [78] referring to judgments of 22 June 1989, *Costanzo*, Case 103/88, ECLI:EU:C:1989:256 [30 to 33]; of 14 October 2010, *Fuß v Stadt Halle*, C-243/09, ECLI:EU:C:2010:609 [61,63]; and of 4 December 2018, *The Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, ECLI:EU:C:2018:979 [36,38]. See also e.g. Michael Dougan, ‘Primacy and the Remedy of Disapplication’ (2019) 56 Common Market Law Review 1459.

<sup>245</sup> Judgment of 14 October 2010, *Fuß v Stadt Halle*, C-243/09, ECLI:EU:C:2010:609.

<sup>246</sup> Judgment of 14 October 2010, *Fuß v Stadt Halle*, C-243/09, ECLI:EU:C:2010:609 [66], with reference, by analogy, to judgment of 22 September 1998, *Coote*, C-185/97, ECLI:EU:C:1998:424 [24, 27]. 1998

<sup>247</sup> E.g. judgment of 22 January 2019, *Cresco Investigation*, C-193/17, ECLI:EU:C:2019:43 [78,80]; judgment of 9 March 2017, *Milkova*, C-406/15, ECLI:EU:C:2017:198 [67].

X. As much as EU measures of private international law are to be interpreted in conformity with Article 47 of the Charter,<sup>248</sup> questions of jurisdiction of national courts in civil disputes will also be assessed in view of the right to an effective judicial remedy.<sup>249</sup>

X. Thus, the CJEU has held that ‘a national court implementing EU law in applying Regulation No 44/2001 must comply with the requirements flowing from Article 47 of the Charter’.<sup>250</sup> In that context, it has had to consider, for example, whether a plea relating to immunity from jurisdiction would lead to a denial of right of access to a court;<sup>251</sup> whether a Member State procedural rule concerning appeal rights under Regulation 44/2001 rendered that right impossible in practice or excessively difficult to enforce in breach of Article 47,<sup>252</sup> whether Article 47 allows a Member State court to examine of its own motion the whether a judgment was given in compliance with the rules on jurisdiction in order to make up for the imbalance which exists between the consumer and the professional.<sup>253</sup>

X. The application of this approach by the CJEU, however, is not always consistent. In *Schrems v Facebook*, for example, the CJEU refused to address explicit references to Article 47 of the Charter in a case of arguments regarding *de jure* and *de facto* effective remedies to consumers in Europe,<sup>254</sup> with the AG

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<sup>248</sup> See e.g. judgment of 11 September 2014, *A*, C-112/13, ECLI:EU:C:2014:2195 [51], referring to judgment of 17 November 2011, *Hypoteční banka*, C-327/10, ECLI:EU:C:2011:745 [48-49]; judgment of 15 March 2012, *G*, C-292/10, ECLI:EU:C:2012:142 [47-48].

<sup>249</sup> Judgment of 17 November 2011, *Hypoteční banka*, C-327/10, ECLI:EU:C:2011:745 [49]. See also: judgment of 15 March 2012, *G*, C-292/10, ECLI:EU:C:2012:142, [47-48], See e.g. judgment of 11 September 2014, *A*, C-112/13, ECLI:EU:C:2014:2195 [58].

<sup>250</sup> Judgment of 7 May 2020, *Rina*, C-641/18, ECLI:EU:C:2020:349 [55] referring to judgment of 25 May 2016, *Meroni*, C-559/14, ECLI:EU:C:2016:349 [44].

<sup>251</sup> Judgment of 7 May 2020, *Rina*, C-641/18, ECLI:EU:C:2020:349.

<sup>252</sup> Judgment of 12 December 2019, *Aktiva Finants*, C-433/18, ECLI:EU:C:2019:1074.

<sup>253</sup> Judgment of 4 September 2019, *Salvoni*, C-347/18, ECLI:EU:C:2019:661.

<sup>254</sup> Judgment of 6 October 2015, C-498/16 *Schrems v Facebook*, ECLI:EU:C:2018:37.

arguing that the underlying issue of developing the possibility of collective action by consumers should rather be addressed by the legislator and would entail too far reaching consequences to be discussed in a single case before the CJEU.<sup>255</sup>

- *Conduct ex officio review of EU law by national courts and tribunals*

X. 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*).<sup>256</sup> In procedures before the CJEU it is in principle for “the parties to proceedings to take the initiative,” so that the CJEU itself “is bound by the obligation to keep to the subject matter of the dispute and to base its decision on the facts put before it” under certain exceptions such as in the interest of public interest, the rights of the defence and ensure the proper conduct of proceedings.<sup>257</sup> The duty on Member State courts to consider questions of European Union law of their own motion is arguably broader, due to their obligation to comply with the principle of

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<sup>255</sup> The AG in extra-judicial writing argues that this case stems from the area of ‘consumer protection and the aggregation of claims in civil matters in order to establish class action, and the correlating issue of international jurisdiction and standing, was chosen as a certain counterpoint. It demonstrates that although the caselaw of the Court on such matters has indeed a certain tendency, it is by no means just linear.’ See Michal Bobek, National Courts and the Enforcement of EU Law, in: Marleen Botman, Jurian Langer (eds.) *National Courts and the Enforcement of EU law: The Pivotal Role of National Courts in the EU Legal Order*, the XXIX FIDE Congress in the Hague, 2020 Congress Publications Vol 1. (The Hague, eleven international publishing 2020), 77. For further discussion on judicial protection of collective interests see e.g. Catherine Warin, ‘Individual Rights and Collective Interests in EU Law: Three Approaches to a Still Volatile Relationship’ (2019) 56 *Common Market Law Review* 463.

<sup>256</sup> 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 to apply EU law on its own motion. 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).

<sup>257</sup> Judgment of 7 August 2018, C-300/17, *Hochtief*, EU:C:2018:635 [52], referring to judgments of 14 December 1995, *van Schijndel and van Veen*, joined cases C-430/93 and C-431/93, ECLI:EU:C:1995:441 [20-21], of 7 June 2007, *van der Weerd and Others*, joined cases C-222/05 to C-225/05, ECLI:EU:C:2007:318 [34-35]. The public interest exception also applies to Member State courts. See the judgment of 17 December 2009, *Martin Martin*, C-227/08, ECLI:EU:C:2009:792 [20].

effectiveness<sup>258</sup> and equivalence.<sup>259</sup> This question arises mostly, but not exclusively, in disputes between individuals and has become increasingly important in the context of the possibilities of horizontal direct effect of rights under Article 47 CFR.<sup>260</sup>

X. 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.<sup>261</sup> Whether the conditions of equivalence exist is assessed on a case-by-case basis.<sup>262</sup>

X. However, the position with respect to the principle of effectiveness is more complex. While the established case law states broadly that ‘EU law, and in particular the principle of effectiveness, does not, as a rule, require national courts to raise of their own motion an issue concerning the breach of provisions of EU law, where examination of that issue would oblige them to go beyond the ambit of the dispute defined by the parties themselves and rely on facts and circumstances other than those on which the party with an interest in

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<sup>258</sup> The most notable recent judgments are the judgments of 9 July 2020, *Raiffeisen Bank*, C-698/18, ECLI:EU:C:2020:537; of 11 March 2020, *Lintner*, C-511/17, ECLI:EU:C:2020:188; of 3 April 2019, *Aquamed*, C-266/18, ECLI:EU:C:2019:282; and of 20 September 2018, *OTP and OTP Faktoring*, C-51/17, ECLI:EU:C:2018:750. See also notably the judgments of 18 February 2016, *Finanmadrid EFC*, C-49/14, ECLI:EU:C:2016:98; of 14 June 2012, *Banco Español de Crédito*, C-618/10, ECLI:EU:C:2012:349; and of 21 November 2002, *Cofidis SA v Fredout*, C-473/00, ECLI:EU:C:2002:705.

<sup>259</sup> E.g. judgment of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, ECLI:EU:C:2009:615 [49]; judgment of 12 February 2008, *Kempter*, C-2/06, ECLI:EU:C:2008:78 [45].

<sup>260</sup> Judgment of 14 December 1995, *Peterbroeck*, C-312/93, ECLI:EU:C:1995:437,

<sup>261</sup> Judgment of 1 June 1999, *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269,[37]; judgment of 26 October 2006, *Mostaza Claro*, C-168/05, ECLI:EU:C:2006:675[35]. See also *Asturcom Telecomunicaciones* ibid and *Kempter* ibid. For further discussion see: Anthi Beka: *The Active Role of Courts in Consumer Litigation Intersentia* (Amsterdam 2018).

<sup>262</sup> See critically with further discussion e.g. G de Búrca, ‘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) chapter 4.

application of those provisions has based his claim.’, <sup>263</sup> an exception to this is equally well established in the field of EU consumer protection law.<sup>264</sup>

X. Generally, “adequate and effective means to stop the use of unfair terms in consumer contracts must include provisions enabling the latter to be guaranteed effective judicial protection by making it possible for them to bring legal proceedings against the disputed contract including in the enforcement phase and under reasonable procedural conditions so that the exercise of their rights is not subject to conditions, in particular time-limits or costs which make it excessively difficult or impossible to exercise the rights guaranteed” by directives protecting the interests of consumers.<sup>265</sup>

X. In the foundational *Cofidis ruling*,<sup>266</sup> it was held 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.’<sup>267</sup> It follows, the Court subsequently stated, that even in absence of specific pleadings by the consumer, ‘effective protection of the consumer may be attained only if the national court

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<sup>263</sup> Judgment of 26 April 2017, *Farkas*, C-564/15, ECLI:EU:C:2017:302, referring to judgments of 14 December 1995, *van Schijndel and van Veen*, joined cases C-430/93 and C-431/93, ECLI:EU:C:1995:441 [22] and of 7 June 2007, *van der Weerd and Others*, joined cases C-222/05 to C-225/05, ECLI:EU:C:2007:318 [36]. However, due to the ruling in judgment of 14 December 1995, *Peterbroeck*, C-312/93, ECLI:EU:C:1995:437, if the expiry of a time limit for raising of arguments before the Member State court renders EU law impossible in practice or excessively difficult, a Member State court will be required to consider the relevant points of EU law of their own motion.

<sup>264</sup> Note that the exception routinely applied in the field of consumer protection law was not applied in a recent case concerning public procurement. See the judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato - Antitrust and Coopservice*, C-216/17, ECLI:EU:2018:1034, [40].

<sup>265</sup> Judgment of 1 October 2015, *Erste Bank Hungary*, C-32/14, ECLI:EU:C:2015:637 [59].

<sup>266</sup> Judgment of 21 November 2002, *Cofidis SA v Fredout*, C-473/00, ECLI:EU:C:2002:705.

<sup>267</sup> *Ibid.* Judgment of 21 November 2002, *Cofidis SA v Fredout*, C-473/00, ECLI:EU:C:2002:705 [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.’

acknowledges that it has power to evaluate terms of this kind of its own motion'.<sup>268</sup>

X. The Member State court is to apply the following steps. National procedural law will, where possible, have to be interpreted in conformity with EU law which includes changing “their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives” of relevant EU law.<sup>269</sup> Where national law cannot be interpret in compliance with EU law, “national courts are obliged to examine of their own motion whether the provisions agreed between the parties are unfair and, where necessary, are to disapply any national legislation or case-law which precludes such an examination.”<sup>270</sup> This obligation may further exist, where a national court reviews the enforceability of an arbitration award made in the context of a consumer contract.<sup>271</sup>

X. In *Asturcom v Nogueira*,<sup>272</sup> a case regarding the legality of an arbitration clause in a consumer contract, the CJEU held that, a national court is “obliged to assess of its own motion whether that clause is unfair” in the light of Article 6

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<sup>268</sup> Judgment of 27 June 2000, *Océano Grupo and Others*, joined cases C-240/98 to C-244/98, ECLI:EU:C:2000:346 [26]; judgment of 4 June 2009, C-243/08 *Pannon*, ECLI:EU:C:2009:350 [32]; judgment of 17 December 2009, *Martin Martin*, C-227/08, ECLI:EU:C:2009:792 [29]; judgment of 9 November 2010, *Pénzügyi Lízing*, C-137/08, ECLI:EU:C:2010:659 [48, 51–53] ; Order of 16 November 2010, *Pobotovost*, C-76/10, ECLI:EU:C:2010:685, [40–43] ; judgment of 3 October 2013, *Soledad Duarte Hueros*, C-32/12, ECLI:EU:C:2013:637. See also M Ebers, ‘From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata’ (2010) *European Review of Private Law* 823–46. See also judgment of 21 February 2013, *Banif Plus Bank Zrt v Csaba Csipai*, C-472/11, ECLI:EU:C:2013:88 [33].

<sup>269</sup> Judgment of 17 April 2018, *Egenberger*, C-414/16, ECLI:EU:C:2018:257 [72]; judgment of 4 June 2020, *Kancelaria Medius*, ECLI:EU:C:2020:431 [50].-

<sup>270</sup> Judgment of 4 June 2020, *Kancelaria Medius*, ECLI:EU:C:2020:431 [51]; judgment of 7 November 2019, *Profi Credit Polska*, joined cases C-419/18 and C-483/18, ECLI:EU:C:2019:930 [76].

<sup>271</sup> Judgment of 26 October 2006, C-168/05 *Mostaza Claro*, ECLI:EU:C:2006:675 [30]; Order of 16 November 2010, *Pobotovost*, C-76/10, ECLI:EU:C:2010:685 [53-54].

of Directive 93/13 on the protection of consumers.<sup>273</sup> And in order to compensate for the imbalance between the consumer and the seller, or supplier,<sup>274</sup> the CJEU has held that where a Member State court has available to it the necessary factual and legal elements, “the national court is required to assess of its own motion whether a contractual term coming within the scope of Directive 93/13 is unfair.”<sup>275</sup>

- *Grant of access to information*

X. Finally, it has been established that the right to effective enforcement of EU law includes a right for one private party to bring proceedings against another. The protection of business secrets and other confidential information must be undertaken by Member State courts in a way, which protects the rights for effective remedies.<sup>276</sup>

X. The case law is especially developed for breaches of EU competition law.<sup>277</sup> Effectiveness of enforcement of competition law in principle precludes a provision of Member State law banning access to public competition proceedings files, 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. The principle of effectiveness requires the national judge to weigh up all the relevant factors, including the

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<sup>273</sup> Judgment of 4 June 2020 *Kancelaria Medias*, C-495/19, ECLI:EU:C:2020:431 [36].

<sup>275</sup> Judgment of 4 June 2020 *Kancelaria Medias*, C-495/19, ECLI:EU:C:2020:431 [37]. In the absence of these legal and factual elements ‘the national court must be entitled to adopt of its own motion the measures of inquiry needed to establish whether a term in the contract which gave rise to the dispute before it, concluded between a seller or supplier and a consumer, comes within the scope of that directive’. See also judgment of 11 March 2020, *Lintner*, C-511/17, ECLI:EU:C:2020:188 [36-37].

<sup>276</sup> Judgment of 14 February 2008, *Varec*, C-450/06, ECLI:EU:C:2008:91 [46-52].

<sup>277</sup> Judgment of 13 July 2006, *Manfredi and Others*, joined cases C-295/04 to C-298/04, ECLI:EU:C:2006:461 , and judgment of 20 September 2001, *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:465.

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.<sup>278</sup>

X. However, where access to documents held by EU institutions and bodies is a pre-condition for an effective private enforcement of EU law, the CJEU has shown to be very hesitant to interpret EU law, especially Regulation 1049/2001 with respect to requirements under Article 47 of the Charter. Here, the CJEU risks establishing double standards obliging Member State authorities to further reaching obligations in the light of effective enforcement of EU law, than it is willing to oblige EU institutions and bodies. Despite the *telos* of Regulation 1049/2001 requiring in its Article 1 “the fullest possible” access, the existence of a specific fundamental procedural right to transparency in Article 42 of the Charter and Article 15 TFEU as well as the necessity of access as an effective pre-condition to the exercise of the right to an effective judicial remedy, the CJEU has developed the opposing doctrine proclaiming “a general presumption of confidentiality.”<sup>279</sup> This presumption, albeit rebuttable, covers

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<sup>278</sup> See judgment of 6 June 2013, *Donau Chemie AG*, C-536/11, ECLI:EU:C:2013:366, which built on principles established in the judgment of 14 June 2011, *Pfleiderer*, C-360/09, ECLI:EU:C:2011:389. 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. See more recently judgment of 27 February 2014, *Commission v EnBW Energie Baden-Württemberg*, C-365/12 P, ECLI:EU:C:2014:112, and the Opinion of Advocate General Cruz Villalon of 3 October 2013, ECLI:EU:C:2013:643.

<sup>279</sup> Judgment of 27 February 2014, *Commission v EnBW Energie Baden-Württemberg*, C-365/12 P, ECLI:EU:C:2014:112, [93]; judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, ECLI:EU:C:2010:376; judgment of 21 September 2010, *Sweden and Others v API and Commission*, joined cases C-514/07 P, C-528/07 P and C-532/07 P, ECLI:EU:C:2010:541 [94]; judgment of 14 November 2013, *LPN and Finland v Commission*, joined cases C-514/11 P and C-605/11 P, ECLI:EU:C:2013:738 [65]. See more recently the detailed judgment of 13 March 2019, *Alzchem*, C-666/17 P, ECLI:EU:C:2019:196, upholding the concept of a presumption of confidentiality.

documents, which in may contain relevant public findings, which when disclosed upon request by an interested party, would allow for private enforcement of EU law.

(iii) *Policy specific case law regarding obligations under Article 47 of the Charter*

X. The right to an effective remedy under Article 47 of the Charter, which in many senses is a meta right having an effect on the enforcement of rights and obligations arising from all areas of EU law, will necessarily have received specific interpretation in the context of various specific policy areas. In fact, the examples for the general approaches to the law cited above are all to be seen also in the context of the specific sets of facts arising from the specific setting of the individual policy area in which they arise. It is a formidable task for the CJEU to maintain a common approach and general line across policy areas and it is thus not surprising that this task is achieved in some areas with more success than in others.

X. Reference has already been made to consumer protection law,<sup>280</sup> private international law,<sup>281</sup> environmental law,<sup>282</sup> and criminal law, as areas in which rules that are linked to Article 47 have been developed, and which are particular to those subject areas. In addition to this, it is worth underscoring that it is settled case law of the CJEU that remedies stipulated in EU legislation covering a discrete subject area are to be interpreted in conformity with Article 47 of the Charter.<sup>283</sup> Similarly, Member State judicial review of procedures contained in EU legislation must be available. If not, breach of Article 47 of the Charter arises.<sup>284</sup>

X. Another substantive field of EU law in which Article 47 has had ois the field of immigration and asylum. In the area of asylum and immigration policy, there

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<sup>280</sup> Paragraphs XX to XX above.

<sup>281</sup> Paragraphs XXX to XX above.

<sup>282</sup> Paragraphs XX to XXX above.

<sup>283</sup> E.g. judgment of 29 July 2019, *Torubarov*, C-556/17, ECLI:EU:C:2019:626 [55], referring to the judgments of 26 July 2017, *Sacko*, C-348/16, ECLI:EU:C:2017:591 [31] and of 25 July 2018, *Albeto*, C-585/16, ECLI:EU:C:2018:584 [114].

<sup>284</sup> E.g. judgment of 19 September 2019, *Rayonna Prakuratura Lomm*, C-467/18, ECLI:EU:2019:765 [57]; judgment of 10 September 2019, C-94/18, *Chenchooliab*, ECLI:EU:C:2019:693.

is a line of case law interpreting to ‘effective remedy’ the right of asylum seekers challenging the return or transfer under the Dublin III Regulation only as provided specifically under its Art. 27(1) (and its scope as clarified in the Recital 19 of the Regulation which nonetheless itself refers to Art. 47 of the Charter and hence only relying on secondary law without reference to Article 47 itself.<sup>285</sup> That however does not mean that in the field of asylum and immigration policy there is not also case law with a specific reference to also Art. 47 of the Charter the right of effective remedy.<sup>286</sup>

X. In this field<sup>287</sup> there has also been especially relevant developments linking the rights of the defence and the right to be heard.<sup>288</sup>

*e) Intensity of judicial review*

X. To date the CJEU case law on the right to an effective remedy, despite stating the need for *de jure* and *de facto* effective remedies mostly focusses on matters of admissibility and accessibility to a particular type of remedy.<sup>289</sup> The

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<sup>285</sup> See e.g. judgment of 7 June 2016, *Karim*, C-155/15, ECLI:EU:C:2016:410 [22]; judgment of 7 June 2016, *Ghezalbash*, C-63/15, ECLI:EU:C:2016:409 [38-9], [47-53]; judgment of 26 July 2017, *Mengesteab*, C-670/16, ECLI:EU:C:2017:587[42-3], [45-8]; judgment of 26 July 2017, *A.S.*, C-490/16, ECLI:EU:C:2017:585 [25-6]; judgment of 16 February 2017, *C. K. and Others*, C-578/16 PPU, ECLI:EU:C:2017:127 [64-5], [75]; judgment of 11 December 2014, *Boudjlida*, C-249/13, ECLI:EU:C:2014:2431 [58].

<sup>286</sup> E.g. judgment of 25 October 2017, *Shiri*, C-201/16, ECLI:EU:C:2017:805 [44] (on the objective of ‘effective remedy’ under the Regulation ‘as in accordance with Art. 47’); judgment of 26 July 2017, *Sacko*, C-348/16, ECLI:EU:C:2017:591[28-31] [31] according to which it “follows that the characteristics of the remedy provided for in Article 46 of Directive 2013/32 must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection”); judgment of 17 December 2015, *Tall*, C-239/14, EU:C:2015:824, [51]; judgment of 5 June 2014, *Mahdi*, C-146/14 PPU, ECLI:EU:C:2014:1320 [50-2]; judgment of 8 May 2014, *N.*, C-604/12, ECLI:EU:C:2014:302 [41].

<sup>287</sup> See further contribution by D. Lawumni in this commentary.

<sup>288</sup> Judgment of 11 December 2014, *Boudjlida*, C-249/13, ECLI:EU:C:2014:2431 [41-2]; judgment of 5 November 2014, *Mukarubega*, C-166/13, ECLI:EU:C:2014:2336 [51-2].

<sup>289</sup> See further Brunessen Bertrand, Jean Siinelli, ‘Le Principe du droit au juges et à une protection juridictionnelle effective’, in: Jean-Bernard Auby, Jacqueline Dutheil de la Rochère (eds.) *Traité de droit Administratif Européen* 2ième ed. (Bruylant, Bruxelles 2014) 567-593 at 580.

question of what kind of degree of review, or with other words, the intensity of review will be offered by a court or tribunal, once access has been granted, has been discussed mostly in the context of the necessity of national courts offering specific forms of redress. Examples are matters of interim relief,<sup>290</sup> declaratory relief in various contexts,<sup>291</sup> or *ex officio* recourse to matters of EU law.<sup>292</sup>

X. Accordingly, the CJEU in *Wilson* 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.<sup>293</sup> Preclusion of review of the types of evidence put to the referring court would equally in breach of Article 47.<sup>294</sup> Review of all pertinent elements of fact is also predicated on an adequate statement of reasons so that this review can take place.<sup>295</sup>

X. However, it is further established in the case law that, when the competent national authorities have a wide discretion in assessing the facts, ‘judicial review is limited, as far as that assessment is concerned, to the absence of manifest error. Judicial review must also relate to compliance with procedural guarantees, which is of fundamental importance. Those guarantees include the

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<sup>290</sup> E.g. Judgment of 19 June 1990, *Factortame*, C-213/89, ECLI:EU:C:1990:257. Two examples of reasoning in which effective judicial protection is linked to interim measures can be found in the judgments of 11 January 2001, *Kofisa Italia*, C-1/99, ECLI:EU:C:2001:10 and of 11 January 2001, *Siples*, C-226/99, ECLI:EU:C:2001:14. See discussion in the Opinion of Advocate General Pikamäe of 23 April 2020 in *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, joined cases C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:294 [189]. See also above paragraphs XXXXX.

<sup>291</sup> Judgment of 1 April 2004, *Jégo-Quéré*, C-263/02 P, ECLI:EU:C:2004:210; judgment of 6 October 2015, *Schrems v DPC (Schrems I)*, C-362/14, ECLI:EU:C:2015:650 [65].

<sup>292</sup> E.g. judgment of 6 October 2009, *Asturcom v Nogueira*, C-40/08, ECLI:EU:C:2009:615 [29], [51-52].

<sup>293</sup> Judgment of 19 September 2006, *Wilson*, C-506/04, ECLI:EU:C:2006:587 [62].

<sup>294</sup> Judgment of 23 October 2014, *Unitrading*, C-437/13, ECLI:EU:C:2014:2318 [25].

<sup>295</sup> Judgment of 4 April 2017, *Fabimian*, C-544/15, ECLI:EU:C:2017:255 [46] referring to see, by analogy, judgments of 21 November 1991, *Technische Universität München*, C-269/90, ECLI:EU:C:1991:438 [14] and of 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, ECLI:EU:C:2008:392 [69]. See further on the obligation to state reasons for an EU measure, e.g., judgment of 16 June 2016, *SKW Stahl-Metallurgie and SKW Stahl-Metallurgie Holding v Commission*, C-154/14 P, ECLI:EU:C:2016:445 [40].

obligation for those authorities to examine carefully and impartially all the relevant elements of the situation in question.<sup>296</sup>

X. It is worth noting that there are substantive areas of the law in which the CJEU has unlimited jurisdiction, such as judicial review of fines for breach of EU competition law,<sup>297</sup> the intensity of judicial review is different. Article 47 of the Charter requires the CJEU, in the exercise of powers conferred on it by Articles 261 and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or duration of the infringement.<sup>298</sup> Discrete judicial review rules might also be viewed as having merged with respect to Member State justification on the basis of ‘grounds of public policy’.<sup>299</sup>

X. But one of the core difficulties and differences under EU law is to establish the relation between judicial self-restraint in the context of legislative or executive discretion, on one hand, and a well-developed review under criteria of proportionality and compliance with legal requirements on the other. This balancing is generally undertaken by the CJEU with the help of the concept of the ‘duty of care’, under which the CJEU reviews whether all relevant information from a qualitative and a quantitative point of view have been taken

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<sup>296</sup> Judgment of 4 April 2017, *Fabimian*, C-544/15, ECLI:EU:C:2017:255, referring to judgments of 9 March 2010, *ERG and Others*, joined cases C-379/08 and C-380/08, ECLI:EU:C:2010:127 [60-61], and of 16 June 2015, *Gauweiler and Others*, C-62/14, ECLI:EU:C:2015:400 [69]. See also on Article 47 of the Charter, and the need to review facts, law, and procedures, the judgment of 12 July 2018, *Banger*, C-89/17, ECLI:EU:C:2018:570 [51]. On Article 47 and the duty of Member State courts to verify relevant facts in the light of criteria set in a directive see, e.g. the judgment of 26 June 2019, *Craeynest and others*, C-723/17, ECLI:EU:C:2019:533.

<sup>297</sup> See e.g. judgment of 26 September 2016, *Infineon Technologies v. Commission* C-99/17 P, ECLI:EU:C:2018:773.

<sup>298</sup> *Ibid* [195] referring to judgments of 18 December 2014, *Commission v Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, ECLI:EU:C:2014:2456 [75] and the case-law cited, and of 26 January 2017, *Villeroy & Boch Austria v Commission*, C-626/13 P, ECLI:EU:C:2017:54 [82].

<sup>299</sup> See e.g. judgments of 12 December 2019, *G.S. (Menace pour l'ordre public)*, C-381/18, ECLI:EU:C:2019:1072, and *E.P. (Menace pour l'ordre public)*, C-380/18, ECLI:EU:C:2019:1071.

into account and whether cognitively, a decision could have been based on such facts.<sup>300</sup> The CJEU in *Gauweiler*<sup>301</sup> gives a practical example of this approach. There, the CJEU linked the duty of care and the principle of proportionality to review the exercise of very broadly defined discretionary powers of the ECB in matters of monetary policy.<sup>302</sup> Such an exercise requires large quantities of statistical information and economic expertise, the exercise of which is difficult to monitor through judicial review. Thus, in *Gauweiler* the CJEU held that the institution or body exercising its broad discretion is required in accordance with its duty of care case law dating back to the early days of the European Coal and Steel Community in the 1955 case of *Netherlands v High Authority*,<sup>303</sup> ‘to examine carefully and impartially all the relevant elements of the situation in question’ and to document this in an ‘adequate statement of the reasons for its decisions’.<sup>304</sup> The careful and impartial examination, in other words the compliance with the principle of care, emerged as a key concept in the review of whether the ECB had complied with its obligations under the principle of proportionality.<sup>305</sup> However, following the CJEU’s approach in *Weiss and Others*,<sup>306</sup> the German Constitutional Court (GCC) in *PSPP* claimed that the CJEU should adopt a more testing standard of degree of review.<sup>307</sup>

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<sup>300</sup> See Herwig C.H. Hofmann, The Duty of Care in EU Public Law – A Principle Between Discretion and Proportionality, 2020 *Review of European Administrative Law (REALaw)* (forthcoming).

<sup>301</sup> Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, ECLI:EU:C:2015:400.

<sup>302</sup> *Ibid.*

<sup>303</sup> Judgment of 21 March 1955, *Netherlands v High Authority*, Case 6/54, ECLI:EU:C:1955:5, 112 (English language version) and 220 (French version).

<sup>304</sup> Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, ECLI:EU:C:2015:400.

<sup>305</sup> *Ibid.*, [66-69].

<sup>306</sup> Judgment of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000 [36-42].

<sup>307</sup> This, in order to ensure standards of an effective judicial protection (Article 47 Charter) and submit to full review whether all factors of a decision have been taken into account as well as, additionally, review whether the latter have been properly weighed in an overall assessment by the decision-maker. See: German Constitutional Court (Bundesverfassungsgericht) of 5 May 2020 *PSPP* joined cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, para 144.

X. What *full* review requires under Article 47 Charter has not been addressed by the case law of the CJEU to great detail. One standard formula is that judicial review should be offered on points of law and fact.<sup>308</sup> The CJEU had generally not elaborated any further criteria for identifying ‘thorough review’ beyond these standards.<sup>309</sup>

X. Most recent cases concern specifically in the field of immigration and asylum law,<sup>310</sup> setting standards which, as pointed out by AG Bobek in *Torubarov*, constitute an expression ‘of more general principles related to the requirement of effective judicial remedy’ in Article 47 of the Charter and Article 19(1) second sentence TEU.<sup>311</sup> There, the notion of ‘full’ judicial review in view of Article 47 Charter, according to the CJEU, means that ‘the court or tribunal is required to examine both the evidence which the determining authority took into account or could have taken into account’ if it had properly taken a decision.<sup>312</sup> In this respect, under Article 52(3) of the Charter the case law of the ECtHR, which has established important standards with regard to the scale of judicial review required under Article 6 ECHR,<sup>313</sup> is to be taken

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<sup>308</sup> Judgment of 6 October 2020, *Etat Luxembourgeois v B and Others*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 [66]; judgement of 6 November 2012, *Otis and Others*, C-199/11, ECLI:EU:C:2012:684 [49]; judgment of 12 December 2019, *Aktiva Finants*, C-433/18, ECLI:EU:C:2019:1074 [36]; judgment of 19 September 2006, *Wilson*, C-506/04, ECLI:EU:C:2006:587 [62].

<sup>309</sup> See e.g. judgment 28 July 2011, *Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, C-69/10 ECLI:EU:C:2011:524 [56, 57] with reference to judgment of 19 September 2006, *Wilson*, C-506/04, ECLI:EU:C:2006:587 [60-62].

<sup>310</sup> See e.g. judgment of 25 July 2018, *Albeto*, C-585/16, ECLI:EU:C:2018:584 [105-106]. ; judgment of 29 July 2019, *Torubarov*, C-556/17, ECLI:EU:C:2019:626 [73-74].

<sup>311</sup> AG Bobek in Opinion of 30 April 2019, in *Torubarov*, C-556/17, ECLI:EU:C:2019:339 [48]. *Torubarov* however addressed the exceptional case, where the CJEU held that it might be necessary that a Court be ‘required to vary a decision of the administrative or quasi-judicial body’ and to ‘substitute its own decision’ in order to ensure compliance with the principle of effective judicial protection in only the most exceptional cases where an administration does not comply with a previous judgment. Judgment of 29 July 2019, *Torubarov*, C-556/17, ECLI:EU:C:2019:626 [74].

<sup>312</sup> Judgment of 25 July 2018, *Albeto*, C-585/16, ECLI:EU:C:2018:584 [113, 114].

<sup>313</sup> See for example *Menarini v Italy* Application no 43509/08 (27 September 2011); *Jussila v Finland* Case 2006-XIII (23 November 2006); *Hatton and Others v United Kingdom* Application no 36022/97 (8 July 2003) [141–142; Case 34619/97 *Janosevic v Sweden* (21 May 2003); *Société Stenuit v France* No 73053/01 (27 February 1992); *Engel and Others v Netherlands* (Series A, No 232-A) of 8 June 1976.

into account for clarification of minimum standards of the degree of review required. It would however appear, that under the case law of the European Court of Human Rights, no further reaching standards are required under the European Court of Human Rights in the context of Articles 6(1) or 13 ECHR.

X. The standards of the duty of care so far established are thus also the standards interpreted to be required under the principle of effective judicial protection as general principles of EU law. Under these standards, expertise such as technical and scientific specialist knowledge can not, according to the CJEU, be subject to judicial review per se but must be framed in procedural terms. Although therefore the duty of care standards allow for deep and far reaching probing, there seems to be no specific criteria in the principle of effective judicial remedies forcing a court to go further and substitute its assessment for that of an institution constitutionally empowered to assess a situation.

X. The above discussion shows the need for the CJEU to address this question regarding Article 47 of the Charter with more clarity, not least in order to elucidate the relevant level in view of the German Constitutional Court's and other high national courts potential future refusal in recognizing primacy of EU law.

#### **f) Limitations on the Right to an Effective Remedy Before a Court or Tribunal of the Member State**

Any right, including the right to an effective judicial remedy, “may be restricted, provided that the restrictions in fact correspond to objectives of general

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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.”<sup>314</sup> Article 52(1) of the Charter recalls that limitations need to be based on law, respect the essence of the right and to comply with the principle of proportionality.<sup>315</sup> These conditions for limitations are also applicable to Member States when acting in the scope of EU law.<sup>316</sup>

X. The test is therefore whether a proposed limitation touches upon the essence of the right or only limits a more peripheral element of scope of protection. Limitations touching the periphery may be permissible if they pursue a legitimate public policy objective and are proportionate.<sup>317</sup> The latter requires that a measure limiting the right must not only be capable of achieving its public policy objective but where several appropriate measures exist which are more or less equally capable of achieving the objective, “recourse must be had to the least onerous” in the sense of the limitation least limiting the right.<sup>318</sup> 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. Finally, under the proportionality test, the overall balance between the objective and the means chosen must not be wholly unreasonable.<sup>319</sup>

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<sup>314</sup> Judgment of 6 October 2020, *Etat luxembourgeois v B and Others*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 [49]; judgment of 18 March 2010, *Alasini*, joined cases C-317/08 to C-320/08, ECLI:EU:C:2010:146 [63], with reference to judgment of 15 June 2006, *Doktor and Others*, C-28/05, ECLI:EU:C:2006:408 [75] and the case law cited. See e.g. more recently judgment of 23 September 2013, *Textdata Software GmbH*, C-418/11, ECLI:EU:C:2013:588 [108].

<sup>315</sup> See the chapter on Article 52 (1) by XXXXX in this commentary.

<sup>316</sup> See Article 51 of the Charter restated in judgement of 6 October 2020, *B and Others*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 [60].

<sup>317</sup> See Art 52(1) CFR.

<sup>318</sup> See for many e.g. judgment of 8 July 2010, *Afton Chemical*, C-343/09, ECLI:EU:C:2010:419 [45].

<sup>319</sup> The most explicit and detailed discussion of proportionality to date seems to have been undertaken in

X. 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.<sup>320</sup> 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 13 ECHR.<sup>321</sup>

(i) Limitation required by law

X. Any limitation of the right to an effective remedy must be provided by law. In the relevant cases, the CJEU refers to the legal basis requirement that limitation “must be provided for by law, which implies that the legal basis which permits the interference with that right must itself define, clearly and precisely, the scope of the limitation on its exercise.”<sup>322</sup>

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judgment of 22 January 2013, *Skey Österreich*, C-283/11, ECLI:EU:C:2013:28[52-67].

<sup>320</sup> See as a restatement of the general approach e.g. judgment of 18 March 2010, *Alassini*, joined cases C-317/08 to C-320/08, ECLI:EU:C:2010:146 (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.

<sup>321</sup> 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 *Asbingdane 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.’

<sup>322</sup> Judgment of 6 October 2020, *Etat Luxembourgeois v B and Others*, joined cases C-245/19 and C-246/19, EU:C:2020:795 [76]; and generally to the formula for identifying the limitation by law e.g. Judgement of

X. For example, where as in *Liivimaa Lihaveis* the lack of a remedy against a measure undertaken by Member States acting in the scope of EU law results from a ‘manual’ of an agency, such limitation is not provided by law.<sup>323</sup> Consequently, the CJEU holds that where a national decision cannot be subject to an appeal, there is a potential violation of the principle of effective judicial protection laid down in the first paragraph of Article 47 of the Charter.<sup>324</sup> Accordingly, in order to ensure that right arising from EU law, “it is for the national courts to rule on the lawfulness of a disputed national measure and to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case.”<sup>325</sup>

(ii) Essence

X. *Schrems I* was the first case, the CJEU invalidated an act of EU institutions, for violation of the very essence of a fundamental right protected by the EU legal order. Since, the right to an effective judicial remedy has been the right where the concept of essence and the violation thereof has been most developed:

‘legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the

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8 September 2020, *Recorded Artists Actors Performers*, C-265/19, ECLI:EU:C:2020:677 [86]; Judgement of 17 December 2015, *WebMindLicenses*, C-419/14, ECLI:EU:C:2015:832 [81].

<sup>323</sup> Judgment of 17 September 2014, *Liivimaa Lihaveis MTÜ v Seirekomitee*, C-562/12, ECLI:EU:C:2014:2229 [73].

<sup>324</sup> Judgment of 17 September 2014, *Liivimaa Lihaveis MTÜ v Seirekomitee*, C-562/12, ECLI:EU:C:2014:2229 [74].

<sup>325</sup> Judgment of 17 September 2014, *Liivimaa Lihaveis MTÜ v Seirekomitee*, C-562/12, ECLI:EU:C:2014:2229 [75].

essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter.<sup>326</sup>

X. Other instances, in which the CJEU has found violation of the essence of the right to an effective remedy have since followed in data protection matters<sup>327</sup> as well as in information exchange regarding taxation.<sup>328</sup> At the same time the CJEU refers to a long history of case law under which the ‘very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law.’<sup>329</sup>

X. In what is known as either *Berlioz II* or *Shakira* case, the CJEU has very broadly interpreted the essence of the right to an effective remedy. According to this particularly wide interpretation, according to which

‘...the essence of the right to an effective remedy enshrined in Article 47 of the Charter includes, among other aspects, the possibility, for the person who holds that right, of accessing a court or tribunal with the power to ensure respect for the rights guaranteed to that person by EU law and, to that end, to consider all the issues of fact and of law that are relevant for resolving the case before it.’<sup>330</sup>

X. Especially, the Court finds that ‘in order to access such a court or tribunal, that person cannot be compelled to infringe a legal rule or obligation or to be subject to the

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<sup>326</sup> Judgment of 6 October 2015, *Schrems v DPC (Schrems I)*, C-362/14, ECLI:EU:C:2015:650 [95].

<sup>327</sup> See e.g. judgment of 6 October 2015, *Schrems v Facebook*, C-498/16, ECLI:EU:C:2018:37; Judgement of 16 July 2020, *DPC v Facebook and Schrems*, C-311/18, ECLI:EU:C:2020:559.

<sup>328</sup> Judgment of 6 October 2020, *Etat Luxembourgeois v B and Others*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 [69].

<sup>329</sup> Judgments of 23 April 1986, *Les Verts v Parliament*, Case 294/83, ECLI:EU:C:1986:166 [23]; judgment of 15 May 1986, *Johnston*, Case 222/84, ECLI:EU:C:1986:206 [18-19]; of 15 October 1987, *Heylens and Others*, Case 222/86, ECLI:EU:C:1987:442 [14]; judgment of 11 September 2008, *UGT-Rioja and Others*, joint cases C-428/06 to C-434/06, ECLI:EU:C:2008:488[80].

<sup>330</sup> Judgment of 6 October 2020, *Etat Luxembourgeois v B and Others*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 [66].

penalty attached to that offence<sup>331</sup>. Thereby the notion of essence is expanded to argument from the earlier case law, concerning the obligations of Member States to ensure that individuals would not have to breach legal obligations in order to ensure an individual implementing or enforcement act in order to incidentally seek judicial review of the underlying general act, to the level of the essence of the right – thus a principle which cannot be limited by proportionate limitations serving a public interest or the realization of another fundamental right.<sup>332</sup> Accordingly, future cases might warrant qualifications of this position by the CJEU where a reasonable balance between competing societal interests and rights will need to be reached.

X. The requirement that courts be independent (see above on the notion of independence of courts and tribunals for a detailed discussion of the requirements) now explicitly “forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial”.<sup>333</sup> Whether granting access to some form of remedies, but not by courts which comply with the basic requirements of independence, will also be seen as an attack on the essence of the right will remain to be addressed by the CJEU. This matter may come to be discussed in the wake of the *LM* case.<sup>334</sup>

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<sup>331</sup> Judgment of 6 October 2020, *Etat Luxembourgeois v B and Others*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 [66] with reference to Judgments of 1 April 2004, *Commission v Jégo-Quéré*, C-263/02 P, ECLI:EU:C:2004:210 [35]; of 13 March 2007, *Unibet*, C-432/05, ECLI:EU:C:2007:163 [64]; and of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, ECLI:EU:C:2013:625 [104].

<sup>332</sup> For further discussion see also Kathleen Gutman, ‘The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?’ (2019) 20 German Law Journal 884; Takis Tridimas and Giulia Gentile, ‘The Essence of Rights: An Unreliable Boundary?’ (2019) 20 German Law Journal 794.

<sup>333</sup> Judgment of 5 November 2019, *Commission v Poland (Polish judges)*, C-192/18, ECLI:EU:C:2019:924 [106]; judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, ECLI:EU:C:2018:586 [48], [63]; judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, ECLI:EU:C:2019:531 [58].

<sup>334</sup> Judgment of 25 July 2018, *Minister for Justice and Equality (LM)*, C-216/18 PPU, ECLI:EU:C:2018:586. See also the discussion in Theodore Konstadinides, ‘Judicial Independence and the Rule of Law in the Context of Non-Execution of a European Arrest Warrant: *LM*’ (2019) 56 Common Market Law Review 743.

X. Further questions of the identification of the essence of the right to an effective remedy have been discussed by the CJEU with respect to the right to representation.<sup>335</sup>

X. The essence of the right to an effective remedy has finally also been evoked in the context of national legislation, results in a situation where the judgment of a court applying EU law remains ineffective, especially where that occurs 'because that court does not have any means of securing observance of the judgment.' That in the words of the CJEU 'fails to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter.'<sup>336</sup>

X. Such case law must be reviewed with great care. The broadening of notions of essence takes a matter beyond the possibility of proportionate limitations of the right to an effective remedy. The complexity of ensuring remedies by independent courts or tribunals in the context of procedural rules, rules on establishing courts and the various factors of internal and external guarantees of independence and impartiality require the possibility of undertaking a balanced review by courts.

(iii) Proportionate limitations of the Right to an Effective Judicial Remedy

X It is established in the case law of the CJEU 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

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<sup>335</sup> Judgment of 12 June 2014, C-314/13 *Užsienio reikalų ministerija*, ECLI:EU:C:2014:1645 [30, 34].

<sup>336</sup> Judgment of 19 December 2019, *Deutsche Umwelthilfe v Freistaat Bayern*, C-752/18, ECLI:EU:C:2019:1114 [35]; judgment of 29 July 2019, *Torubarov*, C-556/17, ECLI:EU:C:2019:626 [72].

example, compliance of national sanctions and procedural rules under which Member State courts operate to provide an effective remedy. Statutory limits defining limitation periods for bringing actions before national courts thus do not necessarily run contrary to Union law, as described above in the section on statutory limitations and timing.<sup>337</sup>

X. Other instances of proportionate limitations of the right to an effective remedy are the fight against international tax evasion and tax fraud. These objectives allow for limiting the right of individuals, whose data are requested by mutual assistance requests of tax authorities, to incidental review of the legality of mutual information requests in case of a final decision to such procedure, for example in form of a request for additional tax payments.<sup>338</sup>

X. Similarly, regarding the notion of accessibility to court, and court fees, the possibility that those concerned may bring a dispute before a tribunal in order to obtain a declaration of a breach of the relevant rules can be limited solely by proportionate restrictions, provided by law (Article 52(1) of the Charter). Such limits may include restrictions linked to the payment of court costs, that pursue a legitimate aim and do not adversely affect the very essence of the right of access to such a tribunal'.<sup>339</sup> Thus, fees payable for litigation can amount to 'an insurmountable obstacle to access to courts', particularly in the light of the amount of the fee.<sup>340</sup>

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<sup>337</sup> See above at paragraph XXX.

<sup>338</sup> Judgment of 6 October 2020, *Etat Luxembourgeois v B and Others*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 [85-92].

<sup>339</sup> The Opinion of the Court of 30 April 2019, Opinion 1/17 *Accord ECG UE-Canada*, ECLI:EU:C:2019:341 [201] referring to judgment of 30 June 2016, *Toma*, C-205/15, ECLI:EU:C:2016:499 [44].

<sup>340</sup> Judgment of 4 October 2018, *Kantarev*, C-571/16, ECLI:EU:C:2018:807 [135] referring to judgment of 22 December 2010, *DEB*, C-279/09, ECLI:EU:C:2010:811 [61]. See further e.g. to judgment of 30 June 2016, *Toma*, C-205/15, ECLI:EU:C:2016:499 [44]; judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, ECLI:EU:C:2015:655 [72, 79] and ECtHR, 8 June 2006, *V.M. v. Bulgaria*, CE:ECHR:2006:0608JUD004572399 [41-42].

X. Other legitimate steps limiting access to a judge recognised in EU law include, for example, ‘making the admissibility of legal proceedings concerning electronic communications services conditional upon the implementation of a mandatory attempt at settlement.’<sup>341</sup> 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.<sup>342</sup> 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.’<sup>343</sup>

X. 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

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<sup>341</sup> Judgment of 18 March 2010, *Alassini*, joined cases C-317/08 to C-320/08, ECLI:EU:C:2010:146 [62].

<sup>342</sup> Judgment of 4 December 2003, *Evans*, C-63/01, EU:C:2003:650.

<sup>343</sup> IBID. Judgment of 4 December 2003, *Evans*, C-63/01, ECLI:EU:C:2003:650 [54].

an abuse of a dominant position within the meaning of Article 86 [now Art 102] of the Treaty.<sup>344</sup>

X. In addition to this, Member States need ‘to protect the essential interests of its security and the guarantee of the procedural rights enjoyed by Union citizens<sup>345</sup> 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.’<sup>346</sup>

X. Finally, individual parties may limit in certain circumstances their own right to an effective remedy under Article 47 of the Charter. For example, in relation to commercial arbitration, the CJEU has held “that the requirements of efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling.”<sup>347</sup>

*g) Final remarks on the development of the right to an effective remedy:*

X. The discussion of Article 47 of the Charter concerning Member States displays an extremely dynamic field of EU law. The move from an

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<sup>344</sup> Judgment of 17 July 1998, *ITT Promedia*, T-111/96, ECLI:EU:T:1998:183 [60]; judgment of 5 March 1997, *WWF UK*, T-105/95, ECLI:EU:T:1997:26 [56].

<sup>345</sup> AG Bot Opinion of 12 September 2012 in *ZZ*, C-300/11, ECLI:EU:C:2013:363 [3].

<sup>346</sup> AG Bot Opinion of 12 September 2012 in *ZZ*, C-300/11, ECLI:EU:C:2013:363 [83].

<sup>347</sup> Judgment of 6 March 2018, *Achmea*, C-284/16, ECLI:EU:C:2018:158 [54], with reference to judgment of 1 June 1999, *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269 [35, 36 and 40]; judgment of 26 October 2006, *Mostaza Claro*, C-168/05 EU:C:2006:675 [34-39]. See further on interpretation of arbitral agreements in conformity with Article 47, judgment of 13 May 2015, *Gasprom*, C-536/13, ECLI:EU:C:2015:316 [38-39].

effectiveness of EU law based approach, linked to questions of primacy and direct effect, to a fully-fledged rule of law based principle of judicial remedies to protect rights and freedoms under EU law is visible in many of the developments cited in this commentary. The case law flows freely between identifying obligations under Article 19(1) TEU and protecting individual rights under Article 47(1) of the Charter. However, the rule of law crises in several EU Member States has also put obligations under Article 19(1) TEU back into focus along with the questions of definition of courts or tribunals under EU law and the requirements for their independence.<sup>348</sup>

X. This development is supported by the more detailed explanations of vertical and, increasingly, also the horizontal direct effect of the right to an effective remedy. The affirmation that the right to an effective remedy is sufficient in itself, and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right on which they may rely, expands the contexts in which the right to an effective remedy can be invoked beyond the interpretation of existing EU and national law. However, the implications of the horizontal effect are not yet fully explored, but are amongst the more consequential recent developments of the case law on Article 47 of the Charter.

X. Finally, one of the very interesting debates which has also only unfolded in the past decade is the question of limitations of the right to an effective remedy under Article 47 of the Charter. Any limitation must comply with the criteria set put in Article 52(1) of the Charter, and, must especially protect the essence

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<sup>348</sup> For more discussion on the implications of the recent rule of law crises in some Member States see e.g. Theodore Konstadinides, 'Holding Member States to the Rule of Law', *The Rule of Law in the European Union: The Internal Dimension* (Hart 2017), Koen Lenaerts, 'New Horizons for the Rule of Law Within the EU' (2020) 21 *German Law Journal* 29.

of this right. Here, the notion of the essence of Article 47 is becoming the epicenter of development of more generally applicable concepts of the essence of EU fundamental rights.