Chapter 7
The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?

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Abstract Since the coming into force of the Charter as primary law of the EU, Article 47 CFR is 'the reference standard' when the Court deals with issues of effective judicial protection. However, the general principle of effective judicial protection existed already for some 25 years, developed in the case law of the Union courts. While the interpretation and application of Article 47 build upon this case law, a number of changes can be pointed out. What was formerly under the loose umbrella of effective judicial protection and related principles is now split over three different articles of the Charter. On the one hand, these provisions are partly overlapping; on the other hand, their configuration also leads to a lacuna. This gap is bridged by the unwritten general principles such as the rights of defence. When compared to the pre-Charter era, Article 52(1) CFR structures the review of limitations of fundamental rights in a more compelling fashion. Specifically for Article 47 CFR, which has to be interpreted in harmony with Article 6 ECHR, the implicit limitations of Article 6 ECHR constitute a potential trap of 'double limitation'. Article 47 may be relied upon by individuals alleging a violation of rights and freedoms conferred upon them by EU law. However, the principle of effective judicial protection is broader in application, providing protection against acts that adversely affect an individual's interests. In so far as the interpretation of Article 47 would not reach the same scope and level of protection as the general principle of effective judicial protection, this principle should continue to apply.

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7.1 Introduction

In EU law, a jurisprudential development of the same 'grande envergure' as the *Van Gend&Loos* judgement is the articulation of the principle of effective judicial protection, which arose in the mid-1980s of the last century. While in the early case law there were already some rudimentary indications of the existence of this principle,[1] in its seminal judgment in *Johnston v. Chief Constable of the RUC*,[2] the Court held that the requirement of judicial control stipulated by Article 6 of Directive 76/207 (equal treatment of men and women)[3] reflected a general principle of law which underlies the constitutional traditions common to the Member States and which is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). While in *Johnston* the judgement was still closely tied to the directive at issue in that case, the statement that Article 6 reflects a general principle of law proved to be crucial for the further application of the principle in areas of Union law where no such principle exists in a codified form. In subsequent cases, starting only a few months later with *Heylens*,[4] the principle took on an entirely independent role, even in areas of Union law where there were no provisions applicable similar to the one contained in Article 6 of Directive 76/207.[5] Moreover, in

[1] Case 13/68 *Salgoil* EU:C:1968:54, p. 463; Case 179/84 *Bozzetti*, EU:C:1985:306, para 17; Case 14/83 *von Colson* EU:C:1984:153, paras 18 and 22.

[2] Case 222/84 *Johnston* EU:C:1986:206.

[3] OJ 1976, L 39/40.

[4] Case 222/86 *Heylens* EU:C:1987:442.

[5] For example, Case C-340/89 *Vlassopoulou* EU:C:1991:193, Case C-104/91 *Borrell* EU:C:1992:202, Case C-459/99 *MRAX* EU:C:2002:461, Case C-226/99 *Siples* EU:C:2001:14 and joined Cases C-372/09 and C-373/09 *Peñarroja Fa* EU:C:2011:156.

accordance with its *general* nature, the principle also applies to the protection of individuals against EU institutions.[6]

While it started as a principle developed in the case law of the ECJ, subsequently the requirement of effective judicial protection has increasingly been incorporated into secondary law instruments. In particular, in recent years, there has been a burgeoning of legislative measures emphasizing judicial protection and remedies across various sectors of EU policies.[7] Obviously, the interpretation of the relevant provisions in secondary law is guided by the general principle of effective judicial protection itself.[8]

With the entry into force of the Lisbon Treaty, the principle of effective judicial protection acquired an express, *written* primary law status. Article 47 of the Charter of Fundamental Rights of the European Union (CFR) lays down the 'right to an effective remedy and to a fair trial'.[9] Or, as the Court of Justice often puts it, the principle of effective judicial protection 'has been reaffirmed'[10] by Article 47 CFR or 'to which expression is now given'[11] by that article. Ever since the entry into force of the Lisbon Treaty, Article 47 has been one of the provisions most often relied upon. Much of the case law concerns the impact of the guarantees laid down in Article 47 upon procedures and remedies available before national courts. Another strand of case law concerns, as pointed out above, protection against EU institutions, in particular protection where restrictive measures are taken against persons or entities associated with international terrorism and in the case of competition law procedures.

While the still evolving EU standard of effective judicial protection obviously gives rise to many questions, the present contribution addresses a slightly different topic: what has changed now that effective judicial protection, a product of somewhat loose and flexible judge made law, is governed by the written text of the Charter? In order to explore the significance of this move 'from unwritten principles to written rules', I will briefly discuss, consecutively, the scope of application of Article 47 CFR, the need for a more precise delimitation of effective judicial protection vis-à-vis other closely related (written) principles, the effects of the explicit rule on limitations of rights laid down in Article 52(1) CFR, and of the 'harmonizing clause' in relation to the ECHR in Article 52(3) CFR.

[6]For instance in direct actions in competition cases or in the so-called 'restrictive measures' cases. See for instance Case 53/85 *AKZO* EU:C:1986:256, Case C-389/10 P *KME* EU:C:2011:816, joint Cases C-402/05 P and C-415/05 P *Kadi I* EU:C:2008:461 and joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* EU:C:2013:518. Similarly, the principle plays an important role in the interpretation of Article 263(4) TFEU. See, for instance Case C-583/11 P *Inuit* EU:C:2013:625.

[7]Just to mention a few examples, the implementation of the Aarhus Convention, several instruments in the fields of EU competition and consumer protection law, and provisions in public procurement and asylum legislation.

[8]Cf. Case C-300/11 *ZZ* EU:C:2013:363.

[9]Furthermore, note that, according to Article 19 TEU, '[m]ember States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

[10]Joined Cases C-317/08 to C-320/08 *Alassini* EU:C:2010:146, para 61.

[11]Case C-199/11 *Otis* EU:C:2012:684, para 46.

7.2 Scope of Application of Article 47 CFR

The scope of application of Article 47 is, first of all, part of a more general question, namely whether the Charter applies at all. As soon as the Charter applies under the test of Article 51(1) CFR as interpreted by the Court, effective judicial protection has to be ensured.

As is well-known, according to Article 51(1), the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union and to the Member States only when they are implementing Union law. This gave rise to a debate as to what is implementation? Moreover, the debate was complicated by the fact that the 'Explanations',[12] which refer to pre-existing case law of the Court of Justice, use a seemingly broader terminology, stating that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act within the scope of Union law.

In its judgment in *Åkerberg Fransson*, the Court confirmed the relevance of its earlier case law[13] and that no systematic distinction should be made between the notions 'implement' and 'act within the scope of application'.[14] According to *Fransson*, as confirmed by subsequent case law, the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.[15] The mere fact that a national measure comes within an area in which the Union has powers to act cannot bring the measure within the scope of EU law and, therefore, cannot render the Charter applicable.[16] The current test can conveniently be summarized as follows: is there, in the case at hand, *another* EU law provision applicable than the provision of the Charter relied upon? Charter provisions cannot, of themselves, trigger their own application.[17]

For the application of Article 47 this means that the guarantees listed in that Article become operative only when another provision of EU law is—arguably—applicable. Such a link was not present in, for instance, *Chartry*,[18] which involved a retroactive rule applying to a purely national tax dispute or in *Lorrai*,[19] where in a criminal procedure there was no other provision of EU law relied upon in addition to Article 47(2) CFR. In *Pringle,*[20] since the Member States were not imple-

[12] I.e. the explanations relating to Article 51 of the Charter, which must be taken into consideration for the interpretation of the Charter pursuant to Article 6(1) TEU and Article 52(7) CFR.

[13] Case C-617/10 *Åkerberg Fransson* EU:C:2013:105.

[14] Cf. more recently Case C-198/13 *Hernández* EU:C:2014:2055, para 33.

[15] See to this effect para 21 of the judgment. Cf. also Case C-390/12 *Pfleger* EU:C:2014:281, para 34.

[16] Case C-198/13 *Hernández* EU:C:2014:2055, para 36.

[17] Case C-265/13, *Torralbo Marcos* EU:C:2014:187, para 30.

[18] Case C-457/09, *Chartry* EU:C:2011:101.

[19] Case C-224/13, *Lorrai* EU:C:2013:750.

[20] Case C-370/12, *Pringle* EU:C:2012:756, paras 180–182.

menting Union law when they established a stability mechanism such as the European Stability Mechanism (ESM), an argument based on a potential breach of Article 47 did not work.

In particular before the Court's judgment in *Fransson* there was some debate as to whether the scope of application of general principles of law, and therefore also the unwritten principle of effective judicial protection, was or could be broader than the one enshrined in the Charter. Regarding general principles, there was well-established case law according to which Member States must observe those general principles of EU law when they act within the scope of the law of the Union.[21] Already before the judgment in *Fransson,* the Court found that an empowering provision in the Treaty, such as Article 13 EC,[22] did not suffice to bring a national measure within the scope of EU law, for the purposes of the application of fundamental rights as general principles of EU law, when that measure did not come within the framework of the directives adopted on the basis of that article.[23] After *Fransson*, the debate lost a lot of relevance, although it might have been argued that the scope of Union law for the purposes of application of general principles of law was still different from the scope for the purposes of the application of the Charter.[24] Such a debate was also nurtured by difficulties and uncertainties as to how to apply the condition of 'scope of Union law' in concrete cases. However, in the meantime, the Court has indicated that for the general principles of law and for the fundamental rights enshrined in the Charter the test is the same. In *Siragusa*, it held that because it was not established that an Italian Legislative Decree fell within the scope of EU law or implemented that law for the purposes of the application of Article 17 CFR, it had 'by the same token' not been established that the principle of proportionality could apply.[25]

The test for the application of Article 47 CFR and general principles of law being the same, this does not imply that the unwritten principle of effective judicial protection has become entirely obsolete. Although Article 47 should be interpreted in accordance with the Court's previous case law,[26] it cannot be entirely

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[21]Cf. the Opinion of AG Sharpston in Case C-427/06 *Bartsch* EU:C:2008:517, in particular para 69, and Tridimas 2006, pp. 36–42. Note that the category of general principles of EU law is broader than fundamental rights only.

[22]Now Article 19 TFEU. This article serves as a legal basis for the Union to take appropriate action to combat discrimination based on a number specified grounds.

[23]Case C-427/06 *Bartsch* EU:C:2008:517, para 18; Case C-555/07 *Kücükdeveci* EU:C:2010:21, para 25; and Case C-147/08 *Römer* EU:C:2011:286, para 61, as referred to in Case C-198/13 *Hernandez EU:C:2014:2055*, para 36.

[24]On the difference between Charter rights and fundamental rights as general principles, see, for instance, Ladenburger 2012, pp. 4–5. and AG Trstenjak, in Case C-282/10, *Dominguez* EU:C:2012:33, paras 127–131.

[25]Case C-206/13 *Siragusa*, EU:C:2014:126, para 35.

[26]Cf. the Preamble of the Charter and Article 53, which provides that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law […]'.

excluded straight away that the personal and substantive scope of the Article on the one hand, and the unwritten principle on the other hand may differ or that variation may occur in the level of protection. The following brief discussion may illustrate the point.

According to Article 47, everyone whose *rights and freedoms guaranteed by the law of the Union* are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that Article. By contrast to Article 13 ECHR, Article 47 may be relied upon by individuals alleging a violation of any rights conferred upon them by EU law and not only in respect of the rights guaranteed by the Charter. Generally it is assumed that the terms 'rights and freedoms' do not have any special meaning.[27] Moreover, the question of whether EU law guarantees any particular right or freedom is a matter of interpretation of the individual EU law provision(s) concerned.[28] This is no doubt a correct proposition. However, the real question is whether this really matters and, in particular, whether in a concrete case one needs to establish first the existence of a right or freedom arising from EU law that needs to be protected before Article 47 applies. In my opinion, the answer is no, for a number of reasons.

In the first place, such an—often somewhat dogmatic—exercise, seeking to construe that there is a right or a freedom at stake, would limit the protection provided for in Article 47 by unnecessarily complicating the access to a court. It is submitted that the very fact that there is a dispute over alleged rights and freedoms should suffice in any case. Moreover, the guarantees laid down in that Article also protect those who seek to defend themselves against the enforcement of EU law provisions. Obviously, a party that contests an obligation stemming from EU law is entitled to a fair trial, without there being a need to establish that a right or freedom has been violated.[29] Finally, the principle of effective judicial protection, and arguably also Article 47, does not only cover the potentially somewhat limited category of the 'protection of rights and freedoms' but is broader in application. It equally applies in situations in which individuals seek protection against acts that adversely affect their interests.[30] For the time being, there are no indications in the case law that the Court would depart from this interpretation. However if, for some reason, the scope of protection of Article 47 is going to be limited to the protection

[27]Cf. Peers et al. 2014, p. 1199.

[28]Ibid., p. 1211. For a recent example see Case C-510/13, *E.ON Földgáz Trade* EU:C:2015:189, paras 42–48.

[29]Cf. for instance Case C-418/11 *Texdata Software* EU:C:2013:588 concerning an automatic penalty for failure to disclose accounting documents.

[30]Cf. for instance Case C-334/12 RX-II *Jaramillo* EU:C:2013:134, para 44 and Case C-383/13 PPU *G. and R.* EU:C:2013:533, para 35. The latter case concerns, strictly speaking, the rights of defence and the right to be heard in administrative proceedings. However, as will be pointed out below, these rights are also part of the rights guaranteed under Article 47 CFR. Cf. Case C-530/12 P *National Lottery Commission* EU:C:2014:186, paras 53–54. Cf. also Case C-562/12 *Liivimaa Lihaveis* EU:C:2014:2229, paras 69–71, concerning rejection of an application for aid.

of rights and freedoms only[31] and therefore will narrow down the protection,[32] the unwritten principle of effective judicial protection should fill the gap.

7.3 Delimitation of Various Charter Provisions

To a certain extent, the principle of effective judicial protection functioned—and still functions—as an umbrella principle. In fact, it comprises various elements, which themselves constitute rights or principles of their own; this is in particular true for the right of access to a tribunal, the principle of equality of arms and the rights of the defence. Those principles have been often applied in a somewhat loose, flexible fashion, sometimes as self-standing principles,[33] sometimes in connection with the principle of effective judicial protection or as a part of it.

For instance, the Court has inferred from the principle of effective judicial protection an obligation on the part of national authorities to give reasons for the decisions they take so that the person concerned is able to defend his rights under the best possible circumstances, and to put the court hearing the case fully in a position to review the lawfulness of the decision in question.[34] Usually, no clear distinction has been made between administrative and judicial proceedings. In *Steffensen*, when the Danish Government and the Commission made a distinction between administrative procedure and proceedings before a tribunal, the Court held, while making reference to European Court of Human Rights (ECtHR) case law, that Article 6(1) ECHR relates to the proceedings considered as a whole, including the way in which the evidence was taken in an administrative procedure.[35] In other words, an unfair administrative procedure can impact the fairness of the trial before a court.

Obviously there was a considerable overlap between the various principles or sub-principles, which, however, given the flexible context in which they applied did not really matter. This has changed, to a certain extent, with the entry into force of the Charter. Not in the sense that the Charter has resolved the overlaps. To

[31]Note, however, that the Court is rather generous in accepting the existence of a right.

[32]Cf. in this respect the somewhat intriguing observation by Ladenburger who, when discussing Article 52(5) CFR, points out that the 'limited justiciability' of principles implies, *inter alia*, that the principles in the sense of Article 52(5) 'are not the object of the guarantee of judicial protection in Article 47 and cannot as such be invoked with direct effect before a national judge to found any claim that would not exist under national law.' (Ladenburger 2012, p. 33.) It is submitted that one should not deduce from this that whenever a 'Charter principle' is relied upon in order to test the legality of legislative and executive acts, Article 47 does not apply.

[33]For instance Case C-28/05 *Dokter* EU:C:2006:408, para 74, and Case C-349/07 *Sopropé*, EU:C:2008:746, paras 33 and 36.

[34]Settled case law ever since Case 222/86 Heylens EU:C:1987:442, para 15. Cf. more recently Case C-300/11 *ZZ*, EU:C:2013:363, para 53 with further references.

[35]Case C-276/01 *Steffensen* EU:C:2003:228, paras 73–77.

the contrary, partial overlap or coincidence continues to exist between, in particular, Article 41 CFR (the right to good administration), and Articles 47 CFR and 48(2) CFR (the rights of defence). For instance, the divide between Article 47 and Article 41 is far from clear in that the right to be heard provided for in 41(2)(a), that applies to administrative procedures, is also a part of the right to fair trial.[36] Similarly, the access to a file guaranteed under Article 41(2)(b) or the obligation of the administration to give reasons laid down in Article 41(2)(c) may both overlap with the protection provided under Article 47, as already pointed out above[37] and, in so far as concerns the adversarial principle, which is inherent to Article 47, include the right to examine all the documents submitted to the court.[38] Furthermore, there is an overlap between Article 47(2) and Article 48(2) CFR, specific protection of the rights of defence, in so far as, for instance, the right to be informed of an investigation is a right of the defence[39] but also a component of the right to a fair trial.[40]

While the various provisions are still closely interrelated and overlapping, the written text of the Charter compels a more structured approach and better delimitation compared to the loose application referred to above, in the beginning of this section. This is, *inter alia*, important because the various guarantees, which are comprised in the principle of effective judicial protection, apply to both administrative and judicial proceedings. Under the Charter regime, however, a threefold distinction has been made, in Articles 41, 47(2) and 48(2).[41] This distinction is, moreover, not without certain consequences.

In the first place, Article 41 CFR is solely addressed to the institutions, bodies, offices and agencies of the Union. After the judgment in *M* it could have been believed that Article 41 may also apply in administrative proceedings in the Member States.[42] In that judgment, after having underlined that the rights of defence, including the right to be heard, is a fundamental principle of EU law, the Court considered that Article 41(2) is of general application. However, in later case law, the Court made clear that Article 41 does not apply to the actions of Member States. This, however, does not leave the person concerned empty handed. When national authorities take measures which come within the scope of EU law, they are subject to the obligation to observe the rights of the defence of addressees of decisions which significantly affect their interests. However, this is

[36]Case C-530/12 P *National Lottery Commission* EU:C:2014:186, paras 53–54.

[37]'Heylens case law', recently confirmed in relation to Article 47 in, for instance, Case C-437/13 *Unitrading* EU:C:2014:2318, para 20.

[38]Case C-300/11 *ZZ* EU:C:2013:363, paras 55 and 56.

[39]Cf. for instance Case T-99/04 *AC-Treuhand* EU:T:2008:256, paras 51 and 52.

[40]Article 6(3)(a) ECHR.

[41]Note that this hold also true for Article 6 ECHR which does not make a distinction between administrative and judicial proceedings leading to the adoption of measures imposing a sanction.

[42]Case C- 277/11 *M.M.* EU:C:2012:744, paras 81–84.

on the basis of the rights of defence as a general principle of EU law.[43] Moreover, it should not be excluded that in certain circumstances the guarantees listed in Article 41 may come within the scope of Article 47. As we have seen above, the obligation to state reasons is part of the principle of effective judicial protection.[44]

In the second place, the relationship between Articles 47 and 48(2) has yet to crystalize. While in *Mukarubega* the Court held that those articles ensure respect both for the rights of defence and for the right to a fair legal process in all judicial proceedings,[45] it is not clear how far administrative proceedings might also be 'caught' by Article 48(2).[46] Much will depend on the interpretation of the term 'charged' in the latter article.[47]

Summing up, under the rule of law, the fundamental guarantees of rights to a fair hearing, due process or a fair trial should apply in both administrative and judicial proceedings. The 'tryptic' of the Charter, apart from causing concrete problems of delimitation, does not provide a watertight system: the general principles of EU law therefore remain of importance.

7.4 Limitations of Article 47 CFR

Like most other fundamental rights, the right to effective judicial protection can be limited. Many of the procedural matters, that nowadays could be considered as limitations of, for instance, the right to access to a court, were in the past reviewed under the 'procedural rule of reason' mechanism or something akin to that.[48]

[43]Cf. *inter alia* Case C-166/13 *Mukarubega* EU:C:2014:2336, paras 43–50, with further references. Note, that in Case C-604/12 *H.N.* EU:C:2014:302, the Court held that the right to good administration reflects a general principle of EU law, which is indeed broader than the rights of defence.

[44]Cf. also Case C-300/11 *ZZ* EU:C:2013:363, para 53.

[45]Para. 43 of the judgement.

[46]By some it is argued that Article 48(2) applies also before national administrative and judicial bodies. Cf. Peers et al. 2014, pp. 1289–1290.

[47]Article 48(2) states: 'Respect for the rights of the defence of anyone who has been charged shall be guaranteed.'

[48]This 'mechanism' can be used to 'outweigh' the principle of effectiveness, i.e. where the question arises whether a national procedural rule renders application of Union law impossible or excessively difficult (the so called 'Rewe effectiveness'). A number of factors must be analysed, such as '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' which may justify the application of the rule at issue. For instance, ever since *Rewe* (Case C-33/76 EU:C:1976:188) it is settled case law that the setting of reasonable time-limits for bringing proceedings, in the interests of legal certainty and for the protection of both the individual and the administrative authority concerned, is compatible with EU law. More recently, this 'rule' has been considered as an acceptable limitation of the right to effective judicial protection laid down in Article 47. Cf. Case C-19/13 *Fastweb* EU:C:2014:2194, paras 57–58.

Another, more recent, strand of case law uses another test. Under this test it is pointed out, often with reference to ECtHR case law, that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions correspond 'to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed'.[49]

The question arises as to how this standard test for justification of limitations of fundamental rights sits with Article 52(1) CFR, which is indeed increasingly applied in cases governed by the Charter provisions. That article comprises a number of elements: the limitation must be provided by law; it must respect the essence of the right or freedom at stake; it must be justified either by an objective of general interest recognized by the Union or by the need to protect the rights and freedoms of others; and, finally, the principle of proportionality has to be respected.

Up until now, the requirement that the limitation must be provided by law does not feature very often in the Court's case law.[50] Focusing more particularly on Article 47 CFR, a rare example is Case *Liivimaa Lihaveis* in which the Court held that, since there was no legal remedy against the rejection of an application for subsidy and the lack of a remedy was due to a provision in a programme manual adopted by a committee,[51] the limitation of the right to an effective remedy could not be considered as being provided by law.[52]

A second issue that hardly has been addressed until now is what constitutes the essence of effective judicial protection. The judgement in *Peftiev* suggests that, where legal representation is obligatory before a court of law, its effective existence in a concrete case and the availability of funds to be represented forms the essence of the rights of effective judicial protection.[53] Furthermore, it can also be deduced from a number of cases that individuals must be given a minimum of

[49]Joined Cases C-317-320/08 *Alassini* EU:C:2010:146, para 63. Cf. also already Case C-28/05 *Dokter* EU:C:2006:408, para 75. More recently see Case C-619/10 *Trade Agency* EU:C:2012:531, para 55, Case C-156/12 *GREP* EU:C:2012:342, para 39 and Case C-418/11 *Texdata* EU:C:2013:588, para 84.

[50]Cf. Peers et al. 2014, pp 1470 et seq. on this issue in general. In a number of cases this requirement is addressed by the Court. Cf. already Case C-407/08 P *Knauf Gips* EU:C:2010:389, para 91; a recent example is Case C-129/14 PPU *Spasic* EU:C:2014:586, para 57.

[51]Monitoring Committee of the Estonia-Latvia Programme for 2007 to 2013 promoting European territorial cooperation, an action taken within the framework of the European Regional Development Fund.

[52]Case C-562/12 *Liivimaa Lihaveis* EU:C:2014:2229, para 73. Note that in this case, instead of referring to the standard test mentioned above, the Court relied on Article 52(1) CFR.

[53]Case C-314/13 *Peftiev* EU:C:2014:1645, paras 30 and 34. Cf. also Case C-279/09 *DEB* EU:C:2010:811, para 60–62, which are focused on the question whether the conditions for granting legal aid may limit the right to access to the courts in such a way that the very core of the right is undermined.

information in order to be in a position to defend themselves, even where confidentiality or consideration of state or international security are at stake.[54] However, explicit indications as to what constitutes the essence of the right of effective judicial protection remain lacking.

As to the grounds of general interest that may serve to limit Article 47 CFR, such as overriding considerations pertaining to the security of the EU or of its Member States when the disclosure of information is at issue[55] or the existence of swift, effective and less costly dispute settlement or certain judicial proceedings,[56] it would not seem that Article 52(1) brings about important changes compared to the pre-Charter regime. The same is true in relation to the proportionality test. Notwithstanding this, two specific points should be made.

In the first place, case law from another area of law indicates that the intensity of the review to be applied by a court depends, *inter alia*, on the specific area of law concerned, the nature of the right at issue and on the extent and seriousness of the interference with that right. A serious interference with a fundamental right may therefore mean a stricter review.[57]

Second, there is a difference in the review of a limitation of a fundamental right for reasons of an objective of general interest, on the one hand, and in order to protect the rights and freedoms of others on the other. Indeed, in both situations a balance has to be struck between the fundamental right and either the general interest or the 'other' right concerned. While in the first situation the test would seem a traditional one, i.e. in particular a strict test of proportionality, what is at issue in the second situation is the need to reconcile the requirements of the protection of the different rights.[58] Finding a fair balance between two (fundamental) rights is arguably a different issue than balancing the protection of a right and an objective of general interest.

As far as the rights at issue in the present contribution are concerned, central in *Varec* was the balancing between the right of access to information of a party involved in a contract award procedure stemming from the requirement of fair trial of Article 6(1) of the ECHR and the right of other economic operators to the protection of their confidential information and their business secrets, covered by, *inter alia*, Article 8 ECHR. The Court pointed out that the protection of confidential information and business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence

[54] Case C-300/11 ZZ EU:C:2013:363, para 65, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* EU:C:2013:518, para 111. Cf. also, for instance, Case C-280/12 P *Fulmen* EU:C:2013:775.

[55] Cf. for instance Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* EU:C:2013:518, para 125, C-300/11 *ZZ*, EU:C:2013:363, paras 54 and 57.

[56] Joined Cases C-317-320/08 *Alassini* EU:C:2010:146, para 64, C-619/10 *Trade Agency* EU:C:2012:531, paras 57 and 58.

[57] Cf. Joined Cases C-293/12 and C–594/12 *Digital rights EU:C:2014:23*, paras 47 and 48.

[58] Cf. Case C-283/11 *Sky Österreich EU:C:2013:28*, paras 59–60.

of the parties to the dispute.[59] At the end of the day the actual reconciliation was left to the national court. *Varec* dates from the pre-Charter era. However, it is to be expected that the dichotomy clearly suggested by Article 52(1) between general interest on the one hand and the rights and freedoms of others on the other hand, will stimulate further and more precise elaboration.

In summary, it seems that, when compared to the pre-Charter era, Article 52(1) CFR structures in a more compelling fashion the review of limitations of fundamental rights and therefore also of the limitations to Article 47 CFR, in particular by adding up two requirements which hardly has been explored until now, namely that the limitation must be provided for by law[60] and the question of what the essence of the right of effective judicial protection is.

7.5 Aligning Article 47 CFR and Article 6 ECHR

According to Article 52(3) CFR, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by that Convention. However, this does not preclude that wider protection may be granted under EU law,[61] while in accordance with Article 53 CFR the level of protection guaranteed by Article 47 CFR may not be lower than that guaranteed by the ECHR. The 'Explanations' on Article 52(3) indicate that the meaning and the scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR, but also by reference to the case law of the ECtHR.

Articulation between Union law principles and the ECHR and Strasbourg case law is not new. The case law on the rights of defence, the protection of confidentiality, the presumption of innocence or reasonable time already provides rich examples.[62] In particular, the Court's interpretation of the principle of effective judicial

[59] Case C-450/06 *Varec* , EU:C:2008:91, paras 46–52.

[60] With a number of other issues in the slipstream, such as what requirements must be satisfied to qualify a provision as 'law'.

[61] This includes both the standard and the scope of protection. As to the latter, Article 47 CFR fully applies to administrative law matters; this in contrast to Article 6 ECHR that in principle covers 'civil rights and obligations' and 'criminal charges'. Matters outside the scope of Article 6 include *tax proceedings* (*Ferrazzini v. Italy* [GC], appl. no. 44759/98, para 29), *procedures in the immigration field* (*Maaouia v. France* [GC], appl. no. 39652/98, para 38), certain *disputes relating to public servants* (*Vilho Eskelinen and Others v. Finland* [GC], appl. no. 63235/00, para 62) and *political rights* (*Pierre-Bloch v. France* 120/1996/732/938, para 50).

[62] Case C-276/01 *Steffensen* EU:C:2003:228 (rights of defence); Case C-450/06 *Varec* EU:C:2008:91 (confidentiality); Case C-45/08 *Spector* (presumption of innocence) EU:C:2009:806; Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland* EU:C:2009:456 (reasonable time). See also Case C-400/10 PPU *J. McB* EU:C:2010:582, in particular para 53.

protection—and therefore now also of Article 47—has been strongly tailored to the interpretation of Article 6 ECHR and to the case law of the ECtHR regarding this article.[63] Arguably, this existing practice has been given a legal basis in Article 52(3) CFR.

Does this mean that in every single case on effective judicial protection the EU Courts should explicitly take into consideration Article 6 ECHR (and where appropriate Article 13) and the relevant case law? This is certainly not the case. As the Court has indicated in, for instance, *Otis*: 'Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47'.[64] In other words, Article 47 is the starting point of reference and in many cases the analysis is limited to this Article and corresponding EU case law only. However, last but not least because Article 52(3) obliges the Court to respect the ECHR in cases where the Charter rights and Convention rights correspond, the ECHR is indeed taken on board in certain situations. It may be referred to in order to confirm or support the Court's findings[65] or, in some cases, to guide its interpretation of Article 47. A striking example of the latter situation is the judgement in *DEB*. In that case, the Court relied extensively on the case law of the ECtHR relating to the availability of legal aid when it was confronted with the question of whether a legal person can qualify for such an aid and of the nature of the costs covered by legal aid.[66] Similarly, in cases where there is a real or alleged tension between the EU law regime and Article 6 ECHR as interpreted by the Strasbourg Court, the Court of Justice will have a close look at the matter. This was for instance the case when the Court had to review judicial protection in competition cases in the light of the *Menarini* judgement of the ECtHR.[67]

A final point that merits attention here and that is closely related to the previous paragraph is the certain degree of incongruence between the system of limitations of the right of effective judicial protection under the Charter and the system under the

[63]And sometimes also Article 13 ECHR. Cf. already Case C-222/84 *Johnston* EU:C:1986:206. Note also that, according to the Explanations, the first paragraph of Article 47 CFR is based on Article 13 of the ECHR (right to an effective remedy) and the second paragraph corresponds to Article 6(1) of the ECHR (right to a fair trial).

[64]Case C–199/11 *Otis and Others* EU:C:2012:684, para 47.

[65]Cf. for instance Joined Cases C-317-320/08 *Alassini* EU:C:2010:146, para 63, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* EU:C:2013:518, para 133; Case C-399/11 *Melloni* EU:C:2013:107, para 50; Case C-334/12 RX-II *Jaramillo* EU:C:2013:134, para 43; Case C-50/12 P *Kendrion* EU:C:2013:771, para 81; Case C-562/13 *Abdida* EU:C:2014:2453, paras 51–52.

[66]Case C-279/09 *DEB* EU:C:2010:811, paras 45–52; note in this respect that the Explanations on Article 47(3) CFR refer explicitly to the case law of the ECtHR, in particular the judgment of 9 October 1979, *Airey*, Series A, Vol. 32, p. 11.

[67]ECtHR judgment of 27 September 2011, A. *Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08. Cf. for instance Case C-501/11 P *Schindler and others* EU:C:2013:522 and the opinion of AG Wahl in Case C-583/13 P *Deutsche Bahn* EU:C:2015:92, in particular paras 43–52.

ECHR. The system under the Charter in essence provides that the rights laid down in the respective provisions, such as Article 47, may be limited under the conditions laid down in Article 52(1) CFR. In the ECHR, in contrast to some other rights guaranteed by that Convention, Article 6 does not contain a separate paragraph dealing with possible limitations. In fact, as the case law of the Strasbourg Court makes clear, the limitations to Article 6 are inherent to its provisions.[68] It is settled case law of the latter Court that the right of access to the courts secured by Article 6(1) ECHR is not absolute, but may be subject to limitations. The limitations are permitted by implication 'since the right of access by its very nature calls for regulation by the State'. However, the limitations applied may 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'. Moreover, a limitation will not be compatible with Article 6(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'.[69] Clearly, this type of limitation mirrors both the jurisprudential limitation arrangement of the Court of Justice and that of Article 52(1) CFR. Basically, it is a difference in limitation techniques. However, in a concrete case it is important to be aware of this difference. It would seem to me that once an interpretation is given of an Article 47 provision in compliance with the ECHR, including the 'limitations permitted by implication', there is no more room for a limitation under Article 52(1) CFR.[70] Put in mathematical and somewhat simplified terms: Article 47 CFR ≠ Article 6 ECHR, but Article 47 + Article 52(1) CFR = Article 6 ECHR.

7.6 Some Conclusions

Since the declaration of the Charter as primary law, Article 47 CFR is 'the reference standard' when the Court provides effective judicial protection. However, the general principle of effective judicial protection existed already for some 25 years and was amply developed in the case law of the Union courts. While the interpretation and application of Article 47 build upon this case law, a number of changes can be pointed out. A considerable number of these changes are in fact not specific to Article 47 but are a part of general issues relating to the Charter. One of them is indeed that EU fundamental rights now have their own written legal framework. In contrast to—often unwritten—general principles of law, the rights themselves, their scope and even the way in which they have to be interpreted are now in a number of respects more sharply defined.

[68]The so called 'limitations permitted by implication'. Cf. *Golder v. the United Kingdom*,judgment of 21 February 1975, Series A no. 18, pp. 13–18, §§ 38–39.

[69]Quotations from *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I, § 59.

[70]A case in point is Case C-279/09 *DEB* EU:C:2010:811, where the national court was in fact requested to apply such an implied limitation test instead of Article 52(1) CFR. See paras 60–62.

This implies, in the first place, a slight reorientation of the way in which the rights may be limited. The limitation arrangements of Article 52(1) contain some more specific components than the jurisprudential standard test and it may, in addition, induce further differentiation between the restriction of fundamental rights by certain measures in the general interest on the one hand and of the fundamental rights of others on the other hand. Specifically for Article 47 CFR, which has to be interpreted in harmony with Article 6 ECHR, the implicit limitations of Article 6 ECHR constitute a potential trap of 'double limitation'.

Second, the text of the Charter is more compelling as far as the articulation between Article 47 CFR and Article 6 ECHR is concerned. However, this does not mean that in every single case a close scrutiny of Article 6 ECHR is necessary.

In the third place, what was formerly under the loose umbrella of effective judicial protection and related rights is now split over three different articles of the Charter. On the one hand, these provisions are partly overlapping and pose problems of delimitation in concrete cases. On the other hand, their configuration also leads to a lacuna. This gap is bridged by the unwritten general principles of rights of defence and good administration. In the same vein, it has been submitted that in so far as the interpretation of Article 47 would not reach the same scope and level of protection as the general principle of effective judicial protection, this principle should continue to apply. This continuing reliance on the general principles of law illustrates, finally, that while the Charter is the first point of reference for the protection of fundamental rights, it does not exclude other possible sources of rights, such as general principles of EU law.

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