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ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter

MODULE 3 – RIGHT TO AN EFFECTIVE REMEDY

IN THE FRAMEWORK OF THE PROJECT “ACTIVE CHARTER TRAINING THROUGH INTERACTION OF NATIONAL EXPERIENCES” (ACTIONES)



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Coordination of the ACTIONES Project:

Prof. Fabrizio Cafaggi (Scientific Coordinator)

Dr. Federica Casarosa (Project Manager) – Module Coordinator

Dr. Madalina Moraru

Dr. Nicole Lazzerini

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1. Preliminary issue: terminology

The right to an effective remedy is an obligation of the State to provide a judicial relief when a violation of a right is acknowledged. This right entails a double dimension: on the one hand, the procedural right to an effective access to a fair hearing, and on the other hand, the substantive right to an adequate redress.

As will be described in more detail below, the right to an effective remedy has been characterised as a general principle of EU law,¹ stemming from the constitutional traditions of the Member States by the Court of Justice of EU (hereinafter CJEU).² Given that general principles are defined on the basis of the Treaties, they are hierarchically equal to primary law, thus binding on the EU and on the Member States, both in implementing Treaty obligations and when they are otherwise acting in an area falling within the scope of EU law. The recognition as a general principle of EU law, thus, entails that effective remedies, *rectius* effective judicial protection, must be ensured

- when the CJEU interprets Treaty provisions as applied by EU bodies;
- when the CJEU reviews the validity of secondary law as implemented by Member States, eventually entailing also disapplication;³
- when national courts interpret national law, so as to provide effective remedies and procedures when dealing with rights under Union law.⁴

A first practical use of the principle was identified by the CJEU in the case *von Colson and Kaman*, where the Court was asked to evaluate if a specific national remedy was sufficient to ensure the protection of Union rights as defined by the Directive on 76/207 on equal treatment of men and women. Here, the Court affirmed that “*national remedies had to guarantee real and effective judicial protection*”.⁵ A couple of years later, the CJEU developed the definition including within the definition of effective judicial protection also the right to effective judicial review and access to a competent court in the landmark case of *Johnston*.⁶ Further extension to areas where the principle applies took place in the *Heylens* case, where the Court affirmed that

¹ A general principle of EU law can be described as a fundamental principle of the legal system, encompassing certain basic values and enjoying a certain amount of recognition. According to Tridimas general principles may be distinguished between, on the one hand, principles based on the rule of law and governing the relationship between the individual and the Union; and on the other hand, principles relating to the supranational relationship between the Union and its Member States. See T. Tridimas, *The General Principles of EU Law*, 2nd ed., Oxford: Oxford University Press, 2006

² See Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, para 18; Case 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*, ECLI:EU:C:1987:442, para 14; Case C-409/06, *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim*, ECLI:EU:C:2010:503, para 58.

³ Tridimas, *The General Principles of EU Law*, cit., p. 51-52.

⁴ Jan H. Jans, Roel de Lange, Sacha Prechal and Rob J.G.M. Widdershoven, *Europeanisation of Public Law*, Groningen: Europa Law Publishing, 2007, p. 124.

⁵ Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, ECLI:EU:C:184:153, para 23.

⁶ Case *Johnston*, cit., para 17.

“the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right [free access to employment] is essential in order to secure for the individual effective protection of his right”.⁷ Then, the principle was applied to other areas where no direct connection with Treaty freedoms was present.⁸

Later on, also secondary law started to include the requirement of effective judicial protection, basing the interpretation of such provision on the CJEU case law.⁹ Finally, with the entry into force of the Lisbon Treaty, the principle acquired the status of primary law being included as Article 47 in the Charter of Fundamental Rights of the European Union (hereinafter CFREU), providing for an explicit recognition of the ‘right to an effective remedy and to a fair trial’.

However, this shift from general principle to Charter article is not without consequences. Being the general principle for its own nature an ‘umbrella principle’,¹⁰ it was interpreted in a flexible manner, and did not suffer for strict limitations its scope of application, thus it was used by the CJEU in civil, criminal or administrative enforcement proceedings. Art 47 CFREU, instead, defines a more structured architecture where art 41 and art 48 CFREU applicable respectively to administrative and criminal proceedings play a role. Therefore, the interpretation of art 47 CFRUE should consider such correlations, and the boundaries between one and the other.

Moreover, it is important to note that the principle is also enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which respectively address the right to a fair trial and the right to effective remedies.¹¹

The connection between the general principle of EU law, art. 6 and 13 ECHR and art 47 of the Charter of Fundamental right is then expressly clarified by the CJEU in the *Alassini* case, where it is affirmed that “it should be borne in mind that the principle of effective judicial protection 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 ECHR and which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union”.¹²

This interconnection among these provisions will be discussed in the following sections.

⁷ Case *Heylens*, cit., para 14.

⁸ See Case C-340/89, *Irène Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, ECLI:EU:C:1991:193; C-104/91, *Oleificio Borelli SpA v Commission of the European Communities*, ECLI:EU:C:1992:491; Case C-19/92, *Dieter Kraus v Land Baden-Württemberg*, ECLI:EU:C:1993:125.

⁹ See below.

¹⁰ S. Prechal, *The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?*, C. Paulussen et al. (eds.), *Fundamental Rights in International and European Law*, 2016, p. 149.

¹¹ For the analysis between art 41 and 47 CFRUE, see below par. 5; for the comparison between CFREU and ECHR see below at par. 2.2.

¹² See Joined Cases C-317/08 to C-320/08, *Rosalba Alassini v Telecom Italia SpA et al.*, ECLI:EU:C:2010:146 para 49.

2. Sources

2.1. Is there a right to effective remedies?

The right of effective remedies is explicitly defined by Art 47 CFREU, which provides:

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

As it is clear from the wording, Art 47 CFREU does not limit its scope to a narrow interpretation of the right to effective remedies; rather it addresses the wider concept of the right to effective judicial protection. Within this concept the CJEU jurisprudence includes several elements,¹³

1. the right to bring an action
as stated in *Földgáz Trade*,¹⁴ where the CJEU affirmed that “*Article 5 of Regulation No 1775/2005, read in conjunction with the Annex to that regulation, and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation concerning the exercise of rights of action before the court or tribunal having jurisdiction to review the lawfulness of acts of a regulatory authority, which, in circumstances such as those at issue in the main proceedings, does not make it possible to confer on an operator, such as E.ON Földgáz, locus standi for the purpose of bringing an action against a decision of that regulatory authority relating to the network code*”;
2. right of access to a tribunal
as stated in *Otis* where the Court affirms that “*with regard, in particular, to the right of access to a tribunal, it must be made clear that, for a ‘tribunal’ to be able to determine a dispute concerning rights and obligations arising under EU law in accordance with Article 47 of the Charter, it must have power to consider all the questions of fact and law that are relevant to the case before it*”;¹⁵
3. the right to be heard
as stated in *Boudjlida*, where the Court affirms that “*The right to be heard in all proceedings is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) of the Charter provides that the right to good*

¹³ For a detailed analysis of the different facets composing the right to effective judicial protection in the procedural timeline see Module 8.

¹⁴ Case C-513/10, *Földgáz Trade Zrt v Magyar Energetikai és Közmű-szabályozási Hivatal*, ECLI:EU:C:2015:189.

¹⁵ Case C-199/11, *Europese Gemeenschap v Otis NV and Others*, ECLI:EU:C:2012:684, para 49.

*administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken”;*¹⁶

4. the rights of the defence

as stated in *A*, where the Court affirms that “*all the provisions of Regulation No 44/2001 express the intention to ensure that, within the scope of the objectives of that regulation, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence enshrined in Article 47 of the Charter are observed*”;¹⁷

5. the principle of equality of arms

as stated in *Sanchez Morcillo I*, where the Court affirms that “*That principle is, however, an integral element of the principle of effective judicial protection of the rights that individuals derive from EU law, such as that guaranteed by Article 47 of the Charter*” and adding that “*the principle of equality of arms [...] is no more than a corollary of the very concept of a fair hearing that implies an obligation to offer each party a reasonable opportunity of presenting its case in conditions that do not place it in a clearly less advantageous position compared with its opponent*”;¹⁸

6. the principle of audi alteram partem

as stated in *Banif Plus Bank*, where the court affirmed that “*the national court must also respect the requirements of effective judicial protection of the rights that individuals derive from European Union law, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. Among those requirements is the principle of audi alteram partem, as part of the rights of defence and which is binding on that court, in particular when it decides a dispute on a ground that it has identified of its own motion*”.¹⁹

As with all articles of the Charter, Art 47 CFREU binds the Member States (including all institutional actors, such the legislator as well as national courts)²⁰ only when they act within the scope of EU law, as provided by art 51 CFREU.²¹ Thus, in order to trigger the application of the guarantees listed in Art 47 CFREU, another provision of EU law should apply to the

¹⁶ Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:203.

¹⁷ Case C-112/13, *A v B and Others*, ECLI:EU:C:2014:2195, para 51.

¹⁸ Case C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2014:2099, para. 48-49.

¹⁹ Case C-472/11, *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, ECLI:EU:C:2013:88, Para 29.

²⁰ Obviously, this obligation may assume different forms depending on the type of institutional actor: the national (and European, as it is evident in Case C-362/14 *Schrems*) legislator shall draft the national law implementing EU law in the light of the Charter; whereas the national courts shall interpret national law, which falls into the scope of EU law, in the light of the Charter. Note that in some countries, national courts have started to interpret national law, *not* falling into the scope of EU law, in the light of EU law, showing the indirect effect of harmonisation triggered by the general obligation.

²¹ Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, and also case C-418/11 *Texdata Software*, confirming *Fransson*. “*Since the fundamental rights guaranteed by the Charter must [...] be complied with where national legislation falls within the scope of [EU] law, situations cannot exist which are covered in that way by [EU] law without those fundamental rights being applicable. The applicability of [EU] law entails applicability of the fundamental rights guaranteed by the Charter*”.

case.²² Accordingly, if such a connecting link is missing, an argument based on a potential breach of Art 47 CFREU may not be invoked.

Art 47 CFREU must be interpreted and exercised “*under the conditions and within the limits’ defined by relevant Treaty provisions which make provision for it*”, pursuant to Art 52(2) CFREU. In this sense, the reference is Art 19(1) TFEU, which establishes that national judges are judges of Union law, in that Member States “*shall provide the remedies sufficient to ensure effective legal protection in the fields covered by Union law*”.

It should be noted that since 2010, several courts have presented preliminary rulings addressing the compliance of general national procedural rules with the right to effective judicial protection, i.a. the Italian Council of State,²³ the Romanian Appeal Court of Bacau,²⁴ the Spanish Audiencia Provincial of Balears Iles,²⁵ the Hungarian Fovarosí Itelotabla,²⁶ the Portuguese 5º Vara cível de Lisboa,²⁷ the Dublin District Court,²⁸ the francophone Court of first instance of Brussels.²⁹

Although in all cases presented by the aforementioned courts the CJEU affirmed that it is not competent, as the procedural rules do not fall into the scope of application of EU law, the cases are not irrelevant. They are a sign of the process of internalisation of EU fundamental rights at national level, with the effect that national courts are not only conscious of the existence of EU standards of fundamental rights protection, but are also open to the possibility that those standards may be applicable also to general national legislation, in particular in those cases where the European standards are higher than national ones. This spill-over effect emerges also at national level, where it is not uncommon that courts include references to Charter articles as a source of inspiration also in areas that are not covered by EU law.³⁰

2.2. What is the relationship between art 47 CFREU and arts 6 and 13 ECHR? Do they have the same scope?

As mentioned in the Explanations to the Charter, Art 47 is based on the common constitutional traditions of the Member States and on Arts. 6 and 13 ECHR.

Art 6 ECHR provides:

²² See the negative appraisal provided by the CJEU in cases C-457/09, *Chartry* ECLI:EU:C:2011:101; C-224/13, *Lorrai* ECLI:EU:C:2013:750; and C-370/12, *Pringle* ECLI:EU:C:2012:756, paras 180–182.

²³ See C-520/15

²⁴ See C-407/15

²⁵ See C-380/15

²⁶ See C-45/14

²⁷ See C-258/13

²⁸ See C-321/16

²⁹ See C-508/16

³⁰ However, for instance, in Italy the Supreme Court does not allow this extensive interpretation, as clarified in the decision n. 24823/2015, 9 December 2015. For a deeper analysis of the Italian framework see R. Conti, *L’uso fatto della Carta dei diritti dell’Unione da parte della Corte di Cassazione*, Consulta Online, 2016.

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Art. 13 ECHR provides:

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

Although ECHR served as a point of reference in the decisions of CJEU, as well as a source of inspiration in the drafting of Art. 47 CFREU, the scope and content of Arts. 6 and 13 ECHR do not completely overlap with either the general principle of the right to effective judicial protection or with the right to effective remedies and to fair trial as provided by the Charter.

This different scope of application may result, in relation also to the national constitution norms applicable, in the following situations faced by the national judges:

- a) areas where art 47 CFREU, art. 13 and/or 6 ECHR and national constitutional provisions may apply (with similar yet not completely overlapping standards, e.g. *Tall* case³¹);
- b) areas where art 13 and/or 6 ECHR and national constitutional provision may apply, i.e. areas outside the scope of EU law (again with similar yet not completely overlapping standards, e.g. *Scordino v Italy*³²).

As regards the European provisions, the main differences between the scope of application of Art. 47 vis-à-vis Arts. 6 and 13 ECHR are the following:

(1) Art. 6 ECHR is limited to disputes relating to civil rights and obligations or criminal proceedings whereas Art. 47 CFREU is effective both in those cases and in pure administrative law proceedings.³³

(2) Art. 47 CFREU may be relied upon by parties where there exists a violation of any right conferred on them by EU law and not only in respect of the rights guaranteed by the Charter, whereas Art. 13 ECHR is limited to the right guaranteed by the Convention itself. In this sense,

³¹ See Case C-239/14, *Abdoulaye Amadou Tall v Centre public d’action sociale de Huy*, ECLI:EU:C:2015:824.

³² See EctHR, *Scordino v. Italy*, Application no. 36813/97, 29 March 2006, which triggered the set of national decisions of the Italian Supreme Court (Cassation Court, Criminal I, n. 2800, 1 December 2006) and of the Italian Constitutional Court (n. 348 and n. 349, 22 October 2007) regarding the legal status of the ECHR provisions in the national system of sources.

³³ See below at par. 5.

there is a direct relationship between effective judicial protection and rule of law as stated in *Union pequeños agricultores*, where Court affirmed:

“38 The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.

39 Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”³⁴

This implies that in his/her argumentation of the decision,

- in order to apply art 47 CFREU the judge should clarify only the connecting factor with EU law, as indicated above;
- in order to apply art 13 ECHR, the judge should identify among the rights guaranteed by the ECHR, the one applicable to the specific case at hand.

(3) Art. 47 CFREU only guarantees the right to an effective remedy before a “tribunal”, whereas Art. 13 ECHR refers in general to “*a national authority*”. Under the ECHR system the ‘authority’ does not need necessarily to be a judicial authority, however it does need to be capable of making binding decisions.³⁵ In particular, the ECtHR affirmed in that the elements a national authority should have are the following features:

- Being established by law;
- Having the power to issue binding decisions;

³⁴ See Case C-50/00, *Unión de Pequeños Agricultores v Council of the European Union*, ECLI:EU:C:2002:462.

³⁵ See *Kudla v Poland*, para 151 where the ECtHR affirms that “*The Court finds nothing in the letter of Article 13 to ground a principle whereby there is no scope for its application in relation to any of the aspects of the “right to a court” embodied in Article 6 § 1. Nor can any suggestion of such a limitation on the operation of Article 13 be found in its drafting history. Admittedly, the protection afforded by Article 13 is not absolute. The context in which an alleged violation – or category of violations – occurs may entail inherent limitations on the conceivable remedy. In such circumstances Article 13 is not treated as being inapplicable but its requirement of an ‘effective remedy’ is to be read as meaning ‘a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in [the particular context]’ (see the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 31, § 69). Furthermore, ‘Article 13 does not go so far as to guarantee a remedy allowing a Contracting State’s laws to be challenged before a national authority on the ground of being contrary to the Convention’ (see the *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, p. 47, § 85). Thus, Article 13 cannot be read as requiring the provision of an effective remedy that would enable the individual to complain about the absence in domestic law of access to a court as secured by Article 6 § 1.”*

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- Being subject to rules of law (in substantive and procedural terms);
- Having full jurisdiction over the case;
- Being independent and impartial.³⁶

Although the CJEU never addressed in detail the definition of a “tribunal”, a useful point of reference is art. 267 TFEU concerning the preliminary ruling jurisdiction, where the definition of court and/or tribunal is a wide one.³⁷ The CJEU case law on this point identified a set of elements that allowed several bodies that may not be formally part of the judiciaries of the Member States to be included within the notion of court or tribunal.³⁸ The elements are the following:

1. the body is established by law;
2. it is a permanent body;
3. has compulsory jurisdiction;
4. its procedures are *inter partes*;
5. it applies rule of law;
6. it is independent.³⁹

Although the features of a “tribunal” listed above are almost overlapping with those qualifying a “national authority” under art 13 ECHR, the former seems to be interpreted in a more stringent way by the CJEU. However, similarly to the case-by-case approach adopted by the ECtHR, the jurisprudence of the CJEU shows that it is not excluded, in principle, that the concept of “tribunal” may include also bodies that are not courts.

For instance, in case C-464/13, *Europäische Schule München*, the CJEU addressed if the Complaint board of the Schule can be qualified as a tribunal and verified the existence of the specific features, allowing the Court to affirm that the exclusive jurisdiction of a non judicial body “*does not adversely affect the right of the interested parties to effective judicial protection*”.⁴⁰ Then, the CJEU linked such analysis to one additional features provided by art

³⁶ For an analysis of art 13 ECHR guarantees see also FRA, Handbook on Access to justice, p. 30 ff.

³⁷ See that in the specific case of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, such a connection is explicitly provided in whereas 27: “*It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty [now art. 267]. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.*”

Such connection was then applied in practice in C-175/11 H.I.D., where the CJEU analysed in depth the characteristic of the Irish Refugee Appeals Tribunal in order to verify if it may be compliant with EU law.

³⁸ Case C-17/00, *De Coster*.

³⁹ Case C-54/96, *Dorsch* par. 23

⁴⁰ See Case C-464/13, par. 71.

47 CFREU, namely the right of access to a second level of jurisdiction, which could be interpreted as this provision applies also to such bodies.

(4) Art 47 CFREU provides for less procedural limitations compared to art 6 ECHR, in particular when the application of the Convention is limited by statutory or constitutional provisions. As shown by the *Benkharbouche* case,⁴¹ Article 47 CFREU allowed for the disapplication of the provisions of the UK State Immunity Act that limited access of individuals to claim damages for discriminatory practice of foreign States' embassies, which was instead impossible under the application of the ECHR regime.

Taking into account the previous differences which do not allow to affirm the complete overlapping between the relevant provisions of the ECHR and CFREU, the Charter includes a coordination provision, namely art. 52 CFREU. The latter provides that the Charter needs to be interpreted to at least the same level of protection as the relevant right in the ECHR. This is confirmed by the explanatory notes to the Charter, which requires that its meaning and scope shall be determined not only by reference to the text of the ECHR but also by reference to the case law of the ECtHR.

This approach was expressly adopted by the CJEU in its decisions, and in particular in *DEB* where the ECtHR's case law was analysed in detail so as to verify if under the ECHR the grant of legal aid to legal persons was in principle possible. This, however, led the CJEU to find a broader protection under the CFREU than that provided for by the ECHR. This example shows how the CJEU ensures consistency between rights guaranteed by the CFREU and the ECHR, taking the ECtHR jurisprudence either as an element to confirm or support the CJEU findings,⁴² but without taking the level of protection afforded by ECHR as a ceiling.

Casesheet n. 3.1 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland

Facts: Full description in Module 8 - Casesheet n. 8.3

Reasoning of the Court:

The CJEU addressed the analysis of the principle of effectiveness evaluating if the fact that a legal person is unable to qualify for legal aid renders the exercise of its rights impossible. In particular, the denial of legal aid could in practice limit access to a court to the legal person. The CJEU immediately approach the problem affirming that *“the right of a legal person to effective access to justice and, accordingly, in the context of EU law, it concerns the principle of effective judicial protection. That principle 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, signed in Rome on 4 November 1950 (‘the ECHR’) [...]”*. In that sense, the CJEU then connected through art 51 and 52 CFREU the protection afforded by the Charter to the one provided by art 6 of ECHR (para 32 and 35).

This connection is even more clear in the following analysis where the CJEU addresses explicitly the case law of ECHR, in order to affirm that *“the right of access to a court constitutes an element which is inherent in the right to a fair trial under Article 6(1) of the ECHR”*, however

⁴¹ [2015] EWCA Civ 3. See Module 6, casesheet n. 6.7.; Module 8, casesheet n. 8.17.

⁴² See *Alassini*, para 63, *Melloni*, para 50; *Jaramillo*, para 43, *Kendrion*, para 81, *Abdida* para 51-52.

such a right is not absolute, and in case of the provision of legal aid this may depend on the facts and circumstances of each case and “*upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent himself effectively*”.

Then, through the detailed description of the reasoning of the ECHR in *VP Diffusion Sarl v. France* of 26 August 2008, and *CMVMC O’Limov. Spain* of 24 November 2009, the CJEU concluded that the grant of legal aid to legal persons is not in principle impossible, but requires the examination of the applicable rules and of the economic situation of the company. In this sense, the CJEU provides general criteria to the national court in order to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts, namely: the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant’s capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.

Additionally, the CJEU proposed also specific criteria applicable to legal persons, namely: the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.

However, there are also cases where the coordination between art. 6 and 13 ECHR and art 47 CFREU is perfectly achieved, as different outcomes are decided by the European courts in similar cases providing different level of protection.⁴³ For instance, the CJEU deemed the measures implementing the Directive 2005/85 on asylum in Luxembourg as compatible with the requirements of effective judicial protection, in particular those providing for an accelerated procedure to examine asylum application, granting low standards of protection as to the applicant’s right to defence, participation in the proceedings and review of legality. In case C-68/11, *Samba Diouf*, the CJEU affirmed that such national provisions were proportionate to the legitimate aim pursued.

Instead, the ECtHR addressing a similar problem, but focusing on the specific application of the French fast track procedure for asylum seekers carried out by administrative authorities, deemed that the objective of swifter decisions that underlid the limitation to judicial review in accelerated procedures as disproportionate and incompatible with art. 13 ECHR.⁴⁴

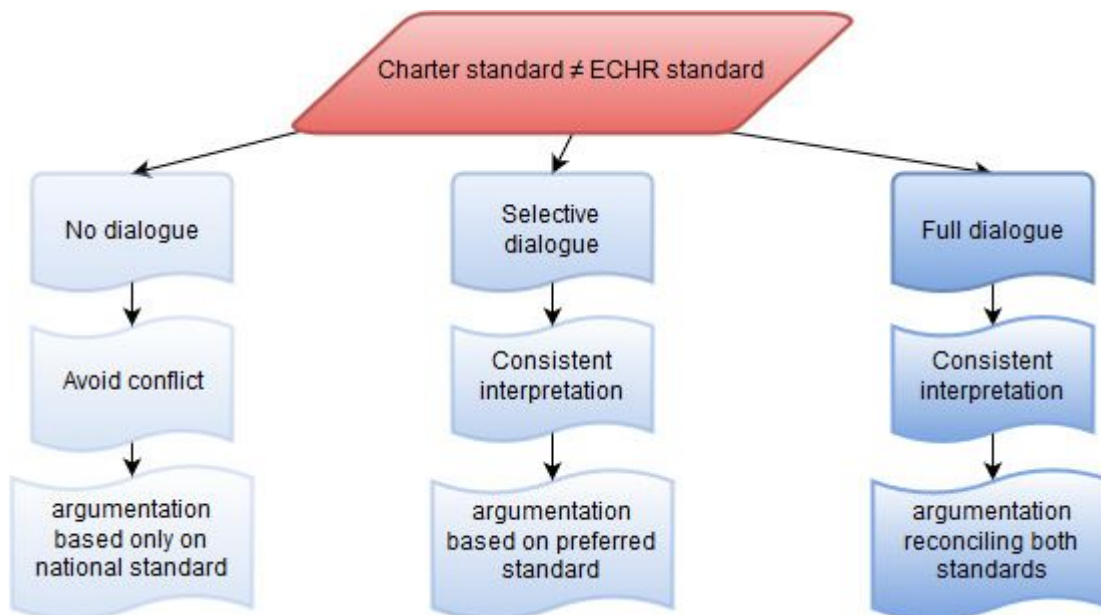
This different interpretation then affects the decisions of national courts, as they may face the choice of adhering to one or the other standard, with the consequence of subsequent quash of their decisions in the following instances before higher, or supranational, courts. If, on the one hand, national higher and constitutional courts may have more interest in using consistent interpretation so as to achieve a tentative reconciliation between the different standards;⁴⁵ such

⁴³ See also the cases presented in JUDCOOP Final Handbook, p. 34.

⁴⁴ ECtHR, *I.M. v France*, No. 9152/09, judgement of 2 February 2012

⁴⁵ See for instance the important role of the UK Supreme Court’s judgment in *EM(Eritrea)* influenced the ECtHR reasoning in the *Tarakhel* judgment. See also Module 2, p. 35.

discrepancy may affect the choice of lower courts which may prefer to avoid the conflict and address only national standards of protection (see graphical representation below).



More recently the CJEU has addressed the issue regarding the consistency between rights guaranteed by the Charter and the ECHR in other cases. Although the stronger position giving independent ‘life’ of Art. 47 CFREU vis-à-vis Art. 6 ECHR was only stated by the AG Opinion in *Melloni* case,⁴⁶ the CJEU affirmed in *Otis* that since Art. 47 CFREU secures the protection afforded by Art. 6 ECHR, it henceforth referred only to Art. 47 CFREU.⁴⁷

This is in accordance with Art. 53 CFREU, which provides that the level of protection guaranteed by Art. 47 CFREU may not be lower than that guaranteed by ECHR, but does not preclude that wider protection may be granted by EU law, both as regards the standard and the scope of protection.

However, this does not mean that the EU law always provides for a higher standard of protection of fundamental rights than the one provided by national constitutions. This can be shown by the *Melloni* case where CJEU faced the question of the Spanish Constitutional Court.⁴⁸ The CJEU held that Art. 53 CFREU and the national higher standards of protection of the right to a fair trial cannot be used to prevent the application of the European Arrest Warrant Framework Directive. The EU secondary instruments harmonised the conditions for the execution of a European arrest warrant issued for the purposes of executing a sentence rendered in absentia.

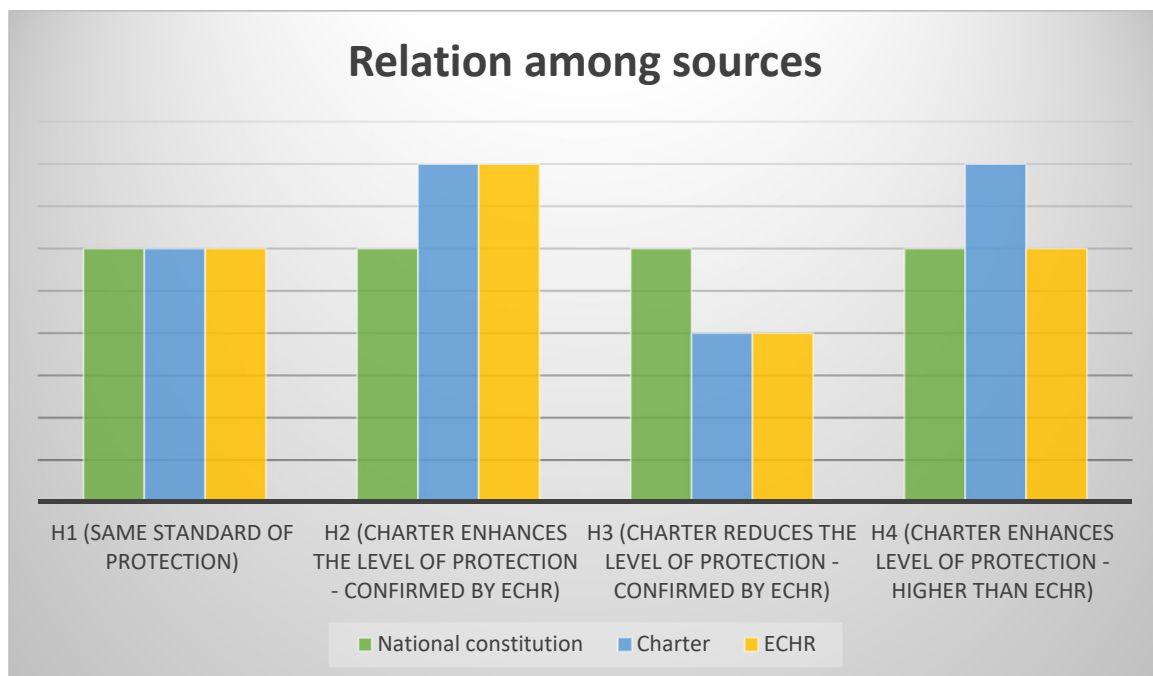
⁴⁶ See AG Cruz Villalon in C-399/11 *Melloni*: effective judicial protection per Art.47 “acquired a separate identity and substance, which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. In other words, once it is recognised and guaranteed by the European Union, that fundamental right goes on to acquire a content of its own”.

⁴⁷ See *Otis*, para. 47 “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 (Case C-386/10 *P Chalkorv Commission* [2011] ECR I-13085, paragraph 51).”

⁴⁸ See the wider analysis provided in Module 2, Casesheet n. ??.

Consequently, the CJEU affirmed that allowing a Member State to avail itself of Art 53 CFRUE to make the surrender of a person conditional on a requirement not provided for in the framework decision would, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that decision, undermine the principles of mutual trust and recognition which that decision purports to uphold and would therefore compromise its efficacy. Therefore, an interpretation of Art. 53 EU Charter that would allow the Member States to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution is precluded on the basis of the principle of primacy of EU law (para 58).

Therefore, as described by the graphical representation below, except for the cases where the standards of protection are equal under the perspective of national constitutions, Charter and ECHR (H1), the assumption is that the Charter standard of protection will be always be at least equal (H2 and H3), if not higher than the one defined by the ECHR (H4); but in comparison to national constitutions, it is possible that the Charter provides for even a lower level of protection (H3).



2.3. Is the failure to present a preliminary ruling a violation of art 47 CFRUE?

Art. 267 TFUE establishes the specific conditions upon which national court may (or in some cases must) present a preliminary ruling to the CJEU as regards the interpretation or the validity of EU law:

- national courts may present a preliminary ruling if it considers that a decision is “necessary” to enable it to give a judgment in a particular case;
- national courts of last instance (e.g. supreme courts)⁴⁹ are obliged to present a preliminary ruling when the answer is necessary to reach a decision;

⁴⁹ In this case, no additional level of jurisdiction or appeal is available.

- national courts are obliged to present a preliminary ruling when a question on the validity of EU law arises.

The preliminary reference procedure may be qualified, on the one hand, as a clear means of vertical dialogue among national and European courts;⁵⁰ on the other hand, as one of the fair trial guarantees provided by the EU system.

This is true either for validity of EU legal provisions as the preliminary references constitute itself a remedy to give individuals access to the CJEU: according to art 263 (4) TFEU only under specific circumstances, individuals can plead the invalidity of an EU legal provision, in all the other cases, they can present the plead before a national court and bring the latter to present a preliminary ruling.⁵¹

Similarly, the preliminary rulings regarding the interpretation of EU legal provisions aim at ensuring uniformity across Member States and, as a consequence, effectiveness of EU law. From the point of view of the individuals, in order to achieve the effective enjoyment of EU conferred rights,⁵² they should have access to courts and, through the preliminary reference, achieve the judge-made standard of protection provided by the CJEU.⁵³

In case of failure to present a preliminary ruling, the jurisprudence of the ECHR plays a very important role, as such a failure can entail a breach of art. 6 ECHR. The cases decided by the ECtHR clarify that not only national courts should provide a justification for the refusal to present the preliminary reference,⁵⁴ but such justification should refer to the *acte clair* or *acte éclairé* doctrines.⁵⁵

Although the CJEU addressed a few cases regarding the failure to present a preliminary ruling and its consequences,⁵⁶ it has never provided as an argument the violation of art. 47 CFREU. In the most recent case, *Ferreira da Silva*,⁵⁷ the CJEU affirmed that a supreme court had breached its duty to make a preliminary reference under article 267.3 TFEU. In particular, the fact that different interpretation of a EU directive at national level, but also across Member States, triggered the decision of the CJEU, rejecting the claim of the national court of compliance with the doctrine of the *acte clair*.⁵⁸ Thus, this may imply that national courts of last instance have the responsibility to verify not only the uniform interpretation of EU law

⁵⁰ See also Module 2, par. 2, pag. 10.

⁵¹ See Case C-583/11 P, *Inuit*, para 92.

⁵² See below at ** the

⁵³ See Case C-112/13, A.

⁵⁴ See ECHR, *Dhahbi vs Italy*. See also Module 6, casesheet 6.5.

⁵⁵ See ECHR, *Scordino v Italy*. Note that the *acte éclairé* doctrine was firstly defined in the CJEU case C-283/81, *CILFIT*, where the Court indicated a set of criteria which should guide the decision of national judges in case of doubts regarding the compliance of the national law and the EU law. See C. Barnard, and S. Peers, (eds.), *European Union Law*, Oxford University Press, 2014; A. Limante, *Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a more Flexible Approach*, *Journal of Common Market Studies*, 2016, 54, 6, p. 1386.

⁵⁶ See *Kobler*

⁵⁷ Case C-160/14, *João Filipe Ferreira da Silva e Brito and Others v Estado português*, 9 September 2015.

⁵⁸ See Case *Ferreira da Silva*, at par. 41.

within the internal legal system, but also in case of doubts to take into account also the interpretation provided by foreign courts so as to ensure the uniformity across Member States.

However, it should be added that any limitation to the possibility for national judges to present a preliminary ruling (being them direct or indirect) are to be interpreted as violation of art. 47 CFREU. For instance, in *Ognyanov*,⁵⁹ the CJEU affirmed that the presentation of the factual and legal context of the cases in the preliminary ruling cannot be deemed as the expression by the referring judge of a provisional opinion. Moreover, if the national law imposes that the referring judge is disqualified and his final judgment set aside, such a rule is detrimental to the effective cooperation between European and national courts, thus violating art. 47 and art 48(1) CFREU.

3. Limits

3.1. National procedural autonomy and the so called Rewe-test

EU law, while conferring rights to individuals through primary and secondary law provisions,⁶⁰ does not provide for specific remedies in each and every legislative intervention adopted. However, the Court of Justice of European Union (hereinafter CJEU) has unequivocally affirmed that the Treaties “*created a complete system of legal remedies*”.⁶¹ Such a straightforward sentence is realised more fully if one looks at the wider framework of multi-level structure of EU system, where the coordinated effort of European and national bodies, whether legislative, judicial or administrative ones, is at work.

As a matter of fact, the CJEU affirmed that where EU law does not in itself identify specific judicial remedies applicable for violations, or alternatively demands only for general requirement of effective, proportionate and dissuasive remedies,⁶² Member States legal systems will provide for them, the latter being required to establish a sufficiently complete system of legal remedies and procedures.⁶³ This cooperation between the two levels, European and national, provides for the practical implementation of the old maxim of *ubi jus ibi remedium*.⁶⁴

Through this allocation of competence, the Member States retain their competence in procedural matters, including in those cases where Union rights are at stake. However, where there is a case of unjustified interference in the exercise of a right arising from the Union legal order, the national courts and the national procedural system should ensure the existence of a

⁵⁹ C-614/14

⁶⁰ As stated by the seminal decision Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*.

⁶¹ See *Unión de Pequeños Agricultores*, para 40; Case C-263/02, *Jégo-Quéré*, para 30; Case C-167/02, *Rothley*, para 46; C-461/03 *Gaston Schul*, para 22.

⁶² For a set of examples taken from the legal areas analysed within the ACCIONES project see above.

⁶³ See *Unión de Pequeños Agricultores*, paras 40, 41; *Oleificio Borelli*, para 15.

⁶⁴ See below.

remedy capable of providing for the enforcement of that right. This decentralised enforcement system involving Member States courts is defined as national procedural autonomy.

National remedies and procedures are generally perceived as falling under the national procedural autonomy, EU law assuming that national remedies and procedures were both sufficient and adequate. However, litigation involving EU law issues revealed that the national procedures and, in particular, the panoply of domestic remedies were sometimes insufficient or deficient.⁶⁵

The level of autonomy of Member States as regards procedural guarantees is not without caveats. In 1976, the landmark cases of *Rewe* and *Comet* addressed in a clear manner the test that national procedural law should undergo in order to be deemed sufficient to ensure the exercise of Union rights.⁶⁶ The CJEU decision affirmed that:

“in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature [...] the position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.”⁶⁷

Later on, the CJEU clarified such concept, starting to adopt a standard formula, which provides that

“In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.”⁶⁸

The principles that should guide the evaluation of the CJEU in front of national remedies and procedures have since been termed the principle of equivalence and the principle of effectiveness.

⁶⁵ S. Prechal, National Courts in EU Judicial Structures, Yearbook of European law, Oxford Vol. 25, Iss. 1, (2006): 429 - 450.

⁶⁶ Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*; and Case 45/76, *Comet*.

⁶⁷ See *Rewe*, para. 5, since then repeated in dozens of cases, e.g. Case C-128/93, *Fischer*, para. 39; Case C-410/92, *Johnson*, para. 21; Case C-394/93, *Alonso-Pérez*, para. 28; Case C-246/96, *Magorrian and Cunningham*, para. 37; Case C-78/98, *Preston*, para. 31; Joined Cases C-52/99 and C-53/99, *Camarotto and others*, para. 21; Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd.*, para 39; Case C-268/06, *Impact*, para. 44; Case C-40/08, *Asturcom Telecomunicaciones SL*, para 41.

⁶⁸ Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and the Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, para. 83.

Under the principle of equivalence, the terms of comparison are the remedies provided by national law for non-EU based claims vis-à-vis those available for EU based claims. The judicial or legislative treatment of the former should be ‘equivalent’ to the one applicable to the latter. This applies to procedures including situations and possibilities of class action as well as substantive law. The similarity of a situation is subject to detailed case-by-case analysis, the Court looking at the purpose and effect of a national measure in question and exists ‘*where the purpose and cause of action are similar*’,⁶⁹ or where the case concerns ‘*the same kind of charges or dues*’.⁷⁰ It is important to stress that the principle does not imply necessarily that actions based on EU law always should benefit from the most favourable procedural regime in national law; rather, it implies that those claims that are deemed to be comparable should be treated equally, prohibiting straightforward discrimination based on the origin of the claim (whether national or European).⁷¹

Under the principle of effectiveness, the term of reference is the national conditions that may apply to the EU-based rights, such conditions should not make impossible or extremely difficult to exercise such right. The threshold from mere “*impossibility*” to “*impossible or extremely difficult*” was raised through the jurisprudence of the CJEU.⁷² This reframing of the effectiveness test was important in introducing a balancing exercise by the CJEU itself: in order to evaluate if the exercise of EU based right is made “*excessively difficult*” a comprehensive review is needed. Thus, the analysis of the CJEU should not limit itself to the specific national procedural provision applicable, rather it should address the procedural system as a whole,⁷³ taking into account all the particularities of national legal systems.

Casesheet n. 3.2 Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, SA

Facts: See Module 4, Casesheet n. 4.5

Reasoning of the Court:

The CJEU addressed the principle of effectiveness evaluating the whole procedural system in detail, observing that:

“37 However, taking into consideration the role of Article 695(1) of the LEC within the context of the procedure as a whole, the following findings must be made.

⁶⁹ Case C-326/96 Levez, para 41.

⁷⁰ Case C-231/96 Edis, para 36; Joined Cases 66/79, 127/79 and 128/79 Salumi, para 21.

⁷¹ See that the principle of equivalence is a specific application of the broader principle of non-discrimination.

⁷² See Case 199/82, San Giorgio, para 12-14; Case C-312/93, Peterbroeck, para 12; Case C-261/95, Palmisani, , para 27.

⁷³ See *Peterbroeck*, Judgement, para.14: “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”.

38 First, it is apparent from the case-file submitted to the Court that, according to the Spanish procedural rules, mortgage enforcement proceedings relating to an asset that meets an essential need of the consumer, namely, provision of a dwelling, may be initiated by a seller or supplier on the basis of an enforceable notarial instrument, without the contents of that instrument having been subject to judicial scrutiny in order to determine whether one of more of the clauses is unfair. Such a right, afforded to a seller or supplier, renders it all the more necessary that the consumer, in the position of a debtor against whom mortgage enforcement proceedings are brought, can avail himself of effective judicial protection.

39 As regards the scrutiny exercised by the enforcing court, it should be observed, on the one hand, that as the Spanish Government confirmed at the hearing, notwithstanding the legislative amendments to the LEC made after the judgment in *Aziz* (EU:C:2013:164) introduced by Law 1/2013, Article 552(1) of the LEC does not oblige the enforcing court to examine of its own motion whether the contractual clauses upon which the request is based are unfair, but only a discretionary power to do so.

40 On the other hand, pursuant to Article 695(1) of the LEC, as amended by Law 1/2013, the party against whom mortgage enforcement proceedings are brought may raise an objection when founded, in particular, on the unfairness of a contractual clause upon which the enforcement is based or which allowed the sum due to be determined.

41 In that respect, however, it must be emphasised that, under the terms of Article 552(1) of the LEC, the assessment by the court of an objection based on the unfairness of the contractual clause is subject to time constraints, such as that of hearing the parties within 15 days and giving a ruling within 5 days.

42 Furthermore, it is apparent from the information provided to the Court that the Spanish procedural system in relation to mortgage enforcement is characterised by the fact that, once the procedure has been initiated, any other legal claim that the consumer might bring, including claims contesting the validity of the instrument enforced, enforceability, certainty, or extinction or the amount of the debt, is dealt with in separate proceedings and by a separate decision, without either one or the other having the effect of staying or terminating the pending enforcement proceedings, except in the residual circumstances in which a consumer has lodged a preliminary application for annulment of the mortgage before the marginal note regarding issue of the security certificate (see, to that effect, *Aziz*, EU:C:2013:164, paragraphs 55 to 59).

43 Having regard to those characteristics, if the consumer's objection to the enforcement of the mortgage against his property is dismissed, the Spanish procedural system, taken as a whole and in the manner applicable in the main proceedings, exposes consumers, and possibly, as is the case in the main proceedings, their family, to the risk of losing their dwelling in an enforced sale, while the enforcing court may have, at most, delivered a rapid assessment of the validity of the contractual clauses upon which the seller or supplier bases his application. The protection that the consumer, as a mortgage debtor against whom enforcement proceedings are brought, might obtain by way of a separate judicial scrutiny undertaken in the context of substantive proceedings brought in parallel with the enforcement proceedings, cannot offset that risk because, even if the scrutiny revealed the existence of an unfair clause, the consumer would not be granted a remedy reflecting the damage he had suffered by restoring him to the situation he was in before the enforcement proceedings against the mortgaged property, but, at best, an award of compensation. The purely compensatory nature of the remedy that might be awarded to the consumer would confer on him only incomplete and insufficient protection. It would not constitute either adequate or effective means, within the meaning of Article 7(1) of Directive 93/13, of preventing the continued use of the clause, found to be unfair, in the instrument that contains a pledge by way of mortgage against a property on the basis of which

enforcement proceedings were brought against that property (see, to that effect, Aziz, EU:C:2013:164, point 60).

44 In the second place, having regard once again to the role played by Article 695(4) of the LEC within the scheme of mortgage enforcement proceedings as a whole under Spanish law, it should be noted that that provision gives the seller or supplier, as a creditor seeking enforcement, the right to bring an appeal against a decision ordering a stay of enforcement or declaring an unfair clause inapplicable, but does not permit, by contrast, the consumer to exercise a right of appeal against a decision dismissing an objection to enforcement.

45 Therefore, it is clear that the procedure for objecting to enforcement, laid down by Article 695 of the LEC, before the national court places the consumer, as a debtor against whom mortgage enforcement proceedings are brought, in a weaker position compared with the seller or supplier, as a creditor bringing mortgage enforcement proceedings, as regards the judicial protection of the rights that he is entitled to rely on by virtue of Directive 93/13 against the use of unfair clauses.

46 In those circumstances, it must be stated that the procedural system at issue in the main proceedings places at risk the attainment of the objective pursued by Directive 93/13. The imbalance between the procedural rights available to the consumer, on the one hand, and to the seller or supplier on the other hand, simply accentuates the imbalance existing between the parties to the agreement, already mentioned at paragraph 22 of this judgment, and which is also echoed in the context of an individual action involving a consumer and the seller or supplier who is his co-contractor (see, by way of analogy, Asociación de Consumidores Independientes de Castilla y León, EU:C:2013:800, paragraph 50).

3.2. Can national judges adapt remedies on the basis of effectiveness?

The interpretative effort of the CJEU may have a prominent effect at national level: namely the so-called *hybridisation* of remedies. This process may be triggered by the decision of the CJEU, where the available national remedy is interpreted in the light of the EU standard, and then ‘upgraded’ via consistent interpretation. Otherwise, the hybridisation may emerge at national level, where the national courts, finding a conflict between EU law and national provisions, are required to adapt the procedural rule and/or the available remedies in order to comply with EU standard of effectiveness.

This could result in the availability of new remedies, which may already be available in the legal system but not for the specific case,⁷⁴ or may be previously non-existent; or vice versa, the expected remedies may no longer be available.⁷⁵ In these cases, the national courts will have the task to decide which judicial dialogue technique may help in avoiding further conflicts.⁷⁶

For instance, a milder option is the use of consistent interpretation of national legislation, which was the choice of German judges in the aftermath of the *Heininger* case.⁷⁷ Nonetheless, the

⁷⁴ See above *Factortame*.

⁷⁵ See Case *Pia Messner*.

⁷⁶ For an analysis of judicial dialogue techniques see Module 2.

⁷⁷ Case C-481/99, *Heininger*. Note that the CJEU affirmed in its decision that loan agreements are covered by the doorstep revocation directive, and that the exception in Art. 3(2) of the doorstep-selling directive was not relevant: “*Second, whilst a secured-credit agreement of the type in question in the main proceedings is linked to a right relating to immovable property, in that the loan must be secured*

amendment of national legislation triggered further preliminary references to the CJEU in the subsequent *Schulte* and *Crailsheimer Volksbank* cases.⁷⁸

Otherwise, the national judge may be bound to disapply national legislation in order to resolve the conflict. This for instance was the choice of the UK Court of Appeal that disapplied primary, national legislation on the basis of incompatibility with an EU Directive and Articles 7, 8 and 47 CFREU, as EU law provided a remedy where English law did not.⁷⁹

3.3. Can EU law impose on national judges the creation of new remedies?

Although the CJEU has always stated that the right to an effective remedy “*was not intended to create new remedies*”,⁸⁰ in some cases the decisions of the CJEU lead national courts (as well as legislators) to question whether it was necessary to modify the national procedural system so as to include a new remedy in order to comply with EU principles, as interpreted in CJEU judgments.

For instance, in the competition law area, the decision in *Courage v Crehan* affirmed that the full effectiveness of EU law would be put at risk if the parties to a contract cannot seek damages for losses caused by the illegal agreement, even if such bar to an action is provided by law.⁸¹ Although the CJEU did not provide for a specific set of legal requirements upon which the action for damages can be pursued, the Court acknowledged that “any individual” suffering damages by anti-competitive behaviour is entitled to act for compensation implicitly imposing Member States to provide for such an action when not previously available.⁸² Similarly, in the decision in *Manfredi*, the CJEU affirmed that whenever there is a causal link between the prohibited agreement or practice and the harm suffered, compensation can be claimed.⁸³

It is important to note that the need to modify or create a new legal remedy is to be interpreted as a solution to be adopted only in exceptional cases. Under normal circumstances, the evaluation of the CJEU takes into account the remedies already existing at national level and the possibility to interpret the procedural provisions so as to fill the alleged gap in the enforcement of Union rights.

by a charge on immovable property, that feature is not sufficient for the agreement to be regarded as concerning a right relating to immovable property for the purposes of Article 3(2)(a) of the doorstep-selling directive. Both for consumers, whom the doorstep-selling directive is designed to protect, and for lenders, the subject-matter of a credit agreement such as that in point in the present case is a grant of funds which is linked to a corresponding obligation of repayment together with interest. The fact that the credit agreement is secured by a charge on immovable property does not render any less necessary the protection which is accorded to the consumer who has entered into such an agreement away from the trader's business premises.” Par. 32-34.

⁷⁸ See Case C-350/03, *Schulte*, and C-229/04, *Crailsheimer Volksbank*.

⁷⁹ The Court of Appeal affirmed in its decision that “*in so far as a provision of national law conflicts with the requirement for an effective remedy in article 47, the domestic courts can and must disapply the conflicting provision*”. See *Google Inc v Vidal-Hall & Ors* [2015] EWCA Civ 311 (27 March 2015).

⁸⁰ Case 158/80 *Rewe II*, summary para 6.

⁸¹ *Courage v. Crehan*, at 25

⁸² *Reich*, 2007, 724

⁸³ *Vincenzo Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA*, at 60-61.

The boundary between interpretative analysis (which may lead to adaptation of existing remedies) and creation of new remedy is not a straightforward one, as exemplified by the well known case of *Factortame*.⁸⁴ Here, the CJEU affirmed that interim relief, available in principle but not for cases against the Crown, should be granted, as the principle of effectiveness justified the obligation for national courts to “*guarantee real and effective judicial protection*” even when no equivalent form of protection of rights under national law exists in that specific situation.⁸⁵ The same approach may be taken by national courts when evaluating the remedies available, for instance, national courts may provide as a justification for the adoption of a (previously inapplicable) interim relief the lack of effective remedies within a mortgage foreclosure, as the *Aziz* case shows.⁸⁶

A more cautious approach was adopted by the CJEU in the *Inuit* case, where the Court had the opportunity to affirm that “*neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law*”.⁸⁷ However, as mentioned above, an exception to this principle may emerge if the domestic legal system does not provide for any direct or indirect remedy capable of ensuring respect for the rights, which individuals derive from European Union law.⁸⁸

4. The requirements of remedies: effectiveness, proportionality and dissuasiveness

Another set of additional requirements of remedies emerging from the case law of the CJEU are those that prescribe that the remedies should be effective, dissuasive and proportionate. If on the one hand, the elements of effectiveness and dissuasiveness are based on the principles of equality and effectiveness⁸⁹; the requirement of proportionality, on the other hand, appears

⁸⁴ Case C-213/89 *Factortame*. The case concerned the impossibility for the English courts to order, by way of interim relief against the Crown, that the application of certain national rules should be suspended, even if the conformity of those rules with EU law was being challenged in those proceedings and the parties concerned would suffer irreparable damage if the interim relief were not granted and they were successful in the main proceedings. See also case *Verholen*, where the CJEU stated that even though it was for the national rules to determine standing in the Member States’ courts, these rules were not allowed to render the exercise of Union law rights virtually impossible. Consequently, if an individual’s rights under EU law are at stake, national rules must provide for standing. Similarly, in *Borelli*, as national procedural restrictions were denied jurisdiction to review a preparatory administrative decision, which was binding on the Commission when it took the final decision, the CJEU affirmed that is the national courts’ duty to allow individuals to challenge the legality of EU acts.

⁸⁵ *Ibid.* paras. 19, 20. The principle that a court seized of a dispute governed by rules of EU law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under EU law has been confirmed in, inter alia, Case C-226/99, *Siples*, para 19.

⁸⁶ See Module 4 on consumer protection.

⁸⁷ See *Inuit*, Para 103.

⁸⁸ See *Inuit*, para 104, which adds the alternative case or “*if the sole means of access to a court was available to parties who were compelled to act unlawfully*”.

⁸⁹ These are the basis of the so-called *Rewe test*, which includes the principle of equivalence, upon which the remedies provided by national law for non-EU based claims should be equivalent to those

as an additional feature to be evaluated by European and national courts, based on the more general principle of Union law applicable to Member States when acting within the scope of application of the Treaty.

4.1. Are the features of effectiveness, proportionality and dissuasiveness imposed by EU law?

It is important to note these specific features of remedies have their basis in EU secondary law provisions. In the areas covered by the ACTIONES project, there are several examples where EU directives require Member States to impose effective, dissuasive and proportionate remedies. For example:

Consumer law : Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection law

Art. 2 (10)

Member States shall lay down the rules on penalties, including criminal sanctions where appropriate, applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive and may be applied to cover the period of any breach, even where the breach has subsequently been rectified. The Member States shall notify those provisions to the Commission by 25 May 2011, and shall notify it without delay of any subsequent amendment affecting them.

Migration and asylum law: Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

Art. 5 (1)

Member States shall take the necessary measures to ensure that infringements of the prohibition referred to in Article 3 are subject to effective, proportionate and dissuasive sanctions against the employer.

Non-discrimination : Directive 2000/43/EC

Articles 15 Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary

available for EU based claims; and the principle of effectiveness, upon which the national conditions that may apply to the EU-based rights should not make impossible or extremely difficult to exercise such right. See below at 4.

to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.⁹⁰

Criminal law : Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law

Art. 3 Criminal penalties

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 1 and 2 is punishable by effective, proportionate and dissuasive criminal penalties.

2. Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1 is punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment.

The CJEU has never clarified expressly such features, although it has used the principles to evaluate national provisions.⁹¹

It is difficult to draw a clear boundary between effectiveness, proportionality and dissuasiveness as these three features are unavoidably interrelated. However, a set of guidelines drawn by the CJEU case law may help in their analysis.

4.2. When is the remedy effective?

Effectiveness refers to the relationship between a particular goal set by the policy maker and the legal remedies available to reach the goal set by the legislator. (e.g. consumer protection or fair market competition). Within this analysis a set of criteria should be taken into account: the national remedial system should be able to provide for general deterrence (*ex ante* dissuasion from violation); should aim at restoration of harm (if possible *restitutio in integrum*); and should aim at prevention of future harm. Moreover, the effectiveness of the legal remedy provided

⁹⁰ Similar requirements with slightly different wording are defined by Article 14 of Directive 2004/113/EC (penalties), Article 18 (compensation or reparation) and 25 (penalties) of Directive 2006/54/EC, Art. 10 of Directive 2010/41/EU (compensation or reparation).

⁹¹ Only in the AG Kokott, in *Berlusconi* provided a more detailed definition:

“A penalty is dissuasive where it prevents an individual from infringing the objectives pursued and rules laid down by Community law. What is decisive in this regard is not only the nature and level of the penalty but also the likelihood of its being imposed. Anyone who commits an infringement must fear that the penalty will in fact be imposed on him. There is an overlap here between the criterion of dissuasiveness and that of effectiveness.

A penalty is proportionate where it is appropriate (that is to say, in particular, effective and dissuasive) for attaining the legitimate objectives pursued by it, and also necessary. Where there is a choice between several (equally) appropriate penalties, recourse must be had to the least onerous. Moreover, the effects of the penalty on the person concerned must be proportionate to the aims pursued.

The question whether a provision of national law contains a penalty which is effective, proportionate and dissuasive within the meaning defined above must be analysed by reference to the role of that provision in the legislation as a whole, including the progress and special features of the procedure before the various national authorities, in each case in which that question arises.” (para 90-92).

should be evaluated also on the basis of the factual circumstances (i.e. procedural rules) that may hamper the achievement of the aforementioned objective.

It is important to underline that effectiveness test may lead to different outcomes when looking at individual versus collective redress mechanisms.⁹² Collective redress may be seen as the response of the legal system to some of the features of individual actions which may hamper access to justice, such as the underreporting of individual claims due to the high economic costs of litigation (usually higher than the value of the claim), the complexity of the legal provisions applicable, the duration of the judicial proceedings, the imbalance between the individual claimant and the professional counterparty (e.g. consumers vis-à-vis professional, discriminated workers vis-à-vis employer, etc.).⁹³ These features are shared in several areas of law, including those covered by the ACTIONES project. Under this perspective, the availability of collective redress is to be interpreted as an effective remedy: for instance, it is not disputable the legal standing of a public body to pursue an action against discrimination even when there is not an identifiable victim of such discrimination.⁹⁴

However, recent decisions of the CJEU in the field of consumer protection show that in case of collective redress the factual circumstances that may hamper the achievement of effective protection have a different weight. In *ACICL*,⁹⁵ the CJEU affirmed that when a consumer association brings an action for an injunction, the mere fact of not being an individual consumer excludes the need to apply the rebalance exercise, thus, it does not require, the applicability of protective procedural rules such as the jurisdiction of consumer residence (i.e. consumer association seat). Similarly, in *Sales Sinues*,⁹⁶ the CJEU affirmed that a national rule imposing the judge to stay an individual action when a collective action, the outcome of which is likely also to be applied in the individual action, is pending “*appears incomplete and insufficient and does not constitute either an adequate or effective means of bringing to an end the continued use of unfair clauses, contrary to the requirements of Article 7(1) of Directive 93/13*”⁹⁷.

⁹² Collective redress is a procedural mechanism that allows many similar legal claims to be bundled into a single court action. This term encompasses two forms of collective redress. It can take the form of injunctive relief, where cessation of the unlawful practice is sought, or compensatory relief, aiming at obtaining compensation for damage suffered.

⁹³ See “Towards a European Horizontal Framework for Collective Redress”, COM(2013) 401 final. V. Trstenjak, and P. Weingerl, *Collective Actions in the European Union—American or European Model?*, Beijing Law Review, 2014, 5, 155-162; R. Van der Bergh, *Private Enforcement of European Competition Law and the Persisting Collective Action Problem*. Maastricht Journal, 2013, 20, 12-34.

⁹⁴ Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, 10 July 2008, ECLI:EU:C:2008:397.

⁹⁵ Case C-413/12, *Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL*, 5 December 2013, ECLI:EU:C:2013:800

⁹⁶ Joined Cases C-381/14 and C-385/14, *Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA (Catalunya Banc S.A.)*, 14 April 2016, ECLI:EU:C:2016:252.

⁹⁷ *Idib.* at p. 39.

4.3. When is the remedy proportionate?

Proportionality refers firstly to the seriousness of the offence and the size and type of remedies applicable to the offender. In the jurisprudence of the CJEU, the seriousness of the offence includes the actual damage both in its material and immaterial manifestation.⁹⁸

In *Kusionova*, the CJEU addressed the effects in practice of the penalty on the consumer, affirming that “[w]ith regard to the proportionality of the penalty, it is necessary to give particular attention to the fact that the property at which the procedure for the extrajudicial enforcement of the charge at issue in the main proceedings is directed is the immovable property forming the consumer’s family home” and given that the loss of a home is one of the most serious breaches of the right to respect for the home, the CJEU stated that “with regard in particular to the consequences of the eviction of the consumer and his family from the accommodation forming their principal family home, the Court has already emphasised the importance, for the national court, to provide for interim measures by which unlawful mortgage enforcement proceedings may be suspended or terminated where the grant of such measures proves necessary in order to ensure the effectiveness of the protection intended by Directive 93/13.”⁹⁹

When looking at the size and type of remedies, courts may take into account other elements in order to evaluate the concrete sanction such as the financial capacity of the author of the violation, the repetitive nature of the violation and the fact that multiple violations may have occurred.

For instance, in the decision of an Italian Tribunal, as regards discriminatory statements against Roma population affirmed by a politician in the context of TV programme, the criteria used to quantify the damages toward the association protecting Roma rights including subjective and objective criteria:

- The high discriminatory content of the statement;
- The defamatory and denigratory content of the statement;
- The reiteration of the statement;
- The consciousness of the speaker;
- The public role of the speaker;
- The magnitude of the effects.¹⁰⁰

When several remedies are available, the proportionality principle is used to select the best solution available vis-à-vis the seriousness of the violation (and its cost-effectiveness).¹⁰¹ In this sense, proportionality may take into account the interests of the infringer.

For instance, when addressing the selection of the type of remedies available to the judge in the implementation of Consumer Sales directive provisions, the CJEU clarified in *Weber and Putz* that “In considering whether, in the case in the main proceedings, it is appropriate to reduce the consumer’s right to reimbursement of the costs of removing the goods not in conformity and

⁹⁸ L. Farkas, Collective actions under European anti-discrimination law,

⁹⁹ See *Kusionova*, para 62-66.

¹⁰⁰ Tribunal of Milan, 16 April 2016.

¹⁰¹ On the hierarchy of civil remedies in the light of the principle of proportionality, see F. Cafaggi, *The regulatory functions of transnational commercial contracts. New architectures*, in *Fordham Journal of international law*, 36, 2013, 1557 seq.

of installing the replacement goods, the referring court will therefore have to bear in mind, first, the value the goods would have if there were no lack of conformity and the significance of the lack of conformity, and secondly, the Directive’s purpose of ensuring a high level of protection for consumers. The possibility of making such a reduction cannot therefore result in the consumer’s right to reimbursement of those costs being effectively rendered devoid of substance, in the event that he had installed in good faith the defective goods, in a manner consistent with their nature and purpose, before the defect became apparent.” The CJEU then adds that *“in the event that the right to reimbursement of those costs is reduced, the consumer should be able to request, instead of replacement of the goods not in conformity, an appropriate price reduction or rescission of the contract, pursuant to the last indent of Article 3(5) of the Directive, since the fact that a consumer cannot have the defective goods brought into conformity without having to bear part of these costs constitutes significant inconvenience for the consumer.”*¹⁰²

4.4. When is the remedy dissuasive?

Dissuasiveness refers to the capability to lead potential authors of violation to comply with the law. Thus, it addresses both the author of the violation in the case decided before the court, but also the potential violators that will be refrained from the violation. Under the first perspective, the choice among monetary remedies versus remedies in kind may affect the achievement of the dissuasive effect: damages, restitution, and similar monetary remedies, which are the main option in cases where the violation cannot be solve through the restoring of the status quo antea (e.g. discriminatory speech in public) may be interpreted by violators as “prices” for committing the infringing behaviour,¹⁰³ thus may be perceived as not sufficiently dissuasive if their amount is limited to the compensation of the material damages.¹⁰⁴ Instead, remedies in kind, such as injunctions or obligation to repair (defective goods) or to reinstate (discriminated workers) or to inform (asylum seekers) may have a higher deterrent effect.

For instance, in *Credit Lyonnais* the CJEU evaluated if the penalty imposed by the legislator in situations where banks do not verify in advance the creditworthiness of consumers may affect the subsequent behaviour of banks, and affirmed that *“given the importance [...] of the objective of consumer protection inherent in the creditor’s obligation to assess the borrower’s creditworthiness, the penalty of forfeiture of entitlement to contractual interest cannot be regarded, more generally, as being genuinely deterrent if the referring court were to find [...] that — in a case such as that which has been brought before it, in which the outstanding amount of the principal of the loan is immediately payable as a result of the borrower’s default — the amounts which the creditor is likely to receive following the application of that penalty are not significantly less than those which that creditor could have received had it complied with that obligation.”* Hence, *“if the penalty of forfeiture of entitlement to interest is weakened, or even*

¹⁰² See CJEU, 16 June 2011, *Joined Cases C-65/09 and C-87/09, Gebr. Weber GmbH (C-65/09) v Jürgen Wittmer, and Ingrid Putz (C-87/09) v Medianess Electronics GmbH, ECLI*****, para 76-77.

¹⁰³ F. Cafaggi and P. Iamiceli, *The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions*, forthcoming in *European review of contract law*, 2017.

¹⁰⁴ FRA, *Access to justice in cases of discrimination in the EU - Steps to further equality*, 2012, p. 48 available at fra.europa.eu/sites/default/files/fra-2012-access-to-justice-social.pdf.

entirely undermined, by reason of the fact that the application of interest at the increased statutory rate is liable to offset the effects of such a penalty, it necessarily follows that that penalty is not genuinely dissuasive.”¹⁰⁵

Casesheet n. 3.3 - Asociația Accept v Consiliul Național pentru Combaterea Discriminării

Facts: See Module 6, casesheet n. 6.15

Legal issues:

The Court of Appeal of Bucarest presented i.a. the following question:

(4) Does the fact that it is not possible to impose a fine in cases of discrimination after the expiry of the limitation period of six months from the date of the relevant fact, laid down in Article 13(1) of [GD No 2/200]1 on the legal regime for sanctions, conflict with Article 17 of [Directive 2000/78] given that sanctions, in cases of discrimination, must be effective, proportionate and dissuasive?’

Reasoning of the Court:

The CJEU addressed the meaning of discrimination as provided by the Directive and then points to the elements regarding the type of penalty that should be used to sanction a discriminatory behaviour. In this sense the CJEU observed that the directive precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation, it is only possible to give a ‘warning’ after the expiry of six months from the date on which the facts occurred. As this penalty lacks the essential requirement of effectiveness, proportionality and dissuasiveness.

In particular, the CJEU affirmed that:

“67 It is for the referring court to ascertain in particular whether, in circumstances such as those set out in the preceding paragraph, those with legal standing to bring proceedings might be so reluctant to assert their rights under the national rules transposing Directive 2000/78 that the rules on sanctions adopted in order to transpose that directive are not genuinely dissuasive (see, by analogy, Draehmpaehl, paragraph 40). Regarding the dissuasive effect of the sanction, the referring court may also take account, where appropriate, of any repeat offences of the defendant concerned.

68 It is true that the mere fact that a specific sanction is not pecuniary in nature does not necessarily mean that it is purely symbolic (see, to that effect, Feryn, paragraph 39), particularly if it is accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of that directive in a possible action for damages.

69 However, in the present case it is for the referring court to ascertain whether a sanction such as a simple warning is appropriate for a situation such as that at issue in the main proceedings (see, by analogy Case C-271/91 Marshall [1993] ECR I-4367, paragraph 25). In that connection, the mere existence of an action for damages under Article 27 of GD No 137/2000, for which the limitation period for bringing proceedings is three years, cannot, as such, make good any shortcomings, in terms of effectiveness, proportionality or dissuasiveness of the sanction, that might be identified by that court with regard to the situation set out in paragraph 66 of the present judgment. As Accept maintained at the hearing before the Court, where an association of the type referred to in Article 9(2) of Directive 2000/78 does not act on behalf of

¹⁰⁵ See *Credit Lyonnais* para 52-53.

specific victims of discrimination, it could be difficult to prove the existence of harm suffered by such an association for the purpose of the relevant rules of national law.

70 Furthermore, if it were the case that, as Accept argues, the sanction consisting in a warning is generally only imposed in Romanian law for very minor offences, that fact would tend to suggest that such a sanction is not commensurate to the seriousness of a breach of the principle of equal treatment within the meaning of that directive.”

Then the CJEU left the task of interpretation to national courts, requiring them to interpret national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.

It is important to note that the principles of effectiveness, proportionality and dissuasiveness are relevant regardless the area of law where they emerge first. Most importantly, the standards provided in one area of law may be translated into another area not only by the CJEU, but also by national courts.¹⁰⁶

For instance, effectiveness, dissuasiveness and proportionality of remedies should be addressed not only in the discrimination cases but also in cases concerning the violation of other fundamental rights. An example, is the decision of the Tribunal of Vercelli regarding the sanctions applicable in case of violation of the freedom of expression principle. After the decision of the Municipality of Varallo to prohibit access to the lake plages to any Burquini and Niqab covered women, a small group of citizens presented an action for discrimination before the Tribunal of Milan; eventually, given the withdrawn of the Municipality decision, the case was dismissed. However, the Mayor and the local municipality put up a set of posters within the city (incorrectly) claiming that the decision of the Tribunal of Milano conflicted with the position of the claimants and calling the claimants, indicating fully their names, communist-like people requiring the use of local municipality funds for such useless claims. The addressees of the posters, then presented a claim before the court of Vercelli. The local court then affirmed that the right to freedom of expression cannot protect the words published on the posters, and determined the sanctions to be applied to the local municipality on the basis of the criteria provided in *Firma Feryn* case and on the basis of the criteria of effectiveness, proportionality and dissuasiveness of the sanctions.¹⁰⁷

4.5. Can criminal law provide for additional elements as regards effectiveness, proportionality and dissuasiveness?

As regards criminal proceedings, the proportionality feature of the remedies guaranteed should be analysed also in relation to Art. 49 CFREU providing:

“Principles of legality and proportionality of criminal offences and penalties:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was

¹⁰⁶ See below at par. 6.

¹⁰⁷ Tribunal of Vercelli, 4 December 2014.

committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.”

This provision aims at protecting individual freedom by requiring for the punishability of conduct prior to legal prohibition, as well as the protection of confidence in terms of predictability and accountability of criminal law.¹⁰⁸ As regards the principle of proportionality of penalty, the Charter is a novelty as no other international legal instrument provides a similar statement. However, such principle is not new in national law and practice of Member States.¹⁰⁹

This principle applies to the legislator, allowing criminalization and the punishment of behaviour only in so far as it is required, appropriate and suitable for protecting the object of legal protection within legitimate goals of penalty. But it is also applicable to the judge, imposing the selection of a penalty proportionate to the offence, taking into account the objective severity of the wrong and the individual severity of blameworthiness. For instance, in *JZ*,¹¹⁰ the CJEU addressed in detail the jurisprudence of the ECHR so as to identify the specific elements to be taken into account in order to qualify ‘detention’. The analysis was crucial to provide the needed guidance to the national Polish court as regards the possibility to evaluate the application of a series of different measures (in different MS) as a deprivation of liberty, thus imposing a reduction of the final custodial sentence, in the basis of art 49(3) CFREU.

It is important to note that criminal sanctions can also be impose within different types of enforcement systems, i.e. criminal and administrative. In case of administrative enforcement, sanctions may be deemed of “criminal nature”, thus, as affirmed both by ECtHR and CJEU, for those sanctions the criminal law principles should apply. In particular, the ECtHR case law

¹⁰⁸ See i.a. C-105/14, *Taricco*, where the CJEU affirmed that in case of limitation period of pending criminal proceedings, the disapplication of a national provision would not breach art 49(1) CFREU as the effect of disapplication would only allow the effective prosecution of the alleged crimes, and to ensure, if necessary, that penalties provided by law are applied, as “*It would in no way lead to a conviction of the accused for an act or omission which did not constitute a criminal offence under national law at the time when it was committed (see, by analogy, judgment in Niselli, C-457/02, EU:C:2004:707, paragraph 30), nor to the application of a penalty which, at that time, was not laid down by national law. On the contrary, the acts which the accused are alleged to have committed constituted, at the time when they were committed, the same offence and were punishable by the same criminal penalties as those applicable at present.*” (par. 56).

¹⁰⁹ S. Peers, T. Harvey ... *Commentary to the Charter*, p. 1353 ff. See also where the CJEU affirmed that “*Article 49(1) of the Charter, is part of primary EU law. Even before the entry into force of the Treaty of Lisbon, which conferred on the Charter the same legal value as the treaties, the Court held that that principle followed from the constitutional traditions common to the Member States and, therefore, had to be regarded as forming part of the general principles of EU law, which national courts must respect when applying national law*”. Thus, also in those cases preceding the entry into force of the Treaty of Lisbon, art 49(1) may apply.

¹¹⁰ CJEU, case C-294/16 PPU *JZ v Prokuratura Rejonowa Łódź–Śródmieście*.

shows the identification of a category of punitive sanctions, within which substantive and procedural criminal law safeguards should be applied, to an extent proportional to the severity of the coercion or punishment.¹¹¹

5. Effective remedies in different enforcement proceedings

As mentioned above, the right to effective remedies, as enshrined in Art. 47 CFREU, is applicable to civil, criminal and administrative enforcement.

As regards the administrative enforcement, an additional reference is Art 41 CFREU, which provides for the right to good administration. Art 41 CFREU provides that :

“1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

- the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.”

This right has a double feature: on the one hand, the explanation to the Charter as well as CJEU jurisprudence clarifies that, as indicated in the Charter, this right binds the EU institutions, bodies, offices and agencies.¹¹² On the other hand, as a general principle of EU law, this right

¹¹¹ See ECtHR, *Jussila v. Finland*, 23 November 2006, application No 73053/01, cons. 43: “*There are clearly ‘criminal charges’ of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a “criminal charge” by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties, prison disciplinary proceedings, customs law, competition law, and penalties imposed by a court with jurisdiction in financial matters. Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency*”. See also ECtHR, *Grande Stevens and others v. Italy*, 4 March 2014, application No 73053/01, cons. 94 et seq.

¹¹² See CJEU in case *Cicala*, 28 and later on Case C-166/13 *Mukarubega*, para 43–50, with further references. Note that a different approach was taken in Case C- 277/11 *M.M.*, paras 81–84 where the CJEU decided the case on the assumption that Art 41 binds also Member States when they act within the scope of EU law.

has a wider scope and also binds the Member States when they act within the scope of EU law.¹¹³

Thus, 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 on the basis of the rights of defence qualified as general principle of EU law.

A partial overlap between Art. 41 and Art. 47 CFREU may emerge, for instance, as regards the right to be heard. On the one side Art. 41(2)(a) provides that the right of good administration includes “*the right of every person to be heard, before any individual measure which would affect him or her adversely is taken*”; on the other Art. 47 includes the same right within the right to fair trial.¹¹⁴

Similarly, access to a file, guaranteed under Art. 41(2)(b), or the obligation of the administration to give reasons, laid down in Art. 41(2)(c), may both overlap with the protection provided under Art. 47¹¹⁵ and, in so far as concerns the adversarial principle, which is inherent to Art 47, include the right to examine all the documents submitted to the court.¹¹⁶

Such an overlap is not uncommon as, for instance, in the migration and asylum proceedings the boundaries between administrative and judicial phase is not always clear cut in the national enforcement systems.¹¹⁷

Casesheet n. 3.4 - Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration

Facts: In 2009, Mr Samba Diouf, a Mauritanian national, submitted to the competent department of the Luxembourg Ministry of Foreign Affairs and Immigration an application for international protection. Mr Samba Diouf asserted that he had left Mauritania in order to flee from slavery and that he wished to settle in Europe in order to live in better conditions and start a family. He also expressed the fear that his former employer would have him hunted down and killed.

The application for international protection submitted by Mr Samba Diouf was examined under an accelerated procedure, in accordance with Article 20(1) of the Luxembourg Law of 5 May 2006, and was rejected as unfounded by the Luxembourg Minister for Labour, Employment and Immigration. Consequently, the Minister ordered Mr Samba Diouf to leave Luxembourg; the subsidiary protection claim was also rejected.

¹¹³ In Case C-604/12 *H.N.*, 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. Moreover, in C-349/07, *Sopropé*, the CJEU affirmed that the authorities of the Member States must comply with the EU general principles every time they take decisions which come within the scope of EU law.

¹¹⁴ Case C-530/12 *National Lottery Commission*, paras 53–54.

¹¹⁵ 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. *Heylens* case law’, recently confirmed in relation to Article 47 in, for instance, Case C-437/13 *Unitrading* EU:C:2014:2318, para 20.

¹¹⁶ Case C-300/11 *ZZ* EU:C:2013:363, paras 55 and 56.

¹¹⁷ See Module 5.

Mr Samba Diouf brought an action before the Tribunal Administratif, seeking annulment of the decision. The Tribunal Administratif held that Article 20(5) of the Law of 5 May 2006, which does not provide for any appeal against the administrative authority's decision to rule on the merits of the application for international protection under the accelerated procedure, gave rise to questions concerning the interpretation of Article 39 of Directive 2005/85, with respect to the application of the general principle of the right to an effective remedy.

Legal issues:

The Tribunal Administratif raised two questions:

- in its first question, it asked the ECJ to clarify whether Article 39 of Directive 2005/85/EC precludes national rules, pursuant to which an applicant for asylum does not have a right to appeal to a court against the administrative authority's decision, to rule on the merits of the application for international protection under an accelerated procedure.
- in case the answer to the previous question was negative, the ECJ was requested to assess the compatibility of such an interpretation of Article 39 of Directive 2005/85/EC with Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR).

Reasoning of the Court:

The ECJ observed, at the outset, that the right to an effective remedy is a general principle of EU law, which is now protected by Article 47 of the Charter.

It then recalled its jurisprudence on case C-13/01, *Safalero*, [2003] ECR I-8679, paragraphs 54 to 56, in which it held that such principle did not preclude national legislation under which an individual cannot bring court proceedings to challenge a decision taken by the public authorities, where there is available to that individual a legal remedy which ensures respect for the rights conferred on him by EU law and which enables him to obtain a judicial decision finding the provision in question to be incompatible with EU law.

Accordingly, the absence of a remedy against the decision relating to the procedure does not constitute an infringement of the right to an effective remedy, provided, however, that the legality of the final decision adopted in an accelerated procedure may be the object of a thorough review by the national court, within the framework of an action against the decision rejecting the application.

What is important, therefore, is that the reasons justifying the use of an accelerated procedure may be effectively challenged at a later stage before the national court and reviewed by it within the framework of the action that may be brought against the final decision closing the procedure relating to the application for asylum.

In relation to the accelerated procedure, it will be for the national court assess, in relation to the circumstances at stake, whether such a right is duly respected. In particular, taking into account the procedural differences between the accelerated procedure and the ordinary procedure, it will be for the national court to determine whether the time-limit for bringing an action of 15 days in the case of an accelerated procedure is sufficient to prepare and bring an effective action. On the contrary, the fact that the applicant for asylum has the benefit of two levels of jurisdiction only in relation to a decision adopted under the ordinary procedure does not imply that Directive 2005/85 does require there to be two levels of jurisdiction. All that matters is that there should be a remedy before a judicial body, as is guaranteed by Article 39 of Directive 2005/85. The principle of effective judicial protection, in fact, affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction.

5.1. Is art 47 CFREU applicable also to independent regulatory authorities?

The wording provided by Art. 47 CFREU is not limited to administrative, civil and criminal judicial courts, as the wording of the article use the term of “tribunal”, however the CJEU never provided a specific definition of such term. As mentioned above, the caselaw of the CJEU on the preliminary ruling jurisdiction may provide some features to identify which are the boundaries of the concept of “tribunal”.¹¹⁸

Although arbitral bodies are excluded from the application of Art. 267 TFEU, as they are established on the basis of an agreement between the parties; but the jurisprudence of the CJEU shows that national bar councils¹¹⁹ or independent authorities may instead be qualified as tribunals, if they comply with the mentioned elements, and in particular those of independence and impartiality.¹²⁰

For instance, in *Panicello*,¹²¹ the CJEU addressed in detail the features of the *Secretario Judicial*, who presented the preliminary ruling, in order to verify if it was entitled to be qualified as ‘tribunal’. In particular, the lack of independence of the deciding body and the fact that the jurisdiction lacked a mandatory feature, falling more into an administrative procedure than in a judicial one were sufficient to affirm that the *Secretario Judicial* was not a tribunal.

It is important to note that in some cases, the CJEU clarified the importance of the collaboration between national sectorial authorities and courts in order to provide access to EU system in the perspective of art 47 CFREU. For instance, in *Schrems*, the CJEU affirmed that “[i]t is incumbent upon the national legislature to provide for legal remedies enabling the national supervisory authority concerned [i.e. Data protection authority] 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.”

In another case, only the coordination and collaboration between independent authorities and judicial courts allowed to overcome the problem of access to EU courts by independent authorities. For instance, the *Belov*¹²² case was submitted directly by the Bulgarian equality body, which was eventually deemed as inadmissible due to the fact that the referring body could not be defined as a tribunal. Then, the Sofia Administrative Court facing a very similar case, where the same defendant was appealing against the decision of the Bulgarian equality body, refer a preliminary ruling to the CJEU. In *Nikolova*,¹²³ then, the CJEU addressed the issues that were common to both cases.¹²⁴

¹¹⁸ See above in par. 2.2.

¹¹⁹ Case *Torrise* (20-25)

¹²⁰ See *Wilson*, and *RTL 517/09* on broadcasting authorities.

¹²¹ CJEU, Case C-503/15, *Ramón Margarit Panicello v Pilar Hernández Martínez*

¹²² CJEU, case C-394/11, *Valeri Hariev Belov v CHEZ Elektro Bulgaria AD and Others*.

¹²³ CJEU, case C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*

¹²⁴ See S. Cox, *When all the people in a district are victims of race discrimination: CJEU ruling in CHEZ v Nikolova*, EU law analysis, 24 July 2015, available at

<http://eulawanalysis.blogspot.it/2015/07/when-all-people-in-district-are-victims.html>.

6. Comparative analysis of the CJEU approach towards remedies within the different fields

The effectiveness of remedies is a matter that was analysed by the CJEU in different fields. Although a direct comparison is not feasible as the number of cases available in some areas is limited, and the factual circumstances are not always comparable, the comparative analysis will take as a proxy the specific aspect that the cases have dealt with.¹²⁵

	Consumer protection	Migration	Asylum	Non-discrimination	Criminal law
Ex officio	Banif Plus Bank	Benallal (only Opinion)			
Right to be heard		Mukarubega			
Right to fair trial					
Right to an effective remedy	Kusionova	Abdida		H.I.D.	
Right to defence		Boudjlidia			
Right to appeal	Sanchez Morcillo I Sanchez Morcillo II ACICL	Samba Diouf			
Collective redress	Pohotovost				
Out-of-court settlement	Alassini				

From the analysis of the reasoning used by the CJEU in its own case law related to Art. 47 CFREU to justify the conclusions in different areas of law. For instance, both decisions related to *Sanchez Morcillo* case mention expressly the migration law case of *Samba Diouf* on the right of appeal.¹²⁶ Similarly, in the migration law case of *Boudjlida* the CJEU expressly mentions the *Alassini* case as regards the balancing exercise between rights of the defence and possible national limitations.¹²⁷

The CJEU not only mentions cases that emerge in different areas of law, but in comparable cases, it shows a similar approach in the application of Art. 47 CFREU. This can be

¹²⁵ Note that the cases included in the table will be updated throughout the project ACTIONES.

¹²⁶

¹²⁷ See para 43.

demonstrated through the following comparison between the analysis provided in consumer law and in migration law. The two cases address the existence (in the Slovakian case) or the lack (in the Belgian case) of interim measure having suspensive effect.

KUSIONOVA	ABDIDA
<p>Facts: Extrajudicial enforcement of a debt Auction sale of the immovable property given as security Opposition to auction sale without suspensive effect Risk of loss of the family home for the claimant</p>	<p>Facts: Refusal of a third country national for leave to remain Appeal but without suspensive effect Real risk for life or physical integrity of the claimant</p>
<p>Legal issues: Analysis of the overall procedural system Effectiveness and dissuasiveness of remedies (penalty)</p>	<p>Legal issues: EU law requires a right of appeal but does not require the appeal to have suspensive effect (Art. 13(1) Return directive)</p>
<p>Reasoning of the Court: Interim measures are justified to protect the consumer’s fundamental right to a house (Art. 7 CFREU) Reference to ECHR jurisprudence on loss of house</p>	<p>Reasoning of the Court: Balance between Arts. 47 and 19(2) CFREU with Art. 3 ECHR (non-refoulement principle in exceptional cases) Interim measures are justified to protect fundamental right to health If non-existent they should be made <i>ipso jure</i> available (ECtHR decision in <i>Gebremedhin</i>)</p>
	<p>Subsequent decision: TALL</p>
	<p>If no risk of ill-treatment, there is no need to provide suspensive effect on appeal Coordination between Art. 13 ECHR and Art. 47 CFREU</p>

The comparison show a similar reasoning structure. First of all, the CJEU address the overall procedural system at national level and the effects of the lack of interim relief available at national level. In both cases the CJEU then clarifies that the national procedural system provides for effective judicial protection, as the measures available for the claimants are sufficient and compliant with EU law. Thus, no interim relief should be introduced, as it is neither required by secondary EU law nor provided for in national implementing measures. Additionally, the cases involve other fundamental rights that relate to the claimants, respectively the right to a house and the right to health. Here the CJEU does not limit the references to the Charter to Art. 47 but expressly mentions Art. 7 and Art. 19(2), as well as relevant ECtHR case law. Given the specificities of the cases, the CJEU came to the conclusion that the concurring fundamental rights support the view that interim relief must be available.