

# Effective Remedy in the ECHR protection system and the EU legal order

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# Effective remedy

## ECHR

- **Article 13 – Right to an effective remedy**

“Everyone whose rights and freedoms as set forth in [the] 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.”

## CFREU

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

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

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

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

# Harmonizing clause

- Art 52/3 Charter

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

- Art 53 Charter

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.”

# Remedy

- Institutionlized procedural mechanism structured in accordance with some understanding of the notions of fairness and rule of law
- Double layer:
  - procedural aspect concerns access, initiation and employment of institutionalized procedural mechanism of providing relief
    - in compliance with some notion of fairness
  - substantive (material) aspect concerns an adequacy of available redress
    - in compliance with some notion of proportionality/compensatory justice

# Rule of Law - Rule of Rights

- The notion of “remedy” presupposes concept of “rights”
  - Conceptually, rights are limits of the reach of governmental (state) power; they restrain autocratic and arbitrary conduct; command government what it cannot do
  - guarantees of personal self-governance; safeguard personal autonomy
- The right to remedy itself is restraint on the state power telling the government what it cannot do: *leave rights of individuals not being carried out effectively* (positive right – command to take action)
  - commands the government to establish procedural mechanism for enforcement of all other substantive rights recognized to individuals
  - presupposes separation of state power (another structural restraint of power) with its accompanying notion of checks and balances
  - more fundamentally it presupposes that state power always remains within the control of the people from whom it originates and whose common interests it serves
    - legitimacy of state power is contingent on effective respect of rights of individuals

# Effective Remedy: Art 13 ECHR

Travaux préparatoires to the ECHR:

- the object of Article 13 is to provide ***a means*** whereby individuals can obtain ***relief*** at national level for violations of their Convention rights ***before having to set in motion the international machinery*** of complaint before the Court
  - Kudła v. Poland [GC], 2000, § 152

# International Law Framework

- Sovereign autonomy of Contracting Parties
  - CoE does not have legislative powers
    - Scrutinize implementation of contractual obligations, including effectiveness and efficiency
  - Regulatory law-making autonomy rests with the states
    - Structuring (institutional, procedural and substantive) of the national legal order rests exclusively with the states
    - Institutional architecture as well procedural rules are within the preview of national legislators
- Subsidiarity conditionality
  - The ECHR system of protection can be activated only after claims of violations had been scrutinized within national legal order
  - “outsourcing” of responsibility for protection to the ECHR would implode the system

# The structure of Art 13 right

- Includes three elements/factors; in their semantic order they are:
  - (presumption of) violation of some (other) Convention right
  - availability of reparation mechanism
  - existence of national authority provided with enforcement competence.
- not self-standing
  - serves to facilitate enforcement of other “substantive” Convention rights
- subsidiarity mechanism
  - the exhaustion requirement



# Unpacking the Remedy

- Logical ordering:
  - basic presumption of recognized (fundamental) rights
    - right of substantive content
      - right of procedural content to enforcement mechanism (remedy)
  - claim of harm done - substantive right had been violated
  - need for legal protection – *the right to* acquire remedy
    - legally provided form of action
    - designated authority responsible for lodged action
      - unbiased and fair decision-making procedure
      - reasoned decision
    - redress of harm

# The Arguability Condition

- To acquire Art 13 protection an applicant must have an arguable *primary claim* of violation of a substantive Convention right
  - the question of arguability is the question of the *applicability* of Art 13 (Vilvarajah and Others v. the United Kingdom, 1991, § 121; Chahal v. the United Kingdom, 1996, § 147)

# Scale of Applicability

- Tied faiths:
  - primary claim justified → Art 13 claim applicable
    - not necessarily justified
  - primary claim admissible → *prima facie* arguability, Art 13 applicable
    - not necessarily justified
  - primary claim admissible but unjustified → Art 13 claim likely but not necessarily inapplicable
    - cases of clear denial of access to or effectiveness of remedial mechanism
  - primary claim “manifestly ill-founded” → unarguable, hence inapplicable

# Art 13: National Authority

- Decide *in meritorum* claims of substantive rights violation claim and award appropriate redress if violation established
- The national authority may take a form of a quasi-judicial body such as an ombudsman (Leander v. Sweden, 1987), an administrative authority such as a government minister (Boyle and Rice v. the United Kingdom, 1988), or a political authority such as a parliamentary commission (Klass and Others v. Germany, 1978).
- Whatever the form the authority must be:
  - sufficiently independent (Khan v. the United Kingdom, 2000 (§§ 45-47))
    - no control by those who are under scrutiny
    - control cannot be neither appointing power or financial dependency
  - decisions must be legally binding
  - basic criteria of transparency
    - sufficient information regarding procedural steps
    - legal representation in communication must be allowed
    - decisions must be disclosed

# Art 13: Effectiveness

## Basics

- To be effective, a remedy must be capable of directly providing redress for the impugned situation (Pine Valley Developments Ltd and Others v. Ireland, Commission decision, 1989)
- assessed in relation to each complaint specifically;
- nature of the right has implications for the type of remedy required under Article 13 (Budayeva and Others v. Russia, 2008, § 191)
  - either preventive or compensatory

# Art 13: Effectiveness

## Type and Form

- Decision must
  1. establish responsibility for the breach and
  2. provide compensation for the pecuniary and non-pecuniary damage (T.P. and K.M. v. the United Kingdom [GC], 2001, § 107)
- decision of the national authority must
  - address all essential elements of the alleged violation as presented in the applicant's claim (Hatton and Others v. the United Kingdom [GC], 2003, § 141)
- various forms possible:
  - annulment, withdrawal or amendment of an act breaching the Convention,
  - an investigation, reparation, or sanctions imposed on the person responsible for the act

# Art 13: Effectiveness

## Basic Fairness

- Excessively restricted access
  - locus standi (Camenzind v. Switzerland, 1997 (§ 54)),
  - time-constraints
  - (self)representation (Petkov and Others v. Bulgaria, 2009 (§ 82); Margareta and Roger Andersson v. Sweden, 1992 (§101))
- Minimal standard of promptness (Payet v. France, 2011, §§ 131-134; Vidas v. Croatia, 2008, § 37)
- Available in law and actual practice (M.S.S. v. Belgium No. 30696/09, 2011, §288)
  - must not depend on the acts of the state bodies and official and cannot be hindered by their omissions (Paul and Audrey Edwards v. the United Kingdom, 2002, § 96)
- The Government carries a burden of demonstrating practical effectiveness of the remedy that they have suggested (Kudła v. Poland [GC], 2000, § 159; Segerstedt-Wiberg and Others v. Sweden, 2006, § 120; Stanev v. Bulgaria [GC], 2012, § 219)
  - provide relevant examples of case-law from national courts or pointing to the decisions of administrative authorities in a similar case
  - provided practice must be stable and predictable (Čonka v. Belgium, 2002, § 83)
  - single decision not enough even if elaborated and rendered at highest level

# Art 13: the Reach of the Protection

- Decisions of state institutions and officials capable of violating rights of concrete individual:
  - Acts of the administration or the executive (Al-Nashif v. Bulgaria, 2002, § 137).
  - Acts of the individuals falling within the scope of positive obligations of the State (Plattform “Ärzte für das Leben” v. Austria, 1988, §§ 34)
- Acts of Legislature – laws and general policies – cannot be challenged as such
- Regarding judicial proceedings as remedy Art 13 does not require:
  - specific type of court
  - multi-layered jurisdiction
  - right to appeal
  - constitutional complaint
- Art 13 not applicable where the alleged violation has taken place in the context of judicial proceedings
  - argument that a denial of action by a court where competence was not granted violates Art 13 not allowed
  - except the right to trial within a reasonable time
  - higher standards of protection from Art 6 apply



# The EU's Key Procedural Right

- Article 47 of the Charter of Fundamental Rights of the European Union lays down the **'right to an effective remedy and to a fair trial'**

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

Everyone is entitled to a ***fair and public hearing*** within a reasonable time by an ***independent and impartial tribunal*** previously established by law. Everyone shall have ***the possibility of being advised, defended and represented***.

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

# Art 47

## The Roots

- Joined Cases C-317/08 to C-320/08 *Allassini*

Secondly, 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 (see *Mono Car Styling*, paragraph 47 and the case-law cited).

# Effective Judicial Protection

- Case 222/84 Johnston

*„...it must be borne in mind first of all that article 6 of the Directive requires Member States to introduce into their internal legal systems **such measures as are needed** to enable all persons who consider themselves wronged by discrimination ' **to pursue their claims by judicial process**'.*

*It follows from that provision that the **Member States must take measures which are sufficiently effective to achieve the aim** of the Directive and that **they must ensure that the rights thus conferred may be effectively relied upon before the national courts** by the persons concerned .*

*The requirement of judicial control stipulated by that article **reflects a general principle of law which underlies the constitutional traditions common to the member states**. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”*

# Union Based on the Rule of Law

- C-50/00 P - *Unión de Pequeños Agricultores v Council*

“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.”

# Application of the Principle

- ***effective judicial protection*** to be provided
  - when national courts interpret national law, to provide effective remedies and procedures when dealing with rights under Union
    - Art 267 TFEU mechanism
  - when the CJEU interprets Treaty provisions as applied by EU bodies;
  - when the CJEU reviews the validity of secondary law, eventually entailing also disapplication;

# What Has Made Judicial Protection „fundamentally” Effective

- **No arguability threshold**
- **Pursue their claims by judicial process**
  - ❖ **courts must be independent and impartial/rule of law**
  - ❖ **access to courts (from locus standi to statutory limitations rules)**
    - disclosure/transparency issues
      - **principle of (minimum) good governance**
  - ❖ **trial must be procedurally structured in fair manner (procedural due process)**
    - the right of defence
    - right to representation
    - Right to fair distribution of burden of proof/rules of evidence
    - the right to reasonable length of proceedings
  - ❖ **system of sanctions must be appropriate**
- **“Procedural rule of reason” applies**
  - ❖ **Equivalence**
  - ❖ **Necessity**
  - ❖ **Proportionality**

# Amenable Character

- the principle of effective judicial protection has been functioning as an „umbrella principle”
  - it comprises various elements, which themselves, per se, constitute rights or principles
  - they have often been applied in a flexible manner
    - sometimes as self-standing principles, sometimes in connection with the principle of effective judicial protection or as a part of it
- those separate elements are today reflected in Art 41, Art 47 and Art 48 CFREU

# Sister provision: Art 41

- Right to good administration
  1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
  2. This right includes:
    - (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
    - (b) 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;
    - (c) the obligation of the administration to give reasons for its decisions.
  3. Every person has the right to have the Union 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.



# Sister Provision: Art 48

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

# More Effective Effectiveness

- Basic reasons why Art 47 cannot be easily compared either to Art 13 ECHR or Art 6 ECHR
  - EU rule of law principle entails enforcement of all rights provided by EU legislature
    - Art 47 protection extends to whatever **court** – civil, criminal or administrative - enforcing EU law
  - EU effectiveness principle entails judicial protection
    - the starting point for Art 47 is Art 6 ECHR while Art 13 is of minor relevance
  - EU supremacy principle entails higher level of scrutiny of national procedural law provisions
    - Art 47 is buttressed by the requirements of equivalence and necessity being structural elements of fundamental principle

# The Right and/or the Fundamental Principle

- The distinction between the Right and the Fundamental Principle
  - not primarily about the substance (substantive/material content)
  - ***rather about the scope of application (the reach)***
    - consequently, about the authority and strength of the Court's scrutiny over conduct of national authorities in MSs, including national judiciary

# „In the Scope of of EU Law”

- C-617/10 *Fransson*

”20 That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 DEB [2010] ECR I-13849, paragraph 32). According to those explanations, ***‘the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law’***.

21 Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. ***The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.***

22 Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-466/11 Currà and Others [2012] ECR, paragraph 26).”

# Access to Protection:

## Rule of Law – Rule of Courts

- Protection MUST be JUDICIAL in character
  - Art 52 CFR refers to relevant treaty provisions
  - Art 19 TFEU
    - Fundamental Principle of Judicial Protection
      - goes beyond the limits of Charter applicability
      - essential feature of the rule of law which is the shared corner stone of legitimacy of both EU and national legal orders
    - Courts must be **independent** (institutional requirement) and **impartial** (procedural requirement)
  - Certain fundamental features of constitutional architecture are intertwined in a manner that the two are inseparable at the fundamental level;
    - hence a threat to one is always necessarily a threat to the other too

# Judicial Independence

- C-64/16 Associação Sindical dos Juízes Portugueses
- C-618/19 Commission v Poland, (2019)
- C-585/18, C-624/18 and C-625/18, A.K. (Independence of the Disciplinary Chamber of the Supreme Court),
- C-924/19 PPU and C-925/19 PPU Országos,
- Two aspects:
  - External dimension (institutional requirements)
  - Internal dimension (procedural requirements)
    - C-554/21 HANN INVEST (pending)

# Access to Protection: Procedural Aspects

- Type of action  
(222/84 Johnston;  
C-583/11 P Inuit)
  - suite against the  
State (C-46/93  
Factortame; C-224/01  
-Kobler)
  - collective  
redress/class  
action (C-54/07  
Firma Feryn; C-81/12  
Accept)
- Conditions of proceedings initiation (C-97/91  
Oleificio; C-13/01 Safalero; C-63/08 Pontin; C-181/16  
Gnandi;)
  - locus standi (C-432/05 Unibet; C-214/16  
King)
  - amicable settlements; arbitration  
pretrial investigations; (C-284/16  
Achmea)
  - time limitations; value caps/ceilings  
(C-63/08 Pontin 489/07 Pia Messner;  
C-418/11 Texdata Software; C-19/13 Fastweb;  
C-651/19 JP)
  - suspension order (C-181/16 Gnandi )
  - disclosure of information necessary for  
claim evaluation (226/86 Heylens;  
Schrems; C-437/13 Unitrading)
    - Art 41: good governance
    - Interventions of independent bodies

# Fair Trial

- Equality of Arms (C-305/05 *Ordre des barreaux francophones*)
  - Right to be heard/Right of defence (C-199/99 P *Corus UK*; C-283/05 *ASML*; C-341/04 *Eurofood*)
    - the adversarial principle (C-450/06 *Varec*; C-276/01 *Steffensen*)
  - Representation (*Krombach*, case C-7/98)
  - Procedural transparency
    - Access to file (C-63/01 *Evans*; C-402/05 P *Kadi*; C-300/11 *ZZ*)
    - Public hearings
  - Burden of Proof Rules (199/82 *San Giorgio*, 109/88 *Danfoss*, *CHEZ*)
  - Public and Elaborated (reasoned) decision (C-221/97 P *Schröder*; C-583/11 P *Inuit*)
- Reasonable Length (C-385/07 P *Der Grüne Punkt*; C-185/95 *Baustahlgewebe*)



# Limited Procedural Autonomy: Non-discrimination and Minimal Effectiveness

- 33/76 REWE-ZENTRAL

„The prohibition laid down in Article 13 of the Treaty ...have a **direct effect and confer on citizens rights** which the national courts are required to protect .

Applying ***the principle of cooperation*** laid down in article 5 of the Treaty, **it is the national courts** which are **entrusted with ensuring the legal protection** which citizens derive from the direct effect of the provisions of Community law.

Accordingly, 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...

In the absence of such measures of harmonization the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.

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 .

This is not the case ***where reasonable*** periods of limitation of actions are fixed .

The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the tax-payer and the administration concerned .”

# Impossible or Excessively Difficult

- C-312/93 *Peterbroeck*

For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law ***impossible or excessively difficult*** must be ***analysed*** by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.

In the light of that analysis the basic principles of the domestic judicial system, such as protection of the *rights of the defence*, the principle of *legal certainty* and the *proper conduct of procedure*, must, where appropriate, be taken into consideration.

# Execution of Judicial Decisions

- The judgment of a court cannot remain ineffective because that court does not have any means of securing observance of that judgment
  - C-556/17 *Torubarov*,
  - C-752/18 *Deutsche Umwelthilfe*
    - order the coercive detention of state officials responsible for violation of EU environmental law

# No Right to Appeal

- C-93/12 Agroconsulting

As regards, next, the principle of effectiveness, it must be recalled that, from the point of view of the analysis required by the case-law cited at paragraph 38 above, the question whether a national procedural provision renders the exercise of an individual's rights under the European Union legal order *impossible in practice or excessively difficult* must be assessed taking into consideration, as appropriate, the principles which lie at the basis of the national legal system concerned, such as the *protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings* (see inter alia, to that effect, *Peterbroeck*, paragraph 14, and *Pontin*, paragraph 47).

the case in the main proceedings, the referring court must, as regards the concerns set out at paragraphs 30 and 31 above, take account of the following factors.

...

So far as concerns, lastly, **Article 47** of the Charter, it is apparent from the Court's case-law that that provision **constitutes a reaffirmation of the principle of effective judicial protection**, a general principle of European Union law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention ... (see to that effect, inter alia, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37; and Case C-334/12 *RX-II Arango Jaramillo and Others v EIB* [2013] ECR, paragraph 40).

In the present case, it is sufficient to observe in this connection that, taking account, inter alia, of the considerations expressed in paragraphs 50 to 58 of this judgment and in the light of the information available to the Court in these proceedings, it does not appear that an individual in a position such as that of Agroconsulting is deprived of an effective remedy before a court with a view to defending rights derived from European Union law.

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

# Redress/Sanctions

- Already in the **Case 14/83 von Colson** the Court held that „national remedies had to guarantee real and effective judicial protection”:

“22 It is impossible to establish real equality of opportunity without an appropriate system of sanctions. ...

23 Although, as has been stated in the reply to Question 1, full implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection.

Moreover, it must also have a real deterrent effect on the employer. It follows that where a member state chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.”

# Effectiveness of Redress

- No specific form of redress required:
  - Restitution
    - in kind or financial compensation
      - effectiveness: must be adequate and enable making good and damage sustained (C-271/91, M. Helen Marshall; C-180/95 Draehmpaehl)
        - » pecuniary and non-pecuniary damages
        - » no disproportional caps/ceallings
      - equivalence applicable (C-78/98 Preston)
    - special performances (C-489/07 Messner; C-65/09 - Gebr. Weber and Putz)
      - if mandated by secondary law elaborating the principle of effective remedy
    - suspensive remedies/injunctions (C-314/12 UPC)

# Limitations of the Right/Principle

## Art 52/1

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

## Principle

- C-320/08 Alassin  
“fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to **objectives of general interest** pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a **disproportionate and intolerable interference** which infringes upon the very substance of the rights guaranteed”

# Provided by Law

- C-562/12 Eesti-Läti programmi 2007-2013 Seirekomitee,

67 The first paragraph of Article 47 of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.

68 To ensure that the right to an effective remedy within the EU is upheld, the second subparagraph of Article 19(1) TEU requires the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

69 In a case such as that in the main proceedings, the rejection of an application for aid by the Seirekomitee means that the applicant is definitively excluded from the procedure allocating the aid cofinanced by the EU, without any decision being communicated to it subsequently.

70 Furthermore, it is apparent from the second sentence of the first subparagraph of Chapter 6.6 of the programme manual that the decisions of the Seirekomitee are not appealable. It is therefore not possible for an applicant whose application for aid has been rejected to contest that rejection decision.

71 In those circumstances, the lack of any remedy against such a rejection decision deprives the applicant of its right to an effective remedy, in breach of Article 47 of the Charter.

72 It must be added that Article 52(1) of the Charter accepts that limitations may be made on the exercise of the rights and freedoms recognised by the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

73 ***In any event, the lack of remedy against a decision rejecting an application for aid, such as that at issue in the main proceedings, was provided for by the Seirekomitee and not by law.***

74 Consequently, it must be found that, ***in so far as it provides that a decision of the Seirekomitee rejecting an application to aid cannot be subject to an appeal, the programme manual does not comply with the principle of effective judicial protection*** laid down in the first paragraph of Article 47 of the Charter.

75 Furthermore, it must be borne in mind that the requirement for judicial review of any decision of a national authority constitutes a general principle of EU law. Pursuant to that principle, it is for the national courts to rule on the lawfulness of a disputed national measure and to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case (see, to that effect, judgment in *Oleificio Borelli v Commission*, EU:C:1992:491, paragraphs 13 and 14).



# Essence of Effective Judicial Protection

- C-279/09 DEB

In the light of all of the foregoing, the answer to the question referred must be that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.

In that connection, **it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right**; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.

In making that assessment, the national court ***must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the 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.

- C-314/13 Peftiev

As regards the Lithuanian Government's argument that the respondents in the main proceedings could obtain legal aid as provided for under national law in order to obtain legal representation, suffice it to note that, ***through Article 3(1)(b) of Regulation No 765/2006, the European Union legislature introduced a coherent system in order to ensure observance of the rights guaranteed by Article 47 of the Charter***, irrespective of any freezing of funds. ***When a person included in the list in Annex I to that regulation must have recourse to necessary legal services, it cannot be that that person must be regarded as destitute due to that freezing of funds; rather, that person must be able to apply to have certain funds or economic resources released***, provided that the conditions set out in that provision are satisfied.

**The very essence of Article 3(1)(b) precludes the competent national authority from refusing to authorise a release of funds on the ground that such a person may have recourse to legal aid.**

As regards the criteria to be taken into consideration by the competent national authority when deciding on a request for a derogation, Article 3(1)(b) of Regulation No 765/2006 sets out limitations on the use of funds: they must be intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services.

# Grounds of General Interest

- Examples from the caselaw:
  - established Rewe/Peterbroock principles still prevail – „the rights of the defence, the principle of legal certainty and the proper conduct of procedure”
    - time-limits: C-470/99, Universale-Bau AG; C-500/16, Carterpillar Financial Services; C-637/17, Cogeo Communications; C-676/17, Călin; C-280/18, Alain Flausch
    - res-judicata/duble jeopardy: C-119/05, Lucchini; C-2/08, Fallimento Olimpiclub; C-213/13, Pizzarotti; C-64/14, Târsia
    - ius standi rules: C-510/13, E.ON FoldgazTrade
  - considerations pertaining to the security of the EU or of its Member States
    - Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Kadi II; C-300/11 ZZ;
  - the existence of swift, effective and less costly dispute settlement
    - Joined Cases C-317-320/08 Alassini; C-619/10 Trade Agency
  - protection of health and life
    - procedural limitations due to COVID-19
  - autonomy of religious organisations („organization’s ethos”)
    - C-414/16 Egenberger

# Proportionality

- Different Aims – Different Types of Scrutiny
  - difference in the review of a limitation of a fundamental right for reasons of
    - an objective of general interest
      - the test would seem a traditional one, i.e. in particular a strict test of proportionality
    - to protect the rights and freedoms of others
      - the need to reconcile the requirements of the protection of the different rights
      - C-450/06 Varec

*“On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.*

*The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute (see, by analogy, Case C-438/04 Mobistar [2006] ECR I-6675, paragraph 40) and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial.*

*To that end, the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets (see, by analogy, Mobistar, paragraph 40).”*