

## **RIGHT TO AN EFFECTIVE REMEDY AND TO A FAIR TRIAL IN EU LAW**

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### **1. Article 47 of the Charter in its context**

Article 47 of the Charter:

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.

Article 52(3) of the Charter:

Scope and interpretation of rights and principles

[...]3. 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.

Article 13 of the ECHR:

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

Article 6(1) of the ECHR:

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.

## 2. Effective judicial remedies before the EU courts

### 2.1. Judicial review in the area of CFSP

*Opinion 2/13*, EU:C:2014:2454 (EU's accession to the ECHR)

Pending cases:

*Elitaliana / Eulex Kosovo*, C-439/13 P (appeal against GC's order in *Elitaliana v Eulex Kosovo*, T-213/12, EU:T:2013:292)

*Kanageswaran*, C-7/15 (preliminary reference from Landgericht Essen: 'Is the inclusion of the Liberation Tigers of Tamil Eelam in the list referred to in Article 2(3) of Council Regulation (EC) No 2580/2001 [...] invalid?')

*Rosneft*, C-72/15 (preliminary reference from the High Court of Justice of England and Wales: 'Does the Court of Justice have jurisdiction to give a preliminary ruling under Article 267 TFEU on the validity of Council Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine?')

### 2.2. Judicial review in the context of competition investigations

#### 2.2.1. Scope of review: Chalkor, KME and Menarini

ECtHR, *Menarini Diagnostics Srl v. Italy*, no. 43509/08.

*Chalkor / Commission*, C-386/10 P, EU:C:2011:815, paragraphs 62-63.

*KME and Others / Commission*, C-272/09 P, EU:C:2011:810, paragraphs 102- 103:

'The Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission's margin of discretion ... as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.

The review of legality is supplemented by the unlimited jurisdiction... That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.

*MasterCard / Commission*, C-382/12 P, EU:C:2014:2201.

*Telefónica and Telefónica de España / Commission*, C-295/12 P, EU:C:2014:2062.

*Galp Energia España e.a. / Commission*, C-603/13 P (pending).

#### 2.2.2. Dawn raids: Nexans, Deutsche Bahn and Delta Pekárny

*Nexans and Nexans France / Commission*, C-37/13 P, EU:C:2014:2030.

*Deutsche Bahn/Commission*, C-583/13 P (pending) – Opinion of Advocate General of 12 February 2015: 'Is the current EU system of inspections under Regulation (EC) No 1/2003 (2) compatible with Articles 7 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter')? and (ii) what are the consequences, within that system, of an illegal search by the Commission?'

ECtHR, *Société Colas Est and others v. France*, no. 37971/97, ECHR 2002.

ECtHR, *Delta Pékárny AS v. the Czech Republic*, no. 97/11, ECHR 2014

ECtHR, *Vinci Construction and GTM Genie Civil and Services v. France*, no. 63629/10 and no. 60567/10, judgment of 2 April 2015.

### 2.3. Rights of the defence and access to evidence (restrictive measures)

*Kadi II*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 97-100

‘The Courts of the EU must... ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights including review of such measures as are designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations...’

Those fundamental rights include, inter alia, respect for the rights of the defence and the right to effective judicial protection... The first of those rights, which is affirmed in Article 41(2) of the Charter, includes the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality... The second of those fundamental rights, which is affirmed in Article 47 of the Charter, requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the court having jurisdiction to require the authority concerned to disclose that information.’

*France / People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853.

*ZZ*, C-300/11, EU:C:2013:363.

*Council / Fulmen and Mahmoudian*, C-280/12 P, EU:C:2013:775.

*Council v Bank Mellat*, C-176/13 P (pending) – Opinion of AG of 26 February 2015.

*Rules of procedure of the General Court* (OJ 2015, L 105), Article 105.

### 2.4. Judgment within a reasonable time: *Groupe Gascogne* and *Kendrion*

*Gascogne Sack Deutschland / Commission*, C-40/12 P, EU:C:2013:768, *Kendrion / Commission*, C-50/12 P, EU:C:2013:771, *Groupe Gascogne / Commission*, C-58/12 P, EU:C:2013:770 :

‘the Court of Justice cannot allow an appellant to reopen the question of the validity or amount of a fine, on the sole ground that there was a failure to adjudicate within a reasonable time...’

...the sanction for a breach, by a Court of the European Union, of its obligation under the second paragraph of Article 47 of the Charter to adjudicate on the cases before it within a reasonable time must be an action for damages brought before the General Court, since such an action constitutes an effective remedy.’

Pending cases: *Kendrion / Court of Justice* (T-497/14), *Gascogne Sack Deutschland / Court of Justice* (T-577/14), *Groupe Gascogne / Court of Justice* (T-843/14), *Aspla and Armando Alvarez / Commission and Court of Justice* (T-40/15), *Aalberts Industries / Commission and Court of Justice* (T-725/14).

### **3. Effective judicial remedies before the national courts**

#### 3.1. Scope of application of the Charter

Article 51(1) of the Charter:

‘Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.’

*Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 19-22:

‘the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations’. ‘The applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter’.

#### 3.2. National procedural autonomy v. the principles of effectiveness and equivalence’

Judgment in *Rewe-Zentralfinanz and Rewe-Zentral*, 33/76, EU:C:1976:188, paragraph 5: ‘In the absence of relevant EU rules, it is for the legal system of each Member State to determine the system of legal measures and procedures intended to ensure the protection of the rights that individuals derive from EU law. Those measures are determined autonomously by national law, with due regard for the principles of effectiveness and equivalence’:

- national rules governing actions for safeguarding an individual’s rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law,
- the rules in question must apply, without distinction, to actions based on infringement of EU law and those based on infringement of national law having a similar purpose and cause of action.

*DEB*, C-279/09, EU:C:2010:811 (right to legal aid for legal persons in the context of a procedure for pursuing a claim seeking to establish State liability under EU law)

*Agrokonsulting*, C-93/12, EU:C:2013:432 (national legislation concentrating, before a single specialised court, all disputes concerning decisions of the national authority responsible for paying agricultural aid under the common agricultural policy).

*Orizzonte Salute*, C-61/14 (pending) – Advocate’s General opinion of 7 May 2015 (court fees applicable in administrative proceedings relating to public procurement).

*Târșia*, C-69/14 (pending) – Advocate’s General opinion of 23 April 2015:

Article 47 of the Charter of Fundamental Rights of the European Union and the principle of effectiveness ... do not preclude national rules which allow for revision of national judicial decisions delivered in administrative proceedings when there is an infringement ... of EU law and which do not allow for revision on the same basis of national judicial decisions delivered in civil proceedings.

The principle of equivalence precludes national rules which allow for revision of national judicial decisions delivered in civil proceedings because of a later judgment of the national Constitutional Court or the European Court of Human Rights, but do not allow for this with respect to a later judgment of the Court of Justice of the EU.

### 3.3. Effect of Article 47 on national procedural provisions (recent examples)

#### Locus standi in administrative proceedings

*T-Mobile Austria*, C-282/13, EU:C:2015:24, (Pursuant to the principle of effective judicial protection, it is for the courts of the Member States to ensure judicial protection of an individual's rights under EU law. Undertaking which is a competitor of the parties to a procedure for the authorisation of a transfer of rights to use radio frequencies before the national regulatory authority, where the decision is likely to have an impact on that first undertaking's position on the market, must be regarded as a person 'affected' for the purposes of Framework Telecom Directive).

*E.ON Földgáz Trade*, C-510/13, EU:C:2015:189 (Article 5 of Regulation No 1775/2005 on conditions for access to the natural gas transmission networks, read in conjunction with Article 47 of the Charter, must be interpreted as precluding national rule which does not make it possible to confer on an operator locus standi for the purpose of bringing an action against a decision of national regulatory authority relating to the gas network code).

#### Consumer law

*Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099 (Article 7(1) of Directive 93/13 on unfair terms in consumer contracts, read in conjunction with Article 47 of the Charter must be interpreted as precluding a system of mortgage enforcement inasmuch as the debtor against whom mortgage enforcement proceedings are brought, may not appeal against a decision dismissing his objection).

#### Asylum and immigration

*Mahdi*, C-146/14 PPU, EU:C:2014:1320 (Directive 2008/115 (Return directive): the scope of supervision that has to be undertaken by a judicial authority dealing with an application for extension of the detention of a third-country national)

*Abdida*, C-562/13, EU:C:2014:2453 (Directive 2008/115: incompatibility of the national provision which does provide for suspensive appeal against a decision ordering a third country national suffering from a serious illness to leave the territory of a Member State, where the enforcement of that decision may expose that person to a serious risk of grave and irreversible deterioration in his state of health)

## 4. Concluding remarks