Part III

Remedies

8

Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU

Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States

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I. INTRODUCTION

Justice is foundational for any community. Without any promise of justice, individuals could hardly agree to cooperate and, ultimately, build societies. Crucial steps in achieving justice are an effective application of the law and the protection of rights, which both aim to grant to individuals the legal entitlements promised by the laws governing a society. Seen from another point of view, justice is the fulfilment of the social and legal arrangements on which a community is founded. It follows that the idea of justice is intrinsically procedural and substantive: on the one hand, it demands clear, participatory and transparent rules to enforce the law (procedural justice) and, on the other hand, it imposes to grant everything that the law has 'promised' (substantive justice). In this context, the guarantee that courts offer redress for violations of the law (including rights) via fair trials strengthens justice and ultimately the premises on which societies are construed. As Sir Arthur Conan Doyle rightly affirmed: 'It is every man's business to see justice done.'[1]

In the light of these observations, the judicial narrative on effective remedies and protection of rights enshrined in the EU general principle of effective judicial protection[2] is not surprising: it signals the willingness of the EU judicature to achieve justice in the Member States. Not surprising is also the exponential relevance of Article 47 of the EU Charter of Fundamental Rights (Article 47) in the enforcement of EU law at the national level. This article provides the right to an effective judicial remedy and a fair trial. Whereas the former right ensures that effective redress is available in the case of violations of EU rights,

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[1] Arthur Conan Doyle, *The Memoirs of Sherlock Holmes* (London, George Newnes, 1893).

[2] Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

the right to a fair trial imposes a series of procedural guarantees to access to courts and to conduct fair judicial proceedings. Article 47 *reaffirms* the principle of effective judicial protection.[3] As pointed out by Prechal,[4] the optimal relationship between Article 47 and the principle of effective judicial protection is of complementarity: when the former provision cannot be invoked, the Court can 'fall back' to the general principle. The (partial) codification of the principle of effective judicial protection in the Charter restates the importance of this right in the EU constitutional architecture.[5]

Interestingly, the EU case law illustrates that the more defined wording of Article 47 aids the Court of Justice of the European Union (CJEU) in painting the content of the principle of effective judicial protection. In *Associação*,[6] the *Tribunal de Contas* asked the CJEU to assess whether the principle of effective judicial protection was breached by national rules reducing the salaries of judges in Portugal. The CJEU interpreted this principle in the light of Article 47,[7] which protects the principle of judicial independence. This case is a powerful example of the increasing prominence of Article 47 in scrutinising national laws.

Indeed, due to its link with the principle of effective judicial protection, Article 47 serves as a parameter for the CJEU to review national rules used to enforce EU law in the Member States. The scrutiny of national rules under Article 47 is qualitatively and quantitatively remarkable. Qualitatively, the scope[8] of Article 47 has proved to be extensive, 'capturing' not only rules used to enforce EU law *stricto sensu*, but also institutional design norms that *in abstracto* are related to the application of EU law.[9] Quantitatively, Article 47 has become the most invoked Charter provision at the national level, and preliminary references regarding this norm are increasing.[10] It is not an overstatement to say that Article 47 is almost 'omnipresent' in the EU judgments as a result of a growing number of preliminary rulings on that provision. The substantial amount of preliminary references concerning Article 47 reveals that national jurisdictions are actively engaging with the Luxembourg Court to identify the requirements stemming from that provision. In so doing, national judges utilise Article 47 to shape the way of granting justice in the areas covered by EU law via national procedural rules. The national application of Article 47 clearly reinforces the narrative on justice[11] initiated with the establishment of the principle of effective judicial protection by the CJEU. The scrutiny of the CJEU over national rules in the light of Article 47 of the Charter thus constitutes a topic of major constitutional interest, not least because of the repercussions of Article 47 as a fundamental right in the EU multi-level judiciary. Moreover, the EU case law is increasingly addressing the question of the essence of Article 47, thus laying down the foundations

[3] See Case C-348/16 *Moussa Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano* EU:C:2017:591; and Case C-243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín* EU:C:2016:838.

[4] S Prechal, 'Effective Judicial Protection: Some Recent Developments – Moving to the Essence' (2020) 13 *Review of European Administrative Law* 16.

[5] S Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in C Paulussen et al (eds), *Fundamental Rights in International and European Law* (The Hague, TMC Asser Press, 2016) 152–153.

[6] See Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117.

[7] It should be noted that the Court also referred to art 19 of the Treaty on European Union (TEU); see para 32.

[8] Charter rights can be applied to scrutinise national measures whenever Member States are implementing EU law; see art 51 of the Charter.

[9] See Case C-619/18 *European Commission v Republic of Poland* EU:C:2019:531; *Associação* (n 6).

[10] Article 47 is amongst the most invoked provisions in the EU case law. See G de Burca, 'The Domestic Impact of the EU Charter of Fundamental Rights' (2013) 49 *Irish Jurist* (New Series) 49 ff; for more recent data, see E Frantziou, 'The Binding Charter Ten Years on: More Than a "Mere Entreaty"?' (2019) 38 *Yearbook of European Law* 73.

[11] See, among others, *Commission v Poland* (n 9).

of the EU constitutional essentialism. These issues are currently under-researched and beg for scientific observation.

In particular, three questions regarding the influence of Article 47 in the Member States' legal orders arise. First, what is the margin of discretion left to national judges under that provision when they enforce EU law? Second, what has Article 47 added to the notion of effective judicial protection developed under the homonymous EU general principle? Third, and consequently, what kind of justice does Article 47 enhance at the national level: procedural or substantive – or both? The chapter addresses these issues in turn and is divided into three main parts. Section II discusses the margin of discretion of national authorities under Article 47 of the Charter. Section III looks at how this provision has shaped the understanding of effective judicial protection in the EU and focuses on the content of Article 47.[12] Section IV considers the overall influence of Article 47 on the justice systems in the Member States.

II. THE INDIRECT JUDICIAL REVIEW OF NATIONAL PROCEDURAL RULES BY THE CJEU

Via the indirect judicial review carried through the preliminary ruling procedure, the CJEU contributes to the enforcement of EU law at the national level in cooperation with the Member States' courts. The Luxembourg judges offer the interpretation of EU law and draw the boundaries within which national courts can enforce EU law effectively. The rights to an effective remedy and to a fair trial included in Article 47 enhance the competence of the CJEU to oversee the national systems of enforcement of EU law, in compliance with Article 19 of the Treaty on European Union (TEU).[13] Seen from another perspective, Article 47 works as a general clause granting entitlement to an effective remedy and a fair trial when an EU right is breached, either by the state or by an individual.[14] The *Egenberger* case further established that Article 47 may apply in horizontal situations,[15] and thus brought this provision closer to its 'mother' right, the general principle of effective judicial protection.[16]

Article 47 is subject to the general provisions of the Charter, including Article 51 thereof.[17] Consequently, the scope of application of Article 47 is more limited compared to that of the general principle of effective judicial protection, which applies, instead, in all areas covered by EU law regardless of the existence of implementing measures.[18] In this respect, the CJEU has clarified that the Charter is invokable with regard to procedural rules used to

[12] As observed in the literature, a comprehensive study on the essence of the right to an effective remedy under art 52 of the Charter is still missing; see Prechal (n 4). Gutman has recently initiated a debate on the essence of the right to an effective remedy and to a fair trial under art 47 of the Charter; see K Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best is Yet to Come?' (2019) 20 *German Law Journal* 884.

[13] C Mak, 'Rights and Remedies: Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' in HW Micklitz (ed), *Constitutionalization of European Private Law* (Oxford, Oxford University Press, 2014).

[14] In Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* EU:C:2018:257, para 78, the CJEU held that 'Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such'.

[15] ibid.

[16] As established in Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981, EU general principles may have a horizontal application.

[17] Article 51 of the Charter: '1. The provisions of this Charter are addressed to (…) the Member States only when they are implementing Union law.'

[18] See, eg, *Associação* (n 6), which is analysed below.

enforce EU law since they qualify as implementing rules under Article 51 of the Charter.[19] However, the Charter does not apply when national procedures implementing EU law cover situations that are not expressly envisaged under the original EU measure.[20] In other words, provisions included in a national implementing measure that 'go beyond' the scope of EU law will not fall under the umbrella of 'implementing measures' under Article 51. It follows that the notion of 'implementation of EU law' under Article 51 of the Charter is becoming more stringent[21] and covers only circumstances covered under the wording of EU (secondary) law. A more precise identification of the notion of 'implementation' would make it possible to better delineate the areas in which Article 47 may be relied on to scrutinise national rules.

More importantly, the scope of application of Article 47 of the Charter and the consequent margin of discretion of national courts in the enforcement of EU law impact the division of judicial competences in the EU. Indeed, when Article 47 is interpreted as not imposing specific requirements of effective judicial protection, Member States' judges remain 'free' to choose national procedural rules when applying EU law. On the contrary, when Article 47 is construed as requiring specific standards of judicial protection, national courts may have to adjust procedural rules to the conditions stemming from that provision under the guidance of the CJEU. From this angle, Article 47 is the compass of the effective enforcement of EU law and guides the cooperation between national courts and the CJEU in ensuring effective EU law application. The scope of Article 47 directly influences national procedural autonomy[22] and may therefore impose limits upon national authorities as to the shape and form of national procedural law.

This section demonstrates that there is a correlation between the source of the principle of effective judicial protection,[23] including the relevant sub-rights, and the margin of discretion left to the national courts. Notably, the CJEU acknowledges a relatively broad discretion for national courts when the sources used to scrutinise the compatibility of national procedural rules with EU law are Article 47 of the Charter alone (section II.A.i) or Article 47 jointly with a 'general' (ie, not sufficiently detailed) secondary EU law provision (section II.A.ii). Instead, the CJEU limits the discretion of national judges, with the corresponding higher likelihood that national law may be found to be incompatible with Article 47 of the Charter, when the source of effective judicial protection is a detailed EU secondary law provision (section II.B.i) or when Article 47 is applied with Article 19 TEU (section II.B.ii).

These different margins of discretion reflect the division of competences between the EU and the Member States. A broader leeway for national courts exists when the EU has not detailed the procedural rules applicable in the Member States. Instead, when the EU

[19] See section II.A.ii below.

[20] Case C-653/19 PPU *Criminal Proceedings against Spetsializirana prokuratura* EU:C:2019:1024, para 41.

[21] *cf* Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105.

[22] The principle of national procedural autonomy has received particular attention in the literature. See, for instance, A Biondi and G Gentile, 'National Procedural Autonomy' in *Max Planck Encyclopedias of International Law* (Oxford University Press), www.opil.ouplaw.com/view/10.1093/law-mpeipro/e1878.013.1878/law-mpeipro-e1878; M Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States' in HW Micklitz and B de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Antwerp, Intersentia, 2012).

[23] Eliantonio has addressed the relationship between EU secondary environmental law and the principle of effectiveness, including art 47. See M Eliantonio, 'The Relationship between EU Secondary Rules and the Principles of Effectiveness and Effective Judicial Protection in Environmental Matters: Towards a New Dawn for the "Language of Rights"?' (2019) 12 *Review of European Administrative Law* 95.

institutions have introduced distinct procedural rules, the discretion left to the Member States is correspondently limited. Additionally, it should be observed that the narrower discretion of national courts under the combined use of Article 19 TEU and Article 47 is in line with the well-established EU case law, according to which the CJEU has the interpretative monopoly in determining the implications of Treaty provisions, and therefore can direct national courts towards specific outcomes.[24] The following section will provide an overview of these four categories of the CJEU's jurisprudence and focuses on cases in which the impact of Article 47 on the discretion of national courts becomes especially evident.

A. The Broader Discretion of National Authorities Regarding National Procedural Rules

i. Article 47 as a Stand-Alone Parameter

As a first example, in *Toma*,[25] the preliminary question referred to the CJEU concerned the existence of a potential breach of the principle of equality of arms, a corollary of the general principle of effective judicial protection. The matter regarded a national rule requiring private parties to pay court fees and provide a guarantee when initiating an action against the state for restitution of taxes levied in violation of EU law. However, the same regime did not apply to public entities, which were exempted from that guarantee. The national court asked the CJEU to assess the compatibility of the procedural rule at issue with Article 47. The CJEU held that the national procedural rule complied with Article 47, as EU law (including the European Convention on Human Rights (ECHR) case law in the light of which Article 47 is interpreted)[26] did not provide any precise requirement regarding the enforcement of the principle of equality and the imposition of court fees.[27] In this sense, the scrutiny exerted by the CJEU was 'less strict' and recognised the broad discretion of the Member States as to the regulation of court fees.

Another case falling into this category is *Agrokonsulting*.[28] The background of the case was as follows. Under the applicable provisions, a company (Agrokonsulting) could only complain about decisions regarding agricultural aid before a central court and not the closest local court. Unwilling to go before the central court, Agrokonsulting relied on Article 47 to verify whether national rules offered an effective remedy to protect the EU-derived right to agricultural aid. The referring court considered this procedural norm as potentially hindering the effective judicial protection of EU rights. However, no EU secondary law provided for detailed rules on the seat of courts before which claims could be brought in this area of law. Consequently, in its decision the CJEU declared that the national procedural law at issue appeared to be compatible with Article 47.[29]

[24] For an account on the interpretative methods of the EU courts, see K Lenaerts and JA Gutiérrez-Fons, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice' (2013) EUI Working Paper AEL 2013/9, 55 and ff.

[25] Case C-205/15 *Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP) v Vasile Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* EU:C:2016:499.

[26] See art 52(3) of the Charter.

[27] *Toma* (n 25) para 59.

[28] Case C-93/12 *ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie' – Razplashtatelna agentsia* EU:C:2013:432.

[29] ibid para 60.

Further examples of the broad discretion left to national courts under Article 47 are *Ordre des barreaux francophones and germanophone*[30] and *TX*.[31] In the first case, a national rule imposing VAT on lawyer services in Belgium, implementing Directive 2006/112/EC, was scrutinised in the light of Article 47 of the Charter. In the absence of detailed EU rules regulating costs for legal services, the CJEU considered that the national legislation at issue was compatible with Article 47 of the Charter.[32] Similarly, *TX*[33] indicates that Article 47 does not limit the discretion of Member States in regulating procedural rights where EU secondary legislation only achieves a minimum harmonisation. In particular, Member States remain free to adopt rules regarding the waiver of procedural rights of individuals, subject to compliance with the minimum requirements set in EU secondary legislation and case law. *TX* further suggests that the CJEU aligns rather faithfully with the minimum requirements on the waiver of defence rights identified in the ECHR case law,[34] in the light of which Article 47 should be interpreted.

ii. Article 47 and General EU Secondary Law Provisions

In *Texdata*,[35] the question concerned the compatibility of a national rule imposing periodic penalties on companies having failed to disclose annual accounts. The imposition of the penalty occurred without prior notice and with no possibility for the addressees to make their views heard. This legislation implemented Article 7(a) of Directive 2009/101, according to which the Member States should provide appropriate penalties at least in the case of failure to disclose accounting documents as required by Article 2(f) of Directive 2009/101. This norm includes a precise obligation (ie, the imposition of penalties for failure to disclose financial accounts); however, its implementation is left to the discretion of the Member States.

The CJEU used a manifest error threshold by stating that 'it does not appear that … the imposition of an initial penalty of EUR 700 without prior notice or any opportunity for the company concerned to make known its views before the penalty is imposed impairs the substance of the fundamental right at issue'.[36] It observed that the penalty system did not impair the substance of Article 47, since the submission of a reasoned objection against the penalty decision rendered that decision inoperable and triggered an ordinary procedure under which there is a right to be heard.[37] Moreover, the CJEU took into consideration the fact that the penalty provided under national law contributed towards the achievement of an EU general objective, such as the effective disclosure of financial accounts. Also in this case, no secondary EU law provided for more detailed procedural rules and thus the national procedural rules were found to be compatible with Article 47 in the light of the broad discretion left to Member States in this area.

[30] Case C-543/14 *Ordre des barreaux francophones and germanophone and Others v Conseil des ministers* EU:C:2016:605.
[31] Case C-688/18 *Criminal Proceedings against TX and UW* EU:C:2020:94.
[32] Also, VAT legislation is one of the main examples of EU competence.
[33] *Criminal Proceedings against Spetsializirana prokuratura* (n 20).
[34] ibid paras 34–37.
[35] Case C-418/11 *Texdata Software GmbH* EU:C:2013:588.
[36] ibid para 85.
[37] ibid.

Another case falling into this category is *SC Star Storage*.[38] The CJEU was asked whether several provisions of Directive 92/13, read together with Article 47 of the Charter, should be interpreted as precluding legislation which makes access to review procedures of decisions of contracting authorities subject to an obligation to deposit beforehand a 'good conduct guarantee'.[39] The Court acknowledged that 'neither Directive 89/665 nor Directive 92/13 contains any provisions specifically governing the conditions under which those review procedures may be used'.[40] Subsequently, the CJEU went on to undertake a detailed scrutiny of how the provision of a guarantee could limit the right to an effective remedy. Notably, it evaluated the proportionality of this guarantee in relation to the objective it wishes to pursue, that is, the proper administration of justice.[41] It applied a deferential margin in favour of national legislation and affirmed that the guarantee did 'not go beyond' what is necessary to achieve the objective of combating improper actions. Thus, the national provisions in question were found to be compatible with Article 47 of the Charter and EU secondary law.

An additional example of the broad discretion left to national courts in enforcing EU law is the *Deutsche Umwelthilfe eV* case.[42] The factual background was as follows. A German official had consistently refused to comply with EU environmental law. The referring court sought to ascertain whether the first paragraph of Article 47 should be interpreted as empowering the national courts to order the coercive detention of office-holders involved in the exercise of official authority, in circumstances in which a national authority persistently refuses to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from Directive 2008/50. As in *Texdata*, the EU secondary legislation in *Deutsche Umwelthilfe eV* required national authorities to provide penalties and left the implementation of this obligation to national authorities.[43]

The judgment found that when national authorities are implementing EU law, including the Aarhus Convention, they should comply with the principle of effective judicial protection reaffirmed in Article 47. Additionally, national courts should not only ensure the effectiveness of EU law objectives, but also balance the achievement of EU goals with the protection of EU fundamental rights – in that specific case, the right to liberty. The CJEU provided detailed guidance to national courts on the ways to ensure compliance with both the EU general objectives and fundamental rights; however, it acknowledged the ultimate discretion of national courts in achieving the final decision, taking into account all the above-mentioned factors. *Deutsche Umwelthilfe eV* held that compliance with EU fundamental rights is a precondition to the effectiveness of EU law objectives. Notably, national courts become primary guardians of EU fundamental rights: in this context, respect of Article 47 participates in a general balancing act carried out by national courts, which are delegated to guarantee both the respect of fundamental rights and the effectiveness of EU law.

It should be further observed that in *Deutsche Umwelthilfe*, the remedy at stake did not protect an individual right; on the contrary, the redress consisted in detention for an official having breached EU environmental law. In this sense, the 'remedy' protected the general

[38] Case C-439/14 *SC Star Storage SA and Others v Institutul Național de Cercetare-Dezvoltare în Informatică (ICI) and Others* EU:C:2016:688.

[39] Notably, arts 271a and 271b of the Government Emergency Ordinance No 34/2006.

[40] *SC Star Storage* (n 38) para 42.

[41] ibid para 53.

[42] Case C-752/18 *Deutsche Umwelthilfe eV v Freistaat Bayern* EU:C:2019:1114.

[43] It should be noted that art 30 of Directive 2008/50 ([2008] OJ L152/1) merely states that the penalties to be adopted must be 'be effective, proportionate and dissuasive'.

interest in the environmental protection guaranteed under Directive 2008/50. Article 47 is thus transforming into a truly systemic norm able to shape the application of remedies to protect the EU general interest in the Member States.[44]

Such an application of Article 47 brings to the fore the tension between views on fundamental rights as individual or collective tools of legal protection.[45] A traditional and consolidated standpoint is that fundamental rights seek to ensure human dignity and private legal positions.[46] Under this paradigm, the individual protection stemming from fundamental rights provides guarantees for private interests that could 'go lost' in the enhancement of the general interest. Could a traditionally (individual) fundamental right, such as the right to an effective remedy, be used as a norm to protect the general interest of a community to obtain clean air? The underlying reasons justifying the innovative use of Article 47 in *Deutsche Umwelthilfe eV* are valid and worthy of support. Nevertheless, a 'general-interest-oriented' application of Article 47 could deprive this norm of its nature as an *individual* fundamental right.

As will be discussed in the following section, the CJEU has identified a narrower discretion for national courts in the light of Article 47 of the Charter in other circumstances.

B. The Narrower Discretion of Member States in Relation to National Procedural Law

i. Article 47 and Detailed EU Secondary Procedural Law

As mentioned above, when Article 47 is invoked jointly with EU secondary law detailing more precise remedial and procedural rules, the discretion of national authorities is more limited when enforcing EU law. As a consequence of the scrutiny of national rules under Article 47 and secondary law, the procedural autonomy of the Member States is subject to more stringent restrictions: the requirements of Article 47 are coupled by detailed provisions of EU secondary, which further reduce the leeway available to Member States authorities in choosing procedures and remedies to enforce EU law. *Lesoochranárske, Sacko, VW* and *FMS, FNZ et al* provide useful illustrations in this regard.

In *Lesoochranárske*[47] an environmental association sought to intervene in a procedure for the granting of building permits in a protected area, but its request was dismissed. Subsequently, this association lodged an appeal against that decision. Following contradictory judgments on the right of the environmental associations to intervene in that procedure, the Slovak Supreme Court decided to stay proceedings and refer a question to the CJEU. In particular, the Slovak Court enquired whether national rules limiting the possibility for environmental associations

[44] Roeben has discussed the role of the EU principle of judicial protection as a meta-norm in the EU judicial architecture. See V Roeben, 'Judicial Protection as the Meta-Norm in the EU Judicial Architecture' (2020) 12 *Hague Journal on the Rule of Law* 29.

[45] See, among others, A McHarg, 'Reconciling Human Rights and the Public Interest' (1999) 62 *Modern Law Review* 671. For an opposite view, see D Meyerson, 'Why Courts Should Not Balance Rights against the Public Interest' (2007) 31 *Melbourne University Law Review* 873.

[46] Roeben has highlighted that the principle of effective judicial protection, traditionally conceptualised as a 'subjective right', has also acquired a 'general obligation' dimension under art 19 TEU: 'The animating idea of this fundamental right is to enforce individual rights and only rights. Right is a thick, value-bound concept, distinct from the formal completeness of the rule on which direct effect it is based. The amended art. 19(1) of the Treaty on European Union (TEU) turns the subjective right into an objective obligation for Member States to ensure that their judicial systems provide effective judicial protection.' See Roeben (n 44) 31.

[47] *Lesoochranárske zoskupenie VLK* (n 3).

to intervene in environmental procedures were in breach of Article 47, Directive 92/43 and the Aarhus Convention. It should be observed that Articles 6 and 9 of the Aarhus Convention detail the procedural guarantees for third parties seeking to intervene in environmental procedures and specify the locus standi requirements.[48]

The CJEU held that while Member States are in charge of laying down the detailed procedural rules to enforce of EU environmental law, the combined reading of Directive 92/43 and the Aarhus Convention provided that the environmental association had a right to participate in the administrative procedure actively. The Court further specified that Article 9 of Directive 92/43 limited the discretion of the Member States in terms of shaping the procedural mechanisms to allow participation of the 'public'[49] in the judicial review of environmental permits. In the light of these factors, the Slovakian rules denying the status of participants to associations in the context of litigation on environmental permits were incompatible with the right to an effective remedy under Article 47 and the relevant EU secondary legislation.

The *Sacko*[50] case offers further insights into the possible limitations of the discretion of national authorities under a combined reading of Article 47 of the Charter and EU secondary law. This preliminary question arose in relation to an Italian national rule that empowered judges to dismiss manifestly unfounded appeals on international protection without hearing the applicant. The Court assessed with great intensity whether this norm was compatible with Directive 2013/32/EU, regulating the granting of international protection in the EU, and Article 47 of the Charter. In so doing, it identified several conditions to be respected in order to ensure compatibility of this national norm with Article 47. Among those, the addressee of the decision should have the opportunity to make his views heard at first instance; in addition, the report of the interview should be placed in the casefile. Therefore, while the national rule at stake was not contrary to EU law per se, the CJEU put conditions upon the application of that very procedural norm in order to comply with Article 47.

The CJEU is increasingly interpreting EU secondary law in the light of Article 47 of the Charter: *VW*[51] and *FMS, FNZ et al* are worthy of discussion in this respect. In the former case, the Court was asked to evaluate whether 'Directive 2013/48, read in the light of Article 47 of the Charter, allows Member States to derogate from the right of access to a lawyer, which must … be guaranteed to a suspect who has been summoned to appear before an investigating judge, on account of that person's failure to appear'. The Court found that the Directive provided an exhaustive list of conditions to allow such derogation and, therefore, the discretion of Member States was accordingly restrained. It followed that national authorities could not delay the right to access to a lawyer granted to individuals under Directive 2013/48 because the suspect or accused person has failed to appear. Any derogation from that right had to fall into one of the grounds included in the Directive. This was not the case in *VW*.

In *FMS, FNZ et al*,[52] Article 47 not only entailed a limitation of the discretion of the referring court, but also showed its 'creationist' power. The preliminary ruling request in that case regarded the right of individuals seeking asylum to obtain the review of administrative

[48] Environmental protection is among the EU's objectives under art 11 TFEU.

[49] See the definition under the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

[50] *Sacko* (n 3).

[51] Case C-659/18 *Criminal Proceedings against VW* EU:C:2020:201.

[52] Case C-924/19 PPU *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* EU:C:2020:367.

decisions amending the destination of a return decision. In its judgment, the CJEU affirmed that the features of the remedies provided in favour of asylum seekers under Article 13 of Directive 2008/115 should be determined in the light of Article 47. That provision entailed two requirements: that an independent body competent to review the decision of return should grant the remedies envisaged under Article 13, and that individuals should be able to challenge an administrative decision amending the destination of a return decision. The CJEU observed that the authority in charge of reviewing the administrative decisions in the case at hand was supervised by the minister controlling the police forces and, thus, the executive power. As a consequence, the principle of judicial independence, which stems from Article 47, was breached in its external aspect.

In addition, the CJEU held that Member States are not obliged to introduce specific actions to enforce EU law unless there is no remedy at the national level to protect EU rights. The same applies in the event that the national procedural rules consider a case based on EU law to be inadmissible. Therefore, Article 47 and Directive 2008/115 had to be interpreted as allowing an action to challenge an administrative act amending the destination of a decision of return. In *FMS, FNZ et al*, Article 47 was used to establish new remedies at the national level. Therefore, the creative aspect of the principle of effective judicial protection is also replicated under Article 47.[53] The CJEU may accordingly interpret this latter norm to impose obligations of results when it comes to granting remedies set out into EU secondary legislation.

ii. Article 47 of the Charter and Article 19 TEU

Recent jurisprudential developments have highlighted the essential role of Article 47 in the EU constitutional architecture, jointly with Article 19 TEU. This latter article provides the duty of Member States to grant 'remedies sufficient to ensure effective legal protection in the fields covered by Union law'. The judgment in *Associação Sindical dos Juízes Portugueses*[54] provided the CJEU with the opportunity to declare that the existence of effective judicial review in the Member States is part of the *essence of the rule of law* in the EU. Moreover, the Court interpreted the content of the principle of effective judicial protection laid down in Article 19 TEU in the light of the principle of judicial independence laid down in Article 47 of the Charter. Since the *Associação* judgment, the combined application of Article 47 of the Charter and Article 19 TEU has provided the legal basis to limit the discretion of national authorities to ensure effective remedies under EU law.

What is remarkable about this jurisprudence is that the duty to provide effective remedies in the fields covered by EU law, which is imposed by Article 19 TEU, gives significant leeway for the CJEU to impose specific obligations of result on the Member States. The difference between the reduction of national courts' margin of discretion under Article 19 TEU and under the combined application of Article 47 of the Charter and EU detailed secondary legislation is the interpretative activity of the CJEU. While under EU secondary legislation containing procedural rules, the CJEU requires Member States' authorities to achieve the results envisaged under that legislation, under Article 19 TEU, the CJEU exercises its interpretative powers to ensure that national courts grant 'effective remedies'. In this latter scenario, the CJEU is making use of its competence to interpret what the law is under the Treaties. *Commission v Poland* and *GAEC Jeannigros* exemplify this finding.

[53] Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271.
[54] *Associação* (n 6) para 36.

The judgment in *Commission v Poland*[55] came after the initiation of infringement proceedings against Poland for breaches of Article 19(1) TEU and Article 47. In particular, these violations occurred due to the judicial reform passed by the majority party in Poland, the PiS. Among the introduced innovations, members of the Supreme Polish jurisdictions were forced to retire. The CJEU found that the judicial reform hindered the principle of judicial independence, protected under Article 19 TEU and Article 47 of the Charter. In the reasoning of the Court, judicial independence is of cardinal importance as a guarantee that EU-derived rights will be effectively protected;[56] it is part of the essence of the right to an effective remedy and a fair trial, as well as a crucial aspect of the rule of law. Consequently, the CJEU held that, due to the link between Articles 19 TEU, Article 47 of the Charter and the rule of law, the remedies granted at the national level in the fields covered by EU law must comply with the principle of judicial independence. After the application of the appearance test developed in the ECHR case law,[57] the measures introduced in Poland were found to affect the independence of the judiciary and were thus in breach of Article 19 TEU, interpreted in the light of Article 47. *Commission v Poland* indicates that the right to an effective remedy under Article 47 requires Member States to satisfy certain standards of judicial independence when designing judicial bodies. As already seen in *Deutsche Umwelthilfe eV*, Article 47 may be used as a systemic norm to guide national authorities to provide effective remedies to protect the EU general interest, including EU founding values such as the rule of law.

In *GAEC Jeannigros*,[58] Article 47 read in the light of Article 19 TEU showed its potential to impose obligations of result and accordingly restrict the discretion of national courts when granting remedies. These provisions were invoked to assess the duty of national courts to adjudicate on disputes regarding product specifications' decisions. The matter was raised to the attention of the CJEU since the Commission had granted an application submitted by national authorities seeking a minor amendment to a product specification decision. Therefore, national courts were enquiring whether the pending disputes on the decision needed adjudication. The CJEU concluded that the finding that a court does not need to adjudicate on that matter after the amendment decision adopted by the Commission would 'compromise the effective judicial protection that that court is required to provide in respect of such applications for amendments'.[59] Allowing national courts to consider those disputes as settled would deprive individuals of the possibility to challenge the minor amendments introduced by the Commission.

It should be observed that in the recent judgment in *Repubblika v Il-Prim Ministru*[60] the CJEU has imposed obligations of effective judicial protection on national courts on the basis of a joint reading of Articles 2 and 19 TEU. In particular, the Court declared that Article 47 of the Charter and Article 19 TEU are different in nature: the former applies to protect rights deriving from EU law, while Article 19 'seeks to ensure that the system of legal remedies established by each Member State guarantees effective judicial protection in the fields covered by EU law'.[61] In so doing, the CJEU seems to separate the principle of effective judicial protection

[55] *Commission v Poland* (n 9).
[56] ibid para 58.
[57] For an analysis, see M Krajewski, 'The AG Opinion in the Celmer Case: Why the Test for the Appearance of Independence is Needed', *Verfassungsblog* (5 July 2018), www.verfassungsblog.de/the-ag-opinion-in-the-celmer-case-why-the-test-for-the-appearance-of-independence-is-needed.
[58] Case C-785/18 *GAEC Jeanningros v Institut national de l'origine et de la qualité (INAO) and Others* EU:C:2020:46.
[59] ibid para 37.
[60] Case C-896/19 *Repubblika v Il-Prim Ministru* EU:C:2021:311.
[61] ibid para 52.

enshrined in Article 47 of the Charter from Article 19 TEU, the latter provision being focused on structural elements of the justice systems of the Member States. This is a welcome development, which better distinguishes the role of Article 47 of the Charter and the principle of effective judicial protection – both being sources of fundamental rights in favour of individuals – from the structural obligations for the Member States' judiciaries required under Article 19 TEU. It remains to be seen whether the approach adopted in *Repubblika* will be followed in future cases.

We may conclude this part of the chapter with a metaphor. Article 47 is like a spider's web: it is apparently invisible, but, in reality, it seizes all national rules used (or that in principle can be used) to enforce EU law. The various degrees of discretion left to national court are the consequence of two factors: the detailedness of EU secondary procedural rules and the enhancement of the system of remedies in the Member States under Article 19 TEU. The subject matter or the competence of the EU does not seem to impact the margin of discretion left to national courts under Article 47.

III. THE CONTENT OF ARTICLE 47 OF THE CHARTER

Having discussed the discretion left to the national courts in the enforcement of EU law and the role played by Article 47 in this respect, we now move to the 'substantive' impact of Article 47 on national procedural systems. Another facet of the influence of Article 47 relates to its fundamental right dimension and the relationship with the principle of effective judicial protection: what has this provision added to the EU notion of effective judicial protection? The analysis of the content of this provision will cast light on this complex matter.

First of all, the implications of Article 47's dualistic nature constituted by the coexistence of the right to a fair trial and to an effective remedy require some clarifications. Under Article 47, the right to an effective remedy and the right to a fair trial are undoubtedly interconnected. The EU case law does not clearly differentiate between them. According to *Ordre des Barreaux*,[62] the right to an effective remedy is provided under the second paragraph of Article 47, which lays down the right to a fair trial. In other cases, such as *Ognyanov*,[63] the Luxembourg Court held that the right to a fair trial is enshrined in the second paragraph of Article 47 of the Charter, and thus suggested its separate identity from the right to effective remedies under the first paragraph of Article 47 of the Charter.

Regardless of the (somewhat unclear) CJEU case law on the content of Article 47, although linked, these rights serve different understandings of justice. On the one hand, the right to a fair trial reflects a bundle of procedural guarantees that allow individuals to ascertain and defend their right before courts. These guarantees incorporate, among other things, the reasonable duration of proceedings, and the independence and impartiality of the court.[64] Such procedural rights ensure the right to be effectively heard by an impartial and independent tribunal. On the other hand, the right to an effective remedy grants an effective redress for violations of rights. This latter right seeks to achieve corrective justice objectives by ensuring that those wronged are restored in their legal entitlements. On a more systemic level, the right to an

[62] *Ordre des Barreaux* (n 30) para 27.

[63] Case C-614/14 *Criminal Proceedings against Atanas Ognyanov* EU:C:2016:514, para 23.

[64] Legal aid, which is referred to in the third paragraph of art 47, is the condition to access a right to an effective remedy and to a fair trial.

effective remedy requires that justice be made in cases of unlawful conducts violating rights and freedoms deriving from EU law.

While the right to a fair trial is intrinsically procedural, the right to an effective remedy embodies a substantive view on justice. From a procedural point of view, the right to a fair trial protected by Article 47 guarantees that the decisions achieved by EU and national courts, as well as other entities, are 'procedurally sound', meaning that the participatory rights of the parties are respected. From a substantive perspective, the right to an effective remedy under Article 47 of the Charter contributes to effectively redressing violations of EU law, and protects EU derived rights and interests. In other words, the potential of Article 47 from a substantive justice perspective lies in the fact that it ensures the correction of instances of 'inadequate enforcement' of EU law. In so doing, the right to an effective remedy favours an 'upgrade' of national remedies to attain the objectives and the guarantees enshrined in EU law.[65]

The substantive justice dimension of the right to an effective remedy and its interplay with the (procedural) right to a fair trial becomes evident when one analyses the *Johnston* case,[66] which laid down the principle to effective judicial protection, the 'parent right' of Article 47. The facts of the case are well known: Ms Johnston sought judicial review of a decision adopted by the UK Secretary of State that prohibited her admission to the armed forces on the ground of her sex. While Ms Johnston could access a court and lodge a claim under the procedural guarantees existing under UK law (which granted her the right to access court and obtain a fair trial),[67] the applicable national rules excluded review by UK courts of decisions adopted by the UK Secretary of State. Therefore, Ms Johnston could not obtain an effective remedy to set aside that act and protect her Community-derived right not to be discriminated against on the basis of gender. The principle of effective judicial protection was introduced by the CJEU in that case precisely to overcome this gap in the judicial protection system in the UK, and thus to offer the chance to obtain a redress for violations of the Community right to equal treatment.

Johnston illustrates that compliance with procedural guarantees may not be sufficient to achieve substantive justice. At the same time, the centrality of a fair trial to attain substantive justice should not be understated. Without the promise that the parties of a dispute can equally and fairly contribute to the discovery of the 'truth', the possibility to ensure substantive justice is also negatively impacted. Procedural wrongs impede individuals to effectively participate in litigation; in turn, procedural injustices prevent everyone from obtaining what the law has 'promised' them. The right to an effective remedy is thus to be conceptualised as the consequence and the aspirational outcome of the right to a fair trial: the fair trial, and safeguarding the procedural guarantees and rights of the parties to the litigation are a precondition to obtaining an effective remedy. Through its potential to enhance *both* procedural and substantive justice, Article 47 becomes a central tenet in the achievement of EU objectives.

[65] For the concept of 'upgrading national remedies', see N Reich, '"I Want My Money Back": Problems, Successes and Failures in the Price Regulation of the Gas Supply Market by Civil Law Remedies in Germany' (2015) EUI Department of Law Research Paper No 2015/05.

[66] *Johnston* (n 2).

[67] According to Langford, the notion of a 'fair trial' may be traced in the UK legal terminology since the seventeenth century. This is reflected in a solid tradition of respect for procedural guarantees before UK courts. See I Langford, 'Fair Trial: The History of an Idea' (2009) 8 *Journal of Human Rights* 37. The concept of 'fair trial' is also one of the main aspects of the UK doctrine on natural justice. See EJ Sullivan, 'The Missing Link: Fairness, British Natural Justice, and American Planning and Administrative Law' (1979) 11 *Urban Lawyer* 75.

However, Article 47 rights are not unfettered prerogatives. The ECtHR case law on the right to be heard, in the light of which Article 47 of the Charter must be interpreted,[68] confirms that this latter article is not an absolute right.[69] The scope of Article 47 is influenced by Article 52 of the Charter, according to which Charter rights may be restrained subject to certain conditions. First, the limitation is to be provided for by the law. Second, it shall respect the essence of fundamental rights. Third, the limitation should comply with the principle of proportionality.[70] Fourth and finally, the limitation is to be necessary and should genuinely meet an objective of general interest recognised by the Union or needs to protect the rights and freedoms of the others.

A crucial element[71] under the test included in Article 52 of the Charter is the identification of the essence of the rights. A useful image to represent the concept of the essence is the pit of certain fruits: like the pit, the essence is what is left after 'consuming' the outside of the right. Charter rights may indeed be 'consumed' because of pressing EU general interests demanding sacrifices to individuals as to their fundamental entitlements or to protect a competing fundamental right.

All in all, the polymorph nature of Article 47 makes the task of identifying its essence challenging and complex. However, this exercise allows the CJEU to shed light on the non-derogable aspects of the judicial protection in the EU. The essence of Charter rights, including Article 47, is in fact shielded from legislative intervention and constitutes the core of fundamental guarantees in the EU constitutional space. A question arises: how does the CJEU identify the essence of Article 47?

The following section offers a discussion on the possible ways to extrapolate the essence of Article 47. Distinguishing possible methodologies for this purpose enables reflections on the breadth that the CJEU grants to the core of Article 47. Moreover, the identification of the essence of Article 47 entails consequences for the national procedural systems: the essence of Article 47 constitutes the inalienable minimum of judicial protection standards for the enforcement of EU law that national judges should always respect.

A. How to Identify the Essence of Article 47: An Analysis

First, it may be argued that, in the light of the 'multiple' sub-rights forming the content of the right to an effective remedy, the latter has no one single essence, but *multiple essences* belonging to the different sub-rights thereof. Therefore, there might be an essence to the (sub-)right to legal aid, an essence to the sub-right to a public hearing, and to all other sub-rights granted under Article 47. While this perspective would allow for enhanced logical clarity, two issues might arise: the need to identify multiple essences of the right to an effective remedy and, thus,

[68] Article 52(3) of the Charter.

[69] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* EU:C:2013:518, para 102; and, to that effect, Case C-560/14 *M v Minister for Justice and Equality Ireland and the Attorney General* EU:C:2017:101, para 33.

[70] For an analysis of the protection of the essence of Charter rights, see T Tridimas and G Gentile, 'The Essence of Rights: An Unreliable Boundary?' (2019) 20 *German Law Journal* 794.

[71] Under art 52 of the Charter, limitations to fundamental rights are subject to a more detailed test than that used by the ECtHR. See S van Drooghenbroeck and C Rizcallah, 'The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?' (2019) 20 *German Law Journal* 904.

the potential fragmentation of this fundamental right and its essence. In the event that the latter approach were to be followed, the task of determining the essences of Article 47 would become highly complex for the CJEU.

Second, the essence of Article 47 might be interpreted as composed by *some sub-rights*. This approach would entail a selection of the most 'fundamental' elements of the EU notion of effective judicial protection as part of the essence of Article 47. Under this perspective, the challenge for the Court would be to determine the hierarchy of sub-rights and their relevant scope. This interpretation of the essence of Article 47 could appear more desirable than the previously outlined approach, insofar as it allows the Court to establish core sub-rights which should never be curtailed. Still, the question would remain as to how to identify the scope of the sub-rights forming the essence of Article 47, which should be accordingly shielded from legislative intervention.

A third potential approach would be to consider as essence of Article 47 the *essences of some sub-rights*. Under this conceptualisation, the essence of Article 47 would correspond to the essence of, for instance, the rights to an independent and impartial tribunal, and to legal assistance. In this manner, the CJEU would need to identify a series of essential contents of selected sub-rights, violations of which would lead to the breach of the very substance of Article 47. This judicial methodology would have the benefit of enhancing analytical clarity and identifying elements of Article 47 which cannot be derogated. In parallel, it requires the CJEU to create a hierarchy between sub-rights and their essences, by sacrificing others to possible total limitations. The same problems identified for the second approach would also apply in this case.

A fourth possible methodology would be to select a *single sub-right* as forming the essence of the right to an effective remedy. By having a single sub-right as the essence of right to an effective remedy, the Court would consider all other sub-rights as potentially subject to unlimited curtailment, while the core sub-right could never be restricted. Let us consider a potential scenario: the CJEU proclaims that the essence of the right to an effective remedy is the sub-right to a hearing. It would follow that all restrictions to this sub-right would breach the essence of Article 47 of the Charter and could not be justified under Article 52 Charter. This approach would have the benefit of clearly identifying the core of Article 47 of the Charter as opposed to its periphery. Nevertheless, this method might risk limiting the polymorph nature of Article 47.

A fifth possible way of interpreting the essence of Article 47 would be to identify *the essence of a single sub-right*. For instance, the essence of the right to an effective remedy would correspond to the essence of Article 47. Such approach might nevertheless excessively reduce the protection granted under Article 47. Thus, it is argued that this methodology is the least appropriate, as it might excessively limit the protection granted under Article 47.

A final method to interpret the essence of Article 47 might be a mix of the previous ones. The essence of that provision could be, for example, the right to an independent tribunal and the essence of the right to legal aid.

In the view of the author, the most viable approach would be the second, ie, pinpointing some sub-rights as the essence of Article 47. This methodology would make it possible to offer a series of non-derogable entitlements to individuals, while leaving room of manoeuvre for the CJEU as to the distinction between the periphery (derogable) and the core (underogable) of Article 47. In the light of the case law, it appears that the CJEU is applying this strategy, at least to a certain extent. The Court has indeed carved out, among other things, the principle

of judicial independence and the existence of a remedy as part of the essence of Article 47 of the Charter.[72] Accordingly, the CJEU has shielded pivotal aspects of the EU notion of effective judicial protection from legislative intervention.

However, the Luxembourg judges do not follow a systematic approach as to the identification of the essence of Charter rights, including Article 47. In other words, the CJEU has not expressly clarified its approach as to the protection of the essence of Article 47 – eg, whether it sees the core of Article 47 as given by 'entire' sub-rights, or by the essence of sub-rights, or according to other approaches. Rather, the Court appears to employ the concept of essence with a signalling function, in order to highlight the importance of the violation of EU law. While the selective approach of the CJEU concerning the essence of Article 47 is an expression of the interpretative powers of the EU judicature,[73] a legitimate question is what principle(s) should guide the EU courts in drawing the boundaries of the essence of Charter provisions, including Article 47.

In this respect, it is submitted that the supreme values of the EU legal order may offer guidance in search of the essence of Charter rights. Not surprisingly, these values are also recalled in the preamble to the same Charter. The protection of the essence of Charter fundamental rights is in fact intrinsically linked with founding values of the EU, such as the rule of law and human dignity: the essence of Charter rights are those non-derogable individual entitlements that make the EU 'a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.[74] The essence of Charter rights may therefore be conceptualised as all the 'faculties/rights' undeniably granted to individuals who are members of a society based on the values of Article 2 TEU.[75] It follows that the Court should ultimately consider the essence of Charter rights from the perspective of Article 2 TEU. In the event that the essence of Charter rights is not respected, the EU founding values would also be breached.

Applying these principles to Article 47, the identification of its essence would thus require the CJEU to answer the following question: what would be the sub-rights of Article 47 that, if annulled, would violate Article 2 TEU? In applying this test, the CJEU could identify the essential sub-rights of the rights to a fair trial and an effective remedy that form the unfettered constitutional underpinnings, and thus the identity, of the EU.[76]

Remarkably, the CJEU has recently begun to develop case law on the founding values of the EU as well as the essence of Charter rights. In so doing, the Court is laying the foundations to build the EU constitutional essence. In this jurisprudence, the connection between Article 2 TEU and the right to an effective remedy has been explored, insofar as the right to effective judicial review was declared to constitute the essence of the rule of law.[77] Nevertheless, when identifying the essence of Charter rights, Article 2 TEU does not currently play a primary role. This also applies for Article 47. The next section will illustrate these points.

[72] See Case C-216/18 PPU *LM* EU:C:2018:586; *Commission v Poland* (n 9).

[73] For an analysis of the interpretative powers of the EU judicature, see K Lenaerts, JA Gutierrez-Fons and F Picod, *Les Méthodes d'interprétation de la Cour de Justice de l'Union Européenne* (Brussels, Bruylant, 2020).

[74] Article 2 TEU.

[75] *cf* with A von Bogdandy et al, 'Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review* 489 ff. The authors consider that the protection of the EU citizenship rights is intrinsically connected to the protection of the EU fundamental values.

[76] It is suggested that this test could apply to all Charter rights.

[77] *Associação* (n 6).

B. The Essence of Article 47 in the EU Case Law

In *Puškár*[78] the CJEU had to consider whether Article 47 of the Charter must be interpreted as precluding national legislation which makes the exercise of a judicial remedy by a person alleging a violation of his right to protection of personal data subject to the prior exhaustion of the remedies available before the national administrative authorities. In this case, the CJEU identified a limitation to the right to access to justice and assessed its lawfulness under Article 52 of the Charter. The Court held that the first part of the Article 52 test – ie, whether the limitation to the right was imposed for by the law – was respected. When assessing the respect of the essence, the Court considered that this requirement was also complied with: by imposing an additional step to the access to court, the national legislation at issue was enabling, instead of impeding, the exercise of the right stemming from Article 47. Subsequently, the CJEU considered compliance with the proportionality principle and delegated the duty to carry this assessment out to the national court. As in *Texdata*, in *Puškár* the Court also considered that the essence of the right to an effective remedy was not breached since national legislation was merely imposing *additional temporary steps* to the exercise of that right.

The *SC Star Storage* case[79] (discussed above) is a more unique than rare example of judgment in which the CJEU fully applied all steps of the test under Article 52 of the Charter. When assessing whether the essence of the right to an effective remedy was preserved, the CJEU considered the regime governing the good conduct guarantee, since it imposed a limitation to the right to an effective remedy. It affirmed that the fact that the guarantee would have been returned in any event, regardless the outcome of the litigation, did not hinder the essence of Article 47.[80] Having considered the protection of the essence of Article 47, the CJEU scrutinised the guarantee under the principle of proportionality, and concluded that it was proportionate.

It should be remarked that the CJEU has also identified the essence of Article 47 without recurring to the Article 52 test. For instance, in *Schrems*[81] the absence of judicial remedies under the Safe Harbour Agreement was seen as a flagrant violation of Article 47, entailing a breach of its essence. In *LM*,[82] *Associação*[83] and *Commission v Poland*,[84] the CJEU declared that the principle of judicial independence is part of the essence of the principle of effective judicial protection. In *Deutsche Umwelthilfe eV*,[85] the non-compliance with a judgment would be against the essence of the right to an effective remedy under Article 47.

In the light of these judgments, it is clear that there is no precise methodology to identify the essence of Article 47 under Article 52 of the Charter. The case law indicates that there is no analytical distinction between the essence of the right to an effective remedy and that of the right to a fair trial. The Court does not seem to privilege substantive or procedural justice aspects when it comes to protecting the essence of Article 47: a breach of the essence of the

[78] Case C-73/16 *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy* EU:C:2017:725.

[79] *SC Star Storage* (n 38).

[80] There might be different arguments against this interpretation, such as the limited financial resources of the parties. Also, the relationship between the granting of this guarantee and the possibility to obtain legal aid is not clear.

[81] Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* EU:C:2015:650.

[82] *LM* (n 72).

[83] *Associação* (n 6) para 45.

[84] *Commission v Poland* (n 9) para 58.

[85] *Deutsche Umwelthilfe eV* (n 42) para 35.

right to an effective remedy (Article 47(1) of the Charter) or to that of a fair trial (Article 47(2) of the Charter) is equally serious. Overall, the depiction of the essence of Article 47 is impressionistic and fragmented. The discovery of the essence of Article 47 occurs in the form of judicial 'enlightenments' and is strategically used by the CJEU to protect the rule of law in the Member States. The fuzzy use of the notion of essence by the CJEU may be considered as a form of judicial empowerment: the concept of essence is selectively applied to shield the scope of Article 47 from legislative intervention, or to guide EU and national authorities to adopt measures in order to protect crucial aspects of the justice system.

On the whole, Article 47 has added a more defined content and core to the understanding of effective judicial protection in the EU. Through its wording, Article 47 has transformed effective judicial protection into a (somewhat) more binding norm in the EU. Additionally, the identification of 'underogable' aspects of Article 47 has been progressively shaping the assessment of the compatibility between national rules and EU effective judicial protection. This methodology enhances the fundamental rights dimension of EU law enforcement in the Member States: it permits the balancing between the periphery of Article 47 with national policy objectives, while safeguarding the essential aspects of the EU understanding of effective judicial protection.

Having considered the influence of Article 47 on the discretion of national authorities and what this norm has added to the principle of effective judicial protection, this chapter will now offer some conclusive evaluations. In particular, it will reflect on how Article 47 has so far addressed questions of justice in the Member States.

IV. THE IMPACT OF ARTICLE 47 ON THE NATIONAL PROCEDURAL SYSTEMS: BETWEEN PROCEDURAL AND SUBSTANTIVE JUSTICE

The significant impact of Article 47 of the Charter on national systems emerges with regard to two elements. First, Article 47 has strengthened the competence of the CJEU to shape both procedural and substantive justice in the Member States. Procedurally speaking, the CJEU has contributed to regulate procedural rights and duties of the parties involved in litigation concerning EU law, by reference, among other things, to the right to a lawyer,[86] the right to be heard,[87] the right to intervene in environmental procedures,[88] and the level of court fees.[89] From a substantive justice point of view, Article 47 has influenced the granting of effective remedies and thus the possibility to obtain judicial protection following alleged violations of EU rights[90] or general interests.[91] Under Article 47, the content and the shape of the remedies and procedures used at the national level are tailored to the objectives pursued at the EU level. In this respect, Article 47 has been innovatively used as a legal basis for collective remedies, thus contributing to ensure the effective enforcement of EU general policy objectives. Overall, as the predecessor principle of effective judicial protection, Article 47 contributes to the hybridisation of remedies, which become polymorph creatures bearing both national and EU features.

[86] *VW* (n 51).
[87] *Sacko* (n 3); *Texdata* (n 35).
[88] *Lesoochranárske zoskupenie VLK* (n 3).
[89] *Toma* (n 25); *SC Star Storage* (n 38).
[90] *FMS, FNZ et al* (n 52).
[91] *Deutsche Umwelthilfe eV* (n 42).

Second, the underogable content of Article 47 has contributed to identifying essential aspects of the EU conception of justice.[92] Also in this respect, procedural justice and substantive justice in the Member States were both impacted. On the substantive side, *Schrems* has indicated that the absence of the possibility of effective remedies in the field of data protection runs counter to the essence of Article 47; similarly, *Deutsche Umwelthilfe eV* specifies that when a judgment issued by a national court on EU environmental matters is not enforced, this violates the essence of Article 47. These aspects aim to ensure that remedies may be effectively granted and that individuals may obtain protection of their rights or the EU general interest. In other words, individuals should be able to obtain everything that has been 'promised' by the law through effective judicial protection. On the procedural side, in *Commission v Poland* the CJEU has indicated that the essence of the right to a fair trial is the independence of the adjudicatory body.[93] Judicial independence has thus acquired a fundamental status among the procedural guarantees in favour of individuals involved in the enforcement of EU law, as it ensures that judges will enjoy equal distance from the parties involved in litigation and the state powers in the interpretation of the law. In the considered judgments, the protection of the essence of Article 47 was ultimately triggered to shield the rule of law and gradually build the constitutional identity of the EU.

It is therefore undeniable that Article 47 has empowered the CJEU to build a constitutional essentialist approach regarding effective judicial protection in the EU. Notably, the case law on the essential core of Article 47 contributes to a judicial narrative whereby the CJEU depicts the constitutional underpinnings of the EU. It is true that even before the entry into force of the Charter, the CJEU engaged in the analysis of the protection of the very substance of EU fundamental rights.[94] However, this exercise was not systematic or prominent. Article 47 has allowed the CJEU to progressively identify the 'noyeau dur' of an EU justice conception. The essence of Article 47 has also clarified what underogable entitlements individuals have with regard to the enforcement of EU law before the national authorities. In the light of the considered case law, it is evident that Article 47 partakes in enhancing justice for individuals and the achievement of objectives of general interests, such as the protection of the environment.

Moreover, the jurisprudence of Article 47 also influences national rights' enforcement. This spill-over effect is evident in case no 03542/2012 of the Italian Council State[95] where Article 47 was relied upon to 'rebrand' an extraordinary administrative action as judicial. The reconceptualisation of that action permitted the introduction of the right for the claimants to also obtain damages – normally not available for that type of administrative claims and only allowed for judicial actions. The impact of Article 47 on purely internal situations is a testament to the transformative power of the Charter as a source of fairness in the Member States.

V. CONCLUSION

This chapter has gathered novel findings as to the application of Article 47 of the Charter by the CJEU and its impact on national procedural rules. This provision works as an additional

[92] Domurath and Mak have offered interesting insights on the idea of justice under EU law concerning housing rights. See I Domurath and C Mak, 'Private Law and Housing Justice in Europe' (2020) 83 *Modern Law Review* 1468.

[93] *Commission v Poland* (n 9).

[94] *cf* Case C-4/73 *J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491, para 14. For an analysis of the case law on the limitation of EU fundamental rights before the entry into force of the EU Charter, see Tridimas and Gentile (n 70) 802 ff.

[95] Parere Consiglio di Stato, Sezione II, 11 June 2018, no 1517.

tool guiding the cooperation between national and EU courts in the enforcement of EU law. In contributing to this endeavour, Article 47 has offered the legal basis for the CJEU's competence to significantly shape procedural rules and the judicial systems in the Member States, in particular with reference to the margin of discretion of national courts in enforcing EU law, the concept of effective judicial protection and the construction of an essential core of this right, and, ultimately, the enhancement of justice at the national level.

First, under Article 47 of the Charter, the CJEU has recognised a broad or a narrow discretion to national authorities in the application of national rules to enforce EU law. These different degrees of leeway for national authorities are determined in the light of the sources of EU law used to scrutinise national law. When the parameters to review national procedural rules are Article 47 of the Charter alone or general provisions included in EU secondary law, Member States will have a broader discretion in enforcing EU law. When, instead, national procedural rules are assessed not only in the light of Article 47 of the Charter but also under EU secondary law provisions which impose upon Member States more precise and tangible procedural duties, Member States have a narrower level of discretion. The same level of reduced discretion applies when Article 47 of the Charter is enforced with Article 19 TEU. These margins of discretions reflect the division of competences between the EU and the Member States when the EU legislature has (not) harmonised procedures and remedies, in parallel with the willingness of the CJEU to delineate the duty of national courts to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[96]

The chapter has further highlighted that Article 47 is detaching itself from its role of fundamental right, while becoming the legal basis for enforcing the EU general interest at the national level (eg, *Deutsche Umwelthilfe eV*). It was also demonstrated that the creationist nature of the principle of effective judicial protection is replicated under Article 47 of the Charter. Indeed, this latter provision allowed the introduction of new remedies not established at the national level (eg, *FMS, FNZ et al*). However, it should be observed that the recent *Repubblika* judgment has innovatively distinguished the scope of Article 47 of the Charter, which is applicable to redress individual rights' violations, from that of Article 19 TEU, which imposes structural obligations on the national judiciaries.

Second, the essence of Article 47 of the Charter is increasingly identified in recent cases, but the CJEU does not apply a clear methodology to identify the core of that provision. Rather, the Court makes strategic use of the essence of Article 47 in a twofold sense. On the one hand, the identification of essential features of Article 47 creates a shield from legislative intervention with regard to those aspects of judicial protection; on the other hand, the case law on the non-derogable core of Article 47 contributes to carving out the aspects of judicial protection which should always be respected by national (and EU) authorities. Overall, the depiction of the essence of Article 47 furthers the construction of the EU constitutional essentialism.

In conclusion, Article 47 is the factotum of the EU: it has enriched the EU conception of justice with a more prescriptive dimension and has strengthened procedural and substantive aspects of the judicial systems of the Member States. Article 47 is also intrinsically linked to the protection of the rule of law, and its interpretation and enforcement led to setting aside laws that *in abstracto* could hinder the application of EU law (eg, *Commission v Poland*). Article 47 continues to surprise us, and seems not to have any limits, also thanks to its links with Article 19 TEU.[97] Or should Article 47 instead have limits? This debate would require the attention of further research. Yet, so long as Article 47 makes it possible 'to see justice done', it will have achieved its purpose.

[96] Article 19 TEU.
[97] However, see the recent *Repubblika* case (n 60).