

*Judicial Training Project
Roadmap to European Effective Justice (Re-Jus): Judicial Training Ensuring Effective Redress
to Fundamental Rights Violations*

RE-JUS

GUIDELINES FOR JUDGES



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1 MAIN QUESTIONS ADDRESSED BY THE RE-JUS PROJECT

- 1) What is the impact of fundamental rights in the EU on national case law?
- 2) What are the features of vertical judicial dialogue in the jurisprudence of fundamental rights?
- 3) Are national courts responsive to CJEU jurisprudence with regard to fundamental rights? Are there divergences or conflicts with national constitutional traditions? What is the approach taken by CJEU when constitutional traditions differ?
- 4) How does art. 47 (CFR) CJEU jurisprudence change the power and responsibilities of national judges?
- 5) What is the impact on independence and the right to a fair trial?
- 6) How does CJEU choose the framing of preliminary rulings related to art. 47 (specific versus principle based)? When and how does the CJEU aim to have a systemic impact and when does it solely aim to provide a solution to the problem raised in the preliminary reference?
- 7) What is the role of article 47 CJEU jurisprudence in:
 - a. interpreting substantive national laws?
 - b. interpreting procedural national laws?
- 8) What impact does art. 47 have in shaping the right to effective remedies? How is this impact related to the need for effective, proportionate and dissuasive remedies?
- 9) Does it affect the relationship between national judges and the parties in civil proceedings?
- 10) Does it affect the sanctioning power of administrative and criminal judges at the national level?
- 11) Has article 47 had a different impact on individual and collective remedies?
- 12) What is the impact of article 47 upon cross-border litigation? How does it influence the identification of courts which have jurisdiction or those of applicable law? How does it influence the scope of the application of EU laws with respect to third countries?
- 13) Is the impact of art. 47 uniform across sectors or is it more intense in some areas than others?
- 14) Is the impact of art. 47 uniform in the interpretation of procedural rules in different areas? For example, does the impact of art. 47 CFR jurisprudence on the power of national judges differ between consumer, data protection and asylum law? Theoretically the impact should be uniform, however when linked to secondary legislation the application of art. 47 CFR has led to different results, particularly in procedural and remedial laws. Why?
- 15) How should national courts make use of art. 47 jurisprudence that comes from different areas. For example, when and how could national courts engaged in asylum litigation make use of case law in consumer protections concerning the application of the right to effective judicial protections?

2 EFFECTIVE PROTECTION OF FUNDAMENTAL RIGHTS: A HORIZONTAL VIEW

National judges are confronted with ever more daunting challenges concerning the application of EU law. The binding nature of the Charter subjects their activity to a delicate inquiry into the scope of application (art. 51 CFR) and into the consequences of interpreting national law that stems from EU secondary legislation or to having an impact on primary legislation (e.g. the four freedoms).

The mode of inquiry is increasingly dialogical; it often involves the CJEU with the submission of preliminary references whose objectives are very diverse. Some are limited to the solution of specific interpretive problems of EU law connected to national legislation, others concern the scope and impact of general principles like effectiveness, proportionality, and subsidiarity. National judges are asked to engage in a decision-making process that may include several techniques: from conforming interpretation to disapplication or to the submission of preliminary references concerning the interpretation of EU law in relation to national law.

The decision tree that relates to the application of the Charter, specifically to art. 47 CFR with different options is at the core of the REJUS project. On the basis of the CJEU and national court case law the casebooks and the guidelines provide the national judge with a brief yet comprehensive illustration of the decision-making process. The first step is discerning the applicability of the Charter. In this respect, it should be noted that the CJEU recently argued that Art. 47 CFR “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” (*Egenberger*, C-414/2016).

Once applicability is positively ascertained, then the inquiry moves towards the consequences of application. First, it touches upon the interpretation of EU and national law; secondly, when the conflict between national and EU law cannot be solved via a conforming interpretation, disapplication or lack of application of national rules come into play.

CJEU scrutiny may be combined with a review of constitutionality, where conformity with the EU is analysed within the lenses of constitutional principles. Outcomes of constitutionality reviewed at the national level may differ and there is a significant and increasing margin for their appreciation. In this context, the development of common constitutional traditions may represent an instrument that can emphasize the relevance of national constitutions in the analysis of non-conformity.

The project analyses the impact of fundamental rights, in particular art. 47 concerning the right to effective judicial protection, on substantive and procedural national rules. It focuses on how the tasks, powers and responsibilities of national judges are changing with the application of EU rules and principles. In particular, it examines the judicial use of general principles to connect substantive and procedural rules. It moves from the conceptual premises that the effectiveness of rights depend on adequate and proportionate remedies and sanctions. Hence, the judicial role with regard to the decentralized enforcement of EU law gains even more relevance.

Examination of national caselaw shows that, when national courts make references to CJEU, they refer to judgments of the same area. We suggest that a more cross-sectoral approach should be adopted by national courts. For example, some caselaw in art. 47 in the field of consumer protection can be applied to other areas like data protection. However, caution is needed as the principles

articulated by the CJEU may be the outcome of the interpretation of secondary legislation (sector specific by definition) and the provisions of the Charter of fundamental rights.

2.1 INDEPENDENCE OF JUDGES AND OTHER ENFORCERS

When scrutinizing, art. 47 CFR the first issue concerns independence and impartiality. Art. 47 CFR links effective judicial protection with judicial independence and impartiality (*CJEU Associação Sindical dos Juízes Portugueses case, C-64/16*).

Judicial independence and impartiality are strictly linked to judicial status, which is protected by Art. 6(1) and Art. 47(2) CFR; they are, by definition, horizontal dimensions that permit a “test” of the level of protection of fundamental rights in different sectors.

The contribution of the European Courts in defining the content of independence and impartiality, as components of the umbrella principle of “fair trial” has been fundamental (*LM case, C-216/18*) and several decisions show that independence of the enforcer is essential to ensuring effective judicial protection (*Soufiane El Hassani, C-403/16*).

Specifically, with regard to the **concept of independence**, the CJEU (*Online Games, C-685/15*) and the ECtHR (*Agrokompleks v. Ukraine, 6 October 2011*) points out two elements. The first aspect, which is external, entails protection of the judicial body against **external** intervention or pressure liable to jeopardise the independent judgment of its members. The second aspect, which is **internal**, is linked to “impartiality” and seeks to ensure a level playing field between the parties to the proceedings and their respective interests regarding the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest of the judge in the outcome of the proceedings apart from the strict application of the rule of law.

Focusing on the **impartiality concept**, ECtHR (*Sacilor Lormines v. France, 9 November 2006; Kleyn And Others v. The Netherlands, 6 May 2003*) and CJEU case-law shows that impartiality refers to the absence of connections between the judge and the parties, to their detachment towards the conflicting interests and to the outcome of the dispute, to its lack of prejudice in relation to *thema decidendi* and its position of equal distance with respect to the parties, to the *super partes* character of the judge. The “impartiality” of the judge refers specifically to the functions it performs. Furthermore, it should be pointed out that the “impartiality” of the judge must be assessed in terms of both “subjective” and “objective” perspectives, although these are not clearly separated (*Vardanyan and Nanushyan v. Armenia, 27 October 2016*). The former profile addresses the “inner hole” of the judge, presumed impartial until proven otherwise; the second involves the trust that the courts must inspire in citizens.

National courts should take into account that the ECtHR (*Fazli Aslaner v. Turkey case, 4 March 2014*) and CJEU have detected **different circumstances** such as the intervention of political forces in the composition of administrative bodies of justice, the issuing of disciplinary sanctions to judges (ECtHR, *Harabin vs. Slovakia, 20 November 2012*), the reduction of their salaries (CJEU *Associação Sindical dos Juízes Portugueses case, C-64/16*), and attempts by non-judicial authorities to intervene in court proceedings (CJEU, *H.I.D. C-175/11, 31 January 2013*), **that can jeopardize the independent position of the enforcer.**

Enforcement of EU rights is increasingly entrusted to administrative bodies whose independence is as important as that of the judiciary. Art. 47 might not apply to these bodies but the right to good administration includes independence of the enforcer. Regarding the **issue of independence of an enforcer other than that of the judiciary** CJEU case law (*Commission v. Hungary*, C-288/12) provides some guidance in a case related to the (Hungarian) Data Protection Authority (DPA). The reasoning of the Court points out that DPAs must enjoy an independence which allows them to perform their duties free from external influence in whatever form, whether direct or indirect, and which may have an effect on their decisions and which could call into question the performance of those authorities in their task of striking a fair balance between the protection of the right to private life and the free movement of personal data. However, the judgment also considers in a critical perspective, that “*operational independence*” is not alone sufficient to protect DP authorities from all external influences. According to the Court, “*the mere risk that the State scrutinizing authorities could exercise a political influence over the decisions of the supervisory authorities is enough to hinder the latter in the independent performance of their tasks.*” **This decision suggests the application of the independence requirement to non-judicial enforcers like administrative authorities as well (Competition, Data Protection, Central Banks and financial authorities).** Furthermore, looking at national case-law in the area of asylum and migration, the decision of the Hellenic Council of State, no 447/2017 should be recalled, in which the Court considered that impartial and independent administrative bodies can “exercise jurisdictional powers,” ensuring the right to an effective judicial remedy; in the present case, the Court considered as relevant the necessity of ensuring effective remedy for asylum seekers, which, in the Council of State opinion, justifies the necessity of the formation of these new administrative bodies.

2.2 ACCESS TO JUSTICE AND THE COORDINATION BETWEEN ADMINISTRATIVE AND JUDICIAL ENFORCEMENT MECHANISMS

Enforcement is still primarily a matter for Member States. The principle of procedural autonomy confers discretionary power to MS to select the best combination between ADR, administrative and judicial enforcement. However, there is an increasing use of administrative enforcement as a complement rather than a replacement of judicial enforcement. Art. 47 CFR does not apply to administrative bodies but provides guidance on how the different enforcement regimes should be coordinated at the EU and national level (*Puskar* C-73/16).

In terms of coordination, administrative and judicial enforcement can have the following relationships:

- **Alternative:** when one type of enforcement is chosen, the other is precluded (Italy has adopted this model in the data protection area for instance).
- **Complementary:** both are available but with different objectives (with regard to sanctions and remedies in particular); Slovakia and Ireland have adopted this model in the data protection area.
- **Independent:** both are available, and no coordination emerges, potentially resulting in overlaps and conflicting decisions.

When it exists, coordination between administrative and judicial enforcement is normally established at the MS level. However, the type of coordination is not uniform across MSs. The application of

general principles, particularly the principle of effective judicial protection and art. 47 CFR, may provide important guidelines in this respect.

When the national legislative framework does not provide for coordination, judges are at the forefront in providing for the application of fundamental rights and thus in charge of interpreting the national provisions so as to comply with the right to an effective remedy. For example, the Tribunal of Milan (dec. no 10374/2016), deciding a data protection case, stated that the court before whom the claimant appeals against an administrative decision, cannot limit its powers to a mere evaluation of formal regularity, considering the nature of fundamental rights of the positions involved.

Accordingly, the choice of **alternative enforcement** may be highly problematic *vis-à-vis* Art. 47 CFR, as the limitation to one enforcement mechanism – in particular that of administrative enforcement – may be interpreted as a violation to the right to access to courts (*El Hassani* case, C-403/16; by analogy, *Puskar* case, C-73/16). Asylum provides an interesting test since many MSs are moving towards the reinforcement of administrative enforcement and the limitation of judicial enforcement. In this respect, at the national level, the [Polish Supreme Administrative Court act](#) should be recalled, [which submitted a request for preliminary ruling to the CJEU C-403/16 *El Hassani*, regarding an asylum and migration case.](#) Under Polish law, the consulate's refusal to issue a visa cannot be appealed before a Court or even before another administrative authority. The Court considered exclusion of judicial control with regard to the Consulate's decision to refuse issuance of a visa to be doubtful in light of the obligation of Member States to ensure effective remedy against a decision refusing an individual's right acquired as a result of EU law.

Complementarity may avoid this problem, though the distinction between simultaneous and sequential enforcement may affect the degree of compliance with Art. 47 CFR. In the case of **sequentiality**, some formal conditions should be considered, namely the cost and length of the overall proceeding (*Puskar*, C-73/16). Moreover, the period for the time-barring of judicial claims should be suspended during the administrative procedure, and interim measures should be possible in exceptional cases, where the urgency of the situation requires as much (*Puskar*, C-73/16, applying *Alassini* C-317-320/08).

Although the responsibility of providing coordination rules compatible with article 47 CFR is mainly the domain of national legislators, courts shall interpret existing rules or, where possible, fill in the gaps in accordance with the Charter in order to ensure that the existence of multiple enforcement mechanisms does not in fact unreasonably delay or hinder access to justice and the provision of effective remedies. Furthermore, secondary EU law should be interpreted in the light of art. 47 CFR; for example, in the context of EU secondary legislation on mutual assistance for the recovery of claims, the courts can rely on the lack of an effective judicial remedy (e.g. judicial review) to question the mutual recognition of an administrative decision never notified to the person concerned (*Donnellan*, C-34/17).

2.3 FAIR TRIAL AND THE RIGHT TO BE HEARD: BETWEEN EFFECTIVE JUSTICE AND GOOD ADMINISTRATION

Once the independence of the judge is established and the existence of multiple enforcement systems is considered, the examination should then encompass the procedural guarantees associated with the right to a fair trial. The right to a fair trial includes the right to a defence, the right to be heard (ECtHR, *Donadze v. Georgia*, 7 June 2000), the right of equal arms, the right to the communication of trial

documents from the court (ECtHR *Göç v. Turkey*, 11 July 2002), the right to the assessment of the proceedings as a whole (ECtHR, *Centro Europa 7 S.R.L. And Di Stefano v. Italy*, 7 June 2012); the right to adversarial proceedings (ECtHR, *Werner v. Austria*, 24 November 1997; *Nideröst-Huber v. Switzerland*, 18 February 1997), and the obligation for courts to give sufficient reasons for their decisions (ECtHR, *H. v. Belgium*, 30 November 1987, *Carmel Saliba v. Malta*, 29 November 2016). These rights and court obligations stem from art. 47 CFR and art. 6 ECHR but their content and intensity may vary depending on whether the judicial phase is itself the review of an administrative proceeding or is the first stage of litigation between parties.

The right to a fair trial becomes relevant when procedural legislation enables some extension of the effects of enforcement decisions related to persons who have not been a party to the procedure. National courts must interpret procedural laws in order to ensure the effectiveness of rights.

2.3.1 Procedural guarantees and administrative proceedings between art. 41 and 47 CFR

Current developments in EU secondary legislation and caselaw show that administrative or procedural guarantees, similar to those provided by Art. 47 CFR, should be applied to administrative enforcement. The main drivers of these developments have been the principle of good administration and the principle of effectiveness, that is the principle of effective protection of rights based on EU law: the former (principle of good administration) applicable to administrative enforcement proceedings at EU and national level (therefore beyond the scope of article 41 CFR, only referred to EU bodies); the latter (principle of effectiveness) applicable to various enforcement mechanisms, including the administrative ones.

Clearly the role of art. 47 CFR and the inapplicability of 41 CFR to national administrative bodies make a difference between administrative and judicial enforcement. However, the principle of good administration and the systemic role of art. 47 CFR as described in *Puskar* (C-73/16), may contribute to generate a common set of principles especially if decisions of the administrative enforcers are not appealed before courts.

2.3.2 The right to be heard

Among the many components of the right to a fair trial, the right to be heard plays a pivotal role, with special reference to cases involving unbalanced relations or public authorities deciding over individual interests. For instance, the **Belgian Council of Alien Law Litigation** (CALL) consistently applies the right to be heard as a general principle of EU law. Guarantees and procedural guidelines on the interpretation and application of the right to be heard can be found separately in each of the three selected areas (consumer protection, migration and asylum, and data protection; see below), and which show different features in each of them as well as some common aspects.

Generally speaking, the right to be heard may be linked to:

- *the right to a defence*: this is the core function of the right to be heard and applications may be found in all three sectors with regard to traders (*Biuro* case C-119/15), data processors, and asylum seekers;
- the need to provide evidence about facts or legal requirements to be ascertained before the enforcement decision: this informative function is strongly connected to a cooperative approach to enforcement proceedings and enables the enforcer to optimize its decision along the lines of the principle of effectiveness; this aspect is extremely important in the area of international protection, where the third country national is asked directly to provide

information regarding conditions, but may play a relevant role in consumer and data protection whenever paper-driven information is not sufficient;

- the need to specify the *claim* or adapt it to the emergence of new elements (e.g. *ex officio* ascertainment of an infringement) within the limitations provided by the principle of own initiative (principle of demand); as a matter of fact, this dimension has been very relevant in consumer cases dealing with increasing *ex officio* powers (*Banif plus* case, C-472/11); however, it may play a relevant role whenever a cooperative approach enables the emergence of new elements within the proceedings.

Bearing in mind these functions of the right to be heard, practitioners can be inspired by the more detailed guidelines which the CJEU has developed in a certain sector and consider the possibility of applying them in other fields. When doing so, the following may be taken into consideration:

- the enforcer's discretion in assessing the space for the right to be heard, as increasingly acknowledged in EU case law (*consumer law: Biuro case, C-119/15; Asylum and migration: M.M.(1) case, C-277/11; Sacko Moussa case, C-348/16*) and secondary legislation (*Reg. 2017/2394; GDPR, Reg. no. 679/2016*), should be turned to Article 47 CFR and the principle of effective protection of EU-based rights.
- the structure of the enforcement mechanisms, as combining administrative and judicial procedures, is relevant (*Asylum and migration: Sacko Moussa case, C-348/16; Benallal case, C-161/15*). In this respect, in light of the principle of proportionality, the right to be heard should not create too heavy a burden on the judicial procedure when it has been fully ensured within the administrative phase, and no new elements have appeared that would justify an additional hearing in person.

Lastly, it should be noted that in cases of violations of the right to be heard during administrative proceedings, the CJEU has not clarified in the selected areas whether it is the national court's duty to rehear the case or send it back to the administration to carry out the hearing in line with EU guarantees. The CJEU issued a judgment in another field of administrative law, namely customs duty. The CJEU held that it is up to the national court reviewing the conduct of the administration to decide whether "*it must give a ruling in the action brought against that decision or whether it can consider referring the matter back to the competent administrative authority.*" (Cases C-29-30/13, *Global Trans Lodzhistik OOD*). When making this assessment, article 47 CFR should be considered, e.g. considering the impact on the length of the procedure, the relative scope of judicial review by the authority and the court, the impact of the delay on access to justice and the provision of effective remedy. Lastly, it should be recalled that in the asylum and migration area, the **Supreme Administrative Court of Lithuania** (SAC, *Z. K. v. Kaunas County Police Headquarters*, case No. A-2681/2012, decision of September 3, 2013; *M.S. v. Migration Department under the Ministry of Interior*, case No. A-69/2013, decision of June 20, 2013), established, on the basis of Article 41 CFR and the principle of good administration as laid down in EU law and the Constitution, a positive obligation for public authorities, in return proceedings, to hear the TCN on aspects related to his/her family life; children; and any criminal record. On the contrary, the **German Federal Administrative Court** stated that the right to good administration enshrined in Art. 41 CFR is addressed to EU institutions and bodies alone, and cannot therefore be invoked against domestic authorities ([Federal Administrative Court, Decision of 27.10.2015, 1 C 33.14](#)). This was also the conclusion of the **French**

Council of State (see above), though it considered there was no practical difference between the invocation of Article 41 CFR and the right to be heard as a general principle of EU law.

The following table summarises the main legal sources and(or) forms of applications of the right to be heard in the three areas analysed:

RIGHT TO BE HEARD	Consumer law	Asylum and migration	Data protection
Judicial proceedings	<ul style="list-style-type: none"> - Not established by secondary EU law. - The CJEU referred to the right to be heard for balancing procedural rights of litigants (both the professional party in <i>Biuro</i>, C-119/15, and of the consumer in <i>Banif</i>, C-472/11). 	<p><u>International protection proceedings:</u></p> <ul style="list-style-type: none"> - not established by secondary EU law. - The CJEU applies the right to be heard relying on art. 47 CFR. - The judge's margin of discretion in evaluating the necessity of a hearing is significant (<i>Sacko Moussa</i>, C-348/16). <p><u>Return proceedings:</u></p> <ul style="list-style-type: none"> - could be considered as a component of the general principle of rights of defence, or relying on Art. 47 CFR (no CJEU case law) 	<p>In the light of the principle of proportionality, the right to be heard should not create too heavy a burden on the judicial procedure when:</p> <ul style="list-style-type: none"> - it has been fully ensured within the administrative phase, and - no new elements have appeared to justify additional hearing in person. <p><i>Puskar</i> (C-73/16),</p>
Administrative proceedings	<p>Reg. 2017/2394 states that exercise of powers o related to the Reg. shall comply with applicable procedural safeguards and with the principles of the Charter of Fundamental Rights of the European Union.</p>	<p><u>International protection proceedings:</u></p> <ul style="list-style-type: none"> - mandatory right to be heard established by Art. 14, Dir. 2013/32. - The legal bases are the right of defence and general principle of good administration <i>M.M.1</i> (C-277/11), <i>M.M.2</i> (C-560/14). <p><u>Return proceedings:</u></p> <ul style="list-style-type: none"> - not established by secondary EU law. The CJEU clarified the issues on which the TCN must be able to express his/her point of view: <i>Mukarubega</i> (C-166/13); <i>Boudjlida</i> (C-249/13). 	<p>Art 83(8), recitals (129) and (148) of the GDPR state that the exercise by the supervisory authority of its powers shall be subject to appropriate procedural safeguards in accordance with UE and MSs law, including effective judicial remedy and due process.</p> <div style="text-align: center;">  </div> <p>The right to be heard must be applied.</p>

2.4 EFFECTIVE JUSTICE AND EX OFFICIO POWERS

2.4.1 Ex officio powers and the equality of arms principle

The CJEU is interpreting art. 47 CFR and the principle of effectiveness in such a way as to broaden *ex officio* powers. National courts have to interpret their procedural rules in light of art. 47 when the substantive right is within the scope of EU law (See below).

This is often grounded on the specificity of the areas where there is an imbalance between the consumer and the asylum seeker on the one side, and the professional and the executive on the other

side. In consumer cases, *ex officio* powers aim to ensure the invalidity of unfair contractual terms and trade practices and full access for consumers to effective remedies against infringements of their rights. In the consumer field these powers have become duties and national courts must police unfair contractual terms and practices that come under their scrutiny even when parties have not raised the issue. The CJEU caselaw has deeply influenced national caselaw under this respect. For instance, the French *Cour de Cassation* (3 November 2016) annulled a judgment of the Court of Appeal to the extent that the latter failed to *ex officio* declare a non-binding term. Dec. no 26242-26243/2014 of the Italian *Corte di Cassazione* interpreted art. 1421 of the Italian Civil Code as stating that the *ex officio* ascertainment of nullity is an obligation and not a mere power of the judge. Romanian, Portuguese, and Dutch courts also recognize judges' *ex officio* obligation. Whether a similar active role can be played in data protection when the protection of fundamental rights is at stake is an open question. In asylum cases, secondary legislation has specifically introduced the State's duty to cooperate, which includes a judicial duty to cooperate with the asylum seeker by means of expanded powers to identify relevant issues, legal grounds for claims and evidence thereof. Looking at the national case-law in asylum and migration areas, judgement no 7333/2015 of the Italian *Corte di Cassazione* on subsidiary protection should be recalled. The Court, quoting *Elgafaji* (C-465/07) and *Diakité* (C-285/12) CJEU cases, stated that the authorities are under a duty to take into account, also *ex officio*, general information regarding the country of origin and the applicant. In these fields, **the CJEU aims to ensure an equality of arms**, and at the same time **cooperation** between the applicants and the court. The *ex officio* powers of the national judge could help to ensure the **effective implementation of the right to a fair trial**.

It is important to note that such an extension is not limited to the investigatory powers that allow a judge to gather additional information regarding, e.g. the status of the consumer or the conditions in the country of origin of the asylum seeker, or his/her credibility. This dimension does play an important role, as shown, in the area of asylum and migration, by judgment no 25534/2016 of the Italian *Corte di Cassazione*, according to which the judge, assessing asylum claims, must exert an "unofficial probative inquiry" ("attività istruttoria ufficiosa"), which includes recourse to diplomatic channels or even international rogatories. Beyond this dimension, in certain cases, the extension of *ex officio* powers may also include the possibility of casting a remedy different from that requested by the consumer/asylum seeker or provided by the administration (Duarte Hueros, C-32/12).

It should be noted that judicial powers based on national procedural rules vary across Member States, not only among the different areas, but also within the same field: this has led to divergent practices. The CJEU has, to a certain extent and in some specific areas, contributed to clarifying to what extent such divergences were compatible with article 47 CFR and the principle of effectiveness, in pre-removal detention cases so far (see *Mahdi* case, C-146/14), and in proceedings concerning unfair contractual terms (see *Oceano* case, C-240-244/98; *Pannon* case, C-243/08).

The general principles and the Charter provisions are used differently by the CJEU across the different sectors; in order to support its reasoning, the CJEU normally relies on the principle of effectiveness applied to national procedural law in the consumer protection area, whereas in migration law, the point of reference is the fundamental right to an effective remedy linked to the duty to cooperate as enshrined in the sectorial legislation. In both cases, the two arguments were the drivers for the

empowerment/extension of the judges' powers *vis-à-vis* the parties and the administration, but the intensity of such expansion was different. More specifically, courts shall balance the use of *ex officio* powers with the duty to a fair trial and equality of arms and invite all parties involved to present their views on the question or evidence raised *ex officio*. This principle, applied by the CJEU in consumer law cases (*Banif* case, C-472/11), may have a more general scope with respect to other areas in which *ex officio* powers play a similar function.

In the data protection area, where such an empowering process has not (yet) emerged from the available CJEU jurisprudence, the interplay between data and consumer protection may hint at the use of *ex officio* powers that emerge from the consumer area, also in favour of data subjects. This could definitively regard the assessment of unfair terms concerning data processing within consumer relations as well as the ascertainment of unfair practices and unlawful processing that causes damages for data subjects. Cooperation between data protection authorities and courts, including access to relevant documentation gathered by the former, could feed judicial powers further and be fostered in order to make access to justice more effective (artt. 77, 78 GDPR); procedural national law should be interpreted accordingly to foster such cooperation.

Article 47 CFR does not necessary lead to the expansion of *ex officio* powers of courts in all sectors and cases in which EU law is applicable. Especially when questions should be raised and evidence brought by public administrations as involved parties, courts may not be substituted for the competent authority, whose task is to provide the evidence necessary to enable the court to determine the occurrence of a violation of EU law (*Online Games*, C-685/15). Similarly, in competition law cases, article 47 CFR supports the expansion of full judicial review in decisions adopted by administrative authorities but not the emergence of an *ex officio* power to raise pleas in law against contested decisions and to adduce evidence in support of those pleas (*Villeroy & Roch*, C-644/13 P).

The following table summarise the *ex officio* powers in the three areas analysed:

EX OFFICIO POWERS OF THE COURTS	Consumer protection	Migration and Asylum	Data Protection
<p>Declare the violation of EU law and/or rights and freedoms based on EU law</p>	<p>National courts must exercise this power to declare the unfairness of a consumer contract term <i>Pannon</i>, (C-243/08); <i>Sanchez Morcillo</i>, (C-169/14); <i>Karel de Grote</i>, (C-147/16) <i>et al.</i></p>	<p>In cases of <u>immigration detentions</u>, applying the principle of effective judicial protection, proportionality and art. 47 CFR, national judges must have full jurisdiction to take into account facts and evidentiary elements beyond those submitted by the administration <i>Mahdi</i> (C-146/14)</p>	<p><u>Judicial proceedings:</u> the interplay between consumer protection and data protection may allow to extend the <i>ex officio</i> powers of judges in the latter area (e.g. in the field of Data Protection Policy terms). <u>Administrative proceedings:</u> <i>ex officio</i> power is granted to national supervisory authorities. <i>Schrems II</i>, (C-498/16)</p>
<p>(Contribute to) identify and provide means of proof in order to give evidence of such violation</p>	<p>In ascertaining contract term's unfairness, the court's must make also <i>ex officio</i> investigations in order to ascertain if that term is unfair. <i>Pénzügyi</i> (C-137/08)</p>	<p>The duty of cooperation as interpreted by the CJEU leads to recognise <i>ex officio</i> duties of national courts: - a duty to establish measures of inquiry on its own motion; - the obligation of the national court</p>	

EX OFFICIO POWERS OF THE COURTS	Consumer protection	Migration and Asylum	Data Protection
		<ul style="list-style-type: none"> - to investigate the country of origin situation of its own motion, or - to consider, <i>ex officio</i>, a possible new ground for recognising international protection <i>Diakite (C-285/12)</i>	
Identify and assign an effective remedy/measure for the protection of fundamental rights	The CJEU tends to overcome foreclosures existing in national legal systems, especially in the sale of consumer goods. <i>Duarte Hueros</i> , (C-32/12); <i>Oliva</i> , (C-568/14 to C-570/14)	Courts established new remedies, not set out in domestic law, such as the recognition of the automatic suspensive effect of appeals in accelerated asylum and return proceedings (on the basis of Arts. 19(2) and 47 EU Charter <i>Abdida</i> (C-562/13); <i>Tall</i> (C-239/14); <i>Mahdi</i> (C-146/14) In case of <u>immigration detentions</u> , national judges <i>ex officio</i> decide on the appropriate remedy in case prolongation of detention is no longer justified. <i>Mahdi</i> , (C-146/14)	n.a.

2.5 EFFECTIVE, PROPORTIONATE AND DISSUASIVE REMEDIES

In all three examined areas the principles of effectiveness, proportionality and dissuasiveness have been used by the CJEU in a wide number of cases, shaping existing remedies or casting new ones. These three principles concern sanctions and remedies and have been introduced in secondary legislation. They have to be interpreted in light of art. 47 CFR. The simultaneous application of these three principles forces the judge to engage in complicated trade-offs. Pursuing deterrence may enter in conflict with the respect of proportionality. The level of fines or private penalties must be determined by a careful balance between dissuasiveness and proportionality. Often the legislator provides only a minimum and a maximum leaving the task of determining the exact amount to the national judge. For instance, in the data protection area the French *Conseil d'Etat* (dec. no 389448/2016) observed that, when the French supervisory authority imposes, in addition to the main sanction, a measure consisting in the publicity of the sanction imposed on the controller, such an additional sanction is necessarily subject to the principle of proportionality, even if the law does not expressly state as much. Similar evaluations apply to non-pecuniary remedies like injunctions and restitutions. The duration and scope of prohibition is the outcome of a delicate balance between deterrence and proportionality.

It is important to note that in CJEU jurisprudence different outcomes have resulted from the application of the principles in various areas and combinations. Courts may use effectiveness to rely on wider powers to adopt more proportionate measures than those provided for in the law, administrative decisions, or in the pleas of different parties. For instance, in *Moussa Sacko* (C-348/2016) and *the Tribunal of Turin* of the 25th of May, 2016 (migration and asylum area) and in

Duarte Hueros (C-32/12, consumer protection), the linkage between effectiveness and proportionality called for a wider power for judges, allowing them to respectively overcome the limits set by administrative decisions or national legislation, and to provide remedies that were not asked for by the consumer or expressly provided by the national legislation. Looking at national case-law in data protection, the French *Cour de cassation* (judgment no 12-17037/2013) indicated that, even if the law does not expressly state it, the sale of a file including personal data which was unlawfully collected and processed is void since the object of the sale - the undeclared processing of data - is unlawful and thus cannot be seen as being available for trade. This decision implicitly relies on the principles of effectiveness and dissuasiveness since it deprives any commercial interest files including personal data that have been unlawfully processed. Furthermore, national courts may use proportionality to tailor the (effective) sanction to the concrete circumstances of the case (i.e. the duration of the breach of data protection rules and the importance, for the persons concerned, of the protection of the data disclosed; see in data protection the *Bodil Lindqvist* case (C-101/01)).

The need to comply with the principle of **dissuasiveness** primarily leads the judge to identify a measure or a sanction to deter future infringement. Deterrence is often ensured by the **contextual application of the three principles** (effectiveness, dissuasiveness and proportionality). This contextual application has led to relevant consequences and different impact in different sectors, as shown here below.

Usually, article 47 CFR requires that sanctions and remedies be determined in accordance with effectiveness, dissuasiveness and proportionality (e.g. as stated in the competition law case, *Villeroy & Roch*, C-644/13 P). Consistently, in judicial review of administrative sanctions, MSs have conferred the power to **re-determine** or have asked courts to guide administrative enforcers in order to re-determine the content according to the correct interpretation of EU law. However, there are cases in the consumer protection area where the national judge has been asked to set aside contract terms on remedies for breach **without replacing them with a newly determined remedy or sanction** based on existing rules (e.g. a different amount of default interests replacing the disproportionate ones unfairly imposed by a professional against the consumer – *Credit Lyonnaise* case, C-565/12). The CJEU approach limiting term replacement, so the claim goes, would ensure higher deterrence against the violation of EU law by means of an unfair exercise of freedom of contract; certainly, this power to set aside contractual terms without allowing for a substitute application of default remedies should be assessed against the principle of proportionality: indeed, not all violations equally deserve this level of deterrence (*Home Credit*, C-42/15). This CJEU caselaw had different impacts in different MSs or within MSs: the Romanian (*ÎCCJ*, Decision no. 84/2016, *ÎCCJ*, Decision no. 886/2016), Spanish (*Tribunal Supremo*, no. 364/2016; *Tribunal Supremo*, no. 79/2016; *Tribunal Supremo*, 22 April 2015) and courts and French Tribunals (*Tribunal d'instance Thiers*, 13 January 2009, no. 08-147; *Tribunal d'instance Aurillac*, 11 December 2009, no 09-32) based their judgements on CJEU caselaw; whereas the French Supreme Court's judgement has not departed yet from the possibility of the application of default interests acknowledged in earlier caselaw (*Cour de Cassation*, 18 mars 2003). Also in Italy the approach is not univocal (for. ex. *Trib. Genova*, 14.2.2013; *Trib. Nola*, 19.9.2011; *Court of Appeal of Milan*, 23.7.2004; *BFA Coordination Committee* decision n. 1875 of 28 March 2014; decision n. 2666 of 30 April 2014). Though developed in the area of consumer protection, this combined application of the three principles within the article 47 CFR framework may be considered whenever a judge declares a contract or terms of a contract to

be invalid for breach of EU law. Indeed, within the limitations imposed by proportionality, the application of default rules replacing invalid terms/contracts could undermine the effectiveness of EU law and the deterrence function of remedies.

The application of the three principles may also differ depending on the type of right violated. The interplay between article 47 CFR and specific fundamental rights may bring about different outcomes. The principles of effectiveness, proportionality and dissuasiveness may be differently balanced depending on whether there has been a violation of a fundamental right and whether the right is absolute or not. Hence **the principles may have different consequences in different areas due to the type of fundamental rights that are at stake**; in particular, the effects may be different in the case of data protection and migration for example, where the principles apply to remedies that affect the dignity and/or the identity of individuals and the liberty of the third country national. In these cases, the effectiveness and proportionality principles have a wider effect and allow for an empowerment of judges, in the migration and asylum area in particular where judges extended their investigative and corrective powers *vis-à-vis* the administration.

Moreover, from the perspective of effective judicial protection and of Art. 47 CFR, **collective redress** is a specific case where the redress itself is a means of overcoming some of the difficulties of individual actions which may hamper access to justice, such as the underreporting of individual claims due to the high economic costs of litigation (usually higher than the value of the claim), the complexity of the legal provisions applicable, the duration of the judicial proceedings, the imbalance between the individual claimant and the professional counterparty (in particular consumers *vis-à-vis* professionals). In the current legislation and jurisprudence, collective redress is primarily available within the area of consumer protection; in this area a reform, leading to a new directive repealing Dir. 2009/22, is now under way (*New Deal for consumers*, COM (2018) 184 final). In the data protection area, given the new provision of the GDPR dedicated to an association's right to sue (Art. 80), one may question whether the principles and arguments that currently apply to the consumer protection area may be adapted to that of data protection. The possibility of aggregated claims can be favoured in particular to enhance effective protection of data subjects due to the higher capacity of collective institutions to coordinate multiple claims, to identify potentially interested victims, to lower the costs of litigation, and therefore to increase the levels of deterrence of enforcement mechanisms. This is already a possibility where data protection policies are embedded within a contractual relationship, as national caselaw already shows. In this latter reading, some similarities could be traced back to consumer protection case law by the CJEU (*Sales Sinués* case, C-381-385/14), where the Court distinguishes between individual redress mechanisms and collective redress mechanisms and acknowledges that the presence of representative associations may lower the need for a higher degree of consumer protection, e.g. in the field of *ex officio* judicial powers. However, the fundamental right of data protection may require different evaluations.

The following table summarises the remedial options largely influenced, through judicial dialogue, by the principles of dissuasiveness, proportionality and effectiveness on remedies in three areas analysed:

PRINCIPLES AND REMEDIES	Consumer protection	Migration and Asylum	Data Protection
invalidity	In several MSs (Italy) the consequence of the unfairness of a contractual term is voidness.	The remedy of nullity of administrative decisions adopted	In France, even if the law does not expressly state so, the sale of a file including

PRINCIPLES AND REMEDIES	Consumer protection	Migration and Asylum	Data Protection
	<p>The void term cannot be substituted (<i>Banco Español de Crédito</i>, C-618/10), except if (a) the existence of contract is endangered by the voidness of unfair term and (b) termination of the contract would cause significant disadvantage to the consumer. <i>Kásler</i> (C-26/13)</p> <p>The occurrence of an <u>unfair practice</u> may influence the assessment of unfair terms in the contract but no automatic inference may be drawn from the former on the latter. <i>Pereničová</i>, (C-453/10).</p>	<p>with the violation of fundamental rights.</p> <p>The nullity of asylum and immigration detention orders is required when the detention measure is not necessary, justified or proportionate according to secondary EU provisions and in light of Article 6 and 52(1) CFR.</p> <p>EU asylum and return law in conjunction with Art. 6, 47 and 52(1) CFR confer a power and obligation upon national courts to adapt the administration measures ordering detention of aliens. <i>Mahdi</i> (C-146/14); <i>G&R</i>, (C-383/13); <i>Sacko Moussa</i>, (C-348/16).</p>	<p>personal data, which has been unlawfully collected and processed is void since the object of the sale (the undeclared processing of data) is unlawful and thus cannot be seen as being available for trade (<i>Cour de Cassation</i>, no. 12-17037/2013).</p>
<p>injunctions</p>	<p>Dir. 2009/22 provides injunctions in case of violation of consumers interests, such as those protected in dir. 93/13 and of 2005/29</p>	<p>n.a.</p>	<p>Data protection authorities have the power to</p> <ul style="list-style-type: none"> - impose a temporary or definitive limitation including a ban on processing - order the suspension of data flows to a recipient in a third country or to an international organisation. (art 58 GDPR)
<p>Corrective measures</p>	<p>In case of violation of consumers interests, such as those protected by dir. 93/13 and 2005/29, the competent body can provide, where appropriate, measures such as the publication of the decision, and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement</p> <p>Dir. 2009/22, art. 2.</p>	<p>n.a.</p>	<ul style="list-style-type: none"> - Right to erasure ('right to be forgotten'): art. 17 GDPR, <i>Google Spain</i>, (C-131/2012); <i>Salvatore Manni</i> (C- 398/15) - Right of access by the data subject (art. 15 GDPR) - Right to restriction of processing (art 18 GDPR) - Right to data portability (art. 20 GDPR) - corrective powers of the supervisory authority (art 58 GDPR)
<p>Restitution</p>	<ul style="list-style-type: none"> - Restitutions related to the declaration of unfairness of the contractual term must cover the whole time-span of the contractual relation. <i>Naranjo</i> (Joined Cases C-154/15, C-307/15 and C-308/15) 	<p>n.a.</p>	<ul style="list-style-type: none"> - Right to rectification (art 16 GDPR)

2.6 EFFECTIVE PROTECTION IN CROSS-BORDER CASES

Art. 47 applies to disputes between parties of the same jurisdiction as well as to cross-border disputes. Both substantive and procedural rules of private international law have to be interpreted in light of art. 47 CFR.

2.6.1 Applicability of (art. 47 of) the Charter to private international law issues

- Private international law (PIL) rules must be interpreted in light of art. 47 CFR.

Pursuant to art. 51 CFR, art. 47 CFR unambiguously applies to **PIL rules enacted by the EU itself**, which have multiplied exponentially over recent decades. Rules laid down in the Brussels I (n°44/2001) and Brussels I bis (n°1215/2012) regulations for instance, or in the Rome I (n°593/2008) and Rome II (n°864/2007) regulations should be interpreted by Member State courts, “*in the light of art. 47 CFR*” and/or of the principles of effectiveness, proportionality, and dissuasiveness. Although the number of cases on PIL matters in which the CJEU expressly refers to the Charter is, till now, quite low, the CJEU caselaw confirms the influence of art. 47 CFR in the implementation of EU PIL rules (see *Meroni* case, C-559/14, interpreting the Brussels I Regulation in light of art. 47). Moreover, many CJEU cases are at least implicitly decided by the Court with due consideration given to the principles of effectiveness and proportionality.

What is less obvious, is that the Charter may also have an impact on the implementation, by the national courts, of **PIL rules enacted by the Member States** (applicable in the absence of any applicable EU PIL rules). Such a situation occurs when national PIL rules have an impact on the effectiveness of the rights conferred upon natural or legal persons by EU law. For instance, the CJEU affirms that the free movement of persons may be jeopardized when Member States’ PIL rules are an obstacle to the recognition, in one Member State, of the name of a person registered in another Member State. The CJEU controls the extent to which it is possible for Member States to apply their own conflict-of-law rules on this matter, in light of the Charter (art. 7) and of the ECHR (art. 8) (cases *Garcia Avello*, C-148/02; *Bogendorff von Wolffersdorff*, C-438/14).

2.6.2 Access to justice and conflict-of-courts rules

Although conflict-of-courts rules enacted by the EU have been designed to ease access to justice in cross-border litigation, there are shortcomings within the system. Art. 47 of the Charter and/or the principle of effectiveness should be referred to in order to deal with such flaws in the system.

- Choice-of-court clauses are to be set aside, on grounds of art. 47 CFR, when they are serious hindrances to a party’s access to justice.

Concerning **choice-of-court clauses**, art. 47 CFR should encourage Member State courts to verify whether such clauses, even when legally permitted by EU instruments and/or Member State rules, deprive a party from an effective access to justice and in such cases, to set aside the clause. The CJEU has not yet decided on this precise issue, but its reasoning on choice-of-law clauses in consumer contracts (case *Amazon*, C-191/15, see below) as well as its caselaw on air transport contracts (case *Flightright*, C-447/16) suggests that such a guideline - already implemented in some Member States - is relevant. Before deciding on the application of a choice-of-court provision, national courts should assess whether, given the personal situation of the party and the interests at stake (proportionality), there are major practical difficulties and/or a cost of access to the selected forum such that the clause may deter the party from bringing the case before the courts. This reasoning was applied by the Paris

Appeal Court (*Cour d'appel de Paris, Pôle 2 – Chambre 2*, 12 février 2016, n°15/08624, *Facebook*). The Appeal Court stated that: pursuant to art. 15 and 16 of the Brussels I Regulation, the consumer could decide to bring their claim before the court in their place of domicile. The Paris tribunal consequently had jurisdiction to rule on the choice-of-court provision included in the general terms and conditions of the contract. The choice-of-court provision being found unfair, it was to be deleted and the French courts were to have jurisdiction over the claims brought by the consumer. It should be noted that the same reasoning could be transposed to **arbitration clauses**, notably in consumer contracts.

- Art. 47 CFR may authorize a broad interpretation of EU rules on jurisdiction, when needed to ensure the effectiveness of a right awarded by EU law, given that enough balance is ensured between the rights of the claimant and the defendant.

Article 47 CFR could be referred to, to justify a broad interpretation of EU rules on the jurisdiction of courts. Two situations are particularly relevant. Firstly, art. 47 could influence interpretation of the jurisdiction rules designed for the protection of vulnerable parties (consumers, data subjects), where it serves the objective of reinforcing the protection awarded by EU law to such parties (see for instance, in consumer protection, cases *Pammer and Hotel Alpenhof*, C-585/08 and C-144/09, *Hypoteční*, C-327/10, *Armin Maletic*, C-478/12). Secondly, a broad interpretation may be supported in order to extend EU competence over cases involving third countries, where the jurisdiction of Member State courts appears to be a condition for the effectiveness of a right granted by EU law (in data protection, the right to be delisted, for instance).

However, it should be noted that the CJEU demonstrates great caution in these matters, and there are no neat examples of it expressly referring to art. 47 CFR or to the principle of effective access to justice to justify a broader interpretation of EU rules in the jurisdiction of courts (Brussels I and Brussels I bis Regulations). The reason for CJEU self-restraint is suggested in its caselaw. Even if the purpose of granting an effective access to justice to one party may imply a broad interpretation of the jurisdiction rule, the Court must also keep in mind the equally important right of the other party to be fairly treated, and to not suffer any harm resulting from a procedural imbalance created by the judge. Therefore, whenever it gives a broad interpretation of a jurisdiction rule based on the principle of effective access to justice, the CJEU also carefully assesses the case **in light of the principle of proportionality**. In data protection, for instance, the Court has broadly interpreted art. 7 (2) of Regulation n°1215/2012 (Brussels I bis) – according to which, in tort matters, the court with jurisdiction is the court located in the place where the harmful event occurred – to decide that a natural or legal person suffering a violation of their personality rights should be able to claim damages before the courts of the place where their center of interests is located; that is the place of residence for natural persons and the place where the major part of economic activities are carried out for legal persons (case *eDate*, C-509/09 and C-161/10; case *Svensk Handel*, C-194/16). To reach this decision, the Court implicitly relied upon **the principle of effectiveness of justice**, stressing that courts of the Member State in which the centre of interests of the person affected is located are best placed to assess the impact of the wrongful content on the rights of that person, and on **the principle of proportionality**, balancing the applicant's interest to easily identify the court in which he may sue, with the defendant's interest in reasonably foreseeing before which court he may be sued.

2.6.3 Effectiveness of justice and conflict-of-law rules

- Art. 47 CFR and/or the principle of effectiveness invite MS judges, when dealing with a conflict-of-law clause which is prima facie lawful, to ensure that the clause does not jeopardize a right or protection granted by the EU, and if such is the case, to set it aside.

Even if it conforms to EU private international law, a choice-of-law provision should be set aside, pursuant to the principle of effectiveness, when it jeopardizes a right or protection granted by EU law. The CJUE decided as much in the field of consumer protection (case *Amazon*, C-191/15), adding a new condition to the validity of choice-of-law provisions: even if authorized by EU law (Regulation Rome I), **a choice-of-law clause included in a consumer contract must be scrutinized in light of the principle of effectiveness of consumer protection against unfair clauses**. Since the Rome I regulation organizes consumer protection against choice-of-law clauses by making the law of consumer's residence applicable whenever it provides more protection than the chosen law, a choice-of-law clause should be seen as unfair if it doesn't provide clear information to the consumer as to his/her right to claim protection awarded by the law in his/her place of residence. The reasoning could be transposed to other fields of law, such as labour law where the EU also intended to protect employees against choice-of-law clauses imposed by employers, although it did allow such clauses in employment contracts.

- Art. 47 CFR and/or the principle of effectiveness should influence the interpretation of EU conflict-of-law rules, notably when they endorse a substantive function such as the protection of a weaker party.

In the three examined areas, this guideline has not been clearly implemented by the CJEU. However, it is permissible to consider that if art. 47 CFR has had an impact on the interpretation of jurisdiction rules meant to protect weaker parties in conflict-of-courts matters (see above), it should also influence the interpretation of conflict-of-law rules pursuing the same objectives. Moreover, the CJUE caselaw related to **international employment contracts** proves that the Court has been relying on the principle of effectiveness as guidance in the interpretation of the conflict-of-law rule laid down in the Rome Convention/Rome 1 Regulation. In *Koezsch* (C-29/10) the Court decided that the main connecting factor set in art. 6 of the Rome Convention – the criterion of the country in which the employee 'habitually carries out his work' – must be given a broad interpretation, whereas the subsidiary criterion of 'the place of business through which [the employee] was engaged' ought to apply only in cases where the court dealing with the case is not in a position to determine the country in which the work is habitually carried out. Consequently, even when work is carried out in more than one Member State, the main criterion of the country in which the work is habitually carried out shall apply, and be broadly interpreted as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities. The Court justifies its reluctance to apply the subsidiary criterion – which usually leads to the application of the law of the country where the employer is established – by stressing the necessity of ensuring the effectiveness of the protection of the employee enshrined in the conflict-of-law rule applying to employment contracts.

- Where the effectiveness of a protection/right awarded by the EU is at stake, art. 47 CFR may justify a broad interpretation of the criteria defining the (extra)territorial scope of EU and MS legislations.

EU and MS legal systems occasionally derogate from the traditional bilateral conflict-of-laws methodology, and unilaterally define the extraterritorial scope of their substantive rules. In this respect, **art. 47 CFR has a role to play in the definition of the (extra)territorial scope of the application of a substantive rule**, since the rule's scope of application is a key element of its effectiveness.

Caselaw related to data protection provides numerous examples of how the principle of effectiveness has been used by the CJEU to broadly interpret the criteria setting the (extra)territorial application of Member States' rules transposing Directive n°95/46, that is "the processing of data carried out in the context of the activities of an establishment of the controller in the territory of" a Member State. In *Google Spain* (C-131/12), the CJEU relied on the principle of effectiveness to underline how, given the objective of ensuring an effective and complete protection of the fundamental rights and freedoms of natural persons with respect to the processing of personal data, the words "carried out in the context of the activities" of an establishment cannot be interpreted restrictively. The same reasoning was applied in *Weltimmo* (C-230/14) to propose a broad and flexible definition of the word "establishment." It should be noted that the GDPR confirmed the large territorial scope of the application of EU rules protecting personal data (art. 3).

3 EFFECTIVE JUSTICE IN CONSUMER PROTECTION

3.1 ACCESS TO JUSTICE AND THE COORDINATION BETWEEN ADMINISTRATIVE AND JUDICIAL ENFORCEMENT MECHANISMS

The general principle that steers relations between administrative and judicial enforcement is **the right to effective judicial remedy** derived from Article 47 CFR and **the right to good administration** (Article 41 CFR). Furthermore, the principles of effectiveness, equivalence and proportionality play a significant role in CJEU case law and, as a consequence, impact on national jurisprudence. More practically, domestic courts should consider the following:

- With regard to the relevance of an administrative decision in a judicial proceeding, courts should refer to the reasoning of the *Pereničová* case (C-453/2010): the administrative decision as to the unfairness of the practice could be relevant, among other elements, for the judge's decision on the unfairness of the term(s).
- Article 47 CFR has an even stronger impact on the coordination between administrative decisions and the court's assessment when both concern unfair terms, the former *in abstracto*, the latter *in concreto*. Indeed, further to the CJEU's reasoning in the *Invitel*, C-472/10 and *Biuro*, C-119/15 cases, courts should derive all consequences from an earlier ascertainment of unfair terms, including the non-bindingness of those terms with respect to consumers in present and future transactions when, in light of national applicable law, the ascertainment may be extended to terms equivalent to the ones found to be unfair, though used by other businesses that were not party to the proceedings, these shall have, under article 47 CFR, adequate means for challenging the decision establishing that equivalence (*Biuro* case, C-119/15).

3.2 FAIR TRIAL AND THE RIGHT TO BE HEARD: BETWEEN EFFECTIVE JUSTICE AND GOOD ADMINISTRATION

Generally speaking, there has been little reference to procedural guarantees in favour of consumers in EU legislation thus far; the system has therefore relied primarily on national procedural legislations related to administrative and judicial proceedings, interpreted in light of EU general principles and art. 47 CFR. A good example is the right to be heard. In this respect, national courts should consider how:

- With regard to **administrative proceedings** the right to be heard is left to national legislation, with a relevant exception provided by the recent Regulation n. 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws which expressly refers to the right to be heard of the trader (Art. 19). It is important to note, however, that in this case the right to be heard is not to be granted to consumers and professionals alike, but rather only to the latter which is the party subject to potential sanction.
- In the area of **judicial enforcement**, the right to be heard plays an important function in balancing the procedural rights of litigants as a consequence of the gradual expansion of an enforcers' power to identify an infringement of consumer rights and to adopt effective measures for consumer protection (*Banif plus* case, C-472/11).

- With regard **to the interaction between the administrative proceeding and the judicial review**, in light of art. 47 CFREU, the trader must have a chance to be heard within judicial review proceedings on an administrative decision addressing a supposedly existing trader's infringement, notwithstanding the right to be heard during the administrative proceedings (*Biuro* case C-119/15).

Conclusively, both courts and administrative authorities shall ensure that, as those that are targeted by the investigatory powers of the latter and the sanctioning powers of both, professionals have the opportunity to present their views on assessments that may impact their interest; even greater still when judges have the power to raise questions *ex officio*. On the consumer side, in the area of unfair contract terms, the right to be heard shall be ensured in order to enable consumers to oppose, if ever interested in doing so, the non-bindingness of unfair terms (*Banif plus* case, C-472/11).

3.3 EFFECTIVE JUSTICE AND EX OFFICIO POWERS

The CJEU expanded the role of the *ex officio* powers of civil judges in consumer litigation. In the view of the CJEU, *ex officio* powers contribute to the effectiveness of consumers rights (*Oceano* case, C- 240-244/98). CJEU caselaw on *ex officio* powers plays a key role in the interpretation of EU law in several aspects, so providing clear guidance for national courts:

- *Consumer status*

The principle of effectiveness requires a national court to ascertain *ex officio* the consumer status of a party, even though the consumer has not herself made her status clear when filing the claim or in her defence, as soon as that court has the matters of law and of fact necessary for that purpose at its disposal or may have them at its disposal simply by making a request for clarification (*Faber* case, C-497/13).

- *Declaration of unfair contractual terms*

According to CJEU case law (*Pannon* case, C-243/08), a national court **must declare** the term of a consumer contract unfair of its own motion, even if the consumer has not raised the unfairness of the term in this respect. The obligation of the judge is coupled with the **consumer's right to oppose the declaration** of a term as non-binding to the extent that this declaration does not meet the concrete interest of the consumer (*Pannon* case, C-243/08; *Banif plus*, C-472/11; *Asbeek*, C-488/11). Moreover, the **principle of audi alteram partem**, as a general rule, requires the national court which has found that a contractual term is unfair by its own motion to inform the parties of such and to invite each of them to set out its views on the matter (*Banif* case, C-472/11).

- *The duty of the judge to investigate*

In light of the principle of effectiveness, the CJEU also expands the duty to ascertain the unfairness of a term with regard to the **judge's obligation to investigate** in order to evaluate a term's unfairness (*Pénzügyi* case C-137/08, concerning a jurisdiction clause). In this respect, it should be pointed out that the CJEU has not yet addressed the question of whether the reasoning of the *Pénzügyi* case (C-137/08) could apply to all types of clauses, including the ones that require complex investigation, or

whether it could extend to phases of judicial proceedings in which parties may be precluded from providing evidence that supports their claims or defences.

- *Remedies*

The expansion of *ex officio* powers by virtue of the principle of effectiveness also influences the **assignment of remedies**, especially with regard to those set forth in the Consumer sales Directive (dir. 1999/44). The CJEU (*Fernández Oliva* case, C-568-570/14; *Duarte Hueros* case, C-32/13), by virtue of the principle of effectiveness, tends to overcome foreclosures existing in the national legal systems, allowing the judge to exercise *ex officio* powers in order to grant the proper effective remedy/measure, even if it is not claimed by the consumer, when the consumer has no possibility of obtaining that effective remedy elsewhere. With this trend in mind, the domestic courts, assessing cases in which EU law is involved, should interpret national procedural rules in light of the principle of effectiveness, in order to ensure that remedies can be granted to consumers. In this respect, it should be noted that national procedural rules must ensure the effectiveness of consumer protection and an effective judicial protection (*Sziber*, C-483/16). In this context, consistent interpretation could lead to the construction of *ex officio* powers of the judge, if it is necessary to avoid the risk of a lack of effective consumer protection. Additional clarification may be sought through preliminary reference proceedings in this respect.

3.4 EFFECTIVE, PROPORTIONATE AND DISSUASIVE REMEDIES

3.4.1 The use of nullity (of contracts or contract clauses) and the use of modification/adaptation powers by judges with respect to contractual content

3.4.1.1 Unfair contractual terms

According to the principles of effectiveness and dissuasiveness, the CJEU has limited the possibility of a national court attempting to remedy the invalidity of an unfair term by substituting a supplementary (default) provision of national law. In this respect, the CJEU has stated that the national courts are only required to exclude the application of an unfair contractual term so that it does not produce binding effects with regard to the consumer, without being authorized to revise its content (*Banco Español* case, C-618/10). The contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as such continuity of the contract is legally possible.

Nevertheless, according to the *Kásler* case (C-26/13) concerning a consumer loan agreement, the CJEU, applying the principle of dissuasiveness, stated that in such a situation in which a contract concluded between seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, national law may enable the national court to cure the invalidity of that term by substituting it for a supplementary provision of national law.

3.4.1.2 Unfair commercial practices

The question arises whether the EU principles of effectiveness, proportionality and dissuasiveness can influence the identification of civil remedies against unfair commercial practices. In this respect, according to the *Pereničová* case (C-453/10), the occurrence of an unfair practice may influence the

assessment of unfair terms of the related contract, but no automatic inference can be made from the former to the latter.

The conclusion reached by the CJEU is compatible with the possibility that national legislation provides for validity rules applicable to contracts concluded as a consequence of unfair practices. Indeed, in some MSs, the consumer has been enabled to set aside the concluded contract on the basis of unfair commercial practices through different means (nullity, voidability, unwinding). If the proposal developed by the EU Commission within the New Deal for Consumers (COM (2018) 183 final) is approved, similar remedies would be required under EU law, widening the possible impact of article 47 CFR on the identification of effective remedies and the conforming interpretation of national law.

3.4.2 The use of means of collective redress

When a collective and an individual redress are available, the question of their coordination arises. With regard to the coordination mechanisms of suspension, the CJEU stated that, according to the principle of effectiveness, national law cannot automatically impose the suspension of individual action pending a collective procedure (*Sales Sinués* case, C-381-385/14).

Generally speaking, in the identification of the effective remedy with special regard to collective redress, as it assesses the coordination between collective and individual redress, national courts could identify the different *rationes* of them and strike a balance between the need to ensure consistency and procedural economy to the legal system on the one side, and, on the other, the need for effective protection of the individual consumer. When collective and individual procedures, though linked, aim at different outcomes (e.g. ascertainment of unfairness *in abstracto* or *in concreto*), suspension may be challenged under article 47 CFR.

3.5 EFFECTIVE PROTECTION IN CROSS-BORDER CASES

3.5.1 Effective consumer protection and courts with jurisdiction over cross-border consumer cases.

The **scope of application** of the rules on jurisdiction of the Brussels I Regulation protecting consumers shall be defined broadly, based on the principle of effectiveness of consumer protection, mitigated by the principle of proportionality [necessity to ensure a fair balance between the rights of the applicant/professional (access to justice) and those of the defendant/consumer (right of the defence)]. The same EU principles should offer guidance in **the interpretation of the rules on jurisdiction** set by the Brussels I Regulation for cases involving consumers.

Even if the **notion of “consumer”** is to be strictly construed for the purpose of applying art. 15 and 16 of Regulation no 44/2001 (art. 17 & 18, Reg. no 1215/2012), judges shall interpret it in light of the principle of effectiveness, taking the concern of consumer protection into account as the party deemed economically weaker and less experienced in legal matters than the other party to the contract. This weakness must be distinct from the knowledge and information that the person concerned actually possesses. The consequence is that activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement does not entail the loss of a private Facebook account user’s status as a ‘consumer’

within the meaning of that Regulation (Schrems case, C-498/16). However, jurisdiction cannot be established through the concentration of several claims concerning consumers domiciled in several MSs, in the person of a single applicant, since the consumer is protected only in so far as he is, in his personal capacity, the plaintiff or defendant in proceedings (Schrems case, C-498/16). Possible future developments in EU consumer law may bring further clarification about the role of collective redress mechanisms in securing access to justice (See, in the framework of the New Deal for Consumers, Art. 16 of the proposal for a directive on representative actions for the protection of the collective interests of consumers, repealing dir. 2009/22, COM (2018) 184 final).

In light of the principle of effectiveness of consumer protection, judges shall verify, *ex officio*, if a **choice-of-court provision** included in a transnational consumer contract meets the conditions set by art. 17 of Regulation 44/2001 (corresponding to Art. 19 of Regulation 1215/2012)¹ and if not, verify that the consumer knowingly accepts the jurisdiction of the tribunal designated by the clause.²

A national court, before which a consumer brings an individual claim based on an allegedly unfair term, shall not **stay its proceedings** because of the existence of parallel proceedings ongoing before the courts of another MS on the basis of an action brought by a consumer association seeking an injunction against the same unfair term.

3.5.2 *Ex officio* powers to declare the unfairness of a choice-of-law clause.

The principle of effectiveness implies that, **when dealing with a conflict-of-law clause in a consumer contract, judges shall verify, *ex officio*, if the clause is unfair** by applying the criteria established by the CJEU on the basis of the provisions of Directive 93/13. A pre-formulated choice-of-law clause is unfair when it misleads the consumer on the scope of the protection he is entitled to under art. 6(2) of the Rome I Regulation, securing the protection afforded to the consumer by provisions that cannot be derogated from an agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of default criteria set by the Regulation.

Moreover, if the conflict-of-law clause is an unfair term, the judge should apply *ex officio* the law of the country of residence of the consumer, instead of the chosen law (Amazon case C- 191/15, para. 70). This conclusion may not change in cases in which an injunction is sought with regard to the future use of such or of contract terms: indeed, whereas the fairness assessment is subject to the Rome I Regulation being a matter of contractual obligations, only the use of terms and their prohibition have an extra-contractual nature, therefore falling under the Rome II Regulation (Amazon case C-191/15).

¹ According to Art. 17 Reg. no. 44/2001 and Art. 19 Reg. no 1215/2012 the conditions are that the agreement: a) is entered into after the dispute has arisen; or b) allows the consumer to bring proceedings in courts other than those indicated in this Section; or c) is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

² According to Art. 24 Reg. no44/2001 and Art. 26 Reg. no 1215/2012, when a defendant enters an appearance before a court without challenging its jurisdiction, the jurisdiction of such a court is prorogated. The rule applies even if the defendant is a consumer.

4 EFFECTIVE JUSTICE IN DATA PROTECTION

4.1 INDEPENDENCE OF JUDGES AND OTHER ENFORCERS

Independence is a feature that also refers to national independent authorities, such as data protection supervisory authorities, according to art. 52 GDPR. The jurisprudence of the CJEU on this point affirms that the concept of independence is to be understood as including an operational independence:

- the absence of external – direct or indirect – influence with regard to the performance of authorities’ activities
- the availability of human and financial resources to perform the given authorities’ activities.

Moreover, such operational independence should be coupled with an obligation to allow the supervisory authorities to serve their full term of office and cause them to vacate office before expiry of the full term only in accordance with applicable legislation (*Commission v Hungary*, C-288/12). Otherwise, a supervisory authority exposed to the threat of premature termination could enter into a “*form of prior compliance with the political authority, which is incompatible with the requirement of independence.*” Moreover, in such a situation, the impartiality of the supervisory authority would also be threatened.

4.2 ACCESS TO JUSTICE AND THE COORDINATION BETWEEN ADMINISTRATIVE AND JUDICIAL ENFORCEMENT MECHANISMS

The coordination between administrative enforcement, addressed by national supervisory authorities, and of judicial enforcement is addressed differently by Member States. The possible relationships between administrative and judicial enforcement on the basis of current national legislations are the following: (a) Alternative; (b) Complementary with simultaneous or sequential procedures; (c) Independent.

Art. 78 GDPR on the right to an effective judicial remedy against a supervisory authority is to be interpreted in light of art. 47 CFR, as leaving the choice to the national legislator to define the coordination mechanisms of judicial review with respect to the decisions of supervisory authorities. Indeed, this coordination should not limit access to justice to data subjects in case of violation of their rights.

The jurisprudence of the CJEU acknowledges that a limitation upon objectives of the general interest can be justified, such as the swiftness of administrative proceedings and the efficiency of judicial proceedings. Moreover, the CJEU has imposed a proportionality test in order to evaluate if any coordination mechanism is in line with effective judicial protection, namely:

- The procedures do not cause a substantial delay for the purposes of bringing legal proceedings;
- The procedures suspend the period for the time-barring of claims;
- The procedures do not give rise to excessive costs for the parties;
- The procedures allow for interim measures in exceptional cases where the urgency of the situation so requires (*Alassini*, C-317/08, as referred in *Puskar*, C-73/16).

4.3 FAIR TRIAL AND THE RIGHT TO BE HEARD BETWEEN EFFECTIVE JUSTICE AND GOOD ADMINISTRATION

Within the field of data protection, the right to be heard shall be respected both during the procedure before the national supervisory authority and before the judicial courts. According to art. 83(8) GDPR the procedural guarantees should apply not only to courts but also to national supervisory authorities whenever they are exercising their adjudicatory powers. Recital (148) specifies that, more specifically, the imposition of penalties including administrative fines should be subject to the appropriate procedural safeguards in accordance with the general principles of Union law and the Charter, including effective judicial protection and due process.

In most cases, guarantees provided by the national legislation with respect to administrative proceedings before the national supervisory authorities are aimed at protecting the position of the data processor or data controller, which is the party who may potentially be subject to sanctions and fines.

However, Art. 83(8) GDPR, read in light of Art. 47 CFR, does not provide any distinction with regard to the type of proceedings; thus, each party should be able to exercise their rights of defence. Therefore, in light of the general principles of Union law and the Charter, including effective judicial protection and due process, the national supervisory authorities cannot deny the possibility to data subjects to have an oral hearing or to have their views presented before the administrative authority in case of a claim. In this case, this may be justified by the following reasons:

- A data subject may potentially be subject to negative effects of the enforcement decision of the supervisory authority;
- A data subject can contribute to the proceedings providing evidence about fact or legal requirements;
- A data subject may specify the claim according to additional circumstances emerging from the proceedings.

Moreover, according to CJEU jurisprudence (part. *Puskar*, C-73/16), in light of the principle of proportionality, the right to be heard should not create an overly heavy burden on the judicial procedure when it has been fully ensured within the administrative phase, and no new elements have appeared to justify additional hearings in person.

4.4 EFFECTIVE JUSTICE AND EX OFFICIO POWERS

Ex officio power of judges has not yet been addressed by the CJEU in the data protection area. However, the interplay between data protection and consumer protection emerging from CJEU jurisprudence (see *Amazon*, C-191/15; *Schrems II*, C-498/16) may lead to questions regarding the role of the judge in ascertaining the status of a consumer in a contract which also encompasses the processing of data.

Whenever the processing of data is encompassed in a consumer contract, the data subject may also be a consumer. Thus, in light of the caselaw on consumer protection, this status has to be ascertained ex officio. Moreover, ex officio powers may extend to unfair terms of data protection policies, including, for example, those providing a consumer's consent for data processing that may not be interpreted as freely given whenever "the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment" (see recital (42) GDPR).

4.5 EFFECTIVE, PROPORTIONATE AND DISSUASIVE REMEDIES

Art. 78 GDPR provides that, without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to *an effective judicial remedy* against a legally binding decision of a supervisory authority concerning them; moreover, he/she/it has a right to an effective judicial remedy whenever the supervisory authority does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged. Recital (141) GDPR clarifies that this provision shall be interpreted in light of article 47 CFR, while recital (148) GDPR specifies that the imposition of penalties should be subject to appropriate procedural safeguards in accordance with the general principles of Union law and the Charter. The principles of effectiveness, proportionality and dissuasiveness are specifically referred to in art. 83(1) GDPR and more precise criteria are provided accordingly.

Both administrative authorities and courts shall apply these criteria in the light of the Charter when identifying appropriate measures and remedies against infringements of the data protection legislation. National supervisory authorities and courts can also refer to a set of proportionality criteria used by the CJEU in order to identify the best suitable remedy vis-à-vis the specific circumstances of the case, namely:

- the duration of the breach of data protection,
- the importance, for the persons concerned,
- the fact that the data in question already appears in public sources,
- the nature of the information in question and its sensitivity for the data subject's private life,
- the public interest in the information,
- the age of the data subject.

When the breach of data protection legislation is a result of a conflict between data protection and other fundamental rights, the national court should engage in a preliminary balance between the fundamental rights at stake and also select the remedy on the basis of the results of the proportionality test.

In case of conflict between freedom of expression and data protection, the national courts shall examine the legitimate interest of the public to know the information published and the right of data subjects to data protection. For this purpose, national courts shall examine the veracity, the date of publication, the intimacy and the prejudicial aspect of personal data exposed. Moreover, the national courts may differentiate the types of remedies on the basis of the data processor's status, distinguishing for instance between the case of a search engine and a press outlet.

4.6 EFFECTIVE PROTECTION IN CROSS BORDER CASES

Data processing is performed more and more often in a cross-border dimension. Both substantive and procedural rules of private international law have to be interpreted in light of art. 47 CFR. Art. 3 GDPR solves the issue of the law applicable to cross-border processing, by defining the territorial scope of EU legislation. Art. 79 GDPR defines the jurisdiction of courts before which claims related to data processing are brought for the purpose of obtaining a judicial remedy. However, further questions may be referred by the courts with regard to the interpretation of the connecting factors included in art. 3 and 79 GDPR in order to achieve effective enforcement of data protection regulation. Before the entry into force of the GDPR, the CJEU referred to the principle of

effectiveness to expand **the territorial scope of the application of EU data protection** (*Google Spain*, C-131/12; *Weltimmo*, C-191/15). The court also relied on the principles of effectiveness and of proportionality to propose a **broad interpretation of art. 7 Reg. no1215/2012** (Brussels I bis) in order to define the jurisdiction of courts in data protection litigation (*Svensk Handel*, C-196/16). With regard to the territorial reach of the powers of the national supervisory authorities, art. 55 and 56 GDPR provide for a definition of the responsibilities of the national supervisory authorities for cross-border processing. In this case, the principle of effectiveness triggers an enhanced cooperation among national supervisory authorities (art. 61, GDPR): the authority to which the original complaint has been submitted must, in fulfilment of the duty of cooperation, request the supervisory authority of the Member State whose law is applicable, to establish an infringement of that law and to impose penalties if that law permits. Before the GDPR entered into force, the CJEU relied on the principle of effectiveness to impose the duty of cooperation (*Weltimmo*, C-230/14).

5 EFFECTIVE JUSTICE IN ASYLUM AND IMMIGRATION

5.1 INDEPENDENCE OF THE JUDICIARIES AND OTHER ENFORCERS

With regard to the independence of the judiciary in the field of asylum and irregular immigration, Article 47 of the EU Charter has played a double role. On the one hand, Member States have created new specialised tribunals and legal professions (e.g. Giudice di Pace in Italy) to ensure that asylum adjudication is not delayed and thus secure compliance with Article 47 EU Charter requirements of a fair trial carried out in a reasonable amount of time. On the other hand, the conformity of these newly created courts and legal professions with Article 47 EU Charter requirements of independence and impartiality has been called into question, due to these courts' formation which has raised concerns regarding their members' independence from the administration.

According to the CJEU preliminary ruling in the *H.I.D* (C-175/11), the assessment of the independence of a specialised asylum tribunal has to be carried out in light of Article 47 CFR, and must take into account the place of this tribunal within the whole of the national asylum system. The CJEU held that as long as there are means of obtaining redress against the judgments of the specialised tribunal, then these are capable of protecting the said tribunal against potential temptations to give into external intervention or pressure liable to jeopardise the independence of its members.

According to the CJEU, "the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision" (*H.I.D*). External independence entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members with regard to the proceedings before them. The internal aspect of independence is linked to the impartiality of the members and seeks to ensure a level playing field for the parties to the proceedings and their respective interests.

When doubts exist with regard to compliance with Article 47 CFR standards of judicial independence, the CJEU can clarify them within the procedural framework of a preliminary reference and the substantive ambit of EU law, meaning that a connection with an EU law instrument other than Article 47 CFR must be present. While the independence and adversarial proceedings guarantees of the **Irish Refugee Appeal Tribunal** were reviewed by the CJEU in the *H.I.D* case, the independence and constitutionality of the **Greek Independent Appeals Committees** were reviewed only by the **Greek Council of State, without also involving the CJEU**. The Greek Council of State referred to the CJEU standards in the *Tall* judgment³ for the purpose of highlighting the importance of the right to an effective remedy, which was interpreted as requiring Member States to establish the specialised tribunal that would ensure a fast and effective remedy to the applicants, which avoided keeping them in an uncertain legal situation for long durations. If the interpretation of Article 47 CFR in a particular case is clear or has been clarified by the CJEU in its previous jurisprudence, then the national court should give preference to the interpretation which renders the interpretation of the national provision consistent with the Charter requirements (see *N.S. & ME*, C-411/10). The CJEU has made clear that "Member States must [...] make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law" (*N.S. & ME*).

³ The judgment is discussed in the Chapter – Right to an effective remedy and the suspensive effect of appeal.

Access to an independent judicial authority is one of the main guarantees of the right to an effective judicial remedy which must be secured even in areas traditionally perceived as falling under the discretionary powers of the administration (see in this respect the CJEU judgement *Fahimian*, C-544/15). For instance, the CJEU noted in *El Hassani* (C-403/16) that Article 47(2) CFR provides that everyone is entitled to a hearing by an independent and impartial tribunal. The concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision. This was not the case of the Polish consulate in the *El Hassani* case. Therefore, the CJEU required that the consulate's decisions refusing a visa to third country nationals for accessing an EU Member State must be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider all the relevant issues.

5.2 ACCESS TO JUSTICE

The CJEU held that the principle of effective judicial protection, affirmed in Article 47 of the EU Charter, comprises various elements. Among them, the Court included the right of access to a tribunal (CJEU, C-69/10, *Diouf*, and C-348/16, *Sacko*). Accessibility to a tribunal means not only availability of an independent court that has jurisdiction and/or is capable of securing effective reparations, where appropriate, but also that its access may not be subject to conditions that make it impossible or extremely difficult to exercise the right of accessing a court.

Access to court is an essential part of access to justice. The CJEU held in *El Hassani* that the Polish legislation which did not permit appeal against the refusal to grant a visa to a third country national by the Polish consulate was incompatible with Article 47(2) CFR. Although Member States enjoy wide procedural autonomy, particularly in areas associated with statehood, Article 47(2) of the EU Charter requires that Member States, when they act within the scope of EU law, ensure basic fair trial guarantees as access to justice. In this respect, recently the CJEU stated that Art. 47 CFR requires that after a judgment of annulment of a decision concerning an application for international protection, in the event that the file is referred back to a quasi-judicial or administrative body, a new decision must be adopted within a short period of time and must comply with the assessment contained in the judgment annulling the initial decision (*Alheto*, C-585/16).

5.3 FAIR TRIAL AND THE RIGHT TO BE HEARD WITHIN THE SEQUENCE BETWEEN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

The right to be heard is a particularly important fundamental guarantee in asylum and return proceedings, due to the limited evidence existent in these proceedings. The investigation of the credibility of the asylum seeker and of irregular migrants thus relies heavily on the information shared by them during hearings. Both within international protection and return proceedings the hearing shall take place first before administrative authorities and, in case of a negative decision, there can be a second hearing during an appeal lodged before a court or tribunal. Thus, administrative enforcement of the right to be heard is subject to review by judicial authorities according to the requirements of effective judicial protection and fair trial guarantees. Asylum investigation requires the duty of cooperation between the administration and the individual, on the one hand, and between the judiciary and the individual in establishing all the necessary evidence regarding the credibility of the asylum seeker and his/her application. Existing legislation on the relation between the administration and the judiciary regarding asylum investigation, normally established at the Member State level, should be

interpreted in light of Article 47 CFR and of the general principles of EU law standards of effective judicial protection. The exercise of administrative investigative powers should not limit, restrict or impede judicial review powers, which have the freedom to decide to hold an oral hearing, even if not legally binding according to national legislation, if the court considers it necessary to fulfil the requirements of Article 47(2) CFR and relevant EU secondary legislation (see *Sacko Moussa*, C-348/16).

While the administrative hearing during asylum proceedings is highly regulated by the Asylum Procedure Directive (Directive 2013/32), the hearing within the appeal phase before the court is less regulated. In the face of national legislation restricting judicial review powers of the national courts, the CJEU underlined the discretionary power of the national courts to decide whether or not to hold an oral hearing in *Sacko Moussa*, even when a personal interview of the asylum seeker took place before administrative authorities and the report or transcript of the interview was placed in the case-file, as long as the court hearing the appeal considers it necessary for the purpose of ensuring that there is a full and *ex nunc* examination of both facts and points of law, as required under Article 46(3) of the Asylum Procedure Directive to hold another hearing. Therefore, if the hearing powers of the national courts are limited, the court can rely directly on Article 47(2) of the EU Charter jointly with Article 46(3) of the Asylum Procedure Directive to widely interpret the national legislation as allowing the necessary oral hearing, even in cases of manifestly unfounded applications.

The CJEU case law on return proceedings showed that even in the absence of an express right to be heard set out by the specific EU secondary legislation, the Member States must secure this right to individuals by the competent administrative authorities on the basis of the general principle of the rights of defence (*Boudjlida*, C-166/13, and *Mukarubega*, C-249/13). However, the right to be heard is not absolute and can be restricted. Should a violation of the right to be heard occur, it does not automatically lead to an annulment of the unlawful return decision, but does so only if the administrative decision would have been different had the individual been heard (*G&R*, C-383/13).

5.4 JUDICIAL REVIEW, EFFECTIVE JUSTICE AND EX OFFICIO POWERS

Effective justice is dependent on the national courts having the power to obtain a full review of facts and the law, beyond those raised by the parties, particularly when a potential violation of absolute rights is at issue (such as Articles 4 and 19(2) CFR), or of the right to liberty (Article 6 EU Charter). According to the CJEU judgment in the *Mahdi* (C-146/14) case, the national courts have full powers of assessment of facts and law beyond the evidence submitted by the parties in order to decide on the legality of the prolongation of pre-removal detention.

The right to an effective remedy shall be interpreted as allowing the judicial review of detention also by individual application even if the national law sets out only *ex officio* judicial review. For example, although under Italian law, in cases of extended detention of an asylum seeker, only *ex officio* judicial reviews are admitted, to be carried out at regular intervals of 60 days, the **Tribunal of Turin** allowed an action to be brought by a detained asylum seeker against an on-going detention.

When, due to specific and personal circumstances, the individual is unable to make the appeal in asylum or return proceedings in due time, due to illiteracy conditions of the individual, or scarce knowledge of the language, or the individual is detained and did not have access in due time to legal representation and/or legal aid, national courts from some Member States (*Italy, Czech Republic,*

Estonia) consider these circumstances to permit consideration of the appeal on merit even if the deadline for lodging the judicial appeal has expired.

Absolute fundamental rights, such as the prohibition of ill treatment (Article 4 EU Charter) and the principle of non-refoulement (Article 19(2) EU Charter) trump procedural limitations of the judicial review powers of national courts (*Abdida*, C-562/13; *Tall*, C-239/14; *C.K.*, C-578/16) and require an obligation of ex officio judicial review of potential violations of these absolute fundamental rights by the national court. When there is a risk of a potential violation of absolute rights, Article 47 CFR also requires a suspension of the execution of the expulsion of the third country national (see, *Abdida*, and *Gnandi*, C-181/16). While Member States enjoy discretion on whether to decide on the nature and number of possible appeals before the national courts, the Member States nevertheless have the obligation to respect the principles of the EU law of equivalence and effectiveness. The **principle of equivalence** requires that the procedural conditions governing actions of law intended to ensure the rights individuals acquire as a result of EU law cannot be less favourable than those relating to similar actions of a domestic nature. The principle of **effectiveness** requires that these conditions cannot make it impossible in practice to exercise the rights acquired as a result of EU law before the national courts.