The Right to Effective Judicial Protection and Remedies in the EU

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Abstract Given some important amendments of the European Treaties and recent case-law of the courts at the European and national levels this article seeks to establish to what extent the fundamental right to an effective remedy and judicial protection of rights and freedoms guaranteed by Union law (Article 47 of the European Charter of Fundamental Rights) is given effect. It honours the jurisprudence of the ECJ for the 60 years of its existence, and it pleads for a broad interpretation to be given to Article 263 (4) TFEU as a new opportunity to ensure access to justice for the individual being directly affected by the provisions of a Union regulation. Looking at the national level, note is taken of the achievements, but also of the difficulties of the German Federal Constitutional Court to ensure that German courts refer cases to the ECJ when the rights or freedoms of individuals are at stake. Yet, a comparative study would be needed in order to assess the situation in other Member States in implementing their respective duties under Article 19 (1) TEU.

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1 Introduction

The European Union has been established as a Community based on the rule of law.[1] Not only the Preamble of the Treaty on European Union (TEU) in its second and fourth recitals refer to the rule of law, but also Article 2 TEU includes among the fundamental values of the Union the rule of law and respect for human rights. One decisive element of the rule of law is the principle of effective judicial control. Accordingly, the Court has recognised the "principle of judicial control" already in the *Johnston* judgment of 1986 as a "general principle of law which underlies the constitutional traditions common to the Member States".[2] Its jurisprudence also reflects general guarantees of international law such as Article 10 of the Universal Declaration of Human Rights (1948), Article 14 (1) of the UN Covenant on Civil and Political Rights as well as Articles 6 (1) and 13 of the European Convention on Human Rights. As a result, Article 47 of the Charter of Fundamental Rights of the European Union (CFR) provides for everyone the right to an effective remedy[3] and to a fair trial.[4]

It seems to be far from clear, however, what exactly the extent and limits of the guarantees spelled out in this provision are. As can be seen in Article 51 (1) CFR the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union, and to the Member States only when they are implementing Union law. No institution in Europe has taken effective remedies and the defence of the rights and freedoms guaranteed by the law of the Union more seriously than the ECJ during its 60 years of existence. It thus sets an example for what its original role under Article 19(1)(1) TEU is and what from now on Article 47 CFR is explicitly requiring it to do (see infra 2.). The only open question in this regard is the access to justice in cases of individuals directly affected by EU legislative acts. Even if they have a valid claim that their fundamental rights and freedoms under the Charter are violated, it remains open whether or not they have, as guaranteed in Article 47 (1) CFR, "an effective remedy before a tribunal in compliance with the conditions laid down in this Article" (see infra 3.). The question seems to be related to the role of the national courts and tribunals as part of the Union's overall judicial system. If it is true that the national judge when implementing Union law is acting as a European judge[5]—and the new provision of Article 19(1)(2) requiring the Member States to provide sufficient remedies to ensure effective legal protection in the fields covered by Union law seems to confirm this assumption—it is difficult to see how the judicial systems of the Member States might implement

[1] ECJ case 294/83, *Les Verts*, 23. For the concept see Hallstein 1973, p. 31.

[2] ECJ case 222/84, *Johnston*, 18, 19; case 222/86, *Heylens*, 14–15; with more references in case C-432/05, *Unibet*, para 37.

[3] ECJ case C-402/05, *Kadi*, 335.

[4] ECJ case C-385/07, *Der Grüne Punkt*, 177–179.

[5] See the contribution of Nial Fennelly, *Le juge national en tant que juge de l'Union*, in this volume supra I.4. For a theoretical foundation with implications, see Pernice 1996, pp. 27–28.

this requirement in all circumstances. To be more precise, in the case of an alleged violation of a fundamental right by an EU legislative act where the national judge is prohibited to remedy directly but would need to refer the question of validity to the ECJ under the *Foto-Frost* jurisprudence,[6] what are the remedies for the individual if the national judge refuses to act under Article 267 TFEU? (see infra 4.)

2 Sixty Years in Defence of Effective Remedies and Individual Rights

The 60th anniversary of the ECJ is an opportunity to honour the merits of the ECJ in particular with regard to its achievements in defending the rights to an effective remedy as well as the fundamental rights and the freedoms of the individual under Union law. Any attempt to give the European treaties the character of simple treaties under international law has been rejected from the very beginning. The Court has made clear, instead, that the European Communities are not only a matter of states, but involve rights and duties of individuals which have to be observed, implemented and protected both at the European and at the national levels. In recognising the direct effect of the market freedoms since *Van Gend & Loos*[7] and of European legislation, in particular of directives conferring rights to the individuals,[8] the Court not only gives them an effective remedy to benefit from their freedoms, but also uses the national courts as instruments to enforce the proper application of European law against their own national governments, sometimes even against the national constitutional courts. This is also true of the recognition of a right to damages where Member States violate their obligations under European law,[9] and even of infringements by the national legislature[10] or the judiciary.[11]

As a corollary of its jurisprudence on the primacy of European law over national law,[12] and the fact that European law also creates obligations for the individual, the Court recognised the need, in the absence of express provisions in the Treaty, for developing fundamental rights of the individual which have to be respected both by the European institutions[13] and, within the scope of European

[6] ECJ case 314/85, *Foto Frost*, 15.

[7] ECJ case 26/62, *Van Gend & Loos*.

[8] ECJ case 41/74, *Van Duyn*, 9–15.

[9] ECJ case C-6/90, *Francovich*, 31–37.

[10] ECJ case C-46/93, *Brasserie du Pêcheur*.

[11] ECJ case C-224/01, *Köbler*, 30–50.

[12] ECJ case 6/64, *Costa v ENEL*; with regard to national guarantees of fundamental rights as well as "principles of a national constitutional structure"; see also case 11/70, *Internationale Handelsgesellschaft*, 3.

[13] Beginning with ECJ case 29/69, *Stauder*, 7. See also Cunha Rodrigues 2010, p. 89.

law, the Member States.[14] This process was driven by the German Federal Constitutional Court's refusal to recognise primacy of European law without provisions, at the European level, ensuring an adequate protection of fundamental rights.[15] The result of this extraordinary and courageous step of constitutionalisation[16] is a comprehensive system of rights and freedoms, as has finally been made visible and more operational by the Charter of Fundamental Rights,[17] including its Article 47.

The recognition of fundamental rights as such does not imply the provision of a procedural remedy. It gives, however, substantial meaning and value to the specific right to effective judicial protection and remedies which is guaranteed as one of the fundamental rights under Article 47. The ECJ as well as all the national courts and tribunals, when implementing European law have to ensure that effective legal remedies are available to everyone who has a claim that his or her rights and freedoms guaranteed by Union law are violated. In the *Kadi* case, this right to effective legal remedies was even extended, at least indirectly, to the application of smart sanctions under the Charter of the United Nations.[18]

The effort to ensure judicial protection was not hampered even by the lack of express provisions in the Treaty. This is the reason why, in *Les Verts*, the Court based its argument on "the spirit" of the former Article 164 EEC, the rule of which is now retained in Article 19 (1) TEU, and "its scheme which is to make a direct action available against all measures adopted by the institutions which are intended to have legal effects", in order to admit an application against the European Parliament under Article 173 EEC although this provision did not mention it as a possible defendant.[19] Accordingly, in the *Chernobyl* judgment the Court has overruled the fact that Article 173 EEC did not mention the European Parliament as a possible applicant in considering an effective remedy necessary as far as the Parliament defends its institutional prerogatives. Clearly, recourse to the fundamental right to judicial protection was not available as an argument in this case. Instead, the Court referred to the institutional balance as part of the law, the observance of which it has to ensure under Article 164 EEC.[20]

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[14] ECJ case C-5/88, *Wachauf*, 17–19; case C-260/89, *ERT*, 41–44. For the widening of the "projection of fundamental rights over Community law itself by extending it to the law of Member States", see Cruz Villalón 2010, p. 163.

[15] BVerfGE 37, 271—*Solange I.*

[16] Bryde 2010, p. 119.

[17] For an overview, classification and analysis at the stage after the Charter was proclaimed see Kühling 2006, p. 501.

[18] ECJ case C-402/05, *Kadi,* 342–353.

[19] ECJ case 294/83, *Les Verts*, 24–25.

[20] ECJ case C-70/88—*Chernobyl*, 23: "The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the Parliament' s prerogatives when called upon to do so by the Parliament, by means of a legal remedy which is suited to the purpose which the Parliament seeks to achieve."

The Treaty of Maastricht filled the gap with the new Article 173 EC mentioning the European Parliament as a possible applicant and defendant in so far as its prerogatives are at stake.

3 Effective Legal Remedies Against EU Regulations at EU Level

What is the role of Article 47 CFR in cases where fundamental rights of an individual are allegedly violated by a European act of general application? Effective legal protection against legislative acts directly affecting the individual is, from a German point of view, considered to be ensured by filing a constitutional complaint to the Federal Constitutional Court. Such a type of direct remedy seems to be excluded by a narrow interpretation, under the "*Plauman*" jurisprudence, of the requirement in Article 263 (4) TFEU that the applicant must be directly and individually affected.[21] The Court has rejected the attempts of Advocate General Jacobs and of the Court of First Instance in the cases *UPA*[22] and *Jégo Quéré*[23] to abandon this restrictive approach with a view to granting effective legal protection and thus to avoiding a denial of justice. Even if the individual concerned has no remedy, under national law, to review the validity of the European act in question, the Court argued that its

> interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty. The Community Courts would otherwise go beyond the jurisdiction conferred by the Treaty.[24]

It would be "for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection", the Court said, and left it expressly to "the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force".[25]

With the Treaty of Lisbon the Member States have followed this advice to a certain extent: First, the general provision of Article 19 (1) TEU regarding the role of the ECJ was extended by the obligation of the Member States to provide the remedies as required. Second, Article 263 (4) TFEU was complemented by an opening for proceedings of any natural or legal person "against a regulatory act which is of direct concern to them and does not entail implementing measures".

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[21] ECJ case 25/62, *Plaumann*, 4.

[22] Opinion of Advocate General Jacobs in case C-50/00, *Unión des Pequenos Agricultores*, 35–49, 59–105.

[23] CFI case T–177/01, *JégoQuéré*, 47–54.

[24] ECJ case C-50/00, *Unión des Pequenos Agricultores*, 44; case C-263/02, *JégoQuéré*, 36.

[25] ECJ case C-50/00, *Unión des Pequenos Agricultores*, 41, 45.

Is the problem solved by these amendments? All depends on the interpretation of the term "regulatory act". There is a strong literal argument based on the simple word "regulatory" for assuming that a regulation is covered by this term. For instance, the German translation "*Rechtsakte mit Verordnungscharakter*" literally excludes the argument that a "*Verordnung*" would not meet this requirement.[26] A systematic argument, however, based on the definition in Article 289 (3) TFEU according to which "legal acts adopted by legislative procedure shall constitute legislative acts", as well as the distinction in Article 290 TFEU of "legislative acts" and "non-legislative acts" seems to act against a broad definition of regulatory acts. The confusion may be due to the history of the provision. The Treaty establishing a Constitution for Europe did indeed make a clear distinction in its Article I-33 between non-legislative acts such as the European regulation, defined as an act of general application for the implementation of legislative acts and of certain provisions of the Constitution, and the term legislative acts used for laws (formerly regulations) and framework laws (formerly directives). While this symbolic upgrading[27] has not been retained in the Treaty of Lisbon, the wording of what is now Article 263 (4) TFEU has, in contrast, remained unchanged. The interpretation, thus, is left to the judiciary, which may be inspired by the objectives of the new provision as well as by the fundamental right laid down in Article 47 CFR.

The General Court has ruled on the question in two recent judgments. While in the case of *Microban* it accepted a decision of the Commission to be a regulatory act because of its general application,[28] it refused to do so in the case of *Inuit* for a regulation of the European Parliament and the Council.[29] Based on literal, historical and teleological arguments in the case of *Inuit* it has ruled that Article 263 (4) TFEU only covers acts of general application, which are not legislative acts.[30] It uses the same argument as the ECJ in *UPS* and *Jégo Quéré*, namely that the application of the fundamental right to effective judicial protection guaranteed by Article 47 CFR may not have the effect of "setting aside those conditions, expressly laid down in the Treaty, even in the light of the principle of effective judicial protection".[31]

The General Court, however, does not sufficiently take into account that not only the Charter of Fundamental Rights has meanwhile become a binding instrument, but also the substantial change the former Article 230 (4) EC has

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[26] See also Everling 2010, p. 575: "unvertretbar" (not arguable).

[27] This term is used by Everling 2010, p. 574: "Hochstufung".

[28] GC case T-262/10, *Microban*, 20–25, regarding Commission Decision 2010/169/EU of 19 March 2010 concerning the non-inclusion of 2,4,4′-trichloro-2′-hydroxydiphenyl ether in the Union list of additives which may be used in the manufacture of plastic materials and articles intended to come into contact with foodstuffs under Directive 2002/72/EC (OJ 2010 L 75, p. 25).

[29] GC case T-14/10, *Inuit*, regarding Regulation (EC) No 1007/2009 on trade in seal products (OJ 2009 L 286, p. 36).

[30] GC case T-14/10, *Inuit*, 38–56. This result was confirmed in case T-262/10, *Microban*, 22.

[31] GC case T-14/10, *Inuit*, 51.

undergone following the entry into force of the Treaty of Lisbon, with the extension of the powers of the Court under the new Article 263 (4) TFEU to the benefit of the individual. What might have been true before these changes took effect—that the Court cannot set aside the conditions expressly and (perhaps) clearly laid down in the Treaty—does not necessary count for the new provision in Article 263 (4) TFEU. So far, the General Court rightly accepts from the outset that interpretation is needed, because "the meaning of 'regulatory act' is not defined by the TFEU Treaty".[32] Giving a precise meaning to unclear legal provision is a fundamental task of the judiciary. As long as the limits of the text are respected, it is difficult to maintain, as the General Court seems to do, that the European Courts, by giving the term "regulatory act" a broad interpretation, would be "exceeding their jurisdiction".[33]

As demonstrated above, the term yet needs to be defined. To the extent that the scope of the wording so permits, provisions of the Treaties, namely those regarding judicial protection of the individual, must be interpreted in consistence with the fundamental rights, including Article 47 CFR. The General Court, instead, in seeking guidance to the interpretation of the term "regulatory act" first refers to Article 114 TFEU on the harmonisation of national law, regulation and administrative action.[34] However this provision does not show more than the mere fact that, under the Treaty, regulations and administrative action are recognised as distinct categories of legal acts. "Deducing" from this differentiation that a narrow interpretation of the term "regulatory act" is demanded, however, is a non sequitur.

The same applies, secondly, to the historical argument made in the *Inuit* judgment. Reference is made to a cover note of the Presidium of the Convention indicating that the term "act of general application" had been replaced by "regulatory act". Some conclusion could be drawn from this if the term "regulatory act" was defined elsewhere in the Treaty. The mere fact that it replaces another term, however, does not explain much as to its meaning. If, in the context of the Constitutional Treaty, it was to exclude legislative acts, an explanation is missing as to the question why the Presidium would not follow the clear invitation by the ECJ to remedy the lack of judicial protection against acts of general application not entailing implementing measures. Whatever the Presidency may have had in mind at that time,[35] with the failure of the Constitutional Treaty and the abandonment of its new terminology for EU action, the context has changed, as explained, and the term "regulations" has been re-introduced instead of "laws". If the attempt of symbolic "upgrading" as

[32] Ibid. 39.

[33] Ibid. 51: "According to settled case-law, the Courts of the European Union may not, without exceeding their jurisdiction, interpret the conditions under which an individual may institute proceedings against a regulation in a way which has the effect of setting aside those conditions, expressly laid down in the Treaty, even in the light of the principle of effective judicial protection".

[34] Ibid. 46. For critics on this argument: Everling 2012, 378.

[35] The former President of the ECJ, Rogdríguez Iglesias 2003, p. 3, understood it as a "policy choice" which could be changed.

foreseen in the Constitutional Treaty was abandoned in the Treaty of Lisbon because the term "law" might suggest a higher legitimacy as the word "regulation",[36] there is no reason any more to maintain the categorial distinction between legislative regulations and other regulatory acts with a view to limiting the judicial protection of the individual as it might have been justified in accordance with some constitutional cultures which express a particular degree of respect for the law made by a democratically elected parliament. So far, the General Court rightly emphasises that "the fourth paragraph of Article 263 TFEU pursues an objective of opening up the conditions for bringing direct actions."[37] Had it been the intention to exclude, nevertheless, regulations of a legislative character from judicial review under this provision, this could have been clarified in the text. Instead, it was left open and thereby left to the Court to decide.

The Courts of the European Union would not, therefore, be "exceeding their jurisdiction" if they accepted regulations to be covered by the term "regulatory act" in Article 263 (4) TFEU. The problem is whether or not the term excludes, as suggested in the case of *Inuit*, legislative acts and, thus, regulations adopted by a legislative procedure.[38] While the Treaty distinguishes between "legislative acts" adopted by the ordinary or specific "legislative procedure" within the meaning of Article 289 TFEU, and non-legislative acts as referred to in Article 290 (1) TFEU, it is, in contrast, silent as to any qualification of the term "regulatory acts". The term may exclude directives, it may be opposed to individual decisions without general application, but it may not necessarily be assimilated with non-legislative acts and, thus, be opposed to legislative acts.

Nothing, therefore, compels the Court, when taking position on the appeal lodged against the *Inuit* judgment,[39] to exclude that regulations adopted by a legislative procedure are treated as regulatory acts.

4 Duties of Member States Under Articles 19 TEU and 47 CFR

National judges are an integral part of the European judicial system established by the Treaties. The entire system is based on efficient judiciaries at Member States' level and the overall respect of the rule of law. The interface between the two levels is the judicial

[36] See also Kottmann 2010, pp. 561–562, referring to the "higher dignity" of legislative acts in this sense.

[37] ECJ case T-262/10, *Microban*, 32, with reference to case T-14/10, *Inuit*, 50. See also Görlitz and Kubicki 2011, p. 250 who detect only one aim of the new provision being to fill the gap of legal protection in specific cases as dealt with by in the recent jurisprudence.

[38] Ibid. 56. For this interpretation, see Pech 2010, pp. 391–392; Herrmann 2011, pp. 1352, 1354–1356; Schwensfeier 2009, p. 330, who states that there is unanimity on this interpretation. For the opposite: Everling 2010, p. 575; Kottmann 2010, p. 559, with more references.

[39] ECJ case C-583/11 P, *Inuit* (pending). Recommending a revision of the General Court's judgment in favour of an opening for complete legal protection: Everling 2012, 379–380.

dialogue instituted under Article 267 TFEU. The President of the German Federal Constitutional Court, Andreas Voßkuhle, rightly describes and develops the "Multi-level cooperation of the European Constitutional Courts" with the German term "*Der Europäische Verfassungsgerichtsverbund*".[40] But the system encompasses all the courts, including particularly the ordinary and specialised courts. Its guiding structural principle is a fundamental division of responsibilities corresponding to the division of legislative and administrative powers of the European Union: The judicial protection against acts of the EU authority is the responsibility of the European Courts, while the judicial review of national legislative and administrative acts is reserved to the national courts. Each judiciary has the ultimate exclusive power to judge the constitutionality and interpretation of acts taken at its level.[41] Nevertheless, within the composed constitutional system of the EU the two levels of jurisdiction are bound together and interwoven in a way that ensures effective judicial protection in accordance with the requirements of Article 47 CFR. As it can be seen from the case-law referred to above, Member States have the general duty to ensure that effective remedies are available for the individual and to protect their rights under Union law against acts of the Union, where access to the European Courts is not open.[42] Article 19(1)(2) TEU confirms this, though it is broader in application and—being more concrete than the principle of cooperation enshrined in Article 4 (3) TEU—also covers judicial protection of the individuals in case their rights are violated by national measures.[43] This broader scope is also that of Article 47 CFR.[44] If the right to an effective remedy has to be provided for everyone whose rights and freedoms guaranteed by the law of the Union are violated, this means all rights under the Treaties including fundamental rights as well as, in particular, the market freedoms and the rights derived from the citizenship of the Union or from secondary law.

The roots of this broad application can already be found in the *Heylens* judgment of the ECJ regarding the free movement of workers, qualified by the Court as a "fundamental right". This freedom was constructed in this particular case not only as a material guarantee but also as having a procedural side: it requires a Member State to ensure that decisions denying the effective exercise of this freedom (because of insufficient professional qualifications in the case) indicate the reasons for refusal and are subject to effective judicial control.[45] Contrary to the situation in the earlier case of *Johnston*, there was no provision of secondary law in the *Heylens* case requiring the Member States to provide such legal remedy. Confirming its development of the principle of effective judicial protection as a

[40] Voßkuhle 2010, p. 175.

[41] Pernice 2006, p. 54.

[42] ECJ case C-50/00, *Unión des Pequenos Agricultores*, 41, 45 (see footnote 25 above). See also ECJ case C-432/05, *Unibet*, 38–45.

[43] For the application of Article 10 EC see, in particular, ECJ case C-432/05, *Unibet*, 38.

[44] For the correlation between the second indent of Article 19 (1) and Article 47 CFR, see Barents 2010, pp. 709, 717.

[45] ECJ case 222/86, *Heylens*, 14–17.

fundamental right, the Court went a step further by combining the material freedom with procedural guarantees to make it fully effective for the individual. Nothing was said in the Treaty about such obligations of the Member States and no competence is given to the Union to legislate in the field of procedural law in the Member States. Nevertheless, this case-law can be understood as a first step in developing specific obligations of the Member States to ensure effective legal protection of the individuals in matters of European law, based on their substantive rights and freedoms combined with considerations of effectiveness (*effet utile*) and the general principles of loyalty and cooperation.

Having been made more explicit in positive Union law, the duties of the Member States to provide effective remedies and to ensure judicial protection of the individual are particularly relevant as regards the preliminary proceedings under Article 267 TFEU. For all cases within the scope of European law, either because of European law being implemented by national measures or because the limits set to the autonomous action of a Member State by European primary or secondary law may be neglected, the dialogue between national courts and the ECJ is essential not only for the unity of European law and its uniform application throughout the Union, but also for the effective legal protection of the individual as required by Article 47 CFR.

This dialogue, on the one side, may not be hampered by national legislation. The ECJ has made this entirely clear in the recent *Melki* case[46]:

> According to the settled case-law of the Court, in order to ensure the primacy of EU law, the functioning of that system of cooperation requires the national court to be free to refer to the Court of Justice for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality.

Such an interlocutory procedure had been introduced in France in order to give the *Conseil Constitutionnel* priority in assessing the constitutionality of an implementing measure with the effect that, eventually, no reference to the ECJ could be deemed necessary. The Court was very clear in making sure that, though the interlocutory procedure was not ruled out as such, the effective protection of rights of the individual would nevertheless be entirely guaranteed.[47]

The other side is to ensure that, whenever rights or freedoms of the individual are at stake in a procedure before a national court, the ECJ is given the opportunity to either provide an adequate interpretation of the EU law involved or to annul the relevant EU provision. Article 267 TFEU is the gateway which includes the ECJ in the procedure. Under Article 267 (3) TFEU this is even mandatory for Courts of last instance, as is the case whenever the validity of an act of the Union is being questioned. The systemic problem, however, is how to ensure remedies in cases where a reference required under Article 267 TFEU is refused by a national court.

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[46] ECJ case C-188/10, *Melki*, 52.

[47] Ibid., 57.

The approach chosen in Germany is to construe the ECJ as an integral part of the system of judicial protection. Like the domestic courts, the Court is "lawful judge" ("*gesetzlicher Richter*") from whose jurisdiction no one shall be removed according to Article 101 (1) of the Constitution.[48] In its decision of January 9, 2001, the Federal Constitutional Court declared the decision of the Federal Administrative Court void for not having respected this fundamental right in a case where no reference was made to the ECJ although it would have been required to take into consideration the (European) principle of non-discrimination based on sex as interpreted by the ECJ. As the protection of fundamental rights against acts of secondary legislation of the EU is, also according to Karlsruhe, reserved to the ECJ, the failure to refer a case to Luxembourg where a violation of a fundamental right is at stake, would deny the possibility for the ECJ to review secondary law on the basis of the fundamental rights guaranteed at the European level. As this would lead to a situation in which the protection of fundamental rights would vanish, Article 101 (1) of the German Basic law is violated. In other words, failure to make a reference to the ECJ is, under certain circumstances, sanctioned by German constitutional law.[49] A similar approach has been taken by the Constitutional Courts in the Czech Republic (with explicit reference to the German case-law)[50] and Austria.[51]

The more recent jurisprudence of the Federal Constitutional Court on these issues, however, seems to be less responsive to the principle of effective judicial protection of the individual. In general the Constitutional Court would only intervene if the competent court has arbitrarily refused to refer a case to the ECJ. The question is when such arbitrariness can be stated. As shown in a thorough analysis by Meinhard Schröder[52] the first Senate seems to be inclined to use the *CILFIT* criteria,[53] while the second Senate sticks to the standard of arbitrariness. In the *Honeywell* case[54] it states:

> According to the case-law of the Federal Constitutional Court, however, it is not the case that all violations of the obligation under Union law to make a submission [reference to the ECJ] immediately constitute a breach of Article 101.1 sentence 2 of the Basic Law. The Federal Constitutional Court complains of the interpretation and application of rules on competences only if, on a sensible interpretation of the concepts determining the Basic Law, they no longer appear to be comprehensible and are manifestly untenable.

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[48] See BVerfGE 73, 399, *Solange II*, pp. 366–369, confirmed in case 1 BvR 1036/99 judgment of 9 January 2001 - Teilzeitarbeit, para 18 with more references.

[49] Ibid., para 24.

[50] Czech Constitutional Court, decision of 8 January2009. US 1009/08. Para. 21 et seq.

[51] Austrian Constitutional Court, decisions Nos 14.390/1995, 14.889/1997, 15.139/1998, 15.657/1999, 15.810/2000, 16.391/2001 and 16.757/2002.

[52] Schröder 2011, pp. 815–819. See also Wendel 2011, pp. 423–424 and 466 in a comparative perspective.

[53] See BVerfG, 1 BvR 3461/08 of 21 December 2010, para 8. ECJ case 283/81, *CILFIT*.

[54] BVerfG, 2 BvR 2661/06 of 6 July 2010, *Honeywell*, note 88.

The Court maintains further that it is "not obliged under Union law to fully review the violation of the obligation to make a submission under Union law and to take the case-law of the Court of Justice re Article 267.3 TFEU as an orientation", and it emphasises that there is no requirement in this provision for "an additional remedy to review compliance with the obligation to make a submission". Finally, it does not see the Constitutional Court as the "supreme court of review for submissions".[55]

A more open approach, based on the criteria of the *CILFIT* jurisprudence, however, would seem to be appropriate not only with a view to the obligation, as Schröder rightly argues,[56] arising from the guarantee of effective judicial protection under Article 19 (4) of the German Constitution and the general obligation Article 19 (1)(2) TEU. Article 47 CFR must also be taken into account. Where the decision on the interpretation of European law is, by law, a matter for the ECJ, the national judge is simply not competent and would not be "the lawful judge within the meaning of Article 101.1 sentence 2 of the Basic Law",[57] guaranteed to the applicant as a fundamental right under the German Constitution.

The first Senate of the German Federal Constitutional Court is much more supportive of the prerogatives of the ECJ as the appropriate institution to ensure effective judicial protection in cases where the constitutionality of measures implementing European law is at stake. In a recent judgment it has rejected a reference under Article 100 (1) of the German Basic Law for the simple reason that it would only be competent to judge if, and to the extent that, the underlying act of Union law leaves discretion to the national authorities in charge of the implementation. It thus confirms its jurisprudence that, with a view to the principle of primacy, it would not admit constitutional complaints or references regarding national measures implementing European law, which are fully determined by the Union act. In such cases only the ECJ would be competent, and this is why the Constitutional Court holds the referring judge responsible to, first, make a reference to the ECJ for clarification of the binding nature of the Union measure at stake.[58]

This new jurisprudence will encourage national judges to make use of the procedure of Article 267 TFEU more frequently and, thus, will make the judicial dialogue and the judicial protection it allows more effective.[59] What remains open, however, is the question of what happens if a judge—or even the Constitutional Court itself—fails to comply with the obligations under Article 267 (3) TFEU read together with Articles 19 (1) TEU and 47 CFR to refer to the ECJ, where required for ensuring effective legal remedies in cases of possible violation of EU law. In the absence of a direct remedy one way could be an application for damages according to the principles developed by the *Köbler* jurisprudence.[60]

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[55] Ibid., 89.

[56] Schröder 2011, pp. 820–824, 826.

[57] For these terms, see BVerfG, 2 BvR 2661/06 of 6 July 2010, *Honeywell*, note 88.

[58] BVerfG, 1 BvL 3/08 of 4 October 2011, *Investitionszulagengesetz*, 45–56.

[59] On that, see Wendel 2012, p. 217.

[60] ECJ case C-224/01, *Köbler*.

Another way could be a complaint to the European Court of Human Rights, based on a violation of Article 6 ECHR.[61] The right to a fair trial would then have to be construed in a broader sense, being understood as an instrument of last resort to get effective the guarantees of judicial protection under EU law. A fresh wind in this direction might have been breathed into the discussion by the recent decision of the Strasbourg Court in the case of *Ullens*. The key question was whether the Belgian *Conseil d'Etat* and the *Cour de cassation* had violated their obligations under Article 6 (1) of the Convention by refusing, in two separate cases, to refer a preliminary question to the ECJ. While Strasbourg reiterated that the ECHR did not generally provide for a right to have a case referred by a domestic court to another judicial body (be it at national or at supranational level), it observed that Article 6 (1) of the Convention imposes an obligation on the national courts "to give reasons for any decision refusing to refer a question" to the ECJ. This is, according to Strasbourg, particularly the case when the applicable law—that is to say, EU law—permits such a refusal only in exceptional circumstances.[62] In this respect the ECtHR paid particular attention to the *CILFIT* jurisprudence of the ECJ as regards the obligation of the national courts to justify their decision not to refer ("*obligation de motivation*").[63] Thus, the solution found by the ECtHR turns out to be an *ultima ratio* tool for enforcing the obligation to refer a preliminary reference to Luxembourg, along the lines developed by the ECJ in its *CILFIT* jurisprudence.

5 Conclusions

European and national courts are bound by Article 47 CFR to ensure effective legal remedies in cases where rights and freedoms guaranteed by the law of the Union may be violated. But first of all, it is a task for the Member States, stated in Article 19 (1) TEU, to make sure that effective legal protection is provided for everyone. The jurisprudence of the ECJ has, until now, developed favourably to this aim, though it is not yet clear whether or not it will further follow this strain when it decides the pending issue of admissibility in the *Inuit* case. This would, however, be important with a view not to leave a gap in judicial protection, which the national courts cannot easily fill. Their role is not to supervise the constitutionality of European acts. The mere fact that regulatory acts—be it legislative or implementing regulations—not entailing implementing measures would not offer for national authorities, by definition, the opportunity to issue acts which the

[61] See Lenski and Mayer, EuZW 2005, p. 225. See also Schröder 2011, p. 824, with reference to the *Bosphorus* decision of the ECHR where the *CILFIT* jurisprudence is mentioned as a relevant criterion; see Judgment of 30 June 2005, Application no. 45036/98 case of *Bosphorus Hava* Yolları *Turizm ve Ticaret Anonim Şirketi v. Ireland*, para 147.

[62] ECHR, judgment of 20 September 2011, Nos 3989/07 and 38353/07, *Ullens* et al., paras 55–67.

[63] Ibid, para 62.

individual could challenge before a national court, would leave the individual without a remedy. It is difficult to see how this would be compatible with Article 47 CFR.

Further implications of Article 47 CFR for the Member States and their respective judicial systems are yet to be determined. This fundamental right could privilege cases involving Union law and put at risk the coherence of national judicial systems, as national courts are bound to guarantee procedural rights under this provision even where an applicant would not have similar remedies and rights under national law in purely national cases. Finally, the question as to who might be the judge to assess whether or not a national tribunal—or the ECJ—has observed its duties under Article 47 CFR has not yet found an answer. One might hope that the Member States take seriously their obligation under Article 19 (1) TEU to ensure that national courts use systematically the procedure offered by Article 267 TFEU in all cases where rights and freedoms of the individual under Union law are at stake. With this, the question of further remedies might become less virulent.

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