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The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?

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Abstract

This contribution examines the developing contours of the essence of the fundamental right to an effective remedy and to a fair trial in the light of salient case-law of the Court of Justice of the European Union. It is divided into three main parts. The first part provides an overview of the meaning of the essence of fundamental rights in EU law and the scope of the inquiry in relation to Article 47 of the Charter of the Fundamental Rights of the European Union (“the Charter”). The second part evaluates the essence of the fundamental right to an effective remedy and to a fair trial in connection with justified limitations that may be placed on its exercise as provided for in Article 52(1) of the Charter within the framework of the EU system of fundamental rights protection, which in turn implicates the relationship with the Court’s case-law on national procedural autonomy, equivalence, and effectiveness. The third part delves into the essence of the fundamental right to an effective remedy and to a fair trial within the framework of the EU system of judicial protection, as illustrated by the Court’s case-law in several areas, including standing for individuals in direct actions before the EU courts, judicial independence, and restrictive measures in the Common Foreign and Security Policy. Through this analysis, the author argues that, while much awaits further refinement, certain recent developments in the Court’s case-law indicate that the essence of the fundamental right to an effective remedy and to a fair trial can play a meaningful role in the EU system of fundamental rights protection and the EU system of judicial protection more broadly, and thus the best may be yet to come as that case-law progresses in the future.

Keywords: Article 47 of the Charter; essence; justified limitations; effective judicial protection; judicial independence; restrictive measures

A. Introduction

The essence of fundamental rights in EU law may be considered something of a “late bloomer.” To be sure, the concept of the essence of fundamental rights appears expressly in Article 52(1) of the Charter of Fundamental Rights of the European Union (‘the Charter’). That provision permits justified limitations on the exercise of the rights and freedoms recognized in the Charter under certain conditions, including that such limitations “respect *the essence* of those rights and

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freedoms.⁷¹ Yet, presently, the essence of fundamental rights in EU law, and in particular the fundamental right to an effective remedy and to a fair trial,² appears to be underdeveloped in the case-law of the Court of Justice of the European Union,³ as compared to other aspects concerning the Charter, such as its scope of application⁴ and the so-called horizontal effect of Charter rights.⁵ Moreover, in some of the Court's case-law concerned with the application of Article 52(1) of the Charter, the examination of the essence of the Charter right concerned sometimes seems to be given "short shrift" or cursory mention—if at all⁶—in contrast to other elements of the analysis, such as "provided for by law"⁷ or—more often—proportionality.⁸ This may not be all that surprising, given that the consideration of the essence of fundamental rights in EU law brings into play a host of complex issues from a variety of perspectives,⁹ as spotlighted by this special issue.

Added to this reality are particular challenges associated with fleshing out the dimensions of the essence of the fundamental right to an effective remedy and to a fair trial as guaranteed by Article 47 of the Charter.¹⁰ For example, Article 47 of the Charter in itself encompasses various rights

¹Emphasis added.

² See, e.g., Sacha Prechal, *The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?*, in *FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW: PUBLIC AND PRIVATE LAW PERSPECTIVES* 143, 152–53 (Christophe Paulussen et al. eds., 2016); Marek Safjan & Dominik Dürsthaus, *A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU*, 33 *Y.B. EUR. L.* 3, 37 (2014).

³This contribution refers to the EU courts as denoting the institution of the Court of Justice of the European Union, currently comprising, under the first subparagraph of Article 19(1) TEU, the Court of Justice ("the Court") and the General Court.

⁴ See, e.g., Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising and Others v. Commission and ECB*, 2016 E.C.R. I-701, para. 67; Case C-258/14, *Florescu and Others*, 2017 E.C.R. I-448, paras. 44–48; Case C-682/15, *Berlioz Investment Fund*, 2017 E.C.R. I-373, paras. 32–42; Opinion of Advocate General Bobek at para. 29–65, Case C-298/16, *Ipsas v. Direcția Generală a Finanțelor Publice Cluj* (Nov. 9, 2017), <http://curia.europa.eu/juris/recherche.jsf?language=en>. For a general discussion, see, e.g., Koen Lenaerts & Jose A. Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in *THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY* 1559–94 (Steve Peers et al. eds., 2014); Michael Dougan, *Judicial Review of Member State Action Under the General Principles and the Charter: Defining the "Scope of Union Law"*, 52 *COMMON MKT. L. REV.* 1201 (2015).

⁵ See, e.g., Joined Cases C-569/16 & C-570/16, *Wuppertal v. Bauer*, 2018 E.C.R. I-871, paras. 79–92; Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v. Tetsuji Shimizu*, 2018 E.C.R. I-874, paras. 69–81. With regard to Article 47 of the Charter, see Case C-414/16, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, 2018 E.C.R. I-257, para. 78.

⁶ See, e.g., Joined Cases C-92/09 & C-93/09, *Volker und Markus Scheck v. Land Hessen*, 2010 E.C.R. I-662, paras. 50, 65–89; Case C-473/16, *F v. Bevándorlási és Állampolgársági Hivatal*, 2018 E.C.R. I-36, paras. 55–56.

⁷ See, e.g., Case C-562/12, *Liivimaa Lihaveis*, 2014 E.C.R. I-2229, paras. 72–74; Opinion of Advocate General Cruz Villalón at paras. 88–113, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL* (Nov. 14, 2011), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=81776&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8958396>.

⁸ See, e.g., Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd*, 2017 E.C.R. I-987, paras. 90–99. See also, notes 6, 43 and accompanying text.

⁹ See generally ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 192–96 (Julian Rivers transl., 2d ed. 2004); Maja Brkan, *The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core*, 14 *EUR. CON. L. REV.* 332 (2018); Esi Örüçü, *The Core of Rights and Freedoms: The Limit of Limits*, in *HUMAN RIGHTS: FROM RHETORIC TO REALITY* 37–59 (Tom Campbell et al. eds., 1986); Gerhard van der Schyff, *Cutting to the Core of Conflicting Rights: The Question of Inalienable Cores in Comparative Perspective*, in *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS* 131–47 (Eva Brems ed., 2008).

¹⁰Charter of Fundamental Rights of the European Union, June 7, 2016, 2016 O.J. (C 202) 389 [hereinafter *The Charter*], art. 47 ("Right to an effective remedy and to a fair trial") provides in full:

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

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

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

(and general principles of EU law), and is linked to other rights recognized in the Charter.¹¹ Moreover, by virtue of its “procedural” nature, the fundamental right to an effective remedy and to a fair trial intersects with various matters that fall outside of the confines of the EU system of fundamental rights protection strictly speaking, yet within the overarching framework of the EU system of judicial protection, encompassing the Union’s system of judicial review and the relationship between EU law and the Member States’ remedial and procedural regimes.¹²

Consequently, without purporting to be exhaustive, this contribution aims to examine the developing contours of the essence of the fundamental right to an effective remedy and to a fair trial in the light of salient case-law of the Court of Justice of the European Union. It is divided into three main parts. The first part provides an overview of the meaning of the essence of fundamental rights in EU law and the scope of the inquiry in relation to Article 47 of the Charter. The second part evaluates the essence of the fundamental right to an effective remedy and to a fair trial in connection with justified limitations that may be placed on its exercise as provided for in Article 52(1) of the Charter within the framework of the EU system of fundamental rights protection, which in turn implicates the relationship with the Court’s case-law on national procedural autonomy, equivalence, and effectiveness. The third part delves into the essence of the fundamental right to an effective remedy and to a fair trial within the framework of the EU system of judicial protection, as illustrated by the Court’s case-law in several areas, including standing for individuals in direct actions before the EU courts, judicial independence, and restrictive measures in the Common Foreign and Security Policy (“CFSP”).

B. Overview of the Meaning and Scope of the Essence of Article 47 of the Charter

So far, the Court has not elaborated on a general definition of what is meant by the “essence” of fundamental rights in EU law for the purposes of Article 52(1) of the Charter or otherwise. Rather, the case-law seems to proceed on an ad hoc basis depending on the application of the fundamental right at issue and the particular circumstances of the case. Generally speaking, “essence” may be defined as the “intrinsic nature or indispensable quality of something . . . which determines its character” or “a property or group of properties of something without which it would not exist.”¹³ It may be used synonymously with other terms, such as substance, core, or fundamental quality.¹⁴ These definitions are useful for the purposes of this discussion because they help to guide the inquiry into the role played by the essence of rights—particularly the fundamental right to an effective remedy and to a fair trial—in the Court’s case-law. Moreover, the terms essence, substance, core, and essential content, or a similar variant, are employed interchangeably in the Court’s case-law in the context of the Charter. In large part, this appears to be the result of the evolution of the Court’s case-law, issues relating to translation, and the importation of other fundamental rights sources.

As already mentioned, explicit reference to the “essence” of fundamental rights is made in Article 52(1) of the Charter: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must . . . respect *the essence* of those rights and freedoms.”¹⁵ According to the Explanation on Article 52(1) of the Charter, the wording of this provision is based on the

¹¹See *infra* notes 28, 30 and accompanying text.

¹²For a general discussion, see, e.g., Pekka Aalto et al., *Right to an Effective Remedy and to a Fair Trial*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY, *supra* note 4, at 1197–276; Frederic Krenç, *Article 47 Droit à un Recours Effectif et à Accéder à un Tribunal Impartial*, in CHARTE DES DROITS FONDAMENTAUX DE L’UNION EUROPÉENNE—COMMENTAIRE ARTICLE PAR ARTICLE 981–1006 (Fabrice Picod et al. eds., 2018).

¹³*Essence*, LEXICO, <https://www.lexico.com/en/definition/essence> (last visited July 3, 2019).

¹⁴*Essence*, LEXICO, <https://www.lexico.com/en/definition/essence> (last visited July 3, 2019).

¹⁵The Charter, *supra* note 10, at art. 52(1) (emphasis added).

Court's case-law, to the effect that "restrictions may be imposed on the exercise of the fundamental rights, . . . provided that those restrictions in fact correspond to objectives of general interest pursued by the [Union] and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining *the very substance* of those rights."¹⁶ Thus, there does not appear to be an intended difference in meaning between the "essence" and "substance" of fundamental rights in this regard, although this case-law has had an impact on the application of the essence criterion as part of the application of Article 52(1) of the Charter as detailed below.¹⁷

In other case-law, the "core,"¹⁸ "essential content,"¹⁹ or related variant, of a fundamental right has been used in this context. References to the "essential content" may in part result from the translation of the relevant wording of Article 52(1) into English from other language versions—particularly French as the working language of the Court.²⁰ Sometimes, the choice of terminology may stem from the importation of particular wording from other sources, such as the case-law of the European Court of Human Rights interpreting the provision found in the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"), which features in the assessment of the right recognized in the Charter.²¹ For example, in *DEB*,²² the Court referred to the "very core" of the fundamental right of access to a court as taken from relevant case-law of the European Court of Human Rights in the context of the assessment of certain national measures bearing on legal aid for legal persons with Article 47 of the Charter.²³ This highlights the close relationship between the rights contained in Article 47 of the Charter and the ECHR regime.

The first paragraph of Article 47 of the Charter states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions set down in that article.²⁴ The second paragraph of Article 47 of the Charter provides that everyone has the right to a fair and public trial within a reasonable time by an independent and impartial tribunal and that everyone must have the possibility of being advised, defended and represented. The third paragraph of Article 47 of the Charter ensures that legal aid is to be made available to those whose lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.²⁵

¹⁶Explanations Relating to the Charter of Fundamental Rights, Dec. 14, 2007, 2007 O.J. (C 303) 17 [hereinafter Charter Explanations], Explanation on art. 52, at 32 (citing Case C-292/97, *Karlsson and Others*, 2000 E.C.R. I-202, para. 45) (emphasis added).

¹⁷See *infra* Part C(I).

¹⁸See, e.g., *infra* notes 23, 38 and accompanying text. See also, Case C-283/11, *Sky Österreich*, 2013 E.C.R. I-28, para. 49 ("core content"). As noted in the literature, the core of a particular right should be distinguished from core rights. Örcü, *supra* note 9, at 38 n.1. Cf., e.g., Daniel Sarmiento, *The EU's Constitutional Core*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 177–204 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013). Yet, there may be some overlap. See *supra* note 64 and accompanying text.

¹⁹See, e.g., Case C-528/13, *Léger v. Ministre des Affaires sociales*, 2015 E.C.R. I-288, para. 54; Case C-190/16, *Fries v. Lufthansa CityLine GmbH*, 2017 E.C.R. I-513, para. 38. See also, Case C-157/14, *Société Neptune Distribution v. Ministre de l'Économie et des Finances*, 2015 E.C.R. I-823, paras. 70–71 ("actual content").

²⁰See, e.g., The Charter, *supra* note 10, at art. 52(1) (translating the article into French, "le contenu essentiel").

²¹For further discussion of the essence concept in the case-law of the European Court of Human Rights, see, e.g., the contribution by Sébastien van Drooghenbroeck & Cecilia Rizcallah, *The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?*, 20 GERMAN L.J. 904 (2019).

²²Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 2010 E.C.R. I-811.

²³*DEB*, Case C-279/09 at paras. 47, 51, 59–61. See also, e.g., Case C-156/12, *GREP GmbH v. Freistaat Bayern*, 2012 E.C.R. I-342, paras. 40, 45; Opinion of Advocate General Jääskinen at paras. 84, 88, Case C-129/14 PPU, *Zoran Spasic* (Aug. 4, 2011), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

²⁴See *supra* note 10. Regarding the "rights and freedoms guaranteed by the law of the Union," see Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes*, 2017 E.C.R. I-373, paras. 44–52.

²⁵See, e.g., *DEB*, Case C-279/09 at para. 31.

Pursuant to Article 52(3) of the Charter, the meaning and scope of the right to an effective remedy and to a fair trial guaranteed by Article 47 of the Charter must be the same, or more extensive, as the meaning and scope of the rights laid down in Articles 6(1) and 13 of the ECHR.²⁶ This is determined by the text of the ECHR as well as the case-law of the European Court of Human Rights in the light of which Article 47 of the Charter is to be interpreted.²⁷

Notwithstanding the simplicity of its title (“Right to an effective remedy and to a fair trial”), Article 47 of the Charter houses several rights (and general principles of EU law) in its own right. Furthermore, it is linked to other fundamental rights recognized in the Charter, such as Article 41 on the right to good administration and Article 48(2) regarding the rights of the defense.²⁸ As the Court has held, Article 47 of the Charter reaffirms the principle of effective judicial protection, which is a general principle of Union law stemming from the constitutional traditions common to the Member States²⁹ and which comprises various elements, including the rights of defense (which in turn embodies the right to be heard), the principle of equality of arms, the right of access to a court, and the right to be advised, defended, and represented.³⁰

Consequently, there is not just one singular essence of the fundamental right to an effective remedy and to a fair trial embodied in Article 47 of the Charter in the sense of there being one sole component. Rather, each paragraph of Article 47 of the Charter arguably contains components that instruct the essence of this fundamental right—for example, access to a court, judicial independence, legal representation, and legal aid—as illustrated by the Court’s case-law discussed in the sections that follow.

Moreover, the essence of the fundamental right to an effective remedy and to a fair trial is guided, where relevant, by the case-law of the European Court of Human Rights as well as other sources. As Advocate General Cruz Villalón stated in his opinion in *Samba Diouf*:

[T]he right to effective judicial protection, as expressed in Article 47 of the [Charter] has . . . acquired *a separate identity and substance* under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. In other words, once it is recogni[z]ed and guaranteed by the European Union, that fundamental right goes on to acquire a content of its own, the definition of which is certainly shaped by the international instruments on which that right is based, including, first and foremost, the ECHR, but also by the constitutional traditions from which the right in question stems and together with them, the conceptual universe within which the defining principles of a State governed by the rule of law operate.³¹

²⁶See Charter Explanations, *supra* note 16, Explanations on arts. 47, 52, at 29, 30, 33, 34 (indicating that the scope of Article 47 of the Charter is broader than that of Articles 6(1) and 13 ECHR). See, e.g., Opinion of Advocate General Bobek at para. 40, Case C-556/17, *Torubarov* (Apr. 30, 2019), <http://curia.europa.eu/juris/recherche.jsf?language=en>. As the Court has held, Article 47 of the Charter secures in EU law the protection afforded by Articles 6(1) and 13 ECHR. See, e.g., Case C-682/15, *Berlioz Investment Fund, Berlioz Investment Fund SA v. Directeur de l’administration des contributions directes*, 2017 E.C.R. I-373, para. 54.

²⁷Charter Explanations, *supra* note 16, Explanation on art. 52, at 33. See, e.g., Case C-205/15, *Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP) v. Vasile Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, 2016 E.C.R. I-499, para. 41; Opinion of Advocate General Wathelet at paras. 73–74, Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l’administration des contributions directes* (May 16, 2017), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

²⁸See, e.g., Prechal, *supra* note 2, at 149–51; Opinion of Advocate General Kokott at paras. 78–79, Case C-358/16, *UBS Europe SE and Alain Hondequin and Others v. DV and Others* (Sept. 13, 2018), <http://curia.europa.eu/juris/recherche.jsf?language=en>. See also, *supra* note 12.

²⁹See, e.g., Case C-93/12, *ET Agroconsulting-04-Velko Stoyanov v. Izpalnitelen direktor na Darzhaven fond ‘Zemedelie,’* 2013 E.C.R. I-432, para. 59; Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, 2018 E.C.R. I-117, para. 35.

³⁰See, e.g., Case C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 2017 E.C.R. I-591, paras. 32–35.

³¹Opinion of Advocate General Cruz Villalón at para. 39, Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail* (Jul. 28, 2011), <http://curia.europa.eu/juris/recherche.jsf?language=en> (emphasis added).

That said, much of the Court's case-law bearing on the essence of the right to an effective remedy in the first paragraph of Article 47 of the Charter has been focused on the right of access to a court.³² This goes back to the origins of the recognition of the right to an effective remedy starting in the Court's seminal judgments in *Johnston*,³³ *Heylens*,³⁴ and *Oleificio Borelli v. Commission*,³⁵ as cited in the Explanation on Article 47 of the Charter.³⁶ In particular, in its judgment in *Heylens*, the Court held that "the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is *essential* in order to secure for the individual effective judicial protection for his right."³⁷

More recently, in his opinion in *El Hassani*, Advocate General Bobek declared:

[T]he duty of the Member States under the first paragraph of Article 47 of the Charter is to guarantee *the very core or essence* of the right enshrined therein, namely access to the courts. To preserve that core, judicial review of decisions cannot be excluded when an EU right or freedom has been infringed.³⁸

The identification of the right of access to a court as part of the essence of the fundamental right to an effective remedy and to a fair trial is aptly demonstrated in the Court's case-law in the context of justified limitations under Article 52(1) of the Charter.

C. The Essence of Article 47 of the Charter Within the EU System of Fundamental Rights Protection

I. Role in Article 52(1) of the Charter

A great deal of the attention with respect to the role of the essence of fundamental rights in the Court's case-law seems to center on the assessment of justified limitations to the exercise of fundamental rights recognized in the Charter, as provided for in Article 52(1). For the purposes of this discussion, one of the key issues relating in respect to that provision is the viability of the essence criterion in that assessment. So far, there is no overall guidance on the meaning and application of this criterion in the case-law. Depending on the case, the Court's approach is largely aimed at determining whether the particular limitation calls into question the fundamental right concerned, or rather whether that limitation is of a more circumscribed or temporary nature, thereby respecting the essence of that right.³⁹

Article 52(1) of the Charter states in full:

³²See, e.g., Case C-362/14, Maximilian Schrems v. Data Protection Commissioner, 2015 E.C.R. I-650, para. 95; Case C-682/15, Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes, 2017 E.C.R. I-373, paras. 44–59; Opinion of Advocate General Cruz Villalón, *supra* note 31, at para. 43; Opinion of Advocate General Wathelet, *supra* note 27, at para. 67.

³³Case 222/84, Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. I-206, paras. 18–19. See also, Opinion of Advocate General Darmon at paras. 3–4, Case 222/84, Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary (Jan. 28, 1986), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

³⁴Case 222/86, Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens, 1987 E.C.R. I-442, paras. 14–15. See also, Opinion of Advocate General Mancini at para. 6, Case 222/86, Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens (Oct. 15, 1987), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

³⁵Case C-97/91, Oleificio Borelli SpA v. Commission, 1992 E.C.R. I-491, para. 14. See also, Opinion of Advocate General Darmon at para. 31, Oleificio Borelli SpA v. Commission (Dec. 3, 1992), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

³⁶See Charter Explanations, *supra* note 16, Explanation on art. 47, at 29.

³⁷*Georges Heylens*, Case 222/86 at para. 14 (emphasis added).

³⁸Opinion of Advocate General Bobek at para. 110, Case C-403/16, Soufiane El Hassani v. Minister Spraw Zagranicznych (Dec. 13, 2017), <http://curia.europa.eu/juris/recherche.jsf?language=en> (emphasis added).

³⁹See, e.g., Case C-601/15, J.N. v. Staatssecretaris van Veiligheid en Justitie, 2016 E.C.R. I-84, para. 52; Case C-190/16, Werner Fries v. Lufthansa CityLine GmbH, 2017 E.C.R. I-513, para. 38; Case C-524/15, Criminal Proceedings Against

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect *the essence* of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.⁴⁰

To recall, according to the Explanation on Article 52(1) of the Charter, the wording of that provision is based on the Court's case-law, with reference to the Court's judgment in *Karlsson and Others*, to the effect that

restrictions may be imposed on the exercise of the fundamental rights, . . . provided that those restrictions in fact correspond to objectives of general interest pursued by the [Union] and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining *the very substance of those rights*.⁴¹

While that may be, the wording of Article 52(1) of the Charter indicates that there are four main conditions that must be complied with,⁴² whereas the passage from the Court's case-law just cited could imply that the essence/substance criterion relates—or is somehow linked—to proportionality.⁴³ In fact, this may explain why some case-law of the General Court refers to three, not four, conditions with respect to Article 52(1) of the Charter, thereby assessing the essence criterion in the context of the proportionate nature of the measure in question.⁴⁴

As illustrated by recent case-law on Article 47 of the Charter, the Court of Justice generally makes a concerted effort to undertake the assessment of each of the four conditions separately.⁴⁵ A salient example is *Puškár*,⁴⁶ in which the Court was asked to provide an interpretation of several provisions of EU law—including Article 47 of the Charter—by way of a reference for a preliminary ruling from the Supreme Court of the Slovak Republic. The dispute in the main proceedings

Luca Menci, 2018 E.C.R. I-197, para. 43; Case C-537/16, *Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa*, 2018 E.C.R. I-193, para. 45.

⁴⁰Emphasis added.

⁴¹Charter Explanations, *supra* note 16, Explanation on art. 52, at 32 (citing Case C-292/97, *Karlsson and Others*, 2000 E.C.R. I-202, para. 45) (emphasis added). As pointed out in the literature, the Court's case-law goes back even further. See, e.g., *Brkan*, *supra* note 9, at 345–47. For some recent applications, see, e.g., Case C-75/16, *Menini and Rampanelli v. Banco Popolare*, 2017 E.C.R. I-457, para. 54; Case C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, para. 38 (Jul. 26, 2017) <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-348/16>.

⁴²Namely, those conditions are that such limitation: (1) is provided for by law; (2) respects the essence of the particular right or freedom; (3) meets objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others; and (4) complies with the principle of proportionality.

⁴³See, e.g., *Joined Cases C-317/08 to C-320/08, Alassini and Others v. Telecom Italia SpA and Others*, 2010 E.C.R. I-146, paras. 63–66; Case C-166/13, *Mukarubega v. Préfet de police and Préfet de la Seine-Saint-Denis*, 2014 E.C.R. I-2336, para. 53. See also, *Opinion of Advocate General Szpunar* at para. 131 n.127, Case C-165/14, *Rendón Marín v. Administración del Estado* (Sept. 13, 2016), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

⁴⁴See, e.g., Case T-262/15, *Kiselev v. Council*, 2017 E.C.R. I-392, paras. 69–125, paras. 69, 84–125; Case T-149/15, *Ben Ali v. Council*, 2017 E.C.R. I-693, paras. 160–73; Case T-515/15, *Almaz-Antey v. Council*, 2018 E.C.R. I-545, paras. 135–48, paras. 136, 141–48.

⁴⁵For some recent applications regarding other Charter articles, see, e.g., *Joined Cases C-293/12 & C-594/12, Digital Rights Ireland Ltd. v. Minister for Commc's*, 2014 E.C.R. I-238, paras. 38–69; Case C-524/15, *Menci*, 2018 E.C.R. I-197, paras. 40–59; Case C-537/16, *Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa*, 2018 E.C.R. I-193, paras. 42–63; Case C-540/16, *UAB 'Spika' and Others v. Žuvinkystės tarnyba prie Lietuvos Respublikos žemės ūkio ministerijos*, 2018 E.C.R. I-565, paras. 36–55; Case C-151/17, *Swedish Match AB v. Secretary of State for Health*, 2018 E.C.R. I-938, paras. 88–91. For a particular emphasis on the essence criterion, see also, e.g., Case C-149/17, *Bastei Lübbe GmbH & Co. KG v. Michael Strotzer*, 2018 E.C.R. I-841, para. 46; Case C-147/17, *Sindicatul Familia Constanța and Others v. Direcția Generală de Asistență Socială și Protecția Copilului Constanța*, 2018 E.C.R. I-926, paras. 83–87.

⁴⁶Case C-73/16, *Puškár v. Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy*, 2017 E.C.R. I-725.

centered on whether the national tax authorities were permitted to keep a confidential list of persons who purport to act as “front men” for companies (so-called “*biele kone*” or “white horses”).⁴⁷ In effect, the case raised two key questions about effective judicial protection: First, whether the exhaustion of an obligatory administrative remedy may be made a pre-condition for the bringing of legal proceedings; and second, whether the list may be rejected as inadmissible evidence if it was circulated without the consent of the tax authorities.⁴⁸

In its judgment, with regard to the first question, the Court held that by making the admissibility of a legal action brought by a person alleging breach of his right to protection of personal data under Directive 95/46⁴⁹ subject to the prior exhaustion of the administrative remedies available, the national legislation at issue introduces an additional step for access to the courts that would delay access to a judicial remedy and could also cause additional costs to be incurred.⁵⁰ Thus, the Court ruled that the obligation to exhaust additional administrative remedies constitutes, as a precondition for bringing a legal action, a limitation on the right to an effective remedy before a court within the meaning of Article 47 of the Charter, which may be justified in accordance with Article 52(1) of the Charter.⁵¹ In undertaking that assessment, first, the Court found that the legal basis for that obligation was set out in a specific provision of the Slovak Code of Civil Procedure in such a way that it must be regarded as being provided for by national law.⁵² Second, the Court held that that obligation respects the essential content of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter: “That obligation does not call into question that right as such. An additional procedural step is merely imposed in order to exercise it.”⁵³ Then, the Court considered that it must still be determined, third, whether that obligation corresponds to an objective in the general interest; and if so, fourth, whether it complies with the principle of proportionality within the meaning of Article 52(1) of the Charter, both of which appeared to be met. The Court, however, left it to the referring court to determine whether the practical arrangements for the exercise of administrative remedies available under Slovak law did not disproportionately affect the right to an effective remedy under Article 47 of the Charter.⁵⁴

With regard to the second question, the Court encouraged the referring court to undertake a similar analysis in respect to the compliance with Article 47 of the Charter of the rejection of the contested list as evidence of breach of the protection of personal data conferred by Directive 95/46, since it was obtained without the consent of the competent authorities.⁵⁵ Still, the Court considered that, in the relevant circumstances, such rejection appears disproportionate.⁵⁶ On that basis,

⁴⁷*Puškár*, Case C-73/16 at paras. 2, 26–32; Opinion of Advocate General Kokott at para. 15, Case C-73/16, *Puškár v. Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy* (Sep. 27, 2017), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

⁴⁸Opinion of Advocate General Kokott, *supra* note 47, at para. 1.

⁴⁹Council Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281) 31 (EU) (as amended). It has now been replaced by the General Data Protection Regulation, Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, 2016 O.J. (L 119) 1 (EU). See Opinion of the Advocate General Kokott, *supra* note 47, at paras. 41–43 (noting that that regulation did not clarify the issue raised by the present case).

⁵⁰*Puškár*, Case C-73/16 at para. 61.

⁵¹*Puškár*, Case C-73/16 at para. 62.

⁵²*Puškár*, Case C-73/16 at para. 63.

⁵³*Puškár*, Case C-73/16 at para. 64.

⁵⁴*Puškár*, Case C-73/16 at paras. 65–72. In doing so, the Court stressed that it is important that that obligation does not lead to a substantial delay in bringing a legal action, involves the suspension of the limitation period of the rights concerned, and does not involve excessive costs. *Puškár*, Case C-73/16 at paras. 73–76.

⁵⁵*Puškár*, Case C-73/16 at paras. 77, 87–93.

⁵⁶*Puškár*, Case C-73/16 at paras. 94–97.

the Court held that Article 47 of the Charter precludes that rejection, unless it is laid down by national legislation and respects “both the essential content of the right to an effective remedy and the principle of proportionality.”⁵⁷

The Court’s judgment in *Puškár* largely—though not entirely as detailed below⁵⁸—followed Advocate General Kokott’s opinion, which also emphasized the application of proportionality in the proceedings.⁵⁹ The Advocate General further noted, as part of her inquiry concerning other Charter rights, that despite the adverse effects associated with the inclusion of the claimant on the contested list, those interferences do not meet the threshold of a breach of the essence of those rights if the principle of proportionality is otherwise respected.⁶⁰

Indeed, other Advocate General opinions have voiced similar sentiments. For example, in her opinion in *K*, Advocate General Trstenjak posited:

The question even arises whether the guarantee of respect for the essence of the right can acquire autonomous significance that goes beyond the three-stage verification of proportionality. If a limitation is so comprehensive that it completely disregards crucial aspects of the fundamental right in question and consequently affects its essence, it must as a rule be challenged as unreasonable and hence as disproportionate.⁶¹

Moreover, in his opinion in *Delvigne*, Advocate General Cruz Villalón considered the essence of the right to vote recognized in Article 39(2) of the Charter, stating:

In the context of the Charter, respect for the essence of the rights recognised therein acts as absolute, insuperable limit, as a “limit of limits”. In other words, failure to respect the essence of the fundamental right in question leads to that right becoming “unrecognisable as such” so that it will not then be possible to refer to a ‘limitation’ of the exercise of the right but rather, purely and simply, to the ‘abolition’ of the right.⁶²

When applying that consideration to the present case and taking account of the nature of the limitation at issue, he then found it necessary to determine whether the limitation in question was proportionate because if not, he reasoned, the limit imposed by the Charter on any possible limitation of the fundamental rights—that is to say, their essence—will have been disregarded.⁶³ In his

⁵⁷*Puškár*, Case C-73/16 at para. 98 (emphasis added). The Court likewise stressed the application of proportionality in considering compliance with Directive 95/46 and other provisions of the Charter of the tax authorities’ drawing up the contested list without the consent of the persons named therein. See *Puškár*, Case C-73/16 at paras. 102–17.

⁵⁸See *infra* notes 80, 81 and accompanying text.

⁵⁹See Opinion of the Advocate General Kokott, *supra* note 47, at paras. 57, 81.

⁶⁰Opinion of the Advocate General Kokott, *supra* note 47, at para. 116.

⁶¹Opinion of Advocate General Trstenjak at para. 75, n.30, Case C-245/11, *K v. Bundesasylamt* (Nov. 6, 2012), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

⁶²Opinion of Advocate General Cruz Villalón at para. 115, Case C-650/13, *Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* (Oct. 6, 2015), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

⁶³Opinion of Advocate General Cruz Villalón, *supra* note 62, at para. 116. Of note, in order to assess whether the limitation was proportionate, the Advocate General engaged in a comparative analysis of the laws of the Member States and the case-law of the European Court of Human Rights, on the basis of which he considered that the national legislation at issue was not in principle precluded by Article 39 of the Charter, though leaving the final determination to the national court. See Opinion of Advocate General Cruz Villalón, *supra* note 62, at paras. 117–24. This analysis raises an interesting question as to the extent to which a comparative analysis of the constitutional traditions common to the Member States—see *infra* note 64 and accompanying text—may help to guide the Court in future case-law on the application of the essence of fundamental rights in EU law, as has been done for proportionality in this context. See also, Opinion of Advocate General Campos Sánchez-Bordona at paras. 82–94, Case C-524/15, *Criminal Proceedings Against Luca Menci* (Mar. 20, 2018), <http://curia.europa.eu/juris/recherche.jsf?language=en> (with respect to the necessity requirement in connection with Article 50 of the Charter on *ne bis in idem*). This discussion was reiterated in his related opinions, Opinion of Advocate General Campos Sánchez-Bordona at paras. 74–78, Case C-537/16, *Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e*

opinion in *Rendón Marín*, Advocate General Szpunar echoed these remarks in his comparison of the “essence of rights” in the context of fundamental rights—which he emphasized was well-known both in EU law and the constitutional traditions of the Member States—and the “substance of the rights” in the context of EU citizenship.⁶⁴

Nevertheless, answers have started to emerge in the Court’s case-law. In particular, the Court’s judgment in *Schrems*⁶⁵ suggests a distinctive role for the essence criterion in the assessment of justified limitations to Article 47 of the Charter under Article 52(1) of the Charter. As is well-known, this case concerned the interpretation—in light of Articles 7, 8, and 47 of the Charter—of Directive 95/46 on the protection of personal data⁶⁶ and in effect the validity of a Commission decision⁶⁷ adopted pursuant to that directive on the adequacy of the protection provided by the safe harbor privacy principles issued by the United States Department of Commerce.⁶⁸ The case stemmed from a complaint made by Mr. Schrems, an Austrian national, to the Data Protection Commissioner regarding the fact that Facebook Ireland transferred the personal data of its users to the United States, which allegedly did not ensure adequate protection of the personal data held in its territory against the surveillance activities of public authorities.⁶⁹

In its judgment, with regard to the legality of the Commission decision, the Court held in relevant part, building on its previous ruling in *Digital Rights Ireland*,⁷⁰ that EU legislation involving interference with the fundamental rights guaranteed by Article 7 of the Charter (respect for private and family life) and Article 8 of the Charter (protection of personal data) must lay down clear and precise rules governing the scope and application of a measure and imposing minimum safeguards, so that persons whose personal data is concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against unlawful access and use of that data.⁷¹ Furthermore and above all, the Court stressed, protection of the fundamental right to respect for private life at EU level requires derogations and limitations in relation to the protection of personal data to apply only in so far as is strictly necessary, which was not the case here.⁷² In particular, legislation permitting public authorities to have access to the content of electronic communications on a generalized basis must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter.⁷³

la Borsa (Mar. 20, 2018), <http://curia.europa.eu/juris/recherche.jsf?language=en>; Opinion of Advocate General Campos Sánchez-Bordona at paras. 81–85, Joined Cases C-596/16 & C-597/16, *Di Puma and Others v. Commissione Nazionale per le Società e la Borsa* (Mar. 20, 2018), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

⁶⁴See Opinion of Advocate General Szpunar, *supra* note 43, at paras. 128–31. In paragraph 128, footnotes 117 and 118, the Advocate General referred to eight Member States: The Czech Republic, Germany, Hungary, Poland, Portugal, Romania, the Slovak Republic, and Spain. In focusing on the relative position involving proportionality, he also took note of the absolute conception of the essence of fundamental rights. See Opinion of Advocate General Szpunar, *supra* note 43, at para. 129, n.121. For a general discussion of the relationship between these areas of EU law, see, e.g., Francesco De Cecco, *False Friends and True Cognates: On Fundamental Freedoms, Fundamental Rights and Union Citizenship*, in *THE REACH OF FREE MOVEMENT* 253–271 (Mads Andenas et al., eds., 2017).

⁶⁵*Schrems*, Case C-362/14.

⁶⁶See *supra* note 49.

⁶⁷Commission Decision 2000/520, of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, 2000 O.J. (L 215) 7 (EC).

⁶⁸*Schrems*, Case C-362/14 at para. 67.

⁶⁹*Schrems*, Case C-362/14 at paras. 28–30.

⁷⁰*Digital Rights Ireland*, Joined Cases C-293/12 & C-594/12.

⁷¹*Schrems*, Case C-362/14 at para. 91.

⁷²*Schrems*, Case C-362/14 at paras. 92–93.

⁷³*Schrems*, Case C-362/14 at para. 94 (citing paragraph 39 of the judgment in *Digital Rights Ireland*). Yet, to be clear, in *Digital Rights Ireland*, the Court held that—as regards to the assessment under Article 52(1) of the Charter—the essence criterion was complied with in respect to Articles 7 and 8 of the Charter. It was rather proportionality that was not. See *Digital Rights Ireland*, Joined Cases C-293/12 & C-594/12 at paras. 39, 40, 45–69. See also, Joined Cases C-203/15 & C-698/15, *Tele2 Sverige AB v. Post- och telestyrelsen and Others*, 2016 E.C.R. I-970, para. 101.

The Court then declared:

Likewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the *essence* of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. . . . The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law.⁷⁴

On that basis, the Court held that the Commission decision failed to comply with the requirements of the Directive—read in the light of the Charter—and was therefore invalid.⁷⁵

The Court’s reasoning above indicates that a measure that does not afford any remedy before a court does not respect the essence of Article 47 of the Charter⁷⁶ and thus will not be justified, without having to proceed to consider the other criteria set forth in Article 52(1) of the Charter.⁷⁷ Consequently, the Court’s judgment in *Schrems* signals that the assessment of the essence criterion in respect of Article 47 of the Charter is not to be subsumed within the proportionality analysis.⁷⁸ Further support for this position may be gleaned from the Court’s case-law on the application of the essence criterion in respect of other fundamental rights. For example, in *Alemo-Herron and Others*⁷⁹—concerning Article 16 of the Charter laying down the freedom to conduct a business—the Court considered that the limitation in question was liable to adversely affect the “very essence” of that freedom and thus was precluded, without examining the other criteria laid down in Article 52(1) of the Charter. That being said, further clarification in the case-law is warranted because, admittedly, in *Schrems*, the Court’s reasoning on this point followed the discussion of proportionality in respect of Article 7 of the Charter.

II. Relationship with National Procedural Autonomy, Equivalence, and Effectiveness

As noted above, there was a difference of approach between the Court’s judgment and Advocate General Kokott’s opinion in *Puškár*.⁸⁰ In contrast to the Court’s judgment—which focused on Articles 47 and 52(1) of the Charter—the Advocate General’s opinion highlighted the interplay between the principle of effectiveness and the right to an effective remedy in her assessment of certain questions. Specifically, she noted the potential application of the Court’s case-law on

⁷⁴*Schrems*, Case C-362/14 at para. 95 (emphasis added).

⁷⁵*Schrems*, Case C-362/14 at paras. 96–98, 104–06. See further Opinion of Advocate General Mengozzi at para. 326, Opinion 1/15, EU-Canada PNR Agreement (Jul. 26, 2017), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

⁷⁶See also, e.g., Opinion of Advocate General Cruz Villalón at para. 39, Case C-580/13, Coty Germany GmbH v. Stadtparkasse Magdeburg (Jul. 16, 2015), <http://curia.europa.eu/juris/recherche.jsf?language=en>; Opinion of Advocate General Tanchev at para. 81, Case C-34/17, Donnellan v. The Revenue Commissioners (Apr. 26, 2018), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

⁷⁷See, e.g., Tuomas Ojanen, *Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights Under the Charter*, 12 EUR. CONST. L. REV. 318 (2016). See further contributions in this special issue, in particular Maja Brkan, *The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU’s Constitutional Reasoning*, 20 GERMAN L.J. 864 (2019); Koen Lenaerts, *Limits on Limitations: The Essence of Fundamental Rights in the EU*, 20 GERMAN L.J. 779 (2019).

⁷⁸In that regard, see, e.g., Case C-300/11, ZZ v. Secretary of State for the Home Department, 2013 E.C.R. I-363, para. 51 (in reference to Article 52(1) of the Charter, the Court states that “any limitation must in particular respect the *essence* of the fundamental right in question and *requires, in addition, that subject to the principle of proportionality, the limitation must be necessary and genuinely meet objectives of general interest recognised by the European Union*”) (emphasis added).

⁷⁹Case C-426/11, Alemo-Herron and Others v. Parkwood Leisure Ltd., 2013 E.C.R. I-521, paras. 34–37. For a different view, see, e.g., Xavier Groussot, Gunnar Thor Péttersson, & Justin Pierce, *Weak Right, Strong Court—The Freedom to Conduct Business and the EU Charter of Fundamental Rights*, in RESEARCH HANDBOOK ON EU LAW AND HUMAN RIGHTS 326–44 (Sionaidh Douglas-Scott & Nicholas Hatzis eds., 2017).

⁸⁰*Puškár*, Case C-73/16.

national procedural autonomy, equivalence, and effectiveness to the present case, but she considered that reliance on Article 47(1) of the Charter structured the necessary review of the relevant measure, as it inevitably brought the limits of fundamental rights under Article 52(1) of the Charter into focus. Consequently, she found that Article 47(1) of the Charter and the principle of effectiveness ultimately embody the same legal principle and could be examined jointly using the rules in Articles 47(1) and 52(1) of the Charter.⁸¹

Indeed, the essence of the fundamental right to an effective remedy intersects with the hotly debated issue of the relationship between the Court's case-law on Articles 47 and 52(1) of the Charter and on national procedural autonomy, equivalence, and effectiveness.⁸² As mentioned in several Advocate General opinions,⁸³ the Court has not yet elaborated when or why it resorts to one, the other, or both in the particular case. The essence of Article 47 of the Charter figures into this dynamic in at least two important ways.

First, as noted in the commentary,⁸⁴ the relationship between these two strands of the Court's case-law has implications for the distinction between the subjects concerned solely with national procedural autonomy, equivalence, and effectiveness and those involving only Article 47 of the Charter. This raises the question of what does or does not constitute the essence of the fundamental right to an effective remedy and to a fair trial as part of delineating that boundary. This brings the elucidation of the essence of this fundamental right into sharp focus, and in turn, the need for further case-law of the Court on the matter.

Second, regarding the subjects in which the two strands of the Court's case-law overlap, it is often perceived that the standards set by that case-law for compliance with Article 47 of the Charter are higher than those for the principle of effectiveness (in the *Rewe* sense).⁸⁵ Consequently, the essence of the right in the assessment under Article 52(1) of the Charter may be significant in the finding that a particular national (procedural) rule is, or is not, precluded by Article 47 of the Charter.

A notable example is *Star Storage and Others*,⁸⁶ in which the Court and the Advocate General came to different conclusions with respect to the essence criterion, as well as the tests to be applied. This case involved a reference for a preliminary ruling from two Romanian appellate courts concerning the compatibility with EU law of national rules requiring the applicant to deposit a "good

⁸¹Opinion of Advocate General Kokott, *supra* note 47, at paras. 46–52, 70, 78–79.

⁸²See, e.g., Sacha Prechal & Rob Widdershoven, *Redefining the Relationship Between "Rewe-effectiveness" and Effective Judicial Protection*, 4 REV. EUR. ADMIN. L. 31 (2011); Jasper Krommendijk, *Is There Light on the Horizon? The Distinction Between "Rewe-effectiveness" and the Principle of Effective Judicial Protection in Article 47 of the Charter After Orizzonte*, 53 COMMON MKT. L. REV. 1395 (2016). For a general discussion of the Court's case-law on national procedural autonomy, equivalence, and effectiveness, see, e.g., KOEN LENAERTS, IGNACE MASELIS & KATHLEEN GUTMAN, *EU PROCEDURAL LAW* 107–56 (Janek Tomasz Nowak ed., 2015).

⁸³See, e.g., Opinion of Advocate General Jääskinen at paras. 33–37, Case C-61/14, *Orizzonte Salute* (Oct. 6, 2015), <http://curia.europa.eu/juris/recherche.jsf?language=en>; Opinion of Advocate General Sharpston at paras. 36–38, Joined Cases C-439/14 & C-488/14, *Star Storage and Others* (Sept. 15, 2016); Opinion of Advocate General Bobek at paras. 99–100, Case C-89/17, *Secretary of State for the Home Department v. Banger* (Jul. 12, 2018), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

⁸⁴See Prechal & Widdershoven, *supra* note 82, at 46–49.

⁸⁵See, e.g., Prechal & Widdershoven, *supra* note 82, at 101. *But see*, Krommendijk, *supra* note 82, at 1406–07, 1412–17. This point refers to the line of case-law starting with the 1976 judgments in *Rewe*, in which the Court has held that, in the absence of EU legislation in the field, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law (principle of national procedural autonomy). Yet, in accordance with the principle of sincere cooperation, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favorable than those governing similar domestic actions (principle of equivalence) and must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). See, e.g., Case C-234/17, *XC and Others v. Generalprokuratur*, 2018 E.C.R. I-853, paras. 21–23. For a broader perspective on procedural autonomy, see Sacha Prechal, *Between effectiveness, procedural autonomy and judicial protection*, in *FUNDAMENTAL CHALLENGES OF LAW IN LIFE REALITY—LIBER AMICORUM MARKO ILEŠIĆ* 391–404 (Marko Pavliha et al. eds, 2017).

⁸⁶Joined Cases C-439/14 & C-488/14, *Star Storage and Others*, 2016 E.C.R. I-688.

conduct guarantee” to access review procedures for public procurement decisions by contracting authorities. As framed by Advocate General Sharpston, the key issue arising for the Court’s consideration in the case was how far the Member States could go in setting financial requirements for challenging decisions in order to reduce the risk of frivolous challenges that were likely to be unsuccessful and impede the public contract award procedure.⁸⁷

In its judgment, the Court rooted its assessment in Article 47 of the Charter.⁸⁸ It considered that the good conduct guarantee constitutes, as a pre-condition for getting any challenge examined, a limitation on the right to an effective remedy within the meaning of Article 47 of the Charter and thus could only be justified in accordance with Article 52(1) of the Charter.⁸⁹ The Court ruled that the conditions set down in Article 52(1) of the Charter were satisfied,⁹⁰ and in particular, found that the fact that the good conduct guarantee may reach the substantial amount of EUR 25 000 or even EUR 100 000 could not lead to the conclusion that it undermines the “fundamental content” of the right to an effective remedy, since in any event that guarantee cannot be kept by the contracting authority, whatever the outcome of the action.⁹¹

In her opinion, Advocate General Sharpston reached a different conclusion and by a different route. She considered the matter jointly on the basis of the case-law on national procedural autonomy, equivalence, and effectiveness and the right to an effective remedy under Articles 47 and 52(1) of the Charter.⁹² On that basis, she took the view that the good conduct guarantee involves a disproportionate limitation on the right to an effective remedy and therefore undermines the effectiveness of the relevant provisions of the directives.⁹³ She also found that the good conduct guarantee affects the essence of that right because it is liable in practice to deprive economic operators having or having had an interest in obtaining a particular contract from accessing a remedy against allegedly illegal decisions of contracting authorities.⁹⁴

D. The Essence of Article 47 of the Charter Within the EU System of Judicial Protection

1. Role in the Union’s System of Review

Although it may be tempting to focus on the role of the essence of the fundamental right to an effective remedy and to a fair trial in the context of the application of justified limitations to the exercise of that right under Article 52(1) of the Charter, it is not limited as such. Recent case-law of the Court of Justice demonstrates that the essence of the fundamental right to an effective remedy and to a fair trial is linked to other aspects within the broader framework of the EU system of judicial protection.

This link is suggested in the Explanation on Article 47 of the Charter, indicating that the inclusion of the Court’s case-law—recognizing the right to an effective remedy before a court as a general principle of Union law—was not intended to change the system of judicial review laid down by the Treaties in Articles 251 to 281 TFEU, and in particular the rules relating to the admissibility of direct actions brought by natural and legal persons before the EU courts under the fourth paragraph of Article 263 TFEU as amended.⁹⁵ This points to the relevant changes brought by the Lisbon Treaty—by virtue of

⁸⁷Opinion of Advocate General Sharpston, *supra* note 83, at paras. 1–2.

⁸⁸See *Star Storage*, Joined Cases C-439/14 & C-488/14 at paras. 42–46.

⁸⁹*Star Storage*, Joined Cases C-439/14 & C-488/14 at para. 49.

⁹⁰*Star Storage*, Joined Cases C-439/14 & C-488/14 at paras. 50–63.

⁹¹*Star Storage*, Joined Cases C-439/14 & C-488/14 at para. 50.

⁹²Opinion of Advocate General Sharpston, *supra* note 83, at paras. 32–39.

⁹³Opinion of Advocate General Sharpston, *supra* note 83, at paras. 51–52, 57–58.

⁹⁴Opinion of Advocate General Sharpston, *supra* note 83, at para. 51.

⁹⁵Charter Explanations, *supra* note 16, art. 47, at 29.

the new limb added to the fourth paragraph of Article 263 TFEU⁹⁶ in tandem with the introduction of the second subparagraph of Article 19(1) TEU⁹⁷—with a view to remedying the apparent gaps in the EU system of judicial protection in connection with direct actions brought by natural and legal persons to challenge the legality of Union measures without implementing measures.⁹⁸

The essence of the fundamental right to an effective remedy and to a fair trial recognized under Article 47 of the Charter is therefore tied, among other things, to these institutional developments. This is part of the construction of a truly complete and coherent system of judicial protection in the EU so as to ensure that individuals have access to a court—either at national or EU level—to challenge the legality of Union measures.⁹⁹

Regarding the completeness of the system in terms of ensuring no gaps, the Court's case-law concerning the interpretation of the new limb of the fourth paragraph of Article 263 TFEU—in respect to regulatory acts not entailing implementing measures—may be considered to enrich the conception of the essence of the first paragraph of Article 47 of the Charter involving access to a court. As the Court recently recalled in the *European Union Copper Task Force and Industrias Químicas del Vallés* cases,¹⁰⁰ the expression “which . . . does not entail implementing measures” within the meaning of the fourth paragraph of Article 263 TFEU must be interpreted in the light of the objective of that provision, which is to ensure that individuals do not have to break the law in order to have access to a court. Where a regulatory act directly affects the legal situation of a private party without requiring implementing measures, that party could be denied effective judicial protection if he did not have a legal remedy before the EU courts for the purpose of challenging the legality of the regulatory act.¹⁰¹

Admittedly, in some circles, this line of case-law has met with disappointment so far on account of the limits placed on this new limb of the fourth paragraph of Article 263 TFEU. In particular, this is due to the fact that regulatory acts are restricted to non-legislative acts of general application starting in *Inuit Tapiriit Kanatami and Others v. European Parliament and Council*.¹⁰² There has also been a noticeable split between the Court and its Advocates General—in cases such as *Telefónica v. Commission*,¹⁰³ *Stichting Woonpunt and Others v. Commission*,¹⁰⁴ *T & L Sugars* and *Sidul Açúcares v. Commission*,¹⁰⁵ and the cases just

⁹⁶The fourth paragraph of Article 263 TFEU provides:

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. (Emphasis added).

⁹⁷The second subparagraph of Article 19(1) TEU provides: “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

⁹⁸For background on this well-trodden subject, see, e.g., LENAERTS ET AL., *supra* note 82, at 331–37.

⁹⁹See LENAERTS ET AL., *supra* note 82, at 1–7.

¹⁰⁰Case C-384/16 P, *European Union Copper Task Force v. Commission*, 2018 E.C.R. I-176; Case C-244/16 P *Industrias Químicas del Vallés v. Commission*, 2018 E.C.R. I-177. Reference is made to the first case for convenience.

¹⁰¹*European Union Copper Task Force*, Case C-384/16 P at para. 42.

¹⁰²*Compare* Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v. European Parliament and Council*, 2013 E.C.R. I-625, paras. 51–62, with Opinion of Advocate General Wathelet at paras. 51–65, Case C-132/12 P, *Stichting Woonpunt and Others v. Commission* (Feb. 27, 2014), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

¹⁰³*Compare* Case C-274/12 P, *Telefónica v. Commission*, 2013 E.C.R. I-852, paras. 27–39, with Opinion of Advocate General Kokott at paras. 35–42, 60–61, C-274/12 P, *Telefónica v. Commission* (Dec. 13, 2013), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

¹⁰⁴*Compare* *Stichting Woonpunt*, Case C-132/12 P at paras. 49–54, with Opinion of Advocate General Wathelet at paras. 69–99, Case C-132/12 P, *Stichting Woonpunt and Others v. Commission* (Feb. 27, 2014), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

¹⁰⁵*Compare* Case C-456/13 P, *T & L Sugars and Sidul Açúcares v. Commission*, 2015 E.C.R. I-284, paras. 29–51, with Opinion of Advocate General Cruz Villalón at paras. 16–48, Case C-456/13 P, *T & L Sugars and Sidul Açúcares v. Commission* (Apr. 28, 2015), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

mentioned¹⁰⁶—in reconciling the requirements of direct concern and not entailing implementing measures, as well as the interpretation of the latter. Yet, arguably, the fact that such limits have been placed on this new limb does not necessarily present a gap in the EU system of judicial protection, provided that the second subparagraph of Article 19(1) TEU essentially “picks up the slack” at the national level.

Under the Court’s case-law, the conditions for admissibility laid down in the fourth paragraph of Article 263 TFEU are to be interpreted in the light of the fundamental right to effective judicial protection without, however, setting aside those conditions which are expressly laid down in the Treaties. Judicial review of compliance with the Union legal order, however, is ensured, as seen from Article 19(1) TEU, by both the Court of Justice and by the courts of the Member States. The TFEU has established—by Articles 263 and 277 TFEU on the one hand, and Article 267 TFEU, on the other hand—a complete system of legal remedies and procedures designed to ensure judicial review of the legality of Union acts. Consequently, for persons who do not satisfy the admissibility requirements of the fourth paragraph of Article 263 TFEU, it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection. That obligation of the Member States follows from the second subparagraph of Article 19(1) TEU, as well as from Article 47 of the Charter to the extent that Member States are implementing EU law within the meaning of Article 51(1) of the Charter.¹⁰⁷

Moreover, as regards the coherence of the system in the sense of ensuring complementary routes of direct and indirect review of legality before the EU courts and the national courts, the Court’s judgment in *Rosneft*¹⁰⁸ also infuses the essence of the first paragraph of Article 47 of the Charter in respect of access to a court. The key issue presented by that case was whether the Court had jurisdiction to give a preliminary ruling on the validity of a Council decision prescribing restrictive measures adopted on the basis of provisions relating to the CFSP, thereby allowing for the indirect review of legality, even though the Treaties explicitly provided only for direct review of the legality of decisions imposing restrictive measures on individuals via the fourth paragraph of Article 263 TFEU.¹⁰⁹

In its judgment, the Court affirmed its jurisdiction in this regard on the grounds that—provided it has the requisite jurisdiction under Articles 24(1) TEU and 275 TFEU to rule on the validity of EU acts—it would be inconsistent with the system of effective judicial protection to exclude the possibility that national courts may refer questions on the validity of Council decisions prescribing the adoption of restrictive measures against individuals.¹¹⁰ The Court ruled, *inter alia*, that because the implementation of such decisions is in part the responsibility of the Member States, a reference for a preliminary ruling on validity plays an essential part in ensuring effective judicial protection.¹¹¹ Further, having regard to the fact that Member States must ensure that their national policies conform to the Union position enshrined in Council decisions, access to judicial review of those decisions is *indispensable* when those decisions prescribe restrictive measures against such persons.¹¹² The Court also took note of the requirements set down in the first paragraph of Article 47 of the Charter and stressed that “the very existence of effective judicial review designed to ensure compliance with provisions of EU law is *of the essence* of the rule of law.”¹¹³

¹⁰⁶Compare *European Union Copper Task Force*, Case C-384/16 P at paras. 32–71, with Opinion of Advocate General Wathelet at paras. 44–84, Case C-384/16 P, *European Union Copper Task Force v. Commission* (Mar. 13, 2018), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

¹⁰⁷*European Union Copper Task Force*, Case C-384/16 P at paras. 111–12, 116–17.

¹⁰⁸Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty’s Treasury*, 2017 E.C.R. I-236.

¹⁰⁹See *Rosneft*, Case C-72/15 at paras. 65–66. See also, *C-455/14 P, H v. Council and Commission*, 2016 E.C.R. I-569, paras. 41–58.

¹¹⁰*Rosneft*, Case C-72/15 at para. 76.

¹¹¹*Rosneft*, Case C-72/15 at para. 70.

¹¹²*Rosneft*, Case C-72/15 at para. 71 (emphasis added).

¹¹³*Rosneft*, Case C-72/15 at para. 73 (emphasis added).

Consequently, the Court's judgment ensures that an indirect route for access to a court to challenge the legality of Union measures is open, where the direct route is foreclosed.

II. Judicial Independence

Recent case-law on Article 47 of the Charter—along with the second subparagraph of Article 19(1) TFEU—has also started to fill out the contours of the essence of other aspects of the fundamental right to an effective remedy and to a fair trial.

In particular, *Associação Sindical dos Juizes Portugueses*¹¹⁴ involved a reference for a preliminary ruling from the Supreme Administrative Court of Portugal concerning the compatibility of national legislation, temporarily reducing the salaries paid to members of the Portuguese judiciary to combat the effects of the economic crisis, with the principle of judicial independence enshrined in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.¹¹⁵

In its judgment—confined to the interpretation of the second subparagraph of Article 19(1) TEU¹¹⁶—the Court emphasized that, with regard to a court or tribunal as defined by EU law which may rule on questions involving the application or interpretation of that law, the Member States must ensure that that court meets the requirements *essential* to effective judicial protection in accordance with the second subparagraph of Article 19(1) TEU.¹¹⁷ In order for that protection to be ensured, maintaining that court's independence is *essential*, as confirmed by the second paragraph of Article 47 of the Charter referring to the access to an “independent” tribunal as one of the requirements linked to the fundamental right to an effective remedy.¹¹⁸ The Court also pointed out that, like the protection against removal from office, the receipt by members of the body concerned of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee *essential* to judicial independence.¹¹⁹ Taking account of the particular circumstances of the present case, the Court held that the salary-reduction measures at issue in the main proceedings did not impair the independence of the members of the court concerned and thus the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude such measures.¹²⁰

Several months later, in *Minister for Justice and Equality*,¹²¹ involving a reference for a preliminary ruling from the High Court of Ireland, the Court was presented with questions relating to the requirements of judicial independence under Article 47 of the Charter. The main issue raised by this case essentially concerned whether, under the Framework Decision 2002/584 on the European arrest warrant,¹²² the person concerned should be surrendered from Ireland to Poland when the

¹¹⁴Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, 2018 E.C.R. I-117.

¹¹⁵*Associação Sindical dos Juizes Portugueses*, Case C-64/16 at paras. 1, 2, 11–18.

¹¹⁶*Associação Sindical dos Juizes Portugueses*, Case C-64/16 at para. 27. In that regard, the Court pointed out—in paragraph 29 of its judgment—that, “as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to ‘the fields covered by Union law,’ irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter.” For further discussion of the relationship between that provision and Article 47 of the Charter in light of this judgment, see, e.g., Opinion of Advocate General Tanchev at paras. 52–62, Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)* (Nov. 15, 2018), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

¹¹⁷*Associação Sindical dos Juizes Portugueses*, Case C-64/16 at paras. 37–40 (emphasis added).

¹¹⁸*Associação Sindical dos Juizes Portugueses*, Case C-64/16 at para. 41 (emphasis added).

¹¹⁹*Associação Sindical dos Juizes Portugueses*, Case C-64/16 at para. 45 (emphasis added).

¹²⁰*Associação Sindical dos Juizes Portugueses*, Case C-64/16 at paras. 46–52. See also, Case C-49/18, *Vindel v. Ministerio de Justicia*, 2019 E.C.R. I-106, paras. 67–74.

¹²¹See Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, 2018 E.C.R. I-586, paras. 14–25, 33–34; Peter Bárd & Wouter van Ballegooij, *Judicial Independence as a Precondition for Mutual Trust? The CJEU in Minister for Justice and Equality v. LM*, 9 NEW J. EUR. CRIM. L. 353, 354 (2018).

¹²²Council Framework Decision 2002/584/JHA, of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002 O.J. (L 190) 1 (as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, 2009 O.J. (L 81) 24).

executing judicial authority had serious doubts as to whether that person's fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter would be respected due to the apparent lack of independence of the Polish judiciary resulting from the reform of the Polish justice system.¹²³

In its judgment, the Court—drawing in relevant part from its findings in *Associação Sindical dos Juizes Portugueses*¹²⁴—declared, *inter alia*, that

the requirement of judicial independence forms part of the *essence* of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.¹²⁵

The Court further reiterated that the very existence of effective judicial review designed to ensure compliance with EU law is of the *essence* of the rule of law, and that maintaining the independence of national courts and tribunals is essential for ensuring effective judicial protection, as confirmed by the second paragraph of Article 47 of the Charter, as well as the proper functioning of the preliminary ruling procedure and the European arrest warrant mechanism.¹²⁶ On that basis, the Court held that the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the *essence* of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant, on the basis of Article 1(3) of Framework Decision 2002/584.¹²⁷

The Court's judgments in these foregoing cases may thus be read as developing the dimensions of judicial independence as part of the essence of the rights enshrined in the second paragraph of Article 47 of the Charter. It is left open whether other essential elements of the EU system of judicial protection may be recognized in the future. The case-law in the context of restrictive measures in the CFSP helps to illuminate further attributes of the essence of the rights contained in Article 47 of the Charter.

III. Restrictive Measures in the CFSP

Generally, matters bearing on the essence of the fundamental right to an effective remedy and to a fair trial may arise, explicitly or implicitly, in various constellations of the Court's case-law, depending in large part on the circumstances of the case and the provisions of EU law in question. One fruitful area, among others,¹²⁸ for examining the dimensions of the essence of the rights enshrined in Article 47 of the Charter concerns the Court's case-law on restrictive measures

¹²³Those doubts had been prompted by the Commission's reasoned proposal in accordance with Article 7(1) TEU regarding the rule of law in Poland (*Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, COM (2017) 835 final (Dec. 20, 2017)), which in turn referred to documents issued by various international and European bodies expressing serious concerns about such reform. See *Minister for Justice and Equality*, Case C-216/18 PPU at paras. 17–22. Of note, there are several cases presently pending before the Court relating to such reform. See Opinion of Advocate General Tanchev, *supra* note 116, at para. 2 n.2.

¹²⁴See *Minister for Justice and Equality*, Case C-216/18 PPU at paras. 49–54, 63–64.

¹²⁵*Minister for Justice and Equality*, Case C-216/18 PPU at para. 48 (emphasis added).

¹²⁶*Minister for Justice and Equality*, Case C-216/18 PPU at paras. 51–58 (emphasis added).

¹²⁷*Minister for Justice and Equality*, Case C-216/18 PPU at para. 59 (emphasis added). To that end, the Court established the two-step assessment which must be undertaken by the executing judicial authority in that regard. See *Minister for Justice and Equality*, Case C-216/18 PPU at paras. 60–79.

¹²⁸For example, other potential areas for examination which come to mind include the Court's developing case-law on asylum policy, unfair contract terms, and access to justice in environmental matters.

in the CFSP, as already shown by the *Rosneft* case above. This case-law is typically situated within the context of litigation brought by private parties before the EU courts (namely, the General Court, with appeal to the Court of Justice) seeking the annulment of restrictive EU measures imposed against them, freezing their funds.

The *Kadi* cases are a prominent example. As has been well-documented, *Kadi I*¹²⁹ presented the Court on appeal with the judicial review of EU restrictive measures implementing United Nations Security Council (“UNSC”) Resolutions in the context of the fight against terrorism, whereby Mr. Kadi and another claimant had brought actions for annulment against certain measures freezing their funds.¹³⁰ In its judgment, the Court ruled, *inter alia*, that since the Council had failed to inform them of the reasons for their listing, the evidence on which that listing was based or afforded them the right to be heard, their fundamental rights of defence and effective judicial review were violated, and there was an unjustified restriction on Mr. Kadi’s fundamental right to property.¹³¹ The Court therefore annulled the restrictive measures against them.¹³² Although the Court did not refer explicitly to the essence of those fundamental rights in its judgment, Advocate General Poiares Maduro remarked—in the context of his discussion of the alleged breach of the right to effective judicial view—that, “[w]hile certain limitations on that right might be permitted if there are other compelling interests, it is unacceptable in a democratic society to impair the *very essence* of that right.”¹³³

The Court was more forthcoming in *Kadi II*.¹³⁴ In order to remedy the infringements of EU law identified by the Court in *Kadi I*, the Commission communicated to Mr. Kadi the narrative summary of reasons provided by the UNSC for his inclusion on the list of restrictive measures and afforded him the opportunity to comment, following which the Commission maintained his name on the list.¹³⁵ Mr. Kadi challenged these restrictive measures maintaining his listing, which were annulled by the General Court.¹³⁶ In its judgment, the Court of Justice dismissed the appeal, again pronouncing on issues concerning the judicial review of UN-implemented EU restrictive measures and on whether the observance of Mr. Kadi’s fundamental rights of defence and effective judicial protection required disclosure of the information and evidence relied on.¹³⁷

Importantly, in *Kadi II*, the Court laid down a series of criteria to ensure respect for these fundamental rights, drawing on previous case-law. In particular, it underlined that the fundamental right to effective judicial protection affirmed in Article 47 of the Charter requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based—either by reading the decision itself or by requesting and obtaining disclosure of those reasons—without prejudice to the power of the courts having jurisdiction to require the authority concerned to disclose that information. This is in order to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter in a position to fully review the lawfulness of the decision in question.¹³⁸

¹²⁹Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, 2008 E.C.R. I-461 [hereinafter *Kadi I*].

¹³⁰See *Kadi I*, Joined Cases C-402/05 P & C-415/05 P at paras. 11–106.

¹³¹*Kadi I*, Joined Cases C-402/05 P & C-415/05 P at paras. 333–71.

¹³²*Kadi I*, Joined Cases C-402/05 P & C-415/05 P at para. 372.

¹³³Opinion of Advocate General Poiares Maduro at para. 52, Joined Cases C-402/05 P and C-415/05 P, *Kadi I* (Sept. 3, 2008), <http://curia.europa.eu/juris/recherche.jsf?language=en> (emphasis added).

¹³⁴Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, *Commission and Others v. Kadi*, 2013 E.C.R. I-518 [hereinafter *Kadi II*].

¹³⁵See Opinion of Advocate General Bot at paras. 19–28, Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, *Kadi II* (Jul. 18, 2013), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

¹³⁶Case T-85/09, *Kadi v. Commission*, 2010 E.C.R. I-418.

¹³⁷*Kadi II*, Joined Cases C-584/10 P, C-593/10 P & C-595/10 P at paras. 103–34.

¹³⁸*Kadi II*, Joined Cases C-584/10 P, C-593/10 P & C-595/10 P at paras. 98–137 (in particular, paragraphs 98 and 100 and the case-law cited).

Also, in this context, the Court stressed that judicial review of the lawfulness of the contested measures was all the more essential because—despite improvements—the United Nations regime did not provide persons with the guarantee of effective judicial protection.¹³⁹ The Court then stated:

The *essence* of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered.¹⁴⁰

This stands as an important proclamation of an essential component of the fundamental right to an effective remedy. Moreover, the criteria elaborated above by the Court in *Kadi II* indicates that individuals must be afforded a minimum of information in order to be in a position to defend themselves which, too, may be considered to form part of the essence of that right.¹⁴¹

*Peftiev and Others*¹⁴² is also instructive for the essence of the right to an effective remedy with regard to legal representation. Through a reference for a preliminary ruling from the Supreme Administrative Court of Lithuania, this case concerned the interpretation of certain EU restrictive measures in respect to Belarus, which set forth a derogation from fund-freezing measures for the payment of legal services in order to allow the persons concerned to challenge the lawfulness of such measures in court.¹⁴³

In its judgment, the Court ruled that when taking a decision on whether to grant a derogation for the release of funds under the measures concerned, the competent national authority does not enjoy an absolute discretion, but must exercise its powers in a manner that upholds the rights provided for in the second sentence of the second paragraph of Article 47 of the Charter¹⁴⁴ and, in a situation such as that in the main proceedings, observes the *indispensable nature of legal representation* in bringing an action challenging the lawfulness of restrictive measures.¹⁴⁵ In doing so, the Court rejected the Lithuanian Government's argument that the refusal to grant the derogation did not undermine the essence of the right to an effective legal remedy because the person providing the legal services will be paid after the funds have been released, underlining that that argument was based on the assumption that the action brought will be successful, which it may not be, and moreover, a Member State may not require a legal service professional to bear such a financial risk.¹⁴⁶

Altogether, on the basis of the Court's case-law, the essence of the fundamental right to an effective remedy and to a fair trial within the EU system of judicial protection may be considered to act as a kind of developmental device in the Union legal order, encouraging the progressive realization of Charter rights.

¹³⁹*Kadi II*, Joined Cases C-584/10 P, C-593/10 P & C-595/10 P at para. 133.

¹⁴⁰*Kadi II*, Joined Cases C-584/10 P, C-593/10 P & C-595/10 P at para. 134 (emphasis added).

¹⁴¹Prechal, *supra* note 2, at 152–53.

¹⁴²Case C-314/13, Užsienio reikalų ministerija and Finansinių nusikaltimų tyrimo tarnyba v. Peftiev and Others, 2014 E.C.R. I-1645.

¹⁴³*Peftiev and Others*, Case C-314/13 at para. 11–22.

¹⁴⁴To recall, that provision states: "Everyone shall have the possibility of being advised, defended and represented." The Charter, *supra* note 10, at art. 47.

¹⁴⁵*Peftiev and Others*, Case C-314/13 at para. 29 (emphasis added).

¹⁴⁶*Peftiev and Others*, Case C-314/13 at para. 30. See also, *Peftiev and Others*, Case C-314/13 at para. 31.

E. Conclusion

In view of the foregoing discussion, the role played by the essence of the fundamental right to an effective remedy and to a fair trial in the case-law of the Court of Justice of the European Union is extensive, both in depth and breadth. On the one hand—in terms of depth—there is not just one singular essence of the fundamental right to an effective remedy and to a fair trial embodied in Article 47 of the Charter. Rather, each paragraph of that provision contains components that inform and nourish the essence of this fundamental right, including access to a court, judicial independence, legal representation, and legal aid, as fleshed out in the Court's case-law in various areas as detailed above.

On the other hand—in terms of breadth—the Court's case-law indicates that the essence of the fundamental right to an effective remedy and to a fair trial has an autonomous function apart from proportionality in the context of the application of justified limitations to the exercise of that right under Article 52(1) of the Charter. Moreover, it is linked to matters bearing on the overarching framework of the EU system of judicial protection. In particular, it features in the entangled relationship between the Court's case-law on Articles 47 and 52(1) of the Charter and national procedural autonomy, equivalence, and effectiveness. Additionally, it is tied to institutional developments involving standing before the EU courts as part of the construction of a truly complete and coherent system of judicial protection in the EU. It thereby acts as a developmental device in the Union legal order, encouraging the progressive realization of Charter rights, as further illustrated by the Court's case-law on judicial independence and restrictive measures in the CFSP.

Consequently, while much awaits further refinement, certain recent developments in the Court's case-law indicate that the essence of the fundamental right to an effective remedy and to a fair trial can play a meaningful role in the EU system of fundamental rights protection and the EU system of judicial protection more broadly. At the same time, there are remaining questions to be clarified in relation to the essence of Article 47 of the Charter, which could help develop this case-law in the desired direction. These include, in particular, addressing the relationship between that provision and the principle of effectiveness and the possible recognition of other elements which are considered essential to the EU system of judicial protection alongside judicial independence. Hopefully, this situation may stimulate research into other fruitful areas of the Court's case-law for elucidating the essence of the rights enshrined in Article 47 of the Charter. In this way, the best may be yet to come as that case-law progresses in the future.