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# REMEDIES UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS

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## 1. INTRODUCTION

I first met Ulf in 1997 when I was the Deputy Director of the Centre for European Legal Studies at Cambridge. We were looking to build links with other law faculties in the EU in order to develop the long intellectual tradition at Cambridge in comparative law, and to integrate it into the research and teaching of EU legal problems. Ulf and the Swedish Network for European Legal Studies proved to be excellent collaborators. It was during this time that we began a shared intellectual interest in the protection of fundamental rights in the EU.

Even though the EU Charter of Fundamental Rights has been, since the Lisbon Treaty, legally binding, it does not necessarily follow that the EU suddenly became a 'human rights organisation'.<sup>1</sup> There are several general features of the Charter that must be born in mind before a clear understanding can be reached of the ways and means of securing a sanction to enforce it. These include, firstly, the distinction between rights and principles and the related confinement of the pertinence of some Charter provisions to the elaboration of EU policy. Secondly, the restriction on the reach of the Charter by reference to the law making competences of the EU cannot be set to one side; if EU law is irrelevant to the resolution of a dispute then so too is the Charter. Thirdly, due consideration needs to be given to the division between derogable and non-derogable rights, which is as important under the Charter as it is under the European Convention of Human Rights (ECHR). And fourthly, the facility for limiting some of the Charter's substantive rights that is provided in Charter Article 52(1) furnishes a final and important fetter on the Charter's impact.

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1 K. Lenaerts and J. Fons 'The Place of the Charter in the EU Constitutional Edifice' in S. Peers, T. Hervey, Gutierrez-. Kenner and A. Ward (eds) *The EU Charter of Fundamental Rights; a Commentary* p. 1559, at p. 1562 citing T. Tridimas *The General Principles of EU Law* (2006) at p. 613.

According to that provision, such limitations will be lawful if they are provided for by law, respects the essence of the Charter right concerned, and comply with the proportionality test set out in Article 52(1). These preliminary issues will be addressed in Part II below.

The core remedial issues arising under the Charter will be addressed in Parts III and IV. As is well known, the judicial enforcement of EU law is split along two different judicial paths, one that is devoted to correcting failure to comply with EU law by Member States and private legal entities, while the other provides an avenue for correcting the failure of EU institutions and their sub-entities to meet EU law obligations. The former type of action is initiated before the Member State courts, while the latter is usually commenced before the General Court of the European Union, subject to the jurisdiction of the Member State courts to hear, if not decide on, challenge to the validity of EU measures of a normative nature. If a Member State Court has a serious doubt as to the validity of an EU measure of this kind, they are bound to make a reference to the Court of Justice under Article 267 TFEU where the question will be decided.<sup>2</sup>

## 2. PRELIMINARY ISSUES

### 2.1 The Distinction between Rights and Principles and Charter Provisions Directed at EU Policy

It is already established that 'rights' provided by the Charter are judicially enforceable, while 'principles' are not. The distinction between the two appears in Article 52 (5) of the Charter and its effects were considered by the Court of Justice in Case C-176/12 *Association de médiation sociale (AMS) v Union locale des syndicats CGT and others (CGT)*.<sup>3</sup> ASM, an organisation governed by French law on the contract of association, resisted the appointment by CGT of a trade union official to represent the interests of ASM employees. The objection was based on an argument to the effect that ASM was not obliged to have such a representative under French law, given that ASM had less than fifty employees. Given that the substance of the dispute concerned interpretation of provisions of Directive 2002/14 establishing a general framework for informing and consulting employees in the European Union,<sup>4</sup> the national court seized of the dispute between AMS and CGT referred Article 267 questions to the Court of Justice concerning, *inter alia*, whether the fundamental right of workers to information and consultation, recognised by Article 27 of the Charter, either by itself or read in conjunction with the relevant provisions of Directive 2002/14,

2 Case C – 314/85 *Foto Frost* ECLI:EU:C:1987:452.

3 ECLI:EU:C:2014:2 and the Opinion of Advocate General Cruz Villalón of 18 July 2013 ECLI:EU:C:2013:491. Hereafter referred to as *AMS v CGT*.

4 OJ 2002 L 80 p. 29.

could be invoked in a dispute between private parties when the national court was assessing the compliance with EU law of national measures implementing the Directive.

The Court of Justice held that the Article 27 right of workers to information and consultation required more specific expression in European Union or national law before it could be fully effective.<sup>5</sup> This was so because Article 27 states that workers' rights to information and consultation within the undertaking arise 'under the conditions provided for by Union law and national law and practices.'<sup>6</sup> The Court held that it was 'not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that that article' that the provision in issue in that case, namely Article 3(1) of Directive 2002/14, 'lays down and addresses to the Member States a prohibition on excluding from the calculation of staff numbers in an undertaking a specific category of employees initially included in the group of person to be taken into account in that calculation'.<sup>7</sup>

This ruling is significant in that other rights in the Charter contain the same, or a similar, caveat relating to EU law and national laws and practices. Aside from Article 27, these are the Article 28 right to collective bargaining and action, the Article 30 right to protection in the event of unjustified dismissal, the Article 34 right to social security and social assistance, the Article 35 right to health care, and the Article 36 right of access to services of general economic interest. The invocability of these rights would therefore appear to be wholly dependent on the existence of sufficiently detailed Member State or EU initiatives.<sup>8</sup>

5 Above n 3 paragraph 45.

6 Ibid paragraph 44.

7 Ibid paragraph 46.

8 Charter rights that are directed at the elaboration of EU policy include Article 35, the second sentence of which states that a 'high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities', Article 37 which says that a 'high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development,' and Article 38 which is confined to affirming that 'Union policies shall ensure a high level of consumer protection.' See also on the distinction between 'principles' and 'rights' the explanations accompanying Article 52 (5) of the Charter and T. von Danwitz and K Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights' (2012) 35 *Fordham International Law Journal* 1397, at 1410 to 1414 and K. Lenaerts 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, at 400, and the analysis of Advocate General Cruz Villalón in his Opinion in *AMS v CGT* ECLI:EU:C:491 at paragraphs 43 to 80. For another case that bears out this distinction see Case C-356/12 *Glatzel v. Freistaat Bayern* ECLI: EU:C:2014:350.

## 2.2 Non-derogable rights and permissible limitations

### 2.2.1 *Derogable and non-derogable rights*

Like the European Convention of Human Rights, the EU Charter is divided up into derogable and non-derogable rights, albeit through a somewhat enigmatic drafting technique. Title I entitled 'Dignity', is made up of five provisions, namely the Article 1 right to 'Human Dignity', the Article 2 'Right to life', the Article 3 'Right to the integrity of the person', the Article 4 'Prohibition of torture and inhuman or degrading treatment or punishment' and the Article 5 'Prohibition on slavery and forced labour'. These encapsulate all of the rights that are non-derogable under Article 15 (2) of the ECHR, save for the Article 7 ECHR rule on no punishment without law, which is guaranteed under the Charter by Article 49.

In any event, notwithstanding the absence of a provision in the EU Charter that is analogous to Article 15 (2) ECHR, which states that no 'derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision' the 'absolute status' of Title I Charter rights, and Article 49, would seem to be guaranteed by Article 52 (3) of the Charter. It provides that in 'so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down in the Convention. This provision shall not prevent Union law providing more extensive protection.'<sup>9</sup> Thus, notwithstanding the absence of an express rule under the Charter vesting some rights with a non-derogable status, Article 52(3) shows that the non-derogable rights cannot be protected less rigorously in the EU Charter than they are under the ECHR.

### 2.2.2 *Permissible limitations*

Somewhat less enigmatic is the manner in which the Charter imports a rule similar to that appearing in the ECHR on permissible limitations for certain rights. Charter Article 52 (1) provides as follows;

'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.'

<sup>9</sup> For a detailed discussion of Article 52 (3) of the Charter see the contribution by Steve Peers and Judge Sacha Prechal S Peers, T Hervey, J Kenner and A. Ward (eds) *The EU Charter of Fundamental Rights; a Commentary* (2014, Hart Publishing) pp 1490 to 1503.

In the ECHR a similar provision attaches to Articles 8 to 11 of that instrument, encompassing the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, and freedom of assembly. These rights are protected under the EU Charter in Articles 7 to 12,<sup>10</sup> although, unlike the parallel provisions in the ECHR, they are expressed in those provisions in absolute terms. Yet, due to the combined effects of Article 52(3), which ensures that, at minimum, ECHR and Charter rights shall be the same, and the limitation contained in Article 52(1), Article 7 to 12 of the Charter are subject to permissible restriction in a manner that is analogous to Articles 8 to 11 of the ECHR. Equally, however, the extent to which permissible limitations have no role under the ECHR, as is the case, for example, with respect to the above discussed non-derogable rights, Article 52(1) has no role to play in defining the outer-limits of non-derogable rights under the Charter. This is also a function of the text of Article 52 (3) which preserves the minimum standards set by the ECHR.<sup>11</sup>

### 3. EFFECTIVE REMEDIES TO SUPPORT CHARTER RIGHTS BEFORE MEMBER STATE COURTS

#### 3.1 When are Member States 'implementing Union law'

As already noted, a Member State court has no authority to rule on questions arising from the Charter unless, in the dispute in issue, the Member State concerned is 'implementing Union law' within the meaning of Article 51(1). If a Member State is not so doing, the Charter is inapplicable and no remedy can follow from its breach.<sup>12</sup>

This question was addressed in Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*.<sup>13</sup> It concerned a criminal prosecution for breach of various provisions of Swedish tax law some, although not all, of which concerned Value Added Tax. The bulk of the proceedings concerned breach of Swedish income tax and social security law, in circumstances which were purely internal to that Member State.

<sup>10</sup> Article 8 of the Charter supplies a specific right to the protection of personal data while the ECHR contains no such express provision. However, in the context of the ECHR, protection of personal data is classically played out as a balancing exercise between the Article 8 right to privacy and the Article 10 right to freedom of expression.

<sup>11</sup> For examples of how the Article 52(1) limitation works see eg C-419/14 *WebMindLicenses Kft* ECLI:EU:C:2015:832; Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources and Others* ECLI:EU:C:2014:238; C-279/09 *DEB* ECLI:EU:C:2010:811; Case C-317/08 *Alassini and others* ECLI:EU:C:2010:146.

<sup>12</sup> Eg C-333/13 *Dano* ECLI:EU:C:2014:2358.

<sup>13</sup> ECLI:EU:C:2013:105.

In deciding that the legal situation fell within the scope of EU law,<sup>14</sup> the Court of Justice noted that the tax penalties and criminal proceeding were 'connected in part' to breach by Mr Åkerberg Fransson of his obligation to pay VAT.<sup>15</sup> The Court held that, due to Article 4(3) TEU on the principle of sincere cooperation, Article 235 TFEU on the obligation of Member States to counter illegal activities affecting the financial interests of the Union, and various provisions of Council Directive 2006/112/EC on the common system of value added tax,<sup>16</sup> there was a 'direct link' between the collection of VAT revenue and the availability to the European Union of corresponding VAT resources.<sup>17</sup> It followed that the 'tax penalties and criminal proceedings for tax evasion', such as those which had been applied to Mr Åkerberg Fransson constituted 'implementation of Articles 2, 250(1) and 273 of Directive 2006/12 ... and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51 (1) of the Charter.'<sup>18</sup>

However, the Court attenuated its findings, due to the mixed EU and non-EU subject matter of the proceedings. It held that 'national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby comprised.'<sup>19</sup>

The judgment in *Åklagaren v Hans Åkerberg Fransson* can only be fully understood if it is read in the light of C-399/11 *Criminal Proceedings Against Stefano Melloni*.<sup>20</sup> That case concerned the interpretation of Article 53 of the Charter on level of protection, and more specifically whether it preserved fundamental rights protection of national constitutions providing more extensive protection than Charter rights. The Court declined to interpret Article 53 in such a way as to allow application of Spanish constitutional principles on trials in absentia, when they differed from those supplied by both Article 4a(1) of Framework Decision 2002/584 and Article 47 of the Charter. It did so because it 'would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by the State's constitution.'<sup>21</sup> However, *Åklagaren v Hans Åkerberg Fransson* makes it clear

14 Above n 13, see in particular paragraph 27.

15 Above n 13, paragraph 24.

16 [2006] OJ L 347/1. The Court also relied on Article 2(1) of Council Decision 2007/436/EC, Euratom, on the system of the European Union's own resources [2007] OJ L 163/17.

17 *Ibid*, paragraph 26.

18 *Ibid*, paragraph 27.

19 *Ibid*, paragraph 29, citing Case C-399/11 *Criminal Proceedings Against Stefano Melloni*, ECLI:EU:C:2013:107, paragraph 60.

20 *Ibid*.

21 *Ibid* paragraph 58.

that, in mixed cases in which there is no element of EU law governing part of the dispute (in that case the areas being income tax and social security) national fundamental rights standards can continue to apply, provided that the primacy of EU law is in no way imperilled.

### 3.2 No issue of Member State implementation in cases concerned purely with validity challenge

It is also important to bear in mind that, if a litigant is challenging, before a national court, the validity of an EU measure for breach of the Charter, or seeking its interpretation in conformity therewith, there is no need for the national judge to consider whether the Member State is 'implementing' EU law under Article 51 (1) of the Charter. Challenges of this kind are in no way targeted at a national measure. Rather, they simply contend that the breach of the Charter is sourced in a provision of EU law that is in the process of being applied in the Member State concerned. Thus, they are best apprehended as challenges to the institutions, bodies, offices and agencies of the Union, under the arm of Article 51(1), but which are being dealt with, at least in part, by the national courts, with the aid of the Article 267 interpretation/validity mechanism and reference to the Court of Justice.<sup>22</sup>

A notable example of this occurring is found in Case C-400/10 PPU McB.<sup>23</sup> There, on Article 267 reference from an Irish court, the Court of Justice ruled on the compatibility of a provision of Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of foreign judgments in matrimonial matters and matters of parental responsibility<sup>24</sup> with the Article 7 Charter right to family life, and Article 24 of the Charter on the rights of the child. Member State law was necessarily irrelevant to this exercise, because Article 2(11) (a) of Regulation 2201/2003 provided that 'rights of custody' were to be determined by the law of the Member State of the child's habitual residence immediately before any removal or retention. However, it was still necessary to examine whether Regulation 2201/2003 was compatible with the fundamental rights mentioned above to be sure that EU institutions that had passed the Regulation had complied with the Charter.<sup>25</sup> This was held to be the case.

<sup>22</sup> See eg Case C-400/10 PPU McB ECLI:EU:C:2010:582.

<sup>23</sup> *Ibid.*

<sup>24</sup> OJ 2003 L 338/1.

<sup>25</sup> Above note 22 paragraph 49. See more recently C-498/14 PPU Bradbrooke ECLI:EU:C:2015:3. For a recent example of a Commission decision that was held to be invalid for breach of the Charter see C-362/14 Schrems ECLI:EU:C:2015 650.

### 3.3 Exercise of discretion and remedies

In Joined Case C-411/10 and C-493/10 *NS v Secretary of State for the Home Department*,<sup>26</sup> it was held that the Secretary of State was 'implementing' EU law for the purposes of Article 51 (1) of the Charter when he exercised a discretion under Article 3(2) of Regulation 343/2003<sup>27</sup> to examine an asylum application, when the person concerned had already applied for asylum in another Member State. In other words, aside from the decision in which the discretion was exercised, there appeared to be no other provision of Member State law requiring interpretation in conformity with fundamental rights.

The Court held that the discretionary power conferred on the Member State by Article 3(2) of Regulation 343/2003 formed part of the mechanisms for determining the Member State responsible for examining an asylum application, and was therefore an element of the Common European Asylum System. Thus, a Member State which exercised it had to be considered to be implementing European Union law within the meaning of Article 51 (1) of the Charter.<sup>28</sup>

### 3.4 Sanctions and Procedural Rules before Member State Courts to Enforce Charter Rights

Once the above threshold issues have been determined by a national court, it is a fairly simple matter to identify the sanctions and procedural rules to apply to a judicially enforceable Charter right. As in other areas of EU law, it is a matter of national procedural autonomy to designate the remedies and procedures for the enforcement of individual rights guaranteed by the Charter, subject to effectiveness and equivalence. Pursuant to the principle effectiveness, national remedies and procedural rules that render individual rights impossible in practice or excessively difficult to enforce must be disapplied.<sup>29</sup> Pursuant to the principle of equivalence, the same Member State remedies and procedural rules have to be available to enforce individual rights arising from EU law as those that are applicable to analogous claims of a purely domestic nature.<sup>30</sup>

There are fewer Court of Justice rulings concerning the principle of equivalence than there are concerning the principle of effectiveness and fewer com-

26 ECLI:EU:C:2011:865.

27 Establishing the criteria and mechanisms for determining the Member State responsible for processing the asylum application lodged in one of the Member State by a third country national, OJ [2003] L 50/1.

28 Above note 26 paragraph 68.

29 See the line of case law, commencing with C-199/82 *San Giorgio* ECLI:EU:C: 1983:318.

30 Eg Case C-326/96 *Levez* ECLI:EU:C:1998:577. See eg more recently Case C-378/10 *Valle Epitesi kft* ECLI:EU:C:2012:440.



mentaries devoted to its meaning.<sup>31</sup> It is, however, arising with increasing frequency in disputes before the Court. Some examples include a case in which it was argued that the designation of a specialised court to deal with a genre of claims based on EU law did not extend to analogous cases of a purely domestic nature,<sup>32</sup> an allegedly discriminatory time-limit for bringing proceedings,<sup>33</sup> and a barrier to the pursuit of damages for breach of EU law that was said not to extend to analogous claims of a purely domestic nature.<sup>34</sup> Here too, this type of seemingly uneven remedial treatment for claims based on EU law will be equally susceptible to challenge if it stands in the way of judicially enforceable rights contained in the Charter.

It is important to underscore that, as intrusive, in terms of national procedural autonomy, as the Court's case law on Member State remedies and procedural rules may sometimes appear, national courts are bound to create new remedies to enforce EU rights in only a narrow range of circumstances. It was established in the landmark case of C-432/05 *Unibet* that it is only when Member State law, considered as a whole, fails to supply an effective remedy for the enforcement of EU rights that a national judge will be required to craft a new remedy.<sup>35</sup> This is an important caveat on the Article 19 TFEU obligation on Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by EU law', and suggests that it will only be in these rare circumstances that a national judge will be required to craft a novel sanction to enforce judicially enforceable fundamental rights, whether they arise from the Charter or elsewhere.<sup>36</sup> Indeed, the Court has recently reasserted that 'neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by nation law'.<sup>37</sup>

Finally, the question might well be asked as to where Article 47 of the Charter fits in with all of this? The Court has tended to treat challenges to Member

31 For an example see the contribution by E. Paunio entitled 'Effective Remedies before Member State Courts and the Principle of Non-Discrimination' in S. Peers, T. Herve, J. Kenner and A. Ward (eds) the *EU Charter of Fundamental Rights: a Commentary* (Hart Publishing, 2014) p. 1228. Note also that equality before the law is protected by Article 20 of the Charter. See eg Case C-416/14 *Fratelli De Pra and SAIV* ECLI:EU:C:2015:617.

32 Case 93/12 *ET Agroconsulting-04*, ECLI:EU:C:2013:432.

33 Case C-246/09 *Bulicke* ECLI:EU:C:2010:418.

34 C-118/08 *Transportes Urbanos* ECLI:EU:C: 2010:39.

35 ECLI:EU:C:2007:163, paragraphs 71 to 73.

36 See also paragraph 104 of Case C-583/11 P *Inuit Tapiritt Kanatami*, ECLI:EU:C:2013:625 where the Court held that the position would only be otherwise 'if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law, or...if the sole means of access to a court was available to parties who were compelled to act unlawfully'.

37 Case C-583/11 P *Inuit Tapiritt Kanatami*, *ibid*, paragraph 103.

State law that are based on *effet utile* and equivalence separately from other issues arising under Article 47.<sup>38</sup>

The best indication to date as to why this approach might have taken appeared in Case C-279/09 *DEB*.<sup>39</sup> There the Court recast a question sent by a national court on whether Member State laws on legal aid rendered EU law impossible in practice or excessively difficult to enforce, into a question concerned with whether the relevant Member State laws were compatible with the Article 47 Charter right to 'an effective remedy. The Court of Justice held that it was necessary to do so because the "question referred...concerns the right of legal persons to effective access to justice and, accordingly...it concerns the principle of effective judicial protection...stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention'.<sup>40</sup>

Thus, Article 47 of the Charter is best apprehended as securing a set of substantive rights that are essential to the administration of justice, and which arise whenever rights and freedoms guaranteed by the law of the Union have not been respected, and not just when breach of the Charter is in issue. This is clear from the wording of the first paragraph of Article 47. The substantive right that Article 47 protects are the right, in defined circumstances, to the availability of legal aid (Article 47 (3)), the right to a fair and public hearing (Article 47 (2)), and in a reasonable time (Article 47 (2)), the right to an impartial tribunal established by law (Article 47(2)), the right to be advised, defended and represented (Article 47(2)), and the right to an effective remedy before a tribunal (Article 47(1)), including access to justice.<sup>41</sup>

#### 4. EFFECTIVE REMEDIES TO SUPPORT CHARTER RIGHTS BEFORE THE GENERAL COURT

It is important to emphasise the features of the Charter that limit its judicial enforceability described in Part II above are equally applicable to cases instituted before the General Court with respect to acts of the institutions, bodies, offices and agencies of the EU. That is, rights are judicially enforceable in and of themselves, while principles require further elaboration by EU legislation before they can be enforced. In addition to this, Charter provisions directed at

38 See for example the judgment of the Court in *ET Agroconsulting* above note 32.

39 Above note 11.

40 *Ibid* at paragraph 29.

41 For a discussion see the contribution on Article 47 in S. Peers, T. Hervey, J. Kenner and A. Ward (eds) *The EU Charter of Fundamental Rights, a Commentary* (2014). For a recent case exemplifying this see C-535/14 P *Ipatau v Council* ECLI:C:2015:407, paragraph 42. On the relationship between Article 47 and Article 13 ECHR see Case C-239/14 *Tall* ECLI:EU:C:2015:824.

the elaboration of EU policy are similarly limited when direct enforcement of them is sought against institutions, bodies, offices and agencies of the Union.

The distinction between derogable and non-derogable rights is equally relevant when challenging acts of these entities, as is the difference between rights that attract justified limitations and those that do not.<sup>42</sup> The caveat on the scope of the Charter by reference to EU competence, as elaborated in Article 52(1) of the Charter and Article 6(1) TEU, will restrict the circumstances in which the Charter can be called in aid to question the legality of acts of institutions, bodies, offices and agencies of the EU before the General Court in the same way as claims brought before the national courts when Member States implement EU law. In other words, the Charter cannot be recruited to furnish the institutions with powers that have not been conferred on them under the Treaties.

That said, there is an important difference between the remedial rules relevant to the enforcement of the Charter before the General Court and those that apply before the Member State courts. In a nutshell, while the Court of Justice has held that the principle of effective judicial protection is applicable to actions brought before the General Court,<sup>43</sup> none of the case law relevant to the attenuation of the procedural autonomy of Member State tribunals, and which concern the principle of effectiveness and equivalence, appear to be relevant to the remedies which the General Court, and on appeal the Court of Justice, are entitled to issue. This is so because the remedial regime of the Court of Justice of the European Union is laid out comprehensively in the TFEU, the Statute of the Court of Justice, and in the Rules of Procedure of the Court of Justice and the General Court. The Court has to date ruled out the modification of this regime by reference to Article 47 of the Charter.<sup>44</sup> Further, neither the principles of *effet utile* or equivalence have allowed either the General Court or the Court of Justice to enhance the remedies available for breach of EU law by EU institutions.<sup>45</sup>

Thus, anyone wishing to challenge the legally binding acts of the institutions, bodies, offices and agencies of the European Union for their compatibility with the judicially enforceable rights of the Charter can apply for interim measures in support their claim (Article 279 TFEU; Articles 160 to 164 of the Rules of Procedure of the Court of Justice),<sup>46</sup> and an order declaring the relevant EU measure void (Article 264 TFEU). If the order is issued, then the institution whose act has been declared void shall be required to take the necessary measu-

42 C-584/10 P, C-593/10 P, and C-595/10 P Commission v. Kadi ECLI:EU:C:2013:518, paragraph 101.

43 Ibid paragraph 98.

44 See notably Case C-583/11 P Inuit Tapiritt Kanatami, above note 36.

45 For a notable discussion see the Opinion of Advocate General Jacobs in C-50/00 P UPA v. Council ECLI:EU:C:2002:197.

46 For a commentary see B. Wagenbauer Court of Justice of the EU: Commentary on Statute and Rules of Procedure (2013, Beck) pp 442 to 454.

res to comply with the judgment of the General Court, or the Court of Justice, should the case be appealed to the latter (Article 266 TFEU). It should also be added that the time limit for bringing proceedings before the General Court is two months from the publication of the measure impugned, or of its notification to the plaintiff, or in the absence thereof, on the day on which it came to the notification of the plaintiff (Article 263, paragraph 6 TFEU; Articles 49 to 52 of the Rules of Procedure of the Court of Justice).<sup>47</sup>

The limitation on the range of order which the General Court is empowered to issue might be viewed as unfortunate, particularly in comparison with the lengths to which Member State courts are bound to go to secure protection of EU measures vesting individual with rights under the twin imperatives of effectiveness and equivalence. A declaration that the impugned EU measure is 'void' leaving it to the institution concerned to take the appropriate action, will not always lead to an outcome that is satisfactory to the (successful) litigant,<sup>48</sup> and it would certainly fall short of the standards set by *effet utile* if issued by a Member State court. The Court of Human Rights has held that declaratory orders that do not cure the wrong from the point of view of the victim of a human rights violation, are not 'effective remedies' the exhaustion of which is required before petition can be made to the Strasbourg Court.<sup>49</sup> There may be scope, therefore, for a future reinterpretation of Article 264 TFEU, to the end of ensuring that the General Court is able to order Article 47 compliant remedies.<sup>50</sup>

Damages can also be sought before the General Court, and the Court of Justice, with respect to appealed cases (Articles 268 and 340 TFEU). Here there is overlap between the rules pertinent to State liability before the Member State courts for breach of the Charter and the rules on the liability of the EU institutions, bodies, offices and agencies. This is so because the rules on damages were long ago held by the Court of Justice to be 'the same' irrespective of whether they are sought before Member State courts under the rules elaborated in *Brasserie du Pêcheur and Factortame III* for State liability in damages, or against EU institutions under the rule detailed in Article 340 TFEU on their non-contractual liability.<sup>51</sup>

47 For a commentary see pp B. Wagenbauer *ibid* pp. 258 to 263.

48 See Case C-8/99 P *Carmen Gómez de Enterría y v Parliament* ECLI:EU:C:2000:404, where the applicant sought the award of a post, but the Court of Justice held that correction of a procedural error was sufficient to comply with the General Court's declaration that the decision refusing it was void.

49 See eg Application No 32968/11 *Malik*, judgment of 28 May 2013.

50 A. Ward "National and EC Remedies under the Treaty; Limits and Role of the ECHR in C. Barnard et. al. (eds) *The Limits of the Treaty* (2009, Hart Publishing).

51 Case C-352/98 *Bergaderm and Goupil v. Commission* ECLI:EU:C:2000:361. See generally J. Wakefield 'Retrench and Reform; the Action for Damages' (2009) 28 *Yearbook of European Law* 390. See more particularly A. Ward 'Damages under the EU Charter of Fundamental Rights' (2012) 12 *ERA Forum* 589.

Finally, it is important to note the rules on *locus standi* that are operative under the fourth paragraph of Article 263 TFEU. If an EU act is addressed to a natural or legal person, they will automatically be entitled to bring an action before the General Court. This means that if breach of the Charter is alleged in the context of, for example, a decision levying a fine under Competition law, or some other particularised administrative action taken by the Commission, then the action should unquestionably be brought before the General Court. For other measures, in conformity with the fourth paragraph of Article 263 TFEU, the applicant is required to prove that they are 'directly and individually concerned' by the impugned measure, unless it is a regulatory act that does not entail implementing measures. In that case the applicant need only prove direct concern before they will be granted *locus standi*.<sup>52</sup>

As a consequence of the above described judicial architecture, it is important to determine whether the alleged defendant in a challenge for breach of judicial enforceable fundamental rights is an institution, body, office or agency of the Union, or whether the defendant is a Member State authority implementing EU law. If the former, the correct judicial route will usually be Article 263 nullity review before the General Court, to take place within the two month time limit set by Article 263 (6) TFEU, unless the applicant would, without any doubt, have been denied *locus standi* to do so.<sup>53</sup> In such circumstances, validity review of the relevant EU measure is the appropriate route, as occurred in *J Mc B*<sup>54</sup> and *Digital Rights Ireland*.<sup>55</sup> And if a Member State authority is implementing EU law when the alleged breach of the Charter has taken place, the correct route will always be the relevant Member State court.<sup>56</sup>

## 5. CONCLUSION

It would be a mistake, therefore, to view the elevation of the EU Charter of Fundamental Rights to the status of a legally binding instrument as creating any kind of revolution in the judicial enforceability of EU fundamental rights. Aside from the substantive protection afforded by Article 47 of the Charter, it adds nothing to the pre-existing remedial regime of EU law, and much less supplies any kind of enhanced scheme of sanctions for breach of fundamental rights. On the contrary, the Charter has been woven, and seamlessly, into the established judicial architecture of the European Union, all the while respecting

52 Case C-583/11 P *Inuit Tapiritt Kanatami*, above note 37. On whether or not a regulation entails implementing measures see eg C-553/14 P *Kyocera Mita Europe BV* ECLI:EU:C:2015:805.

53 Case C-355/95 P *TWD Deggendorf v. Commission* ECLI:EU:C:1997:241.

54 Above note 22.

55 Above note 11.

56 This conundrum was addressed by the Court in Case C-562/12 *Liivimaa Lihaveis* ECLI:EU:C:2014:2229.

the tried and tested balance between the powers and authority of Member State tribunals on the one hand and the EU courts in Luxembourg on the other. What is more, as was stipulated by the drafters of the Charter, in no circumstances can the Charter be called in aid to expand EU competences as set out in the Treaties.