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## **A Union of Effective Judicial Protection**

Addressing a multi-level challenge through the lens of Article 47 CFREU

*Marek Safjan, President of chamber*  
Court of Justice of the European Union

## **I. Introduction**

Thank you, *Sir Francis*, for this warm welcome and your kind invitation.

When I chose the topic of effective judicial protection for the annual EU law conference I was aware that I may be taking owls to Athens. But then again some owls are endangered species and deserve our special attention. So let us see whether this holds true for the future of effective judicial protection under EU law.

Let me start by recalling that the Court's case-law on effective judicial protection has been constitutionalized under the Treaty of Lisbon in a twofold manner. On the one hand, Article 19(1)(2) TEU has inscribed the Member States' duty to provide effective judicial remedies into the Treaty. On the other, Article 47 CFREU has become formally binding. Article 47 is indeed of singular importance among the Charter rights by serving as their transmission belt, ensuring the respect of these rights across the European Union's composite legal order.

I would contend that through the interaction of Articles 47 CFREU and 19(1)(2) TEU a Union of effective judicial protection emerges. It is characterized by a unique and common standard of protection, reflecting the specific constitutional structure and principles of the European Union. This standard reaches across, and is equally respected at, the different levels of EU law adjudication. Rightly so, as judicial protection of individual – notably fundamental rights – is an overarching challenge for the European Union, to be addressed coherently at all levels.

How is the EU standard of effective judicial protection defined in practice? What room does it leave for national procedural autonomy? To what extent must the right to effective judicial protection be balanced against the effectiveness of EU law? Does the Court's case law sufficiently enable Member State courts to grant individuals access to justice? And finally, what degree of autonomy may and must the EU standard nurture with respect to the ECHR? These questions shall guide us in our review of the most recent case law relating to Article 47 CFREU.

I will address, consecutively, the three main characteristics of the emerging EU standard of effective judicial protection, these being its composite nature, its coherence, and its autonomy.

## **II. A composite standard of effective judicial protection**

As Article 19(1) TUE suggests in its juxtaposition of the EU Courts' missions and the Member States' remedial obligations, effective judicial protection under EU law is a complementary task. This complementarity finds different expressions. As regards the enforcement of EU law rights, national courts grant the level of protection required by EU law, while it is the Court of Justice, which determines exactly what this level is by interpreting Article 47 CFREU. This infuses the national legal orders with the EU standard of effective judicial protection. On the other hand, complementarity can be observed where the availability of remedies or the intensity of review in one court structure compensates the absence or limited scope of remedies in the other.

## 1. Complementarity of review and remedies

Probably the most intensely debated issue relating to the EU judicial architecture is the difficulty for non-privileged applicants to challenge EU acts of general application. As observed, *inter alia*, by AG Jacobs in the *UPA* case (*Unión de pequeños agricultores* C-50/00 P), the combined system of EC and national remedies in place before the Lisbon Treaty did not sufficiently ensure that individual applicants could challenge measures which did not require any acts of implementation by national authorities. Article 263(4) TFEU sought to close this gap in the system of judicial remedies. This provision now permits natural and legal persons to bring an action for annulment '*against a regulatory act which is of direct concern to them and does not entail implementing measures*'. The Court has recently clarified the scope of this amendment in the *Inuit* case (C-583/11 P) concerning the seal products regulation. Our judgment upheld the General Court's finding that a regulatory act should be understood as covering all acts of general application apart from legislative acts. We did not agree with the Inuit that this creates a gap in judicial protection, which would be incompatible with Article 47 CFREU by making legislative acts virtually immune to judicial review.

Whilst the rules on admissibility must be interpreted in the light of Article 47 CFREU, such interpretation cannot have the effect of setting aside the conditions expressly laid down in the Treaty. In any case, neither Article 47 CFREU nor Article 13 of the ECHR require individual direct actions against legislative acts. Moreover, in *Bosphorus*, the Court of Human Rights had mentioned the EU's strict standing requirements in direct actions against legislative acts, but did not voice any criticism.

And there is still indirect review. This last consideration, however, points to a dilemma we are facing in the Union of effective judicial protection. Our judgment respects the will of the Treaty legislator not to relax the standing requirements in direct actions against legislative acts, thereby burdening the Member States with the obligation to provide for indirect review. We thus rely on and, as the case may be, ensure Member State compliance with an obligation resulting from our own inability to grant wide access to justice.

But the complementarity of national and EU courts is not limited to the review of legality. Their interrelationship notably results in the EU standard of effective judicial protection being infused into the national legal order.

## 2. Between complementarity and convergence - Infusing effective judicial protection into the national legal orders

Whilst national courts grant, within their sphere of competence, the level of protection required by EU law, it is the Court of Justice which determines by interpreting Article 47 CFREU, exactly what this level, i.e. the EU standard of protection, is. In the scope of application of EU law, procedures must comply with the requirements of effective judicial protection. Notwithstanding the varying latitude Member States may enjoy as to *how* these requirements are met, the question of *what* they are is a matter of interpreting the fundamental right enshrined in Article 47 CFREU.

I would like to illustrate this by ordering our recent case law according to the degree of autonomy left for the Member States. *First*, there are the cases relating to the enforcement of

substantive EU law in the absence of common procedural rules. Among these cases, we can distinguish those where such enforcement benefits the individual and, those where EU law is enforced against the individual.

*Next* in line are the cases concerning Member State implementation of procedural provisions under secondary law, *followed* by the direct application of EU procedural rules. *Finally*, one needs to look at the cases involving secondary legislation based on the principle of mutual trust.

We will see that whilst the varying degree of autonomy left to the Member States does not alter the requirements of effective judicial protection, it affects the way these requirements are met.

#### a) **Effective judicial protection serving the effectiveness of EU law**

As you know, where EU law requires enforcement but does not lay down the procedural conditions, Member State autonomy is nevertheless limited by the *Rewe* (C- 33/76) principles of equivalence and effectiveness, and by the right to effective judicial protection. Cases like *Agrokonsulting* (C-93/12) show that the right and the principles can be treated harmoniously, both following a restriction/justification/proportionality type of assessment.

In *Agrokonsulting*, our Court had been asked whether Article 47(1) CFREU and the *Rewe* principles preclude a rule of national procedure which has the consequence of concentrating before a single court disputes concerning decisions of the national authority responsible for paying agricultural aid under the common agricultural policy. Our Court first examined the disputed rule against the requirements stemming from the equivalence and effectiveness principles before concluding under Article 47 CFREU that a farmer who can bring a case relating to agricultural aid only at the seat of the competent administrative authority is not thereby deprived of an effective remedy before a court.

On the other hand, the Court's judgment in *DEB* (C-279/09) suggests that the rights enshrined in Article 47 CFREU can also be decoupled from the effectiveness principle. Choosing to examine the question of whether legal persons may be refused legal aid exclusively under Article 47(3), our Court derived from the absence of a common standard under national, EU and ECHR law that, under Article 47 CFREU, legal persons may not, as a rule, be denied legal aid, but that the courts must take account, *inter alia*, of their financial capacity.

#### b) **Effective judicial protection vs. the effectiveness of EU law**

That effective judicial protection and effective enforcement of EU law may even have contrasting purposes can be illustrated by the following examples.

The *Texdata Software* case (C-418/11) raised the question whether the right of effective access to a court was observed where an automatic penalty for failure to disclose accounting documents had to be challenged within only 14 days, in the absence of prior notice and without any opportunity for the company concerned to make known its views. We assessed these conditions and found them to be compatible with the right to an effective judicial protection. Given that, as a rule, the disclosure obligation was of general application, that it

was lawful and known to the interested parties, that Austrian law allowed a period of nine months for making that disclosure and that those time-limits may be suspended if an unforeseen and unavoidable event has prevented timely disclosure, a period of 14 days did not seem, in principle, insufficient in practical terms for preparing and submitting an effective objection.

Article 47 CFREU thus did not limit the effectiveness of EU law. Likewise, the Court found in *Otis* (C-199/11) that, in light of the formal and procedural guarantees under EU law, Article 47 CFREU does not preclude the Commission from bringing an action before a national court for damages in respect of loss sustained by the EU as a result of an infringement of Article 101 TFEU which the Commission had itself found.

The right to effective judicial protection did show its teeth in another case. In *Banif Plus Bank* (C-472/11), a consumer protection case, we held that the principle of *audi alteram partem* stemming from Article 47 CFREU requires the national court which has dutifully found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party. Effective judicial protection thus limited the full effectiveness of the protection provided for by Directive 93/13/EEC on unfair terms in consumer contracts.

**c) Conform interpretation and application of secondary law on procedures**

Complementarity in the field of judicial protection may also be a matter of interpreting secondary legislation in conformity with Article 47 CFREU. Here we can distinguish the implementation and the direct application of procedural provisions.

The *Samba Diouf* case (C-69/10) falls in the first category. It concerned the implementation of Directive 2005/85 on minimum procedural standards for granting and withdrawing refugee status, which notably lays down the right to an effective remedy. *Samba Diouf* raised the issue whether the Luxemburgish remedy system complied with this right and Article 47 CFREU. Our Court found, first, that the absence of a remedy against the decision to examine the application for asylum under an accelerated procedure does not infringe the right to an effective remedy if the legality of the final decision adopted in that procedure may be thoroughly reviewed within the framework of an action against the decision rejecting the application. This notably concerns the reasons for applying the accelerated procedure. Second, our Court accepted that under the accelerated procedure the applicant for asylum only has 15 days (instead of one month) within which to bring an action and does not have the benefit of two levels of jurisdiction. The Court also held that the principle of effective judicial protection certainly affords an individual a right of access to a court or tribunal, but not to a number of levels of jurisdiction.

When it comes to directly applicable EU rules of procedure, the Court's constructive interpretation may notably be required where these rules appear to leave the national judges with little leeway. This was the case in *Hypoteční Banka* (C-327/10), which concerned Article 26 of the *Brussels I* Regulation No 44/2001.

Article 26 is in itself an embodiment of the principle of fair trial and provides that where a defendant domiciled in another Member State does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

The situation under examination in *Hypoteční Banka* exemplified that a strict application of this provision may even infringe the right to effective judicial protection. A German consumer domiciled in the Czech Republic had defaulted on a mortgage loan and disappeared from his domicile. As the requested payment order could not be served on him personally, it was set aside. Unable to establish any place of residence for the defendant in the Czech Republic, the national court assigned a guardian *ad litem* to the defendant with a view to pursue the procedure in his absence. Asked whether this was in line with EU law, we held that whilst the possibility of pursuing a procedure *in absentia* certainly constitutes a severe restriction on the rights of the defence, it may be justified by the objective of avoiding situations of denial of justice. Indeed, respect for the rights of the defence may still be ensured by opposing the recognition of the judgment issued in absentia, but the applicant runs the risk of being deprived of any possibility of recourse. Therefore Article 26 of the Regulation does not preclude a court from continuing proceedings, in the case where it has not been established that the defendant has been enabled to receive the document instituting the proceedings, if all necessary steps in conformity with the principles of diligence and good faith have been taken to ensure that he can defend his interests.

Staying in the area of freedom, security and justice, we should now look at the principles of mutual trust and recognition which, in a nutshell, allocate the duty of respecting the right to effective judicial protection to the judicial authorities of one Member State and oblige those in other Member States to accept this.

#### **d) Effective judicial protection vs mutual trust and recognition**

Our Court may be called upon to examine the conditions under which national judicial authorities must refrain from reviewing decisions taken by their counterparts in other Member States. As the scope and degree of mutual trust and recognition differ among the legislative texts, we shall examine separately to what extent their respective interpretation by the Court allows for some autonomy.

Under Regulation No 44/2001 the recognition and enforcement of foreign judicial decisions may still be refused, albeit on narrow grounds, one of which is the public policy clause in Article 34(1). Judges may base their refusal of recognition or enforcement on that clause when faced with a manifest violation of a fundamental principle of their legal order. While the Member States remain in principle free to determine, according to their own conceptions, what public policy requires, the limits within which it allows to refuse recognition is subject to review by the Court of Justice.

In *Trade Agency* (C-619/10) we were recently asked whether the public-policy clause allows a court to refuse enforcement of a default judgment, which disposes of the substance of the case but does not contain any assessment of the subject-matter or the basis of the action and which is devoid of any argument on the merits thereof? We answered in principle

affirmatively. However, it must appear to the national court, after an overall assessment of the proceedings, that such judgment is a manifest and disproportionate breach of the defendant's right to a fair trial. The court of enforcement must therefore ascertain whether the procedural guarantees surrounding the decision ensure that the persons concerned have the possibility to bring an appropriate and effective appeal against that decision. Whilst accepting that infringements of the right to defend oneself appropriately and in person may hinder the recognition and enforcement of a decision so blemished, the Court thus nevertheless imposes a careful balancing of the interests at stake, including the sound administration of justice which appears to be served by such default judgments.

As regards the return of illegally deported children, Regulation No 2201/2003 (Brussels IIa) excludes any review of the return order on the basis of public policy. Courts of other Member States may not refuse to execute such orders, even where they entertain serious doubts as to compliance with fundamental rights by the issuing court. This is not easily accepted. For example, in *Aguirre Zarraga* (C-491/10 PPU), a German court made a request for an urgent preliminary ruling in order to approve of its intention to refuse the execution of a Spanish court's return order based on the finding that the right of the minor child and her mother to be heard had manifestly been violated. We did not accept this, considering that it would defy the very idea of automatic recognition of return order. It would undermine the principle of mutual trust on which the mechanism of automatic recognition and return without delay is based. We nevertheless recalled the duties and possibilities of the requesting court to respect the right to be heard and took note of the fact that an appeal against the requesting court's decision was still pending and could eventually lead to a constitutional complaint before the Tribunal Constitucional.

In the field of judicial cooperation in criminal matters, the European Arrest Warrant (EAW) is a prime expression of the principle of mutual trust. Here the onus of respecting the right to be heard lies exclusively with either the issuing or the executing judicial authorities. Framework Decision 2002/584 seeks to facilitate and accelerate judicial cooperation by the establishment of a simplified and effective system for the surrender of convicted persons or those suspected of having infringed criminal law.

True to this aspiration, the Court did not follow AG Sharpston's invitation in *Radu* (C-396/11) to allow an exceptional refusal to execute an EAW where the human rights of the person to be surrendered have been or will be infringed. It found instead that the judicial authorities cannot refuse to execute an EAW issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not previously heard in the issuing Member State. Articles 47 and 48 of the Charter do not require that a judicial authority of a Member State should be able to refuse to execute an EAW for that reason. The Court considered that such a requirement would inevitably lead to the failure of the very system of surrender provided for by the Framework Decision.

Effectiveness is also key to understanding the different outcomes of the *Melloni* (C-339/11) and *Jeremy F* (C-168/13 PPU) cases concerning the requirement of reviewing a criminal conviction *in absentia*. The Framework Decision precludes, in a number of situations, the executing judicial authority from making the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in his presence.

In *Melloni*, we found that the executing judicial authorities may not require that the conviction rendered *in absentia* be open to review in the issuing Member State. Conversely, the Court found in *Jeremy F* that the absence of a right of appeal with suspensory effect in the Framework Decision does not prevent the Member States from providing such a right as long as the application of the Framework Decision is not thereby frustrated. It is within the legal system of the issuing Member State that remedies allowing to contest the lawfulness of the respective criminal proceedings must exist. A joint reading of *Jeremy F* and *Melloni* thus suggests that even though the execution of an EAW may not be refused on the ground that the issuing judicial authority has not respected the right to effective judicial protection, both judicial authorities may, within their respective spheres of competence, offer an even better judicial protection if this does not impair the mechanism established by the Framework Decision.

We have so far seen that whilst the EU standard of effective judicial protection is composite in nature, Article 47 CFREU does apply to, and must be respected at, all levels of EU law adjudication, irrespective of the degree of autonomy left to the Member States. Whether Article 47 CFREU is effectively complied with will also depend on a balancing of its different requirements not only with each other (where the rights of others are affected), but also against competing principles of the EU legal order. When searching for the point of balance between the different requirements, neither the effective enforcement of rights granted under EU law, nor the principle of mutual trust should be seen as absolute.

This leads us to the coherence of the common standard of protection among the different levels.

### **III. A coherent standard of effective judicial protection**

As Article 47 CFREU applies to the EU Institutions and the Member States when implementing EU law, its interpretation should be the same on, and with regard to, the different levels of EU law adjudication. In other words, there must be a coherent standard of effective judicial protection within the scope of application of EU law. Over the last years, our Court has thus assessed different requirements under Article 47 with a view both to the EU and Member States' judiciatures.

Two 'high profile' cases which have brought to the fore the question of how to balance public security concerns and the guarantees conferred by Article 47 CFEU are **ZZ** (C-300/11) and **Kadi II** (C-584/10/P). In these cases, the Court has established workable principles to be applied by both the national and EU courts when reviewing measures taken, on the basis of confidential information, with a view to fighting terrorism. Article 52(1) of the Charter allows limitations on the exercise of the rights enshrined in the Charter, provided such limitation respects the essence of the fundamental right in question and is necessary and genuinely meets objectives of general interest recognised by the EU. The question whether there is an infringement of the rights of the defence and of the right to effective judicial protection must be examined in relation to the specific circumstances of each particular case. This requirement has been further elaborated in *ZZ and Kadi II*.

In *ZZ*, we did acknowledge that, in certain cases, disclosure of evidence is liable to compromise State security in that it may endanger the life, health or freedom of persons or

reveal the methods of investigation specifically used by the national security authorities. National courts must therefore assess to what extent the rights of the defence must be limited in the interest of State security. The competent national authority must prove that State security would in fact be compromised by precise and full disclosure to the person concerned of the grounds which constitute the basis of the decision and of the related evidence. There is no presumption that the reasons invoked by a national authority exist and are valid. The national court must carry out an independent examination of all the matters of law and fact relied upon by the competent national authority and it must determine, in accordance with the national procedural rules, whether State security stands in the way of such disclosure.

- If the national court considers that State security does not stand in the way of precise and full disclosure, it proceeds to examine the legality of such a decision on the basis of solely the grounds and evidence which have been disclosed.
- If State security does stand in the way of disclosure, the person concerned must, in particular, be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based.
- The national court must assess whether and to what extent the restrictions on the rights of the defence are such as to affect the evidential value of the confidential evidence.

The requirements stemming from Article 47 CFREU with regard to security sensitive decisions also apply to the EU institutions. This has been recalled in our recent judgment in *Kadi II*. It brought a necessary clarification of *Kadi I* which had established that the EU Courts must ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights, including review of measures giving effect to resolutions adopted by the United Nations Security Council. By mirroring the judgment in *ZZ*, *Kadi II* ensures coherence among the direct review by EU Courts and the national procedural safeguards regarding the implementation of secondary law. We found that respect for the rights of the defence and the right to effective judicial protection implies that, in the event of a legal challenge, the EU Courts are to review, in the light of the information and evidence which have been disclosed inter alia whether the reasons relied on in the summary provided by the Sanctions Committee are sufficiently detailed and specific and, where appropriate, whether the accuracy of the facts relating to the reason concerned has been established. Drawing from the requirements imposed upon national courts in *ZZ*, the obligations for EU courts are the following:

- They may base their decision solely on the material which has been disclosed to them and the competent EU authority bears the burden of proving that the reasons relied on against the person concerned are well founded.
- It is the task of the EU Courts, before whom the secrecy or confidentiality of that information or evidence is no valid objection, to determine whether the reasons relied on by that authority as grounds to preclude that disclosure are well founded.
- If not the EU Courts shall examine the lawfulness of the contested measure solely on the basis of the material which has been disclosed to that person.
- On the other hand, if those reasons do indeed preclude such disclosure, they must assess whether and to what extent the failure to disclose confidential information or evidence to the person concerned and his consequential inability to submit his observations on them affect the probative value of the confidential evidence.

Moving on from these examples of a coherent application of the EU standard of effective judicial protection, I would like to say a few words about its autonomous nature.

#### **IV. An autonomous standard of effective judicial protection**

Whilst the scope and content of the three paragraphs of Article 47 CFREU go beyond those of Article 6(1) and 13 ECHR in several aspects, they do have a solid basis in the ECHR and the Strasbourg Court's case law. It is also true that under Article 52(3) CFREU the protection of the rights enshrined in the Charter may be no less than the guarantees under the ECHR. This does not however hinder their autonomous interpretation. In any case, Article 52(3) allows the charter rights to grant more extensive protection than the ECHR.

Moreover, as Advocate General Cruz Villalón opined in *Samba Diouf*, the right to effective judicial protection under Article 47 CFR has, as part of EU law, '*acquired a separate identity and substance, which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. In other words, once it is recognised and guaranteed by the European Union, that fundamental right goes on to acquire a content of its own.*'(point 39)

It should be noted in this connection that our Court has formalized the autonomy of Article 47 CFREU by declaring that 'Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47.' Moreover, direct references to Strasbourg case law are not as frequent as one may think. Only in 16 out of the roughly 60 cases relating to effective judicial protection since the Charter became binding, did the Court refer to the European Court of Human Rights' case law.

Finally, we have seen in the previous sections that the right to effective judicial protection as guaranteed by Article 47 CFREU may occasionally have to be reconciled with constitutional requirements stemming from the specific nature and purpose of EU law, such as the composite character of our legal order, the effectiveness of EU law, or the principle of mutual trust.

All this being said, I should also stress that the Court's interpretation of Article 47 CFREU has up until now faithfully transposed the ECHR standard of effective judicial protection into EU law. This is confirmed by the Strasbourg Court's case law concerning effective remedies in asylum procedures (*see judgment in I.M. v. France, 2 February 2012, application no. 9152/09*) and against competition fines (*see judgment in Menarini v. Italy, 27 September 2011, application no. 43509/08*). The ECHR does not impose an absolute ban on sentencing in absentia (*see judgment in Haralampiev v. Bulgaria, 24 April 2012, application no. 29648/03*) and the Court of Human Rights has also accepted, most recently, that the automatic enforcement of return orders under Regulation No 2203/2001 is covered by the presumption of Convention compliance (*judgment of 18 June 2013 in Povse v. Austria, application no. 3890/11*). Finally, as stated previously, the ECHR does not require direct review of legislative acts (*ECHR, judgment of 8 July 1987, Lithgow v. United Kingdom, application no. 9006/80*).

Now let me try to put all these findings in perspective.

## V. Conclusion and Outlook

I have argued that the interaction of Articles 47 CFREU and 19(1)(2) TEU allows to qualify our composite legal order as a Union of effective judicial protection, characterised by a unique, common and autonomous standard of protection. This essentially judge-made standard applies to and on all levels of EU law adjudication. Through its interpretation of the requirements of, on the one hand, effective judicial protection and, on the other, the effectiveness of EU law, the Court of Justice infuses this common standard into the legal orders of Member States.

Notably four factors account for the growing impact of the EU standard of effective judicial protection on national legal orders. These are, *first*, the functional interpretation of Article 47 CFREU by the Court, *second*, the broad scope of its application in line with Article 51(1) of the Charter, *third*, the promotion of effective judicial protection by means of interpreting the judicial cooperation legislation and, *finally*, the use of the principle of effectiveness as a vector for the radiation of the EU fundamental right to effective protection.

Within the scope of application of EU law there is, and must be, a uniform and universally accepted standard of effective judicial protection. The now binding character of the fundamental right enshrined in Article 47 facilitates the promotion and enforcement of the EU standard, resulting in a stricter framing of national procedural rules and a growing uniformity. The relationship of the national and EU legal orders thereby evolves from a structural and functional complementarity towards convergence and interdependence. The EU standard of protection is thereby universalized.

This common EU standard of effective judicial protection is essentially judge-made. But it is not created from scratch and its definition is not a one-way street. The right to effective judicial protection is historically based on complementary sources, such as national constitutions and the Convention of Human Rights. Moreover, the national procedural standards and principles are assessed and eventually prevail when their compliance with EU law is challenged before the Court. Such incorporation of national standards through the case-law is necessary in light of the piecemeal state of written EU procedural law. Where there is clear legislative guidance such as the promotion of judicial cooperation based on mutual trust and recognition, the Court respects it as long as our composite procedural legal order as a whole ensures effective judicial protection.

Where the right to effective judicial protection collides with the principle that the rights and obligations under EU law be effectively enforced, the Court strives to achieve a reasonable balance. Such balance favours the effectiveness of EU law only to the extent that the essence of the right to effective judicial protection is preserved. The definition of what constitutes the essence of effective judicial protection needs to take account of the composite nature and complementary functioning of the EU legal order (as exemplified by *Melloni*). The contrasting dynamics of ensuring the effectiveness of EU law *and* effective judicial protection thus entail a novel and original balancing approach, which fundamentally differs from the Strasbourg Court's *margin of appreciation*. Where the effectiveness of EU law so requires, the protection granted by the Charter is not a minimal, but an absolute standard, which must not be overruled. This constitutes a fundamental difference with regard to the ECHR system, so that a Convention lawyer is legitimately puzzled when learning that unlike the similarly worded Article 53 ECHR, its equivalent, Article 53 of the Charter, does not

always allow for higher national standards of protection.

Within the scope of application of EU law it is the Court of Justice which ultimately decides what the EU standard of protection is and to what extent Member States may, without infringing the primacy, unity or effectiveness of EU law, guarantee a higher standard of protection. The Court's jurisdictional competence is, however, exercised in the course of constructive dialogue with national (constitutional) courts. It may be assumed that, following the laudable examples of the *Tribunal Constitucional* and the *Conseil constitutionnel*, the Court will be called upon more and more often to clarify whether the national standard of judicial protection respects the absolute limits resulting from *Melloni*, i.e. the primacy, unity, and effectiveness of EU law.

So perceived, the Court's clarification in *Åkerberg Fransson* (C-617/10) and *Melloni* of the relationship of EU and national standards of fundamental rights protection within the Charter's field of application, does by no means mark the end of the constitutional discourse on the definition of the emerging EU standard of protection. Instead, *Åkerberg* and *Melloni* should be read, first and foremost, as an invitation which the ECJ extends to Member State courts with a view to defining the binding EU standard of protection in a judicial dialogue. Following on from the examples of the *Tribunal Constitucional* in *Melloni* and the *Conseil constitutionnel* in *Jeremy F*, national (constitutional) courts can ensure that this dialogue will result in the most appropriate means of ensuring the protection of fundamental rights, among which Article 47 CFREU. This dialogue can notably allow the composite EU standard of effective judicial protection to incorporate national constitutional standards.

This leads me to our reception of the Strasbourg Court's case law. Up until now, there has been no open contradiction between our respective interpretation of effective judicial protection. Nevertheless, judgments like *Melloni* and *Åkerberg Fransson* also suggest that certain founding requirements of the EU legal order may call for specific solutions, differing from what may be the minimum standard for a high contracting party not involved in, nor bound by, the EU standard of protection. In the composite legal order of the European Union, courts must be able to weigh in the balance, in any given case, the requirements stemming from an effective enforcement of EU law and those following from the fundamental right to effective judicial protection. Neither national nor conventional standards as applied outside the scope of EU law can, as a rule, prevent them from doing so. Thus, in an *Åkerberg* type of situation, national courts may have to allow for a combination of tax penalties and criminal penalties, should any one of these alone not be effective, proportionate and dissuasive. In a *Melloni* type of situation, national courts have to accept the procedural guarantees conferred, in compliance with a consensually agreed EU standard, by other Member States, despite falling short of their own constitutional standards.

European integration through the law has always resulted in an empowerment of the judiciary to set aside rules and standards which would hinder the enforcement of EU law. This cannot, must not be different with respect to fundamental rights protection. By signaling that the EU standard of protection may occasionally differ from the Strasbourg Court's interpretation of the Convention rights, the CJEU has reminded national courts of their power and duty to uphold the primacy of EU law. In order to do so, national judges obviously need guidance from our Court. I know that the promotion of the autonomous EU standard of protection nourished by national and conventional sources (notably in *Åkerberg* and *Melloni*) has raised expectations among the national courts. As regards the effective

judicial protection of EU law, we thus need to clarify what constitutes the essence of this protection beyond its mere effectiveness. The effectiveness of EU law must never be an end in itself. It is a means to be used only where the law to be enforced complies itself with fundamental rights. But how is such compliance to be ensured?

Our recent judgment in *Inuit* has pointed once again to a delicate institutional challenge the Member States may have to face. We have stressed their obligation to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law, as reaffirmed by Article 19(1)(2) TEU. Where there are no remedies to ensure the respect for individual – including fundamental – EU rights, Member States are obliged to create them. Even though the decentralised and indirect system of legality review instituted by the Treaties seems to be working, thereby complying with Article 47 CFREU, its continuing efficiency will have to be monitored. Should there prove to be gaps in access for individuals to judicial review, there are strong reasons for novel solutions to be considered. There may be arguments for the creation of a stand-alone EU fundamental rights complaint. I would favour another route, based on one of the fundamental concepts of our Court's case-law. May I recall that the ground-breaking judgment in *Van Gend en Loos* (case 26/62), whose 50<sup>th</sup> anniversary we celebrated last year, unambiguously found that EU rules are addressed not only to the Member States, but also to their nationals. Today, this characterization of the EU legal order is as valid as ever. We should respect not only the requirements of effectiveness, primacy and uniformity of EU law but, keeping in mind the spirit of *Van Gend en Loos*, we must strive to strengthen the status of the individual within the European legal order. A more effective judicial protection of individuals is undoubtedly an essential step in that direction and *individualising* the preliminary ruling procedure would be the vehicle of choice. The recognition and enforcement of an individual right under EU law to have access to the preliminary ruling procedure could be the cornerstone of our *Union of effective judicial protection*.

**Thank you very much for your attention!**