

Right to a fair trial and the protection of it in the Charter of Fundamental Rights of the European Union

I. Introduction

The protection of fundamental rights has to be efficient to a greater extent on the territory of the European Union (hereinafter referred to as „EU”), in the Member States and in countries aspiring to access to the EU. In the first period the European Community did not give emphasis to the protection of fundamental rights with regard to economical purposes,² however from the 1960’s setting further aims led to a European level of protection. In scientific literature *three levels of protection* can be distinguished: protection granted by member state constitutions, EU fundamental rights, and protection assured by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as „ECHR”).³

On the basis of historical evolution it can be established that in Europe the protection of fundamental rights is no more merely a national duty: internal control is traditionally and principally the task of Constitutional Courts and Supreme Courts, and external control – in a new and subsidiary way – is the task of the European Court of Human Rights (hereinafter referred to as „ECtHR”) and the Court of Justice of the European Union (hereinafter referred to as „Court of Justice”).⁴ However the two courts carry out their activity under different statutes, but partially alongside similar principals: their decisions and the explanations from the protection of fundamental rights case by case and give it further meanings.

The right to a fair trial is undoubtedly the most referred between procedural rights and is most often asked for interpretation before the Court of Justice. There is no standard definition⁵ of fair trial in Hungary, so it is especially important to examine the relevant juridical practice – and the Union relevance of it – in a procedural aspect. In the domestic scientific literature this fundamental right is interpreted as including the right to bring the matter before the court, impartiality, equality before equality of rights, the requirement of judging cases within a reasonable time, as well as the right to remedy. However, the elements of the definition of fair trial cannot be listed taxonomically, for the complete procedure has to be examined to find whether the right to a fair trial is fulfilled in the given case.

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² About relations between internal markets and fundamental rights (relations between economical freedoms and basic rights) see: Marcel, Szabó –Petra Lea, Láncoš – Laura, Gyeney: Az Európai Unió jogi fundamentumai, Szent István Társulat, Budapest, 2013, p. 315-323.

³ See: Michal, Petr: The right to a fair trial in competition cases, 13 Common L. Rev. 25 2014., p. 25., Nóra, Chronowksi: Az alapjogvédelem globális, európai és hazai trendjei, Iustum Aequum Salutare, Nr. 2011/26.; Erzsébet, Szalayné Sándor: Az alapjogok három jogrendszer metszéspontján, Állam- és Jogtudomány, 2009/3. Fruzsina, Gárdos-Orosz: Az Európai Unió alapjogvédelmi rendszere és az Emberi Jogok Európai Bírósága – A kettős európai alapjogvédelem és a magyar alkotmányjog, Jog, Állam, Politika, 2011/4.

⁴ Erzsébet, Szalayné Sándor: Luxembourg – Strasbourg korridor – a koherens európai alapjogvédelem új rendje, Available at: <http://jog.sapientia.ro/data/tudomanyos/Periodikak/scientia-iuris/2011-3/hu6-Szalayne.pdf> (14 January 2014)

⁵ Kitti, Bakos: A tisztességes eljáráshoz való jog: új jogalkotói irányok, Jogelméleti Szemle, 2010/2., Available at: <http://jesz.ajk.elt.hu/bakos42.html> (5 July 2013)

II. The relation of the right to a fair trial to the Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union (hereinafter referred to as „Charter”) is the statute of the Union protection of fundamental rights. Article 6 (1) of the Treaty on European Union (hereinafter referred to as TEU) now provides that ‘[the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...], which shall have the same legal value as the Treaties’]. The Charter therefore constitutes primary EU law; as such, it serves as a parameter for examining the validity of secondary EU legislation and national measures.⁶ The Treaty of Lisbon in respect of the TEU Art. 6. carried out a real reform: it conferred legal force and delivered as an integral part of the *acquis communautaire* the freedoms and principles, furthermore it obliged the EU to join to the ECHR and maintained the system of the previous unwritten rights as a part of the *acquis* with a kind of ‘preserving by discontinuing’ method.⁷ The so called general principles still belong to the first pillar and are meant some kind of common principles of the constitutional tradition of the Member States that can be found in every national legal system. Some principles appear explicitly in the treaties and also in the Charter, but mostly the Court of Justice declares a principle legally binding.⁸ A general principle in EU law does not only support interpretation but they also have a part in filling gaps in the law. The Charter has become a fully binding legal source of fundamental rights, which obliges both the EU and national institutions to interpret these rights in accordance with the ECHR.⁹ By the time recognizing the legal status of the Charter the practice of the Court of Justice relating to fundamental rights also got strengthened, as year by year more and more applications for interpreting basic rights in preliminary ruling procedure are brought before this court. In this respect examining the elements, defining the right to fair trial that belongs to procedural rights is desirable with paying special regard to the judiciary practice of the Court of Justice. Since the attention has paid to this procedural basic right declared in several international agreements¹⁰ is increasing in the national civil procedures. The protection of fundamental rights in the judiciary system means also the protection of each procedural basic right during legal actions.

In the Charter Article 47 regulates the right to a fair trial. According to the first paragraph of this Article everyone whose rights and freedom are guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with

⁶ http://www.europarl.europa.eu/ftu/pdf/hu/FTU_1.1.6.pdf (2 January 2016)

⁷ Erzsébet, Szalayné Sándor: Alapjogok (Európai) válaszüton – Lisszabon után, Jogtudományi Közlöny, 2013/1. p. 19.

⁸ Petra Lea, Láncoş –Laura, Gyeney: Az Európai Unió jogi fundamentumai, Szent István Társulat, Budapest, 2013, p. 63.

⁹ Michal, Petr: The right to a fair trial in competition cases, 13 Common L. Rev. 25 2014., p. 28.

¹⁰ The right for a fair trial appears in the ECHR and in the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”).

According to Art. 13 of ECHR: *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

According to Art 14 of ICCPR: *„All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”*

the conditions laid down in Article 47 Everyone is entitled to a fair and public hearing within a reasonable time by a previously established independent and impartial tribunal previously established by law. Everyone shall have the possibility of possibility of the adequate advice, defence and representation. Legal aid shall be available for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. The Article 47 Par. 2 is based on the Article 6 Par. 1 of the ECHR, though in Union law the right to a fair hearing is not confined to disputes relating to civil law rights and obligations.¹¹ That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, *Les Verts* v *European Parliament* (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.¹² With regard to the third paragraph, it should be noted that in accordance with the case-law of the ECtHR, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, *Airey*, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the Court of Justice of the European Union¹³ Art. 47 Par. 3 ensures effective access to justice to those who lack sufficient resources in so far as such aid is necessary.

III. The right to a fair trial in the practice of the Court of Justice

The Court of Justice interpreted the right to a fair trial and the elements of it several times like in some judgments were formed in the last two years. The aim of this chapter is to presenting the consequences of these rulings.

In *Case C-619/10. Trade Agency Ltd v. Seramico Investments Ltd* the Court of Justice expounded the following statement. Where the defendant brings an action against the declaration of enforceability of a judgment given in default of appearance in the Member State of origin which is accompanied by the certificate provided for by Article 54 of that regulation, claiming that he has not been served with the document instituting the proceedings, the court of the Member State in which enforcement is sought hearing the action has jurisdiction to verify that the information in that certificate which is consistent with the evidence.

Moreover, the Court of Justice expressed that the court of the Member State in which enforcement is sought may refuse to enforce a judgment given in default of appearance which disposes the substance of the dispute but which does not contain an assessment of the subject-matter or the basis of the action and which lacks any argument of its merits, only if it appears to the court, after an overall assessment of the proceedings and in the light of all the relevant circumstances, that judgment is a manifest and disproportionate breach of the defendant's right to a fair trial referred to in the second paragraph of Article 47 of the account of the impossibility of bringing an appropriate and effective appeal against it.

In *Case C-199/11. Europese Gemeenschap v. Otis NV et al* the Court of Justice examined the definition elements of the right for fair trial. This judgment stated that the European Commission (hereinafter referred to as „EC”) is not precluded from representing the EU before a national court hearing a civil action for damages in respect of loss caused to

¹¹ Nóra, Chronowski –Tímea, Drinóczi – Judit, Zeller: Az Alapjogi Charta kommentárja. In: András, Osztoivits (ed.): Az Európai Unióról és az Európai Unió működéséről szóló szerződések magyarázata, Complex Kiadó, Budapest, 2011, p. 561-562.

¹² Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214(01)) (3 January 2016).

¹³ At the same place.

the EU by an agreement or practice prohibited by Article 81 EC and now 101 Treaty on the Functioning of the European Union (hereinafter referred to as „TFEU”) which may have affected certain public contracts awarded by various institutions and bodies of the EU, there are no need for the Commission to have authorization for that purpose from those institutions and bodies. Article 47 of the Charter does not preclude the EC from bringing an action before a national court, on behalf of the EU, for damages in respect of loss sustained by the Union as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC or Article 101 TFEU.¹⁴

In *Case C-279/09. DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland* the reference for a preliminary ruling concerns the interpretation of the principle of effectiveness in order to ascertain whether that principle requires legal aid to be granted to legal persons. The referring court asks whether EU law and, more specifically, the principle of effectiveness, must be interpreted as meaning that, a national rule is precluded under which the pursuit of a claim before the courts is subjected to making of an advance payment in respect of costs and under which a legal person does not qualify for legal aid even though it is unable to make advance payment in respect of the costs of proceedings and to obtain the assistance of a lawyer. In this preliminary ruling procedure the Court of Justice seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice.

The generally recognized right to access to justice is also reaffirmed by Article 47 of the Charter. The Court of Justice stated in this judgment that the principle of effective judicial protection must be interpreted as that meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle, it may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. In that connection, it is the national court’s liability to ascertain whether the conditions for granting legal aid constitute a limitation of the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.

In *Case C-93/12. ET Agroconsulting-04-Velko Stoyanov v. Izpalnitelen direktor na Darzhaven fond ‘Zemedelie’ – Razplashtatelna agentsia* the ruling of the Court of Justice is concerned with the procedural autonomy of the Member States. The EU law, in particular the principles of equivalence and effectiveness and Article 47 of the Charter, does not preclude a national rule of jurisdiction which results in conferring on a single court all disputes relating to decisions of a national authority responsible for the payment of agricultural support under the EU common agricultural policy. The national court is entitled to examine whether this rule causes difficulty in exercising right deriving from Union law.

In *Case C-437/13. Unitrading Ltd v. Staatssecretaris van Financiën* the matter of fair trial occurred to the Court of Justice in connection with the proving procedure. According to the Court’s settled case-law, if the judicial review is guaranteed by Article 47 of the Charter to be effective, on the one hand, 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 notification of those reasons, so as 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 with jurisdiction.¹⁵ On the other hand, the court with jurisdiction must have the power to require the necessary

¹⁴ Case C-199/11. *Europese Gemeenschap v. Otis NV et al* – Judgment (Grand Chamber), 6 November 2012. Article 78.

¹⁵ C-437/13. *Unitrading Ltd v. Staatssecretaris van Financiën* – Judgment (Sixth Chamber), 23 October 2014. Article 20.

information from the authority concerned, in order to get fully in a position in which the review of the lawfulness of the national decision in question may be carried out. According to the point of view of the Court of Justice the right to effective judicial remedy is infringed by judgments based on facts or documents the parties or one of the parties could not get information about.

In *Case C-169/14. Juan Carlos Sánchez Morcillo, María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria SA* the request for a preliminary ruling concerns the interpretation of unfair terms in consumer contracts and Article 47 of the Charter. At issue in the main proceedings provides that mortgage enforcement proceedings may not be stayed by the first instance court. The Court of Justice stated that such system of enforcement does not preclude fair trial. In this judgment the Court of Justice also refers to its settled case-law that the principle of equality of arms, together with, among others, the principle *audi alteram partem*, is no more than a corollary of the very concept of a fair hearing that implies an obligation to offer each party a reasonable opportunity of presenting its case in conditions that do not place it in a clearly less advantageous position compared with its opponent. Article 47 in this relation must be interpreted as the court of first instance, which, in its final decision, may at most award compensation in respect of the damage suffered by the consumer, inasmuch as the latter, the debtor against whom mortgage enforcement proceedings are brought, may not appeal against a decision dismissing his objection to that enforcement, whereas the seller or supplier, the creditor seeking enforcement, may bring an appeal against a decision terminating the proceedings or ordering an unfair term to be disappplied.

IV. Conclusions and summary

The judgments of the Court of Justice presented above they can help national law enforcement bodies with the interpretation of the right to a fair trial. There seem to be more and more cases in which national tribunals request the Court of Justice for a preliminary ruling about the application of the Charter. The main content and importance of these rulings are very diverse, but they can serve as a guideline for the national law enforcement bodies protecting procedural rights effectively. One of the definition elements of fair trial is that cases should be heard within a reasonable time. In principle, the judicial rulings shall contain an explanation with respect to the right to a fair trial. The right to an effective judicial remedy is infringed if a judicial decision is based on facts or documents of which the parties could not ascertain. It was expressed in several judgments of the Court of Justice that the principle of effective remedy can be deduced from the definition elements of fair trial and are the followings: right of defence, equality of arms, right of access to a court, the possibility of being advised and represented. From the right to a fair trial derives also the possibility that legal persons can refer to this principle as well. As artificial persons are also entitled to an effective remedy not only natural persons are entitled to be exempted of the costs. It is the duty of national tribunals to decide whether exempting somebody of the costs does restrict the right to access to court. It can be a problem in several financial lawsuits that a legal person is usually profit-making namely when a business association working for profit. Court of Justice did not make a difference between natural and legal persons in this relation but there is a noticeable difference in enforcing demands. In my point of view the Court of Justice kept strictly to the matter of dispensation of the costs for not taking several economical aspects into consideration.

The Court of Justice expressed also a further right in another ruling stating that the European Commission is not precluded from representing the EU before a national court though this right should be exercised with regard to the rights and freedoms are ensured in the

Charter. Judicial protection aimed at paying respect for Union law rulings goes hand in hand with the rule of law. It is declared that it is not inverse with the right to a fair trial – namely the principals of equivalence and effectiveness – if in Member States there is only one court with an exclusive jurisdiction. The efficiency of judicial protection ensured by the Charter requires the examination held by the national court on evidences, the judgment was based on whether were obtained with infringement of the rights ensured in the Charter.

It is declared that the right to a fair trial is very diverse containing several elements that should be examined during the whole procedure one by one and in their entirety as well. The practice of the Court of Justice is formed ruling by ruling and is competed with further meaning. The expanding legal practice helps the national courts in the interpretation of the Union law.

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