HANDBOOK

Handbook on European law relating to access to justice

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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Foreword

This handbook on access to justice in Europe is jointly prepared by the European Union Agency for Fundamental Rights (FRA) and the Council of Europe together with the Registry of the European Court of Human Rights. It is the fifth in a series of handbooks on European law jointly prepared by our organisations. Previous handbooks focused on European non-discrimination law, European law relating to asylum, borders and immigration, European data protection law, and European law relating to the rights of the child.

Given the positive feedback to previous handbooks, we decided to cooperate on another highly topical subject – access to justice. Access to justice is not just a right in itself but also an enabling and empowering tool central to making other rights a reality.

This handbook summarises the key European legal principles in the area of access to justice. It seeks to raise awareness and improve knowledge of relevant legal standards set by the European Union and the Council of Europe, particularly through the case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). The handbook is designed to serve as a practical guide for judges, prosecutors and legal practitioners involved in litigation in the EU and in Council of Europe member states. Non-governmental organisations and other bodies that assist victims in accessing justice will also find this handbook useful.

We would like to thank the Human Rights Law Centre of the University of Nottingham, UK, for its contribution. We are also grateful to the European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ) for its involvement in the early stages of preparing this handbook and to the European Commission's DG Justice for providing input during drafting. Finally, we would like to express our gratitude to Judge Maria Berger of the Court of Justice of the European Union for her valuable feedback during the final drafting phase.

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Abbreviations and acronyms

ADR	Alternative dispute resolution
CCJE	Consultative Council of European Judges
CEPEJ	European Commission for the Efficiency of Justice
CETS	Council of Europe Treaty Series
CJEU	Court of Justice of the European Union (prior to December 2009, European Court of Justice, ECJ)
CoE	Council of Europe
CRPD	Convention on the Rights of Persons with Disabilities
EC	European Community
ECHR	European Convention on Human Rights
e-CODEX	e-Justice Communication via Online Data Exchange
ECtHR	European Court of Human Rights
EEO	European Enforcement Order
EIA	Environmental Impact Directive
e-SENS	Electronic Simple European Networked Services
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-governmental organisation
NHRI	National human rights institution
ODR	Online dispute resolution
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

How to use this handbook

This handbook provides an overview of key aspects of access to justice in Europe, with specific reference to relevant rights provided in the Council of Europe's European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR), and the Charter of Fundamental Rights of the European Union, as interpreted by the Court of Justice of the European Union (CJEU).

Access to justice is not just a right in itself but also empowers individuals to enforce other rights. This handbook is broad in scope, covering criminal and civil law. Existing FRA-ECtHR handbooks on European law relating to asylum, borders and immigration and to the rights of the child contain analyses on access to justice by asylum-seekers and children; therefore, these areas are not covered in this handbook.

The handbook is designed to assist legal practitioners who do not specialise in access to justice matters, serving as an introduction to key issues involved. It is intended for lawyers, judges, and other legal practitioners, as well as for persons who work with entities that deal with the administration of and access to justice, including non-governmental organisations (NGOs) involved in litigation. The handbook can also be used for legal research or public advocacy purposes. It is designed to permit practitioners to refer directly to specific sections/topics as required; it is not necessary to read the handbook as a whole. The Further reading Section lists specialised material that may be of interest to those seeking additional information on a particular issue.

The relevant laws of the Council of Europe (CoE) and the European Union (EU) are presented as they apply to each topic. There is, however, substantial overlap between the access to justice rights set out in the ECHR and in the EU Charter of Fundamental Rights. The Charter explicitly recognises that, where Charter rights correspond to rights in the ECHR, they are to be given the same scope and meaning. Much of the ECtHR's case law can therefore be considered relevant when looking at the scope and application of Charter rights. EU law should be presumed to be consistent with ECtHR case law unless explicitly stated otherwise. CJEU case law is referred to where relevant jurisprudence is available, providing alternative sources for access to justice rights and, more importantly, demonstrating how the two legal orders work in parallel. Many of the cited CJEU judgments were delivered in the course of a preliminary ruling

procedure initiatied by national courts to obtain the CJEU's interpretation of relevant EU law provisions to resolve a dispute pending consideration at the national level. Under the preliminary ruling procedure, the role of the CJEU is to give an interpretation of EU law or to rule on its validity. It is then the task of the national court to apply that law in conformity with the CJEU interpretation to the factual situation underlying the main domestic proceedings. To avoid confusion, this handbook refers to the European Court of Justice (ECJ) as the Court of Justice of the European Union (CJEU), even for decisions issued before December 2009.

Each chapter starts with a table outlining the issues addressed in that chapter. The table also specifies the applicable legal provisions and lists relevant CJEU and ECtHR case law. This should help users quickly find the key information relating to their situation. Practitioners subject only to CoE law can limit their review to CoE-related material, while those in EU Members States need to consult both columns, as these states are bound by both legal orders.

In addition, key points are presented at the beginning of each section to provide a quick and accessible overview.

The key CoE law is presented in boxes highlighting select ECtHR cases as well as in references in the main text. The cases provide recent examples of how the ECtHR applies the principles it has established in its vast jurisprudence. Council of Europe recommendations and reports are also referenced where relevant, even if they do not establish legally binding obligations.

EU law is presented both in boxes highlighting CJEU cases and by way of references to relevant EU primary law and legislative measures, such as directives and regulations, in the main text. CJEU cases have similarly been selected to illustrate recent applications of the law. Footnotes lead practitioners to further examples. In addition, references to legally non-binding EU instruments are made when relevant to the key points raised.

Although the handbook focuses on law, it features boxes highlighting 'promising practices' in Council of Europe and EU member states. Justice systems can vary widely in these states, but these promising practices include initiatives that may promote access to justice in the short or long term. The adequacy and effectiveness of these initiatives often remain to be tested – for a full understanding of their value, further research of relevant national sources would be needed.

This handbook focuses on criminal and civil law. While administrative law is explored in relation to environmental law (see Chapter 8), this generally falls outside of its scope. The handbook concerns application of the law at national level, so does not address issues of standing and admissibility before the ECtHR and CJEU, except where this aids the understanding of individual rights. Similarly, international instruments and case law, and national case law, are only referenced when these help understand the points made.

The handbook begins with a brief description of the legal meaning of 'access to justice' and the role of the two legal systems as established by CoE and EU law (Chapter 1). It contains seven substantive chapters covering the following issues:

- a fair and public hearing before an independent and impartial tribunal (including the right to access courts, the scope of the right to a fair and public hearing, and alternative paths to justice);
- legal aid (including the 'financial and merits' tests and the 'interests of justice' test for criminal proceedings);
- the right to be advised, defended and represented (including the quality of legal assistance, the right to adequate time and facilities to prepare one's defence, and the right to waive representation);
- the right to an effective remedy (including its substantive and institutional requirements, as well as examples of available remedies);
- limitations on access to justice in general (including the nature of permissible restrictions and examples of limitations);
- limitations on access to justice: the length of proceedings (including criteria for determining the length's reasonableness);
- access to justice in select focus areas (regarding which specific principles have been developed, including persons with disabilities, victims of crime, prisoners and pre-trial detainees and environmental law and e-justice).

1 What does access to justice mean?

EU	Issues covered	CoE
Access to justice		
Charter of Fundamental Rights, Article 47 (right to an effective remedy) Charter of Fundamental Rights, Article 51 (field of application) Charter of Fundamental Rights, Article 52 (3) (scope of interpretation of rights and principles) Treaty on European Union (TEU), Article 4 (3) TEU, Article 19	Scope of application	ECHR, Article 6 (right to a fair trial) ECHR, Article 13 (right to an effective remedy) ECHR, Article 35 (admissibility criteria) ECHR, Article 46 (binding force and execution of judgments)

This chapter introduces the term 'access to justice' with reference to the key European human rights standards. It presents the European regional systems that protect individual rights and addresses the emphasis placed on ensuring the protection of rights at national level. The chapter also summarises the relationship between access to justice rights in the European Union (EU) and the Council of Europe (CoE), and the Figure below outlines the key differences.

Key points

- According to international and European human rights law, the notion of access to justice obliges states to guarantee each individual's right to go to court – or, in some circumstances, an alternative dispute resolution body – to obtain a remedy if it is found that the individual's rights have been violated. It is thus also an enabling right that helps individuals enforce other rights.
- Access to justice encompasses a number of core human rights, such as the right to a fair trial under Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights, and the right to an effective remedy under Article 13 of the ECHR and Article 47 of the Charter.
- Access to justice rights in the EU Charter of Fundamental Rights may correspond to those contained in the ECHR. ECtHR case law is therefore important for interpreting Charter rights.
- Although different systems govern enforcement of the ECHR and the EU Charter of Fundamental Rights, both emphasise that the rights to an effective remedy and to a fair trial should primarily be enforced at national level.

Access to justice enables individuals to protect themselves against infringements of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in criminal proceedings. It is an important element of the rule of law[1] and cuts across civil, criminal and administrative law. Access to justice is both a process and a goal, and is crucial for individuals seeking to benefit from other procedural and substantive rights.

At the international level, the UN Human Rights Committee has, since its establishment, led the way among UN treaty bodies in interpreting concepts relating to access to justice.[2] Access to justice is also safeguarded in UN instruments, such as the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and the 2006 Convention on the Rights of Persons with Disabilities.

At the EU policy level, access to justice in EU Member States – particularly the efficiency and quality of justice systems, and the independence of the judiciary within the EU – is regularly assessed through the so-called EU Justice

1 Council of Europe (2015), *Factsheet on guaranteeing equal access of women to justice*, Strasbourg, Council of Europe.

2 United Nations (UN), Committee on Human Rights, General Comment No. 32 (2007).

Scoreboard.[3] This draws mainly on data from CEPEJ, a Council of Europe expert body, and forms part of the European Commission's Annual Growth Survey; the latter informs the deliberations of the EU's annual policy cycle – the European Semester – which has a significant impact on national finances.[4]

In European human rights law, the notion of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights, which guarantee the right to a fair trial and to an effective remedy, as interpreted by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), respectively. As noted above, these rights are also provided for in international instruments, such as Articles 2 (3) and 14 of the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR)[5] and Articles 8 and 10 of the UN Universal Declaration of Human Rights (UDHR).[6] Core elements of these rights include effective access to a dispute resolution body, the right to fair proceedings and the timely resolution of disputes, the right to adequate redress, as well as the general application of the principles of efficiency and effectiveness to the delivery of justice.[7]

The rights protected in the ECHR and the EU Charter of Fundamental Rights overlap. Charter rights that correspond to ECHR rights are given the same meaning and scope as those laid down in the ECHR, in accordance with Article 53 of the Charter. The Explanations to the Charter[8] – which serve as an interpretative tool to help understand its content, but are not legally binding – provide additional guidance on this point. This overlap means that ECtHR case law is frequently important for interpreting rights under the EU Charter of Fundamental Rights. However, as outlined below, the legal systems of the ECtHR and CJEU are different, which may affect the protection of rights at the national level.

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3 European Commission (2015), *The 2015 EU Justice Scoreboard*, COM(2015) 116 final, Brussels, 9 March 2015.

4 European Union Agency for Fundamental Rights (FRA) (2015), *Fundamental rights: challenges and achievements in 2014 – FRA Annual report*, Luxembourg, Publications Office, Focus chapter, p. 14.

5 UN, General Assembly (GA) (1966), International Covenant on Civil and Political Rights (ICCPR), 16 December 1966.

6 UN, GA (1948), Universal Declaration of Human Rights (UNDHR), 10 December 1948.

7 FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, Luxembourg, Publications Office, p. 9.

8 EU (2012), Charter of Fundamental Rights of the European Union, Art. 52 (3), OJ 2012 C 326. See also the Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17.

European Convention on Human Rights

The CoE has 47 member states; all are parties to the ECHR, which entered into force in 1953.[9] Under Article 1 of the ECHR, States Parties are legally bound to secure ECHR rights to persons within their jurisdiction. States Parties must ensure that their law and practice is in line with the ECHR. They are primarily responsible for implementing and enforcing the rights and freedoms guaranteed by the ECHR, although they may be allowed a 'margin of appreciation' to permit interpretations to be consistent with their own legal systems.

The ECtHR's role is supervisory: it ensures that States Parties observe their obligations by addressing complaints from individuals about violations of the ECHR.[10] Under Article 35 of the ECHR, individuals have to show that they have exhausted all domestic remedies before the ECtHR will consider their case.[11] This reflects the principle of subsidiarity, which means that national courts are primarily responsible for guaranteeing and protecting human rights at a national level.[12] The relevant access-to-justice standards that states must follow are set out in subsequent chapters.

ECHR rights are not always limited to the territories of States Parties; in exceptional circumstances, they can apply extraterritorially – specifically, to situations abroad in which state officials exercise "effective control and authority" over individuals.[13]

Under Article 46 of the ECHR, States Parties involved in proceedings before the ECtHR must abide by its final judgment.

EU Charter of Fundamental Rights

The EU is a unique legal order. EU law is an integral part of the legal systems of Member States.[14] It includes primary law, which is found in the treaties as well

9 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 5, 1950. See also Council of Europe, European Social Charter, CETS No. 35, 18 October 1961, which monitors compliance with social and economic rights; and Council of Europe, European Social Charter (revised), CETS No. 163, 3 May 1996.

10 States Parties may also bring claims against each other.

11 ECtHR, *Er and Others v. Turkey*, No. 23016/04, 31 July 2012, para. 57.

12 ECtHR, *Scordino v. Italy*, No. 36813/97, 26 March 2006, para. 140.

13 ECtHR, *Al-Skeini and Others v. the United Kingdom*, No. 55721/07, 7 July 2011, paras. 133–137.

14 CJEU, C-6/64, *Flaminio Costa v. E.N.E.L.*, 15 July 1964.

as the EU Charter of Fundamental Rights; secondary law, such as regulations, directives and decisions; as well as non-binding legal acts, such as opinions and recommendations.[15]

The implementation and enforcement of EU law takes place primarily at national level. Article 4 (3) of the Treaty on European Union (TEU) requires EU Member States to take appropriate measures to ensure the fulfilment of obligations arising from EU law. This is the principle of sincere cooperation. Additionally, Article 19 of the TEU requires Member States to provide sufficient remedies that ensure effective legal protection in the fields covered by EU law.

Thus, national courts are the primary guarantors of EU law, but to ensure its consistent application they can ask the CJEU to rule on issues of interpretation through the preliminary ruling procedure.[16] This creates a dialogue between national courts and the CJEU. The CJEU is the guardian of the EU's unique legal order, which includes clear fundamental rights obligations. Individuals may be able to pursue annulment actions to review the legality of EU law (including issues of fundamental rights), but the conditions on filing such applications are restrictive. Individuals generally have to show "direct and individual concern".[17] According to the CJEU, this system for judicial review of acts by EU institutions is complete.[18]

Consequently, under EU law it is also important for individuals to be able to enforce their rights in national courts. Originally, the treaties of the European Communities did not contain any references to fundamental rights. Instead, fundamental rights were identified by the CJEU in its case law as general principles of EU law resulting from the ECHR and the common constitutional traditions of Member States.[19] The CJEU has applied these principles when reviewing the lawfulness of EU legislative and administrative measures, as well as the compatibility of measures adopted by Member States when implementing EU law. The case law concerning these general principles is relevant when considering the right to seek justice, and may be useful for practitioners.

15 Treaty on the Functioning of the EU (TFEU), Art. 288, OJ 2012 C 326.

16 *Ibid.* Art. 267.

17 TFEU, Art. 263 (4). For an example illustrating the complexity of this area of law, see CJEU, C-583/11 P, *Inuit Tapiriit Kanatami and others v. European Parliament and Council of the European Union*, 3 October 2013.

18 *Ibid.*, particularly para. 92.

19 TEU, Art. 6 (3) (formerly Art. 6 (2)).

Fundamental rights and freedoms are now set out in the EU Charter of Fundamental Rights, which became legally binding as EU primary law in December 2009.[20] The Charter includes economic, social and cultural rights. In some instances, the Charter refers to 'principles' instead of 'rights' (for example, the principle of equality between women and men in Article 23). According to the EU Charter of Fundamental Rights, when provisions are classified as 'principles', national courts use them only to interpret and rule on the legality of Member State acts implementing EU law.[21]

Under Article 51, the EU Charter of Fundamental Rights applies to EU institutions and bodies without restriction, and to Member States "when they are implementing Union law".[22] The Explanations relating to the EU Charter of Fundamental Rights state that its obligations apply only when Member States are acting "within the scope of EU law". The CJEU has confirmed that "implementing" and "in the scope of" carry the same meaning.[23] This covers situations where Member States are, for instance, implementing EU directives and regulations.[24] However, all 28 EU Member States are also States Parties to the ECHR. This means that, even if the EU Charter of Fundamental Rights does not apply, the ECHR may. Additionally, ongoing negotiations about the European Union's planned accession to the ECHR could affect the access to justice landscape.[25]

Relationship between access to justice rights under CoE and EU law

The Figure summarises the bases for access to justice rights in the EU and CoE. It highlights the two key components of access to justice – the right to a fair trial and the right to an effective remedy – and compares the protection the EU Charter of Fundamental Rights and the ECHR offer. It will be referred to throughout the handbook.

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20 Charter of Fundamental Rights of the European Union, OJ 2012 C326. See TEU, Art. 6 (1).

21 See Art. 52 (5) of the EU Charter of Fundamental Rights, and (limited) guidance provided in the Explanations relating to the Charter of Fundamental Rights. See also CJEU, C-176/12, *Association de médiation sociale v. Union locale des syndicats CGT and Others*, 15 January 2014, paras. 45–49. Compare with CJEU, C-555/07, *Kücükdeveci v. Swedex Gmbh & Co. KG,* 19 January 2010.

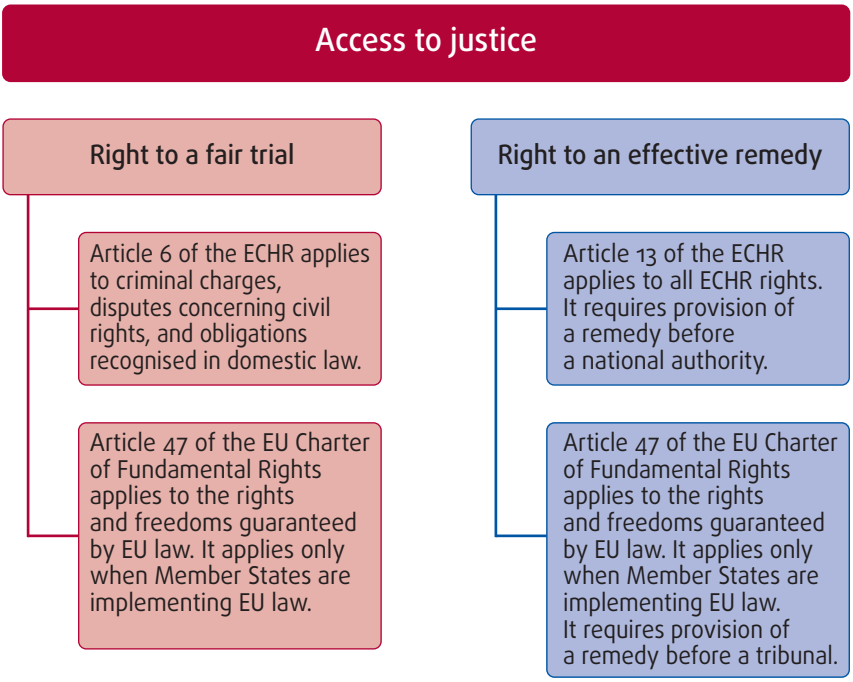
22 Charter of Fundamental Rights of the European Union, Art. 51.

23 CJEU, C-617/10, *Åklagaren v. Fransson*, 7 May 2013, paras. 17–21.

24 CJEU, C-206/13, *Cruciano Siragusa v. Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo*, 6 March 2014, paras. 24–25.

25 See the CJEU's opinion on the proposed accession to the ECHR, Opinion 2/13 of the Court, 18 December 2014.

Figure: Access to justice rights under EU and CoE law



As the Figure indicates, Article 6 of the ECHR has limited scope and only applies to cases concerning criminal charges, civil rights and obligations recognised in domestic law (see Section 2.1). Article 47 of the EU Charter of Fundamental Rights is not as confined and applies to all rights and freedoms recognised by EU law, which include certain additional economic, social and cultural rights. However, there is an important difference in terms of applicability. Article 6 of the ECHR applies to all situations falling within the definition of "criminal charges or civil rights and obligations". Article 47 of the Charter only applies when Member States are applying EU law, such as when implementing the Anti-Trafficking Directive. It thus provides a less comprehensive system of protection.

Article 13 of the ECHR sets out the right to an effective remedy before a national authority for arguable violations of ECHR rights. The right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights applies to all rights and freedoms guaranteed by EU law: it is not limited to violations of the rights included in the Charter. Article 47 also explicitly

guarantees access to a remedy before a 'tribunal', thus offering more extensive protection. It is important to note that, for EU Member States, if the EU Charter of Fundamental Rights does not apply, the ECHR may apply, as all 28 Member States are also States Parties to the ECHR.

Although the systems are distinct, **both CoE and EU law** guarantee the right to an effective remedy and the right to a fair trial, to be primarily enforced at national level, within the two instruments' respective scopes of application, and in accordance with the relevant rules and conditions set out by the CJEU and the ECtHR. Many rights in the EU Charter of Fundamental Rights are described similarly to rights in the ECHR. Article 52 (3) of the Charter confirms that, where Charter rights correspond to ECHR rights, the meaning and scope of those rights are the same, although more extensive protection can be provided.[26] This means that ECtHR case law is relevant for interpreting Charter rights where these rights correspond.

26 Explanations relating to the Charter of Fundamental Rights, OJ 2007 C303/17.

2

A fair and public hearing before an independent and impartial tribunal and other bodies

EU	Issues covered	CoE
Hearing before a tribunal		
Charter of Fundamental Rights, Article 47 (right to an effective remedy) CJEU, Joined cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Antoine Boxus and Others v. Région wallone*, 2011	Access to courts	ECHR, Article 6 (1) ECHR, Protocol 7 ECtHR, *Golder v. the United Kingdom*, No. 4451/70, 1975
CJEU, C-363/11, *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou*, 2012 CJEU, C-394/11, *Belov v. CHEZ Elektro Balgaria AD and others (Bulgaria and the European Commission intervening)*, 2013	Definition of a tribunal	ECtHR, *Julius Kloiber Schlachthof GmbH and Others v. Austria*, Nos. 21565/07 and others, 2013
Independence and impartiality of tribunals		
Charter of Fundamental Rights, Article 47 CJEU, C-506/04, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, 2006 CJEU, Joined cases C-341/06 and C-342/06, *Chronopost SA and La Poste v. Union française de l'express (UFEX) and Others*, 2008	Independence and impartiality	ECHR, Article 6 (1) ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, Nos. 2312/08 and 34179/08, 2013 ECtHR, *Ibrahim Gürkan v. Turkey*, No. 10987/10, 2012

EU	Issues covered	CoE
A fair and public hearing before a tribunal		
Charter of Fundamental Rights, Article 47 Directive on the right to information in criminal proceedings (2012/13/EU) Directive on the right to interpretation and translation (2010/64/EU) Directive on the right of access to a lawyer (2013/48/EU)	A fair hearing	ECHR, Article 6 (1) ECtHR, *Užukauskas v. Lithuania*, No. 16965/04, 2010
Charter of Fundamental Rights, Article 47	A public hearing	ECHR, Article 6 (1) ECtHR, *Khrabrova v. Russia*, No. 18498/04, 2012
Other paths to justice		
	Non-judicial bodies	
CJEU, Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, *Rosalba Alassini and Others v. Telecom Italia SpA*, 2010 Mediation Directive (2008/52/EC) Directive on consumer alternative dispute resolution (2013/11/EU) Regulation on consumer online dispute resolution (No. 524/2013) Victims' Rights Directive (2012/29/EU)	Alternative dispute resolution	ECtHR, *Suda v. the Czech Republic*, No. 1643/06, 2010 CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)

This chapter outlines the right of access to a court (referred to in both CoE law and EU law as a 'tribunal'), which arises from the right to a fair trial. It also explores the definition of the term 'tribunal'. Relevant requirements, including key aspects of the right to a fair and public hearing before an independent and impartial tribunal, are discussed. Non-judicial pathways to justice are also considered, including non-judicial bodies and alternative dispute resolution methods.

2.1. Accessing justice through courts

Key points

- Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights guarantee the right to a fair trial.
- The ECtHR has held that the right to a fair trial encompasses the right of access to a court. Article 6 applies to criminal charges, disputes concerning civil rights and obligations recognised by domestic law.
- Article 47 of the Charter includes the right of access to courts. It is not confined to criminal charges and civil rights and obligations; the Charter, however, applies domestically only when Member States are implementing (or derogating from) EU law.
- Both CoE and EU law use the term 'tribunal' rather than 'court', but these terms are equivalent. A tribunal must possess judicial functions, be capable of issuing binding decisions and meet other criteria developed by the ECtHR and CJEU, including being independent and impartial. The ECtHR and the CJEU have established consistent principles for determining if a body qualifies as a tribunal.
- The right of access to a court is not absolute. It can be limited – but restrictions may not impair the right's essence.

2.1.1. Right of access to a court

Under both CoE and EU law, the right of access to a court means that courts should be accessible. Accessibility can involve the availability of courts with relevant jurisdiction, availability of interpretation, access to information and the accessibility of court judgments. It may also involve the geographical remoteness of a court, if its location prevents applicants from participating effectively in proceedings[27] (see also Section 8.1 on persons with disabilities).

27 CJEU, C-567/13, *Nóra Baczó and János István Vizsnyiczai v. Raiffeisen Bank Zrt,* 12 February 2015, paras. 56-57. See also CJEU, C-413/12, *Asociación de Consumidores Independientes de Castilla y León v. Anuntis Segundamano España SL*, 5 December 2013, para. 41. For further information, see also Council of Europe, European Commission for the Efficiency of Justice (CEPEJ) (2013), *Guidelines on the Creation of Judicial Maps to Support Access to Justice within a Quality Judicial System*, 21 June 2013; Council of Europe, CEPEJ (2014), *Guidelines on the organisation and accessibility of court premises*, 12 December 2014; Council of Europe, CEPEJ (2008), *Checklist for promoting the quality of justice and the court*, 3 July 2008, e.g. at pp. 19-25, including interpretation, access to information, accessibility of court judgments.

The right of access to a court is an important element of access to justice given that courts provide protection against unlawful practices and uphold the rule of law.[28] **Under CoE law**, Article 6 (1) of the ECHR requires that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Access to court is implicit in the right to a fair hearing because it suggests that disputes must be decided on by courts. States are not compelled to establish specific types of courts – such as, for example, appellate courts. However, if a State Party sets up such courts, Article 6 will apply to them.[29]

Example: In *Golder v. the United Kingdom*,[30] the applicant was a prisoner who wanted to bring libel proceedings against a prison officer who accused him of taking part in a prison riot. He was refused permission to consult a lawyer, which he claimed hindered him in bringing an action in the courts.

The ECtHR held that Article 6 sets out the procedural guarantees available to parties in a litigation. This would be meaningless without access to court. Thus, the right of access to a court is implied in the right to a fair trial under Article 6 (1) of the ECHR.

Under the ECHR, rights must be "practical and effective" rather than "theoretical and illusory".[31] For the right of access to a court to be effective, states may have to provide legal aid, translation or other practical support to enable individuals to access court proceedings (see Chapter 3 on legal aid and Chapter 4 on the right to be advised, defended and represented).

The right of access to a court under Article 6 of the ECHR is limited to disputes concerning criminal charges against the applicant or civil rights and obligations.

28 ECtHR, *Běleš and Others v. the Czech Republic*, No. 47273/99, 12 November 2002.

29 ECtHR, *Khalfaoui v. France*, No. 34791/97, 14 December 1999, para. 37.

30 ECtHR, *Golder v. the United Kingdom*, No. 4451/70, 21 February 1975. For the right of access to a court in criminal cases, see for example ECtHR, *Jansovic v. Sweden*, No. 34619/97, 23 July 2002, para. 80.

31 ECtHR, *Artico v. Italy*, No. 6694/74, 13 May 1980, para. 33.

Both terms are given an autonomous meaning independent of the categorisations national legal systems employ.[32]

When determining whether a 'criminal charge' exists, the following criteria must be considered:

- the classification of the offence under the domestic legal system;
- the nature of the offence;
- the potential nature and severity of the penalty.[33]

The criteria are alternative and not cumulative.[34] If, however, it is not possible to reach a clear conclusion on a single criterion, a cumulative approach may be necessary.[35] States may distinguish between criminal and regulatory or disciplinary law, but the distinction must not undermine the object and purpose of Article 6.[36] Criminal penalties are usually of a punitive character.[37] A penalty's lack of seriousness does, nevertheless, not deprive an offence of its "inherently criminal character".[38] The relevant criteria must be applied before a decision is taken.

In non-criminal proceedings, for Article 6 of the ECHR to apply, there must be a dispute regarding a civil right or obligation recognised in domestic law, irrespective of whether it is protected by the ECHR. The dispute must be genuine and serious and the outcome of the proceedings must be directly decisive for the right.[39] The ECtHR has identified various proceedings as being outside the scope of civil rights and obligations, including non-criminal taxation

32 For criminal charges, see ECtHR, *Engel and Others v. the Netherlands*, Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976, para. 81. In relation to civil rights and obligations, see ECtHR, *König v. Germany*, No. 6232/73, 28 June 1978, paras. 88–89.

33 ECtHR, *Engel and Others v. the Netherlands*, Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976, paras. 81–85.

34 ECtHR, *Ziliberberg v. Moldova*, No.61821/00, 1 February 2005, para. 31.

35 ECtHR, *Ezeh and Connors v. the United Kingdom*, Nos. 39665/98 and 40086/98, 9 October 2003, para. 86.

36 ECtHR, *Weber v. Switzerland*, No. 11034/84, 22 May 1990, para. 30.

37 ECtHR, *Öztürk v. Germany*, No. 8544/79, 21 February 1984, para. 53.

38 *Ibid.*, para. 54.

39 ECtHR, *Boulois v. Luxembourg*, No. 37575/04, 3 April 2012, para. 90.

proceedings,[40] decisions regarding the entry, stay and deportation of aliens,[41] and proceedings relating to the right to stand for election.[42]

The right of access to a court is not absolute. It can be limited. For example, imposing reasonable time limits can promote the proper administration of justice. Additionally, a requirement to pay court fees may eliminate frivolous claims or may be justified for budgetary reasons.[43] However, restrictions must not impair "the very essence of the right".[44] For example, staying proceedings for a significant time may infringe the right of access to court because it prevents an individual from obtaining a "determination" of the dispute.[45] Permissible restrictions are further discussed in Chapter 6.

Under EU law, Article 47 of the EU Charter of Fundamental Rights states: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented".[46] Article 47 applies to all rights and freedoms arising from EU law; the Explanations to the Charter confirm that it corresponds to the rights in Article 6 (1) of the ECHR, without Article 6's limitation on civil rights and obligations.[47] Article 47 therefore secures, as a minimum, the protection offered by Article 6 of the ECHR, in respect to all rights and freedoms arising from EU law.[48] This explicit connection means that the cases mentioned under CoE law will be relevant in EU law unless otherwise stated. However, as noted in Chapter 1, the EU Charter of Fundamental Rights applies domestically only when Member States are implementing (or derogating from) EU law.[49]

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40 ECtHR, *Ferrazzini v. Italy*, No. 44759/98, 12 July 2001, para. 29.

41 ECtHR, *Maaouia v. France*, No. 39652/98, 5 October 2000, para. 40.

42 ECtHR, *Pierre-Bloch v. France*, No. 24194/94, 21 October 1997, paras. 49–52.

43 ECtHR, *Ashingdane v. the United Kingdom*, No. 8225/78, 28 May 1985, para. 57.

44 *Ibid.*

45 ECtHR, *Kutic v. Croatia*, No. 48778/99, 1 March 2002, para. 25.

46 Art. 47 of the EU Charter of Fundamental Rights is also relevant to the judicial protection offered by the CJEU itself.

47 CJEU, C-619/10, *Trade Agency Ltd v. Seramico Investments Ltd*, 6 September 2012, para. 52.

48 CJEU, C-199/11, *Europese Gemeenschap v. Otis NV and Others*, 6 November 2012, para. 47.

49 On the limits of Art. 6, see for example, ECtHR, *Maaouia v. France*, No. 39652/98, 5 October 2000. On the scope of Art. 47, see CJEU, C-370/12, *Thomas Pringle v. Government of Ireland, Ireland and the Attorney General*, 27 November 2012, paras. 178–182.

Article 47 of the EU Charter of Fundamental Rights embodies the EU legal principle that Member States must ensure effective judicial protection of an individual's rights arising from Union law (including Charter rights). This means that the right of access to a court applies whenever rights and freedoms guaranteed by EU law are involved. It is for EU Member States to establish a system of legal remedies and procedures that ensure respect for rights under EU law.[50] National legislation must not undermine the effective judicial protection of these rights.[51]

Example: In *Boxus v. Région wallonne*,[52] a Belgian court raised a question concerning the Environmental Impact Assessment Directive after a project was authorised by a legislative act (decree) of the Walloon parliament against which, under national law, no substantial review procedure was available.

The CJEU confirmed that the power to exercise review over the legislative act was necessary to ensure the effective judicial protection of individual procedural rights, even if this was not envisaged by national law.

As with CoE law, the right of access to a court under EU law is not absolute. It can be limited by national procedures to ensure the efficient administration of justice. Permissible restrictions are discussed further in Chapter 6.

To facilitate access to courts in cross-border scenarios, several EU secondary law instruments of private international law nature have been adopted to help determine which Member State's courts are competent to decide a civil law dispute. These instruments deal with jurisdiction, the applicable law, and recognition and enforcement in the area of civil law; examples include the regulations addressing jurisdiction and regulation and enforcement of judgments in

50 CJEU, C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*, 13 March 2007, paras. 37–42.

51 CJEU, C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, para. 59.

52 Joined Cases, C-128/09 to C-131/09, C-134/09 and C-135/09, *Antoine Boxus, Willy Roua, Guido Durlet and Others, Paul Fastrez, Henriette Fastrez, Philippe Daras, Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh), Bernard Page, Léon L'Hoir, Nadine Dartois v. Région wallonne*, 18 October 2011, paras. 49–57.

civil and commercial matters, in matrimonial matters and matters of parental responsibility, and in matters of succession (see also Section 6.3).[53]

2.1.2. Definition of 'tribunal'

Both CoE and **EU law** use the term tribunal rather than court. The word 'tribunal' is given an autonomous meaning, and the ECtHR and the CJEU have applied consistent principles in determining whether a body qualifies as a tribunal.

Under CoE law, a tribunal is characterised by its judicial function.[54] It does not have to be a court of the "classic kind".[55] A tribunal can be a body set up to determine a limited number of specific issues (for example, compensation), provided it offers the appropriate guarantees.[56]

Example: In *Julius Kloiber Schlachthof GmbH and Others v. Austria*,[57] the applicant companies carried out the slaughter of cattle and pigs, for which they had to pay agricultural marketing charges to the national agricultural marketing board (AMA). The AMA issued payment orders and imposed a surcharge for their failure to pay. The applicants appealed and asked for oral hearings. The federal minister, who acted as appellate authority, dismissed their appeals without holding a hearing. The applicants complained that the proceedings were not decided on by a tribunal.

53 Regulation (EC) No. 44/2001 of the European Parliament and the Council of 22 December 2000 on jurisdiction and regulation and enforcement of judgments in civil and commercial matters, OJ 2001 L 12; Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and regulation and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351 (Denmark has not opted in); Regulation (EU) No. 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012 L 201/107; Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ 2003 L 338/1; or Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009L 7/1.

54 ECtHR, *Belilos v. Switzerland*, No. 10328/83, 29 April 1988, para. 64.

55 ECtHR, *Campbell and Fell v. the United Kingdom*, Nos. 7819/77 and 7878/77, 28 June 1984, para. 76.

56 ECtHR, *Lithgow and Others v. the United Kingdom*, No. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81 and 9405/81, 8 July 1986, para. 201.

57 ECtHR, *Julius Kloiber Schlachthof GmbH and Others v. Austria*, Nos. 21565/07, 21572/07, 21575/07 and 21580/07, 4 April 2013.

The ECtHR reiterated that a tribunal was characterised by its judicial function, which meant determining matters within its competence by applying the law and after conducting proceedings in a prescribed manner. Further requirements were independence, impartiality, the duration of its members' terms of office and the availability of procedural guarantees – several of which appeared in the text of Article 6. The Court decided that neither the AMA nor the minister qualified as tribunals and that Article 6 (1) was violated.

Appropriate guarantees include:

- the power to issue binding decisions;[58]
- the ability to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner;[59]
- having full jurisdiction over the case;[60]
- independence and impartiality (see Section 2.2).

Tribunals must also be 'established by law'. This means that states are obliged to adopt specific laws establishing and then managing the functioning of national courts. This requires permanence, so excludes bodies that exercise a judicial function on the basis of an agreement between the parties to a case. However, it can include a body set up to determine a limited number of specific issues, provided it offers appropriate guarantees.[61] If an administrative body does not afford the guarantees of Article 6 (1), there must be a right of appeal to a judicial body that does.[62]

A body can still be a tribunal if it performs other functions in addition to judicial functions (e.g. administrative, disciplinary or advisory functions), but it cannot undertake both judicial and executive functions.[63] Similarly, tribunals

58 ECtHR, *Benthem v. the Netherlands*, No. 8848/80, 23 October 1985, paras. 40 and 43.

59 ECtHR, *Sramek v. Austria*, No. 8790/79, 22 October 1984, para. 36.

60 ECtHR, *Galina Kostova v. Bulgaria*, No. 36181/05, 12 November 2013, para. 59.

61 ECtHR, *Lithgow and Others v. the United Kingdom*, Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81 and 9405/81, 8 July 1986, para. 201.

62 ECtHR, *Albert and Le Compte v. Belgium*, Nos. 7299/75 and 7496/76, 10 February 1983.

63 ECtHR, *Benthem v. the Netherlands*, No. 8848/80, 23 October 1985, para. 43.

may include judges who are non-lawyers or members who have non-judicial functions as long as they comply with the requirements of independence and impartiality.[64]

Ultimately, determining whether a body qualifies as a tribunal depends on the facts of the case. The decision is made by applying the principles set out above. For example, a body that can only issue advisory opinions[65] would not fall within the definition of a tribunal, while an arbitral body with appropriate guarantees for determining specific matters would.[66] For further discussion, see Section 2.4 on other pathways to justice.

Under EU law, Article 47 of the EU Charter of Fundamental Rights guarantees the right to a fair hearing before a tribunal. The CJEU has addressed the meaning of 'tribunal' in the context of deciding whether a particular entity is permitted to refer a case to the CJEU for a preliminary ruling, which national courts and tribunals may do (see Chapter 1 on access to justice).[67] To qualify as a tribunal for this purpose, the body referring a case to the CJEU must:

- be established by law;
- be permanent;
- be independent and impartial (see below);
- include an *inter-partes* procedure;
- have compulsory jurisdiction;
- apply rules of law.[68]

64 ECtHR, *Campbell and Fell v. the United Kingdom*, Nos. 7819/77 and 7878/77, 28 June 1984, para. 81. Regarding the participation of lay judges, see also ECtHR, *Ibrahim Gürkan v. Turkey*, No. 10987/10, 3 July 2012, para. 18.

65 ECtHR, *Benthem v. the Netherlands*, No. 8848/80, 23 October 1985.

66 ECtHR, *Lithgow and Others v. the United Kingdom*, Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81 and 9405/81, 8 July 1986.

67 TFEU, Art. 267. See also CJEU, *Information note from national courts for a preliminary ruling*, 5 December 2009, OJ C 2009 C 297/01, para. 9 (confirming that the "status as a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law").

68 CJEU, C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, 17 September 1997, para. 23.

The proceedings before the body must be intended to lead to decisions of a judicial nature.[69]

Example: In *Epitropos tou Elegktikou Synedriou sto Ypourgio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou*,[70] the applicant (*Elegktikou Synedriou*, Greece's Court of Auditors) raised questions concerning the compatibility with EU law of national rules allowing public sector employees to take leave for trade union business. The CJEU had to consider whether *Elegktikou Synedriou* was a tribunal within the meaning of Article 267 of the TFEU.

The CJEU ruled that it did not constitute a tribunal because: (i) it had ministerial links, which meant it was not acting as a third party in relation to the interests at stake; (ii) its jurisdiction was limited to *a priori* auditing of the state's expenditure, and did not include making a determination; (iii) its decision did not acquire the force of *res judicata* (final judgment) and its proceedings were not intended to lead to a decision of a judicial nature; and (iv) the beneficiary of the expenditure at issue was not a party to the proceedings before the *Elegktikou Synedriou*.

As with CoE law, under EU law, arbitral bodies are generally not considered tribunals because of the optional nature of proceedings and the lack of involvement by state authorities (see Section 2.4 on other paths to justice).[71]

Example: In *Belov v. CHEZ Elektro Balgaria AD and others* (Bulgaria and the European Commission intervening),[72] the Bulgarian Commission for Protection against Discrimination (KZD) requested a preliminary ruling on various provisions of EU law relating to discrimination and consumer protection.

69 CJEU, C-443/09, *Camera di Commercio, Industria, Artigianato e Agricoltura (CCIAA) di Cosenza v. Grillo Star Srl.*, 19 April 2012, paras. 20–21.

70 CJEU, C-363/11, *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou*, 19 December 2012, paras. 19-31.

71 CJEU, C-125/04, *Guy Denuit and Betty Cordenier v. Transorient - Mosaïque Voyages et Culture SA.*, 27 January 2005, para. 13. For a case in which an arbitral body was deemed a tribunal, see CJEU, C-555/13, *Merck Canada Inc. v Accord Healthcare Ltd and Others*, 13 February 2014, paras. 18–25.

72 CJEU, C-394/11, *Belov v. CHEZ Elektro Balgaria AD and others (Bulgaria and the European Commission intervening)*, 31 January 2013, para 26.

The CJEU confirmed that a national body might be classified as a court or tribunal within the meaning of Article 267 of the TFEU when performing judicial functions, but could not be recognised as such when exercising other functions, such as those of an administrative nature. Accordingly, it was necessary to determine in what specific capacity a body was acting when it sought a ruling from the CJEU. In this case, various factors led the court to reject the contention that the proceedings before the body were intended to lead to a decision of a judicial nature; these included: that KZD could proceed on its own motion, and had extensive investigative powers; KZD's power to join persons to the proceedings on its own initiative; that KZD would be a defendant in court proceedings if its decision were appealed; and that KZD could revoke its decisions.

2.2. Independence and impartiality of tribunals

Key points

- CoE and EU law require tribunals to be independent and impartial.
- The CJEU and ECtHR have set out detailed rules on independence to guarantee neutrality. The rules relate to the manner of appointing tribunal members, the duration of their terms of office, and the existence of guarantees against outside pressure.
- A tribunal is presumed to be impartial unless proved otherwise. Bias can be subjective (relating to the individual judge's personal bias) or objective (relating to the appearance of bias). Subjective bias is difficult to prove.

Independence and impartiality are often examined together and are closely linked, which can make them difficult to distinguish.[73] However, independence generally relates to the structure of a tribunal, while impartiality is an individual characteristic of a decision-maker.[74]

73 For example, see ECtHR, *Findlay v. the United Kingdom*, No. 22107/93, 25 February 1997, para. 73.

74 ECtHR, *Parlov-Tkalčić v. Croatia*, No. 24810/06, 22 December 2009, paras. 86–87.

Independence

Under CoE law, the case law on Article 6 of the ECHR provides detailed rules about the independence of the judiciary, which are designed to protect it from external pressures and guarantee neutrality.[75] These rules cover the manner of appointing tribunal members, the duration of their terms of office, and the existence of guarantees against outside pressure.[76]

Example: In *Maktouf and Damjanović v. Bosnia and Herzegovina*,[77] both applicants were convicted of war crimes by the Court of Bosnia and Herzegovina (the State Court). The State Court consisted of international and national judges and had the power to decide on cases involving war crimes. The first applicant maintained that the State Court was not independent because two of its members were appointed by the Office of the High Representative in Bosnia and Herzegovina for a renewable period of two years.

The ECtHR rejected this argument. It found no reason to doubt that the international judges of the State Court were independent of the political organs of Bosnia and Herzegovina, of the parties to the case and of the institution of the High Representative. Their appointment was motivated by a desire to reinforce the independence of the State Court's war crimes chambers and to restore public confidence in the judicial system. That the judges in question were seconded from among professional judges in their respective countries represented an additional guarantee against outside pressure. There was no violation of Article 6 of the ECHR.

Judges may be appointed by the executive, but the law must ensure that they do not receive instructions on how to exercise their duties.[78] The final, binding and enforceable judgments of a court should not be interfered with.[79]

75 For further details on the right to a fair and public hearing by a competent independent and impartial tribunal, see UN, Committee on Human Rights (HRC) (2007), *General Comment 32*, 23 August 2007, paras. 19–23.

76 ECtHR, *Campbell and Fell v. the United Kingdom*, Nos. 7819/77 and 7878/77, 28 June 1984, para. 78.

77 ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, Nos. 2312/08 and 34179/08, 18 July 2013, paras. 48–53.

78 ECtHR, *Beaumartin v. France*, No. 15287/89, 24 November 1994, para. 38.

79 ECtHR, *DRAFT - OVA a.s. v. Slovakia*, No. 72493/10, 9 June 2015, paras. 80–86.

The length of judicial appointments also contributes to independence. Tribunal members do not have to be appointed for life. Most importantly, terms of office must be stable in length and free of outside interference. At minimum, members of a tribunal must be protected against removal during their terms of office.[80] A lack of adequate guarantees against removal vitiates a tribunal's independence.[81]

The appearance of independence is also important but not decisive for establishing a lack of independence.[82] In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the views of the parties to the proceedings are important, but not decisive. Doubts must be objectively justified.[83] For example, where two lay assessors who sat on a tribunal dealing with a claim for revision of a lease were appointed by associations that had an interest in its continuation, the applicant's concern about impartiality was justified.[84]

Under EU law, the independence requirement obliges a tribunal to act as a third-party decision-maker, independent of the administrative authorities and the parties.[85]

Example: In *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*,[86] Mr Wilson took a case to the national courts, arguing that by introducing a language requirement Luxembourg created unfair barriers to the implementation of Directive 98/5/EC on the professional establishment of lawyers in Member States other than the one in which they obtained their

80 ECtHR, *Campbell and Fell v. the United Kingdom*, Nos. 7819/77 and 7878/77, 28 June 1984, para. 80.

81 ECtHR, *Henryk Urban and Ryszard Urban v. Poland*, No. 23614/08, 30 November 2010, paras. 49–53. See also Council of Europe, Consultative Council of European Judges (CCJE) (2001), *Opinion N° 1 on standards concerning the independence of the judiciary and the irremovability of judges*, 23 November 2001.

82 ECtHR, *Campbell and Fell v. the United Kingdom*, Nos. 7819/77 and 7878/77, 28 June 1984, para. 81.

83 ECtHR, *Fruni v. Slovakia*, No. 8014/07, 21 June 2011, para. 141.

84 ECtHR, *Langborger v. Sweden*, No. 11179/84, 22 June 1989, para. 35.

85 CJEU, C-24/92, *Pierre Corbiau v. Administration des contributions*, 30 March 1993, para. 15.

86 CJEU, C-506/04, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, 19 September 2006, paras. 47–53.

qualifying professional degree.[87] This required lawyers to attend an oral hearing with the Bar Council. Mr Wilson refused to attend and, as a consequence, the Bar Council refused to register him. He challenged the decision before the Disciplinary and Administrative Committee, which was composed exclusively of lawyers of Luxembourgian nationality. The administrative court requested a preliminary ruling from the CJEU on whether appeal bodies such as the Disciplinary and Administrative Committee constitute a remedy before a court or tribunal in accordance with domestic law within the meaning of Article 9 of the directive.

The CJEU stated that independence, which is inherent in the task of adjudication, meant a tribunal had to act as a third party in relation to the authority that adopted the contested decision. Independence also has two other aspects: (i) the tribunal is free from external intervention or pressure; and (ii) "internal impartiality" ensuring that the parties to the proceedings have a level playing field.[88]

Impartiality

Under CoE law and EU law, impartiality is tightly intertwined with independence. It requires a decision-maker to be open-minded and unprejudiced when determining disputes.

Example: In İbrahim Gürkan v. Turkey,[89] a military criminal court sentenced the applicant to two-and-a-half months' imprisonment for wilfully disobeying a superior. The court was composed of a military officer with no legal training and two military judges.

The ECtHR stated that the participation of lay judges was not necessarily contrary to Article 6 and that the military officer's lack of legal

87 Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ 1998 L 77.

88 On external pressures, see CJEU, C-103/97, *Josef Köllensperger GmbH & Co. KG and Atzwanger AG v. Gemeindeverband Bezirkskrankenhaus Schwaz*, 4 February 1999, para. 21 (the conditions relating to the removal of members were too vague to guarantee against undue pressure). On internal impartiality, see CJEU, C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, 6 July 2000, para. 32 (objective protections in place in the state constitution).

89 ECtHR, *İbrahim Gürkan v. Turkey*, No. 10987/10, 3 July 2012, para. 19.

qualifications did not hinder his independence or impartiality. However, the military officer remained in the service of the army and was subject to military discipline. He was appointed by his superiors and did not enjoy the same constitutional safeguards as the two military judges. The military criminal court could therefore not be considered independent and impartial.

Impartiality has two elements:

- a subjective element relating to an individual judge's personal prejudices or bias;
- an objective element relating to issues such as the appearance of bias.[90]

A tribunal is presumed to be free of personal prejudice unless proved otherwise.[91] Demonstrating subjective partiality requires determining the personal convictions of a particular judge in a given case, which is very difficult. Examples of subjective partiality include displays of hostility or ill will by the judge or evidence that the judge has arranged to have a case assigned to him/herself for personal reasons.[92] The vast majority of cases alleging a lack of impartiality have thus focused on the objective test, which involves ascertaining whether a judge offered guarantees sufficient to exclude any legitimate doubt in this respect.[93] Examples of a lack of objective impartiality include the existence of close family ties between an opposing party's advocate and the judge,[94] or professional relations between the judge and the other party to the proceedings.[95] Being objectively impartial also means offering guarantees sufficient to exclude any legitimate doubt in this respect.[96] The mere fact that a court performs two types of functions in respect of the same decision (advisory and judicial) can cast doubt on its

90 See also Council of Europe, CCJE (2002), *Opinion N° 3 on ethics and liability of judges*, 19 November 2002.

91 ECtHR, *Kyprianou v. Cyprus*, No. 73797/01, 15 December 2005, para. 119.

92 ECtHR, *Morice v. France*, No. 29369/10, 23 April 2015, para. 74.

93 *Ibid.*, para. 119. See also, ECtHR, *Gautrin and others v. France*, No. 21257/93, 20 May 1998, para. 58.

94 ECtHR, *Micallef v. Malta*, No. 17056/06, 15 October 2009, para. 102.

95 ECtHR, *Pescador Valero v. Spain*, No. 62435/00, 17 June 2003, paras. 27–28.

96 ECtHR, *Fey v. Austria*, No. 14396/88, 24 February 1993, para. 28.

structural impartiality.[97] Further, a government official's presence at a court's deliberations has also been found to violate Article 6.[98] Procedures used by courts to consider motions alleging bias must themselves be free of bias (for example, judges accused of bias should not be asked to review the merits of the application).[99]

EU law has consistently followed the principles established by the ECtHR's case law regarding the two required aspects of impartiality: subjective and objective impartiality. Independence is considered a prerequisite of impartiality and adequate rules are required with respect to the composition of a body and the status of its members.[100]

Example: *Chronopost SA and La Poste v. Union française de l'express,*[101] concerned a claim that infrastructural assistance constituted state aid. The case had twice been before the Court of First Instance (CFI), with a different judicial composition but the same Judge-Rapporteur. At the second hearing, the CFI affirmed its first ruling, namely that there was state aid. The appellants claimed that the second CFI was not an impartial tribunal because it included the same Judge-Rapporteur and the decision was tainted with bias.

The CJEU set out the test for impartiality as follows: (i) the members of the tribunal must be subjectively impartial, that is, none must show bias or personal prejudice (there is a presumption of personal impartiality in the absence of evidence to the contrary); and (ii) the tribunal must be objectively impartial by offering guarantees sufficient to exclude any legitimate doubt in this respect. The CJEU dismissed the allegation of bias. The facts did not establish that the Chamber's composition was unlawful.

97 ECtHR, *Procola v. Luxembourg*, No. 14570/89, 28 September 1995, para. 45. Compare with ECtHR, *Kleyn and Others v. the Netherlands*, Nos. 39343/98, 39651/98, 43147/98 and 46664/99, 6 May 2003, para. 27.

98 ECtHR, *Martinie v. France*, No. 58675/00, 12 April 2006, paras. 53–55.

99 ECtHR, *A.K. v. Liechentenstein*, No. 38191/12, 9 July 2015.

100 CJEU, C-506/04, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, 19 September 2006, para. 53.

101 CJEU, Joined cases C-341/06 P and C-342/06 P, *Chronopost SA and La Poste v Union française de l'express (UFEX) and Others*, 1 July 2008, para. 54.

2.3. What is a fair and public hearing?

Key points

- Access to justice requires a hearing that is procedurally fair and public.
- The right to a fair and public hearing is enshrined in Article 6 (1) of the ECHR and Article 47 of the EU Charter of Fundamental Rights. Specific safeguards for a fair trial in criminal proceedings are additionally found in Article 6 (2) and (3) of the ECHR and Article 48 of the Charter.
- The right to a fair hearing essentially includes the right to equality of arms, the right to adversarial proceedings and the right to a reasoned decision, as well as the right to secure the execution of a final judgment.
- A public hearing ensures scrutiny of the judiciary. The right to a public hearing also requires that an individual has the right to attend and hear evidence.

Under CoE law, the right to a fair and public hearing under Article 6 of the ECHR applies in relation to criminal charges and disputes concerning civil rights and obligations (see Section 2.1). **Under EU law**, pursuant to Article 47 of the EU Charter of Fundamental Rights, the right applies to all types of proceedings relating to rights and freedoms arising from EU law.

The case law on the right to a fair trial is vast. This section discusses several core features of the right, which include: the right to equality of arms, the right to adversarial proceedings and the right to a reasoned decision. As noted in Chapter 1, the case law of the ECtHR is relevant to the interpretation of Charter rights where those rights correspond. Article 47 of the EU Charter of Fundamental Rights corresponds to Article 6 of the ECHR on this point.

2.3.1. A fair hearing

Under CoE law, whether a hearing is considered fair depends on all facts of the case, including the ability of the individual to access justice. The proceedings as a whole (i.e. from the institution of proceedings, including police questioning in criminal cases, to the final determination of an appeal) must be considered.[102] Article 6 of the ECHR also applies to the execution of judgments because, ulti-

102 ECtHR, *Edwards v. the United Kingdom*, No. 13071/87, 16 December 1992, para. 34.

mately, if an individual cannot secure the execution of a judgment at the end of proceedings, the right to a fair hearing is of little value.[103]

Promising practice

Ensuring a fair trial through co-hearing

In Tarascon, France, a specialised practice called 'co-hearing' was developed to strengthen the participation of children. It allows social workers to join children during hearings with judges in civil proceedings. The social worker's presence helps the child to express his/her point of view. It also creates a more child-friendly environment. This practice also ensures that the child's replies can be interpreted from two perspectives (judge and social worker), making hearings more fair. The project was given special mention in connection with the 2012 Crystal Scales of Justice Prize.

Source: 2012 Crystal Scales of Justice Award, organised jointly by the Council of Europe and the European Commission.

Under CoE law and EU law, one of the core requirements of the right to a fair hearing is 'equality of arms' between the parties. Equality of arms involves ensuring that each party has a reasonable opportunity to present its case in conditions that do not disadvantage either party. Any complaint regarding the absence of equality of arms "will be considered in the light of the whole of Article 6 (1) because the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial".[104] The CJEU has similarly defined the principle.[105]

In criminal cases, the principle of equality of arms is safeguarded through the specific defence rights set out in Article 6 (3) (d), namely the "right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Article 6 (2) and (3) of the ECHR and Article 48 of the EU Charter of Fundamental Rights outline further specific fair trial guarantees in criminal

103 ECtHR, *Hornsby v. Greece*, No. 18357/91, 19 March 1997, para. 40. See also UN, HRC (2005), Case No. 823/1998, *Czernin v. Czech Republic*, 29 March 2005 (holding that inaction and excessive delays in implementing decisions violate ICCPR Art. 14).

104 ECtHR, *Ruiz-Mateos v. Spain*, No. 12952/87, 23 June 1993, para. 63; see also paras. 63–68.

105 CJEU, C-199/11, *Europese Gemeenschap v. Otis NV and Others*, 6 November 2012, para. 71.

cases. They include the right to be informed promptly of the nature and cause of the accusation faced and the right to adequate time and facilities for preparing one's defence.

Under EU law, secondary legislation further details the scope of fair trial rights. For example, Directive 2012/13/EU on the right to information in criminal proceedings establishes that Member States must inform suspects and accused persons of their rights, including the right to access a lawyer and the right to remain silent.[106] Under the directive, suspects and accused persons who are arrested must also be provided with a 'Letter of rights' containing information on additional rights, including their right to access documents relating to their specific case that are in the possession of the competent authorities – such as evidence – and their right to access urgent medical assistance. The directive is part of an EU 'roadmap' for strengthening procedural rights of suspects and accused persons in criminal proceedings.[107] The roadmap was adopted to strengthen rights of individuals in criminal proceedings within the EU as well as to ensure mutual trust in each other's criminal justice systems and promote judicial cooperation between EU Member States. The roadmap also includes the Directive on the right to interpretation and translation in criminal proceedings,[108] the Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings,[109] a Commission Recommendation on the right to legal aid for suspects or accused persons,[110] and a Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.[111] There is also a Proposal for a Directive on procedural safeguards for children suspected or accused in criminal pro-

106 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142.

107 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 2009 C 295.

108 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280.

109 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 20143 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294/1. The United Kingdom and Ireland have not opted into this directive, and it does not apply to Denmark.

110 European Commission (2013), Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings, OJ 2013 C 378.

111 European Commission (2013), Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ 2013 378.

ceedings[112] and a Proposal for a Directive of the European Parliament and of the Council on provisional legal aid and legal aid in European Arrest Warrant proceedings.[113]

Under both CoE and EU law, another essential component of the right to a fair hearing is the right to adversarial proceedings.[114] The requirements of this right are in principle the same in non-criminal and criminal cases.[115] In practice, the right to adversarial proceedings includes:

- the right to have knowledge of, and comment on, all evidence filed to influence the court's decision;[116]
- the right to have sufficient time to familiarise oneself with the evidence before the court;[117]
- the right to produce evidence.[118]

The courts must consider whether the procedure applied as a whole complied with the requirements of the right to adversarial proceedings.[119]

Example: In *Užukauskas v. Lithuania*,[120] the Lithuanian authorities revoked the applicant's firearms licence because information in police records alleged he was a risk to society. He was required to hand in his arms to the

112 European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013)822.

113 European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824.

114 ECtHR, *Ruiz-Mateos v. Spain*, No. 12952/87, 23 June 1993, para. 63; CJEU, C-300/11, *ZZ v. Secretary of State for the Home Department*, 4 June 2013, para. 55. In relation to criminal proceedings, see ECtHR, *Brandstetter v. Austria*, Nos. 11170/84, 12876/87 and 13468/87, 28 August 1991, paras. 66–67.

115 ECtHR, *Werner v. Austria*, No. 21835/93, 24 November 1997, para. 66.

116 ECtHR, *Vermeulen v. Belgium*, No. 19075/91, 20 February 1996, para. 33.

117 ECtHR, *Krcmar v. Czech Republic*, No. 35376/97 3 March 2000, para. 42.

118 ECtHR, *Clinique des Acacias and Others v. France*, Nos. 65399/01, 65406/01, 65405/01 and 65407/01, 13 October 2005, para. 37.

119 ECtHR, *Rowe and Davies v. the United Kingdom*, No. 28901/95, 16 February 2000, para. 62.

120 ECtHR, *Užukauskas v. Lithuania*, No. 16965/04, 6 July 2010, paras. 45-51.

police in return for payment. He challenged the entry of his name in the operational records, but this action was dismissed on the basis of classified material submitted by the police. The information was not disclosed to the applicant.

The data in the file were of decisive importance to the applicant's case because the judges had to consider them to determine whether he was involved in criminal activity. The police file was the only evidence of the applicant's alleged danger to society. Given that the applicant was not apprised of the evidence against him and did not have the opportunity to respond to it (unlike the police), the decision-making procedure did not comply with the requirements of adversarial proceedings or equality of arms, and it did not incorporate adequate safeguards to protect the interests of the applicant. The ECtHR found that this was in violation of Article 6 of the ECHR.

The right to a reasoned decision is another core aspect of the right to a fair hearing.[121] A reasoned decision demonstrates that a case has been heard properly and permits the parties to bring an appropriate and effective appeal.[122] Courts are not required to give detailed answers to every argument and the duty to give reasons varies according to the nature of the decision and the circumstances of the case.[123] In criminal proceedings, a jury trial must include sufficient safeguards to permit the defendant to understand why s/he has been found guilty. This may include guidance by the judge on legal issues or evidence, and precise, unequivocal questions put to the jury by the judge.[124]

In civil proceedings, courts are obliged to give sufficient reasons for their decisions to allow individuals to make effective applications for appeal.[125] An appellate court may remedy a lower court's inadequate reasoning. In principle, it is acceptable for an appellate body to simply endorse the reasons for the lower body's decision. This, however, was found to be insufficient when the main complaint in the actual appeal was the inadequacy of the lower court's

121 See Council of Europe, CCEJ (2008), *Opinion N°11 on "the quality of judicial decisions"*, 18 December 2008.

122 ECtHR, *Hadjianastassiou v. Greece*, No. 12945/87, 16 December 1992, para. 33. Compare with ECtHR, *Jodko v. Lithuania* (dec.), No. 39350/98, 7 September 1999. On EU law, see CJEU, C-619/10, *Trade Agency Ltd v. Seramico Investments Ltd*, 6 September 2012, para. 53.

123 ECtHR, *García Ruiz v. Spain*, No. 30544/96, 21 January 1999, para. 26.

124 ECtHR, *Taxquet v. Belgium*, No. 926/05, 16 November 2010, paras. 93-100.

125 ECtHR, *Suominen v. Finland*, No. 37801/97, 24 July 2003, para 36-38.

reasoning.[126] The reasons given by the appellate court must address the essence of the issue to be decided in a manner that adequately reflects its role.[127]

Right to appeal

Under CoE law, although Protocol No. 7 to the ECHR (binding only on its States Parties) sets out a specific right of appeal in criminal cases,[128] the ECHR does not guarantee a right of appeal in civil proceedings. The ECtHR has confirmed, however, that, if an appeals process is provided in civil or criminal proceedings, Article 6 will apply to it.[129] **Under EU law**, there is no specific right of appeal in the EU Charter of Fundamental Rights, but ECtHR case law has to be taken into account when interpreting Article 47.

2.3.2. A public hearing

Under CoE law and EU law, the concept of access to justice also includes the right to a public hearing. This helps promote confidence in courts by rendering visible and transparent the administration of justice.[130] Article 47 of the EU Charter of Fundamental Rights corresponds to Article 6 of the ECHR on this point.

Implicit in the right to a public hearing is the right to an oral hearing.[131] For example, in criminal proceedings, an accused should generally be entitled to attend a hearing at first instance.[132] The right to an oral hearing is important because a person cannot exercise the other rights under Article 6 (3) of the ECHR if he/she is not present. However, the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for the trial hearing. The manner in which Article 6 is applied to proceedings before courts of appeal depends on the special features of the proceedings

126 ECtHR, *Hirvisaari v. Finland*, No. 49684/99, 27 September 2001, para 32.

127 ECtHR, *Hansen v. Norway*, No. 15319/09, 2 October 2014, paras. 71 *et seq*.

128 Council of Europe, Protocol No. 7 to the ECHR, CETS No.117, 1984, Art. 2.

129 See for example ECtHR, *Monnell and Morris v. the United Kingdom*, Nos. 9562/81 and 9818/82, 2 March 1987, para. 54.

130 ECtHR, *Pretto v. Italy*, No. 7984/77, 8 December 1983, para. 21.

131 ECtHR, *Allan Jacobsson v. Sweden*, No. 16970/90, 19 February 1998, para. 46. See also CJEU, C-399/11, *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013, para. 49.

132 ECtHR, *Tierce and Others v. San Marino*, Nos. 24954/94, 24971/94, 24972/94, 25 July 2000, para. 94; ECtHR, *Jussila v. Finland* [GC], No. 73053/01, 23 November 2006, para. 40.

involved, and account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein [133] Moreover, the right to an oral hearing is not absolute, and some circumstances may justify dispensing with it, depending on the nature of the issues to be decided by the court.[134] For example, an oral hearing may not be required where there are no issues of credibility or contested facts that necessitate the oral presentation of evidence or cross-examination of witnesses.[135] If a criminal trial is conducted *in absentia*, and the defendant is unaware of the proceedings, the defendant must be able to obtain a fresh determination on the merits of the charge from a court once he/she becomes aware of them. In civil proceedings, it may be possible to proceed without a hearing in cases raising legal issues of a limited nature[136] or where the proceedings are exclusively legal or technical.[137] In principle, however, an individual is entitled to a public oral hearing before the first and only tribunal examining his/her case.[138]

Article 6 (1) of the ECHR explicitly permits excluding the press and public:

- in the interest of morals, public order or national security in a democratic society;
- where it is required in the interests of juveniles or to protect the parties' private life; or
- where publicity would prejudice the interests of justice.

133 ECtHR, *Kremzow v. Austria*, No. 12350/86, 21 September 1993, paras 58-59; ECtHR, *Hermi v. Italy* [GC], No. 18114/02, 18 October 2006, para. 60. In relation to trials in absentia in the EU, see Council of the European Union (2009), Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ 2009 L 81/24.

134 ECtHR, *Kremzow v. Austria*, No. 12350/86, 21 September 1993, para. 59.

135 ECtHR, *Jussila v. Finland* [GC], No. 73053/01, 23 November 2006, paras. 41–42 and 47–48.

136 ECtHR, *Valová and Others v. Slovakia*, No. 44925/98, 1 June 2004, paras. 65–68.

137 ECtHR, *Koottummel v. Austria*, No. 49616/06, 10 December 2009, para. 19.

138 ECtHR, *Becker v. Austria*, No. 19844/08, 11 June 2015, para. 39.

The need to protect professional confidentiality can also justify imposing limitations.[139] Children are given explicit protection and it may be possible to exclude a whole class of proceedings because of the need to protect them.[140]

Example: In *Khrabrova v. Russia*,[141] the applicant was a teacher in Moscow until she was dismissed in February 2002, following a dispute with a pupil during a lesson. She pursued civil proceedings against the school, seeking compensation and reinstatement, and later complained to the ECtHR that the proceedings were unfair. Specifically, she complained about the domestic court's failure to hold a public hearing in the interests of the juveniles involved.

The ECtHR found vague the reasons given by the national court for deciding to hold hearings *in camera*. These suggested that a public hearing would adversely affect the education of an unspecified group of juveniles. The Court stated that domestic courts had to specify sufficient reasons to justify shielding the administration of justice from public scrutiny, a vital safeguard against arbitrariness. However, here this had not been properly done. The public hearing subsequently held before the appellate court did not remedy the violation because it did not have the requisite scope; specifically, the appellate court did not re-hear the witnesses. The Court found that this violated the right to a public hearing under Article 6 of the ECHR.

The right to a public hearing may be waived; waivers must be made of one's free will, in an unequivocal manner and not be contrary to an important public interest. For example, even where an accused does not appear at trial in person, there is no violation if the accused was informed of the date and place of the trial or was defended by a legal counsellor to whom s/he had given a mandate to do so.[142]

139 ECtHR, *Diennet v. France*, No. 18160/91, 26 September 1995, paras. 34–35.

140 ECtHR, *B. and P. v United Kingdom*, Nos. 36337/97 and 35974/97, 24 April 2001, paras. 37–38.

141 ECtHR, *Khrabrova v. Russia*, No. 18498/04, 2 October 2012, paras. 50–53.

142 ECtHR, *Håkansson and Sturesson v. Sweden*, No. 11855/85, 21 February 1990, para. 66; CJEU, C-399/11, *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013, para. 49.

2.4. Other paths to justice

Key points

- Access to justice mechanisms may include non-judicial bodies, such as national human rights institutions, equality bodies, data protection authorities or ombudsperson institutions.
- Administrative, non-judicial bodies may advance access to justice by providing quicker ways of obtaining remedies or by allowing collective redress. However, they must not override an individual's right of access to a court and should generally be subject to judicial supervision.
- Alternative dispute resolution (ADR) procedures, such as mediation and arbitration, provide alternatives to accessing justice via formal judicial routes.
- If the law compels parties to go to arbitration, the arbitration tribunal must comply with Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights.
- The EU has encouraged the use of ADR with legislation such as the EU Mediation Directive and a variety of consumer protection initiatives.

2.4.1. Non-judicial bodies

Many judicial systems face increasing workloads and access to courts can be expensive. A broader view of access to justice encompasses non-judicial bodies as well as courts.[143] This may include equality bodies, administrative and non-judicial institutions that deal with cases of discrimination, national human rights institutions (NHRIs), ombudsperson institutions, data protection authorities, labour inspectorates and specialised tribunals.[144] EU Member States established some of these bodies pursuant to specific EU legislative requirements – for example, equality bodies on racial or ethnic equality and gender equality

143 FRA (2012), *Bringing rights to life: The fundamental rights landscape of the European Union*, Luxembourg, Publications Office.

144 See UN, General Assembly (1993) Resolution A/RES/48/134 on national institutions for the promotion and protection of human rights, 20 December 1993 (*Paris Principles*), Annex.

were set up under the Racial Equality Directive,[145] and national data protection authorities under the Data Protection Directive.[146]

Quasi-judicial procedures brought before non-judicial bodies – often in a form of mediation (see Section 2.4.2 on alternative dispute resolution) – may provide faster, less formalistic and cheaper alternatives for claimants. However, the majority of non-judicial bodies do not have the power to issue binding decisions (exceptions include, for example, data protection authorities and some equality bodies), and their powers of compensation are generally limited.

The ECtHR has stated that a non-judicial body under domestic law may be considered to be a court if it quite clearly performs judicial functions and offers the procedural guarantees required by Article 6 of the ECHR, such as impartiality and independence (see Section 2.1.2).[147] If it does not, the non-judicial body must be subject to supervision by a judicial body that has full jurisdiction and complies with the requirements of Article 6.[148]

Administrative, non-judicial bodies may also advance access to justice by allowing collective redress or complaints. This permits complainants to join forces so that many individual claims relating to the same case can be combined into a single court action.[149] This may allow organisations, such as NGOs, to file complaints on behalf of individuals.

145 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180 (Racial Equality Directive).

146 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281 (Data Protection Directive).

147 ECtHR, *Oleksandr Volkov v. Ukraine*, No. 21722/11, 9 January 2013, paras. 88–91.

148 ECtHR, *Zumtobel v. Austria*, No. 12235/86, 21 September 1993, paras. 29–32.

149 European Commission (2013), Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ 2013 L 201. See also, European Parliament, Directorate General for Internal Policies (2011), *Overview of existing collective redress schemes in EU Member States*, Brussels, July 2011.

Promising practice

Improving access to justice in discrimination cases

In Italy, the equality body dealing with discrimination on grounds of race or ethnic origin – the National Office Against Racial Discrimination – established anti-discrimination offices and focal points in some locations in cooperation with local authorities and NGOs. In addition, equality counsellors, who address discrimination on the ground of sex, exist at national and regional levels; they are mandated to receive complaints, provide counselling and offer mediation services. They cooperate with labour inspectors who have investigative powers to establish the facts in discrimination cases. They also have legal standing in court in cases of collective impact when no individual victim can be identified.

Source: FRA (2012), Access to justice in cases of discrimination in the EU – Steps to further equality, p. 28.

2.4.2. Alternative dispute resolution

Alternative dispute resolution (ADR) refers to dispute resolution procedures – such as mediation and arbitration – that offer out-of-court solutions to disputes.[150] ADR procedures can improve the efficiency of justice by reducing the courts' workload, and by offering individuals an opportunity to resolve disputes in a cost-effective manner.[151] In addition to entailing lower costs, they can benefit individuals by reducing the duration and stress of proceedings. The history and use of ADR across Europe vary. Some of the non-judicial bodies mentioned in Section 2.4.1 frequently use ADR procedures.

150 For example, see European Commission (2011), Consultation Paper on the use of ADR as a means to resolve disputes related to commercial transactions and practices in the European Union, para. 6.

151 Council of Europe, CEPEJ (2014), *Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice"*, Chapter 6, mentioned in ECtHR, *Momčilović v. Croatia*, No. 11239/11, 26 March 2015, para. 33.

Promising practice

Using mediation in family procedures

Most countries consider it beneficial to settle disputes relating to family affairs through mediation rather than by going to court. In Croatia, it is mandatory for parents involved in divorce and custody disputes to try mediation. Psychologists from Centres for Social Welfare perform the mediation.

Mediation is sometimes combined with other functions. For example, in Estonia, a child support specialist assists parents with mediation during the first stages of a trial. In Germany, the child's legal counsel provides parental mediation assistance.

Source: FRA (2015), Child-friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States, p. 47.

Within the CoE, mediation in the context of civil proceedings has been defined as a dispute resolution process in which parties negotiate to reach an agreement with the assistance of a mediator.[152] In the context of criminal proceedings, mediation has been defined as a process in which an impartial mediator – with the consent of both parties – helps the victim and the offender to participate actively in resolving issues arising from a crime.[153] At minimum, arbitration involves a person who by virtue of an arbitration agreement is called upon to render a legally binding decision in a dispute submitted to him/her by the parties to the agreement.[154] It should be noted that non-enforcement of a final arbitration decision can constitute a violation of Article 6 (1) of the ECHR.[155]

152 Council of Europe, Committee of Ministers (2002), Recommendation Rec(2002)10 to member states on mediation in civil matters, 18 September 2002, principle 1. See also Council of Europe, Committee of Ministers (1998), Recommendation, Rec(98)1 on family mediation, 21 January 1998; Council of Europe, Committee of Ministers (2001), Recommendation Rec(2001)9 to member states on alternatives to litigation between administrative authorities and private parties, 5 September 2001; Council of Europe, CEPEJ (2007), *Analysis on assessment of the impact of Council of Europe recommendations concerning mediation*; Council of Europe, CEPEJ (2007), *Guidelines for a better implementation of the existing recommendation on alternatives to litigation between administrative authorities and private parties*.

153 Council of Europe, Committee of Ministers (1999), Recommendation Rec(99)19 to member states concerning mediation in penal matters, 15 September 1999.

154 Council of Europe, Additional Protocol to the Criminal Law Convention on Corruption, CETS No. 191, 2003, Art. 1. This has not been widely ratified. See also, UN, UN Commission on International Trade Law (UNCITRAL) (1985), UNCITRAL Model Law on International Commercial Arbitration, 11 December 1985 (as amended in 2006).

155 ECtHR, *Regent Company v. Ukraine*, No. 773/03, 3 April 2008, para. 60.

Example: In *Suda v. the Czech Republic*,[156] the applicant was a minority shareholder in a public limited company (C.). In November 2003, the general meeting of the company took a majority decision by which C. would be closed down without liquidation and its assets taken over by the main shareholder (E.). The redemption value of the shares held by the minority shareholders, including the applicant, was determined by contract. An arbitration clause in the contract provided that any re-examination of the redemption value would be a matter for arbitration and not ordinary court proceedings; the agreement to submit to arbitration was made between C. and E. The applicant pursued various court proceedings at national level, seeking to have the redemption value re-examined and invalidated, but these were unsuccessful.

The ECtHR held that the arrangement for dispute resolution was not in itself sufficiently unambiguous to constitute a waiver of the right to a tribunal, and that, if the parties were compelled to go to arbitration, the tribunal had to comply with Article 6. The Court found a violation of Article 6 (1) because the arbitration procedure did not fulfil two fundamental requirements: (i) the arbitration clause gave decision-making power to arbitrators on the list of a limited liability company, which was not an arbitration tribunal established by law; and (ii) the arbitration procedure did not allow for a public hearing and the applicant had not in any way waived this right.

Under EU law, mediation has been described as a structured process in which the parties to a dispute voluntarily attempt to reach a settlement with the assistance of a mediator.[157] The EU has adopted several instruments to encourage ADR. For example, the EU Mediation Directive endorses the use of mediation relating to cross-border disputes in certain civil and commercial matters.[158] The directive does not apply to revenue, customs or administrative matters, or to disputes involving the liability of the state; nor does it apply to areas of employment or family law where the parties themselves are not free to decide

156 ECtHR, *Suda v. the Czech Republic*, No. 1643/06, 28 October 2010.

157 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (Mediation Directive), OJ 2008 L 136, Art. 3. It does not apply to Denmark.

158 *Ibid*. Under Art. 2 (1), a "cross-border" dispute occurs when at least one of the parties is domiciled or habitually resident in a Member State different to the other party on one of the following dates: (i) when the parties agree to use mediation, a dispute having arisen; (ii) when a court invites or orders the parties to attempt mediation; or (iii) when the parties are obliged to use mediation under national law.

on rights and obligations under the applicable law, for example, matters of status. It does not oblige parties to mediate: its objective is to facilitate access to ADR and promote the amicable settlement of disputes through mediation.[159] The directive also aims to ensure a balanced relationship between mediation and judicial proceedings and confirms that the parties to a dispute are not to be prevented from exercising their right of access to judicial systems.[160]

The EU has also legislated on ADR in the field of consumer protection.[161] A directive and a regulation on ADR for consumer disputes require Members States to promote and establish systems to enable consumer disputes to be dealt with effectively and quickly.[162] The directive aims to ensure that authorities are designated at national level to maintain and monitor a list of ADR providers who meet the directive's requirements. These ADR providers must keep their websites up-to-date and offer services at no or nominal cost. Member States were required to transpose the directive by July 2015.

The regulation requires the establishment of an online, interactive portal (the ODR Platform) for contractual disputes to be resolved out of court via, for example, e-mediation. The regulation applies to consumers and to traders in domestic and cross-border disputes and to certain disputes brought against consumers by traders. Once EU consumers submit their disputes online, they are linked with national ADR providers who will help resolve them.[163] Member States must propose an online dispute resolution (ODR) contact to assist with disputes submitted through the ODR Platform. Online traders must inform customers of the ADR option and provide a link to the ODR Platform on their website. The mechanism will come into force in January 2016. Further e-justice initiatives are discussed in Section 8.5.

159 *Ibid.*, Art. 1. For a discussion of the directive's impact, see European Parliament (2014), *'Rebooting' the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU*, Brussels, European Union.

160 *Ibid.*, Art. 5 (2).

161 Art. 38 of the EU Charter of Fundamental Rights asserts that "Union policies shall ensure a high level of consumer protection".

162 See Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, OJ L 165 (Consumer ADR Directive), and Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, OJ L 165 (Consumer ODR Regulation).

163 See Consumer ODR Regulation.

The growing popularity of mediation as a potentially cost and time-effective mechanism has prompted some states to introduce mandatory mechanisms. The case below outlines how the CJEU ensured that these mandatory mechanisms comply with the principle of effective judicial protection.

Example: In *Rosalba Alassini v. Telecom Italia SpA,*[164] the CJEU considered four joined preliminary references from the Magistrates Court from Ischia concerning clauses under which an attempt to settle out-of-court is a mandatory condition for certain disputes to be admissible before national courts. The clauses were enacted when transposing Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services. The Magistrates Court asked the CJEU whether the principle of effective judicial protection precludes mandatory mediation.

The CJEU found that the principle of effective judicial protection did not preclude mandatory mediation as long as certain requirements are met: (i) the procedure must not result in a binding decision; (ii) it must not cause a substantial delay for purposes of bringing legal proceedings; (iii) the period for the time-barring of claims must be suspended for the duration of the settlement procedure; (iv) it must not give rise to costs (or only very low costs) for the parties; (v) electronic means cannot be the only means by which the settlement procedure may be accessed; and (vi) interim measures must be possible in exceptional cases.

ADR mechanisms are also available in the area of criminal law. A CoE recommendation provides guidance on the use of mediation in penal matters.[165] Before agreeing to mediation, the parties should be fully informed of their rights, the nature of the mediation process and the possible consequences of their decision.[166] Neither the victim nor the offender should be induced by unfair means to accept mediation[167] – for example, by way of coercion from the prosecutor or because of the absence of legal advice. However, mediation in

164 CJEU, Joined cases C-317/08 to C-320/08, *Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Giorgia Iacono v Telecom Italia SpA and Multiservice Srl v Telecom Italia SpA*, 18 March 2010, para. 67.

165 Council of Europe, Committee of Ministers (1999), Recommendation Rec(99)19 to member states concerning mediation in penal matters, 15 September 1999.

166 *Ibid.*, para. 10.

167 *Ibid.*, para. 11.

criminal cases is not always appropriate. For example, the Council of Europe's Convention on preventing and combating violence against women and domestic violence prohibits mandatory alternative conflict resolution, including mediation and conciliation, in this area.[168]

Under EU law, the Victims' Rights Directive sets out victims' right to safeguards in the context of restorative justice.[169] The rights of victims of crime are further discussed in Section 8.2.

168 Council of Europe, Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), CETS No. 210, 2011.

169 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L 315, Art. 12. See CJEU, Joined cases C-483/09 and C-1/10, *Criminal proceedings against Magatte Gueye and Valentin Salmerón Sánchez*, 15 September 2011, para. 74 and CJEU, C-205/09, *Criminal proceedings against Emil Eredics and Mária Vassné Sápi*, 21 October 2011, para. 40. See also UN, Division for the Advancement of Women in the Department of Economic and Social Affairs (DAW) (2009), *Handbook for Legislation on Violence against Women*, New York, United Nations.

3 Legal aid

EU	Issues covered	CoE
Legal aid in non-criminal proceedings		
Charter of Fundamental Rights, Article 47 (right to an effective remedy) CJEU, C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 2010 Legal Aid Directive (2002/8/EC) Regulation No. 604/2013, Article 27 (5) and (6)	Scope of application	ECHR, Article 6 (1) ECtHR, *Airey v. Ireland*, No. 6289/73, 1979 European Agreement on the Transmission of Applications for Legal Aid, CETS No. 92, 1977
	Financial and merits tests	ECtHR, *McVicar v. the United Kingdom*, No. 46311/99, 2002
Legal aid in criminal proceedings		
Charter of Fundamental Rights, Article 48 (2) (presumption of innocence and right to defence)	Scope of application	ECHR, Article 6 (3) (c)
	Financial test	ECtHR, *Tsonyo Tsonev v. Bulgaria (No. 2)*, No. 2376/03, 2010 ECtHR, *Twalib v. Greece*, No. 42/1997/826/1032, 1998
	Interests of justice test	ECtHR, *Zdravko Stanev v. Bulgaria*, No. 32238/04, 2012

Access to legal aid is an important part of the right to a fair trial under Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights. The right to legal aid ensures effective access to justice for those who have insufficient financial resources to cover the costs of court cases, such as court fees or costs of legal representation (the right to be advised, represented and defended is analysed in Chapter 4).

Under CoE and EU law, legal aid does not have to take a particular form; states are free to decide how to meet their legal obligations. As a result, legal aid systems often vary widely.[170] For example, legal aid may consist of free representation or assistance by a lawyer and/or dispensation from paying the costs of proceedings, including court fees.[171] These arrangements can exist alongside other complementary support schemes, such as *pro bono* defence, legal advice centres or legal expenses insurance – which may be state funded, run by the private sector, or administered by NGOs.[172] This chapter addresses legal aid in non-criminal proceedings (Section 3.1) and criminal proceedings (Section 3.2) separately because the applicable rights vary.

3.1. Legal aid in non-criminal proceedings

Key points

- Article 6 (1) of the ECHR and Article 47 of the EU Charter of Fundamental Rights guarantee the right to legal assistance in civil proceedings. This allows individuals to access justice irrespective of their financial means.
- Legal aid is generally subject to a financial means and merits test. States can decide whether it is in the interest of justice to provide legal aid, taking into account: the importance of the case to the individual; the complexity of the case; and the individual's capacity to represent him-/herself.
- Under CoE and EU law, granting legal aid to legal persons (e.g. companies) is not in principle impossible, but must be assessed in light of the relevant national rules and the situation of the legal person concerned.

170 ECtHR, *Airey v. Ireland*, No. 6289/73, 9 October 1979, para. 26.

171 CJEU, C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, para. 48.

172 FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, p. 47.

3.1.1. Scope of application

Under CoE and EU law, the right of access to a court (arising from the right to a fair hearing) should be effective for all individuals, regardless of their financial means. This requires states to take steps to ensure equal access to proceedings; for example, by setting up appropriate legal aid systems.[173] Legal aid can also facilitate the administration of justice because unrepresented litigants are frequently unaware of procedural rules and require considerable assistance from courts, which can cause delays.

Promising practice

Providing legal aid to vulnerable groups

To ensure access to free legal aid for Roma in Hungary, the Ministry of Justice and Law Enforcement has been operating the Roma Antidiscrimination Network Service (*Roma Anti-diszkriminációs Ügyfélszolgálati Hálózat*) since 2001. The lawyers participating in the network provide free legal aid (offering legal advice, drafting legal documents, initiating lawsuits and representing clients in court) in cases where their clients' rights were infringed because of their Roma origin. The ministry covers the financial resources required to operate the network (lawyers' fees) and the costs of initiating lawsuits.

Source: FRA (2011), Access to justice in Europe: an overview of challenges and opportunities, p. 50.

It is possible for an individual to have effective access to courts when appearing before a high court if the guidance provided by the procedural rules and court directions, together with some legal advice and assistance, is sufficient to provide them an effective opportunity to put forward their case.[174] What is required to ensure effective access to the courts depends on the facts of a particular case (see also Section 4.3 on the right to self-representation).

Under CoE law, there is no obligation to provide legal aid for all proceedings involving civil rights and obligations[175] (see Section 2.1 for the definition of this term). Failure to provide an applicant with the assistance of a lawyer

173 Council of Europe, Committee of Ministers (1978), Resolution 78(8) on legal aid and advice, 2 March 1978.

174 ECtHR, *A. v. the United Kingdom*, No. 35373/97, 17 December 2002, para. 97.

175 ECtHR, *Del Sol v. France*, No. 46800/99, 26 February 2002, para. 20.

may breach Article 6 of the ECHR where such assistance is indispensable for effective access to court, either because legal representation is compulsory (as is the case for various types of litigation), or because a case's applicable procedure is particularly complex.[176] Legal systems may establish selection procedures for determining whether legal aid will be granted in civil cases, but these may not function in an arbitrary or disproportionate manner, or impinge on the essence of the right to access court. For instance, refusing legal aid on the ground that an appeal did not, at the time of application, appear to be well-founded may in some circumstances impair the very essence of an applicant's right to a tribunal.[177]

Example: In *Airey v. Ireland*,[178] the applicant sought judicial separation from her husband but was unable to obtain a judicial order because she could not afford to retain a lawyer without legal aid.

The ECtHR confirmed that, although Article 6 (1) of the ECHR does not explicitly provide for legal aid in civil proceedings, states may be compelled to provide it when legal assistance is indispensable for securing effective access to a court. This does not apply to all cases concerning civil rights and obligations. Much depends on the particular circumstances of each case. In the present case, the relevant factors in favour of granting legal aid were: the complexity of the procedure and of the issues of law; the need to establish facts through expert evidence and the examination of witnesses; and that this was a marital dispute entailing emotional involvement. The Court found a violation of Article 6 of the ECHR.

Under CoE law, granting legal aid to legal persons (for example, companies) is not in principle impossible, but must be assessed in light of the relevant national rules and the situation of the company concerned. The ECtHR has noted that there is a lack of "consensus or even a consolidated tendency" among states on this issue.[179] A legal aid scheme available only to non-profit-making legal persons does not violate the right of access to justice if there is an ob-

176 ECtHR, *P., C. and S. v. The United Kingdom*, No. 56547/00, 16 October 2002, paras. 88-91.

177 ECtHR, *Aerts v. Belgium*, No. 25357/94, 30 July 1998. Following this decision, Belgium amended the law to restrict refusals to manifestly unfounded applications.

178 ECtHR, *Airey v. Ireland*, No. 6289/73, 9 October 1979, para. 26.

179 ECtHR, *Granos Organicos Nacionales S.A. v. Germany*, No. 19508/07, 22 March 2012, para. 47 and 53.

jective and reasonable justification for the restriction (for example, because profit-making companies are able to deduct the legal costs from their tax obligations).[180]

Also, under CoE law, the European Agreement on the Transmission of Applications for Legal Aid allows people who habitually reside in one State Party to apply for legal aid in civil, commercial or administrative matters in another State Party to the agreement.[181]

Under EU law, Article 47 of the EU Charter of Fundamental Rights provides a right to legal aid to those who lack sufficient resources so far as this is necessary to ensure effective access to justice. Article 47 applies to proceedings relating to all rights and freedoms arising from EU law. The Explanations to the Charter confirm that legal aid must be available "where the absence of such aid would make it impossible to ensure an effective remedy".[182] The Explanations to Article 52 (3) of the EU Charter of Fundamental Rights also confirm that Article 47 corresponds to Article 6 of the ECHR. This explicit connection means that the cases mentioned under CoE law are relevant in EU law (see Chapter 1).[183]

It is for national courts to ascertain whether particular conditions on granting legal aid constitute unfair restrictions of the right of access to a court.[184] Restrictions must not constitute "a disproportionate and intolerable interference" on the right itself (see also Chapter 6 on legitimate restrictions).[185]

180 ECtHR, *VP Diffusion Sarl v. France*, No. 14565/04, 26 August 2008.

181 Council of Europe, European Agreement on the Transmission of Applications for Legal Aid, CETS No. 92, 1977.

182 Explanations relating to the EU Charter of Fundamental Rights, OJ 2007 C303/17.

183 EU Charter of Fundamental Rights, Art. 52 (3). See also CJEU, C-619/10, *Trade Agency Ltd v. Seramico Investments Ltd*, 6 September 2012, para. 52.

184 CJEU, C-156/12, *GREP GmbH v. Freistaat Bayern*, 13 June 2012.

185 On restrictions on defence rights, see CJEU, C-418/11, *Texdata Software GmbH*, 26 September 2013, para. 84. See also EU Charter of Fundamental Rights, Art. 52 (1).

Example: In *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland,*[186] DEB, an energy providing company, intended to bring a claim against the German state for delaying the implementation of two directives, which it claimed led to financial losses.[187] It said it lacked the means to pay the court fees or the lawyer required by the applicable Code of Procedure because of these losses. Litigants were required to arrange legal representation, but legal aid for legal persons was only available in 'exceptional circumstances'. The German court referred the issue to the CJEU.

The CJEU considered the ECtHR case law. It noted that granting legal aid to legal persons was not in principle impossible, but it must be assessed in light of the applicable rules and the company's situation. In assessing requests for aid, national courts must consider: (i) the subject-matter of the litigation; (ii) whether the applicant had a reasonable prospect of success; (iii) the importance of what was at stake for the applicant; (iv) the complexity of the applicable law and procedure; (v) the applicant's capacity to represent himself effectively; and (vi) whether the costs of the proceedings might represent an insurmountable obstacle to accessing the courts. Regarding legal persons specifically, courts may take into account: (i) the form of the legal person in question and whether it is profit-making or non-profit-making; (ii) the financial capacity of the partners or shareholders; and (iii) the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings. Under the principle of effective judicial protection enshrined in Article 47 of the EU Charter of Fundamental Rights, it is not impossible for legal persons to receive legal aid.

Under EU law, specific secondary law creates standards for legal aid in cross-border civil cases.[188] For example, the Legal Aid Directive establishes the

186 CJEU, C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, paras. 52–54 and 62.

187 Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ 1998 L 204, and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ 2003 L 176.

188 See also Commission Decision 2005/630/EC of 26 August 2005 establishing a form for the transmission of legal aid applications under Council Directive 2003/8/ECs, OJ 2005 L 225 and Commission Decision 2004/844/EC of 9 November 2004 establishing a form for legal aid applications under Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (notified under document number C(2004) 4285), OJ 2004 L 365.

principle that persons who do not have sufficient resources to defend their rights in law are entitled to appropriate legal aid.[189] It outlines what services must be provided for legal aid to be considered appropriate: for example, access to pre-litigation advice, legal assistance and representation in court, and exemption from – or assistance with – the cost of proceedings, including costs connected with the cross-border nature of the case. EU law also contains specific provisions on legal assistance and legal aid in relation to asylum.[190] The principle of effective judicial protection requires Member States to ensure that the objectives of these EU instruments are met.

3.1.2. Financial and merit tests

In terms of the financial means test, the ECtHR has said that there will be no violation of Article 6 (1) if an applicant falls outside the legal aid scheme because his/her income exceeds the financial criteria, provided the essence of the right of access to a court is not impaired.[191]

States are not obliged to spend public funds to ensure total equality of arms between the assisted person and the opposing party, "as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary".[192]

189 Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ 2003 L 026.

190 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005 L 326 (Asylum Procedures Directive), Articles 10 and 15; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180 (Recast Procedures Directive), Articles 8, 12, 20 and 21; and Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ 2013 L 180/31, Art. 27 (5) and (6). See also FRA (2014*), Handbook on European law relating to asylum, borders and immigration*, Luxembourg, Publications Office, pp. 113-114.

191 ECtHR, *Glaser v. the United Kingdom*, No. 32346/96, 19 September 2000, para. 99. See also ECtHR, *Santambrogio v. Italy,* No. 61945/00, 21 September 2004, para. 58 (the applicant's family paid for representation).

192 ECtHR, *Steel and Morris v. the United Kingdom*, No. 68416/01, 15 February 2005, para. 62.

Refusing to provide legal aid on the merits – because of insufficient prospects of success, or because of a claim's frivolous or vexatious nature (for example, the claim is brought merely to cause annoyance) – may also be legitimate.[193] To avoid arbitrariness, a legal aid system should establish a fair mechanism for selecting cases likely to benefit.[194] It is for states to establish systems that comply with the ECHR.[195] Failing to make a formal decision on a legal aid request may violate Article 6 (1).[196]

Under CoE and EU law, whether the interests of justice require granting legal aid to an individual depends on factors such as:

- the importance of the case to the individual;
- the complexity of the case;
- the individual's capacity to represent him-/herself.

For example, the complexity of the procedures or legal or factual issues in a case may give rise to the need for legal aid. It may also be required if the absence of legal aid infringes "the very essence" of the applicants' right to access a court (see Section 4.1.2 on practical and effective legal assistance).[197] The ECtHR also takes into account statutory requirements for legal representation.[198]

The specific circumstances of each case are important. The key test is whether an individual "would be able to present his case properly and satisfactorily without the assistance of a lawyer".[199] For example, in cases concerning issues of particular importance to an individual (such as contact with their children), legal aid may be required, particularly if an individual is vulnerable (for example, has mental health problems).[200] Legal aid may also be obligatory in

193 ECtHR, *Staroszczyk v. Poland*, No. 59519/00, 22 March 2007, para. 129. See also ECtHR, *Steel and Morris v. the United Kingdom*, No. 68416/01, 15 February 2005, para. 62.

194 ECtHR, *Gnahoré v. France*, No. 40031/98, 19 September 2000, para. 41.

195 ECtHR, *Sialkowska v. Poland*, No. 8932/05, 22 March 2007, para. 107.

196 ECtHR, *A.B. v. Slovakia*, No. 41784/98, 4 March 2003, paras. 61-63.

197 ECtHR, *Miroslaw Orzechowski v. Poland*, No. 13526/07, 13 January 2009, para. 22.

198 ECtHR, *Airey v. Ireland*, No. 6289/73, 9 October 1979, para. 26.

199 ECtHR, *McVicar v. the United Kingdom*, No. 46311/99, 7 May 2002, para. 48.

200 ECtHR, *Nenov v. Bulgaria*, No. 33738/02, 16 July 2009, para. 52.

complex actions requiring ongoing representation by an experienced lawyer.[201] The existence of great disparities in the legal assistance available to parties (such as individuals taking on multi-national corporations) may also violate Article 6 of the ECHR.[202]

Example: In *McVicar v. the United Kingdom*,[203] the applicant published an article suggesting a well-known athlete used performance-enhancing drugs. The athlete brought a libel action. The applicant, who was not represented, lost the case and was ordered to pay the costs of the action. He complained to the ECtHR that the unavailability of legal aid violated his right of access to a court. He was a defendant, so the question of legal aid related to the fairness of proceedings.

The ECtHR decided that whether legal representation was required depended on the specific circumstances of the case, and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer. The principles applied to the defendant in this case were identical to those applied in *Airey*. The libel action was brought by a comparatively wealthy and famous individual before the High Court. The applicant was required to call witnesses and scrutinise evidence in a trial that lasted over two weeks. On the other hand, he was a well-educated and experienced journalist who would have been capable of formulating cogent arguments in court. In such circumstances, the Court found no violation of Article 6 (1) of the ECHR.

201 ECtHR, *Steel and Morris v. the United Kingdom*, No. 68416/01, 15 February 2005, para. 69.

202 *Ibid*.

203 ECtHR, *McVicar v. the United Kingdom*, No. 46311/99, 7 May 2002, paras. 48–53.

Promising practice

Offering online legal aid to secure access to justice

In Spain, the General Council of Spanish Bars successfully implemented a system allowing applicants to request, through a single online entry point, judicial aid for legal costs and the designation of a lawyer. This spares applicants from having to gather various documentation to support their applications and dramatically reduces the time it takes to process applications.

Source: 2014 Crystal Scales of Justice Prize organised jointly by the Council of Europe and the European Commission.

3.2. Legal aid in criminal proceedings

Key points

- The right to legal assistance in criminal proceedings is guaranteed under Article 6 (3) (c) of the ECHR and Article 48 (2) of the EU Charter of Fundamental Rights.
- Granting legal aid is subject to a financial means and merit test (interests of justice).
- Individuals have to show that they do not have sufficient means. There is no definition of 'sufficient means'. The accused or suspected person bears the burden of proving a lack of means.
- The 'interests of justice' test includes consideration of the seriousness of the offence and the severity of the potential sentence, the complexity of the case and the defendant's personal situation. Where liberty is at stake, the interests of justice call for legal representation.

3.2.1. Scope of application

Under CoE law, an explicit right to legal aid in criminal proceedings is set out in Article 6 (3) (c) of the ECHR. This provides that everyone charged with a criminal offence (see Section 2.1 for the meaning of criminal charge) has a right to free legal aid if they do not have 'sufficient means' to pay for legal assistance (the financial or means test), where the 'interests of justice' so require (the interests of justice test). The right of access to a lawyer in criminal proceedings

applies throughout the entire proceedings, from police questioning to the appeal (see Section 4.2.1 on the scope of the right to legal assistance).[204]

Article 6 (3) (c) of the ECHR also sets out the right to be defended by a lawyer of one's own choosing, which can be subjected to limitations if the interests of justice so require (see Section 4.2.3 on legal assistance of one's own choosing). This means that there is no absolute right to choose one's own court-appointed legal aid lawyer. An individual who requests a change of legal aid lawyer must present evidence that the lawyer failed to perform satisfactorily.[205] Acceptable limitations on the choice of lawyer can include requiring specialist lawyers for specialist proceedings.[206]

Under EU law, in addition to the rights protected under Article 47, Article 48 (2) of the EU Charter of Fundamental Rights guarantees respect for the rights of the defence of anyone who has been charged. The Explanations to the Charter confirm that Article 48 (2) has the same meaning as Article 6 (3) of the ECHR.[207] Thus, the ECtHR case law outlined below is relevant for purposes of Article 48. In terms of EU secondary legislation, the European Council has agreed to strengthen by legislation the procedural rights of suspects or accused persons in criminal proceedings.[208] This includes a *Proposal for a directive on provisional legal aid for suspects or accused persons deprived of liberty and for legal aid in European arrest warrant proceedings*.[209] This would oblige EU Member States to provide without delay provisional legal aid to persons who are deprived of liberty – and before questioning. The provisional aid would apply until a decision on eligibility for legal aid can be made. The Commission has also issued a Recommendation on the right to legal aid for suspects or accused persons.[210] This provides non-binding guidance on the financial and merits tests as well as on the quality and effectiveness of legal aid.

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204 ECtHR, *Salduz v. Turkey*, No. 36391/02, 27 November 2008.

205 ECtHR, *Lagerblom v. Sweden*, No. 26891/95, 14 January 2003, para. 60.

206 For example, ECtHR, *Meftah and Others v. France*, Nos. 32911/96, 35237/97 and 34595/97, 26 July 2002, para. 47.

207 Explanations relating to the EU Charter of Fundamental Rights, OJ 2007 C303/17.

208 The Stockholm Programme, OJ 2010 C 115.

209 See European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824 final, Brussels.

210 See European Comission, Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings, OJ 013 C 378.

3.2.2. Financial means test

The ECtHR has not provided a definition of 'sufficient means'. The particular circumstances of each case will be taken into account to determine whether a defendant's financial circumstances justify granting legal aid. The accused or suspected person bears the burden of proving insufficient means.[211] This does, however, not have to be proven beyond all doubt.[212] All the evidence must be considered, including evidence of the applicant's status (such as whether s/he has spent time in custody), information provided by the individual, and any evidence contradicting the applicant.[213]

Determining this question is a matter for national courts, which must assess the evidence in accordance with the requirements of Article 6 (1).[214]

Example: In *Tsonyo Tsonev v. Bulgaria (No. 2)*,[215] the applicant was convicted of inflicting bodily harm and breaking into someone's home. He was sentenced to 18 months' imprisonment. The applicant requested that he be appointed counsel for his appeal to the Supreme Court of Cassation, but this was refused without specific reasons. The applicant complained that this breached his fair trial rights.

The ECtHR noted that it was difficult to assess whether the applicant lacked sufficient means to pay for legal assistance. It held, however, that certain indications suggested that this was the case: first, counsel had been appointed for the applicant in the previous proceedings, and second, the applicant expressly asserted that he could not afford to retain counsel. The Court held that, given the absence of clear indications to the contrary, the applicant did lack sufficient means to pay for his legal representation. It concluded that this violated Article 6 (1) and (3) of the ECHR.

Example: In *Twalib v. Greece*,[216] the applicant had been in prison for three years and was represented by court-appointed counsel at trial and by a humanitari-

211 ECtHR, *Croissant v. Germany*, No. 13611/88, 25 September 1992, para. 37.

212 ECtHR, *Pakelli v. Germany*, No. 8398/78, 25 April 1983, para. 34

213 *Ibid*.

214 ECtHR, *R. D. v. Poland*, Nos. 29682/96 and 34612/97, 18 December 2001, para. 45.

215 ECtHR, *Tsonyo Tsonev v. Bulgaria (No. 2)*, No. 2376/03, 14 January 2010.

216 ECtHR, *Twalib v. Greece*, No. 42/1997/826/1032, 9 June 1998, para. 51.

an organisation on appeal. These factors amounted to 'strong indications' that he lacked the financial means to pay for legal assistance. The state's failure to provide him with legal aid in proceedings concerning his appeal to the Court of Cassation violated his rights guaranteed under Article 6 of the ECHR.

3.2.3. Interests of justice test

Determining whether the 'interests of justice' (merits) require the provision of legal aid involves taking three factors into account, namely:

- the seriousness of the offence and the severity of the potential sentence;
- the complexity of the case;
- the defendant's social and personal situation.[217]

All three factors should be considered, but they do not necessarily need to be added together; any one of the three can justify granting legal aid.

Example: In *Zdravko Stanev v. Bulgaria*,[218] the applicant was unemployed. He complained that he was refused legal aid in criminal proceedings for forging documents in a civil action. He was convicted of the offence and fined €250. He was also ordered to pay €8,000 in damages.

The ECtHR noted that the applicant was initially at risk of a prison sentence; although none was imposed, the damages award was significant in view of his financial situation. The applicant had a university degree, but no legal training. The proceedings were not of the highest level of complexity but involved issues regarding the rules on admissibility of evidence, the rules of procedure and the meaning of intent. Additionally, the criminal offence with which the applicant was charged involved the impugnment of a senior member of the judiciary and called into question the integrity of the judicial process in Bulgaria. A qualified lawyer would undoubtedly have been in a position to plead the case with greater clarity and to counter more effectively the arguments raised by the prosecution. The Court ultimately found a violation of Article 6 (3) (c) of the ECHR.

217 ECtHR, *Quaranta v. Switzerland*, No. 12744/87, 24 May 1991.

218 ECtHR, *Zdravko Stanev v. Bulgaria*, No. 32238/04, 6 November 2012, para. 40.

The accused or suspected person's personal circumstances are important. The interests of justice test indicates that free legal assistance may be required for persons considered vulnerable, such as children, persons with mental health problems and refugees.[219] Where "the proceedings were clearly fraught with consequences for the applicant" and the case is complex, legal aid should be granted.[220] Even where applicants are educated persons who can understand the proceedings, the important issue is whether they can actually defend themselves without a lawyer.[221] Applicants do not have to show that the absence of legal aid caused "actual damage" to their defence; they must only show that it appears "plausible in the particular circumstances" that a lawyer would be of assistance.[222]

Where an individual's liberty is at stake, the interests of justice in principle call for legal representation.[223] This obligation arises even if there is only a possibility of a custodial sentence.[224]

During the appellate stage of criminal proceedings, the following factors are important for the interests of justice test:

- the nature of the proceedings;
- the capacity of an unrepresented appellant to present a particular legal argument;
- the severity of the sentence imposed by the lower courts.

Where substantial issues of law arise in appeal hearings, free legal assistance has been required.[225] Once it becomes clear that an appeal raises an issue of complexity and importance, the applicant should be given legal aid in the

219 ECtHR, *Quaranta v. Switzerland*, No. 12744/87, 24 May 1991, paras. 32–36.

220 ECtHR, *Pham Hoang v. France*, No. 13191/87, 25 September 1992, paras. 40–41.

221 ECtHR, *Zdravko Stanev v. Bulgaria*, No. 32238/04, 6 November 2012, para. 40.

222 ECtHR, *Artico v. Italy,* No. 6694/74, 13 May 1980, paras. 34–5.

223 ECtHR, *Benham v. the United Kingdom*, No. 19380/92, 10 June 1996, para. 61.

224 See, for example, ECtHR, *Quaranta v. Switzerland*, No. 12744/87, 24 May 1991, para. 33; ECtHR, *Perks and others v. the United Kingdom*, Nos. 25277/94, 25279/94, 25280/94, 25282/94, 25285/94, 28048/95, 28192/95 and 28456/95, 12 October 1999.

225 ECtHR, *Pakelli v. Germany*, No. 8398/78, 25 April 1983, paras. 36–38.

interests of justice.[226] The ECtHR has stated, however, that the interests of justice do not require the automatic granting of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after receiving a fair trial at first instance in accordance with Article 6 of the ECHR.[227]

Finally, it should be noted that the mere provision of legal assistance does not mean that it will be effective. For example, an appointed lawyer may become ill or fail to perform his/her duties.[228] The state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. However, a legal aid lawyer's manifest failure to mount a practical and effective defence may violate Article 6.[229] This is further considered in Chapter 4, which covers the right to be advised, defended and represented.

226 ECtHR, *Granger v. the United Kingdom*, No. 11932/86, 28 March 1990, para. 47.

227 ECtHR, *Monnell and Morris v. the United Kingdom*, Nos. 9562/81 and 9818/82, 2 March 1987, para. 67.

228 ECtHR, *Artico v. Italy*, No. 6694/74, 13 May 1980.

229 ECtHR, *Czekalla v. Portugal*, No. 38830/97, 10 October 2002, paras. 63–66.

4

Right to be advised, defended and represented

EU	Issues covered	CoE
Right to be advised, defended and represented in non-criminal proceedings		
Charter of Fundamental Rights, Article 47 (right to an effective remedy) and Article 48 (2) (presumption of innocence and right of defence)	Scope of application	ECHR, Article 6 (1) and Article 6 (3) (b) and (c)
	'Practical and effective' access to the court	ECtHR, *Bertuzzi v. France*, No. 36378/97, 2003 ECtHR, *Anghel v. Italy*, No. 5968/09, 2013
Right to be advised, defended and represented in criminal proceedings		
Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings	Scope of application	ECtHR, *Salduz v. Turkey*, No. 36391/02, 2008
Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, Articles 3 (3) (b)	Quality of legal assistance	ECtHR, *Aras v. Turkey (No. 2)*, No. 15065/07, 2014
	Legal assistance of one's own choosing	ECtHR, *Lagerblom v. Sweden*, No. 26891/95, 2003
Charter of Fundamental Rights, Article 48 (2) Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, Articles 3 (1), 3 (3) (a) and 4 Directive 2012/13/EU on the right to information in criminal proceedings Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Article 2 (2)	Adequate time and facilities to prepare one's defence	ECHR, Article 6 (3) (b) ECtHR, *Lanz v. Austria*, No. 24430/94, 2002

EU	Issues covered	CoE
Directive 2013/48/EU on the right of access to a lawyer, Article 9	Waiver	ECtHR, *Pishchalnikov v. Russia*, No. 7025/04, 2009
Right to self-representation		
	Scope of application	ECHR, Article 6 (3) (c) ECtHR, *Galstyan v. Armenia*, No. 26986/03, 2007

This chapter summarises **CoE and EU law** on the right to be advised, defended and represented in non-criminal proceedings (Section 4.1) and criminal proceedings (Section 4.2).[230] The scope of the right is considered together with the requirement for legal assistance to be effective. In relation to criminal proceedings, additional and associated rights – such as the right to legal assistance of one's own choosing (Section 4.2.3) and the right to have adequate time and facilities to prepare one's defence (Section 4.2.4) – are also explored. This chapter also addresses circumstances in which the right to legal assistance may be waived (Section 4.2.5) and the scope of the right to self-representation (Section 4.3).

4.1. Right to be advised, defended and represented in non-criminal proceedings

Key points

- Article 6 of the ECHR explicitly guarantees the right to be advised, defended and represented in criminal proceedings but not in non-criminal proceedings. Article 47 of the EU Charter of Fundamental Rights explicitly provides for this right for situations in which Member States are implementing (or derogating from) EU law.
- The right to be advised, defended and represented in non-criminal proceedings is not absolute; reasonable restrictions may be placed thereon. Whether providing legal representation is necessary in non-criminal proceedings depends on the specific circumstances of each case – particularly the nature of the case and the applicant's background, experience and level of emotional involvement.

230 On legal assistance in asylum and return procedures, see FRA (2014), *Handbook on European law relating to asylum, borders and immigration*, pp. 113-114. On children's right to a lawyer in criminal justice and alternative (non-judicial) proceedings, see FRA (2015), *Handbook of European law relating to the rights of the child*, Luxembourg, Publications Office, pp. 195–218.

4.1.1. Scope of application

Promising practice

Offering a variety of forms of legal advice

Wikivorce provides free advice and support to over 50,000 people a year, which means it helps one in three divorces in the United Kingdom. It is the largest online divorce support community in the world, with over 100,000 registered members. It is an award-winning social enterprise that is volunteer-run, government-sponsored and charity-funded. It offers various forms of legal services, including: a discussion forum; free guides to divorce, mediation, finances, child contact and residence; a free DIY divorce guide; free expert advice via a telephone helpline that is open seven days a week; and chat rooms for instant support.

See www.wikivorce.com/divorce, mentioned in Smith, R. (2014), Digital delivery of legal services to people on low incomes, The Legal Education Foundation.

The right to be advised, defended and represented helps individuals have a fair trial and enforce their rights. The right to a fair trial in non-criminal proceedings includes the right of access to a court (see Section 2.1.1). Individuals may require – and hence the state may be obliged to provide – legal representation or assistance to ensure that they can access courts and have fair trials.[231]

Under CoE law, in disputes relating to 'civil rights or obligations' (defined in Section 2.1), these requirements arise under Article 6 (1) of the ECHR.[232] They may arise at any point in proceedings to which Article 6 applies – from the institution of proceedings to the execution of judgment. Although Article 6 does not guarantee a right of appeal, it applies to appellate proceedings where they exist.[233] This means that the right to legal assistance may also apply to appellate proceedings.

Under EU law, the right to be advised, defended and represented in non-criminal proceedings is specifically set out in Article 47 of the EU Charter of

231 ECtHR, *Airey v. Ireland*, No. 6289/73, 9 October 1979, para. 26.

232 ECtHR, *Ringeisen v. Austria*, No. 2614/65, 16 July 1971, para. 94.

233 ECtHR, *T. v. the United Kingdom*, No. 24724/94, 16 December 1999, and *V. v. the United Kingdom*, No. 24888/94, 16 December 1999.

Fundamental Rights. The right is also acknowledged as a general principle of EU law in CJEU case law.[234] For further discussion of the connection between Article 6 of the ECHR and Article 47 of the Charter, see the Figure in Chapter 1.

Under CoE law and EU law, the right is not absolute, and reasonable restrictions may be placed on it (see Chapter 6).

4.1.2. Practical and effective legal assistance

Under CoE law, Article 6 (1) may compel states to provide the assistance of a lawyer to secure effective access to court. In this way, legal assistance and legal aid are closely connected in the ECtHR's case law.[235] The question of whether Article 6 requires providing legal representation in non-criminal proceedings depends on the specific circumstances of each case.[236] In particular, the Court will consider whether an individual would be able to present his/her case properly and satisfactorily without the assistance of a lawyer.[237] The nature of the case, as well as the applicant's background, experience and level of emotional involvement, are significant issues for the Court to consider when determining questions of legal assistance.[238]

Example: In *Bertuzzi v. France*,[239] the applicant was granted legal aid to bring an action for damages against a lawyer. However, all three lawyers assigned to his case sought to withdraw, owing to personal links with the lawyer the applicant wished to sue.

The ECtHR held that the court that permitted the applicant to represent himself in the proceedings against the legal practitioner did not afford him access to a court under conditions that would secure his effective enjoyment of his rights, in breach of Article 6 (1) of the ECHR.

234 CJEU, C-305/05, *Ordre des barreaux francophones et germanophone and others v. Conseil des ministres*, 26 June 2007, para. 31.

235 ECtHR, *Airey v. Ireland*, No. 6289/73, 9 October 1979, para. 26.

236 ECtHR, *Steel and Morris v. the United Kingdom*, No. 68416/01, 15 February 2005, para. 61.

237 ECtHR, *McVicar v. the United Kingdom*, No. 46311/99, 7 May 2002, para. 48.

238 *Ibid.*, paras. 49-52.

239 ECtHR, *Bertuzzi v. France*, No. 36378/97, 13 February 2003, para. 31.

States must be diligent in securing the "genuine and effective" enjoyment of Article 6 rights.[240]

Example: In *Anghel v. Italy*,[241] pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, the applicant asked the Romanian Minister of Justice to help him secure the return of his son, who had been taken to Italy by his mother. As a result, a prosecutor initiated return proceedings in an Italian court, which concluded that the child was not wrongfully removed. The applicant sought to appeal the order but, because he was repeatedly given incomplete or misleading information about the appellate procedure, did not do so within the prescribed time limit.

The ECtHR held unanimously that there was a breach of Article 6. The Italian authorities' delay in providing relevant and correct guidance, coupled with a lack of practical and effective representation, impaired the very essence of the applicant's right of access to court.

Under EU law, the CJEU considered the right to choose a lawyer in the context of the directive relating to legal expenses insurance without commenting on fundamental rights, and it has not discussed the scope of Article 47 on this issue.[242] However, before the EU Charter of Fundamental Rights was adopted, the CJEU established that the right to legal representation and the privileged nature of correspondence between lawyers and clients are a fundamental part of the EU's legal order and must be respected from the preliminary-inquiry stage.[243] Further, as noted, the ECtHR's case law is relevant to the interpretation of Article 47's scope (see the Figure in Chapter 1).

240 ECtHR, *Staroszczyk v. Poland*, No. 59519/00, 22 March 2007, para. 128.

241 ECtHR, *Anghel v. Italy*, No. 5968/09, 25 June 2013, para. 64.

242 See CJEU, C-442/12, *Jan Sneller v. DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV*, 7 November 2013, concerning Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions, OJ 1987 L 185, Art. 4 (1).

243 CJEU, Joined cases C-46/87 and C-227/88, *Hoechst AG v. Commission of the European Communities*, 21 September 1989, para. 15.

4.2. Right to be advised, defended and represented in criminal proceedings

Key points

- Article 6 (3) (c) of the ECHR and Article 48 (2) of the EU Charter of Fundamental Rights explicitly guarantee the right to legal assistance in criminal matters.
- Article 6 (3) (b) of the ECHR sets out the right to adequate time and facilities to prepare one's defence. This is closely linked to Article 6 (3) (c) because adequate time and facilities are required to make effective the right to legal assistance.
- The right to legal assistance applies to the entire proceedings, from the police investigation to the conclusion of the appeal. Access to a lawyer in the early stages of proceedings is particularly important.
- The right may be subject to restrictions, provided that the restrictions do not undermine the essence of the right.
- The right to legal assistance requires the provision of effective representation and not just the mere presence of a lawyer.
- Waiver of the right must: (i) be established in an unequivocal manner; (ii) be attended by minimum safeguards commensurate to its importance; (iii) be voluntary and (iv) constitute a knowing and intelligent relinquishment of a right. It must also be shown that the defendant could reasonably have foreseen the consequences of his/her conduct.

4.2.1. Scope of application

Under CoE law, Article 6 (3) (c) of the ECHR provides that everyone who is charged with a criminal offence has the right to "defend himself in person or through legal assistance of his own choosing" (see Section 2.1 for the definition of criminal charge). Thus, a person charged with a criminal offence has the choice between defending himself/herself or being legally represented. The right to self-representation can, however, be limited in the interests of justice (see Section 4.3). The right to legal assistance is also linked to the right to legal aid (see Section 3.2.1 on legal aid in criminal proceedings) and the right, under Article 6 (3) (b) of the ECHR, to have adequate time and facilities to prepare one's defence. Put simply, legal assistance cannot be effective if a defendant lacks the time and facilities to take advice and prepare his/her case properly (see Section 4.2.4).[244]

244 ECtHR, *Goddi v. Italy*, No. 8966/80, 9 April 1984, para. 31.

States have discretion to choose how to secure the right to legal assistance in their judicial systems.[245] Legal assistance can take many forms – for example, advice during questioning, representation in court, and preparation of appeals – but the right applies to the whole proceeding.[246] The right to a lawyer at the early stages of criminal proceedings is particularly important because adverse inferences can be drawn from an accused or suspected person's silence.[247] Access to a lawyer in the early stages also includes the right to consult privately with the lawyer before any questioning takes place.[248]

Example: In *Salduz v. Turkey*,[249] the applicant was convicted of participating in an unauthorised demonstration in support of an illegal organisation, namely the PKK (Workers' Party of Kurdistan). He did not have access to a lawyer and made statements admitting guilt during interrogation in police custody; he later repudiated the statements. The domestic court relied on the initial statements when convicting him.

The ECtHR confirmed that, for the right to a fair trial to remain "practical and effective", access to a lawyer had to be provided from the first police interrogation. The court noted that suspects are particularly vulnerable at the investigation stage and that evidence gathered may determine the outcome of their case. Early access to a lawyer protects the privilege against self-incrimination and is a fundamental safeguard against ill-treatment. Any exception to this right must be clearly circumscribed and time-limited. Even where compelling reasons arise, restrictions must not unduly prejudice the rights of the accused. In the applicant's case, the absence of a lawyer while he was in police custody irretrievably affected his defence rights, in breach of Article 6 (3) (c) in conjunction with Article 6 (1).

Access to a lawyer has to be effective and practical. For instance, individuals in police custody have to be formally acquainted with their defence rights, including their right to free legal assistance subject to certain conditions, but the police also has to provide them with practical means of contacting and

245 ECtHR, *Quaranta v. Switzerland*, No. 12744/87, 24 May 1991, para. 30.

246 ECtHR, *Salduz v. Turkey*, No. 36391/02, 27 November 2008; see also ECtHR, *Yevgeniy Petrenko v. Ukraine*, No. 55749/08, 29 January 2015, para. 89.

247 ECtHR, *John Murray v. the United Kingdom*, No. 18731/91, 8 February 1996, para. 66.

248 ECtHR, *A.T. v. Luxembourg*, No. 30460/13, 9 April 2015, para. 86.

249 ECtHR, *Salduz v. Turkey*, No. 36391/02, 27 November 2008, paras. 54–62.

communicating with their defence counsel (see also Section 4.2.4). Where laws systematically prevent persons charged with a criminal offence from accessing legal assistance in police custody, Article 6 is violated, even when persons charged with a criminal offence remain silent.[250] The lawfulness of restrictions on the right to legal assistance during the initial stages of police interrogation should be considered in light of their overall impact on the right to a fair hearing.[251]

The right to speak to a lawyer in confidence may also be restricted, but restrictions require substantial justification.[252] This is a particularly important part of the right to legal assistance – without the ability to confer and receive confidential instructions, the right loses much of its usefulness.[253] The ECtHR has consistently held that "weighty reasons" are required to override this right; for example, surveillance of an applicant's contacts with his/her lawyer may be justified where the applicant is suspected of being a gang member and this is necessary to catch the other gang members.[254]

Example: In *Lanz v. Austria*,[255] the applicant was arrested on suspicion of fraud and provisionally detained. His contact with his lawyer during detention on remand was under surveillance because of the risk that the applicant would influence witnesses or remove documents not yet seized. He complained that this breached his defence rights.

The ECtHR found a breach of Article 6 (3) (b) and (c) of the ECHR. The right to communicate with defence counsel out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society. If a lawyer is unable to confer with a client, the lawyer's assistance loses much of its usefulness and becomes ineffective. Surveillance by the investigating judge was a serious interference with the accused's defence rights and very weighty reasons were required for its justification.

250 ECtHR, *Dayanan v. Turkey*, No. 7377/03, 13 October 2009, para. 33.

251 ECtHR, *Pishchalnikov v. Russia*, 24 September 2009, para. 67.

252 ECtHR, *Sakhnovskiy v. Russia*, No. 21272/03, 2 November 2010, para. 97

253 ECtHR, *S. v. Switzerland*, Nos. 12629/87 and 13965/88, 28 November 1991, para. 48. See also ECtHR, *Brennan v. the United Kingdom*, No. 39846/98, 16 October 2001, paras. 58–63.

254 ECtHR, *George Kempers v. Austria*, No. 21842/93. Commission report adopted on 14 February 1998.

255 ECtHR, *Lanz v. Austria*, No. 24430/94, 31 January 2002, paras. 50–52.

Under EU law, the right to legal assistance in criminal proceedings is set out in Article 48 (2) of the EU Charter of Fundamental Rights. This guarantees respect for the defence rights of anyone who has been charged. Just like under CoE law, the right is not absolute under EU law. It has, however, been recognised as one of the fundamental elements of a fair trial;[256] appointed lawyers must be given adequate time and facilities to prepare their clients' defence (see Section 4.2.4).

Example: In *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres*,[257] the CJEU noted that lawyers could not satisfactorily carry out their task of advising, defending and representing their clients if they were obliged to cooperate with authorities by passing them information obtained in the course of related legal consultations.

The right to legal assistance in criminal proceedings is also embedded in EU secondary law: the Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings,[258] to which the ECtHR has also referred.[259] Its objective is to lay down minimum rules concerning the rights of suspects or accused persons in criminal and European arrest warrant proceedings. The directive applies to suspects or accused persons in criminal proceedings from the "time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence" until the "conclusion of the proceedings" (that is, the final determination of the offence, including sentencing and appeal).[260] The directive also applies to individuals who are not suspects but become suspects in the course of an interview.[261] However, different standards of protection apply to individuals who have not been deprived of their liberty; although they are free to contact, consult or be

256 CJEU, C-7/98, *Dieter Krombach v. André Bamberski*, 28 March 2000, para. 39.

257 CJEU, C-305/05, *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres*, 26 June 2007, para. 32.

258 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 20143 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294/1. The United Kingdom and Ireland have not opted into this directive, and it does not apply to Denmark.

259 ECtHR, *A.T. v. Luxembourg*, No. 30460/13, 15 April 2015, para. 38.

260 Directive 2013/48/EU, Art. 2 (1).

261 *Ibid.*, Art. 2 (3).

assisted by a lawyer through their own arrangements, Member States are not obliged "to take active steps" to ensure that they are assisted by a lawyer.[262] The directive also provides protection within European arrest warrant proceedings.[263] It effectively excludes "minor offences" from its protection.[264]

Under EU and CoE law, the right to access legal assistance is particularly important for vulnerable suspects or accused persons, such as persons with disabilities, migrants and children.[265] States must take additional steps to promote their ability to understand and effectively participate in proceedings so that they can – if necessary with the assistance of an interpreter, lawyer, social worker or friend – understand the "general thrust" of what is said.[266] They should also be able to explain their version of events to their lawyers. States must reduce as far as possible feelings of intimidation and ensure that children have a broad understanding of the nature of the investigation and what is at stake. They must ensure that children and other vulnerable persons are informed of their right to legal assistance (see also Section 8.1 on persons with disabilities).[267] In court, defendants should be able to follow what is said by the prosecution witnesses and be able to point out any statements with which they disagree.[268]

An **EU** draft directive on procedural safeguards for children accused or suspected of crimes proposes mandatory access to a lawyer for children who are suspected or accused in criminal proceedings.[269] The European Commission has also issued a *Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings*, which recommends that

262 Directive 2013/48/EU, Recital 27.

263 *Ibid.*, Art. 10.

264 *Ibid.*, Art. 2 (4).

265 See FRA (2015), *Child friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States*. See also FRA (2015), *Handbook on European law relating to the rights of the child*, pp. 195-218.

266 ECtHR, *S.C. v. the United Kingdom*, No. 60958/00, 15 June 2004, para. 29

267 ECtHR, *Panovits v. Cyprus*, No. 4268/04, 11 December 2008, para. 67. On persons with disabilities, see also ECHR, Art. 5 (4), and ECtHR, *Megyeri v. Germany,* No.13770/88, 12 May 1992, para. 27.

268 ECtHR, *S.C. v. the United Kingdom*, No. 60958/00, 15 June 2004, para. 29.

269 Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822/2, Art. 6.

a suspect or an accused person who cannot understand proceedings should not be able to waive his/her right to a lawyer (see Section 4.2.5 on waiver). [270]

4.2.2. Quality of legal assistance

The right to legal assistance is a right to effective assistance and representation.[271] The presence of a lawyer who has no opportunity to intervene to ensure respect for the accused or suspected person's rights is of no benefit to the accused or suspected person.[272]

Example: In *Aras v. Turkey (No. 2)*,[273] the applicant was arrested on suspicion of aggravated fraud. He was questioned without a lawyer by the police and made statements in connection with the offence. He was then brought before the public prosecutor where, without a lawyer present, the applicant repeated his police statement. When the applicant was brought before the investigating judge, the judge allowed the applicant's lawyer to enter the hearing room but he was not allowed to take the floor or advise the applicant.

The ECtHR stated that the "mere presence" of the lawyer was not sufficient to make effective the right under Article 6 (3) (c). The applicant should have had access to a lawyer from the first questioning. The applicant's lawyer's passive presence in the hearing room could not be considered to have been sufficient by ECHR standards.

Under CoE law, how to conduct the defence is essentially a matter between the accused or suspected person and his/her lawyer, but if relevant authorities are alerted to a "manifest shortcoming" on the part of the lawyer, they should act.[274] This obligation arises only where the failure to provide effective representation was "manifest or sufficiently brought to [the state's] attention".[275] For example, when an appeal is deemed inadmissible due to

270 European Commission (2013), Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ 2013 C378.

271 ECtHR, *Imbrioscia v. Switzerland*, No. 13972/88, 24 November 1993, para. 43.

272 ECtHR, *Aras v. Turkey (No. 2)*, No. 15065/07, 18 November 2014, para. 40.

273 *Ibid*.

274 ECtHR, *Daud v. Portugal*, No. 22600/93, 21 April 1998, para. 42.

275 ECtHR, *Imbrioscia v. Switzerland*, No. 13972/88, 24 November 1993, para. 41.

a lawyer's omissions, this may violate the right to a practical and effective defence.[276] Only shortcomings imputable to state authorities can give rise to a violation of Article 6 (3) (c).[277] For example, state liability may arise where a state is aware that a lawyer has failed to act for the accused.[278] However, even serious shortcomings in the fairness of proceedings may not give rise to a violation if the applicant fails to raise the issue on appeal.[279]

Under EU law, the Directive on the right of access to a lawyer confirms that a suspect or an accused person have the right for his/her lawyer to "be present and participate effectively".[280] The lawyer's participation must be "in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned".

4.2.3. Legal assistance of one's own choosing

Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to a lawyer of one's own choosing is not absolute. It is necessarily subject to regulation where free legal aid is concerned because the state controls the criteria and financing for legal assistance (see also Chapter 3 on legal aid).[281] The right may also be subject to restrictions by way of professional regulation; for example, different qualifications may be required for different levels of jurisdiction.

Example: In *Lagerblom v. Sweden*,[282] the applicant, who was from Finland, requested a replacement for his legal aid lawyer. He wanted a lawyer who also spoke Finnish. The domestic courts rejected his request. He argued that this was a breach of Article 6 (3) (c) of the ECHR.

The ECtHR noted that Article 6 (3) (c) entitles an accused to be defended by counsel "of his own choosing" but that the right cannot be considered

276 ECtHR, *Czekalla v. Portugal*, No. 38830/97, 10 October 2002, paras. 63-65; ECtHR, *Vamvakas v. Greece (no.2)*, No. 2870/11, 9 April 2015, paras. 39–43.

277 ECtHR, *Tripodi v. Italy*, No. 13743/88, 22 February 1994, para. 30.

278 ECtHR, *Artico v. Italy*, No. 6694/74, 13 May 1980, para. 33.

279 ECtHR, *Twalib v. Greece*, No. 24294/94, 9 June 1998.

280 Directive 2013/48/EU, Art. 3 (3) (b).

281 ECtHR, *Croissant v. Germany*, No. 13611/88, 25 September 1992, para. 29.

282 ECtHR, *Lagerblom v. Sweden*, No. 26891/95, 14 January 2003.

absolute. When appointing defence counsel, courts must have regard to the accused's wishes, but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice. The applicant had sufficient proficiency in Swedish to communicate with his lawyer and was able to participate effectively in his trial. The courts were entitled to refuse him the lawyer of his choice. There was no violation of Article 6 of the ECHR.

Appointing professional lawyers rather than lay advocates may serve the interests of justice when serious and complex charges exist.[283] Additionally, the special nature of proceedings may justify using specialist lawyers.[284]

4.2.4. Adequate time and facilities to prepare one's defence

Under CoE law and EU law, the accused or suspected person is entitled to adequate time and facilities to prepare his/her defence. This is because a lawyer's ability to provide effective legal assistance may be undermined by the circumstances in which s/he can meet or communicate with a client. This right is set out in Article 6 (3) (b) of the ECHR and included in the rights of the defence under Article 48 (2) of the EU Charter of Fundamental Rights.

Under CoE law, the right to effective assistance implies access to the file.[285] The file includes all documents useful for determining the appropriate legal characterisation.

Whether the time and facilities are adequate is assessed in light of the circumstances of each particular case.[286] A balance must be achieved between ensuring that proceedings are conducted within a reasonable time (see Chapter 7 on the length of proceedings) and allowing sufficient time to conduct and prepare one's defence. The question to be addressed is whether the overall effect of any difficulties contravened the right to a fair trial.[287] For example,

283 ECtHR, *Mayzit v. Russia*, No. 63378/00, 20 January 2005, paras. 70–71.

284 ECtHR, *Meftah and Others v. France*, Nos. 32911/96, 35237/97 and 34595/97, 26 July 2002, para. 47.

285 ECtHR, *Dayanan v. Turkey*, No. 7377/03, 13 October 2009.

286 ECtHR, *Iglin v. Ukraine*, No. 39908/05, 12 January 2012, para. 65.

287 ECtHR, *Öcalan v. Turkey*, No. 46221/99, 12 May 2005, para. 148.

the absence of any time for consultation between the person charged with a criminal offence and the lawyer may amount to a violation of Article 6 (3) (b) because a person charged with a criminal offence cannot be properly assisted without this.[288]

Under EU law, several directives impose specific obligations on EU Member States (see Section 2.3.1 on the right to a fair hearing).[289] For example, Article 3 (1) of the Directive on the right of access to a lawyer requires that access to a lawyer is provided in such time and manner so as to allow the persons concerned to exercise their rights of defence practically and effectively. Article 3 (3) gives suspects or accused persons the right to meet in private and communicate with the lawyer representing them. Article 3 (4) requires EU Member States to make available general information to facilitate the obtaining of a lawyer by suspects or accused persons.

Additionally, the Directive on the right to information in criminal proceedings imposes obligations to inform suspects and accused persons on their rights in criminal proceedings, including, for example, their right to access case materials to prepare their defence.[290]

Finally, Article 2 (2) of the Directive on the right to interpretation and translation in criminal proceedings requires interpretation to be available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural application.[291]

288 ECtHR, *Campbell and Fell v. the United Kingdom*, Nos. 7819/77 and 7878/77, 28 June 1984, para. 99.

289 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 20143 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294/1. The United Kingdom and Ireland have not opted into this directive, and it does not apply to Denmark.

290 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L142.

291 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280.

4.2.5. Waiver

The right to legal assistance is of such fundamental importance that the accused or suspected person may only waive it in limited circumstances.[292] The ECtHR has strictly restricted waiver and has emphasised the importance of providing safeguards.

Example: In *Pishchalnikov v. Russia*,[293] the applicant was arrested on suspicion of aggravated robbery. He was interrogated without a lawyer and confessed to having taken part in criminal activities. During subsequent procedures, he refused legal assistance. He was then assigned a legal aid counsel. When interrogated in the lawyer's presence, he retracted his statements. He was convicted of various offences on the basis of the statements made on his arrest.

The ECtHR noted that an accused who has no lawyer has less chance of being informed of his/her rights; consequently, there is less chance that these rights will be respected. However, persons can waive fair trial guarantees of their own free will, either expressly or tacitly. For safeguards to be effective, a waiver must: (i) be established in an unequivocal manner; (ii) be attended by minimum safeguards commensurate to its importance; (iii) be voluntary; (iv) constitute a knowing and intelligent relinquishment of a right; and (v) if implicit from the accused's conduct, it must be shown that the accused could reasonably have foreseen the consequences of his/her conduct.

In this case, the Court considered it unlikely that the applicant could reasonably have appreciated the consequences of being questioned without legal assistance. It found a violation of Article 6 of the ECHR because there had been no valid waiver of the right.

Inferring a waiver from a suspect or accused person's refusal to instruct a lawyer is inappropriate.[294] Additionally, a valid waiver cannot be implied when a person charged with a criminal offence responds to investigators' questions after being

292 ECtHR, *A.T. v. Luxembourg*, No.30460/13, 9 April 2015, para.59. This case involved the directive on the right to access a lawyer.

293 ECtHR, *Pishchalnikov v. Russia*, No. 7025/04, 24 September 2009, paras. 77–78.

294 ECtHR, *Sakhnovskiy v. Russia*, No. 21272/03, 2 November 2010, paras. 89–93.

reminded of the right to silence.[295] Reasonable steps should be taken to ensure that the accused or suspected person is fully aware of his or her rights of defence and can appreciate, as far as possible in the particular situation, the consequence of his or her waiver.[296] It may also violate Article 6 (3) (c) if a person charged with a criminal offence could not, without the assistance of an interpreter, reasonably appreciate the consequences of being questioned without a lawyer.[297] States need to take additional steps to protect the rights of vulnerable suspects or accused persons, such as persons with disabilities and children – for example, by arranging for third parties to support these individuals (see Chapter 8).[298]

Under EU law, Article 9 of the Directive on the right of access to a lawyer in criminal proceedings specifies three conditions for a valid waiver:

(i) the suspect or accused person must be provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it;

(ii) the waiver must be given voluntarily and unequivocally;

(iii) it must be recorded in accordance with the law of the EU Member State.[299]

However, it should be noted that under the draft directive on procedural safeguards for children suspected or accused in criminal proceedings, children may not waive their right to a lawyer.[300] Further, a European Commission Recommendation on procedural safeguards for vulnerable persons recommends that it should not be possible for vulnerable persons to waive their right to a lawyer.[301]

295 ECtHR, *Pishchalnikov v. Russia*, No. 7025/04, 24 September 2009, para. 79.

296 ECtHR, *Panovits v. Cyprus*, No. 4268/04, 11 December 2008, para. 68.

297 ECtHR, *Şaman v. Turkey*, No. 35292/05, 5 April 2011, para. 35.

298 ECtHR, *Panovits v. Cyprus*, No. 4268/04, 11 December 2008, paras. 67–68. See also European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822/2; European Commission (2013), Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ 2013 C378; and FRA (2015), Child friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States.

299 See Directive 2013/48/EU.

300 European Commission (2013), Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings, Art. 6.

301 European Commission (2013), Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, para. 11.

4.3. Right to self-representation

Key points

- In criminal and non-criminal proceedings, a person may be self-represented unless the interests of justice require otherwise – for example, to protect the rights of the accused or suspected person or if representation is required for the effective administration of justice.
- Determining whether the interests of justice require the compulsory appointment of a lawyer falls within the margin of appreciation of domestic courts.

Promising practice

Assisting self-represented litigants

In the United Kingdom, the Personal Support Unit (PSU) assists litigants who are going through a court process without legal representation. PSU provides trained volunteers who give free assistance to people facing proceedings without legal representation in civil and family courts and tribunals in England and Wales. PSU provides practical guidance on what happens in court; can help with filling in forms or accompany individuals to court; and also provides emotional and moral support. It does not provide an advocacy service or legal representation of individuals at hearings. It can, however, put individuals in touch with other agencies that provide these legal services.

Source: https://www.thepsu.org/

It has been noted that individuals have the right to be represented in non-criminal proceedings if this is necessary to secure practical and effective access to court. Article 6 (3) (c) of the ECHR entitles the person charged with a criminal offence to participate in criminal proceedings through representation or by self-representation.

Self-representation is permitted unless the interests of justice require otherwise – for example, to protect the rights of the accused or suspected person or if representation is required for the effective administration of justice. For instance, some national laws require defendants to be represented only at certain stages or on appeal.

The right to self-representation in non-criminal proceedings is not absolute.[302] Determining whether the interests of justice require the compulsory appointment of a lawyer falls within the margin of appreciation of domestic authorities.[303]

Limitations can be imposed, for example, to prevent abuses to the dignity of the courtroom, to protect vulnerable witnesses from trauma and to prevent suspects or accused persons from persistently obstructing proceedings.[304] Any discretion should be exercised with proportionality and restrictions should be imposed with care.[305]

Example: In *Galstyan v. Armenia,*[306] the applicant was arrested, made aware of his rights and expressly declined a lawyer.

The ECtHR noted that Article 6 (3) 3 (c) gives the accused the choice of defending himself either "in person or through legal assistance". Thus, self-representation is permitted unless the interests of justice require otherwise. In the applicant's case, there was no evidence that his choice to be self-represented was the result of any threats or physical violence or that he was 'tricked' into refusing a lawyer. It was the applicant's own choice to not have a lawyer; thus the state could not be held responsible for the lack of representation. There was no violation of Article 6 of the ECHR.

If an accused or suspected person deliberately waives his/her right to be assisted by a lawyer, the accused or suspected person him/herself is under a duty to show diligence – for example, by obtaining a copy of the court's judgment if it is required for an appeal.[307]

302 ECtHR, *Philis v. Greece*, No. 16598/90, 1 July 1992. See also CJEU, C-399/11, *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013, paras. 49-52.

303 ECtHR, *Correia de Matos v. Portugal*, No. 48188/99, 15 November 2001. See also ECtHR, *Croissant v. Germany*, No. 13611/88, 25 September 1992.

304 *Ibid.*, paras. 12–13.

305 *Ibid.*, para. 18.

306 ECtHR, *Galstyan v. Armenia*, No. 26986/03, 15 November 2007, para. 91.

307 ECtHR, *Melin v. France*, No. 12914/87, 22 June 1993, para. 25.

5 Right to an effective remedy

EU	Issues covered	CoE
What is an effective remedy?		
Charter of Fundamental Rights, Article 47 (right to an effective remedy) CJEU, C-583/11 P, *Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union*, 2013 CJEU, T-49/07, *Sofiane Fahas v. Council of the European Union*, 2010	**Substantive requirements**	ECHR, Article 13 (right to an effective remedy) ECtHR, *McFarlane v. Ireland*, No. 31333/06, 2010 ECtHR, *Rotaru v. Romania*, No. 28341/95, 2000 ECtHR, *Yarashonen v. Turkey*, No. 72710/11, 2014
CJEU, C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 2011	**Institutional requirements**	ECtHR, *Ramirez Sanchez v. France*, No. 59450/00, 2006
Examples of specific remedies		
CJEU, Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, 1991 Racial Equality Directive (2000/43/EC), Article 15	**Compensation**	ECtHR, *Ananyev and Others v. Russia*, Nos. 42525/07 and 60800/08, 2012
CJEU, Joined cases C-65/09 and C-87/09, *Weber* and *Putz*, 2011 Sale of Consumer Goods Directive (1999/44/EC), Articles 3 (2) and (3) Package Travel Directive (90/314/EEC), Articles 4 (6) and (7)	**Specific Performance**	

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 52 (1) (field of application) CJEU, C-314/12, *UPC Telekabel Wien GmbH*, 2014	Injunctions	ECHR, Article 10 (freedom of expression) ECtHR, *Brosa v. Germany*, No. 5709/09, 2014

This chapter, and the rest of the handbook, focuses on domestic remedies rather than standing and remedies before the ECtHR and CJEU. First, the Chapter outlines the procedural and institutional requirements for an effective remedy. It then provides examples of specific types of remedies. Many types of remedies can provide effective redress for rights violations. The remedies addressed in this chapter (compensation, specific performance and injunctions) are illustrative and not exhaustive.

5.1. What is an effective remedy?

Key points

- Article 13 of the ECHR and Article 47 of the EU Charter of Fundamental Rights guarantee the right to an effective remedy. This right is an essential component of access to justice. It allows individuals to seek redress for violations of their rights. Different types of remedies may redress different types of violations.
- Neither the ECHR nor the EU Charter of Fundamental Rights define 'remedy'. The overriding requirement is for a remedy to be 'effective' in practice and in law. There are no requirements regarding the form of the remedy, and states enjoy some discretion in this respect. In deciding what is effective, the aggregate (total) of remedies will be considered.
- Article 13 of the ECHR and Article 47 of the EU Charter of Fundamental Rights have different scopes. Article 13 provides a right to claim "an effective remedy before a national authority" for "arguable claims" of ECHR rights violations.
- Article 47 of the EU Charter of Fundamental Rights requires effective judicial protection of rights arising from EU law. It is based on Article 13 of the ECHR, but provides more extensive protection. Article 47 provides a right to a remedy before a tribunal and applies to all rights and freedoms in EU law. It is not limited to rights under the Charter.
- Under EU law generally, remedies must also comply with the principle of equivalence. This means that conditions relating to claims arising from EU law cannot be less favourable than those relating to similar actions arising from national law.

For a remedy to be effective, it must comply with specific substantive, procedural and institutional requirements, as set out in Sections 5.1.1 and 5.1.2. It should be noted that the requirements under CoE and EU law differ somewhat.

5.1.1. Substantive and procedural requirements of an effective remedy

Individuals are entitled to redress for violations of their human rights. This means that they must be able to obtain a remedy. Different types of remedies may address different types of violations (see Section 5.2).

The term 'remedy' is not defined in CoE law or EU law. The right to an effective remedy is set out in Article 13 of the ECHR and Article 47 of the EU Charter of Fundamental Rights. It is also found in international instruments – such as Article 8 of the UDHR and Article 2 (3) of the ICCPR.[308]

Under CoE law, Article 13 of the ECHR offers protection to individuals who wish to complain about alleged violations of their rights under the convention. Article 13 states: "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".

Example: In *Rotaru v. Romania*,[309] the applicant complained about the Romanian Intelligence Service's storage and use of incorrect, secretly gathered personal information about his conviction for insulting behaviour – arising from letters written as a student during Communist times. He could not seek an order for the destruction or amendment of the information, and claimed this violated Article 13.

The ECtHR confirmed that Article 13 guarantees the availability of a remedy to enforce ECHR rights and freedoms at national level, and that this

308 Note that ICCPR Art. 2 (3) (b) provides that the right to a remedy should be "determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State". Specific protections for detainees are also found in ECHR Art. 5 (4), which guarantees a right of *habeas corpus*. See also EU Charter of Fundamental Rights, Art. 6, and ICCPR, Art. 9 (4).

309 ECtHR, *Rotaru v. Romania*, No. 28341/95, 4 May 2000, para. 67.

remedy must be effective in practice as well as in law. No such remedy in respect of the applicant's grievance existed in Romania at the material time; this constituted a violation of Article 13 of the ECHR.

Article 13 permits individuals to claim a remedy before a national authority for arguable claims that one or more of their rights set out in the ECHR have been violated.[310] Article 13 therefore involves claims alleging substantive breaches of ECHR provisions. This reinforces Article 35 of the ECHR, which requires individuals to exhaust domestic remedies before they have recourse to the ECtHR – and provides an additional guarantee to ensure that rights are protected, first and foremost, at the national level.[311]

Under EU law, Article 47 of the Charter of Fundamental Rights states: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article". The Charter is now part of primary EU law, but Article 47 also reflects existing EU case law, which may provide useful precedent.[312] The right to an effective remedy has long been a core element of an EU legal order based on the rule of law.[313] The CJEU has also emphasised the close connection between effective judicial protection under Article 47 of the EU Charter of Fundamental Rights and Articles 6 and 13 of the ECHR.

Example: In *Sofiane Fahas v. Council of the European Union,*[314] the applicant – an Algerian national living in Germany – sought the annulment of several Council Decisions adopting restrictive measures to combat terrorism.

The CJEU reiterated that "the principle of effective judicial protection is a general principle of Community law stemming from the constitutional

310 ECtHR, *Klass and Others v. Germany*, No. 5029/71, 6 September 1978, para. 64.

311 ECtHR, *Kudła v. Poland*, No. 30210/96, 26 October 2000, para. 152.

312 CJEU, C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 3 September 2008, para. 335.

313 CJEU, C-294/84, *Parti écologiste "Les Verts"* v. European Parliament, 23 April 1986; CJEU, C-50/00 P, *Unión de Pequeños Agricultores v. Council*, 25 July 2002; CJEU, C-222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary,* 15 May 1986.

314 CJEU, T-49/07, *Sofiane Fahas v. Council of the European Union*, 7 December 2010.

traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union".

The Explanations to the EU Charter of Fundamental Rights confirm that the right to a remedy under Article 47 is "based on Article 13 of the ECHR". The ECtHR's case law is important for interpreting the meaning of the right to an effective remedy. There are, however, important differences in the respective scopes of Article 47 of the Charter and Article 6 of the ECHR (see the Figure in Chapter 1).

Under CoE law and EU law, neither Article 47 of the EU Charter of Fundamental Rights nor Article 13 of the ECHR requires any particular form of remedy to be offered. The primary requirement is that the remedy is "effective in practice as well as in law".[315] The effectiveness of a remedy does not depend on the certainty of a favourable outcome.[316] The type of remedy required depends on the circumstances of each case.

Under CoE law, some principles to determine effectiveness have been developed. For example, an effective remedy must:

- be accessible;
- be capable of providing redress in respect of the applicant's complaints;
- offer reasonable prospects of success.[317]

Example: In *McFarlane v. Ireland*,[318] the applicant was arrested on his release from prison in Northern Ireland in 1998. He was charged with offences committed in 1983 in the Republic of Ireland, and was released on conditional bail. He made two applications to halt the prosecution on the ground that his right to a fair trial was irretrievably prejudiced by the loss

315 ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011, para. 288.

316 ECtHR, *Costello-Roberts v. the United Kingdom*, No. 13134/87, 25 March 1993, para. 40.

317 ECtHR, *Vuckovic and Others v. Serbia*, No. 17153/11 and 29 other cases, 25 March 2014, paras. 71 and 74.

318 ECtHR, *McFarlane v. Ireland*, No. 31333/06, 10 September 2010.

of original fingerprint evidence and by delay. Both applications were refused. The applicant was acquitted in June 2008.

The ECtHR doubted the effectiveness of the proposed remedy (an action for damages for breach of a constitutional right) for the following reasons: (i) there was significant uncertainty as to the availability of the proposed constitutional remedy because, although it had been available in theory for almost 25 years, it had never been invoked; (ii) the proposed remedy may not have been available on the facts of the case because of possible judicial immunity; and (iii) it would have been procedurally complex and would have caused delay and incurred costs. The Court therefore found a violation of Article 13 taken in conjunction with Article 6 (1) (length of proceedings) of the ECHR.

Under EU law, the CJEU has recognised Member States' obligation to provide remedies that are sufficient to ensure the effective judicial protection of rights in fields covered by Union law. This is based on the principles of effectiveness and equivalence. The principle of effectiveness requires that domestic law does not make it impossible or excessively difficult to enforce rights under EU law.[319] The principle of equivalence requires that the conditions relating to claims arising from EU law are not less favourable than those relating to similar actions of a domestic nature.

Thus, under EU law, Member States are legally bound to establish systems of legal remedies and procedures to ensure respect for the right to effective judicial protection guaranteed by EU law.[320] This would be undermined by national legal provisions or judicial practices that impair the effectiveness of EU law.[321] Whether a national provision complies with the principle of effectiveness must

319 CJEU, C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 16 December 1976. For more recent examples, see CJEU, C-415/11, *Mohamed Aziz v. Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, 14 March 2013, para. 50, and CJEU, Joined cases C-482/13, C-484/13, C-485/13, C-487/13, *Unicaja Banco SA v. José Hidalgo Rueda and Others, Caixabank SA v. Manuel María Rueda, Ledesma and Others, Caixabank SA v. José Labella Crespo and Others and Caixabank SA v. Alberto Galán Luna and Others*, 21 January 2015.

320 TEU, Articles 4 (3) and 19. See CJEU, C-50/00 P, *Unión de Pequeños Agricultores v. Council of the European Union*, 25 July 2002, paras. 39-41. See also CJEU, T-461/08, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v. European Investment Bank (EIB)*, 20 September 2011, para 46.

321 CJEU, C-213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and Others*, 19 June 1990, para. 20.

be "analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances".[322] The position of the parties and the circumstances of the case must be considered to determine whether there was a lack of effective protection.[323]

Example: In *Inuit Tapiriit Kanatami and Others v. Parliament and the Council,*[324] the CJEU considered the *locus standi* of seal hunters seeking to challenge a regulation prohibiting the marketing of seal products in the EU's internal market.

The CJEU reviewed the system of judicial protection in the EU. It stated that the EU treaties did not create new remedies before the national courts and that, if no EU rules governed the matter, it was for the domestic legal system of each Member State to decide which procedural rules govern actions to safeguard rights. Member States have to pay due regard to the principles of effectiveness and equivalence in establishing these rules. The CJEU held that the seal hunters lacked standing to pursue a direct action for annulment.

The nature of the right at stake has implications for the type of remedy a state is required to provide.[325] **Under CoE law**, for example, compensation for pecuniary and non-pecuniary damage should in principle be available for violations of Article 2 of the ECHR. Pecuniary damage refers to losses that can be precisely calculated. Non-pecuniary losses cannot be precisely calculated – for example, pain and suffering. When considering whether a remedy offers effective redress, the aggregate of remedies provided under domestic law can be taken into account.[326] Where a remedy is sought for a violation of an ECHR right that

322 CJEU, C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, 14 December 1995, para. 14. For a more recent case, see CJEU, C-249/11, *Hristo Byankov v. Glaven sekretar na Ministerstvo na vatreshnite raboti*, 4 October 2012, para. 75.

323 CJEU, C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria SA*, 17 July 2014, paras. 43–51.

324 CJEU, C-583/11 P, *Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union*, 3 October 2013, paras. 102–103.

325 See ECtHR, *Budayeva and others v. Russia*, No. 15339/02, 20 March 2008, para. 191.

326 ECtHR, *De Souza Ribeiro v. France*, No. 22689/07, 13 December 2012, para. 79.

also constitutes a 'civil right' under Article 6, the wider and stricter safeguards of Article 6 (1) apply.[327]

States may have to provide evidence that an effective remedy exists – for example, by pointing to similar cases in which a remedy was successfully obtained.[328]

Example: In *Yarashonen v. Turkey*,[329] a Russian of Chechen origin fled Turkey after Russian security forces allegedly murdered his brother. He later returned and was arrested for illegal entry. He was detained despite having filed an asylum application and did not receive medical treatment. His asylum application was later granted. The applicant complained about his unlawful detention, the conditions of his detention and the lack of effective domestic remedy under Article 13 to address the breach of Article 3 of the ECHR.

The ECtHR held that it was not sufficient that the applicant could raise his complaints within general judicial review proceedings. The government was unable to show a single decision demonstrating that an immigration detainee had been able to use these general review procedures to secure their rights. Without such evidence, the capacity of general remedies to provide effective preventive and/or compensatory redress was not established with a sufficient degree of certainty. The Court found a violation of Article 13 in conjunction with Article 3 of the ECHR.

A state may impose reasonable restrictions on the right to an effective remedy to ensure the proper administration of justice (for example, see Section 6.2.2 on limitation periods).[330] Doubts about the effective functioning of a newly created statutory remedy should not prevent an individual from trying to use it.[331] The Council of Europe has recommended that, when designing new remedies,

327 ECtHR, *Kudła v. Poland*, No. 30210/96, 26 October 2000, para. 146.

328 *Ibid.*, para. 159.

329 ECtHR, *Yarashonen v. Turkey*, No. 72710/11, 24 June 2014, paras. 63–66.

330 See ECtHR, *Stubbings and others v. the United Kingdom*, Nos. 22083/93 and 22095/93, 22 October 1996.

331 ECtHR, *Krasuski v. Poland*, No. 61444/00, 14 June 2005, para. 71.

states should – where appropriate – provide for retroactivity of those remedies designed to deal with systemic or structural problems.[332]

5.1.2. Institutional requirements of an effective remedy

Under CoE law, Article 13 of the ECHR provides a right to a remedy before a 'national authority'. This does not have to be a judicial authority, but it is accepted that judicial remedies furnish strong guarantees of independence, access for victims and families, and enforceability of awards in compliance with the requirements of Article 13 (see Section 2.4.1 on non-judicial bodies generally).[333]

In determining whether a body is able to provide an effective remedy, the facts of the case, the nature of the right at issue, and the powers and guarantees of the body must be considered.[334]

Example: In *Ramirez Sanchez v. France*,[335] the applicant was sentenced to life imprisonment for terrorist attacks in France. He was detained in solitary confinement for eight years and two months, ostensibly because of his dangerousness, the need to maintain order and safety in the prison and the likelihood that he might seek to escape. He applied to an administrative court to quash the decision placing him in solitary confinement. The court dismissed his application, pointing out that the measure was internal, which was at the time not eligible for referral to the administrative courts.

The ECtHR concluded that there had been a violation of Article 13 but not of Article 3, on account of the absence of a remedy in French law enabling the applicant to contest the decision to prolong his detention in solitary confinement. The Court noted that, given the serious repercussions of solitary confinement on the conditions of detention, an effective remedy before a judicial body was essential.

332 Council of Europe, Committee of Ministers (2010), Recommendation Rec(2010)3 to member states on effective remedies for excessive length of proceedings, 24 February 2010, para. 11.

333 ECtHR, *Z and Others v. the United Kingdom*, No. 29392/95, 10 May 2001, para. 110.

334 ECtHR, *Kudla v. Poland*, No. 30210/96, 26 October 2000, para. 157. For a more recent case, see ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, No. 60642/08, 16 July 2014, paras. 131–136.

335 ECtHR, *Ramirez Sanchez v. France*, No. 59450/00, 4 July 2006.

National authorities referred to in Article 13 of the ECHR must meet certain criteria. Institutional independence is required. For example, where a police chief had discretion regarding whether to refer matters to a police complaints authority (an independent body) for investigation, the requisite standards of independence were not met.[336] The power to make binding decisions is also important. A body that lacks this may be considered incapable of providing an effective remedy – particularly if it also lacks procedural safeguards, such as the right to legal representation or disclosure of the decision.[337] A remedy dependent on wholly political discretion does not suffice.[338]

Under EU law, as noted in Section 5.1.2, Article 47 of the EU Charter of Fundamental Rights entitles individuals to seek an effective remedy before a tribunal. The meaning of 'tribunal' is discussed in Section 2.1. A tribunal must meet strict requirements: it must be established by law; be permanent; be independent and impartial; include an *inter-partes* procedure; have compulsory jurisdiction; and apply rules of law.[339] However, the right to seek an effective remedy before a tribunal is not unlimited.

Example: In *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*,[340] Mr Diouf applied for asylum in Luxembourg, alleging that he fled slavery in Mauritania and was persecuted by his former employer. His application was dealt with under an accelerated procedure, was rejected as unfounded, and his removal was ordered. The applicant sought annulment of the decision by the Administrative Tribunal, which made a preliminary reference to the CJEU. It asked whether the obligation to provide an effective remedy precluded national laws that prevent an appeal.

The CJEU stated that there had to be a remedy before a judicial body, but that the principle of effective judicial protection did not require access to a number of levels of jurisdiction. The preliminary decision to review an

336 ECtHR, *Khan v. the United Kingdom*, No. 35394/97, 12 May 2000, para. 47.

337 ECtHR, *Chahal v. the United Kingdom*, No. 22414/93, 15 November 1996, para. 154.

338 A complaint to the Home Secretary about an order controlling prisoners' correspondence is an example of this kind of remedy. See ECtHR, *Silver v. the United Kingdom*, Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, 25 March 1983, para. 116.

339 CJEU, C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, 17 September 1997, para. 23.

340 CJEU, C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para. 69.

application for international protection under the accelerated procedure did not have to be subject to judicial review, provided that this decision was reviewable as part of judicial consideration of the final substantive decision to grant or refuse protection.

Under EU law, Article 47 of the EU Charter of Fundamental Rights does not preclude assigning a single type of court to deal with specific types of cases (for example, cases concerning agricultural aid) – provided that the exercising of rights is not made excessively difficult (for example, because of delay).[341]

5.2. Examples of specific remedies

This Section covers several examples of types of remedies, but does not constitute an exhaustive list. Other examples include restitution (the obligation to return, in money or kind, something taken from an individual) or remedies against removal from a state (a suspensive remedy to prevent a breach of human rights potentially caused by removing an individual from the jurisdiction of a given state). These examples relate to specific substantive rights – such as the right to property – or specific policy areas – such as asylum and immigration – and so are beyond the focus of this chapter. Remedies arising from delays in the execution of court judgments are discussed in Section 5.2.1, while remedies for excessively lengthy proceedings are set out in Section 7.3.

Key points

- Compensation: compensatory remedies may not always provide effective redress – for example, it may be better for proceedings to be expedited. The CJEU has developed principles on state liability to pay damages. Specific EU directives on discrimination also contain provisions on damages: for example, Article 15 of the Racial Equality Directive.
- Specific performance: there are considerable differences regarding specific performance among European legal systems. EU law sets out non-discretionary specific performance provisions at sector-specific level.
- Injunctions: the ECtHR and CJEU have noted the importance of balancing competing rights, and the nature and proportionality of any restriction, when considering injunctions. Some rights can only be limited if specific criteria are met.

341 CJEU, C-93/12, *ET Agrokonsulting-04-Velko Stoyanov v. Izpalnitelen direktor na Darzhaven fond Zemedelie - Razplashtatelna agentsia*, 27 June 2013, paras. 56–61.

5.2.1. Compensation

Compensation is a form of reparation to offset damage sustained as a result of an infringement of legal rights. **Under CoE law**, compensatory remedies generally suffice for breaches of the ECHR, but they do not provide an effective remedy in every situation. For example, where a violation concerns the conditions of detention and the applicant is still in prison, damages may not be sufficient.[342] In addition, compensatory remedies in cases of non-execution of a judgment (see Section 6.3) may only be appropriate if they meet specific conditions:

- the claim is heard within a reasonable time;
- the compensation is paid promptly;
- the procedure complies with Article 6 of the ECHR;
- litigants do not face an excessive cost burden;
- the level of compensation is not unreasonable in comparison with the awards made by the ECtHR in similar cases.

Example: In *Burdov v. Russia (No. 2)*,[343] the applicant obtained judgments ordering the payment of benefits for his work during emergency operations at Chernobyl. Some of the judgments remained unenforced for years. In an earlier case, the ECtHR found violations of Article 6 of the ECHR and of Article 1 of Protocol No. 1. The Court on its own motion decided to examine this issue under Article 13, noting an increasing number of cases concerning non-enforcement.

The Court confirmed that, in cases concerning the non-enforcement of judicial decisions, domestic measures to ensure timely enforcement were of the "greatest value". However, states could choose to impose a purely compensatory remedy if it met specific requirements: the action was heard within a reasonable time; the compensation was paid promptly; procedural rules conform to the principles guaranteed by Article 6; litigants did not face an excessive cost burden; and the level of compensation was

342 ECtHR, *Torreggiani and others v. Italy*, No. 43517/09, 8 January 2013, para. 96.

343 ECtHR, *Burdov v. Russia (No. 2)*, No. 33509/04, 15 January 2009, paras. 98–100.

not unreasonable in comparison with other awards made by the Court. There is a strong but rebuttable presumption that excessively long proceedings cause non-pecuniary damage.

In this case, the ECtHR found a violation of Article 13 of the ECHR because the prolonged non-enforcement of the judicial decisions deprived the applicant of any kind of remedy.

The ECtHR has also specified key criteria for verifying the effectiveness of a compensatory remedy with respect to the excessive length of judicial proceedings (see Section 7.3).[344] If compensation is considered as a remedy, courts must avoid excessive formalism, particularly in relation to evidence of damage.[345] The procedural rules governing the examination of a claim for compensation must conform to the principle of fairness enshrined in Article 6 of the ECHR. This includes that the case be heard within a reasonable time and that the rules governing costs must not place an excessive burden on litigants.

Example: The case of *Ananyev and Others v. Russia*[346] concerned the applicants' detention conditions in various remand prisons between 2005 and 2008.

The ECtHR found violations of Article 3 (prohibition of inhuman and degrading treatment) and Article 13 of the ECHR. Regarding the right to an effective remedy, the ECtHR confirmed that states are required to set up effective preventive and compensatory domestic remedies. The Court also noted that anyone subjected to treatment in breach of Article 3 should be entitled to monetary compensation, and that the burden of proof imposed on claimants should not be excessive.

The continuing failure to provide compensation awarded may amount to an interference with the applicant's right to peaceful enjoyment of their possessions under Article 1 of Protocol 1 to the ECHR.[347] In cases dealing with the deprivation of property, anyone deprived of their property must, in principle, be able to obtain

344 ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, No. 40450/04, 15 October 2009, para. 65.

345 ECtHR, *Radkov v. Bulgaria (No. 2)*, No. 18382/05, 10 February 2011, paras. 38–40.

346 ECtHR, *Ananyev and others v. Russia*, Nos. 42525/07 and 60800/08, 10 January 2012.

347 ECtHR, *Kirilova and others v. Bulgaria*, Nos. 42908/98, 44038/98, 44816/98 and 7319/02, 9 June 2005, paras. 123–124.

compensation "reasonably related to its value", even if "legitimate objectives of 'public interest' may call for less than reimbursement of the full market value".[348]

Under EU law, the EU Charter of Fundamental Rights contains no provision expressly obliging Member States to provide compensation for violations of rights arising from EU law. However, individuals may invoke rights arising from EU law before national courts and Member States may be liable for damages in specific circumstances.[349]

Example: In *Francovich and Bonifaci v. Italy*,[350] under the Insolvency Protection Directive 80/987/EC, Mr Francovich and Ms Bonifaci (and 33 of their colleagues) were owed money after their respective employers went into liquidation. The directive had to be implemented by 1983, but Italy failed to comply; five years later, the workers had been paid nothing. Company liquidators informed them that no money was left. They brought a claim against the state, arguing that it was required to pay damages to compensate them for losses incurred because of its failure to implement the directive.

The CJEU confirmed that the EEC Treaty (then in force) created its own legal system, which Member States' courts were bound to apply. Further, Community law also gave rise to rights by virtue of obligations the treaty imposed in a clearly defined manner on individuals, on Member States and on Community institutions. The principle whereby Member States must be liable for loss and damage caused to individuals because of breaches of EU law for which states can be held responsible was "inherent in the system of the Treaty".

State liability arises when there has been a breach of the EU treaties attributable to the state[351] or a failure to follow the CJEU's case law.[352] Member State liability may also arise in cases between individuals if rights derived from EU law are at issue.[353]

348 ECtHR, *Pincová and Pinc v. the Czech Republic*, No. 36548/97, 5 November 2002, para. 53.

349 CJEU, C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 5 February 1963.

350 CJEU, Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, 19 November 1991.

351 CJEU, Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, 5 March 1996, para. 34.

352 See also CJEU, C-224/01, *Gerhard Köbler v. Republik Österreich*, 30 September 2003, para. 56.

353 CJEU, C-453/99, *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others*, 20 September 2001.

The failure to implement a directive may also give rise to state liability for damages. For liability to arise:

- the directive must have conferred rights on individuals;
- the rights must be clearly defined;
- there must be a causal link between the Member States' failure to implement the directive and the loss suffered.

This principle has been extended to situations where Member States have failed to amend existing national legislation or have incorrectly implemented a directive. It has also been expanded to include violations of EU law by any state authority (including the judiciary).[354] However, in such cases it must also be shown that there has been a sufficiently serious breach of the law. In deciding whether there has been a "sufficiently serious breach", the following factors must be considered:

- the clarity and precision of the rule breached;
- the measure of discretion left to the Member State by the rule;
- whether the breach was intentional;
- whether the breach was excusable;
- the extent to which a position taken by an EU institution may have contributed to the breach;
- the extent to which the Member State adopted or retained national measures contrary to EU law.[355]

354 CJEU, Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, 5 March 1996, para. 34.

355 CJEU, Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, 5 March 1996, para. 56. See also CJEU, C-224/01, *Gerhard Köbler v. Republik Österreich*, 30 September 2003, para. 59.

Specific EU directives on discrimination also contain provisions on damages: for example, Article 15 of the Racial Equality Directive.[356] Where financial compensation measures are adopted, they must be adequate and enable making good the loss and damage sustained.[357] Also, ceilings on the amount of payable compensation may render a remedy ineffective.[358] The principle of equivalence must be complied with in terms of remedies.[359]

5.2.2. Specific performance

Specific performance enforces the terms of a contract, allowing a party to a contract to get what they contracted for by putting them in the position they would have been in if the contract were concluded. There are considerable differences regarding specific performance among European legal systems.[360]

Under CoE law, there is no specific recognition of the principle of specific performance.

Under EU law, however, non-discretionary specific performance obligations have been established at the sector-specific level. For example, see Articles 3 (2) and (3) of Directive 1999/44/EC (Sale of Consumer Goods Directive) and Articles 4 (6) and (7) of Directive 90/314/EEC (Package Travel Directive).[361]

Example: In *Weber* and *Putz*,[362] a preliminary reference from the German courts asked the CJEU whether Article 3 of Directive 1999/44/EC requires

356 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180 (Racial Equality Directive).

357 CJEU, C-271/91, *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority*, 2 August 1993, para. 26.

358 CJEU, C-180/95, *Nils Draehmpaehl v. Urania Immobilienservice OHG*, 22 April 1997, para. 43.

359 CJEU, C-78/98, *Shirley Preston and Others v. Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc*, 16 May 2000, para. 55.

360 A European-wide statement on private law principles provides some guidance: Study Group on a European Civil Code and the Research Group on EC Private Law (2009), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*.

361 For example, Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171, and Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158.

362 CJEU, Joined cases C-65/09 and C-87/09, *Gebr. Weber GmbH v. Jürgen Wittmer* and *Ingrid Putz v. Medianess Electronics GmbH*, 16 June 2011.

sellers to bear the cost of removing goods that do not conform to a contract and of installing replacement goods.

The CJEU confirmed that the directive requires sellers to repair or replace the goods – free of charge – unless this is impossible or disproportionate.

The CJEU has also confirmed that a seller cannot make a financial claim regarding the obligation to bring goods into conformity with a contract. For example, a seller cannot require a consumer to pay compensation for the use of defective goods until their replacement.[363]

5.2.3. Injunctions

An injunction is a court order that requires a person to do something or to stop doing something. **Both CoE law and EU law** permit injunctive relief in a variety of circumstances. It can protect individual rights but, in doing so, may also restrict the rights of others. This means a careful balancing act needs to be undertaken to ensure proportionality and fairness.[364]

Under CoE law, injunctions have frequently been considered in relation to the right to freedom of expression guaranteed under Article 10 of the ECHR. [365] In such cases, the Court repeatedly stated that Article 10 does not prohibit prior restraints on publication or bans on distribution as such.[366] However, the dangers that restrictions of this kind pose for a democratic society call for the most careful scrutiny. Like in any other case involving an interference with a person's freedom of expression, the ECtHR's task is to examine whether the restriction in the particular case was prescribed by law, in pursuit of a legitimate aim[367] and proportionate.

363 CJEU, C-404/06, *Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbände*, 17 April 2008, paras. 41-43.

364 CJEU, C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 24 November 2011, para. 49.

365 Beyond the national level, in applications brought to the ECtHR requesting the suspension of an expulsion or an extradition from the state, the ECtHR May issue an interim measure asking the state to suspend the applicants' expulsion or extradition for as long as the application is being examined by the Court. See, e.g., ECtHR, *Abdollahi v. Turkey*, No. 23980/08, 3 November 2009.

366 See, for example, ECtHR, *Éditions Plon v. France*, No. 58148/00, 18 August 2004.

367 Such aims include: in the interests of national security, territorial integrity or public safety; for the prevention of disorder or crime; for the protection of health or morals; for the protection of the reputation or rights of others; to prevent the disclosure of information received in confidence; or for maintaining the authority and impartiality of the judiciary.

For pre-notification requirements, the ECHR does not require media to give prior notice of intended publications to those who are featured in them. Such a requirement – which would allow the individuals to seek an injunction preventing publication in the context of their right to respect for private life – risks causing a "chilling effect" on freedom of expression.[368]

Example: In *Brosa v. Germany*,[369] the applicant complained that an injunction restraining his distribution of a leaflet alleging that a candidate in local elections was 'covering' for a neo-Nazi organisation violated his right to freedom of expression under Article 10 of the ECHR.

The leaflet was distributed in the run-up to elections and set out the applicant's views on a candidate's suitability for office. Since it was of a political nature and concerned a question of public interest, there was little room for restrictions on the applicant's freedom of expression. The applicant's opinion was not devoid of a factual basis, but the domestic court required "compelling proof" – a disproportionally high degree of factual proof. The domestic court failed to strike a fair balance between the relevant interests and did not establish a pressing social need to put the protection of the candidate's personality rights above the right to freedom of expression. The ECtHR therefore found a violation of Article 10 of the ECHR.

Under EU law, the right to freedom of expression is guaranteed by Article 11 of the EU Charter of Fundamental Rights. Article 52 (1) of the Charter outlines permissible limitations on rights guaranteed by the Charter, specifying that these must:

- be provided for by law;
- respect the essence of the rights;
- be proportionate;
- be necessary;
- genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

368 ECtHR, *Mosley v. the United Kingdom*, No. 48009/08, 10 May 2011, para. 132.

369 ECtHR, *Brosa v. Germany*, No. 5709/09, 17 April 2014.

Example: In *Telekabel v. Constantin Film*,[370] a film production company tried to stop the unauthorized streaming of its films from a particular website. The Internet Service Provider (ISP) refused a request to block the site, so the company pursued an injunction through the courts.

The CJEU balanced the interests of the copyright holders against the ISP's freedom to run a business. Member States must, when transposing a directive, ensure that they rely on an interpretation of the directive that allows a fair balance to be struck between the applicable fundamental rights protected by the EU legal order. Member States must interpret their national law in a manner consistent with that directive and with fundamental rights. An injunction restricts the freedom to conduct a business but, in this case, it did not infringe the "very substance of the freedom".

370 CJEU, C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, 27 March 2014, paras. 46–51.

6 Limitations on access to justice in general

EU	Issues covered	CoE
Legitimate aim and proportionality		
Charter of Fundamental Rights, Article 47 (right to an effective remedy) Charter of Fundamental Rights, Article 48 (presumption of innocence and right of defence) Charter of Fundamental Rights, Article 52 (1) (field of application) CJEU, Joined cases C-317/08 to C-320/08, *Rosalba Alassini and Others v. Telecom Italia SpA*, 2010	Permissible restrictions	ECHR, Article 6 (right to a fair trial) ECHR, Article 13 (right to an effective remedy) ECtHR, *Harrison Mckee v. Hungary*, No. 22840/07, 2014
Examples of restrictions before a final judgment or decision		
CJEU, C-530/11, *European Commission v. the United Kingdom of Great Britain and Northern Ireland*, 2014	Court fees	ECtHR, *Stankov v. Bulgaria*, No. 68490/01, 2007
	Excessive formalism	ECtHR, *Poirot v. France*, No. 29938/07, 2011 ECtHR, *Maširević v. Serbia*, No. 30671/08, 2014

EU	Issues covered	CoE
CJEU, C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH*, 2012 Racial Equality Directive (2000/43/EC), Article 8 Gender Goods and Services Directive (2004/113/EC), Article 9 Gender Equality Directive (2006/54/EC), Article 18 Employment Framework Directive (2000/78/EC), Article 10	Evidence barriers	ECtHR, *Klouvi v. France*, No. 30754/03, 2011
CJEU, Joined cases C-89/10 and C-96/10, *Q-Beef NV v. Belgische Staat and Frans Bosschaert v. Belgische Staat and Others*,2011	Limitation periods	ECtHR, *Bogdel v. Lithuania*, No. 41248/06, 2013
	Immunities	ECtHR, *C.G.I.L. and Cofferati (No. 2) v. Italy*, No. 2/08, 2010
Delay in the execution of final judgments		
TEU, Article 4 (3) and Article 19 European Enforcement Order (Regulation (EC) No. 805/2004) Brussels Regulation (Council Regulation (EC) No. 44/2001) Regulation No. 1215/2012 Regulation No. 650/2012/EU Council Regulation No. 2201/2003 Council Regulation No. 4/2009		ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, No. 40450/04, 2009 ECtHR, *Burdov v. Russia (No. 2)*, No. 33509/04, 2009

This chapter details the law concerning limitations (restrictions) on access to justice; it is of relevance to all other rights referred to in this handbook. Restrictions are permitted if they have a legitimate aim, are proportionate and do not impair the very essence of the right. Section 6.2 provides examples of common limitations in the CoE and EU. The list of these limitations is illustrative rather than exhaustive. It includes court costs, excessive formalism, evidence barriers, limitation periods and immunities. The final part (Section 6.3) deals with delay in the execution of judgments as another form of restriction on access to justice. It also reviews EU legal mechanisms aimed at facilitating the enforcement of judgments within the EU, such as the European Enforcement Order.[371]

371 Regulation No. 805/2004 of the European Parliament and the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ 2004 L143. It does not apply to Denmark.

6.1. Legitimate aim and proportionality

Key points

- Restrictions are permitted if they have a legitimate aim and are proportionate. They must not impair the very essence of the right.
- Examples of legitimate aims include the proper administration of justice (for example, imposing costs) and the protection of free speech.
- Proportionality requires striking a fair balance between the aim to be achieved and the measures used.

The rights under Articles 6 and 13 of the ECHR and Articles 47 and 48 of the EU Charter of Fundamental Rights are not absolute, and can be restricted in specific circumstances. Additionally, derogation clauses in international human rights standards permit states to temporarily adjust some of their obligations in exceptional circumstances – such as in times of public emergency threatening the life of the nation (see, for example, Article 15 of the ECHR).

Under CoE law, in assessing the lawfulness of a limitation, the ECtHR takes into account the importance of access to justice as a democratic principle.[372] A lawful restriction must:

- have a legitimate aim;
- be proportionate;
- ensure that the very essence of the right is not impaired.

Article 6 of the ECHR does not define 'legitimate aim', but ECtHR case law provides examples of such legitimate aims. They include restrictions on the right of access to court to protect those responsible for the care of patients from being unfairly harassed by litigation,[373] to ensure the proper administration of

372 ECtHR, *Kijewska v. Poland*, No. 73002/01, 6 September 2007, para. 46.

373 ECtHR, *Ashingdane v. the United Kingdom*, No. 8225/78, 28 May 1985, para. 57.

justice,[374] and to protect the free speech of parliamentarians and maintain the separation of powers between the judiciary and the legislature.[375]

Proportionality is a key principle in ECtHR case law. It requires striking a fair balance between the legitimate aims of the state and the measures the state uses to achieve those aims. Proportionality also requires a fair balance between individual rights and public interests.[376] The more substantial the interference with the right, the greater the justification required.[377] For example, the obligation to surrender to custody before an appeal hearing was found to be a disproportionate interference with the right of access to a court.[378] The state bears the burden of justifying an interference as proportionate, and it should consider using the least intrusive measure.[379]

Example: In *Harrison Mckee v. Hungary*,[380] the applicant, who was represented by a lawyer, initiated civil proceedings against a public prosecutor, alleging that a letter sent in the course of criminal proceedings contained false information about him. The Budapest Regional Court held that his right to reputation had been violated but dismissed his claim for compensation, stating that it was excessive and that he could not prove that he suffered any actual damage. The applicant was ordered to pay approximately €2,900 in court fees. The applicant appealed to the Budapest Court of Appeal, which upheld the first instance court decision that the applicant should pay court fees calculated as a percentage of the dismissed part of his claims.

The ECtHR reiterated that the right of access to a court is not absolute and can be limited. Limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. In this case, the Court saw no reason to doubt that the applicant,

374 ECtHR, *Harrison Mckee v. Hungary*, No. 22840/07, 3 June 2014.

375 ECtHR, *A. v. the United Kingdom*, No. 35373/97, 17 December 2002, para. 77.

376 For an example of balancing the protection of witnesses and the rights of the defence, see e.g. ECtHR, *Van Mechelen and Others v. the Netherlands*, Nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, paras. 59–65.

377 *Ibid.*, at para. 60.

378 ECtHR, *Papon v. France (No.2)*, No. 54210/00, 25 July 2002, para. 100.

379 ECtHR, *Saint-Paul Luxembourg S.A. v. Luxembourg*, No. 26419/10, 18 April 2013, para. 44.

380 ECtHR, *Harrison Mckee v. Hungary*, No. 22840/07, 3 June 2014.

with the help of his lawyer, could have determined what would have been a 'reasonable' claim and thus the amount of the court fees payable in case of an unsuccessful action was foreseeable. The aims of imposing court fees were compatible with the proper administration of justice, and the proceedings provided adequate safeguards to ensure this requirement did not constitute a disproportionate financial burden on *bona fide* claimants. The Court found that Article 6 of the ECHR was not violated.

A similar approach is taken **under EU law.** Limitations must be proportionate and respect the essence of the right. This means that limitations must not go beyond what is appropriate and necessary to meet the "objectives of general interest recognised by the Union" or to protect the rights and freedoms of others.[381] The state should use the least onerous measure available.[382]

Example: In *Rosalba Alassini v. Telecom Italia SpA,*[383] the CJEU considered four joined preliminary references from the *Giudice di Pace di Ischia* concerning clauses under which an attempt to settle out-of-court was a mandatory condition for certain disputes to be admissible before national courts. The clauses were enacted in the context of transposing Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.

The CJEU confirmed that most fundamental rights do not constitute "unfettered prerogatives" and can be restricted. It referred to ECtHR case law and emphasised that restrictions had to correspond to objectives of general interest. They must not be disproportionate or infringe upon the very substance of the rights guaranteed. The aims of the national provisions at issue – quicker and less expensive dispute settlement, and

381 The Explanations to the EU Charter of Fundamental Rights confirm that "the reference to general interests recognised by the Union covers both the objectives mentioned in Art. 3 of the Treaty on European Union and other interests protected by specific provisions of the Treaties such as Art. 4(1) of the Treaty on European Union and Articles 35(3), 36 and 346 of the Treaty on the Functioning of the European Union". CJEU, C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, 9 November 2010, para. 74.

382 For example, regarding penalties, see C-443/13, *Ute Reindl v. Bezirkshauptmannschaft Innsbruck*, 13 November 2014, para.40.

383 CJEU, Joined cases C-317/08 to C-320/08, *Rosalba Alassini v. Telecom Italia SpA, Filomena Califano v. Wind SpA, Lucia Anna Giorgia Iacono v. Telecom Italia SpA and Multiservice Srl v. Telecom Italia SpA*, 18 March 2010, paras. 63–65.

lightening the burden on the court system – were legitimate, and imposing an out-of-court settlement procedure did not, on the facts, appear disproportionate in relation to the objectives pursued.

6.2. Examples of restrictions before a final judgment or decision

Key points

- Court fees and costs may constitute an unlawful restriction on access to justice if they are too high, because these can deprive individuals of their right of access to court. The appropriateness of a fee depends on the facts of each case, including the applicant's means.
- Excessive formalism (a strict interpretation of procedural rules) may deprive applicants of their right of access to court.
- High evidential thresholds may create barriers to accessing justice. Presumptions of fact or law (e.g. presumptions of discrimination) may assist individuals in pursuing their cases.
- Limitation periods must be proportionate and serve a legitimate aim – such as the proper administration of justice or preventing injustice arising from old claims.
- Immunities may be permitted if they serve a legitimate purpose – for example, protecting parliamentary speech or public officials carrying out their duties.

This section addresses some of the restrictions that have been the subject of decisions by the ECtHR or the CJEU. Some barriers can be described as factual circumstances – for example, delay or excessive formalism – while others result from legal provisions – for example, limitations periods, immunities, and evidence barriers. This is not an exhaustive list. Other barriers include legal standing (see further discussion in Section 8.4 on environmental law) and the excessive length of proceedings (see Chapter 7).[384]

384 FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, p. 38.

6.2.1. Court fees

Court fees may assist the efficient administration of justice (for example, by deterring abusive litigants or reducing administrative costs), but may also restrict access to justice. Excessive court fees that prevent litigants from filing a civil claim may constitute a violation of Article 6 (1) of the ECHR.[385]

Under CoE law and EU law, court fees are not automatically incompatible with Article 6 (1) of the ECHR or Article 47 of the EU Charter of Fundamental Rights. However, if court fees are too high, this may deprive individuals of their right of access to court.[386] For example, the ECtHR found disproportionate fees amounting to approximately four times an applicant's monthly income.[387]

Example: In *Stankov v. Bulgaria*,[388] the applicant successfully sued the state for unlawful detention and was awarded damages. However, he was asked to pay a court fee that amounted to almost 90 % of the compensation the state was ordered to pay. As a consequence, the applicant effectively lost his compensation, even though the Bulgarian courts unequivocally accepted that he was entitled to it.

The ECtHR noted that, in proceedings for damages against the state, rules regarding legal costs must avoid placing an excessive burden on litigants. Costs should not be excessive or constitute an unreasonable restriction on the right of access to a tribunal. Although imposing court fees was compatible with the good administration of justice, the relatively high and wholly inflexible rate of court fees in this case amounted to a disproportionate restriction on the applicant's right to a court. Various procedural solutions used in other member states – such as reducing or waiving court fees in actions for damages against the state or affording courts discretion in determining costs – were absent. The Court found a violation of Article 6 (1) of the ECHR.

385 ECtHR, *Kreuz v. Poland*, No. 28249/95, 19 June 2001, paras. 61–67.

386 ECtHR, *Perdigão v. Portugal*, No. 24768/06, 16 November 2010, para. 74. See also United Nations (UN), Committee on Human Rights (HRC) (2008), *Case No. 1514/2006, Casanovas v. France*, 28 October 2008, para. 11.3.

387 ECtHR, *Kijewska v. Poland*, No. 73002/01, 6 September 2007, para. 47.

388 ECtHR, *Stankov v. Bulgaria*, No. 68490/01, 12 July 2007.

Under EU law, the issue of costs has been considered in relation to the access to justice requirements under the directive implementing the Aarhaus Convention (see Section 8.4 on environmental law).[389]

Example: In *European Commission v. the United Kingdom of Great Britain and Northern Ireland*,[390] a group of environmental NGOs lodged a complaint with the European Commission, alleging that individuals and civil society groups were unable to pursue cases in UK courts because of the "prohibitively expensive" costs of legal action and, specifically, the application of the "loser pays rule", which requires the losing party to cover the winning party's legal costs. They argued that this breached the access to justice provisions (Articles 3 (7) and 4 (4)) of the directive implementing the Aarhaus Convention, which among others, prohibit making review procedures "prohibitively expensive". The European Commission referred the case to the CJEU.

The CJEU considered what was meant by "prohibitively expensive" in the directive. This evaluation required an objective and a subjective assessment. Costs must not be "objectively unreasonable", but also cannot exceed the financial resources of the person concerned. In assessing what is subjectively reasonable, a number of factors can be taken into account, including: (i) whether the case has reasonable prospects of success; (ii) what is at stake for the claimant and the protection of the environment; and (iii) the complexity of the law and relevant procedure. This assessment does not differ at first instance and on appeal. The UK failed to correctly transpose the directive.

Fees must be assessed in light of the particular circumstances of the case – including the individual's ability to pay – to determine whether the individual still enjoys the right of access to a court.[391] This right may be violated by refusals to reimburse the winning party's costs.[392] States should ensure that the

389 UN, Economic Commission for Europe (UNECE) (1998), Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998.

390 CJEU, C-530/11, *European Commission v. the United Kingdom of Great Britain and Northern Ireland*, 13 February 2014. See also CJEU, C-260/11, The *Queen, on the application of David Edwards and Lilian Pallikaropoulos v. Environment Agency and Others*, 11 April 2013.

391 See also ECtHR, *Tolstoy Miloslavsky v. the United Kingdom*, No. 18139/91, 13 July 1995, paras. 61–67 (deeming reasonable the requirement to pay a substantial security deposit in respect of the opposing party's legal costs because the appeal was not considered meritorious).

392 ECtHR, *Stankiewicz v. Poland*, No. 46917/99, 6 April 2006, paras. 60 and 75.

need to fund the administration of justice does not negate the right to access court. National laws often provide for the possibility to apply for legal aid to cover court fees (see Chapter 3 on legal aid). Simplified procedures can also help; these can be similar in nature to the European Small Claims Procedure discussed in Section 8.5, and are often less costly and quicker.

Promising practice

Reducing costs and simplifying procedures

In the United Kingdom (England and Wales), the government introduced *Money Claim Online (MCOL)* as a solution to long and costly procedures for small claims. Claims must be for an amount below £100,000 and be against someone with an address in England or Wales.

Source: Council of Europe, CEPEJ (2014), Report on 'European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice', p. 260. See also www.gov.uk/make-money-claim-online and www.inbrief.co.uk/preparing-for-trial/problems-with-small-claims.htm.

6.2.2. Excessive formalism

Excessive formalism refers to particularly strict interpretations of procedural rules that may deprive applicants of their right of access to a court. This can include strict interpretations of time-limits, rules of procedure and evidence.

Example: In *Poirot v. France*,[393] the applicant, a woman with disabilities, lodged a criminal complaint alleging sexual assault and rape at a residential care home. A judicial investigation of the allegations was opened in 2002. In 2006, the investigating judge amended the charges to allege only sexual assault, and committed the accused for trial at the local criminal court. The applicant appealed the re-classification of the alleged acts and the committal order because she considered the offences serious enough to be tried by the *Cour d'Assise*. Her appeal was dismissed. The decision stated that her notice of appeal did not explicitly mention the grounds for the appeal. The applicant then appealed this decision on points of law, but to no avail. The perpetrator was later acquitted. The applicant alleged that the dismissal of her appeal deprived her of her right of access to the court.

393 ECtHR, *Poirot v. France*, No. 29938/07, 15 December 2011, para. 46.

The ECtHR observed that the Code of Criminal Procedure did not formally require the applicant to make explicit reference to the grounds of her appeal. The relevant provision of the code in question was the only one that allowed the applicant to challenge the committal order made by the investigating judge. The Court accepted that the national authorities were in the best position to interpret domestic legislation. However, the judicial authorities applied the relevant procedural rules in an excessively formalistic manner, thereby infringing on the applicant's right of access to a court. The Court thus found a violation of Article 6 (1) of the ECHR.

The court's role and alternative avenues of redress available to an applicant may be relevant in examining the question of formalism. For example, where a court has a unique role in reviewing administrative decisions, acting both as court of first and last instance, its procedure should not be excessively formalistic, as this deprives individuals of an avenue of redress.[394]

A particularly strict construction of procedural rules by constitutional courts may deprive applicants of their right of access to a court.[395] For example, if a procedural rule – such as a time limit – is construed in such a way that it prevents applicants' actions from being examined on the merits, this undermines the right of access to a court.[396]

Example: In *Maširević v. Serbia,*[397] the applicant, a practising lawyer, filed a civil claim with a municipal court, seeking payment by a private insurance company for a service rendered pursuant to a legal fee agreement. The court initially ordered the payment but, after a counter-claim by the insurance company, quashed the order and declared the contract null and void. The appellate court upheld this judgment and the applicant filed an appeal on points of law with the Supreme Court. The Supreme Court dismissed the appeal, stating that the applicant was not entitled to lodge it because Article 84 of the Serbian Civil Procedures Act specified that an appeal on points of law may only be submitted by an attorney at law, and

394 See, for example, ECtHR, *Sotiris and Nikos Kouras ATTEE v. Greece*, No. 39442/98, 16 November 2000, para. 22 and ECtHR, *Shulgin v. Ukraine*, No. 29912/05, 8 December 2011, para. 65.

395 ECtHR, *Běleš and Others v. the Czech Republic*, No. 47273/99, 12 November 2002, para. 69.

396 ECtHR, *Miragall Escolano and Others v. Spain*, Nos. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98, 25 May 2000, paras. 33 and 36.

397 ECtHR, *Maširević v. Serbia*, No. 30671/08, 11 February 2014.

not the plaintiff personally. The Supreme Court stated that, pursuant to this Act, parties to proceedings lost the legal capacity to file an appeal on points of law individually, even if they were themselves attorneys.

The ECtHR held that this particularly strict interpretation of the procedural rule undermined the right of access to a court. The Court stated that, in cases such as these, its role was to decide whether the procedural rules in question were intended to ensure the proper administration of justice and the principle of legal certainty. The Supreme Court's interpretation of the rule in question did not serve these aims and deprived the applicant of a full examination of the merits of his allegations. The Court therefore found a violation of Article 6 (1) of the ECHR.

Excessive formalism may also occur when a court attaches paramount importance to a factual consideration (such as an applicant's illegal residence status) without balancing this properly with the applicants' fundamental rights (for example, their right to family life under Article 8).[398] Self-reflective practice might assist courts in avoiding practices that can undermine access to justice.

Promising practice

Promoting access to justice by reducing excessive formalism

The Yambol Administrative Court (Bulgaria) was awarded the 2010 Crystal Scales of Justice Prize for its efforts to provide clear and open information about its services to promote confidence in the judicial process. The court implemented an action plan targeting citizens and the media; and it requires its judicial personnel to use plain language when communicating with citizens. Other actions include adopting a 'Clients Charter' – a written undertaking by the court to present its services in an understandable, open and precise style. Such measures can improve individuals' access to court because they help reduce overly complex forms of communication. Surveys confirm that the public's perception of the court's activities has greatly improved.

Source: 2010 Crystal Scales of Justice Prize organised jointly by the Council of European and the European Commission.

398 ECtHR, *Rodrigues Da Silva and Hoogkamer v. the Netherlands*, No. 50435/99, 31 January 2006, para. 44.

6.2.3. Evidence barriers

For individuals to obtain adequate redress from courts, they must provide sufficient evidence to support their cases. If evidential thresholds are too high, actions before courts may be doomed to fail and individual legal rights may in practice be unenforceable.[399]

In some cases, evidence barriers can be reduced by introducing specific requirements about which party has to prove the elements of the case (burden of proof requirements). For example, in criminal matters, the burden of proof lies with the prosecution. The prosecution has therefore the duty to prove the case against the person charged with a criminal offence. This is tied to the presumption of innocence under Article 6 (2) of the ECHR and Article 48 (1) of the EU Charter of Fundamental Rights. Reverse burdens of proof can undermine the presumption of innocence.

However, in very specific and limited cases, **under CoE law**, the evidential burden may be shifted to the defence. The importance of what is at stake and the safeguards that exist to protect the rights of the defence must be considered when determining whether a reverse burden is acceptable.[400]

Example: In *Klouvi v. France*,[401] the applicant lodged a criminal complaint against her former line manager, P., in 1994, alleging rape and sexual harassment. In 1998, the investigating judge held that there was no case, as there was insufficient evidence. Meanwhile, P. initiated criminal proceedings against the applicant for malicious prosecution. The applicant received a suspended prison sentence and was ordered to pay damages. Her appeal was dismissed. She complained that the presumption of innocence had been violated.

The ECtHR recognised that every domestic system uses legal presumptions. In the present case, however, the judgment was based on a strict application of the criminal code – holding first that, if there was no case, this necessarily meant that the applicant's accusations were false and, second, since the applicant complained of repeated rape and sexual harassment, she must

399 FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, p. 62.

400 ECtHR, *Salabiaku v. France*, No. 10519/83, 7 October 1988.

401 ECtHR, *Klouvi v. France*, No. 30754/03, 30 June 2011.

> have known that her allegations were untrue, thus establishing intentional malicious prosecution. The presumptions made meant that she had no means of defending herself against the charge of malicious prosecution. This violated Article 6 (2) of the ECHR.

Other presumptions of fact can arise in specific circumstances. For example, in cases concerning Article 3 of the ECHR (torture or inhuman and degrading treatment), where the relevant events take place within state control (for example, in prison), the burden of proof may shift to the state. This means that the authorities have to provide a satisfactory and convincing explanation for injuries sustained during detention.[402]

Within the EU, a European Commission Proposal for a Directive of the European Parliament and the Council aims to strengthen certain aspects of the presumption of innocence within the EU. [403] Article 5 of the current draft compromise text confirms the presumption of innocence, requesting Member States to ensure that the burden of proof in establishing the guilt of suspects and accused persons is on the prosecution.[404]

Further, **under EU law**, a specific regime now applies to individuals trying to establish discrimination, who traditionally faced particularly complex evidence barriers.[405] Under EU law, once a claimant has established an initial case on the facts, a presumption of discrimination arises, and the responding party must prove that discrimination did not occur. This shift in the burden of proof is now embedded in EU legislation on non-discrimination, such as the Racial Equality Directive and the Gender Equality Directive.[406] These directives are exceptions to the usual evidential requirements, which oblige applicants to prove all elements of their cases.

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402 ECtHR, *Gurgurov v. Moldova*, No. 7045/08, 16 June 2009, para. 56.

403 European Commission (2013), Proposal on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821 final, Brussels, 27 November 2013, Art. 5(2).

404 See Council of the European Union (2015), Note from presidency and permanent representative committee, interinstitutional file 2013/0407 (COD).

405 CJEU, C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, 27 October 1993. See also FRA (2011), *Handbook on European non-discrimination law*, Luxembourg, Publications Office.

406 In terms of EU legislation embedding shifts in the burden of proof, see Racial Equality Directive, Art. 8; Gender Goods and Services Directive, Art. 9; Gender Equality Directive, Art. 18; and Employment Framework Directive, Art. 10.

Example: In *Galina Meister v Speech Design Carrier Systems GmbH*,[407] a Russian national applied for a job vacancy for an 'experienced software developer'. Her application was rejected. A second advertisement with the same content was published by the same company not long afterwards. The applicant's re-application was again rejected. She claimed that she was the victim of discrimination on the basis of her sex, age and ethnic origin. She brought an action seeking compensation for employment discrimination and the disclosure of her file. Her action was dismissed, and her appeal against that decision was also dismissed. She then appealed to the Federal Labour Court, which referred to the CJEU the question of whether the applicant could claim a right to information on the basis of several directives.

The CJEU noted that persons who consider themselves discriminated against must initially establish facts from which discrimination may be presumed. Only after establishment of these facts must the defendant prove that there was no discrimination. The CJEU held that a refusal of disclosure by the defendant could prevent the applicant from establishing the initial facts. The referring court had to make sure that this refusal did not prevent the applicant from establishing her case.

6.2.4. Limitation periods

Limitation periods set time limits within which a party must bring a claim, or give notice of a claim to another party. Imposing reasonable time limits and procedural conditions for bringing claims can promote the proper administration of justice by ensuring legal certainty and finality and protecting potential defendants from old claims that might be difficult to counter because of the passage of time.[408] **Under CoE law and EU law**, a time limit in principle does not violate Article 6 (1) of the ECHR or Article 47 of the EU Charter of Fundamental Rights, respectively.

Under CoE law, although limitation periods are a common feature of domestic legal systems and serve several important purposes, to be lawful, they must pursue a legitimate aim and be proportionate to that aim.[409]

407 CJEU, C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH*, 19 April 2012. See also CJEU, C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, 16 July 2015.

408 ECtHR, *MPP Golub v. Ukraine*, No. 6778/05, 18 October 2005.

409 ECtHR, *Stubbings and others v. the United Kingdom*, Nos. 22083/93 and 22095/93, 22 October 1996, paras. 50–56.

Example: In *Bogdel v. Lithuania*,[410] the applicants inherited a plot of land that had been bought from the state. Ten years later, a court held that the initial sale was illegal and that the land should be returned to the government without payment. The applicants appealed; the appellate court held that the amount originally paid for the land should be refunded, but ownership was denied. The applicants maintained that the state's claim to the land should have been time-barred.

The ECtHR reiterated that limitation periods "are a common feature of the domestic legal systems of the Contracting States". They ensure legal certainty, protect potential defendants and prevent injustices that could arise if courts were required to decide upon events that took place in the past, on the basis of evidence that may no longer be reliable or complete. Here, the applicants argued before the ECtHR that it was discriminatory to apply different rules regarding the starting date for limitation periods to state authorities and to private entities, but did not raise this issue in the domestic courts. Even so, the ECtHR concluded that the effect of this distinction was compatible with the applicants' right to a court, and that Article 6 (1) of the ECHR was not violated.

Similarly, **under EU law**, statutory limitation periods for bringing actions before national courts are not necessarily unlawful.[411]

Example: In *Q-Beef and others*,[412] the applicants on 2 April 2007 instituted proceedings against the Belgian state, seeking reimbursement of contributions paid between January 1993 and April 1998. According to the referring court, the five-year limitation period governing the applicants' claim had expired.

The CJEU held that, with regard to the principle of effectiveness, it was compatible with EU law to establish, in the interests of legal certainty, reasonable time-limits for bringing proceedings. These limitation periods must not make it virtually impossible or excessively difficult to exercise the rights conferred by EU law.

410 ECtHR, *Bogdel v. Lithuania*, No. 41248/06, 26 November 2013.

411 CJEU, C-231/96, *Edilizia Industriale Siderurgica Srl (Edis) v. Ministero delle Finanze*, 15 September 1998, paras. 34–36.

412 CJEU, Joined cases C-89/10 and C-96/10, *Q-Beef NV v. Belgische Staat and Frans Bosschaert v. Belgische Staat, Vleesgroothandel Georges Goossens en Zonen NV and Slachthuizen Goossens NV*, 8 September 2011.

Additionally, under EU law, time-limits must not be less favourable than those relating to similar domestic claims.[413] Several EU secondary law instruments contain specific rules in this context; for example, the Mediation Directive (see Section 2.4.2) requires states to ensure that no limitation periods run while a dispute is being mediated.[414]

6.2.5. Immunities

Immunities are a very specific type of procedural bar. States may also introduce immunities to prevent claims from being made. A legal immunity is an exemption from all or parts of the legal process – for example, from a legal duty, a penalty or from prosecution.[415] Some immunities are designed to comply with obligations arising from public international law – such as state immunity or diplomatic immunity; others may be granted at the domestic level – for example, to protect public officials from liability for decisions made in the course of their official duties, or to protect the free speech of parliamentarians.

Parliamentary immunity may be compatible with Article 6 if it pursues the legitimate aims of protecting free speech in parliament or maintaining the separation of powers between the legislature and the judiciary.[416] Immunity will be easier to justify if it is closely connected to parliamentary activity.[417]

Example: In *C.G.I.L. and Cofferati (No. 2) v. Italy,*[418] the applicants were an Italian trade-union federation and its general secretary. In 2002, an adviser to the Minister of Labour was murdered by the Red Brigades. During a debate in parliament, references were made to the alleged link between terrorism and trade-union campaigns. A member of parliament made allegations to the press. The applicants brought an action for damages against him, arguing that his statements harmed their reputation. The Chamber of Deputies

413 CJEU, C-261/95, *Rosalba Palmisani v. Istituto nazionale della previdenza sociale (INPS)*, 10 July 1997, paras. 27–28.

414 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (Mediation Directive), OJ 2008 L 136, Art. 8.

415 Kloth, M. (2010), *Immunities and the right of access to the court under Art. 6 of the European Convention on Human Rights*, Leiden, Martinus Nijhoff Publishers, p. 1.

416 ECtHR, *A. v. the United Kingdom*, No. 35373/97, 17 December 2002, paras. 75–77.

417 ECtHR, *Cordova v. Italy (No.2)*, No. 45649/99, 30 January 2003, para. 64.

418 ECtHR, *C.G.I.L. and Cofferati (No. 2) v. Italy*, No. 2/08, 6 April 2010, para. 44.

declared that the statements were covered by parliamentary immunity. The applicants complained that this interfered with their right of access to a court.

The ECtHR found a violation of Article 6 of the ECHR. Parliamentary immunity was a long-standing practice aimed at protecting the free speech of parliamentarians. The interference with the applicants' rights pursued a legitimate aim, but it was not proportionate. The statements were not, strictly speaking, linked to the performance of parliamentary duties. The authorities did not strike a fair balance between the general interests of the community and the requirement of protecting the individual's fundamental rights.

State (or sovereign) immunity has been deemed to pursue a legitimate aim justifying restrictions on access to a court because it is a recognised concept of international law that promotes comity (mutual respect) and good relations between states.[419] State immunity can apply even where cases involve allegations of torture. However, the ECtHR has noted that, in light of current developments in this area of public international law, this issue should be kept under review by states.[420]

Other immunities may include limitations on individuals' ability to pursue legal proceedings challenging statements and findings made by civil servants. Such restrictions may be acceptable if they pursue a legitimate aim – for example, the effective functioning of an investigation.[421] However, there must be a relationship of proportionality between the means employed and the legitimate aim pursued.[422]

419 ECtHR, *Al-Adsani v. the United Kingdom*, No. 35763/97, 21 November 2001, para. 56.

420 ECtHR, *Jones and others v. the United Kingdom*, Nos. 34356/06 and 40528/06, 14 January 2014, para. 215.

421 ECtHR, *Fayed v. the United Kingdom*, No. 17101/90, 21 September 1994, para. 70.

422 *Ibid.*, paras. 75–82.

6.3. Delay in the execution of final judgments

Key points

- The right of access to a court includes the right to have a court decision enforced. The failure to execute a judgment may unreasonably obstruct access to justice and violate Article 13 of the ECHR.
- ECtHR case law identifies several criteria relevant to determining the reasonableness of a delay, such as the complexity of the enforcement proceedings; the behaviour of the applicant and the competent authorities; and the amount and nature of the court award.
- Under EU law, the failure to enforce a judgement violates Member State obligations under Articles 4 (3) and 19 of the TEU and the EU Charter of Fundamental Rights. The CJEU has not (yet) ruled on this issue under Article 47.

The non-execution of court judgments limits access to justice. It can undermine fundamental rights protection and deprive individuals of effective judicial protection. In doing so, the non-execution of court judgments also undermines the rule of law.[423]

Under CoE law, the right of access to a court includes the right to have a court decision enforced without undue delay. The non-execution of domestic judgments thus falls within the scope of Article 6 of the ECHR.[424] Delays in executing a judgment may also lead to a violation.[425] States have a duty to ensure that final and binding court judgments are enforced. If the delay or

423 Council of Europe, CCJE (2010), *Opinion n°13 (2010) on the role of Judges in the enforcement of judicial decisions*, Strasbourg, para. 7; Council of Europe, CEPEJ (2007), *Enforcement of court decisions in Europe*, *CEPEJ Studies No. 8*, Strasbourg; CEPEJ (2010), *Access to justice in Europe*, Strasbourg; Council of Europe, CEPEJ (2008), *Checklist for promoting the quality of justice and the court*, Strasbourg, e.g. p.16.

424 ECtHR, *Hornsby v. Greece*, No. 18357/91, 19 March 1997, para. 40. See also UN, Committee on Human Rights (HRC) (2005), *Case No. 823/1998, Czernin v. Czech Republic*, 29 March 2005 (inaction and excessive delays in implementing decisions violate ICCPR Art. 14).

425 Council of Europe, Committee of Ministers (2003), Recommendation Rec(2003)17 to member states on enforcement, 9 September 2003. See also Council of Europe, CEPEJ (2009), *Guidelines for a better implementation of the existing Council of Europe Recommendation on enforcement*.

non-enforcement of a judgment can be attributed to a state, this gives rise to a claim under Article 13 of the ECHR.

Example: In *Ivanov v. Ukraine*,[426] the applicant complained about the non-enforcement of judgments in his favour and the lack of effective remedy at the domestic level.

The ECtHR confirmed that the state is responsible for the enforcement of final decisions if the factors impeding or blocking their full and timely enforcement are within the authorities' control. The Court reviewed the execution of judgments under Article 6 and identified the following factors as relevant to determining the reasonableness of a delay: (i) the complexity of the enforcement proceedings; (ii) the behaviour of the applicant and the competent authorities; and (iii) the amount and nature of the court award. The Court found violations of Articles 6 and 13 of the ECHR.

It is inappropriate to require an individual who has obtained judgment against a state to bring enforcement proceedings to obtain satisfaction therefrom.[427] It is the state's duty to act. A public authority cannot invoke a lack of resources to justify not paying a debt ordered by a court decision.[428] Furthermore, late payment following enforcement proceedings does not afford adequate redress.[429] The ECtHR has stated that, in cases concerning the non-enforcement of judicial decisions, domestic measures to ensure timely enforcement are of the "greatest value". However, states can choose to provide a purely compensatory remedy if the remedy meets specific requirements (for further discussion of compensation as a remedy in cases of non-execution, see Section 5.2.1).

Under EU law, Article 47 of the Charter of Fundamental Rights applies to all rights arising from EU law and entitles individuals to effective judicial protection of these rights. The failure to enforce a judgment violates Member State obligations under Articles 4 (3) and 19 of the TEU (see Chapter 1) and the Charter of Fundamental Rights. The CJEU has not (yet) ruled on this issue under Article 47.

426 ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, No. 40450/04, 15 October 2009, paras. 53–57.

427 ECtHR, *Scordino v. Italy (No.1)*, No. 36813/97, 29 March 2006, para. 198.

428 ECtHR, *Sacaleanu v. Romania*, No. 73970/01, 6 September 2005.

429 ECtHR, *Karahalios v. Greece*, No. 62503/00, 11 December 2003, para. 23.

On the more general issue of enforcing judgments, the EU has adopted secondary legislation to deal with the cross-border recognition and enforcement of judgments. For example:[430]

- The European Enforcement Order (EEO) is available to enforce uncontested civil or commercial judgments in other EU Member States.[431] Uncontested means that the defendant has agreed to the claim, that the court has approved a settlement or that the defendant failed to appear to defend the claim. Individuals may obtain declarations of enforceability. The EEO is then sent to the enforcement authority of the relevant EU Member State. There are express exemptions, such as cases concerning wills and succession or matrimonial property.

- If an EEO cannot be used, individuals may be able to enforce judgments using the Brussels I Regulation from 2001.[432]Excluded proceedings include arbitration, bankruptcy and matrimonial proceedings. A new recast Brussels I Regulation – which replaced the 2001 Brussels I Regulation – came into force on 10 January 2015. [433] The Brussels Regulation, however, still applies to judgments in proceedings started before that date.

430 Other examples include Regulation No. 650/2012/EU of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201/107; Council Regulation No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ L 338/1; and Council Regulation No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7/1.

431 Regulation No. 805/2004 of the European Parliament and the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ 2004 L143. It does not apply to Denmark.

432 Regulation No. 44/2001 of the European Parliament and the Council of 22 December 2001 on jurisdiction and regulation and enforcement of judgments in civil and commercial matters, OJ 2001 L12. The provisions were extended to Denmark by Council Decision 2006/325/EC of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2006/325/EC, OJ 2006 120. See also the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Lugano Convention), OJ 2007 L339, 30 October 2007, signed by the EU, Denmark, Iceland, Norway and Switzerland.

433 Regulation No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and regulation and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L351. Denmark has not opted in.

Promising practice

Enforcing judgments efficiently

In Sweden, debts are enforced by the Swedish Enforcement Authority (SEA). The creditor applies for enforcement. If all necessary documents are enclosed, the SEA notifies the debtor about the debt, giving him/her two weeks to pay or object. If the debtor does not pay, enforcement can start. The SEA searches for assets that can be attached to pay the debt (for example, through the land registry, company registry and tax accounts). The debtor must provide information about his/her assets and may be questioned about them. Third parties are required to provide information about assets that belong to the debtor but are in the third parties' care. The SEA evaluates the information and attaches those assets that can cover the debt with the least harm to the debtor. If money in a bank account is attached, the money is transferred to the SEA within a few days and then distributed to the creditor.

Source: The Swedish Enforcement Authority.

7

Limitations on access to justice: length of proceedings

EU	Issues covered	CoE
Length of proceedings		
Charter of Fundamental Rights, Article 47 (right to an effective remedy) Charter of Fundamental Rights, Article 41 (right to good administration)	Determining the length of proceedings	ECHR, Article 6 (1) (right to a fair trial)
	Non-criminal proceedings	ECtHR, *Oršuš and Others v. Croatia*, No. 15766/03, 2010
	Criminal proceedings	ECtHR, *Malkov v. Estonia*, No. 31407/07, 2010
Reasonableness of the length of proceedings		
CJEU, C-500/10, *Ufficio IVA di Piacenza v. Belvedere Costruzioni Srl.*, 2012	Criteria determining reasonableness	ECtHR, *Starokadomskiy v. Russia (No. 2)*, No. 27455/06, 2014
	Complexity of the case	ECtHR, *Matoń v. Poland*, No. 30279/07, 2009
	Behaviour of the applicant	ECtHR, *Veliyev v. Russia*, No. 24202/05, 2010

EU	Issues covered	CoE
	Behaviour of the domestic authorities	ECtHR, *Sociedade de Construções Martins & Vieira, Lda. and Others v. Portugal*, Nos. 56637/10 and others, 2014
	Importance of the right at stake	ECtHR, *Mikulić v. Croatia*, No. 53176/99, 2002
Remedies for excessive length of proceedings		
CJEU, C-58/12 P, *Groupe Gascogne SA v. European Commission*, 2013		ECtHR, *Scordino v. Italy (No. 1)*, No. 36813/97, 2006

Having court proceedings conclude within a reasonable time is a fundamental human right in both non-criminal and criminal proceedings. This chapter details CoE and EU law on determining the length of proceedings and deciding whether the length is reasonable. Section 7.3 outlines the remedies available for excessively lengthy proceedings.

7.1. Determining the length of proceedings

Key points

- The right to trial within a reasonable time is safeguarded by both Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights.
- The total length of proceedings is considered when deciding whether they were concluded within a reasonable time.
- In non-criminal cases, time normally begins to run from the moment an action is instituted before a tribunal.
- In criminal cases, time normally begins to run from the moment a person is 'charged'. This means from the moment that the individual's situation is 'substantially affected'.
- In both criminal and non-criminal cases, time ends when the determination becomes final (is not open to appeal).

Promising practice

Expediting family cases

The family affairs' courts and the Bar of Berlin, Germany, implemented a successful joint project in Berlin to speed up judicial procedures relating to family cases. The project tackles the length of proceedings and possible conflict between parents, for example. It establishes a consistent, multi-disciplinary approach among professionals (lawyers, social workers and judges), with joint interventions helping parents to independently identify and meet the needs of their children, and more efficiently resolve proceedings.

Source: 2014 Crystal Scales of Justice Award, organised jointly by the Council of European and the European Commission.

The right to trial within a reasonable time is found in Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights. Despite the importance of this right, the excessive length of proceedings is by far the most common issue raised in applications to the ECtHR.[434]

The requirement for proceedings to end within a reasonable time "applies to all parties to court proceedings and its aim is to protect them against excessive procedural delays".[435] Excessive delays can undermine respect for the rule of law and prevent access to justice. Delays in obtaining and executing judgments can constitute a procedural barrier to accessing justice (see Section 6.3). States must organise their legal systems to enable their courts to comply with the obligation to determine cases within a reasonable time.[436] A failure to adjudicate within a reasonable time gives rise to an entitlement to an effective remedy (see Section 7.3).[437] States should guarantee specific legal avenues through

434 Council of Europe, Committee of Ministers (2010), Recommendation Rec(2010)3 to member states on effective remedies for excessive length of proceedings, 24 February 2010. See also Council of Europe, Registry of the European Court of Human Rights, Annual Report 2014, pp. 174–175.

435 ECtHR, *Stögmüller v. Austria*, No. 1602/62, 10 November 1969, para. 5.

436 ECtHR, *Scuderi v. Italy*, No. 12986/87, 24 August 1993, para. 16. ECtHR, *Jama v. Slovenia*, No. 48163/08, 19 July 2012, para. 36.

437 Council of Europe, Committee of Ministers (2010), Recommendation Rec(2010)3. See also Council of Europe, CEPEJ (2012), *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights*. The reports identify and evaluate key principles from the 'reasonable time' case law.

which individuals can seek remedies for unduly long proceedings; failing to do so constitutes a separate violation of Article 13.[438]

Neither CoE law nor EU law has established specific time frames for what constitutes a 'reasonable time'. Cases are assessed on an individual basis and in light of all individual circumstances. This assessment is made pursuant to the criteria established by the ECtHR in its case law and also applied by the CJEU. The ECtHR first identifies the period to be taken into consideration in determining the length of proceedings. It then considers whether the length of time is reasonable (see further Section 7.2).[439] Chapter 1 (in particular the Figure) outlines the connection between the rights in the EU Charter of Fundamental Rights and the ECHR – due to this connection, the CoE law set out below also applies to EU law under Article 47.

The principle of having a hearing within a reasonable time also applies in the context of administrative procedures within the EU.[440] This is also specified in Article 41 of the EU Charter of Fundamental Rights, which gives all citizens the right to have their affairs handled impartially, fairly and within a reasonable time by EU bodies and institutions.

7.1.1. Determining the length of non-criminal proceedings

In non-criminal cases, time normally begins to run from the moment an action is instituted before a tribunal.[441] However, it sometimes begins to run before the start of court proceedings.[442] This only occurs in exceptional circumstances – such as when certain preliminary steps are a necessary preamble to the proceedings.[443] For example, if an applicant must apply to an administrative authority before bringing court proceedings, the time considered may include

438 ECtHR, *Kudła v. Poland*, No. 30210/96, 26 October 2000, paras. 159–160.

439 ECtHR, *Kudła v. Poland*, No. 30210/96, 26 October 2000, para. 124.

440 See also CJEU, T-214/06, *Imperial Chemical Industries Ltd v. European Commission*, 5 June 2012, para. 284.

441 ECtHR, *Poiss v. Austria*, No. 9816/82, 23 April 1987, para. 50.

442 ECtHR, *Golder v. the United Kingdom*, No. 4451/70, 21 February 1975, para. 32.

443 ECtHR, *Blake v. the United Kingdom*, No. 68890/01, 26 September 2006, para. 40.

this period.[444] The time period covers the entire proceedings in question, including appellate proceedings.[445]

Time ends when a determination becomes final (this includes the assessment of damages post-judgment).[446] The ECtHR looks at the entirety of the proceedings in determining whether the length is reasonable.[447] In relation to the conclusion of proceedings, the execution of judgment or enforcement proceedings are considered an integral part of a case for purposes of calculating the relevant period.[448]

Example: In *Oršuš and Others v. Croatia*,[449] the applicants were 15 pupils of Roma origin who attended two primary schools between 1996 and 2000. They attended Roma-only classes at times. On 19 April 2002, they brought proceedings against the schools, alleging discrimination on the basis of race and a violation of the right to education. In September 2002, a court dismissed their complaint and this decision was upheld on appeal. On 7 February 2007, the Constitutional Court dismissed the applicants' complaint. They complained about the length of the proceedings.

The ECtHR noted that the proceedings started on 19 April 2002 and ended, after proceeding before the municipal and county courts, with the Constitutional Court's decision on 7 February 2007. It held that, while the proceedings before the trial and appellate courts were speedily decided, the proceedings before the Constitutional Court lasted four years, one month and 18 days. The ECtHR concluded that Article 6 (1) of the ECHR was violated.

Regarding the length of proceedings before constitutional courts, the ECtHR takes into account their special role as "guardian of the Constitution".[450] The relevant test in determining whether constitutional court proceedings may be taken into account in assessing the reasonableness of the length of

444 ECtHR, *König v. Germany*, No. 6232/73, 28 June 1978, para. 98.

445 ECtHR, *Poiss v. Austria*, No. 9816/82, 23 April 1987, para. 50.

446 ECtHR, *Guincho v. Portugal*, No. 8990/80, 10 July 1984.

447 ECtHR, *Dobbertin v. France*, No. 13089/87, 25 February 1993, para. 44.

448 ECtHR, *Martins Moreira v. Portugal*, No. 11371/85, 26 October 1988, para. 44.

449 ECtHR, *Oršuš and Others v. Croatia*, No. 15766/03, 16 March 2010.

450 *Ibid.*, para. 109.

proceedings is whether the result of the proceedings is capable of affecting the outcome of the dispute before the ordinary courts.[451]

When a litigant dies and another person declares his or her intention to continue the proceedings as the original applicant's heir, the entirety of the proceedings can be taken into account when examining the proceedings' length.[452] By contrast, where an indvidual intervenes in a case as third party only on his/her own behalf, time runs from the date of intervention for this purpose.[453]

7.1.2. Determining the length of criminal proceedings

The reasonable time requirement in criminal proceedings aims to ensure that "accused persons do not have to remain too long in a state of uncertainty as to the outcome of the criminal accusations against them".[454] In criminal cases, time starts to run the moment a person is "charged".[455] This means from the moment that the situation of the accused is "substantially affected".[456] It should be noted that time may begin to run before a case comes to the trial court – for example, from the time of arrest[457] or institution of a preliminary investigation.[458]

Example: In *Malkov v. Estonia*,[459] the applicant was convicted of murdering a taxi driver in 2008. The criminal investigation had started on 6 August 1998. The applicant complained about the excessive length of the proceedings.

The ECtHR reiterated that, in criminal matters, time begins to run as soon as the person is "charged", which may occur before a case comes before a court. The term 'charge' corresponds to the test of whether the suspect's

451 ECtHR, *Süssmann v. Germany*, No. 20024/92, 16 September 1996, para. 39.
452 ECtHR, *Scordino v. Italy (No.1)*, No. 36813/97, 29 March 2006, para. 220.
453 *Ibid*.
454 ECtHR, *Wemhoff v. Germany*, No. 2122/64, 27 June 1968, para. 18.
455 ECtHR, *Tychko v. Russia*, No. 56097/07, 11 June 2015, para 63.
456 ECtHR, *Eckle v. Germany*, No. 8130/78, 15 July 1982.
457 ECtHR, *Wemhoff v. Germany*, No. 2122/64, 27 June 1968, para. 19.
458 ECtHR, *Ringeisen v. Austria*, No. 2614/65, 16 July 1971, para. 110.
459 ECtHR, *Malkov v. Estonia*, No. 31407/07, 4 February 2010.

situation has been substantially affected. The Court took 17 August 2001 as the starting date – the day on which a police investigator drew up charges against the applicant, and he was declared a fugitive. The end date of the proceedings was 22 April 2009, when the Supreme Court declined the applicant's appeal. In total, the proceedings lasted seven years and eight months at three levels of jurisdiction. The proceedings took an excessively long time, violating Article 6 (1) of the ECHR. This was remedied by a reduction of the applicant's sentence.

The reasonable time requirement applies to the whole proceedings in question, including appeal proceedings.[460] Thus time runs until the judgment determining the charge; this can be a decision by an appeal court on the merits.[461] A criminal charge is "determined" only once the sentence is finally fixed.[462] The execution of a court's judgment is regarded as an integral part of the trial for purposes of Article 6; this includes implementation of a decision to acquit.[463]

7.2. Criteria determining the reasonableness of the length of proceedings

Key points

- The reasonableness of the length of criminal and non-criminal proceedings depends on the particular circumstances of each case.
- The following four criteria are used to assess reasonableness in criminal and non-criminal proceedings: the complexity of the case; the conduct of the complainant; the conduct of domestic authorities; and the importance of what is at stake for the complainant.

The approach to establishing whether proceedings have been unduly lengthy has been described as "more pragmatic than scientific".[464] **Under CoE and**

460 ECtHR, *König v. Germany*, No. 6232/73, 28 June 1978, para. 98.

461 ECtHR, *Neumeister v. Austria*, No. 1936/63, 27 June 1968, para. 19.

462 ECtHR, *Eckle v. Germany*, No. 8130/78, 15 July 1982, para. 77.

463 ECtHR, *Assanidze v. Georgia*, No. 71503/01, 8 April 2004, paras. 181–2.

464 Opinion of Advocate General Sharpston in CJEU, C-58/12, *Groupe Gascogne SA v. European Commission*, 30 May 2013, paras. 72–73.

EU law, in both criminal and non-criminal proceedings, the reasonableness of the length of proceedings depends on the particular circumstances of the case.[465]

Four criteria are used to gauge reasonableness in criminal and non-criminal proceedings:

(i) the complexity of the case;

(ii) the complainant's conduct;

(iii) the conduct of the relevant authorities;

(iv) what is at stake for the complainant (see Sections 7.2.1 to 7.2.4).[466]

Applying these criteria, the ECtHR has, for example, deemed 10 years[467] and 13 years[468] to be unreasonable for criminal proceedings. It has also found unreasonable 10 years for civil proceedings[469] and 7 years for disciplinary proceedings.[470] Cases may progress through a number of jurisdictional levels (for example, by way of appeal). This is taken into account when considering reasonableness. The cumulative effect of delay at each level is considered when determining what is reasonable.[471]

A balance must, however, be achieved between expedition and the proper administration of justice. For example, the need for speedy resolution of a case must not deprive an accused of defence rights (see Section 4.2.4 on adequate time and facilities to prepare one's defence).[472]

465 ECtHR, *König v. Germany*, No. 6232/73, 28 June 1978, para. 110.

466 For example, ECtHR, *Frydlender v. France*, No. 30979/96, 27 June 2000, para. 43 (employment).

467 ECtHR, *Milasi v. Italy*, No. 10527/83, 25 June 1987.

468 ECtHR, *Baggetta v. Italy*, No. 10256/83, 25 June 1987.

469 ECtHR, *Capuano v. Italy*, No. 9381/81, 25 June 1987.

470 ECtHR, *Kincses v. Hungary*, No. 662532/10, 27 January 2015.

471 ECtHR, *Deumeland v. Germany*, No. 9384/81, 29 May 1986, para. 90.

472 ECtHR, *Boddaert v. Belgium*, No. 12919/87, 12 October 1992, para. 39.

Example: In *Starokadomskiy v. Russia (No. 2),*[473] the applicant was charged with aggravated murder in February 1998. He was subsequently accused of other violent crimes together with several co-suspects. In November 2004, he was convicted of a number of offences, including conspiracy to commit murder. His conviction was upheld on appeal and he was eventually sentenced to ten years' imprisonment in November 2005. The applicant complained that the length of the criminal proceedings was unreasonable.

There was no indication that the 'reasonable time' requirement was part of the domestic court's reasoning. Article 6 commands that judicial proceedings be completed within a reasonable time, but it also lays down the more general principle of the proper administration of justice. In this case, the Court was not satisfied that the authorities succeeded in maintaining a fair balance between various aspects of this fundamental requirement. The applicant was in custody, so particular diligence was required. The Court found a violation of Article 6 (1) of the ECHR.

The CJEU has applied the same criteria to proceedings before the EU General Court.[474] The CJEU has also ruled that EU legal obligations do not provide a justification for Member States' failure to comply with the reasonable time principle.

Example: In *Ufficio IVA di Piacenza v. Belvedere Costruzioni Srl,*[475] an Italian law provided for the automatic conclusion of certain tax proceedings pending before the tax court of third instance more than ten years after being brought at first instance. This was held to be compatible with EU law.

The CJEU noted that the obligation to ensure effective collection of European Union resources cannot run counter to compliance with the principle, derived from Article 47 of the EU Charter of Fundamental Rights and Article 6 (1) of the ECHR, that judgment should be given within a reasonable time.

473 ECtHR, *Starokadomskiy v. Russia (No. 2)*, No. 27455/06, 13 March 2014.

474 CJEU, C-58/12 P, *Groupe Gascogne SA v. European Commission*, 26 November 2013, paras. 82–88.

475 CJEU, C-500/10, *Ufficio IVA di Piacenza v. Belvedere Costruzioni Srl.*, 29 March 2012, para. 23.

7.2.1. Complexity of the case

Complexity relates both to the facts and to the law. A complex case may involve issues regarding an applicant's state of health,[476] a high volume of evidence,[477] complex legal issues,[478] the need to interview a large number of witnesses,[479] or a large number of persons affected.[480] Some cases may appear more complex by their nature – for example, if they involve both community and individual interests.[481] However, just because a case is considered very complex does not mean that all delays will be considered reasonable.[482]

Example: In *Matoń v. Poland*,[483] on 19 June 2000, the applicant was charged with drug trafficking, unlawful possession of firearms and membership in an organised criminal gang. There were 36 defendants and 147 witnesses in the case. The applicant was convicted in 2008. He appealed to the regional court, which had not yet determined his appeal at the time of the ECtHR hearing. He also lodged a complaint with the court of appeal, alleging a breach of the right to a trial within a reasonable time. That court rejected his application.

The ECtHR accepted that the case was very complex, involving a number of defendants and voluminous evidence. However, it stated that this in itself could not justify the overall length of the criminal proceedings. Even taking into account the significant difficulties faced by domestic authorities, they were required to organise the trial efficiently and ensure respect for ECHR guarantees. The criminal proceedings, which lasted over eight years, did not respect the reasonable time requirement. Article 6 of the ECHR was breached.

Thus, while complex cases may need more time to complete, complexity does not necessarily justify lengthy proceedings.[484]

476 ECtHR, *Yaikov v. Russia*, No. 39317/05, 18 June 2015, para. 76.

477 ECtHR, *Eckle v. Germany*, No. 8130/78, 15 July 1982.

478 ECtHR, *Breinesberger and Wenzelhuemer v. Austria*, No. 46601/07, 27 November 2012, paras. 30–33.

479 ECtHR, *Mitev v. Bulgaria*, No. 40063/98, 22 December 2004, para. 99.

480 ECtHR, *Papachelas v. Greece*, No. 31423/96, 25 March 1999, para. 39 (complexity of the facts).

481 ECtHR, *Wiesinger v. Austria*, No. 11796/85, 30 October 1991, para. 55.

482 ECtHR, *Ferantelli and Santangelo v. Italy*, No. 19874/92, 7 August 1996, para. 42. See also ECtHR, *Ringeisen v. Austria*, No. 2614/65, 16 July 1971, para. 110.

483 ECtHR, *Matoń v. Poland*, No. 30279/07, 9 June 2009.

484 Council of Europe, CEPEJ (2012), *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights*, p. 20.

7.2.2. Conduct of the complainant

A complainant's behaviour is an objective feature of proceedings over which the state does not have control. It must, therefore, be taken into account when determining whether or not a reasonable time period has been exceeded.[485]

Individuals cannot be blamed for exercising their rights or using all avenues of appeal open to them.[486] They are not required to actively co-operate in expediting proceedings against them.[487] The applicant's duty is to be diligent in conducting his/her case, to refrain from using delaying tactics and to avail him/herself of opportunities for shortening the proceedings.[488]

Example: In *Veliyev v. Russia*,[489] the applicant was arrested and detained on 26 February 2004 on suspicion of having taken part in multiple organised armed robberies. The first instance judgment was rendered on 21 June 2006. The conviction was confirmed on appeal. The government argued that the proceedings were prolonged because of deliberate acts by the co-accused, translation from Russian to Azeri, and occasional illness of the applicant, co-accused and lawyers.

The ECtHR reiterated that an applicant cannot be obliged to cooperate actively with the judicial authorities and cannot be criticised for making full use of the available domestic remedies. In this case, the applicant did not contribute significantly to the length of the proceedings, and certain delays could be attributed to the domestic authorities. Article 6 requires judicial proceedings to be expeditious, and it also lays down the general principle of proper administration of justice. The domestic authorities did not strike a fair balance between the various aspects of this fundamental requirement, breaching Article 6 of the ECHR.

An individual's conduct that may lead to delay includes fleeing the jurisdiction. As a general rule, therefore, an accused cannot complain of the unreasonable duration of proceedings after having fled, unless he/she has sufficient

485 ECtHR, *Wiesinger v. Austria*, No. 11796/85, 30 October 1991, para. 57.

486 ECtHR, *Gubkin v. Russia*, No. 36941/02, 23 April 2009, para. 167. See also ECtHR, *Moiseyev v. Russia*, No. 62936/00, 9 October 2008, para. 192.

487 ECtHR, *Eckle v. Germany*, No. 8130/78, 15 July 1982, para. 82.

488 ECtHR, *Unión Alimentaria Sanders SA v. Spain*, No. 11681/85, 7 July 1989, para. 35.

489 ECtHR, *Veliyev v. Russia*, No. 24202/05, 24 June 2010.

reason.[490] An applicant's conduct must not be used to justify periods of inactivity by the authorities.

7.2.3. Conduct of the domestic authorities

Delays attributable to the state must be taken into account,[491] but attributing responsibility must be carefully considered. For example, a delay in proceedings that results from the referral of a question to the CJEU for a preliminary ruling is not the fault of the state.[492]

States must organise their legal systems to enable their courts to guarantee the right to obtain a final decision within a reasonable time.[493] However, the key responsibility for preparing a case and for the speedy conduct of a trial lies with the judge.[494] The ECtHR has found that repeated changes of judge "cannot exonerate the State, which is responsible for ensuring that the administration of justice is properly organised".[495] Likewise, a "chronic overload" of cases does not justify excessively lengthy proceedings.[496] The state is responsible for all state authorities – not just the courts.[497]

Example: In *Sociedade de Construções Martins & Vieira, Lda. and Others v. Portugal*,[498] the Porto prosecuting authorities started an investigation into the applicants' past fiscal activities on 17 September 1999. Subsequently, two separate criminal proceedings were instituted before the Porto and Barcelos criminal courts. At the time of the hearing before the ECtHR, they were both still pending.

490 ECtHR, *Vayiç v. Turkey*, No. 18078/02, 20 June 2006, para. 44.

491 ECtHR, *Buchholz v. Germany*, No. 7759/77, 6 May 1981, para. 49. See also ECtHR, *Yagtzilar and others v. Greece*, No. 41727/98, 6 December 2001.

492 ECtHR, *Pafitis and others v. Greece*, No. 20323/92, 26 February 1998, para. 95.

493 ECtHR, *Cocchiarella v. Italy*, No. 64886/01, 29 March 2006, para. 119. For a criminal case, see ECtHR, *Dobbertin v. France*, No. 13089/87, 25 February 1993, para. 44.

494 ECtHR, *Capuano v. Italy*, No. 9381/81, 25 June 1987, paras. 30-31.

495 ECtHR, *Lechner and Hess v. Austria*, No. 9316/81, 23 April 1987, para. 58.

496 ECtHR, *Probstmeier v. Germany*, No. 20950/92, 1 July 1997, para. 64.

497 ECtHR, *Martins Moreira v. Portugal*, No. 11371/85, 26 October 1988, para. 60.

498 ECtHR, *Sociedade de Construções Martins & Vieira, Lda. and Others v. Portugal*, Nos. 56637/10, 59856/10, 72525/10, 7646/11 and 12592/11, 30 October 2014.

The ECtHR noted that the proceedings already exceeded 14 years. They also came to a standstill for almost four years between December 1999, when the applicants became defendants, and April and November 2003, when charges were brought against them. A further delay of two years followed between 2003 and 2005, when a trial date was set. This showed that, from the beginning, the domestic courts did not demonstrate due diligence in handling the applicants' case. The Court stated that it may be reasonable for domestic courts to await the outcome of parallel proceedings as a matter of procedural efficiency, but that this had to be proportionate as it would keep the accused in a prolonged state of uncertainty. It found a violation of Article 6 of the ECHR.

A temporary court backlog does not trigger state liability if it takes prompt, appropriate remedial action to try to resolve the problem.[499] To surmount backlogs, states may adopt provisional measures, such as choosing to deal with cases in a particular order.[500] However, if these temporary actions fail to work, states need to adopt more effective measures to address the problem.[501] States should seek ways of ensuring that their judicial systems do not create delays in proceedings.

Promising practice

Reducing the length of proceedings by listening to court users

In Sweden, a Quality Court Management project successfully reduced the length of proceedings in appellate and district courts. The project sought internal feedback about court management from judges and court staff. External feedback was also sought from defendants, witnesses, and lawyers. This dialogue took place through surveys, questionnaires and small group work. Suggestions to improve the courts' handling of cases were acted on and reduced the length of time it takes to complete cases.

Source: Carboni, N. (2014), 'From quality to access to justice: Improving the functioning of European judicial systems', Civil and Legal Sciences, Volume 3, Issue 4, p. 4.

499 ECtHR, *Probstmeier v. Germany*, No. 20950/92, 1 July 1997, para. 64. See also Council of Europe, CEPEJ (2012), *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights*, p. 3.

500 ECtHR, *Zimmermann and Steiner v. Switzerland*, No. 8737/79, 13 July 1983, para. 29. See also ECtHR, *Rutkowski and Others v. Poland*, Nos. 72287/10, 13927/11 and 46187/11, 7 July 2015, paras. 207–210. For a criminal case, see ECtHR, *Milasi v. Italy*, No. 10527/83, 25 June 1987, para. 18.

501 ECtHR, *Zimmermann and Steiner v. Switzerland*, No. 8737/79, 13 July 1983, para. 29.

7.2.4. What is at stake for the complainant

The importance of what is at stake for the complainant is another criterion to be taken into account when assessing the length of proceedings. A more rigorous standard applies if the accused is in custody, requiring "special diligence" on the authorities' part.[502] Cases concerning children or life-threatening illness also merit speedier determination.[503]

Promising practice

Speeding up proceedings

In the Espoo area of Finland, criminal courts implemented so-called 'Jouko-days', during which children's cases are prioritised and automatically placed towards the front of the queue. This results in shorter proceedings and less stress for the children involved.

Source: FRA (2015), Child-friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States, p. 35.

For example, in a claim for the return of children to Norway under the International Child Abduction Convention, the ECtHR emphasised "the critical importance" of the passage of time in these types of proceedings, where delays may effectively determine the case outcome.[504] Special diligence is also required in proceedings to determine compensation for victims of road traffic accidents,[505] and in employment disputes.[506]

502 ECtHR, *Jablonski v. Poland*, No. 33492/96, 21 December 2000, para. 102. See also ECtHR, *Chudun v. Russia*, No. 20641/04, 21 June 2011, para. 112.

503 ECtHR, *Hokkanen v. Finland*, No. 19823/92, 23 September 1994, para. 72 (it is "essential that [child] custody cases be dealt with speedily"). See also ECtHR, *X v. France*, No. 18020/91, 31 March 1992, para. 45 (case ought to have been dealt with as a matter of urgency because of the life expectancy of the persons concerned).

504 ECtHR, *Hoholm v. Slovakia*, No. 35632/13, 13 January 2015, para. 51.

505 ECtHR, *Martins Moreira v. Portugal*, No. 11371/85, 26 October 1988.

506 ECtHR, *Vocaturo v. Italy*, No. 11891/85, 24 May 1991, para. 17; ECtHR, *Bauer v. Slovenia*, No. 75402/01, 9 March 2006, para. 19. For details on cases requiring extra diligence, see also Council of Europe, (CEPEJ) (2012), *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights*, p. 3. Note also Council of Europe, (CEPEJ) (2013), *States appeal and supreme courts' lengths of proceedings*.

Example: In *Mikulić v. Croatia*,[507] the applicant and her mother filed a paternity suit against H.P. This led to 15 scheduled hearings, six of which were adjourned because H.P. failed to appear. He also persistently failed to appear for DNA testing. By the time the case got to the ECtHR, the proceedings had already taken four years and were still ongoing.

The case focused on an alleged breach of Article 8, but the ECtHR reiterated that particular diligence is required in cases concerning civil status and capacity. Here, in view of what was at stake for the applicant, and that it was her right to have paternity established or refuted to eliminate uncertainty regarding her natural father's identity, Article 6 required the competent national authorities to act with particular diligence. There was a violation of Article 6 (1) of the ECHR.

7.3. Remedies for excessively lengthy proceedings

Chapter 7 sets out the right to have proceedings concluded within a reasonable time.[508] This section looks at the ECtHR's approach to providing an effective remedy for excessively long proceedings. It must be noted that states are encouraged to prevent excessively lengthy proceedings – by reorganising judicial systems, for example – rather than remedying them through compensation. The ECtHR has stated that remedies to expedite proceedings to prevent excessive length are preferable because this avoids a finding of successive violations in respect of the same set of proceedings.[509]

Example: *Scordino v. Italy (No.1)*[510] involved a claim for compensation for the expropriation of land. A complaint was also brought about the length of the proceedings, which lasted eight-and-a-half years over two levels of jurisdiction.

507 ECtHR, *Mikulić v. Croatia*, No. 53176/99, 7 February 2002.

508 The factors determining reasonableness are set out in the ECtHR's case law; see for example, ECtHR, *Kemmache v. France*, Nos. 41/1990/232/298 and 53/1990/244/315, 27 November 1991, para. 60. The CJEU has adopted the same approach. See CJEU, C-185/95 P, *Baustahlgewebe GmbH v. Commission of the European Communities*, 17 December 1998, para. 29.

509 ECtHR, *Scordino v. Italy (No. 1)*, No. 36813/97, 29 March 2006, para. 183; ECtHR, *Kudła v. Poland*, No. 30210/96, 26 October 2000, para. 152.

510 ECtHR, *Scordino v. Italy (No. 1)*, No. 36813/97, 29 March 2006, paras. 106–108 and 201–205.

With respect to an effective remedy, the ECtHR stated that violations could be addressed by different types of remedies. Some states choose to combine remedies to expedite the proceedings with compensation. States are afforded some discretion; introducing a compensatory remedy only is not regarded as ineffective so long as the remedy complies with the ECHR. There is a strong but rebuttable presumption that excessively long proceedings occasion non-pecuniary damage. But the level of compensation depends on the characteristics and effectiveness of the domestic remedy.

Under CoE law, a preventive remedy – for example, one that expedites proceedings by providing an immediate hearing date – is preferred. However, a compensatory remedy may be effective when proceedings have already been excessively long and a preventive remedy does not exist.[511] In criminal cases, the ECtHR may find that reducing a sentence is an effective remedy.[512]

Under EU law, the CJEU has not ruled on the length of domestic proceedings under Article 47 of the EU Charter of Fundamental Rights, but has accepted compensation as an effective remedy for proceedings before the General Court of the CJEU that violate Article 47.

Example: In *Groupe Gascogne v. Commission*,[513] the CJEU considered cases on the excessive length of proceedings and the appropriate remedy in relation to proceedings before the General Court (GC).

The CJEU concluded that, where a Court of the European Union breaches its obligation under Article 47 of the EU Charter of Fundamental Rights to adjudicate cases before it within a reasonable time, the sanction must be an action for damages brought before the GC. This is an effective remedy.

In 2010, the Committee of Ministers of the Council of Europe issued a recommendation offering practical guidance to states on this issue in terms of redress.[514] It focuses on expediting proceedings.

511 ECtHR, *McFarlane v. Ireland*, No. 31333/06, 10 September 2010, para. 108.

512 ECtHR, *Orchowski v. Poland*, No. 17885/04, 22 October 2009 and *Norbert Sikorski v. Poland*, No. 17559/05, 22 October 2009.

513 CJEU, C-58/12 P, Groupe *Gascogne SA v. European Commission*, 26 November 2013, paras. 82–88.

514 Council of Europe, Committee of Ministers (2010), Recommendation Rec(2010)3 to member states on effective remedies for excessive length of proceedings, 24 February 2010.

8

Access to justice in select focus areas

EU	Issues covered	CoE
Persons with disabilities		
Charter of Fundamental Rights, Articles 6 (right to liberty and security), 20 (equality before the law), 21 (non-discrimination) and 47 (right to an effective remedy) Victims' Rights Directive (2012/29/EU) Directive on interpretation and translation (2010/64/EU) Directive on right to information in criminal proceedings (2012/13/EU) Directive on access to a lawyer (2013/48/EU)	Access to justice	ECHR, Articles 5 (right to liberty and security), 6 (right to a fair trial) and 14 (prohibition of discrimination) ECtHR, *A.K. and L. v. Croatia*, No. 37956/11, 2013
	Legal capacity	ECtHR, *Shtukaturov v. Russia*, No. 44009/05, 2008
Victims of crime		
Charter of Fundamental Rights, Article 47 CJEU, C-105/03, *Criminal proceedings against Maria Pupino*, 2005 Framework Decision on the standing of victims (2001/220/JHA) Victims' Rights Directive (2012/29/EU) Compensation Directive (2004/80/EC)		ECHR, Article 13 (right to en effective remedy) ECtHR, *Dink v. Turkey*, Nos. 2668/07 *et al.*, 2010 Convention on the Compensation of Victims of Violent Crimes (CETS 116)

EU	Issues covered	CoE
Prisoners and pre-trial detainees		
Charter of Fundamental Rights, Article 6 Directive on interpretation and translation (2010/64/EU) Directive on right to information in criminal proceedings (2012/13/EU) Directive on access to a lawyer (2013/48/EU)	Access to a court and to a lawyer	ECHR, Article 5
Charter of Fundamental Rights, Article 6	The right to challenge a deprivation of liberty	ECHR, Article 5 (1), (3) and (4) ECtHR, *Stanev v. Bulgaria*, No. 36760/06, 2012 ECtHR, *Hassan and Others v. France*, Nos. 46695/10 and 54588/10, 2014
Charter of Fundamental Rights, Article 6	Compensation for unlawful detention	ECHR, Article 5 (5)
Environmental law		
CJEU, C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*, 2011 Directive on public access to environmental information (2003/4/EC) Directive on public participation (2003/35/EC) Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention		ECtHR, *Tătar v. Romania*, No. 67021/01, 2009 European Social Charter, Article 11 (right to protection of health)
E-justice		
CJEU, Joined cases C-317/08 to C-320/08, *Rosalba Alassini v. Telecom Italia SpA, Filomena Califano v. Wind SpA, Lucia Anna Giorgia Iacono v. Telecom Italia SpA and Multiservice Srl v. Telecom Italia SpA*, 2010 Regulation (EC) No 1896/2006 on European Payment Order Regulation (EC) No 861/2007 on European Small Claims Procedure		ECtHR, *Lawyer Partners a.s. v. Slovakia*, Nos. 54252/07 *et al.*, 2009

This chapter considers access to justice for select groups and in select focus areas, regarding which specific principles have been developed in CoE and EU law: persons with disabilities (Section 8.1), victims of crime (Section 8.2), prisoners and pre-trial detainees (Section 8.3), environmental law (Section 8.4), and e-justice (Section 8.5). Other groups (specifically, children and irregular migrants) are addressed in existing FRA-ECtHR handbooks on European law relating to asylum, borders and immigration and on European law relating to the rights of the child.[515] It should be noted that the law set out in Chapters 1 to 7 also applies to Chapter 8. Chapter 8 explores additional measures that may be available to ensure that individuals can fully enjoy access to justice.

8.1. Persons with disabilities

Key points

- CoE and EU law draw on the UN Convention on the Rights of Persons with Disabilities (CRPD) and its principles.
- Article 20 of the EU Charter of Fundamental Rights, which confirms that everyone is equal before the law, and Article 21, which prohibits discrimination on the ground of disability, reinforce persons with disabilities' right to access justice. Under CoE law, Article 14 of the ECHR prohibits discrimination on various grounds in relation to ECHR rights. It does not expressly refer to disability, but the ECtHR has included disability in its interpretation of 'other' grounds protected under the Article.
- Accessibility is a key principle of the CRPD. Parties to the CRPD must ensure that persons with disabilities have access – on an equal basis with others – to the physical environment, information and communications, and services and facilities. The CRPD also requires reasonable accommodations to be made to ensure that persons with disabilities can access a court and participate in legal proceedings on an equal basis with others.
- The CRPD, ECHR and EU Charter of Fundamental Rights contain procedural protections for persons detained because of mental health problems, and to ensure that individuals who lack legal capacity can access justice.

People with disabilities face specific obstacles when trying to access justice. States therefore have additional obligations to ensure that people

515 FRA (2014), *Handbook on European law relating to asylum, borders and immigration*, and FRA (2015), *Handbook on European law relating to the rights of the child*.

with disabilities can fully enjoy their access to justice rights.[516] This section explores several relevant key issues, including accessibility and legal capacity. Section 8.3 discusses the involuntary detention of people with psychosocial disabilities – a frequent issue before the ECtHR.[517]

Article 1 of the CRPD defines disability to include people who have long-term physical, mental, intellectual or sensory impairments "which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". The CRPD confirms that persons with disabilities are holders of equality rights – not charity recipients. The EU and 25 of its Member States have ratified the CRPD.[518]

8.1.1. Access to justice

Promising practice

Guiding the police in assisting people with disabilities

In Spain, the Guardia Civil developed a specialised guide for police officers to help them provide better services to people with intellectual disabilities.

See Carrasco, A. et al (2013), Guía de intervención policial con personas con discapacidad intelectual*, Madrid, Fundación Carmen Pardo-Valcarce.*

Accessibility is a key principle of the CRPD and a "vital pre-condition for effective and equal enjoyment of different civil, political, economic, social and cultural rights by persons with disabilities". Under Article 9, parties to the convention must ensure that persons with disabilities have access, on an equal basis with others, to the physical environment (e.g. buildings), information and communications, and to other facilities and services open to the public. Parties to the CRPD have to provide appropriate forms of assistance – including guides, readers and professional sign language interpreters – to secure accessibility.

516 See, for example, Council of Europe, Commissioner for Human Rights (2008), *Human rights and disability: equal rights for all*, para. 3.4, and Recommendation No. 4. See also, Council of Europe, CEPEJ (2010), *Access to justice in Europe, CEPEJ Studies No. 9.*

517 ECtHR, *Gorshkov v. Ukraine*, No. 67531/01, 8 November 2005, para. 44. FRA (2012), *Involuntary placement and involuntary treatment of persons with mental health problems*, pp. 18–19.

518 FRA's online table on ratification specifies which states have ratified it. Another online table lists UN CRPD Art. 33 bodies (bodies for monitoring the convention's implementation).

The right to access court could be violated if it is impossible for an applicant to physically gain entry thereto – for example, due to reduced mobility.[519]

The right to take part in proceedings is an essential part of the right of access to justice.[520] The CRPD guarantees the right of effective access to justice in Article 13. This states that persons with disabilities have the same rights as other court users to go to court, take other people to court, act as witnesses and take part in what happens in court. Reasonable accommodations must be made to ensure that persons with disabilities can exercise these rights on an equal basis with others. Parties to the CRPD must therefore take appropriate measures, where needed, to enable a person with a disability to access and participate in the justice process. Support can include providing sign language, using documents in accessible formats, braille or easy-read, etc.[521] Article 13 also requires appropriate training for courts, police and prison staff.

Under CoE law, persons with disabilities have the right to access justice under Article 6 of the ECHR. Article 14 with its references to 'other' grounds also protects them against any discrimination in the exercise of their rights.[522] However, Article 14 is not a self-standing right: it prohibits discrimination on disability grounds only in relation to ECHR substantive rights. While Procotol No. 12 to the ECHR extends the protection against discrimination to any rights guaranteed under domestic law or in any act by a public authority and is thus wider in scope than Article 14,[523] it only applies to the states that ratified it. [524]

Under EU law, Article 47 of the EU Charter of Fundamental Rights sets out the general right of access to justice. Persons with disabilities are also protected against discrimination by Article 20 of the Charter, which confirms that

519 ECtHR, *Farcas v. Romania*, No. 32596/04, 14 September 2010, para. 48.

520 FRA's report on access to justice in discrimination cases provides recommendations on the structures, procedures and support mechanisms that facilitate access to justice. See FRA (2012), *Access to justice in cases of discrimination in the EU Steps to further equality*.

521 For example, see Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280, and European Commission (2013), Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ 2013 C 378.

522 ECtHR, *Glor v. Switzerland*, No. 13444/04, 30 April 2009.

523 CoE, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.: 177, Rome, 4.11.2000, pp. 1–3.

524 For the current list of states which ratified Proctol No. 12 to the ECHR, see the Chart of signatures and ratifications of Treaty 177.

everyone is equal before the law, and by Article 21, which prohibits discrimination on the ground of disability.

Under CoE and EU law, the prohibitions on discrimination mean that states must take positive action to ensure that persons with disabilities can access their rights in practice. The action required depends on the circumstances. For example, providing free legal representation to persons with disabilities may be required to guarantee the right to a fair trial if individuals have difficulties understanding the complexities of the proceedings (see Sections 3.1.2 and 3.2.3).[525]

Example: In *A.K. and L. v. Croatia,*[526] a child was placed into foster care soon after his birth with his mother's consent. The mother's parental rights were then removed on the grounds that she had a mild intellectual disability and was not able to properly care for her son. An application was made to restore her parental rights, but it was dismissed because third parties had already adopted her son. The mother had not been informed of the adoption proceedings and was not a party to them.

The ECtHR held that the national authorities should have ensured that the mother's interests were adequately protected in the proceedings. In view of her personal circumstances, it was clear that the mother could not properly understand the full legal effect of such proceedings or adequately argue her case, yet the domestic court allowed her to remain unrepresented. The Court found it difficult to accept that the mother, whose speech impediment and limited vocabulary were taken as grounds to fear that she would not be able to teach her child to speak properly, would be able to argue her case in proceedings concerning her parental rights. This was a violation of Article 8.

Additionally, **under EU law**, secondary EU law provides specific rights for persons with disabilities. The Victims' Rights Directive (see Section 8.2) stipulates that victims with disabilities should be able to access the full rights in the directive.[527] The EU has also legislated specific protections for persons with disabilities in criminal proceedings. For example, the Directive on the right to in-

525 ECtHR, *Nenov v. Bulgaria*, No. 33738/02, 16 July 2009, para. 52.

526 ECtHR, *A.K. and L. v. Croatia*, No. 37956/11, 8 January 2013.

527 Directive 2012/29/EU, Recital 15.

formation in criminal proceedings obliges Member States to ensure that the information is provided in simple and accessible language, taking into account the particular needs of vulnerable suspects or vulnerable accused persons.[528] The Directive on the right to interpretation and translation in criminal proceedings requires giving appropriate assistance to persons with hearing or speech impediments.[529] Additionally, the Directive on the right of access to a lawyer requires Member States to ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in its application.[530] Finally, the Commission adopted a Recommendation in which it recommends procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.[531]

8.1.2. Capacity

Legal capacity can also be a significant issue for many individuals with intellectual and psychosocial disabilities. Article 12 of the CRPD recognises that persons with disabilities are "persons before the law" and have legal capacity on an equal basis with others. There is no internationally accepted definition of legal capacity. It has been described as the "law's recognition of the decisions that a person takes: it makes a person a subject of law, and a bearer of legal rights and obligations".[532] This recognition is required to ensure that an individual's decisions have legal effect. From an access to justice perspective, a lack of capacity may prevent a person from commencing litigation or hiring a lawyer in order to access justice.

States are required to ensure that persons who lack capacity are able to participate effectively in proceedings.[533] Article 6 of the ECHR requires an applicant's presence at proceedings in which his or her legal capacity is to be determined.

528 Directive 2012/13/EU, Art. 3 (2).

529 Directive 2010/64/EU, Art. 2 (3).

530 Directive 2013/48/EU, Art. 13.

531 Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ 2013 378.

532 See FRA (2013) *Legal capacity of persons with intellectual disabilities and persons with mental health problems*, p. 9.

533 ECtHR, *Zehetner v. Austria*, No. 20082/02, 16 July 2009, paras. 65 and 78.

Example: In *Shtukaturov v. Russia*,[534] the applicant had a history of mental illness. His mother applied for a court order depriving him of his legal capacity on the grounds that he was incapable of leading an independent life and required a guardian. The applicant was not officially notified of the proceedings. The court examined the application at a hearing attended by the district prosecutor and a representative of a psychiatric hospital in which the applicant had been placed earlier in the year. The applicant was not notified of the hearing and did not attend. The applicant was declared legally incapable and his mother was appointed his guardian. The applicant later contacted a lawyer who believed the applicant was fully capable of understanding complex legal issues. An appeal was lodged, but rejected without being examined on the ground that the applicant had no legal capacity and could only appeal through his official guardian. The applicant's mother had the applicant admitted to a psychiatric hospital, where he was refused permission to meet his lawyer and then refused all contact with the outside world. His lawyer's attempts to seek his discharge from hospital were unsuccessful. An application was lodged with the ECtHR, which ruled – under Rule 39 of its Rules of Court – that the applicant and his lawyer should be provided with the necessary time and facilities to meet and prepare the case pending before it. The Russian authorities refused to comply. The applicant was discharged from hospital in May 2006, but appears to have been later readmitted at his mother's request.

The Court found a violation of Article 6 (1) of the ECHR. The capacity proceedings were important to the applicant because they affected his personal autonomy in almost all areas of life and entailed potential restrictions on his liberty. His participation was necessary both to enable him to present his case and to allow the judge to form a personal opinion about his mental capacity. Accordingly, the judge's decision to decide the case on the basis of documentary evidence, without seeing or hearing the applicant – who, despite his condition, was relatively autonomous – was unreasonable and in breach of the principle of adversarial proceedings. The presence of a hospital representative and the district prosecutor, who remained passive throughout the ten-minute hearing, did not make the proceedings truly adversarial. Nor had the applicant been able to challenge the decision, as his appeal was rejected without examination. In sum, the proceedings before the district court were unfair.

534 ECtHR, *Shtukaturov v. Russia*, No. 44009/05, 27 March 2008.

An individual's presence at a hearing on capacity is crucial for two reasons: first, to enable the person to present his/her own case, and second, to allow the judge to form his/her personal opinion about the applicant's mental capacity.[535] A restriction on capacity may only occur where it is necessary to protect the person concerned.[536]

8.2. Victims of crime

Key points

- Under CoE law, the procedural rights of victims are protected under Article 13 of the ECHR. Victims of crime cannot claim fair trial rights under Article 6 of the ECHR, unless they join criminal proceedings to enforce civil law claims within the framework of the criminal procedure.
- Article 47 of the EU Charter of Fundamental Rights protects all rights arising from EU law. Victims of crime are entitled to an effective remedy in the form of criminal proceedings. Under the Charter, therefore, victims of crime enjoy both – the right to an effective remedy (Article 13 of the ECHR) and fair trial rights (Article 6 (1) of the ECHR). Article 47 of the Charter gives victims of crime the right to a fair and public hearing by an independent tribunal, the right to be advised and represented, the right to legal aid and the right to an effective remedy.
- The EU Victims' Rights Directive embeds important aspects of victims' fair trial rights in EU law, including the right to advice and emotional support.
- States must take positive action to prevent human rights violations from state agents as well as from private individuals. This requires states to criminalise serious human rights abuses and to take action to prevent and investigate violations of Articles 2 and 3 of the ECHR and Articles 2 and 4 of the EU Charter of Fundamental Rights.
- Some victims of crime – such as victims of trafficking – benefit from additional, specific protection both under the ECHR and the EU Charter of Fundamental Rights, and through EU secondary law.

535 ECtHR, *X and Y v. Croatia*, No. 5193/09, 3 November 2011, paras. 84–85.

536 Council of Europe, Committee of Ministers (1999), Recommendation R(99)4 to member states on the principles concerning the legal protection of incapable adults, 23 February 1999, Principle 3. Restrictions May require review after some time, particularly if the person requests it; see ECtHR, *Matter v. Slovakia*, No. 31534/96, 5 July 1999, para. 68.

This section deals with access to justice for victims of crime. The right of victims to access justice was not always seen as compatible with ensuring the rights of defendants, and this right has only recently been afforded the same kind of standing as defendants' rights.[537] This section sets out European law on victims generally. It is important to note, however, that distinct groups of victims (such as victims of bias-motivated crime, victims of trafficking[538] and child victims of sexual abuse[539]) are subjects of specialised legal measures and specific case law.[540]

Under CoE law, Article 1 of the ECHR obliges states to secure the human rights of those within their jurisdiction. This obligation, read together with other Articles – such as Article 2 (the right to life) and Article 3 (the prohibition of torture and inhuman and degrading treatment) – requires states to take positive measures to ensure that individuals rights are not violated by state representatives.[541]

These positive obligations include preventing serious violations of human rights by private individuals.[542] They require states to provide effective protection, particularly for children and other vulnerable persons, and to prevent ill-treatment of which they have or ought to have knowledge.[543]

A key duty of states is to criminalise severe human rights violations.[544] This is because states have an obligation to eradicate impunity for such crimes.[545] For example, states must secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the per-

537 Goodey, J. (2005), *Victims And Victimology: Research, Policy and Practice*.

538 Council of Europe, *Convention on Action against Trafficking in Human Beings*, CETS No. 197, 2005. The Czech Republic is the only EU Member State that has not yet ratified the convention.

539 Council of Europe, *Convention on Protection of Children against Sexual Exploitation and Sexual Abuse*, CETS No. 201, 2007.

540 For example, see ECtHR, *Ciorcan and Others v. Romania*, Nos. 29414/09 and 44841/09, 27 January 2015 (racially motivated crime); ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010 (trafficking of people); ECtHR, *P. and S. v. Poland*, No. 57375/08, 30 October 2012 (child victim of sexual abuse).

541 ECtHR, *Nachova and Others v. Bulgaria*, Nos. 43577/98 and 43579/98, 6 July 2005, paras. 93–97.

542 ECtHR, *M. and Others v. Italy and Bulgaria*, No. 40020/03, 31 July 2012, paras. 99–100.

543 ECtHR, *Z and Others v. the United Kingdom*, No. 29392/95, 10 May 2001, para. 73.

544 ECtHR, *X and Y v. the Netherlands*, No. 8978/80, 26 March 1985.

545 Council of Europe, Committee of Ministers (2011), *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, 30 March 2011.

son, backed up by law enforcement machinery to prevent, suppress and punish breaches of such provisions.[546] Similar duties arise under Article 3.[547] This includes ill-treatment by private individuals.[548] However, the ill-treatment must attain a minimum level of severity to fall within the scope of Article 3.[549] States' positive obligations also extend to cases involving serious violations of personal integrity and dignity – for example, sexual offences.[550]Additionally, to enable the protection of these rights, states must ensure that there is an effective investigation into any violations of Articles 2 and 3 of the ECHR.[551] The state must act of its own motion in commencing an investigation and should not rely on the victim's initiative.[552]

Failing to pursue an obvious line of inquiry in the course of an investigation may also violate Article 2.[553] Indeed, the ECtHR has held that "any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard".[554]

Example: In *Dink v. Turkey*,[555] the applicants were family members of a Turkish national of Armenian origin who was editor-in-chief of a Turkish-Armenian weekly newspaper. He wrote a series of articles on Armenian identity. Extreme Turkish nationalists reacted to the articles by staging demonstrations, writing threatening letters and lodging a criminal complaint. Mr. Dink was found guilty of denigrating 'Turkishness' and received a suspended prison sentence. He was later assassinated. Several investigations and proceedings aimed at establishing whether the police had known about the assassination plot were discontinued.

546 ECtHR, *Osman v. the United Kingdom*, No. 23452/94, 28 October 1998, para. 115. See also *Menson v. the United Kingdom*, No. 47916/99, 6 May 2003, para. 1.

547 ECtHR, *Valiulienė v. Lithuania*, No. 33234/07, 26 March 2013, para. 74.

548 ECtHR, *Mehmet Ümit Erdem v. Turkey*, No. 42234/02, 17 July 2008, para. 26.

549 ECtHR, *Costello-Roberts v. the United Kingdom*, No. 13134/87, 25 March 1993, para. 30. For a more recent case, see ECtHR, *Rumour v. Italy*, No. 72964/10, 27 May 2014, para. 57.

550 ECtHR, *X and Y v. the Netherlands*, No. 8978/80, 26 March 1985.

551 ECtHR, *Gäfgen v. Germany*, No. 22978/05, 1 June 2010, para. 117.

552 ECtHR, *Cadiroğlu v. Turkey*, No. 15762/10, 3 September 2013, para. 30.

553 ECtHR, *Kolevi v. Bulgaria*, No. 1108/02, 5 November 2009, para. 201.

554 ECtHR, *Ramsahai and others v. the Netherlands*, No. 52391/99, 15 May 2007, para. 324.

555 ECtHR, *Dink v. Turkey*, Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010, para. 64.

In view of the reactions to Mr Dink's articles, the security forces could reasonably be considered to have been informed of the intense hostility towards him. Furthermore, it appeared that police departments were informed of the likelihood of an assassination attempt and even of the identity of the alleged instigators. The state nonetheless did not take reasonable measures to prevent the real and immediate risk to life and thus breached Article 2 of the ECHR.

Victims of crime are entitled to an effective remedy in the form of criminal proceedings. The absence of criminal proceedings may violate Article 13 of the ECHR.[556] Access to the criminal justice system is not enough; the state must also ensure that the system is effective.[557] For example, if the defences available to an accused are too broad, the criminal law may not be effective in protecting victims' rights.[558] Additionally, although Article 6 of the ECHR does not explicitly address the situation of victims, the principles of a fair trial require that, in appropriate cases, the rights of victims are acknowledged and balanced against those of the defence.[559]

Promising practice

Supporting victims with learning disabilities

The Portuguese Association for Victim Support (APAV) supports victims of crime and their families and friends. In addition to generic support, APAV also supplies specialised services such as legal, psychological and social support. APAV also plays a role in crime prevention by carrying out awareness and prevention campaigns directed at various audiences, mainly schools. It also does *pro bono* legal work although it is not APAV's mission to represent victims in court proceedings.

Source: FRA (2015), Victims of crime in the EU: the extent and nature of support for victims, p. 114.

EU law provides the same protection. ECHR rights referred to above are also set out in the EU Charter of Fundamental Rights: Article 2 (right to life), Article 4

556 ECtHR, *A v. Croatia*, No. 55164/08, 14 October 2010, paras. 78 and 87.

557 ECtHR, *M.C. v. Bulgaria*, No. 39272/98, 4 December 2003, paras. 150–151.

558 ECtHR, *A. v. the United Kingdom*, No. 100/1997/884/1096, 23 September 1998, para. 24.

559 ECtHR, *Doorson v. the Netherlands*, No. 20524/92, 26 March 1996, para. 70; ECtHR, *Y. v. Slovenia*, No. 41107/10, 28 May 2015.

(prohibition of torture and inhuman or degrading treatment or punishment) and Article 7 (respect for private and family life). The Explanations to Article 52 (3) of the Charter confirm that these rights correspond to the rights in the ECHR and are to be given the same meaning and scope (see Chapter 1 and the Figure).

However, Article 47 of the EU Charter of Fundamental Rights also provides fair trial rights to the victims of crime. Article 47 applies to all rights arising from EU law. This means that, where Charter rights are engaged, or where rights are set out in primary or secondary EU legislation (such as directives), the rights in Article 47 will apply. Under Article 47, fair trial rights include the right to a fair and public hearing by an independent tribunal, the right to be advised and represented, the right to legal aid and the right to an effective remedy. EU Member States are required to provide effective judicial protection for these rights at national level (see Chapter 1 and Section 5.1 on the meaning of an effective remedy). The principle of effectiveness means that domestic law must not make it impossible or excessively difficult to enforce rights under EU law.[560]

Under EU law, the rights of crime victims are further embedded in Directive 2012/29/EU (the Victims' Rights Directive), which replaced the Framework Decision on the standing of victims (although the latter remains in force for Denmark).[561] The Victims' Rights Directive establishes minimum standards on the rights, support and protection of victims of crime. It states that "[c]rime is a wrong against society as well as a violation of the individual rights of victims" (Recital 9). Article 2 defines the term "victim" broadly: (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.[562]

560 CJEU, C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 16 December 1976. For a more recent case, see CJEU, C-415/11, *Mohamed Aziz v. Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, 14 March 2013, para. 50, and CJEU, Joined cases C-482/13, C-484/13, C-485/13, C-487/13, *Unicaja Banco SA v. José Hidalgo Rueda and Others, Caixabank SA v. Manuel María Rueda, Ledesma and Others, Caixabank SA v. José Labella Crespo and Others and Caixabank SA v. Alberto Galán Luna and Others*, 21 January 2015.

561 Directive 2012/29/EU; Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal procedure, OJ 2011 C 187.

562 The Framework Decision did not include family members in the event of a victim's death. The definition in the directive is similar to that in Council of Europe, Committee of Ministers (2006), Recommendation Rec(2006)8 to member states on assistance to crime victims, 14 June 2006, para 1.1.

The Victims' Rights Directive obliges Member States to provide support services (Articles 8 and 9) and certain fair trial rights – the right to be heard (Article 10) and the right to legal aid (Article 13) – to victims. It also contains new provisions on a right to review in the event of a decision not to prosecute (Article 11) and expanded provisions on specific protection needs (Articles 22–24).

Victims must be given practical support to enable them to access justice.[563] This includes providing victim support, raising victims' awareness of their rights, and sufficient training of law enforcement personnel.

The CJEU has not reviewed victims' rights cases under the EU Charter of Fundamental Rights or the Victims' Rights Directive, but has addressed cases involving the Framework Decision on the standing of victims.

Example: In *Criminal proceedings against Maria Pupino*,[564] Mrs Pupino, a nursery school teacher, was charged with inflicting serious injuries on her pupils. Article 8 of the Framework Decision contained specific protections for "vulnerable" victims. A preliminary reference on the provision's application was made to the CJEU.

The CJEU held that young children allegedly mistreated by their teacher are "vulnerable" victims within the meaning of the Framework Decision. Therefore, they were entitled to the specific protection provided by it. The national court had to interpret national law "so far as possible, in the light of the wording and purpose of the Framework Decision".

CoE and EU law also provide for compensation for crime victims. This obligation results from the "harm arising from the infringement of rights which it was the State's duty to protect but which it was not able to guarantee".[565] Section 5.2.1 details ECtHR and CJEU case law on compensation in general – but additional, specific provisions relate to victims of crime. For example, Article 16 of the Victims' Rights Directive also addresses compensation, and the EU Compensation Directive established a system of cooperation to facilitate access to

563 For a detailed discussion of victims' rights to support, see FRA (2015), *Victims of crime in the EU: the extent and nature of support for victims*.

564 CJEU, C-105/03, *Criminal proceedings against Maria Pupino*, 16 June 2005.

565 Opinion of Advocate General Lenz of 6 December 1988 in CJEU, C-186/87, *Ian William Cowan v. Trésor public*, 2 February 1989. The case concerned much broader principles than victims' rights.

compensation for victims of crimes in cross-border situations.[566] Additionally, the Council of Europe's Convention on the Compensation of Victims of Violent Crimes contains minimum standards for state compensation for crime victims.[567] Finally, the Committee of Ministers of the Council of Europe has produced several recommendations relating to crime victims.[568]

8.3. Prisoners and pre-trial detainees

Key points

- Prisoners and pre-trial detainees require access to court to defend themselves in criminal proceedings or to pursue civil actions. They also have the right to legal representation in parole and disciplinary hearings.
- Articles 5 (1), (3) and (4) of the ECHR and Article 6 of the EU Charter of Fundamental Rights provide specific protections for prisoners. Article 5 (1) guarantees the right to liberty; Article 5 (3) requires a detainee to be brought promptly before a judge; and Article 5 (4) gives detainees the right to pursue proceedings to challenge the lawfulness of their detention. Although this is not specifically set out in the text of Article 6 of the EU Charter of Fundamental Rights, the Explanations to the Charter confirm that Article 6 guarantees all rights set out in Article 5 of the ECHR.
- Article 5 (5) of the ECHR and Article 6 of the EU Charter of Fundamental Rights provide the right to compensation for unlawful arrest or detention.

Prisoners and pre-trial detainees may need to challenge their detention, their sentence or conditions of detention. They also have the right to legal assistance in parole and disciplinary hearings. Prisoners and pre-trial detainees may also need to access a court to address a range of civil rights matters and obligations connected to their lives outside of prison – for example, employment, fines, debts, and family problems. However, because they are in prison,

566 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ 2004 L 26.

567 Council of Europe, Convention on the Compensation of Victims of Violent Crimes, CETS No. 116, 1983.

568 Council of Europe, Committee of Ministers (2006), Recommendation Rec(2006)8 to member states on assistance to crime victims, 14 June 2006; Council of Europe, Committee of Ministers (2005), Recommendation Rec(2005)9 to member states on the protection of witnesses and collaborators of justice, 20 April 2005. See also Council of Europe, CEPEJ (2008), *Checklist for promoting the quality of justice and the court*, pp. 19–21 (access to courts).

prisoners and pre-trial detainees may have limited practical opportunity to obtain legal information, advice or representation. Additionally, other complications can make prisoners more vulnerable: they may have disabilities, mental health problems or "have had very little successful educational experience".[569] This section sets out some of the European law relating to the right to access to justice for those remanded in custody or deprived of their liberty following conviction.[570]

It should be noted that the UN has also developed non-binding guidelines with respect to persons held in any form of custody: the draft Basic Standards for people deprived of their liberty.[571] The guidelines reaffirm that *habeas corpus* petitions (petitions filed with courts by persons who object to their own or someone else's detention) must be heard by a competent, independent and impartial court.[572] The document also provides guidance on legal representation and legal aid,[573] and a detainee's right to contact lawyers, family members and other interested parties. [574]

8.3.1. Access to a court and a lawyer

The right to legal aid and the right to be advised, defended and represented are set out in Chapters 3 and 4. The rights are also discussed in this section because of the specific difficulties faced by prisoners and pre-trial detainees.

569 Council of Europe, Committee of Ministers (1989), Recommendation Rec(89)12 to member states on Education in Prison, 13 October 1989.

570 This is based on the definition of "prisoner" in Rule 10.1 of Council of Europe, Committee of Ministers (2006), Recommendation Rec(2006)2 on the European Prison Rules, 11 January 2006. See Section 8.1 for references to detention and mental health patients.

571 UN, Draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before the court.

572 Principle 6 and Guideline 4. See also Guideline 14 on authorities' obligation to justify the need and proportionality of detention.

573 Principle 9 and Guideline 8.

574 Principle 10.

Promising practice

Promoting access to justice for prisoners with learning disabilities

In Wales, a multi-agency group – including major disability charities, the Prison Reform Trust, the police, the prison and prosecution service, and the Welsh government – has produced an access to justice guidebook. It aims to support responsive and appropriate management of adults with learning disabilities in the criminal justice system in Wales. It also intends to support commissioners, planners and practitioners across health, social care and criminal justice services in improving service provision.

Source: Access to justice: A Guidebook supporting the responsive and appropriate management of adults with a learning disability in the criminal justice system in Wales (2013)

Under CoE law, prisoners have a right of access to the courts in non-criminal cases, and, through this, the right of access to lawyers (see Section 2.1).[575] Any restrictions on a prisoner's access to a lawyer must be "proportionate to the aim sought" and should not be such that the "very essence of the right is impaired".[576] Effective access to legal advice requires confidential communications; this can cause practical difficulties for individuals in prison (see Sections 4.2.1 and 4.2.4). It should be noted that Article 8 of the ECHR (right to respect for private and family life, home and correspondence) may be violated if legal correspondence is read, save in exceptional circumstances – for example, where there is reasonable cause to believe that the letter's contents could endanger prison security or the safety of others.[577]

Article 6 of the ECHR has also been cited in relation to disciplinary procedures.[578] This is supported by Article 59 (c) of the European Prison Rules, which stipulate that prisoners charged with disciplinary offences are allowed to defend themselves in person or through legal assistance, if required by the interests of justice.

575 ECtHR, *Golder v. the United Kingdom*, No. 4451/70, 21 February 1975.

576 ECtHR, *Ashingdane v. the United Kingdom*, No.8225/78, 28 May 1985, para. 57.

577 ECtHR, *Piechowicz v. Poland*, No. 20071/07, 17 April 2012, paras. 239–40.

578 ECtHR, *Gulmez v. Turkey*, No. 16330/02, 20 May 2008, paras. 37–39.

Under EU law, the rights under Article 47 of the EU Charter of Fundamental Rights correspond to the rights set out in Article 6 of the ECHR.[579] Additionally, secondary EU legislation outlines specific rights for suspects or accused persons in criminal proceedings – for example, the right to information, to translation and interpretation, and to access a lawyer.[580]

8.3.2. Right to challenge a deprivation of liberty

The lawfulness of detention is a frequent issue before the ECtHR. Detention includes the involuntary detention of people with psychosocial disabilities.[581] In such cases, objective medical evidence is required, as are procedural safeguards – including legal representation – that are effective in practice as well as in law.[582]

Example: In *Stanev v. Bulgaria*,[583] in 2000 a court declared the applicant to be partially lacking legal capacity on the ground that he was suffering from schizophrenia. In 2002, the applicant was placed under partial guardianship against his will and admitted to a social care home for people with 'mental disorders' in a remote location. Following official visits in 2003 and 2004, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) concluded that the conditions at the home could be said to amount to inhuman and degrading treatment. The applicant, through his lawyer, asked the public prosecutor and the mayor to institute proceedings for his release from partial guardianship, but his requests were refused. His guardian likewise refused to take such action. In 2006, on his lawyer's initiative, the applicant was examined by an independent psychiatrist, who concluded that the diagnosis of schizophrenia was inaccurate. The psychiatrist's view was that the applicant's stay in the social care home was very damaging to his health.

579 EU Charter of Fundamental Rights, Art. 52 (3).

580 Directive 2010/64/EU (does not apply to Denmark); Directive 2012/13/EU (does not apply to Denmark); Directive 2013/48/EU (does not apply to Ireland, the United Kingdom or Denmark).

581 ECtHR, *Gorshkov v. Ukraine*, No. 67531/01, 8 November 2005, para. 44. FRA (2012), *Involuntary placement and involuntary treatment of persons with mental health problems*, pp. 18–19.

582 ECtHR, *Winterwerp v. the Netherlands*, No. 6301/73, 24 October 1979, para. 39, and ECtHR, *Megyeri v. Germany*, No. 13770/88, 12 May 1992, para. 23.

583 ECtHR, *Stanev v. Bulgaria*, No. 36760/06, 17 January 2012.

The ECtHR concluded that the decision to place the applicant in the home without obtaining his prior consent was invalid under Bulgarian law. This was in itself sufficient for the Court to establish that the applicant's deprivation of liberty was contrary to Article 5 (1) of the ECHR. In relation to Article 5 (4) of the ECHR, the government did not demonstrate that there was any domestic remedy capable of affording the applicant the direct opportunity to challenge the lawfulness of his placement in the social care home and the continued implementation of that measure. The courts had not been involved and domestic legislation did not provide for automatic periodic judicial review of placement in such homes. Furthermore, since the applicant's placement in the home was not recognised as a deprivation of liberty in Bulgarian law, there was no provision for any domestic legal remedies by which to challenge its lawfulness in terms of a deprivation of liberty. Thus, Article 5 (4) was violated. Finally, as no right to compensation was available to the applicant for the unlawful deprivation of his liberty, the ECtHR also found a violation of Article 5 (5).

CoE law and EU law provide legal protection against the deprivation of liberty. Article 5 (1) of the ECHR and Article 6 of the EU Charter of Fundamental Rights guarantee a person's liberty and – according to the Explanations to the Charter – contain the same rights.[584] According to CoE law and EU law, the decision to deprive someone of their liberty must always be made in "accordance with a procedure prescribed by law".[585] Detention must always be compatible with the purposes set out in Article 5 (1) of the ECHR and Article 6 of the EU Charter of Fundamental Rights.[586]

Prisoners are entitled to access a court to challenge a deprivation of liberty. To ensure that access to the court is practical and effective, prisoners may be entitled to legal assistance and legal aid. **Under CoE law**, for pre-trial detainees, Article 5 (3) of the ECHR requires that persons charged with criminal offences are "brought promptly before a judge or other officer" to make a decision on their detention or released pending trial, and to ensure that the trial occurs

584 Explanations relating to the Charter of Fundamental Rights, OJ 2007 C303/17.

585 ECtHR, *Tsarenko v. Russia*, No. 5235/09, 3 March 2011, para. 62.

586 ECtHR, *L.B. v. Belgium*, No. 22831/08, 2 October 2012, paras. 92, 101. See also Council of Europe, Committee of Ministers (2006), Recommendation Rec(2006)2 on the European Prison Rules, and Council of Europe, Committee of Ministers (2006), Recommendation Rec(2006)13 to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

within a reasonable time. The provision aims to protect against ill-treatment and unjustified inferences with individual liberty.

In respect of the word 'promptly', the ECtHR has said that any delay in excess of four days is too long.[587] However, even a period of less than four days may be incompatible with the promptness requirement if the specific circumstances of the case justify a faster presentation before the court.[588]

Example: In *Hassan and Others v. France*,[589] nine applicants were allegedly involved in acts of piracy. The applicants were arrested and held in custody by French military personnel before being taken to France in a military aircraft. They were under the control of the French authorities for four days and some twenty hours in one case, and for six days and sixteen hours in the other, before being held in police custody for 48 hours and brought before an investigating judge, who placed them under judicial investigation. Six applicants subsequently received prison sentences.

In relation to Article 5 (3) of the ECHR, the ECtHR noted that the context in which the applicants were arrested was "out of the ordinary": 6,000 km from mainland France, in a situation where the Somali authorities were incapable of putting them on trial. Nothing suggested that the transfer took longer than necessary. The "wholly exceptional circumstances" explained the length of the deprivation of liberty endured by the applicants between their arrest and their arrival on French soil. On their arrival in France, however, the applicants were taken into police custody for 48 hours rather than being brought immediately before an investigating judge. Nothing justified that additional delay. Article 5 (3) was not designed to give authorities "the opportunity to intensify their investigations for the purpose of bringing formal charges against the suspects". Article 5 (3) of the ECHR was breached.

587 ECtHR, *McKay v. the United Kingdom*, No. 543/03, 3 October 2006, para. 47. Compare this with UN, Human Rights Committee (2014), *General Comment No. 35 on Art. 9 (Liberty and Security)*, 16 December 2014, para. 33 (stating that a delay beyond 48 hours should be "absolutely exceptional").

588 ECtHR, *Gutsanovi v. Bulgaria,* No. 34529/10, 15 October 2013, paras. 154 and 159.

589 ECtHR, *Hassan and Others v. France*, Nos. 46695/10 and 54588/10, 4 December 2014.

When a pre-trial detainee appears before court, there must be a genuine review on the merits.[590] When a judge makes a decision on detention or bail, she/he must pay due regard to the presumption of innocence, examine all facts for and against a release, and set her/his decision out clearly.[591] Whether it is reasonable for an accused to remain in detention must be assessed on the facts of the case.[592] It is not for the detained person to prove they should be released.[593]

Further protection is found in the 'speediness' requirement under Article 5 (4) of the ECHR and Article 6 of the EU Charter of Fundamental Rights.[594] Under Article 5 (4) of the ECHR, states are required to establish independent legal processes for detainees to appear before judges, who must determine "speedily" the lawfulness of their continuing detention. States are obliged to ensure that the following requirements are met:

- decisions on legal aid and representation should be made quickly;[595]
- the person detained is entitled to regular reviews;[596]
- the applicant is likely to be entitled to legal representation to access the court;[597]
- legal assistance should be paid for by the state if necessary and must be effective (see Chapter 4 on the right to be advised, defended and represented).[598]

Article 5 (4) of the ECHR is the *habeas corpus* provision. It requires regular reviews of continued detention and allows a detainee to require a court to consider whether the grounds for detention still exist. The lawfulness of

590 ECtHR, *Aquilina v. Malta*, No. 25642/94, 29 April 1999, para. 47.
591 ECtHR, *Bykov v. Russia*, No. 4378/02, 10 March 2009, para. 63.
592 ECtHR, *Idalov v. Russia*, No. 5826/03, 22 May 2012, para. 139.
593 ECtHR, *Bykov v. Russia*, No. 4378/02, 10 March 2009, para. 64.
594 Explanations relating to the Charter of Fundamental Rights, OJ 2007 C303/17.
595 ECtHR, *L.R. v. France*, No. 33395/96, 27 June 2002, para. 38.
596 ECtHR, *M.H. v. the United Kingdom*, No. 11577/09, 22 October 2013, paras. 97–99.
597 ECtHR, *Megyeri v. Germany*, No. 13770/88, 12 May 1992, para. 23.
598 ECtHR, *Magalhães Pereira v. Portugal*, No. 44872/98, 26 February 2002, paras. 54–63.

a detention under Article 5 (1) does not absolve states from the speedy assessment requirement under Article 5 (4).[599] The question of speediness must be determined in light of the circumstances of each case.[600] The same factors considered regarding the reasonable time requirement under Article 6 (1) of the ECHR and Article 47 of the EU Charter of Fundamental Rights apply (see also Section 7.2 on the criteria for determining reasonableness).[601] Time generally starts to run when an application for release is made/proceedings are instituted and ends with the final determination of the legality of the applicant's detention.[602] The exceptional complexity of a case (for example, due to complex medical or evidential issues) does not absolve national authorities from their obligation to comply with the reasonable time requirement.[603] Article 5 (4) also applies to proceedings that would not end an applicant's detention, but would result in his/her move to another form of detention – for example, from a hospital to a prison.[604]

Under EU law, although this is not specifically set out in the text of Article 6 of the EU Charter of Fundamental Rights, the Explanations to the Charter confirm that Article 6 guarantees all rights set out in Article 5 of the ECHR. This means that ECtHR case law is important for interpreting Article 6, because this Article is given the same meaning and scope as Article 5 of the ECHR.

The Council of Europe and the European Union have produced instruments to facilitate allowing prisoners to serve their sentences in their countries of origin.[605] Standards have also been produced to promote and facilitate the

599 ECtHR, *Douiyeb v. the Netherlands*, No. 31464/96, 4 August 1999, para. 57.

600 ECtHR, *Mooren v. Germany*, No. 11364/03, 9 July 2009, para. 106.

601 *Ibid.*, para. 106.

602 ECtHR, *Rehbock v. Slovenia*, No. 29462/95, 28 November 2000, para. 85.

603 ECtHR, *Frasik v. Poland*, No. 22933/02, 5 January 2010, para. 63.

604 ECtHR, *Kuttner v. Austria*, No. 7997/08, 16 July 2015, paras. 36–38.

605 Council of Europe, Convention on the transfer of sentenced persons, CETS No. 112, 1983; Council of Europe, Additional Protocol to the Convention on the transfer of sentenced persons, CETS No. 167, 1997; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327 of 5.12.2008, as amended by Framework Decision 2009/299/JHA OJ 2009 L 81. See also ECtHR, *Somogyi v. Hungary*, No. 5770/05, 11 January 2011, para. 22 (applicant spent longer than he should have in prison after the transfer of his sentence).

transfer of alternative sanctions.[606] Prisoners should never be remanded in custody just because they are foreign.[607] Under EU law, pursuant to the Framework Decision on the European Arrest Warrant, individuals may be transferred to another state practically automatically.[608] Therefore, the EU has established rights in directives to reinforce fair trial rights in Member States (see above).

8.3.3. Compensation for unlawful detention

Article 5 (5) of the ECHR sets out an enforceable right to compensation for individuals arrested or detained in contravention of Article 5.[609] According to the Explanations to the EU Charter of Fundamental Rights, rights guaranteed by Article 5 of the ECHR are protected via Article 6 of the Charter.

There is no right to a particular amount of compensation.[610] States have a wide margin of appreciation regarding the amount to be paid, and may require proof of damage.[611] However, automatically crediting the total period of the individual's pre-trial detention towards another penalty imposed in respect of an unrelated offence does not comply with the right to compensation

606 Council of Europe, Convention on the supervision of conditionally sentenced or conditionally released offenders, CETS No. 51, 1964; Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ 2009 L 294; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ 2008 L 337/102. Council of Europe, Committee of Ministers (2010), Recommendation Rec(2010)1 to member states on European Probation Rules, 20 January 2010; Council of Europe, Committee of Ministers (2000), Recommendation Rec(2000)22 to member states on improving the implementation of the European rules on community sanctions and measure, 29 November 2000; Council of Europe, Committee of Ministers (1992), Recommendation Rec(92)16 to member states on the European rules on community sanctions and measures, 19 October 1992 .

607 Council of Europe, Committee of Ministers (2012), Recommendation Rec(2012)12 to member states concerning foreign prisoners, 10 October 2012, para. 13.2.b (addressing difficulties these prisoners may face and establishing basic principles for their treatment).

608 Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States OJ 2002 L 190/1.

609 See also Protocol 7 to the ECHR, Art. 3 (addressing compensation in the case of miscarriage of justice).

610 ECtHR, *Damian-Burueana and Damian v. Romania*, No. 6773/02, 26 May 2009, para. 89.

611 ECtHR, *Wassink v. the Netherlands*, No. 12535/86, 27 September 1990, para. 38.

contained in Article 5 (5).[612] Also, an award cannot be considerably lower than those awarded by the ECtHR for similar Article 5 violations.[613]

8.4. Environmental law

Key points

- The ECHR does not guarantee a right to a healthy environment, but ECHR rights – such as the right to respect for private and family life – may be implicated in environmental cases. An *actio popularis* (public interest litigation) to protect the environment is not envisaged by the ECtHR.
- The EU has adopted the Aarhus Convention. This involves the public in the decision-making process on environmental issues, and guarantees access to justice for individuals and NGOs when environmental law and/or provisions of the convention are breached.
- National rules that restrict the standing of some NGOs may run counter to EU law.

The environment has been defined to include natural resources such as air, water, soil, fauna and flora; property that forms part of the cultural heritage; and the characteristic aspects of the landscape.[614] Environmental issues can involve civil, political, social and economic rights. The right to a healthy environment is also a collective right because healthy environments affect communities – both present and future.

For example, Article 1 of the UN Aarhus Convention sets out the right of present and future generations to live in an environment adequate for their health and well-being.[615] The convention recognises that achieving this requires the so-called 'three pillars': access to information, public participation, and access to justice – i.e. removing barriers to justice, such as excessive costs for challenging decisions. Section 6.2 notes that strict legal standing rules can amount to procedural barri-

612 ECtHR, *Włoch v. Poland (No. 2)*, No. 33475/08, 10 May 2011, para. 32.

613 ECtHR, *Cristina Boicenco v. Moldova*, No. 25688/09, 27 September 2011, para. 43.

614 Council of Europe, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, CETS No. 150, 1993, Art. 2 (10).

615 UN, Economic Commission for Europe (UNECE) (1998), Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998. This has been ratified by the EU and all but one EU Member State (Ireland).

ers to accessing justice. Article 9 of the Aarhus Convention outlines specific rights on access to justice in environmental matters (the third pillar).

Under CoE law, the ECHR does not provide for a right to a healthy environment, but the ECtHR's case law confirms that certain ECHR rights are implicated in environmental cases – for example, Article 2 (right to life)[616] and Article 8 (right to respect for private and family life).[617] Severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes, adversely affecting their private and family life.[618]

Example: In *Tătar v. Romania*,[619] the applicants lived in a residential area near a gold ore extraction plant for a mine. They lodged several complaints about the risks to which they were exposed because of a company's use of a technical procedure involving sodium cyanide. In 2000, even though the authorities reassured the applicants that sufficient safety mechanisms existed, a large quantity of polluted water spilled into various rivers, crossing several borders and affecting the environment of several countries. The applicants claimed that the pollution adversely affected their health.

The ECtHR held that Article 8 is applicable in environmental cases when pollution is directly caused by the state or when the state's responsibility is triggered by inadequate regulation of the private sector. The Court held that the Romanian authorities failed to carry out a satisfactory prior assessment of the possible risks, did not give adequate information to the people concerned and did not put a stop to the industrial activity after the accident. Therefore, Article 8 was breached. Although Article 8 does not contain an explicit procedural requirement, the decision-making process leading to measures of interference must be fair and afford due respect to the interests of the individual as safeguarded by the Article.

616 For example, see ECtHR, *Öneryıldız v. Turkey*, No. 48939/99, 30 November 2004, paras. 111–118 (on procedural aspect of Art. 2).

617 For example, see ECtHR, *Lopez Ostra v. Spain*, No. 16798/90, 9 December 1994, para. 58; ECtHR, *Taşkin and others v. Turkey*, No. 46117/99, 10 November 2004, para. 126. See also Council of Europe (2012), *Manual on Human Rights in the Environment*. See also Council of Europe, Convention on the protection of the environment through criminal law, CETS No. 172, 1998 (requiring States Parties to criminalise serious environmental offences and cooperate in their enforcement).

618 ECtHR, *Guerra and others v. Italy*, No. 14967/89, 19 February 1998, para. 60.

619 ECtHR, *Tătar v. Romania*, No. 67021/01, 27 January 2009.

Only those specifically affected have the right to participate in decision-making in environmental cases. An *actio popularis* – legal action to protect or enforce rights enjoyed by the public (public interest litigation) – to protect the environment is not envisaged.[620]

Promising practice

Promoting environmental democracy in practice

Lithuania scored highly across pillars of the Environmental Democracy Index (EDI) – which evaluates countries based on recognised environmental standards – and received a top score overall in the legal index. The public enjoys the right to appeal refusals to provide environmental information and to bring a wide array of claims when rights are violated or harms are committed. Lithuania has taken several steps to establish legal rights that support environmental democracy. Further details can be found on EDI's website.

Source: www.environmentaldemocracyindex.org/country/ltu.

ECtHR judgments have referred to international environmental standards and the rights in the Aarhus Convention.[621] The Court has also confirmed the importance of the right to access information from the government when serious health effects are possible.[622] Indeed, where a government engages in hazardous activities that might have hidden adverse consequences on the health of those involved, Article 8 requires that an effective and accessible procedure be established to enable those concerned to seek all relevant and appropriate information.[623] The ECtHR has also permitted an association to access justice when complaining about a concrete and direct threat to its personal possessions and the way of life of its members.[624]

620 ECtHR, *Ilhan v. Turkey*, No. 22277/93, 27 June 2000, paras. 52–53.

621 ECtHR, *Tătar v. Romania*, No. 67021/01, 27 January 2009, paras. 93, 101, 113–116 and 118.

622 ECtHR, *McGinley and Egan v. the United Kingdom*, Nos. 21825/93 and 23414/9440, 9 June 1998, para. 101.

623 ECtHR, *Giacomelli v. Italy*, No. 59909/00, 2 November 2006.

624 ECtHR, *Gorraiz Lizarraga and Others v. Spain*, No. 62543/00, 27 April 2004.

The right to the protection of health is also found in Article 11 of the Council of Europe's European Social Charter and of the Revised Social Charter.[625] Under an Additional Protocol to this charter, which came into force in 1998, national trade unions and employers' organisations, as well as certain European trade unions, employers' organisations and international NGOs, are entitled to lodge complaints about violations with the European Committee of Social Rights against State Parties to the Protocol. In addition, national NGOs may lodge complaints if the state concerned makes a declaration to this effect.

Under EU law, Article 37 of the EU Charter of Fundamental Rights asserts that a high level of environmental protection and improving the quality of the environment must be integrated into the policies of the Union.[626] Further, as noted throughout this handbook, Article 47 of the EU Charter of Fundamental Rights provides access to justice rights for all rights arising from EU law.

Additionally, EU secondary legislation contains access to justice rights. Some provisions of the Aarhus Convention can be found in Directive 2003/4/EC (access to information pillar), Directive 2003/35/EC (public participation pillar and access to justice pillar) and Regulation (EC) No 1367/2006 (which applies the Aarhus Convention to EU institutions and bodies).[627] The access to justice rules are now incorporated into Article 10 of the Environmental Impact

625 Council of Europe, European Social Charter, CETS No. 35, 1961, and Council of Europe, Revised Social Charter, CETS No. 163, 1996.

626 See also TEU, Art. 3 (3) and TFEU, Articles 11 and 191.

627 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ 2003 L 41; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/E, OJ 2003 L 156; Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264. See also, CJEU, C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, 8 March 2011.

Directive (EIA),[628] which applies to a wide range of defined public and private projects, and Article 25 of the Industrial Emissions Directive.[629]

Article 11 of the EIA requires Member States to provide access to a review procedure for the "public concerned" to challenge "the substantive or procedural legality" of decisions that are subject to participation requirements by the EIA. Under Article 1 (2) of the EIA, "public concerned" means "the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures". This includes NGOs. That the Aarhus Convention and the corresponding EU directives require national courts to recognise claims brought by NGOs reflects the collective importance of the right.[630] National rules that restrict the standing of NGOs may run counter to the objectives of the EIA Directive.[631]

Example: In *Bund für Umwelt und Naturschutz Deautschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg* (Trianel case),[632] Trianel was granted a permit to build and operate a coal-fired power plant in Lünen, Germany. The proposed plant was to be near five special conservation areas under the Habitats Directive. An NGO sought to have the permit annulled, arguing that it infringed provisions of German law transposing this directive. The German court found that, under German law, an NGO could not bring an infringement action. Its own rights must be infringed in order to appeal to a court. The court referred to the CJEU the question of whether this undermined EIA Directive provisions relating to access to justice.

628 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ 2012 L 26, amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ 2014 L 124.

629 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ 2010 L 334.

630 CJEU, Joined cases C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and C-135/09, *Antoine Boxus and Willy Roua, Guido Durlet and Others, Paul Fastrez and Henriette Fastrez, Philippe Daras, Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh), Bernard Page and Léon L'Hoir and Nadine Dartois v Région wallonne*, 18 October 2011, paras. 44–46, 51. On standing generally, see European Parliament, Directorate General for Internal Policies (2012), *Standing up for your right(s) in Europe: A Comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts*.

631 CJEU, C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd*, 15 October 2009.

632 CJEU, C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*, 12 May 2011.

The CJEU concluded that, because the legislation derived from EU law, which set out clear obligations in this area, the Member State could not require the standing of environmental organisations to depend on the individual rights concept.

The cost of taking legal action is a common obstacle to accessing justice. Both EU law and the Aarhus Convention oblige Member States and contracting parties to ensure that environmental legal proceedings are "not prohibitively expensive".[633] Domestic courts cannot look exclusively at the financial means of individual claimants; they must take a number of other factors into account, including whether the claimant has reasonable prospects of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and whether public funding or other costs protection schemes are available.[634] Relying on courts to exercise their judicial discretion to decline to order an unsuccessful party to pay the costs creates legal uncertainty and does not effectively transpose EU legal requirements.[635]

8.5. E-justice

Key points

- Technology can increase the efficiency and transparency of the judicial process and facilitate access to justice for individuals. However, it also risks undermining access to justice for some (for example, those without internet) if it entirely replaces traditional procedures.
- The CJEU has stated that "electronic means" cannot be the only means offered for accessing procedures because this may make it impossible for some people to exercise their rights.

633 UN, UNECE (1998), Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, Art. 9 (4) (access to justice provisions).

634 CJEU, C-260/11, *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v. Environment Agency and Others*, 11 April 2013, para. 46.

635 CJEU, C-427/07, *Commission of the European Communities v. Ireland*, 16 July 2009, para. 94. See also CJEU, C-530/11, *European Commission v. the United Kingdom of Great Britain and Northern Ireland*, 13 February 2014, paras. 54–58.

Technology can increase the efficiency and transparency of the judicial process and facilitate access to justice for individuals. The term 'e-justice' covers a broad range of initiatives, including the use of email, the filing of online claims, the provision of online information (including case law), the use of video-hearings and conferencing, the online tracking of registration and case progress, and the capacity of judges or other decision-makers to access information electronically. This section outlines the requirements for e-justice and then provides specific examples of such initiatives operating under EU law.

Under CoE law, the ECHR establishes no specific requirements in relation to e-justice, but implementing e-justice initiatives is subject to the rules on access to a court and the right to a fair trial under Article 6 of the ECHR.

Example: In *Lawyer Partners a.s. v. Slovakia*,[636] the applicant, a private limited company, wished to lodge over 70,000 civil actions for debt recovery. Given the huge number of claims, it recorded them on a DVD and sent them to the court with an explanatory letter. Though domestic law allowed filing the claims in this manner, the court refused to register them on the ground that it lacked the necessary equipment. A complaint to the Constitutional Court was rejected as having been lodged outside the statutory two-month time limit.

The ECtHR noted that, if printed, the company's actions and supporting documents would have filled over 40 million pages. In such circumstances, its choice as to the means of filing could not be considered inappropriate. Domestic law provided for the electronic filing of court actions and the applicant company could not be criticised for having availed itself of this possibility. The courts' refusal to register its actions was a disproportionate limitation on its right of access to the court.

The EU's "electronic one-stop shop in the area of justice", the European e-Justice Portal, currently allows individuals to make cross-border small claims or payment orders online, in accordance with relevant EU secondary law. Regulation No. 1896/2006 established a procedure for a European Payment Order (EPO).[637] This

636 ECtHR, *Lawyer Partners a.s. v. Slovakia*, Nos. 54252/07, 3274/08, 3377/08, 3505/08, 3526/08, 3741/08, 3786/08, 3807/08, 3824/08, 15055/08, 29548/08, 29551/08, 29552/08, 29555/08 and 29557/08, 16 June 2009.

637 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ 2006 L 399.

procedure simplifies cross-border cases concerning uncontested pecuniary claims in civil and commercial matters. The European Payment Order is recognised and enforced in all EU Member States, except Denmark, without the need for a declaration of enforceability. It allows creditors to file claims without appearing before court, using standardised forms that can be filed and sent to the competent court.

In accordance with Regulation (EC) No 861/2007, claims can also be made via the European e-Justice Portal under the European Small Claims Procedure. This seeks to improve and simplify procedures in civil and commercial matters involving claims that do not exceed €2000.[638] The Small Claims Procedure applies between all EU Member States except Denmark. It is a written procedure – unless an oral hearing is considered necessary by the court.[639] It establishes time limits for the parties and for the court to speed up litigation, and applies to pecuniary as well as non-pecuniary claims. A judicial decision obtained as a result of this procedure must generally automatically be recognised and enforced in another Member State.

The development of video conferencing and hearings can also help facilitate justice. For example, the European Supervision Order permits EU Member States to issue Supervision Orders releasing suspects or accused persons pending trial to be supervised in their states of residence.[640] Article 19 (4) provides that telephone and video conferencing may be used if national law requires the issuing Member State to hear the defendant before varying the supervision measures or issuing an arrest warrant. The use of video conferencing for hearings is promoted by other EU instruments.[641]

638 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ 2007 L 199.

639 Regulation (EC) No 861/2007, Art. 5 (1).

640 This will be further addressed in a forthcoming FRA report on how EU law is implemented in practice concerning the transfer of persons awaiting trial.

641 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ 2009 L 294. See also Directive 2012/29/EU, Art. 17; Council Act of 29 May 2000 establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ 2000 C 197, Art. 10; Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ 2001 L 174, Articles 10 (4) and 17 (4) (seeking to improve, simplify and accelerate cooperation between courts in taking of evidence); Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ 2004 L 261, Art. 9 (1); and Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure, Articles 8 and 9 (1).

Promising practice

Visualising sentencing: online tool to facilitate access to justice

The United Kingdom's Ministry of Justice was recognised at the International Visual Communications Awards for an interactive guide to help people understand sentencing – 'you be the judge'. This tool facilitates access to justice by familiarising people with the procedures of courts outside of the actual courtroom.

Source: FRA (2012), Fundamental rights: challenges and achievements in 2011 – FRA Annual report, p. 207.

However, not everyone may be able to access technological developments, so it is important that these exist alongside traditional systems. The CJEU has confirmed that procedures accessible solely by "electronic means" may make it impossible for some people to exercise their rights.[642]

Example: In *Rosalba Alassini v. Telecom Italia SpA,*[643] the CJEU considered four joined preliminary references from the *Giudice di Pace di Ischia* concerning clauses under which an attempt to settle out-of-court was a mandatory condition for certain disputes to be admissible before national courts. The clauses were enacted pursuant to the Universal Service Directive.[644] The CJEU considered whether these mandatory referrals complied with the principle of effective judicial protection.

The decision relating to mandatory referrals is detailed in Section 2.4.2. In considering this point, the CJEU also noted that exercising the rights conferred by the Universal Service Directive might in practice be impossible or excessively difficult for certain individuals – in particular, those without access to the internet – if the settlement procedure could only be accessed by electronic means.

642 CJEU, Joined cases, C-317/08, C-318/08, C-319/08 and C-320/08, *Rosalba Alassini v. Telecom Italia SpA, Filomena Califano v. Wind SpA, Lucia Anna Giorgia Iacono v. Telecom Italia SpA and Multiservice Srl v. Telecom Italia SpA*, 18 March 2010, para. 58.

643 CJEU, Joined cases C-317/08 to C-320/08, *Rosalba Alassini v. Telecom Italia SpA, Filomena Califano v. Wind SpA, Lucia Anna Giorgia Iacono v. Telecom Italia SpA and Multiservice Srl v. Telecom Italia SpA*, 18 March 2010, para. 67.

644 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ 2002 L 108.

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EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE
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Access to justice is an important element of the rule of law. It enables individuals to protect themselves against infringements of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in criminal proceedings. This handbook summarises the key European legal principles in the area of access to justice, focusing on civil and criminal law. It seeks to raise awareness of the relevant legal standards set by the European Union (EU) and the Council of Europe, particularly through the case law of the Court of Justice of the European Union and the European Court of Human Rights. The handbook is designed to serve as a practical guide for lawyers, judges and other legal practitioners involved in litigation in the EU and in Council of Europe member states, as well as for individuals who work for non-governmental organisations and other entities that deal with the administration of justice.

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