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Article 47 CFR and the Effective Enforcement of EU Labour Law: Teeth for Paper Tigers?

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'Social rights', the late Professor Sir Bob Hepple warned in 2007 'are like paper tigers, fierce in appearance but missing in tooth and claw.'[1] This note sets out to explore the potential of the right to an effective remedy in Article 47 of the European Union's Charter of Fundamental Rights ('CFR') in equipping the Union's social *acquis* with credible remedies. Article 47 CFR is one of the most-litigated and important articles in the Charter.[2] At the same time, however, it has received surprisingly little attention in the context of EU employment law.[3]

Discussion is structured as follows: section one explores the rise of the principle of effectiveness, from the early case law of the Court of Justice to the Charter's entry into force in 2009. Section two sketches the powerful potential of Article 47 CFR, highlighting its utility both in tackling domestic obstacles to effective enforcement, and expanding the horizontal applicability of EU employment law. Section three briefly highlights some of the limitations litigants might encounter, including a general emphasis on broad regulatory discretion for Member States, and the difficult of crafting (positive) duties out of (negative) restraints. A concluding section turns to EU law more broadly, as well as the European Convention of Human Rights, for inspirations guiding the potential future development of Article 47 CFR.

1 From *Effet Utile* to the Right to an Effective Remedy

The Principle of Effectiveness, or *effet utile*, is an elusive review standard. It is closely linked, in theory and practice, to the fundamental right of access to justice, [4] and finds counterparts in domestic jurisdictions across the European Union.[5] Perhaps unsurprisingly, therefore, the seemingly clear slogan conceals a plethora of different sources and meanings, which make it difficult at first sight to establish a clear legal principle or review standard. Originally developed in the jurisprudence of the Court of Justice, its primary source today is Article 47 of the Charter of Fundamental Rights.[6]

1.1 The Origins

The principle of effectiveness is anchored in *Rewe*, where the Court of Justice recognised both the principle of national procedural autonomy, and more importantly for present purposes, the key qualifiers of equivalence and effectiveness. Rights

> conferred by [Union] law must be exercised before the national courts in accordance with the conditions laid down by national rules. The

[1] B Hepple, *Social and Labour Rights in a Global Context* (Cambridge: CUP, 2007) 238.
[2] P Aalto et al, 'Art 47' in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart, 2014)
[3] There is no dedicated chapter on Article 47, for example, in the early leading work on the Charter: B Bercusson, *European Labour Law and the EU Charter of Fundamental Rights* (Nomos 2006). Notable exceptions include M Ford, 'Employment Tribunal Fees and the Rule of Law: R (Unison) v Lord Chancellor in the Supreme Court' (2018) *Industrial Law Journal* 1; and Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert, and Mélanie Schmitt (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (forthcoming, Hart 2019).
[4] F. Jacobs, *The Right to a Fair Trial in European Law* [1999] *European Human Rights Law Review* 141, 142; T. Cornford, 'The Meaning of Access to Justice' in E. Palmer, T. Cornford, A. Guinchard and Y. Marique (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Oxford: Hart, 2016) 27.
[5] For a full account, see, eg, S. Peers, 'Europe to the Rescue? EU Law, the ECHR and Legal Aid' in E. Palmer, T. Cornford, A. Guinchard and Y. Marique (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Oxford: Hart 2016) 53.
[6] As well as the principle of sincere cooperation (Art 4(3) TEU), and the obligation on Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' (Art 19(1) TEU).

> position would be different only if the conditions … made it impossible in practice to exercise the rights …[7]

The subsequent case law developing the principle of effective judicial protection has been characterised as rearing an 'unruly horse';[8] that said, the direction of travel has become increasingly clear. Recent decades saw significant developments towards a much higher level of scrutiny of Member States' procedural choices,[9] not least as a result of the Court's shift of emphasis and rhetoric to the notion of 'effective judicial protection'. Prechal and Widdershoven have traced the (rather unpredictable) line between the received notion of effectiveness, and a potentially 'more stringent' concept of effective judicial protection'.[10] They demonstrate that the Court's review standard is significantly more interventionist when applying the principle of effective judicial protection,[11] a trend likely to accelerate further as a result of its clear endorsement both in the Charter of Fundamental Rights.

1.2 Article 47 CFR

Since December 1, 2009, the starting point in analysing the principle of effective judicial protection is Article 47(1) of the Charter of Fundamental Rights.[12] Insofar as material, it provides that

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.[13]

Whilst the latter provisions have become the new 'reference standard', earlier jurisprudence continues to be of direct relevance.[14] The upshot is a significant limitation of national procedural autonomy. The combined effect of the Charter and the Court's jurisprudence on Article 47 today

> requires not only that the enforcement of EU law-based claims cannot be rendered *practically impossible*, but also not *excessively difficult*. Impossible means impossible. … Excessively difficult, on the other hand, relies more on subjective visions of the appropriate level of 'difficulty' claimants ought (not) to be facing when vindicating their rights under EU law.[15]

It is to an exploration of this requirement in the context of EU employment law that discussion now turns.

2 Powerful Potential

Recent decisions of the Court of Justice, and to some extent, Member State courts, have shown the powerful potential of Article 47 CFR in combination with the principle of

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[7] C-33/76 *Rewe-Zentralfinanz* v *Landwirtschaftskammer für das Saarland*.
[8] A. Arnull, 'The Principle of Effective Judicial Protection in EU law: an Unruly Horse?' (2011) *European Law Review* 51.
[9] M. Bobek, 'The Effects of EU Law in the National Legal Systems' in C. Barnard and S. Peers (eds), *European Union Law* (Oxford: OUP, 2014), section 3; citing also T. Tridimas, *The General Principles of EC Law* (Oxford: OUP, 2nd ed, 2006) 420 – 422 on 'resurgence of interventionism'.
[10] S. Prechal and R. Widdershoven, 'Redefining the Relationship between "*Rewe*-effectiveness" and Effective Judicial Protection' (2012) 4 *Review of European Administrative Law* 31, 39.
[11] S. Prechal, 'Community Law in National Court: the Lessons from Van Schijndel' (1998) 35 *Common Market Law Review* 681, 689ff.
[12] *Charter of Fundamental Rights of the European Union*, OJ 2000/C 364/01.
[13] See also *Explanations Relating to the Charter of Fundamental Rights,* OJ 2007/C 303/17, 303/29-30.
[14] S. Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in C. Paulussen et al (eds), *Fundamental Rights in International and European Law* (The Hague: TMC Asser, 2016).
[15] Bobek (n 9) 167. See further M Bobek, 'Why There is no Principle of Procedural Autonomy of the Member States' in B. de Witte and H. Micklitz (eds), *The European Court of Justice and Autonomy of the Member States* (Intersentia, 2011).

effectiveness to guarantee effective remedies for rights conferred on workers under the Union's social *acquis*. This potency is unsurprising when looking at the reasoning of the Court and its Advocates General: within the Union's legal order, the provision of effective remedies has been elevated to the highest level through its characterisation as a direct corollary of 'the constitutional principle of the primacy of EU law [… *viz*] as an organic part thereof, the obligation of all organs of the Member State to ensure, within their respective jurisdiction, full effectiveness of EU law.'[16] This section explores two closely intertwined dimensions of this development: Article 47 CFR has played an important role (A) in tackling domestic obstacles to effective enforcement, from relatively straightforward procedural rules through to the creation of remedies otherwise unavailable in domestic law, and (B) opening up new avenues of enforcement in litigation against private sector employers ('horizontal' scenarios) where rights contained in EU Directives have not been properly implemented by a Member State.

2.1 Tackling Domestic Obstacles

Whilst Member States are in principle free, in the absence of Union law prescribing specific procedures or remedies, to determine the courts or tribunals competent to hear a worker's claim, as well to determine the applicable procedural rules, the Court of Justice has long emphasised that this freedom is not absolute. In practice, the Court has nonetheless generally been reluctant to intervene in comparatively minor procedural questions such as time limits, or evidential and probationary requirements.[17] In the specific context of the employment relationship,[18] on the other hand, the Court has increasingly emphasised a heightened need for scrutiny, given the inequality of bargaining power inherent in the relationship between employees and their employers:

> The worker must be regarded as the weaker party in the employment relationship, and it is therefore necessary to prevent the employer from being in a position to impose upon him a restriction of his rights.[19]

In the context of the entitlement to annual leave pursuant to Article 7 of the Working Time Directive,[20] for example, the Court has repeatedly emphasised that 'in order to ensure the effectiveness' of that provision, 'the burden of proof … is on the employer' to demonstrate that workers were in a position actually to take any leave to which they were entitled, including a duty to inform employees of their entitlements and encourage them to take advantage of them.[21]

Whilst these statements might be particularly stark, the operation of the principle of effectiveness is not limited to recent case law, the context of evidential rules, or the Working Time Directive. In *Emmott*, the Court ruled against Ireland's attempt to invoke an expired limitation period against an equal treatment claim in accessing social security benefits, 'in order to protect the rights conferred upon' the individual. [22]

[16] C-378/17 *The Minister for Justice and Equality and Commissioner of the Garda Síochána* [AG 42]; confirmed by the Court's decision at [39], [49].
[17] See, e.g., C-40/08 *Asturcom Telecomuncaciones*.
[18] Another area in which the Court has developed analogous concerns is consumer protection: see further section 4, below.
[19] C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V*. ('*Max Planck*') [41]
[20] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ 2003/L 299/9.
[21] *Max Planck* [44] – [46]. See also C-619/16 *Kreuziger* [53].
[22] C-208/90 *Emmott* [23]. As Barnard has explained, however, '[g]iven the potential implications of the ruling in *Emmott* it is not surprising that the Court began to backtrack', notably by limiting the decision's impact on other remedies such as damages, and accepting the necessity of limitation periods: C Barnard, *EU Employment Law* (OUP 2012) 473-5, citing C-338/91 *Steenhorst-Neerings* and C-188/95 *Fantask*.

More importantly, the operation of the principle of effectiveness, and subsequently Article 47 CFR, is not confined to the procedural dimension of employment litigation: some of the clearest advances can be found in the case law on remedies. Over thirty-five years ago, the Court of Justice famously held in *von Colson* that even though the Equal Treatment Directive then in force did not specify any particular sanction,[23] German law which provided merely for the reimbursement of interview travel expenses for applicants who had been discriminated against on grounds of their gender was insufficient to ensure the effective application of the rights conferred by Union law:

> full implementation of the Directive … does entail that the sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.'[24]

More recently, in *Carla Napolitano*, claimants successfully relied on the principle of effectiveness in challenging Italian legislation which permitted the use of open-ended fixed-term contracts to cover long-term recruitment processes, explicitly 'exclud[ing] any right to compensation for the damage suffered on account of the misuse of successive fixed-term employment contracts in the education sector.'[25] This, the Court found, was incompatible with the framework agreement on fixed-term work,[26] given the absence of serious penalties 'other measure intended to prevent and punish the misuse of successive fixed-term employment contracts.'[27]

Under the Charter, this approach has continued to strengthen. In *King*, the Court was faced with a claim for unpaid, untaken holiday entitlements going back over thirteen years, following the claimant's reclassification to worker status by an employment tribunal. Notwithstanding the fact that the Directive itself was silent 'on judicial remedies available to the worker, in the case of a dispute with [her] employer, to enforce' the right to annual leave, the Court emphasised an obligation on Member States to 'ensure compliance with the right to an effective remedy, as enshrined in Article 47 of the Charter'.[28] Elements of the domestic implementing measures which stood in the way of the claimant's success, from a ban on carrying over to a requirement for leave actually to have been taken in order to claim compensation, were accordingly precluded by Union law.[29]

The starkest illustrations of the operation of Article 47 CFR in the context of domestic remedies, finally, can be found where domestic provisions at the constitutional level come into conflict with the enforcement of EU-based employment rights. The broad duty developed by the Court of Justice in decisions including *Factortame*[30] was applied in the employment context in *Garda Síochána*: applicants excluded from police recruitment on grounds of their age sought to challenge the relevant domestic provisions for violation of

[23] Council Directive No 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regard access to employment, vocational training and promotion, and working conditions, OJ 1976/L 39/40.
[24] C-14/83 *Von Colson* [23].
[25] C-418/13 *Carla Napolitano v Ministero dell'Istruzione, dell'Università e della Ricerca* [114].
[26] Framework agreement on fixed-term work concluded on 18 March 1999 ('the Framework Agreement'), as set out in the annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999/L 175/43.
[27] *Napolitano* [120].
[28] C-214/16 *King v The Sash Window Workshop* [41].
[29] ibid [47], [65].
[30] C-213/89 (previously impossible interim relief to be made available against the Crown).

EU anti-discrimination law before the Irish Equality Tribunal.[31] In so doing, they encountered a Constitutional provision which limited such scrutiny to the High Court.[32] In a powerful decision steeped in the language of primacy and effectiveness, the Court of Justice held that these obstacles were nonetheless to be disapplied: any provision

> … which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law *the power to do everything necessary* at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having *full force and effect* are incompatible with the requirements which are the *very essence* of EU law…[33]

The Workplace Relations Commission (as successor of the Equality Tribunal) was thus empowered to disapply national law in order to 'ensure that EU law is fully effective'.[34]

Given the Charter's direct effect,[35] national courts are under an obligation where possible to arrive at similar results by themselves. In *Benkharbouche*,[36] a number of employment law claims had been brought by foreign service workers against the embassies of Sudan and Libya. Both nations relied on sovereign immunity as set out in Statute in response to these claims.[37] Their defence succeeded insofar as purely domestic claims (such as a failure to pay the minimum wage) was concerned: under domestic law, despite a clear judicial recognition that the State Immunity Act 1978 was in violation of Articles 6 and 14 ECHR, the only remedy available to the claimants was a declaration of incompatibility pursuant to section 4(2) of the Human Rights Act 1998. As regards the remaining claims, based in EU law, on the other hand, Article 47 CFR provided the basis for a powerful remedy: the Court of Appeal disapplied the 1978 Act 'to the extent necessary to enable employment claims … falling within the scope of EU law by members of the service staff … to proceed.'[38]

2.2 Expanding Horizontal Enforcement

The cases discussed thus far set out powerful examples of the Charter's potential in improving the enforcement of EU employment law. Perhaps the most radical potential of Article 47 CFR, however, lies in another area, which has become the subject of intensive litigation: the horizontal enforcement of employment rights. In terms of the practical realisation of rights conferred on workers by the Union legislator, the combined effect of two elements of constitutional law has long provided a near insurmountable obstacle: first, the Treaty framer's design of labour market competences, relying on Directives as primary regulatory device;[39] and second, the Court's consistent refusal to permit the horizontal direct effect of Directives.[40] As a result, private sector employees[41] have

[31] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000/L 303/16.
[32] Irish Constitution, Art 34.3.2. For a full overview of the constitutional context, see https://www.administrativelawmatters.com/blog/2019/01/02/administrative-authorities-disapplication-of-domestic-law/.
[33] *Garda* [36], citing *inter al* C-106/77 *Simmenthal* [22]; C-213/89 *Factortame* [20].
[34] *Garda* [45].
[35] See further the discussion of *Egenberger* in the next subsection.
[36] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 33.
[37] State Immunity Act 1978, sections 4(2)(b) and 16(1)(a).
[38] *Benkharbouche* [85]. The Court's decision was upheld on appeal to the Supreme Court: [2017] UKSC 62.
[39] Article 153(2)(b) TFEU (cf also the provisions for the enactment of social partner dialogue in Article 155 TFEU).
[40] C-91/92 *Faccini Dori v Recreb*. See further Stephen Weatherill, *Cases & Materials on EU Law* (12th ed, OUP 2016) 118ff.
[41] Though this distinction is attenuated somewhat by a wide reading of the state: C-271/91 *Marshall* v *Southampton Area Health Authority*; C-413/14 *Farrell*.

struggled to enforce their rights when faced with explicitly incompatible norms which cannot be interpreted in line with Union law.[42]

A series of recent Grand Chamber decisions promise to revolutionise the enforcement of employment norms in this context: in *Egenberger*, an atheist applicant for a policy research job that had explicitly stipulated membership of a Protestant church as a criterion challenged the employer's refusal to invite her to interview as contravening EU equality law.[43] Under domestic law, national courts were severely restricted in their ability to scrutinise religious exemption claims: 'judicial review should be limited to a review of plausibility on the basis of the church's self-perception.'[44] Closer scrutiny was thus required: but how could it be effected, given the horizontal context of Ms Egenberger's claim? Through the direct effect of the Charter, which allowed the claimant to overcome the traditional limitations placed on rights set out in Directives alone: Article 47 CFR was

> … sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such. […] Consequently, […] the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.[45]

This approach was confirmed in the Grand Chamber's subsequent decision in *Max Planck*,[46] discussed above, and further developed in *IR*: there, a catholic doctor whose employment had been terminated following a second marriage similarly succeeded in challenging the German approach to religious exemptions, albeit on the technically distinct grounds of anti-discrimination as enshrined in the 'mandatory general principle of EU law'.[47]

The Grand Chamber's most recent decision in this line of cases, *Cresco Investigations*,[48] further underlines the need for domestic courts to give full effect to relevant Charter provisions, even in the context of horizontal employment litigation.[49] As discussed in the next section, this does not mean that *every* provision in the Charter can be combined with Article 47 CFR to that effect: but it is nonetheless a significant step forward in ensuring the effective enforcement of employment rights conferred by EU law.

3 The Limitations

Having thus explored the potential of Article 47 CFR and the principle of effectiveness in securing concrete remedies for employees, it remains briefly to highlight some of the potential limitations which litigants might encounter, even where they can find themselves within the (broad) scope of the Charter.[50] With the specific context of EU *labour* law, two challenges in particular should be considered: the significant discretion left to Member

[42] C-176/12 *Association de médiation sociale*.
[43] C-414/16 *Egenberger* [25]. In particular, the religious exemption set out in Art 4(2) of Directive 2000/78.
[44] ibid [37].
[45] ibid [78] – [79].
[46] *Max Planck* [74].
[47] C-68/17 *IR v JQ* [69]. The claimant's employment had been terminated nine months before the entry into force of the Charter: [35].
[48] C-193/17 *Cresco Investigation GmbH v Markus Achatzi*.
[49] See also the Opinion of AG Pitruzzella in C- 55/18 *CCOO v Deutsche Bank SAE*.
[50] For the Charter to apply, 'two cumulative conditions must be met. First, the situation at hand must fall within the scope of EU law for the Charter as a whole to be applicable (Article 51(1) of the Charter as interpreted by the Court in *Åkerberg Fransson*: C-617/10, EU:C:2013:105). Second, as expressly follows from the wording of the first paragraph of Article 47, the applicant must have a concrete 'right or freedom' guaranteed by EU law that can trigger the specific provision of the first paragraph of Article 47.' C-403/16 *El Hassani*, Opinion of AG Bobek [74].

States within the social *acquis* (A), and the potential difficulty of mandating the creation of specific, positive duties to be imposed on employers (B).

3.1 Member State Discretion

Much of EU employment law is designed around enabling regulatory discretion, both for Member States and the social partners within each country.[51] In principle, this is an advantage: given the vast heterogeneity of industrial relations systems and traditions across the Union, a reflexive is key in ensuring effective labour market regulation.[52] In practice, on the other hand, it requires significant deference in assessing Member State's regulatory choices. In *Santoro*, for example, the Court engaged in little active scrutiny of Italian provisions implementing the fixed-term work framework agreement,[53] which significantly limited the availability of sanctions against public-sector employers.[54] An emphasis on Member State discretion meant that despite the clear obligation to ensure effective enforcement and to provide sufficient deterrence,[55] the limited penalties envisaged in domestic legislation were likely to have discharged the State's obligations.[56]

Against this background, it is interesting to note that many of the provisions discussed in the previous section could be characterised as outliers from this general approach, given their explicit nature, with specific norms that only allow for narrow, if any, derogations. In *King*, for example, the Court put significant emphasis on the fact that the right to paid annual leave in Article 7(1) of Directive 2003/88 was a 'a provision from which no derogation is permitted'.[57]

More importantly, in distinguishing the situation in *Max Planck* from the Grand Chamber's 2014 decision in *Association de Médiation Sociale*, in which Article 27 CFR had been found *not* to be applicable in litigation against a private sector employer, the Court explained that

> [b]y providing, in mandatory terms, that 'every worker' has 'the right' 'to an annual period of paid leave' without referring in particular in that regard — like, for example, Article 27 of the Charter […] to the 'cases' and 'conditions provided for by Union law and national laws and practices', Article 31(2) of the Charter, reflects the essential principle of EU social law from which there may be derogations only in compliance with the strict conditions laid down in Article 52(1) of the Charter and, in particular, the fundamental right to paid annual leave.[58]

Applying this approach to the provisions on 'Solidarity' in Chapter IV of the Charter of Fundamental Rights, it quickly becomes clear that the majority of employment rights listed there are heavily conditioned, including the provisions on information and consultation (Article 27 CFR), the right of collective bargaining and action (Article 28 CFR), protection in the event of unjustified dismissal (Article 30 CFR), and the entitlement to social security and social assistance (Article 34 CFR). It is therefore likely that only future

[51] See eg Art 153(3) TFEU.
[52] Though cf e.g. Christopher McCrudden, 'Equality Legislation and Reflexive Regulation' (2007) 36 Industrial Law Journal 255.
[53] Framework agreement on fixed-term work concluded on 18 March 1999 ('the Framework Agreement'), as set out in the annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999/L 175/43.
[54] C-494/16 *Santoro* [13].
[55] ibid [27], [29].
[56] ibid [52].
[57] *King* [32].
[58] *Max Planck* [73]

litigation will establish the precise extent to which employees will be able to rely on Article 47 CFR in enforcing their rights in different areas of EU employment law.

3.2 (Negative) Constraint vs. (Positive) Duties

The principle of effectiveness started its life as negative constraint: Member States were not to make the vindication of Union rights impossible. As discussed in section 2, above, that narrow approach was abandoned as early as *Simmenthal*,[59] and is certainly no longer reflected in Article 47 CFR's commitment to an effective remedy. The precise implications of that turn, however, are much more difficult to interpret: is there a positive duty on Member State (courts) to create new remedies to ensure the effective vindication of EU-conferred rights? In principle, yes, 'if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individuals rights under [Union] law'.[60]

In practice, however, that threshold is a high one: in *von Colson*, the Court of Justice held that the need for an effective remedy could not be read to include a duty to conclude an employment contract with the (putative) employer in response to recruitment discrimination, and side-stepped the referring court's enquiry as to whether one could infer any other sanctions from the scheme of the Directive.[61] The Working Time Directive cases discussed, above, similarly emphasise consistently that while employers are to 'ensure that workers are in a position to exercise' their right to paid annual leave, 'compliance with the requirement, for employers, under Article 7 of Directive 2003/88 should not extend to requiring employers to force their workers to actually exercise their right to paid annual leave'.[62]

That said, there are examples in addition to those already outlined of positive duties founded on Article 47 CFR: in *Fuß*, a fire brigade officer had been taken off active duty and re-rostered to a control room in response to his request to work within the limits prescribed by the Working Time Directive.[63] The 'fundamental right to effective judicial protection', the Court held,

> would be substantially affected if an employer, in reaction to a complaint or to legal proceedings brought by an employee with a view to ensuring compliance with the provisions of a directive intended to protect his safety and health, were entitled to adopt a measure such as that at issue in the main proceedings. Fear of such a reprisal measure, where no legal remedy is available against it, might deter workers who considered themselves the victims of a measure taken by their employer from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the directive'[64]

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Present space limitations limit further discussion of the potential drawbacks of Article 47 CFR: suffice it to say that it cannot be seen as a universal magic bullet. The Court, for

[59] C-106/77 *Simmenthal*.
[60] C-432/05 *Unibet* [41]. Note in particular the emphasis on not considering the mechanism in isolation, confirmed e.g. in C-169/14 *Sanchez Morcillo* [34]: 'the role of [the challenged] provision in the procedure, its progress and its special features, [must be] viewed as a whole, before the various national bodies.'
[61] *Von Colson* [19]
[62] *Max Planck* [44]. Most recently, a further debate seems to have broken out between the Advocates General as to whether obligations should be imposed on employers, or Member States: cf the Opinion of Advocate Cruz Villalon in *AMS* [AG 79] with AG Bobek's (with respect, misguided) suggestions in *Cresco* [AG 173].
[63] C-243/09 *Günter Fuß v Stadt Halle*.
[64] ibid [66].

example, has refused to rule on whether an employee could rely on Article 47 CFR to challenge domestic Spanish rules on *res judicata* in the context of collective redundancies,[65] denied retired workers' challenges to Romanian pension cuts pursuant to an EU Memorandum of Understanding,[66] refused reliance on Article 47 CFR and the principle of effectiveness against Austrian national time limits running prior to a decision of the Court of Justice on age discrimination,[67] held an Article 47 CFR challenge to Spanish insolvency wage protection rules inadmissible as outside the scope of EU law,[68] found no incompatibility in principle (subject to assessment by the national court) of 'relatively narrow time-limits' for German civil servants to assert certain pay claims with the principle of effectiveness,[69] declared it unnecessary to explore the implications of Article 47 CFR and the principle of effectiveness in the substantive interpretation of the Fixed Term Work Framework agreement[70] and the Directive on Transfers of Undertakings,[71] and left it to Member States to define the concept of workers for purposes of the Part-Time Work framework agreement, despite 'the need to safeguard the effectiveness of the principle of equal treatment enshrined in that framework agreement, that such an exclusion may be permitted, if it is not to be regarded as arbitrary'.[72]

The majority of these decisions, of course, turns on their specific facts and/or the legislative context. Furthermore, none of the obstacles highlighted in this section should be taken as a suggestion that the potential of Article 47 CFR in ensuring the effective enforcement of employment law are exhausted. If anything, they merely show the need for careful evaluation of the broader constitutional context in order to ensure the clear development and elaboration of a consistent approach to the effective vindication of workers' rights.

4 Broader Inspiration

In order to guide that development, including the potential development of new substantive or institutional requirements, litigants as well as the Court of Justice may usefully look both to areas of Union law which share key characteristics of the employment setting, and to the case law developed by the European Court of Human Rights in interpreting Article 47 CFR's parallel provisions in the European Convention of Human Rights.[73]

As regards analogous contexts within EU law, first, consumer protection in the context of the Unfair Terms in Consumer Contracts Directive might prove to be a fertile ground for inspiration.[74] The Court has recognised the inequality of arms between consumers and businesses in a manner not dissimilar to the inequality of bargaining power between workers and their employers. In *Sánchez Morcillo*, for example, procedural limitations on consumer appeals against debt enforcement were struck down as the mere availability of damages was 'liable to jeopardise the effectiveness of consumer protection … read in conjunction with Article 47 CFR'.[75] Translated into the employment context, this might lead to substantive scrutiny of particularly onerous standard terms included in contracts

[65] C-472/16 *Jorge Luís Colino Sigüenza v Ayuntamiento de Valladolid* [56] – [62].
[66] C-258/14 *Eugenia Florescu v Casa Judeţeană de Pensii Sibiu.*

[67] C-417/13 *ÖBB Personenverkehr AG v Gotthard Starjakob* [59] – [69].

[68] C-265/13 *Emiliano Torralbo Marcos v Korota SA.*
[69] Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 *Specht v Land Berlin* [110] – [115].
[70] C-361/12 *Carmela Carratù v Poste Italiane SpA* [49].
[71] C-108/10 *Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca* [84].
[72] C-393/10 *Dermod Patrick O'Brien v Ministry of Justice* [42].
[73] Article 6(1) ECHR provides that '…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'
[74] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993/L 95/29.
[75] *Sánchez Morcillo* [50].

of employment, or broader interrogation of 'a procedural system … [of employment law enforcement which] places at risk the attainment of the objective[s]' pursued by Union legislation.[76]

In terms of the European Convention of Human Rights, second, there is a long history of textual cross-references and courts' drawing on both EU and ECHR jurisprudence,[77] despite occasional subtle differences in specific standards or formulations.[78] A comparative report by the European Union's Fundamental Rights Agency and the Council of Europe lists examples including compensation, specific performance, and injunctions.[79] The full potential of Article 47 in this regard is explored in a forthcoming contribution by Klaus Lörcher;[80] potential rights developed there range from a 'right to know reasons for the alleged measure' and a 'right to an adversarial hearing' to the 'right to an expeditious decision' and the 'right to protection against victimisation'.[81] Article 6 ECHR and its domestic equivalents have furthermore played an important role in challenging the imposition of court fees in employment tribunals,[82] where low-value claims might be deterred by an expectation of negative payoffs.[83]

Article 47CFR may, finally, also come to play a central role in developing alternatives to the individual enforcement of employment rights – whether through collective redress mechanisms, [84] the empowerment of social partners, or domestic labour inspectorates. As the Court of Justice emphasised in *Garda Síochána*, the powerful potential of Article 47 CFR and the principle of effective judicial protection is not limited to judicial enforcement:

> As the Court has repeatedly held, that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State — including administrative authorities — called upon, within the exercise of their respective powers, to apply EU law.[85]

[76] *Sánchez Morcillo* [46].
[77] See, eg, Art 52(3) CFR; J. Casey, 'The right to a fair trial and access to justice in employment tribunal cases' (2015) *Scots Law Times* 172, 173.
[78] The Guidance notes to Art 47 CFR, for example, suggest that protection under union law 'is more extensive since it guarantees the right to an effective remedy before a court': Explanations Relating to the Charter of Fundamental Rights, OJ 2007/C 303/17.
[79] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Access to Justice* (Luxembourg 2016) 91ff.
[80] Klaus Lörcher, 'Article 47 – Right to an Effective Remedy and to a Fair Trial' in Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert, and Mélanie Schmitt (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (forthcoming, Hart 2019) 609.
[81] ibid 623, 625, 626, 628.
[82] *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.
[83] A Adams and J Prassl, 'Challenging the Case for Employment Tribunal Fees' (2017) 80 *Modern Law Review* 412.
[84] European Union Agency for Fundamental Rights, *Fundamental Rights Report 2018* (Luxembourg 2018) 212.
[85] *Garda Síochána* [38].