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## EU asylum procedures and the right to an effective remedy

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## 5 Preliminary conclusions and methodology used for the following chapters

In order to be able to understand the potential significance of the right to an effective remedy and related procedural rights for the asylum context, it was necessary to address several preliminary issues in the previous chapters. The following conclusions are most important for the purpose of this study:

- Asylum procedures are now governed by the Procedures Directive and thus fall within the scope of EU law.
- The Court of Justice and national courts may test the validity of the minimum standards of the Procedures Directive against the EU right to an effective remedy. Those standards should be considered invalid if they require or expressly or impliedly authorise the Member States to adopt or retain legislation which does not respect the EU right to an effective remedy.
- The Court of Justice and national courts may also use the EU right to an effective remedy to interpret the provisions of the Procedures Directive.
- Member States are bound by the EU right to an effective remedy when acting within the scope of EU law. They should observe this right even when making use of the discretionary powers afforded to them by the Procedures Directive. As a result the discretion left to the Member States to design their asylum system may be limited to an important extent. The Court of Justice has shown in its case-law concerning other fields of EU law that the EU right to an effective remedy considerably limits the procedural autonomy of the Member States.
- Asylum legislation is a relatively new phenomenon within the EU and case-law concerning the meaning of the EU right to an effective remedy for asylum procedures is still scarce. However, the Court of Justice has developed an important body of case-law concerning the EU right to an effective remedy in its judgments concerning other fields of EU law. The principles emerging from this case-law are applicable in all fields of EU law, including asylum law.
- The EU right to an effective remedy includes rights such as the right to a fair trial, the right of access to court, the right to equality of arms and the right to adversarial proceedings. Furthermore it is closely linked to the right to good administration, which embodies the right to be heard and the duty to state the reasons of a decision. The exact relationship between the EU right to an effective remedy and the principle of effectiveness, which also sets standards for national procedures, remains unclear.

For the purpose of this study the EU Courts' case-law regarding all these rights and principles will be taken into account.

- The interpretation of EU fundamental rights is inspired by international treaties. In the context of asylum the ECHR, Refugee Convention, CAT, ICCPR and CRC are particularly relevant. The EU right to an effective remedy is inspired by Articles 6 and 13 ECHR, Article 3 CAT, Articles 2 (3) and 14 ICCPR. The Court of Justice attaches by far most weight to the ECHR and the ECtHR's judgments as a source of inspiration. However also the authoritative but non-binding views of other supervising bodies such as UNHCR, the Committee against Torture, the Human Rights Committee and the Committee on the Rights of the Child should be taken into account. For the purpose of this study the ECtHR's case-law plays a prominent role, while the non-binding views of other monitoring bodies are used as complementary sources of inspiration.
- EU fundamental rights such as the right to an effective remedy may not offer a lower level of protection than international treaties. the Court of Justice has shown in its case-law that it scrupulously interprets EU fundamental rights in full conformity with the ECtHR's case-law. It follows from the text of the Charter as well as the case-law of the Court of Justice that EU fundamental rights may offer broader protection than international treaties.
- The EU right to a fair trial applies to all cases falling within the scope of EU law including asylum cases. Even though the ECtHR has ruled that Article 6 ECHR does not apply to asylum cases falling within the scope of application of the ECHR, its case-law concerning Article 6 ECHR may very well inspire the EU right to a fair trial, also when it is applied in the asylum context.
- From the EU Courts' and the ECtHR's case-law concerning the right to an effective remedy and fair trial three basic notions emerge, which may be helpful to explain the choices made by these courts when deciding on procedural issues and to predict these courts' approach in new situations:
  - 1 Procedural rights may be limited. Often it is necessary to balance conflicting interests of the parties involved in the procedure
  - 2 The overall fairness of a procedure should be assessed
  - 3 The courts should have regard to the subject matter of the procedure, in particular the nature of the rights claimed and special vulnerability of the person concerned.

## 5.1 METHOD FOR DEFINING THE MEANING OF THE EU RIGHT TO AN EFFECTIVE REMEDY

The next chapters will examine the potential meaning of EU fundamental rights and general principles for an number of key issues of asylum procedures: The

right to remain on the territory during first instance and appeal asylum proceedings (Chapter 6), the asylum applicant's right to be heard on his asylum motives in first instance and appeal proceedings (Chapter 7) and questions relating to evidence in asylum procedures (Chapters 8 to 10).

With regard to most of these topics the Procedures Directive does not provide for minimum standards, the applicable standards leave the Member States wide discretion or these standards are in need of interpretation. It is examined whether the EU right to an effective remedy sets additional standards, limits the Member States' discretion or prescribes a certain interpretation of the Procedures Directive. With regard to some minimum standards the question is raised (and answered) whether they violate the EU right to an effective remedy and should be considered invalid.

The following method is used in order to define the meaning of the EU right to an effective remedy:

- Most of the topics which will be discussed are not specifically addressed by Articles 47 and 41 of the Charter. The meaning of the EU right to an effective remedy is therefore derived from the case-law of the EU Courts and from relevant sources of inspiration, in particular the ECtHR's case-law.
- The case-law of the Court of Justice with regard to the specific meaning of the EU right to an effective remedy for asylum procedures is still very scarce. However the EU Courts have addressed many of these topics in the context of other fields of EU law, such as competition law, equal treatment law or EU sanctions. As was concluded above the procedural principles emerging from this case-law are applicable to asylum procedures.
- The ECtHR's case-law regarding Articles 6 and 13 ECHR with regard to non asylum cases is taken into account when examining which procedural principles follow from the EU right to an effective remedy. With regard to some topics, such as the use of secret information, the standards set out in the ECtHR's case-law complement the principles emerging from the EU Courts' case-law.
- When applying these procedural principles to the asylum context the special features of asylum procedures should be taken into account (see the three basic notions mentioned above). The ECtHR in its case-law under Articles 3 and 13 ECHR concerning asylum cases and the UNHCR and the UN Committees in their views concerning asylum procedures provide important guidance for the way in which the EU right to an effective remedy should be interpreted in the asylum context.
- With regard to some issues discussed in the following chapters, such as the assessment of the credibility of the asylum applicant's asylum account or the right to an oral hearing before a court or tribunal, no relevant case-law of the EU Courts is available. In such situation the meaning of the EU right to an effective remedy is largely defined on the basis of the ECtHR's case-law and (complementary) the views of UNHCR and the UN Committees concerning this issue.

For the purpose of this method in each of the following chapters the following steps will be taken:<sup>244</sup>

- 1 Identification of the provisions of the Procedures Directive applicable to the specific procedural issue discussed
- 2 Assessment of the existing case-law of the EU courts concerning the specific topic.
- 3 Examination of the case-law of the ECtHR and the non-binding views of the UNHCR, ComAT, Human Rights Committee and the ComRC, which inspire the EU right to an effective remedy
- 4 Conclusion as to the meaning of the EU right to an effective remedy for the specific aspect of the asylum procedure
- 5 Application to the provisions of the Procedures Directive

The result of this exercise is a set of EU procedural standards with regard to the key issues discussed in the following chapters.

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<sup>244</sup> See also section 1.4.