International Personal Data Transfers and Effective Redress

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International Personal Data Transfers and Effective Redress: Concluding Remarks

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Abstract

This concluding piece aims to bring together the various reflections contained in the special issue focused on the right to an effective remedy with specific reference to data protection legislation and international personal data transfers. The piece shows how the contributions to the special issue have unveiled an important function of Article 47, that of 'value exporter' of the EU. However, they have also highlighted the conceptual and definitional challenges and persisting uncertainties surrounding the use of Article 47 with respect to international data transfers.

1. Introduction

The growing importance of the right to an effective remedy, protected by Article 47 of the Charter of Fundamental Rights, cannot be overstated. As the most cited provision of the Charter,[1] Article 47 is virtually present in every policy field and has contributed to profoundly shaping the EU multilevel judicial architecture of the EU. From environmental law to migration policy, to competition rules and the Common Foreign and Security Policy, Article 47 has been instrumental to strengthen the protection of EU law before national and EU courts. It has been invoked with respect to procedural rules concerning different areas, from standing to evidence, costs of proceedings as well as structural features of the national judicial systems, as evidenced by the newsworthy case law on the independence of the judiciary.[2]

This special issue seeks to both build on and deepen these reflections by concentrating on the right to an effective remedy with specific reference to data protection legislation and international personal data transfers.

This focus is both timely and needed for two reasons: first, the field of data protection has been subject to an intense 'proceduralisation', i.e. the process

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1 Kathleen Gutman, 'Article 47: The Right to an Effective Remedy and to a Fair Trial' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020).

2 See Matteo Bonelli, Mariolina Eliantonio, and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1 The Court of Justice's Perspective* (Hart Publishing 2023) and the contributions in this volume.

of 'insertion' of rules of secondary nature within EU secondary law measures, aimed to secure the enforcement of substantive EU rules.[3] In turn, these rules interact with the right to an effective remedy under Article 47 of the Charter, but also the pre-Charter principle of effective judicial protection and the *Rewe*-principles of equivalence and effectiveness.[4] This complex web of procedural principles and requirements may contribute to, or conversely undermine, the protection foreseen in EU secondary law. While not unique to data protection, it can be safely said that very few other policy areas have witnessed such a strong proceduralisation process.

Second, the field of data protection, and inevitably the right to an effective remedy when invoked in this area, are inextricably linked to questions of extra-territorial application of EU law.[5] Again, this notion is not peculiar to data protection policy, but has taken centre stage (not least in the case law of the Court of Justice of the European Union – 'CJEU') in this field. It specifically Article 47 and its violation which constituted the fundamental reason for the CJEU to annul the Commission Decisions declaring the US a partially adequate system to receive personal data of EU citizens in the *Schrems I* and *Schrems II* rulings.[6] In *Schrems II*, the CJEU particularly highlighted that effective redress in a third country is 'of particular importance' in the context of personal data transfers.[7]

Taking stock of this groundbreaking case law, which the European Data Protection Board ('EDPB')'s Foreword rightly regards as having 'sent shockwaves through the data protection protection community',[8] this special issue aims to build on the literature which, while focusing on international data transfers, has somewhat neglected the topic of the right to an effective remedy within such transfers.[9] In the next section, the main conclusions arising from the various pieces composing this special issue will be highlighted, before providing

3 For an early account of the phenomenon, see Mariolina Eliantonio and Elise Muir, 'Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law', (2015) 8/1 Review of European Administrative Law 177; and specifically with respect to the proceduralisation of data protection legislation see, in the same special issue, Antonella Galetta and Paul de Hert, 'The Proceduralisation of Data Protection Remedies under EU Data Protection Law: Towards a More Effective and Data Subject-oriented Remedial System?', (2015) 8/1 Review of European Administrative Law 125.

4 Case 33-76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188.

5 See on this phenomenon, Marise Cremona and Joanne Scott (eds) *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019).

6 Case C-362/14, *Maximillian Schrems v Data Protection Commissioner*, ECLI:EU:C:2015:650 ('Schrems I'); and Case C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems*, ECLI:EU:C:2020:559 ('Schrems II').

7 ibid. para 189.

8 Foreword in this special issue.

9 See e.g. Christopher Kuner, 'Reality and Illusion in EU Data Transfer Regulation Post Schrems' (2017) 18/4 German Law Journal, 881-918.

in Section 3 some thoughts on the possible future of the right to an effective remedy in international data transfers.

2. The definition and scope of application of the right to an effective remedy in international data transfers between conceptual confusions and undue limitations

The right to an 'effective' 'remedy': what is in a name (or two)? While the Court has never clarified (and arguably rightly so, seeing its mandate) what an 'effective' 'remedy' is, it has on various occasions provided answers as to the question of what is *not* an 'effective' 'remedy'. With respect to international data transfers, already in the *Schrems I* case, the Court had clarified that 'legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him or her, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection'.[10] In *Schrems II* the Court then added that Article 47 required that a data subject be able to bring his or her action before an independent and impartial court, a condition not fulfilled by the Ombudsperson.[11]

While these rulings do shed light on the threshold below which the Court will consider that Article 47 has been violated, a first layer of complexity in this definitional effort emerges when linking Article 47 to the provisions of EU secondary law providing for an effective judicial remedy (i.e. Article 79(1) of the General Data Protection Regulation – 'GDPR')[12] and Articles 45 and 46 GDPR referring instead to 'effective administrative and judicial redress' and 'effective legal remedies' in the context of international data transfers. These notions are not completely overlapping, as *Maria Tzanou* and *Plixavra Vogiatzoglou* point out, and the Court's approach, seemingly conflating all provisions into one 'right to an effective judicial remedy' is questionable.

Further, on this point, they also consider whether the effective redress under Article 47 requires judicial remedies or whether administrative redress may also be regarded as sufficient. In this context, they point to the fact that, while under the current case law and the Guidelines of the EDPB, a system of admin-

10 *Schrems I* (n 6) para 95.

11 *Schrems II* (n 6) para 195.

12 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ('General Data Protection Regulation') [2016] OJ L-119/1.

istrative redress cannot per se be regarded as falling foul of Article 47, this would hardly be compatible with Article 45(2)(a) of the GDPR which explicitly mention effective administrative *and* judicial redress and with Article 47 EUCFR which mentions an effective remedy before an impartial tribunal.

Finally, and concerning the notion of an effective remedy, without further clarification from the Court, *Janvier Parewyck* asks, can we consider a 'risk-based approach' to data transfers, allowing data to be transferred to third countries if the risks in terms of data protection are low, in line with Article 47? Would the right to an effective remedy be ensured in these cases? While the Commission and the EDPB seem to think so, the ultimate word rests again with the Court, with legal uncertainty reigning in the meantime.

This discussion revolves around the notion of (lawful) limitations to fundamental rights. The right to an effective remedy is indeed subject to limitations under the conditions set in Article 52(1) of the Charter. According to this provision any measure limiting Article 47 EUCFR must be provided for by law, respect its essence, and, subject to the principle of proportionality, be necessary and genuinely meet objectives of general interest recognised by the EU.[13] In this context, *Maria Tzanou* and *Plixavra Vogiatzoglou* highlight a certain confusion in the CJEU's approach between the essence of Article 47 and Article 8(2) of the Charter concerning the right of access, rectification and erasure of personal data. In *Schrems I*, the Court seems to assume that the rights of access, rectification and erasure are protected by the 'essence' of Article 47: given that these rights are protected by Article 8(2), they ask, why did the Court not consider a violation of the 'essence' of Article 8 EUCFR in this case instead of resorting to the essence test under Article 47? This confusion, they argue, conflates the notion of seeking a remedy for the violation of a right, and the actual exercise of a right: this might bring about undue limitations to Article 47 because it might restrict its scope to the exercise of data subjects' rights rather than to the right to an effective judicial remedy to protect those very rights.

Concerning data subjects' rights, *Laura Drechsler* links the *Schrems* rulings with the earlier case law of the CJEU where the Court has considered effective legal remedies to challenge the access to personal data by private authorities as an important element in the consideration of whether the interference with the right to data protection could be regarded as justified.[14] She notes, however, the novelty in the *Schrems* rulings that such effective legal remedies were required with respect to non-EU actors and 'the required legal remedies needed to achieve a specific result, namely that individuals could exercise their data subject rights

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13 See on this Kathleen Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?' (2019) 20 German Law Journal 884.

14 Joined Cases C-203/15 and C-698/15 Tele2 para 121; and Joined Cases C-511/18, C-512/18 and C-520/18 La Quadrature du Net para 66.

of access, rectification and erasure against the foreign (non-EU) public authority'.[15] As *Tzanou* and *Vogiatzoglou*, she does point to a situation of unclarity arising from this interlinkage between data subject rights under the GDPR and the right to an effective remedy, specifically with respect to whether this interaction can also be applied outside the *Schrems*-specific context of non-EU actors accessing personal data originating from the EU or to other data subject rights besides access, rectification, and erasure.

Importantly, with respect to the possible limitations to the right to an effective remedy, it should not be forgotten that data transfers do not only take place for commercial but also for criminal purposes, a topic which is explored in the contribution by *Eleni Kosta* and *Irene Kamara*. They provide an analysis and assessment of the right to an effective remedy in international data transfers of electronic evidence, specifically with the USA. They point out that a major difference between the EU and the US regime is the nature of the right to an effective remedy, which in the US can be much more severely limited than in the EU. These differences render the creation of a framework for transatlantic data transfers particularly challenging.

Another layer of complexity finally arises with respect to the scope of application of Article 47 and the repercussions on the extraterritorial application of the provision. While we know that, pursuant to Article 51 of the Charter, the right to an effective remedy must be respected both by the EU institutions and the Member States when the latter act within the scope of application of EU law, the differences in the constitutional and judicial architectures of the EU and the national systems cannot be overlooked. From this point of departure, *Maria Tzanou* and *Plixavra Vogiatzoglou* argue that the extent to which an EU measure may impose respect of Article 47 upon a third country in the context of an international agreement is questionable. This is because, with respect to national procedural rules, Article 47 is used in the context of a balancing exercise between national procedural autonomy and the need to respect the right to an effective remedy.

The way forward, in their view, is not through the 'essence' of the fundamental right test, but rather, in line with the view taken by the Court in *Schrems II*, through a flexible approach based on the existence of minimum and sufficient guarantees in the third country when it comes to data transfers. These guarantees could be based, in their view, on the case law of the CJEU on the notion of 'court' or 'tribunal' under Article 267.

15 Drechsler in this special issue 53.

3. Conclusions

Article 47 has become a true cornerstone of the European system of multi-level judicial protection, able to shape the entire procedural ecosystem as well as its systemic features at both the national and EU level.[16] The contributions in this special issue have unveiled yet another function of Article 47, that of 'value exporter' of the EU: it is through Article 47 that the CJEU has been able to enforce extraterritorially the protection of EU fundamental rights. Even with all the conceptual and definitional challenges and persisting uncertainties surrounding its use with respect to international data transfers, as highlighted by the various contributions, it is undeniable that the right to an effective remedy has served as a 'booster' for the enforcement of the EU fundamental right to data protection as well as the procedural and substantive provisions of the GDPR. It is the CJEU which, once more, will be called to disentangle several of the questions raised by the authors of this special issue, and further delineate the role of Article 47 in this realm.

[16] This is noted in the Conclusions of Matteo Bonelli, Mariolina Eliantonio, and Giulia Gentile, (n 2) 284-285.