

Faris Godinjak *¹

ARTICLE 47. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN THE LIGHT OF THE C-437/13 DECISION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

ABSTRACT

The role of the Court of Justice of the European Union is very important regarding the exercise of rights from Charter of Fundamental Rights of the European Union. Its decisions have high importance for future cases and practice of the national institutions of member states. The main subject of this article is one of the Court's decisions, specifically case C-437/13, *Unitrading Ltd v Staatssecretaris van Financiën* (State Secretary for Finance). The question of origin of goods, which is focus of this decision, is always relevant and challenging, so the author wanted to present a specific case when the goods were imported into the Union area and the country of origin was disputable. Content of the case has to do with Article 47 of the Charter, which guarantees right to an effective remedy, and the means of proof which was presented. The author analyzed the possibility to exercise this right, concerning the previously mentioned article of the Charter, by presenting the right to an effective remedy as a general principle of law and part of the European Convention on Human Rights and Fundamental Freedoms and the European Union Charter of Fundamental Rights and discussing the outcome of the C-437/13 case in front of the Court of Justice of the European Union.

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Key words: *right to an effective remedy, origin of goods, means of proof, European Union Charter of Fundamental Rights, Court of Justice of the European Union, European Convention on Human Rights and Fundamental Freedoms and European Union*

¹ MA, Expert associate with the Ministry of Foreign Trade and Economic Relations

INTRODUCTION

One of the most important rights guaranteed under the Charter of Fundamental Rights of the European Union is incorporated under Article 47 of the Charter. Right to an effective remedy is a well-known and recognized general principle of law in the European Union which guarantees 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 the aforementioned Article².

Purpose of this paper is to analyze this fundamental right and its effects by analyzing the decision of the Court of Justice of the European Union and presenting the case which the Court referred to in Article 47 of the Charter. The methodology will be from general to specific with the focus on the particular case. At the very beginning, this paper will deal with the right to an effective remedy as a general principle of European Union law and the way it is established through the Court's practice. Afterwards, this right will be analyzed as a part of the Charter of Fundamental Rights of the European Union and compared with the same right as prescribed by the European Convention on Human Rights and Fundamental Freedoms.

Case C-437/13, *Unitrading Ltd v Staatssecretaris van Financiën*, will be presented briefly, from the request to the judgement. In it, the Court decided whether there was a violation of the right to an effective remedy while means of proof and origin of goods were the core elements of the case the national court focused on. In the end, it will be argued why this decision was the most rational.

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1. Right to an effective remedy as a general principle of European Union law and part of the Charter of Fundamental Rights of the European Union and European Convention on Human Rights and Fundamental Freedoms

What is actually a general principle of law? According to the definition of Takis Tridimas that is a general proposition of law of some importance from which concrete rules derive, with the two constituent elements. At first, it must be general and, at second, it must carry added weight, expressing a core value of an area of law or the legal system as a whole.³

It is well known that the right to an effective remedy is a part of the European Convention on Human Rights and Fundamental Freedoms,

² Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C 326, Volume 55, 26 October 2012, p 405

³ T. Tridimas, *The General Principles of EU Law*, Oxford University Press, Oxford, 2007, p 1

precisely Article 13, which prescribes that 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. Having in mind the previous definition, Court of Justice of the European Union, through various cases, established this right as a general principle of European Union law. The most famous decisions regarding this issue were in cases Johnston 222/84⁴ and Borelli C-97/91⁵, where the Court unequivocally concluded that all persons have the right to an effective remedy and that member states are obliged to ensure effective judicial control regarding it.

Remedy implies legally regulated actions of the authorized entities that are opposed to an irregular and unlawful decision, and at the same time require the competent higher instance to correct the existing irregularities and illegalities in the prescribed procedure by abolishing or reversing the challenged decision by adopting a new one.⁶ The main aim of this right is to correct the wrong decision of the state or other public authorities and, by using it, person can eliminate negative harmful consequences caused by irregular or unlawful decision. In practice it means, among others, the following: access to Court, right to appeal, reasonableness of the length of detention, etc.

Having in mind that this right is a part of every important document which deals with human rights (Universal Declaration of Human Rights, European Convention on Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights), this principle became generally known and assumed crucial importance, so it was expected to be a part of the Charter.

Article 47 of the Charter prescribes 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. In relation to the legal subjects of the right definition refers to, it follows that there is no limitation. Furthermore, just as there is no limitation regarding the subject the definition refers to, there is no limitation for the courts. Therefore, the definition can be applied before any court and in any proceedings. The restriction is related to “the law of the

⁴ Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, European Court Reports 1986, p 1663 – 1695

⁵ Case C-97/91, *Oleificio Borelli SpA v Commission of the European Communities*, European Court Reports 1992, p I-6324 – I-6330

⁶ T. Bubalović, *Pravo na pravni lijek protiv odluka tijela državne vlasti prema domaćem i međunarodnom pravu*, Proceedings of the University of Libertas, Zagreb, 2018. vol. 3, p 267-268

Union”, so a legal subject can refer to this article only if there has been violation of rights and freedoms guaranteed by the law of the Union. In case where violation happened, and rights and freedoms are guaranteed by the law of the member states, this right is not applicable. The key word from this definition is “effective”. What does it mean? Efficiency is actually a guarantee in the sense of equivalency or coherence of access to courts and procedural possibilities when exercising rights. It is important to underline that this right should not be considered as mere procedural right, but also as a subjective one, which can be used by every person in front of the court.⁷

Regarding the application of Article 47, general provisions of Article 51 of the Charter must not be omitted. When defining the scope of application of the Charter’s provisions, Article 51 limits it in the way that provisions are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. Any new power or task for the Community or the Union that was not established by the Charter, or powers and tasks as defined by the Treaties, are modified.⁸

As it is mentioned earlier, right to an effective remedy is also guaranteed by the European Convention on Human Rights and Fundamental Freedoms. Article 13 guaranties that 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.⁹ What is the difference between the two definitions? At first glance, Convention’s definition is more general than the Charter’s. The Charter’s definition is clear in the sense that the person can exercise this right only when his/her rights and freedoms guaranteed by the law of the Union are violated. However, the Convention doesn’t have such limiting provision. Naturally, the Convention is applicable in territories under the control of the members of the Council of Europe and can be applied to more people. The second difference is the whole process, from beginning to the end. For example, who is authorized to start proceedings, what are the effects of the Court’s decision, etc. It is well known that a person cannot start the proceedings on the basis of Charter’s provisions, unlike the Convention’s, if other conditions are fulfilled.

⁷ D. Samardžić i Z. Meškić, *Pravo Evropske unije II – Povelja Evropske unije o osnovnim pravima*, Faculty of Law, University of Zenica, Zenica, 2017. p 198

⁸ Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C 326, Volume 55, 26 October 2012, p 406

⁹ European Convention on Human Rights and Fundamental Freedoms, https://www.echr.coe.int/Documents/Convention_ENG.pdf (12 September 2018)

Regardless of all the differences, the fact is that the nature of both provisions is the same as they are giving a guarantee and protection to every person before national courts. Having in mind the Court's case-law, there is no doubt that the right to an effective remedy was really effective.

2. C-437/13 Decision

Request for a preliminary ruling concerned the interpretation of Article 47 of the Charter of Fundamental Rights of the European Union in case number: C-437/13, *Unitrading Ltd v Staatssecretaris van Financiën* (State Secretary for Finance).¹⁰ The request has been made in proceedings between Unitrading Ltd and the State Secretary for Finance of Netherlands regarding the imposition of customs import duties. Main points from the decision are as follows.

Article 243 of the Council Regulation, establishing the Community Customs Code ('Customs Code'), provides that any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.¹¹ The same article prescribes that the right of appeal may be exercised in two ways: initially, before the customs authorities designated for that purpose by the Member States, and subsequently, before an independent body, which may be a judicial authority or an equivalent specialized body, according to the provisions in force in the Member States. Article 245 of the Customs Code stipulates that the provisions for the implementation of the appeals procedure shall be determined by the Member States.¹²

On 20 November 2007 Unitrading, established in Rickmansworth (United Kingdom), made a declaration to the Netherlands customs authorities for release into free circulation of 86,400 kg of fresh garlic bulbs ('the goods'). The declaration was submitted by F.V. de Groof's In- en Uitklaringsbedrijf BV, trading under the name of Comex. In the declaration, Pakistan was cited as being the country of origin of the goods. It was accompanied by a certificate of origin issued by the Karachi Chamber of Commerce and Industry on 5 November 2007.

The Netherlands customs authorities took samples of the goods on 21 November 2007, but on the same day, they demanded an additional guaran-

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¹⁰ Case C-437/13. *Unitrading Ltd v Staatssecretaris van Financiën*, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=158841&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=118358> (11 September 2018)

¹¹ Council Regulation (EEC) No 2913/92 of 12 October 1992, Official Journal of the European Communities, Volume 35, p 47

¹² Ibid.

tee, because they had doubts regarding the country of origin cited. When the guarantee was provided, authorities granted release of goods and at the same time portion of each sample was examined by a laboratory of the US Department of Homeland Security, Customs and Border Protection ('the American laboratory') and the result showed that the probability that the goods in question had originated in China was at least 98%. Comex also requested an analysis by the American laboratory and proposed that the goods be examined in Pakistan as well. Analysis of a different portion sent to American laboratory confirmed its earlier findings, but the proposal for analysis in Pakistan was rejected.

On 2 December 2008 the customs authorities concluded that the goods had originated in China. A notice of assessment of customs duties ('the contested notice of assessment') was issued and served on 19 December 2008 on Unitrading. Having regard to the alleged fact that the goods originated in China, additional duties of EUR 1,200 per 1,000 kg, namely EUR 98,870.40 were imposed.

Unitrading appealed the contested notice of assessment and the American laboratory stated in an email of 9 February 2009 that the portions of the samples had been compared with the data in the American databanks relating to the declared country of origin, namely Pakistan, and the suspected country of origin, namely China. In March 2009 the American laboratory also informed the Amsterdam customs laboratory that more than 15 trace elements had been discovered in the samples of the goods. Nevertheless, it refused to disclose the information concerning the regions of China and Pakistan, which had been compared, on the ground that these were sensitive data to which access was restricted by law.

Additionally, in a mission report of 20 October 2009, concerning enquiries made in China on a number of consignments of fresh garlic bulbs sent to Belgium, the Netherlands and the United Kingdom, for which the country of origin declared was Pakistan while it was suspected that the goods originated in China, the European Anti-Fraud Office (OLAF) concluded that there were strong reasons to believe that the country of origin of the goods in question was in fact China and not Pakistan.

Since the contested notice of assessment has been confirmed by the customs authorities, Unitrading brought an action before the Rechtbank te Haarlem (District Court, Haarlem) which, by judgment of 12 August 2010, declared the appeal brought against that decision to be unfounded. Unitrading appealed against that judgment before the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam), which, on 10 May 2012, upheld the judgment delivered at first instance, taking the view that the Netherlands customs authorities had shown that the goods did not originate in

Pakistan but in China. The Gerechtshof te Amsterdam further stated that, at the time of the hearing before it, in Amsterdam there were still portions of the samples of the goods which could be used for a possible second expert opinion. Unitrading pursued an appeal in cassation before the referring court.

In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Do the rights enshrined in Article 47 of the Charter ... mean that if customs authorities, in the context of the submission of evidence as to the origin of imported goods, intend to rely on the results of an examination carried out by a third party with regard to which that third party does not disclose further information either to the customs authorities or to the declarant, as a result of which it is made difficult or impossible for the defense to verify or disprove the correctness of the conclusion arrived at and the court is hampered in its task of evaluating the results of the examination, those examination results may not be taken into account by the court? Does it make any difference to the answer to that question that third party withholds the information concerned from the customs authorities and from the party concerned on the ground, not further explained, that “law enforcement sensitive information” is involved?

(2) Do the rights enshrined in Article 47 of the Charter mean that when the customs authorities cannot disclose further information in respect of the examination carried out which forms the basis for their position that the goods have a specific origin — the results of which are challenged by reasoned submissions — the customs authorities — in so far as can reasonably be expected of them — must cooperate with the party concerned in connection with the latter’s request that it conduct, at its own expense, an inspection and/or sampling in the country of origin claimed by that party?

(3) Does it make a difference to the answer to the first and second questions that, following the notification of the customs duties payable, portions of the samples of the goods, to which the party concerned could have obtained access with a view to having an examination carried out by another laboratory, were still available for a limited period, even though the result of such an examination would have had no bearing on the fact that the results obtained by the laboratory used by the customs authorities could not be verified, with the result that even in that case it would have been impossible for the court — if that other laboratory were to find in favor of the origin claimed by the party concerned — to compare the results of the two laboratories with respect to their reliability? If so, must the customs authorities point out to the party concerned that portions of the samples of the goods are still available and that it may request those samples for purposes of such an examination?’¹³

¹³ Case C-437/13, Unitrading Ltd v Staatssecretaris van Financiën, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=158841&pageIndex=0&doclang=EN&mo->

The focus of this paper will be only on the first question and the Court's decision regarding it. In Unitrading's submission, if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based. Furthermore, with regard to the adversarial principle that forms part of the rights of the defense, which are referred to in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the Court with the purpose of influencing its decision and to comment on them. Was this the case here? Could the Court take into account this evidence? Was the refusal of the laboratory to disclose the necessary information relevant? Did it infringe on the fundamental right to an effective legal remedy?

The case which could most appropriately be compared regarding similar circumstances is C-300/11, *ZZ v Secretary of State for the Home Department*.¹⁴ Even though the decision had a very different content, the core question was the same and the principle established by this decision is very relevant for the case at hand.

Request for a preliminary ruling in this case came from the Court of Appeal (England and Wales) and concerned the interpretation of Article 30(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda at OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), read in the light, in particular, of Article 47 of the Charter of Fundamental Rights of the European Union.

The request has been made in the proceedings between ZZ and the Secretary of State for the Home Department ('the Secretary of State') concerning the latter's decision excluding ZZ from the United Kingdom of Great Britain and Northern Ireland on grounds of public security. ZZ had dual French and Algerian nationality and has been married to a British national since 1990 and when the request for a preliminary ruling was lodged, they had eight children, aged from 9 to 20 years old. ZZ resided lawfully in the United Kingdom from 1990 to 2005 and in 2004 the Secretary of State granted him a right of permanent residence in the United Kingdom, which was canceled, on the ground that his presence was not conducive to the public good, in August 2005, after ZZ had left the United Kingdom to go to

de=req&dir=&occ=first&part=1&cid=118358 para. 36, para. 13, (11 September 2018)

¹⁴ C-300/11, *ZZ v Secretary of State for the Home Department*, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0300&from=EN>, (11 September 2018)

Algeria. Special Immigration Appeals Commission stated in its judgment that ZZ had no right of appeal against that decision cancelling his right of residence.

In September 2006 ZZ travelled to the United Kingdom, where a decision refusing him admission was taken by the Secretary of State under regulation 19(1) of the Immigration Regulations, on grounds of public security ('the decision refusing entry at issue in the main proceedings'). Following that decision, ZZ was removed to Algeria. On the date when the present request for a preliminary ruling was lodged he was residing in France. The following question was referred to the Court for a preliminary ruling:

*'Does the principle of effective judicial protection, set out in Article 30(2) of Directive 2004/38, as interpreted in the light of Article 346(1)(a) [TFEU], require that a judicial body considering an appeal from a decision to exclude a European Union citizen from a Member State on grounds of public policy and public security under Chapter VI of Directive 2004/38 ensure that the European Union citizen concerned is informed of the essence of the grounds against him, notwithstanding the fact that the authorities of the Member State and the relevant domestic court, after consideration of the totality of the evidence against the European Union citizen relied upon by the authorities of the Member State, conclude that the disclosure of the essence of the grounds against him would be contrary to the interests of State security?'*¹⁵

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In this case the Court concluded that the fundamental right to an effective legal remedy would be infringed if a judicial decision was founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views. It was precisely this position, which the Court took in the C-437/13 case, that led it to the conclusion that the right to an effective remedy was not violated. Accordingly, the Court reached a relevant conclusion that the parties to a case must have the right to examine all documents or observations submitted to the court for the purpose of influencing its decision and to comment on them and that the infringement would be present if a judicial decision was founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views. But, according to the Court, it does not appear that the principles have been infringed in the present judgment. This follows from the order for reference that Unitrading knew of the grounds on which the decision was based, that it was aware of all the documents and observations submi-

¹⁵ Ibid.

tted to the Court, with a view to influence its decision, and that it was able to comment on them before that court.

On these grounds, the Court (Sixth Chamber) hereby ruled next:

Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding proof of origin of imported goods adduced by the customs authorities on the basis of national procedural rules resting on the results of an examination carried out by a third party, with regard to which that third party refuses to disclose further information either to the customs authorities or to the customs declarant, as a result of which it is made difficult or impossible to verify or disprove the correctness of the conclusions reached, provided that the principles of effectiveness and equivalence are upheld. It is for the national court to ascertain whether that is so in the main proceedings.¹⁶

Bearing this in mind, there is no doubt that the Court's decision was rather cautious and that it concluded that the national court had the right to take into account the legal subject's proof and that that proof was sufficient and relevant. To sum up, Charter does not present an obstacle for taking into account presented evidence, regardless of the fact that the third party did not submit any additional information either to the customs authorities or to the declarant. The only condition set up by the Court was that the principles of effectiveness¹⁷ and equivalence¹⁸ are upheld.

It was up to the national court to assess whether this was a case here, in accordance with the case-law.¹⁹ To summarize the above stated, if the set conditions are met, the fact that American laboratory refused to disclose the information concerning the regions of China and Pakistan which had been compared, on the ground that these were sensitive data access to which was restricted by law, was acceptable and in accordance with the Charter.

¹⁶ Case C-437/13, Unitrading Ltd v Staatssecretaris van Financiën, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=158841&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=118358> para. 36, (11 September 2018)

¹⁷ Case 222/84, Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary, European Court Reports 1986, para. 18.

¹⁸ Case 63/08 Virginie Pontin v T-Comalux SA, European Court Reports 2009 I-10467, para. 45.

¹⁹ Ibid.

CONCLUSION

The question of origin of goods is always relevant and a lot of effort needs to be put into the whole procedure regarding it. Additionally, the question in the case at hand was also about the means of proof or, simply put, which proof is good enough or just enough. By resolving this case and reaching this decision, the Court noted that the national court had right to ascertain whether the principles of effectiveness and equivalence are upheld and concluded that the assessment must be carried out on the basis of national procedural law. There is no doubt that the Customs Code of EU prescribes that the provisions for the implementation of the appeals procedure shall be determined by the Member States, but the Court could also have esteemed that the goods should have been examined once more and that the right to an effective remedy wasn't fully used. The core question was, what would have happened if the Court made a different decision? Then, potentially, we would have two versus one proof. Of course, in case the Court decided that the results of examination can't be recognized and that the goods should be examined in Pakistan, what decision regarding the origin of goods could have been expected? On the other hand, wasn't the present examination fair enough? The Court avoided to complicate the case's proceedings and gave rational estimation regarding sufficiency of the means of proof. By making this decision, the sovereignty of national courts could be strengthened, but, taking into account all the circumstances of the case and the Court's position in previous similar cases, its decision was the only one rational.

ČLAN 47. POVELJE EVROPSKE UNIJE O OSNOVNIM PRAVIMA U SVJETLU ODLUKE SUDA PRAVDE EVROPSKE UNIJE C-437/13

SAŽETAK

Uloga Suda pravde Evropske unije veoma je značajna, kada je riječ o konzumiranju prava koja proizilaze iz Povelje Evropske unije o osnovnim pravima. Njegove odluke od velike su važnosti za buduće slučajeve i postupanje institucija država članica. Fokus ovog članka će biti upravo jedna od sudskih presuda, preciznije slučaj C-437/13, Unitrading Ltd v Staatssecretaris van Financiën. Pitanje porijekla robe, koje je u glavnom fokusu ove presude, uvijek je aktuelno i izazovno, te je autor želio prikazati konkretan slučaj, kada je roba uvezena na područje Unije, a sporna je bila zemlja porijekla robe. Sadržaj slučaja odnosi se na član 47. Povelje, koji garantuje pravo na efikasnu pravnu zaštitu, te dokaze koji su bili prezentovani. Autor je analizirao konzumiranje ovog prava, vezano za prethodno spomenuti član Povelje, prikazujući pravno na efikasnu pravnu zaštitu kao opšte pravno načelo i kao dio Evropske konvencije o ljudskim pravima i osnovnim slobodama i Povelje Evropske Unije o osnovnim pravima i razmatrajući ishod slučaja C-437/13 pred Evropskim sudom pravde.

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Ključne riječi: pravno na efikasnu pravnu zaštitu, porijeklo robe, sredstva dokazivanja, Povelja Evropske unije o osnovnim pravima, Sud pravde Evropske unije, Evropska konvencija o ljudskim pravima i osnovnim slobodama