The Right to an Effective Remedy Pursuant to Article II-107 Paragraph 1 of the Constitutional Treaty

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A. Introduction

The fundamental right to an effective remedy as guaranteed in Art. II-107(1) of the 'Treaty establishing a Constitution for Europe' (CT)[1] is part of a comprehensive guarantee of effective legal protection and procedural guarantees. In the following, this fundamental right and how it relates to Parts I and III of the CT will be investigated in detail. First, the scope of Art. II-107(1) CT will be identified in Part B. Part C comments on the binding effect of this right. Finally, in Part D, some aspects of the Union's system of legal protection will be investigated in the light of Art. II-107(1) CT, and it will be discussed whether this right could be an instrument to close gaps in the legal protection of individuals against measures of the European Union.

B. The Content of the Right to an Effective Remedy

I. The Foundations of the Right to an Effective Remedy

The right to an effective remedy as guaranteed by Art. II-107(1) CT is based on two legal sources. Both are mentioned in the explanations to Art. 47 of the Charter of Fundamental Rights,[2] which corresponds to Art. II-107(1) CT. On one hand, this right is based on the principle of "Effective Legal Protection" which has been developed by the European Court of Justice (ECJ). In this respect, the explanations refer to the decisions of the ECJ with regard to the cases of *Johnston*, *Heylens* and

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[1] Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 53 [hereinafter CT].

[2] The Declarations concerning the explanations related to the Charter of Fundamental Rights are part of the Declarations concerning provisions of the Constitution (No. 12). They are published as Annex A after the text of the Constitutional Treaty, *see* CT 2004 O.J. (C 310) 420, 424.

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Borelli, in which this principle was developed.[3] On the other hand, Art. II-107(1) CT is clearly based on Art. 13 of the European Convention for the Protection of Human Rights (ECHR), which is reflected in the similar wording of the two articles. The formulations of Art. II-107(1) CT and Art. 13 ECHR are, despite some deviations,[4] almost identical. These foundations have to be considered in interpreting Art. II-107(1) CT to determine its content.

II. The Consideration of Article 13 ECHR in the Interpretation of Article II-107(1) CT

The European Constitution explicitly refers to the human rights and fundamental freedoms laid down in the ECHR. According to Art. II-112(3) CT, rights guaranteed by the Union's Charter of Fundamental Rights, which correspond to those set out in the ECHR, have the same meaning and scope as provided by the ECHR. In addition to that, Art. II-113 CT stipulates that none of the Charter's provisions are to be interpreted as restricting rights which are recognized by Union law, international law or international agreements, especially by the ECHR. The rules of interpretation aim to achieve the utmost coherence between the protection of fundamental rights of the European Union, the ECHR and the national constitutions of the Member States.[5] A comparison is required between the norms of the Union's fundamental rights and the rights guaranteed by the ECHR. If a correspondence can be established, the interpretation of the respective fundamental right provided for by the Union needs to be based on the relevant fundamental right specified in the ECHR with regard to the scope of its application and its limits[6] as interpreted by the European Court of Human Rights (ECtHR).[7]

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[3] Case C-222/84, Johnston, 1986 E.C.R. 01651; Case C-222/86, Heylens, 1987 E.C.R. 04097; Case C-97/91, Borelli v. Commission, 1992 E.C.R. 06313.

[4] *Infra* A. II in this article.

[5] Martin Borowsky, Art. 52 para. 8, *in* KOMMENTAR ZUR CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION (Jürgen Meyer ed., 2003); Stefan Griller, *Der Anwendungsbereich der Grundrechtscharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu verfassungsgesetzlich gewährleisteten Rechten*, *in* GRUNDRECHTE FÜR EUROPA - DIE EUROPÄISCHE UNION NACH NIZZA 131, 157 (Alfred Duchanek & Stefan Griller eds., 2002).

[6] Christoph Grabenwarter, *Die Charta der Grundrechte für die Europäische Union*, 116 DEUTSCHES VERWALTUNGSBLATT 1, 2 (2001); Yvonne Dorf, *Zur Interpretation der Grundrechtecharta*, 60 JURISTENZEITUNG 126, 128 (2005); Franz Matscher, *Der Europäische Gerichtshof für Menschenrechte und seine Bedeutung mit Blick auf eine Europäische Grundrechtscharta*, *in* TOWARDS A EUROPEAN CONSTITUTION 255, 265 (Michael Gehler et al. eds., 2005).

[7] *See supra* note 2, at 456. For the question of the specific role of case-law developed by the European Court of Human Rights, *see* Christoph Grabenwarter, *Die EMRK in der europäischen Verfassungsentwicklung*, *in* TRADITION UND WELTOFFENHEIT DES RECHTS. STUDIES IN HONOUR OF HELMUT STEINBERGER 1129, 1143 (Hans-Joachim Cremer et al. eds., 2002).

In analyzing the right to an effective remedy in detail one should note that the scope of application as well as the content of this right have been extended in comparison to Art. 13 ECHR.

Article II-107(1) CT guarantees a right to an effective remedy to everyone whose rights and freedoms guaranteed by the law of the Union law are violated. The bodies obliged to protect fundamental rights are required to provide a legal remedy in case of a violation of fundamental rights as laid down in Part II of the Constitution and of other rights and fundamental freedoms guaranteed by the European Constitution. But Art. II-107(1) CT is also applicable to potential infringements upon rights which derive from the remaining Union law, that is secondary law. This literal interpretation of Art. II-107(1) CT is confirmed by the explanations related to the Charter, according to which this fundamental right applies to **all rights** guaranteed by Union law.[8] Thus, the scope of application of the right to an effective remedy has been considerably extended in view of Art. 13 ECHR, which guarantees remedies for the violation of rights as set out in the Convention.[9] Art. 13 ECHR exclusively aims to implement the fundamental rights guaranteed by the ECHR, while Art. II-107(1) CT provides for a judicial implementation of all rights guaranteed by Union law.

Also, the scope of guarantees deriving from Art. II-107(1) CT is more comprehensive than that of Art. 13 ECHR. While Art. 13 ECHR requires a remedy before an independent and impartial organ that is not necessarily a tribunal (in the sense of Art. 6 ECHR), Art. II-107(1) CT guarantees an effective remedy before a tribunal.

In the light of the extended scope of application as well as if the extended content of the right to an effective remedy it cannot be assumed that Art. II-107(1) CT "corresponds" to the right laid down in Art. 13 ECHR.[10] Consequently, there is no

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[8] *Charter of Fundamental Rights of the European Union, Explanations Relating to the Complete Text of the Charter*, Art. 47 at 65 [hereinafter *Charter Explanation*]. According to Art. 112 para. 7 CT the explanations constitute guidelines for the interpretation of the Charter and they shall be given due regard by the courts of the Union and of the Member States. They explicitly indicate that they have no legal status and function as mere support of interpretation. Thus, they help to identify the meaning and scope of the Union's fundamental rights but have no binding force as to the interpretation of the Union's human rights provisions; *see* Dorf, *supra* note 6, at 130.

[9] For the ambit of Art. 13 ECHR *see* CHRISTOPH GRABENWARTER, EUROPÄISCHE MENSCHENRECHTSKONVENTION 351 (2d ed. 2005).

[10] Moreover Art. 107-I CT does not form part of the list, which is provided in the explanations on Art. 52, *see Charter Explanation*, *supra* note 8, at 74 (which contains those fundamental rights, whose meaning and scope is the same as that of corresponding Articles of the ECHR). Admittedly, this list is not a binding

obligation according to Art. II-112(3) CT to grant the Union's right to an effective remedy the same meaning and scope as provided by Art. 13 ECHR and the related case-law developed by the European Court of Human Rights.

However, there are strong arguments for taking recourse to the judicature of the European Court of Human Rights with respect to Arts. 13 and 6 ECHR in interpreting elements of the Union's right to an effective remedy (e.g. the terms "effectiveness" or "tribunal"). As a matter of fact, sophisticated judicature exists with regard to the human rights specified in the ECHR, which for pragmatic reasons, the Union's courts will probably take into consideration in their interpretation of fundamental rights guaranteed by the European Constitution. By this, the judicature of the Union's courts will be continued; Art. 6(2) EU already refers to the Convention and the case-law of the European Court of Human Rights.[11] Furthermore, a systematic approach to the individual rules of interpretation of Articles II-112 and II-113 CT would suggest that they aim at the utmost coherence between the different systems protecting fundamental rights in Europe.[12] That coherence can best be provided by taking recourse to the judicature of the European Court of Human Rights. Finally, the preamble to the Charter generically refers to the case-law of the European Court of Human Rights.[13]

The described deviations of Art. II-107(1) CT from Art. 13 ECHR show that this right has been considerably modified. Article 13 ECHR aims to secure the Convention's rights in its Member States. The Member States are obliged to secure the observation of the rights and freedoms defined in the Convention to everyone within their jurisdiction (See Art. 1 ECHR) and to provide for legal remedy in case of violations. This constitutes a relationship of subsidiarity between the system of legal protection of the Convention and the national protection of human rights. Art.

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guideline of interpretation. As to the other statements of the explanations the list can only be considered as a valuable tool for interpretation, but it cannot anticipate the result of the interpretation.

[11] The ECJ already refers to the ECHR and the case-law of the Strasbourg Court of Human Rights. *See, e.g.*, Case C-465/00, Rechnungshof, 2003 E.C.R. I-04989, para. 71; Case C-245/01, RTL Television GmbH, 2003 E.C.R. I-12489, para. 68; Case C-112/00, Schmidberger, 2003 E.C.R. I-05659, para. 79; *see* Antonio Vitorino, *La Cour de justice et les droits fondamentaux depuis la proclamation de la Charte, in* UNE COMMUNAUTE DE DROIT. STUDIES IN HONOUR OF GIL CARLOS RODRÍGUEZ IGLESIAS 111, 119 (Ninon Colneric *et al.* eds., 2003); Stefan Kadelbach & Niels Petersen, *Europäische Grundrechte als Schranken der Grundfreiheiten*, 30 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 693, 695 (2003).

[12] *See* Borowsky, *supra* note 5.

[13] *See* CT, *supra* note 2; *see also* Dorf, *supra* note 6, at 131. By way of a historical interpretation of the Charter's fundamental rights it is possible to draw conclusions from a comparison of these norms with their judicially developed foundations.

13 ECHR is the material aspect of this principle of subsidiarity.[14] The right of Art. II-107(1) CT whose scope of application has been extended to all Union rights as well as to the guarantee of a remedy before a tribunal, adopts the character of a general and comprehensive guarantee of legal protection provided by a tribunal.[15] In this respect, this article is comparable to Art. 19(4) German Basic Law.[16] However, the principle of subsidiarity does not underlie the latter guarantee.

A systematic analysis of Art. II-107(2), (3) CT supports the idea of a general guarantee of legal protection. These paragraphs provide, similarly to Art. 6 ECHR, for two procedural guarantees. One, these guarantees refer to the organization of a judicial body, and two, ensure a fair judicial procedure to be carried out within a reasonable time. According to the explanations related to this right, its content corresponds to that of Art. 6(1) ECHR.[17] The scope of application has, however, been extended in contrast to Art. 6(1) ECHR. The procedural rights of Art. II-107(2) CT apply to any dispute and are no longer limited to civil and criminal affairs.[18] Thus, Art. II-107 CT altogether constitutes a more well-rounded version of Art. 6 ECHR. It opens up far reaching access to a tribunal and guarantees a fair trial according to Art. 6 ECHR.

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[14] GRABENWARTER, *supra* note 9, at 350; José Antonio Pastor Ridruejo, *Le principe de subsidiarité dans la Convention européenne des droits de l'homme*, *in* INTERNATIONALE GEMEINSCHAFT UND MENSCHENRECHTE. STUDIES IN HONOUR OF RESS 1077, 1081 (Jürgen Bröhmer et al. eds., 2005); with regard to procedural requirements, the obligation to exhaust remedies according to Art. 35 ECHR is the counterpart of the material guarantee stipulated in Art. 13 ECHR.

[15] Eser, *Art. 47*, *in* KOMMENTAR ZUR CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION para. 11 (Jürgen Meyer ed., 2002); HANS-WERNER RENGELING & PETER SZCZEKALLA, GRUNDRECHTE IN DER EUROPÄISCHEN UNION para. 1156 (2004).

[16] For the scope of protection guaranteed by Art. 19(4) *Grundgesetz* (German Basic Law) in comparison to Art. 6 ECHR *see* Christoph Grabenwarter & Katharina Pabel, *Der Grundsatz des fairen Verfahrens*, *in* KONKORDANZKOMMENTAR ZUM EUROPÄISCHEN UND DEUTSCHEN GRUNDRECHTSSCHUTZ para. 77 (Rainer Grote & Thilo Marauhn eds., 2005).

[17] Only developments of the guarantee of a fair trial resulting from the jurisdiction of the ECHR, which contributes to the concretisation of rights resulting from this principle, have been included in Art. II-107 CT. This pertains especially to the right to receive legal aid according to Art. II-107(3) CT; *see* Eser, *supra* note 15, at para. 38; Eckhard Pache, *Das europäische Grundrecht auf einen fairen Prozess*, 20 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1342, 1344 (2001).

[18] As a consequence of the autonomous interpretation of the terms "civil rights" and "criminal charge" carried out by the European Court of Human Rights a couple of proceedings fall in the ambit of Art. 6 ECHR which in the legal systems of the Member States would be qualified as public-law matters. *See* GRABENWARTER, *supra* note 9, at 283 (with references to comprehensive case-law).

C. The Addressee of the Right to an Effective Remedy

The interdependence of the different parts of the Constitution becomes apparent when asking who is addressed by the right to an effective remedy. In the European Union as a supranational organization, two levels can basically be distinguished: the level of the Union on which acts are carried out by its bodies and institutions, and the level of the Member States on which national organs carry out their respective functions. The question arises on which level an effective remedy in accordance with the application of Art. II-107(1) CT must be provided.

According to Art. II-111 CT, the fundamental rights set out in the European Constitution are binding on both the organs of the European Union, and on its Member States in the implementation of Union law.[19] In their *status negativus* the fundamental rights oblige the organs of the European Union and of the Member States not to violate the guaranteed rights. Procedural guarantees which include the right to an effective remedy lead primarily to positive obligations. In this case, the obligation to establish and organize tribunals and to make provisions for an adequate exercise of procedural rights. As to the dimension of fundamental rights as positive obligations, Art. II-111 CT does not fully answer the question on which level the required measures need to be taken.

If we assume, which is debatable, that all parts of the Constitution are of equal legal value (same hierarchical level),[20] the provisions which define and separate the competences of the Union from those of the Member States need to be considered as well. Only through their application can it be determined whether there exists an obligation to guarantee a fundamental right on the side of the Union or on the side of a Member State. In this context, the structure of the European Union[21] is comparable to a federal state, as the fundamental rights refer to bodies and institutions on two levels. In a federal state, fundamental rights are binding on the federation and its constituent states (*Bund* and *Länder*); the fundamental rights of the European Constitution are binding on the institutions and bodies of the Union and of its constituent Member States. The fundamental rights are binding on the respective level in the framework of its competences.[22] Positive obligations resulting from fundamental rights are to be fulfilled by the level that is competent

[19] For the scope of the binding effect of the European Union's fundamental rights on the Member States, *see* Griller *supra* note 5, at 139.

[20] *Infra* sec. C II 3 in this article.

[21] While disregarding the question of whether it has the quality of a state or of a federal state.

[22] *See, e.g.*, PETER PERNTHALER, ÖSTERREICHISCHES BUNDESSTAATSRECHT 645 (2004).

to do so (according to constitutional provisions); with regard to the right to an effective remedy, it must be determined whether the Union or the Member States are competent to establish the necessary remedies.

As to the European Constitution, it can be noted that it offers certain legal remedies by allocating competences to the European courts,[23] and by determining the procedures and admission requirements of proceedings before these courts. These remedies partly fulfill the obligation stipulated in Art. II-107(1) CT to provide remedies, in particular with regard to violations of subjective rights committed by institutions and bodies of the European Union. A conferral of jurisdiction to the courts of the Union beyond the European Constitution does not exist (Art. I-29(3) CT). New competences can only be introduced through revision of the Constitution according to Arts. IV-443 and IV-444 CT.

Furthermore, Art. I-29(1), subpara. 2 CT needs to be considered in this context.[24] According to this article, Member States are obliged to provide sufficient remedies to ensure effective legal protection in the fields covered by Union law. Thus, the European Constitution imposes the obligation on Member States to create remedies apart from those provided by the courts of the Union, necessary to guarantee the fundamental right to an effective remedy.[25] In consideration of Art. I-29(1), subpara. 2 CT it cannot be assumed that the European courts are primarily responsible to secure effective legal protection vis-à-vis measures of the EU institutions and organs. Also, a responsibility "in reserve" (*Auffangverantwortung*)[26] has to be rejected. Referring to a formulation in the judicature of the ECJ, Art. I-29(1) CT specifies the Member States' obligation to provide an effective remedy in order to guarantee the enforcement of Community law, which derives from the general obligation of the loyalty of Member States (Art. 10 EC Treaty).[27] The Member States,

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[23] Specialised courts, the General Court, the Court of Justice, *see* CT Art. I-29(1).

[24] *See* Ulrich Everling, *Rechtsschutz im europäischen Wirtschaftsrecht auf der Grundlage der Konventsregelungen*, *in* DER VERFASSUNGSENTWURF DES EUROPÄISCHEN KONVENTS 363, 370 (Jürgen Schwarze ed., 2004).

[25] *See* Wolfram Cremer, *Gemeinschaftsrecht und deutsches Verwaltungsprozessrecht – zum dezentralen Rechtsschutz gegenüber EG-Sekundärrecht*, 37 DIE VERWALTUNG 165, 172 (2004).

[26] For that, *see* Christian Calliess, *Kohärenz und Konvergenz beim europäischen Individualrechtsschutz*, 55 NEUE JURISTISCHE WOCHENSCHRIFT 3577, 3582 (2002); Martin Nettesheim, *Effektive Rechtsschutzgewährleistung im arbeitsteiligen System europäischen Rechtsschutzes*, 57 JURISTENZEITUNG 928, 934 (2002).

[27] Martin Borowski, *Die Nichtigkeitsklage gem. Art. 230 Abs. 4 EGV*, 39 EUROPARECHT 879, 909 (2004). See the respective postulation in Nettesheim, *supra* note 26, at 934. Concerning the principle of effective legal protection according to the case-law of the ECJ *see*, *e.g.*, MICHAEL TONNE, EFFEKTIVER RECHTSSCHUTZ DURCH STAATLICHE GERICHTE ALS FORDERUNG DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS 248 (1997);

thus, have to establish provisions within their rules of procedure which provide effective remedy for potential violations of subjective rights and freedoms conferred by Union law. Since the Member States cannot confer new competences to the courts of the Union within their legal orders, they have to create new competences in the courts of the Member States.

D. The System of Legal Protection in the Light of Article II-107 CT

As the fundamental right to an effective remedy obligates both the Union and its Member States to provide for the necessary remedies, the following question arises: whether the system of individual legal protection is incomplete and therefore, beyond specific constellations of individual cases, structurally leads to violations of the right ensured by Art. II-107(1) CT.

I. Centralized and Decentralized Individual Legal Protection

The Union's system differentiates between the individual's legal protection against measures taken by the Union (its institutions and bodies), and legal protection against measures taken by Member States or private parties which violate European law. The former are addressed to the courts of the Union (central legal protection), while the latter are referred to the courts of the Member States (decentralized legal protection).[28] Whether legal protection against violations of European law caused by organs of the Member States or by private parties is guaranteed in an adequate and effective manner as set out in Art. II-107(1) CT needs to be examined for each Member State. In this respect, Union law already provides for an obligation to establish effective remedies to ensure the enforcement of subjective rights which are conferred by Union law.[29] Only in some specific

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STEFAN FRANK, GEMEINSCHAFTSRECHT UND STAATLICHE VERWALTUNG 122 (2000); Christoph Grabenwarter, *Die Europäische Union und die Gerichtsbarkeit des öffentlichen Rechts*, *in* VERHANDLUNGEN DES 14. ÖSTERREICHISCHEN JURISTENTAGES, VOL. I/2 VERFASSUNGSRECHT 15, 26 (Österreichische Juristenkommission ed., 2001); Jörg Gundel, *Rechtsschutzlücken im Gemeinschaftsrecht?*, 93 VERWALTUNGSARCHIV 81 (2001); Bernhard Wegener, *Art. 220 EG-Vertrag*, *in* KOMMENTAR ZU EU-VERTRAG UND EG-VERTRAG, para. 29 (Christian Calliess & Matthias Ruffert eds., 2nd ed. 2002); Rudolf Streinz, *Primär- und Sekundärrechtsschutz im Öffentlichen Recht*, 61 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER 300, 340 (2002).

[28] *See e.g.* Wolfram Cremer, *Art. 230 EG-Vertrag*, *in* KOMMENTAR ZU EU-VERTRAG UND EG-VERTRAG, para. 9 (Christian Calliess & Matthias Ruffert eds., 2nd ed. 2002); Carsten Nowak, *Zentraler und dezentraler Individualrechtsschutz in der EG im Lichte des gemeinschaftsrechtlichen Rechtsgrundsatzes effektiven Rechtschutzes, in* INDIVIDUALRECHTSSCHUTZ IN DER EG UND DER WTO 47 (Carsten Nowak & Wolfram Cremer eds., 2002).

[29] *See supra* notes 3, 27.

constellations, therefore, might it be necessary to provide further possibilities of legal protection.

II. Action for Annulment According to Article III-365(4) CT

1. The Problem: Gaps in the Legal Protection Against Legislative Acts

Concerning the legal protection provided by courts of the European Union, an individual has the possibility to address the Court of Justice under the conditions of Art. 230(4) EC Treaty. According to this article, any person (natural or legal) can bring an action against decisions addressed to that person. Additionally, a person can bring an action against acts which are of direct and individual concern to that person, even though they have been addressed to another person or issued in the form of a regulation.[30] While legal protection is guaranteed against decisions which are individual acts, gaps in legal protection can be discovered with regard to regulations and directives as normative acts of the Union. These gaps are widely discussed in literature and are considered to be problematic with respect to the guarantee of effective legal protection.[31] The gap results from a restrictive interpretation of the right to bring an action pursuant to Art. 230(4) EC Treaty by the Court of Justice. According to existing jurisdiction an action for annulment against regulations is, in principle, not admissible due to a lack of individualization of those concerned by the regulation. In reaction to respective rulings by the Court of First Instance,[32] in the most recent case-law the ECJ has held on to the so-called *Plaumann*-formula;[33] accordingly, individual legal protection against regulations or directives can only be reached in exceptional cases via Art. 230(4) EC Treaty.

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[30] Apart from that, individuals have the possibility to bring actions for failure to act (Art. 232 EC) and actions for damages (Art. 235, 288(2) EC) before the European courts.

[31] From the wealth of literature *see*, *e.g.*, Calliess, *supra* note 26, at 3579; Wolfram Cremer, *Individualrechtsschutz gegen Rechtsakte der Gemeinschaft: Grundlagen und neuere Entwicklungen*, *in* INDIVIDUALRECHTSSCHUTZ IN DER EG UND DER WTO 27 (Carsten Nowak & Wolfram Cremer eds., 2002); Nettesheim, *supra* note 26, at 932; Borowski, *supra* note 27, at 894; Franz C. Mayer, *Individualrechtsschutz im Europäischen Verfassungsrecht*, 59 DEUTSCHES VERWALTUNGSBLATT 606 (2004); Eckhard Pache, *Rechtsschutzdefizite im europäischen Gemeinschaftsrecht*, *in* GRUNDRECHTSSCHUTZ FÜR UNTERNEHMEN IM EUROPÄISCHEN BINNENMARKT 199 (Thomas Bruha, Carsten Nowak, & Hans Arno Petzold eds., 2004).

[32] *See* Case T-177/01, Jégo-Quéré v. The Commission, 2002 E.C.R. II-02365, para. 41. *See also* the Opinion of the Advocate-General Jacobs concerning Case C-50/00, Union de Pequeños Agricultores, 2002, E.C.R. I-06677, para. 43 (which was adopted previously).

[33] Case C-50/00, Union de Pequeños Agricultores, 2002, E.C.R. I-06677, para. 39; Case C-263-02 P, The Commission v. Jégo-Quéré, 2004 E.C.R., para. 29. *see* Daniel Dittert, *Effektiver Rechtsschutz gegen EG-Verordnungen: Zwischen Fischfangnetzen, Olivenöl und kleinen Landwirten,* 37 EUROPARECHT 708 (2002); Christian Calliess & Martina Lais, *Anmerkung*, 14 ZEITSCHRIFT FÜR UMWELTRECHT 344 (2002).

In the context of the European Constitution, the possibilities for individuals to bring actions of annulment before the Union's courts have been modified and extended by Art. III-365(4) CT (in contrast to Art. 230(4) EC Treaty). According to the third alternative of Art. 365(4) CT, persons who are directly affected by a regulatory act which does not entail implementing measures are entitled to bring an action. On certain conditions, this article, in contrast to Art. 230(4) EC Treaty, does not require a person to be directly affected according to the restrictive interpretation of the Court of Justice. This leads to an extension of the right to institute proceedings.[34] This extension is, however, of little extent and of subordinate importance.[35]

In fact, this extended possibility of instituting legal proceedings merely applies to regulatory acts which seem to include European regulations and European decisions, the new forms of legal acts which both constitute non-legislative acts.[36] Art. III-365(4) CT lists the conditions of individual legal protection without direct reference to the new types of legal acts which are defined in Arts. I-33 and I-34 CT. In fact, in its first and second alternative the nonspecific term "act" is used. But only for some of the conceivable acts, the so called "regulatory acts" which do not entail implementing measures, is an individual action for annulment admissible even if the requirement of individual concern is not met. The wording of Art. III-365(4) CT indicates that legislative acts should be excluded by the term "regulatory acts," According to a systematic approach with regard to Arts. I-33 and I-34 CT, it is rather unclear whether "regulatory acts" implies the same as "non-legislative acts" as used in Arts. I-33 and I-35 CT. It seems doubtful that two different terms should be used for the same category of legal acts. But it must be assumed that the term "regulatory acts" does not include "legislative acts" as defined in Art. I-33 CT.[37]

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[34] *See* Thomas von Danwitz, *Grundfragen einer Verfassungsbindung der Europäischen Union*, *in* EINE VERFASSUNG FÜR EUROPA 251, 258 (Klaus Beckmann, Jürgen Dieringer, & Ulrich Hufeld eds., 2004).

[35] *See* deviating statements in Jürgen Bast, *Legal Instruments*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast eds., 2005, forthcoming); Jürgen Gündisch, *Grundrechte und Rechtsschutz, in* EINE VERFASSUNG FÜR EUROPA 270, 287 (Klaus Beckmann, Jürgen Dieringer, & Ulrich Hufeld eds., 2004); Pache, *supra* note 31, at 208.

[36] *See* Wolfram Cremer, *Der Rechtsschutz des Einzelnen gegen Sekundärrechtsakte der Union gem. II-270 Abs. 4 Konventsentwurf des Vertrags über eine Verfassung für Europa*, 31 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 577, 579 (2004); Mayer, *supra* note 31, at 610. Legislative acts (see Art. I-33(1) subpara. 2, 3 CT, European laws and European framework laws) correspond to directives and regulations according to the types of legal acts effective under current European law.

[37] Cremer, *supra* note 36, at 579; John Temple Lang, *Declarations, regional authorities, subsidiarity, regional policy measures, and the Constitutional Treaty*, 29 EUR. L. REV. 94, 102 (2004); deviating statements by Bast *supra* note 35.

This understanding of the term "regulatory act" is confirmed by a teleological argument: individual legal protection against legislative acts has not been provided in the European system of legal protection so far. A turning away from this legal position, which was discussed controversially in the European Convention,[38] should be more obvious in the wording of the modified provision of Art. III-365(4) CT.

The amelioration of individual legal protection relates, thus, only to non-legislative acts.[39] As a result, an action of annulment against European law and European framework law as types of legislative acts is only admissible if brought by individuals who are directly and individually affected according to the restrictive interpretation by the Court of Justice.[40] Thus, the mentioned gap in legal protection is marginally diminished but is far from being closed.[41]

2. The Answer of Article 107(1) CT

In view of the guarantee of an effective remedy, a legislative act requiring an act of implementation by the Member States is not problematic. Legal remedy can be sought against the implementing measure before the courts of the Member States, and judicial scrutiny of the legal act can be carried out by way of a preliminary ruling.[42] In general, this possibility is not available if a legislative act is effective without an implementing measure or if the adoption of an implementing measure seems unreasonable. In such a case, a request for legal protection can only be satisfied by judicial scrutiny of the legislative act itself by an individual's application, which is usually not provided.

If we consider the gap in the legal protection in the light of Art. II-107(1) CT, the first question arises whether this guarantee also requires direct remedies against legislative acts. This question has not been completely answered in the case-law of the European Court of Human Rights with regard to Art. 13 ECHR. An obligation

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[38] The relating documents show that the possibility of an individual action against legislative acts should not be introduced by the re-formulation of Art. 230(4) EC Treaty. See CONV (03) 734, 2 May 2003, 20. *See* Hans Arno Petzold, *Lückenhafter Rechtsschutz gegen EG-Verordnungen in der Arbeit des Europäischen Konvents*, *in* GRUNDRECHTSSCHUTZ FÜR UNTERNEHMEN IM EUROPÄISCHEN BINNENMARKT 247, 252 (Thomas Bruha et al eds., 2004).

[39] Everling, *supra* note 24, at 81.

[40] Mayer, *supra* note 31, at 610.

[41] Cremer, *supra* note 36, at 583.

[42] *See* Cremer, *supra* note 36, at 583.

to introduce a procedure reviewing legislative acts on the basis of the Convention has not been deducted from Art. 13 ECHR as yet.[43] But, the existing jurisdiction on measures of general application without legislative character requires a possibility of reviewing an infringement of the Convention.[44]

A literal interpretation of the Union's fundamental right to an effective remedy leads, first of all, to the conclusion that the ambit of this subjective right is not limited to violations of law committed by the executive and/or the legislative. For the applicability of Art. II-107(1) CT it is irrelevant what type of legal act caused the violation of a subjective right.

In consideration of the updated explanations to the Charter of Fundamental Rights, we can find the reference that the fundamental right to an effective remedy does not aim to change the system of legal protection laid down by the Treaties, and particularly, the rules related to the admissibility of direct actions brought before the Court of Justice.[45] However, this explanation does not lead to a clear-cut answer to the issue in question. It can be assumed that the European Convention considered the system of legal protection provided for in the Constitution to be sufficient and that the mentioned gap in legal protection does not constitute a violation of the right to an effective remedy. It can be assumed that this fundamental right conversely does not oblige to establish the possibility of judicial scrutiny of legislative acts upon an individual's application. However, it seems doubtful whether this can be considered a compulsive conclusion.

The explanation to the Charter of Fundamental Rights could also be interpreted differently. It could mean that no changes of the provisions on the admissibility of direct actions brought before the Court of Justice can be derived from Art. II-107(1) CT. Moreover, from this reference it could be deducted that the Convention acted on the assumption of a continuation of the (restrictive) jurisdiction by the Court of Justice with regard to direct actions brought before the Court and didn't assume that an obligation to change its jurisdiction derives from this fundamental right. Whether the Member States are possibly expected to fulfill all obligations resulting from an exhaustive guarantee of the fundamental right pursuant to Art. I-29(1) CT

[43] James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) at para. 85 (1986); Lithgow v. United Kingdom, 102 Eur. Ct. H.R. (ser. A) at para. 206 (1986); Observer and Guardian v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at para. 76 (1991). *See* Grabenwarter, *supra* note 9, at 353.

[44] Silver v. United Kingdom, 61 Eur. Ct. H.R. (ser. A) at para. 118 (1983); Campbell and Fell v. United Kingdom, 80 Eur. Ct. H.R. (ser. A) at para. 127 (1984).

[45] Explanation on Art. 47 of the Charter on Fundamental Rights, 2004 O.J. (C 310) 420, 450.

cannot be answered according to this understanding of the explanations, but could be assumed as a consequence of the judicature of the Court of Justice.[46]

In this context the method of teleological interpretation seems to constitute an appropriate approach. In order to grant an effective remedy for any potential violation of a subjective right, it seems necessary to also provide a remedy if a violation derives from a legislative act which can only be directly contested due to the lack of an implementing measure or due to a lack of reasonability. In such constellations the fundamental rights guaranteed in the European Constitution as well as the fundamental freedoms can only be effectively enforced by way of direct judicial scrutiny of the legislative act.[47] Although individual actions against legislative acts do not form part of a common European standard of legal protection,[48] a remedy must be admissible if no other possibility of legal protection is available in order to effectively enforce the right to an effective remedy. Therefore, it needs to be assumed that the right to an effective remedy requires the establishment of a direct legal remedy against legislative acts if there is no other possibility of legal protection. The conditions of admissibility in respect of such a remedy could, indeed, be narrowly defined and its applicability could be limited to such cases for which no legal protection can be achieved otherwise.[49]

3. The Consequences

As a result of the aforementioned it can be recapitulated: the right to an effective remedy requires the possibility of an individual action against legislative acts if legal protection cannot be achieved otherwise. However, the modified conditions concerning the admissibility of actions of annulment according to Art. III-365(4) CT do not provide remedies against legislative acts without direct and individual concern. To draw the consequences from these considerations, the relationship between the fundamental right as guaranteed in Art. II-107(1) CT on the one hand and Art. III-365(4) CT on the other hand must be clarified.

My considerations emanate from the premise that all parts of the European Constitution and all its provisions are of the same legal hierarchy. It is true that

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[46] Case C-50/00, Union de Pequeños Agricultores, 2002 E.C.R. I-06677, para. 45.

[47] Nettesheim, *supra* note 26, 933; Pache, *supra* note 31, at 202; Jürgen Schwarze, *Der Rechtsschutz Privater vor dem Europäischen Gerichtshof: Grundlagen, Entwicklungen und Perspektiven des Individualrechtsschutzes im Gemeinschaftsrecht*, 117 Deutsches Verwaltungsblatt 1297, 1313 (2002).

[48] Von Danwitz, *supra* note 34, at 259; Everling, *supra* note 24, at 381.

[49] Everling, *supra* note 24, at 381.

Parts I and II contain provisions of rather "constitutional nature" whereas Part III is in many respects very technical. Principles announced in Part I of the Constitution are sometimes specified in detail in Part III. The constitutional nature of provisions can, however, not be the relevant criterion to decide if one part takes precedence over another. Especially in Part III, the "constitutional quality" differs from provision to provision which makes it impossible to decide on what hierarchical level this Part can be placed. The Constitution itself remains silent on this issue. Therefore, there is no evidence that certain Parts of the Constitution, and in particular the fundamental rights of Part II, take precedence over other Parts.[50]

Consequently, the right of Art. 107 CT cannot be considered as a standard for the examination of whether the possibilities of legal protection before the Court of Justice, as they are provided for by Art. III-365(4) CT, correspond to the right to an effective remedy. Similarly, it is impossible to overrule the conditions of admissibility for an action of annulment by an individual through an interpretation of these conditions in the light of the right to an effective remedy.[51] This would also require a superiority of fundamental rights *vis-à-vis* the provisions in Part III of the Constitution.

The claim has sometimes been raised that *praktische Konkordanz* (an adequate balance) needs to be established between the right to an effective remedy and the conditions of admissibility to an action for annulment by an individual. But it is doubtful in what methodological way such an "adequate balance" can be reached. In its jurisdiction the Court of Justice has *de lege lata* ruled out an interpretation of the conditions of admissibility laid down in Art. 230(4) EC Treaty, which excludes an entitlement to institute proceedings in the above mentioned cases.[52] In my view, the above mentioned reference in the explanations seems to constitute an answer to this jurisdiction: the integration of the Charter into the Union's Constitution is not meant to modify the system of legal protection; the provisions on the admissibility of procedures before the Union's courts are laid down in the Constitution.[53] This also means that the jurisdiction of the Court of Justice can be continued insofar as it is not affected by changes in the conditions of admissibility.

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[50] Jürgen Schwarze, *Ein pragmatischer Verfassungsentwurf – Analyse und Bewertung des vom Europäischen Verfassungskonvent vorgelegten Entwurfs eines Vertrags über eine Verfassung für Europa*, 38 EUROPARECHT 535, 536 (2003). In this respect the legal basis has changed after the integration of the Charter of Fundamental Rights into the Constitution. Before that, the Charter existed parallely to primary law; in this context a superiority of fundamental rights could be assumed.

[51] Bast, *supra* note 35.

[52] Case C-50/00, Union de Pequeños Agricultores, 2002 E.C.R. I-06677, para. 44.

[53] For another interpretation of this reference, *see* Eser, *supra* note 15, at para. 12.

Therefore, in application of Art. I-29 CT the Member States are obligated to provide for the necessary remedies.[54] This means that they have to introduce remedies in the rules of procedure which allow access to a court if a legislative act of the Union infringes upon rights or freedoms guaranteed by Union law. Legal protection also needs to be possible if no implementing measure by a national authority has been set or if such a measure cannot be claimed due to considerations of reasonability.[55] In case of justified doubts, the courts of the Member States at least need to be obligated to submit a legislative act to the Court of Justice by way of a preliminary ruling. Such regulations in the national rules of procedure would be possible. However, it also needs to be considered that such constellations would lead to the risk of national courts adopting the function of preliminary examiners or mere intermediaries.[56] This might appear to be an awkward organization of legal protection which is prone to lead to delays.[57] Its effectiveness claimed by Art. II-107(1) CT can not be considered as being a priori affected.[58]

III. An Individual's Right to Initiate a Preliminary Ruling?

The preliminary ruling forms an essential part of the European system of legal protection. Its special importance is to interlock centralized and decentralized courts and to provide for a uniform application of European law.[59] It also serves as an element of individual legal protection.[60] With regard to an amelioration of the individuals' legal protection, some critics call for the possibility for an individual to initiate a preliminary ruling.[61] Despite arguments *de lege ferenda* it has to be considered if the right to an effective remedy requires the right to initiate preliminary rulings.

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[54] Temple Lang, *supra* note 37, at 104.

[55] *See* Cremer, *supra* note 25, at 172.

[56] Borowski, *supra* note 27, at 896.

[57] *See, e.g.*, Bruno De Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, *in* THE EU AND HUMAN RIGHTS 877 (Philip Alston ed., 1999); Pache, *supra* note 31, 207.

[58] *See* Calliess, *supra* note 26, at 3581.

[59] HANS-WERNER RENGELING ET AL., HANDBUCH DES RECHTSSCHUTZES IN DER EUROPÄISCHEN UNION 208 (2003).

[60] *Id*. at 210; BERNHARD SCHIMA, DAS VORABENTSCHEIDUNGSVERFAHREN, 4 (2nd ed. 2004).

[61] *See, e.g.*, LUDWIG ALLKEMPER, DER RECHTSSCHUTZ DES EINZELNEN NACH DEM EG-VERTRAG 171 (1995). *Contra* Pache, *supra* note 31, at 219; Schwarze, *supra* note 47, at 1314.

Effective legal protection requires, first, that every possible violation of a subjective right is considered by a court, and second, that this court can come to a binding decision.[62] Both are available, as any addressee of an act in the field of application of European law has the possibility to bring an action before a court of a Member State. The court decides whether to make a preliminary reference or not. In case of a preliminary ruling, legal protection is provided through cooperation of the courts involved. If the Member State's court refuses to make a preliminary reference, the national court gives at the same time a binding judgment on an alleged violation of a right. There is no right to a successful remedy. Consequently, the right to an effective remedy does not benefit individuals in respect of preliminary rulings. However, if a court arbitrarily refuses to make a preliminary reference, a violation of the right to a fair trial or to access to a court according to Art. II-107(2) CT could be assumed.[63]

E. Conclusion

Art. I-29 CT lays the burden of providing sufficient possibilities of legal protection largely upon the Member States. Whether this leads to a system of legal protection which, guaranteed by the courts of the Union and the Member States, allocates the competences to different courts in a meaningful way remains doubtful. The right to an effective remedy can be useful to close gaps in the legal protection of individuals in certain cases. However, it does not constitute an adequate instrument to reform the system of legal protection of individuals under Union law.

[62] GRABENWARTER, *supra* note 9, at 356 (with reference to the case-law of the ECHR).

[63] For the corresponding jurisprudence of the *Bundesverfassungsgericht* (German Constitutional Court), *see* BVerfGE 73, 339, 366; BVerfGE 75, 223, 233.