The Role of the Principle of Effective Judicial Protection in Relation to Website Blocking Injunctions

by **Saulius Lukas Kalėda***

Abstract: The use of internet blocking to prevent access to illegal content requires the adoption of rigorous procedural safeguards. The necessity of such safeguards is even more pressing when this primarily public tool is transposed into the domain of private enforcement, for the purposes of supressing copyright and trademark infringements. Injunctions in the sphere of IP rights are governed by a net of interrelated EU legal provisions, contained in the Infosoc and the Enforcement directives (2001/29 and 2004/48), the E-Commerce directive (2000/31), and the EU net neutrality (open internet) rules (Regulation 2015/221). However, the core requirements stem from the application of the principle of proportionality and the search for a balance between competing fundamental rights. According to case law of the EU Court of Justice, the limitations upon injunctions in relation to IP rights are deduced in the process of balancing the substantive fundamental rights enshrined in the EU Charter: on the one hand, the right to the protection of intellectual property (Article 17(2)); and on the other, the freedom of expression and information (Article 11), the freedom to conduct business (Article 16), and the rights to privacy and to data protection (Articles 7 and 8). However, in relation to new types of injunctions potentially affecting the rights of multiple third parties, such as blocking injunctions, more weight should be given to procedural fundamental rights stemming from Article 47 of the Charter. This new perspective presents several advantages. Limitations resulting from Article 47 of the Charter constitute a stronger imperative than those deduced from the application of the principle of proportionality. To a large extent, they must be applied by the court of its own motion. In contrast to the principle of proportionality, fair trial requirements form part of European and national public policy provisions, potentially limiting mutual recognition of judicial decisions imposing injunctions. In the absence of harmonisation, the application of Article 47 of the Charter could therefore lead to the establishment of a minimum procedural standard, which can be invoked in order to achieve a certain degree of uniformity. This would be particularly important if blocking injunctions were to be used on an EU-wide basis.

Keywords: Copyright enforcement; injunctions; online intermediaries; judicial protection; website blocking

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A. Introduction

1 The difficulties of enforcing IP rights in the online environment encourage the search for new tools. This consideration is reflected by the recent adoption of website blocking injunctions in the context of copyright and trade mark enforcement.[1] The growing importance of this new tool stands in

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1 The year 2015 was dubbed 'the year of blocking injunctions' by Prof. E. Rosati on IPKat and in her editorial to Journal of Intellectual Property Law & Practice (see <http://ipkitten.blogspot.lu/2014/12/2015-year-of-blocking-injunctions.html>).

contrast to the absence of harmonised EU regulatory framework. This lacuna is partly compensated by the case law of the Court of Justice of the European Union (CJEU – or 'the Court') interpreting the requirement of striking a fair balance between fundamental rights. The application of injunctions in general, and blocking injunctions in particular, has therefore become an important terrain for the application of the EU Charter of the Fundamental Rights.

2 The Court's established case law applying the Charter to injunctions concentrates on the requirement to balance substantive fundamental rights: on the one hand, the right to the protection of intellectual property (Article 17(2) of the Charter); on the other, the freedom of expression and information (Article 11), the freedom to conduct business (Article 16), as well as the fundamental rights to privacy and to data protection (Articles 7 and 8).[2] This case law and the related national judicial practice have motivated a profound doctrinal debate. Several authors discuss the precise content of the limitations upon injunctions, which can be deduced from the proportionality test and the need to respect the rights of internet users.[3] This debate largely leaves out the underlying procedural rights.

3 Procedural safeguards stemming from the right to effective judicial protection and the right to a fair trial guaranteed by Article 47 of the Charter are necessary preconditions for the protection of substantive rights. They also constitute the conditions of legality for any judicial procedure, including the procedure for injunctive relief. In the absence of an explicit legislative framework, Article 47 constitutes the source of procedural requirements, which can ensure the right to a fair trial in the context of injunctive relief.[4]

B. Application of blocking injunctions to copyright and trade mark infringements

4 The need for appropriate procedural safeguards is particularly explicit in relation to blocking injunctions.

5 Website blocking has not yet been globally accepted as being an effective and appropriate IP enforcement tool.[5] In Europe, Germany and the Netherlands have traditionally been the least receptive to blocking for the purpose of copyright enforcement, although this attitude is changing.[6] Most countries in Europe have legislation which permits the courts to issue injunctions against third parties in the context of IP infringements. This legislation can usually be invoked in order to obtain blocking injunctions against internet service providers, although the scope of such measures varies widely.[7] In UPC Telekabel Wien,[8] the Court has clarified that website blocking lies within the scope of enforcement instruments available under EU copyright law.

6 Blocking injunctions raise more controversies than other IP enforcement tools. First, in contrast to 'notice and takedown' procedures, they are not a part of the established statutory safe harbours applicable to online intermediaries.[9] Secondly, they are not concerned with the removal of illegal content, but instead with suppressing public access to information on the internet. The technical tools used are similar to those employed by the governments for the purposes of internet censorship. This explains the political discourse, which favours "deleting"

2 See judgments in Promusicae (C-275/06, EU:C:2008:54), Scarlet Extended (C-70/10, EU:C:2011:771), SABAM (C-360/10, EU:C:2012:85), UPC Telekabel Wien (C-314/12, EU:C:2014:192), Mc Fadden (C-484/14, EU:C:2016:689).

3 See M. Husovec, Injunctions against innocent third parties: the case of website blocking, JIPITEC 4 (2012) p. 116; P. Savola, Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers, JIPITEC 5 (2014) p. 116; A. Marshoof, The blocking injunction – a critical review of its implementation in the UK in the context of the EU, IIC 46 (2015) p. 632; Ch. Geiger, E. Izyumenko, The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking, SSRN Electronic Journal at Researchgate (January, 2016); M. Schaefer, ISP liability for blocking access to third-party infringing content, EIPR 38 (2016) p. 633; J. Riordan, The Liability of Internet Intermediaries, Oxford OUP 2016, Chapters 14 and 15 at p. 461 et seq. Savola concludes that procedural requirements and national modalities, among others, relating to the procedural situation in court and different conceptions of preliminary injunctions, can be examined in the context of proportionality evaluation or under local procedural rules depending on their characteristics, while observing that in-depth discussion is not possible. Savola: Internet Connectivity Providers as Involuntary Copyright Enforcers: Blocking Websites in Particular (2015), text related to fns 67.

4 See with regard to the right to a fair trial in relation to internet disconnection injunctions, M. Husovec, M. Peguera, Much Ado about Little – Privately Litigated Internet Disconnection Injunctions, IIC 46 (2015) p. 27, and with regard to blocking injunctions in the field of trademark protection, A. Marshoof, The blocking injunction, *op. cit.*, p. 632.

5 For instance, concerns based on the grounds of the freedom of speech, security and effectiveness of blocking measures have so far prevented their wider adoption in the US. See "Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy" (2013), <https://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>.

6 The blocking injunction was recently authorised by the German BGH, see BGH I ZR 174/14 – Goldesel.

7 See J. Riordan, The Liability of Internet Intermediaries, *op. cit.*, p. 504.

8 C-314/12, EU:C:2014:192, interpreting Article 8(3) of the Infosoc Directive (2001/29).

9 See Article 14 of the E-Commerce Directive (2000/31).

the infringing website over the "blocking" of that website.[10] A degree of internet censorship is justified in modern democratic society.[11] However, until quite recently, website blocking was considered as a tool which could be directed at public order targets, in particular, to fight child pornography and, even in this case, subject to specific safeguards.[12] Its extension to private law targets, such as copyright and trademark infringements, is a qualitatively new dimension.[13] The use of blocking for the purpose of private enforcement amplifies the need for procedural safeguards.

C. The role of Article 47 of the Charter in relation to injunctive relief

7 While conditions for granting injunctions in relation to IP rights are a matter of national law,[14] EU law contains several limitations upon injunctions. Given the lack of explicit provisions, such as those envisaged in ePrivacy Directive (2002/58), the Court has established those limitations by interpreting the fundamental rights.[15] Thus, the overarching principles derived from the Charter constitute a "maximal admissible ceiling" for the application of national rules.[16] The Court's approach to resolving conflicts of IP with other fundamental rights has drawn some criticism, as appearing to some extent motivated by pro-IP harmonisation bias.[17]

8 In imposing limitations upon injunctions, the Court has so far relied on the balancing between substantive fundamental rights, and has not yet examined the applicability of procedural rights stemming from Article 47 of the Charter. This may partly be explained by the fact that the issue of procedural rights has not been explicitly put before the Court in this context. One should also keep in mind that the conceptual analysis related to the application of Article 47 is different from the one involved in balancing substantive fundamental rights.[18] Article 47 of the Charter is not one of the competing principles involved in the balancing. Rather, the requirement of effective judicial protection underlies the whole process and serves as a "transmission belt" facilitating the effective enforcement of substantive rights. Those requirements cut both ways, ensuring effective enforcement but also protecting those who seek to defend themselves against it.[19]

9 Even though the Court has not yet referred to Article 47 in the context of IP injunctions, there is no doubt that Article 47 of the Charter is applicable to injunctive proceedings.[20] It is also true that Article 47 of the Charter has often been considered in relation to the person seeking to enforce its rights, the potential applicant in the judicial proceedings. However, Article 47 constitutes an overarching provision in relation to all aspects of fair trial, which lays down procedural guarantees applicable not only to the applicant, but also to the defendant,[21] potential co-defendants,[22] and potential third parties whose substantive rights might be affected by the procedure.[23]

10 Insofar as the safeguards relating to injunctions concern the injunctive procedure itself, they can be analysed from the perspective of Article 47 requirements. This perspective presents several advantages. Limitations resulting from Article 47 of the Charter have stronger imperative value than those deduced from the test of proportionality. To

10 As the debate in Germany, in 2010, in relation to sites containing child pornography (eg <http://www.dw.com/en/bundestag-looks-to-delete-child-pornography-websites/a-15575254>).

11 The right to freedom of expression and information (Article 10 ECHR and Article 11 of the Charter) does not prohibit prior restraints on publication. See ECtHR, Yıldırım v. Turkey (3111/10, para 47). See also Y. Akdeniz, To Block or Not to Block: European Approaches to Content Regulation, and Implications for Freedom of Expression [in] New Technologies and Human Rights (Collected Courses of the Academy of European Law), Ashgate 2013, p. 56.

12 See Article 25(2) and recital 47 of Directive 2011/93 on combating the sexual abuse and sexual exploitation of children and child pornography (OJ 2011, L 335, 261).

13 See, for a critical view on the appropriateness of blocking injunctions in the context of trade mark infringements, C. O'Doherty, Online trade mark and copyright infringement injunctions, CTLR (2016) 22, p. 79.

14 See recital 59 in the preamble to Directive 2001/29 and recital 23 in Directive 2004/48.

15 See judgments in Promusicae (C-275/06, EU:C:2008:54, paras 61-68), Scarlet Extended (C-70/10, EU:C:2011:771, paras 42-46) and UPC Telekabel Wien (C-314/12, EU:C:2014:192, para 46).

16 See in relation to internet disconnection injunctions, M. Husovec, M. Peguera, Much ado about little, *op. cit.*, p. 17.

17 See M. Husovec, Intellectual Property Rights and Integration by Conflict: The Past, Present and Future, CYELS 18 (2016), p. 239.

18 See S. Prechal, The Court of Justice and Effective Judicial Protection: What Has the Charter Changed? [in] Fundamental Rights in International and European Law, Springer 2015, p. 153.

19 See M. Safjan, D. Düsterhaus, A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU, Yearbook of European Law 33 (2014) p. 3.

20 See, with regard to asset freezing injunction, judgment in Meroni (C-559/14, EU:C:2016:349).

21 See judgment of 11 September 2014 in A (C-112/13, EU:C:2014:2195, para 51 and the case-law cited).

22 In terms of procedural safeguards, the right to a fair trial under Article 47 of the Charter essentially means that the defendants (and co-defendants) must have the opportunity to effectively challenge the application. See opinion of AG Bobek in Dockevičius (C-587/15, EU:C:2017:234, point 111).

23 See, for instance, judgment in Meroni (C-559/14, EU:C:2016:349).

a large extent, they must be applied by the court of its own motion. In contrast to a proportionality test, which must be applied in casu, Article 47 requirements can lead to the establishment of a uniform procedural standard. While observance of proportionality pertains to the substance of the case, and cannot constitute an obstacle to mutual recognition, Article 47 requirements form part of public order provisions potentially limiting mutual recognition of judicial decisions imposing injunctions. This could be particularly important if blocking injunctions were to be used more widely and on a pan-European basis; for instance, in relation to the infringements of EU trademark.

11 The standards derived from Article 47 and those deduced while balancing substantive rights are to a large extent complementary. Some conditions, for instance, the effectiveness of an injunction, can only be assessed under the proportionality test. Some other guarantees, such as the right to apply for a review of a measure, can be deduced from both standards – since it can be viewed as affecting both the procedural position of third parties and their substantive rights. However, insofar as procedural safeguards are concerned, Article 47 constitutes a more natural and stronger framework of reference.

D. Limitations upon injunctions derived from Article 47 of the Charter

12 The right to effective judicial protection is not absolute. Numerous procedural provisions, such as time limits or application fees, can be regarded as limitations of that right.[24] Similar considerations come into play with regard to injunctive relief.[25] In this regard, the judicial procedure leading to the adoption of website blocking injunctions has several particularities. First, the adoption of a blocking injunction cannot be agreed between the parties and requires the involvement of the court. Secondly, the defendants – typically large ISPs – are neither directly nor indirectly liable for the copyright infringement. The application is made against them merely because they are in a position to enforce the injunction. In most situations the ISPs may not have an interest in opposing the order. In this respect the procedure is not in reality *inter partes*. Secondly, the blocking injunction affects at least two categories of third parties – internet users and internet services providers – who cannot intervene in the proceedings, at least, not initially. Due to those special features, the procedure leading to the blocking injunctions requires specific safeguards, which can be divided into three categories concerning: (i) the role of the court; (ii) the position of the defendant ISPs; and (iii) the position of the affected third parties.

13 All those aspects potentially connect to various elements within the bundle of rights guaranteed under Article 47 of the Charter. The principle of effective judicial protection comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal, and the right to be advised, defended and represented.[26] It is applicable in disputes between individuals and public bodies, as well as the horizontal disputes between individuals.[27] This principle encompasses appropriate, and in principle full, standard of judicial review[28] and may require the court to raise certain legal issues on its own motion.[29] The fair trial rights under Article 47 guarantee an individual's right to "effective participation" in the proceedings, which also implies that each party must be afforded a reasonable opportunity to present its case.[30] They also protect the procedural position of the defendant and, potentially, of the affected third parties.[31] The procedural safeguards stemming from the right to a fair hearing largely depend on the nature of the case. However, Article 47 of the Charter, in the same way as Article 6(1) of the ECHR,[32] imposes a certain minimum standard of fairness – in essence, the right to proper participation in the proceedings – which may be breached if a party to the proceedings, either the plaintiff or the defendant, is put in a position of procedural inequality or is not afforded adequate opportunity to present their case.

I. The role of the court

14 Balancing is inherent in the exercise of judicial function. In doubtful cases, judges must strike a balance between competing interconnected legal

24 See, for instance, judgment in Fastweb (C-19/13, EU:C:2014:2194, paras 57–58).

25 See, for instance, with regard to asset freezing injunction, judgment in Meroni (C-559/14, EU:C:2016:349).

26 See judgment in Otis and Others, C-199/11, EU:C:2012:684, paragraph 48.

27 See H. Hofmann, Article 47 – Right to an Effective Remedy [in] S. Peers, T. Hervey, J. Kenner, A. Ward, The EU Charter of Fundamental Rights. A Commentary, Hart 2014, at 47.72.

28 See judgments in Kadi II (C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paras 97-100) and KME and Others/Commission (C-272/09 P, EU:C:2011:810, paras 102-103).

29 See H. Hofmann, Article 47, *op. cit.*, at 47.77.

30 See D. Sayers, Article 47 – Right to an Effective Remedy [in] S. Peers, T. Hervey, J. Kenner, A. Ward, The EU Charter , *op. cit.*, at 47.203-47.206.

31 See fn 23 supra.

32 See O. Settem, Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings, Springer 2015, p. 89.

interests. Balancing of interests is also an explicit statutory requirement in relation to injunctive relief. In contrast to the application of clear-cut rules, balancing implies wide discretion in weighing the competing factors and, thus, requires the involvement of an independent and impartial body. In the area of fundamental rights, this task should in principle be reserved for a judicial body. The adoption of injunctions, insofar as it requires to strike a fair balance between the fundamental rights, is therefore primarily a task for the courts.[33] Additional argument for mandatory judicial involvement in the adoption of internet related injunctions could be deduced from the EU net neutrality legislation designed to safeguard open internet access. Under the Net Neutrality (Open Internet) Regulation, blocking of specific content by ISPs is prohibited subject to the exhaustive list of exceptions, which include measures necessary to comply with "orders by courts or public authorities vested with relevant powers".[34]

15 Similar considerations determine the relevant standard of judicial review. When deciding on an injunction, the court cannot accept the application even if it appears to have been agreed upon between the parties, but must carry out its own independent assessment in order to ensure an equilibrium between the competing fundamental rights. Moreover, the judicial order should be sufficiently specific in describing the measures ensuing from this balancing exercise, in order to ensure that the established equilibrium will not be compromised at the stage of the implementation.[35]

16 It may be asked whether those requirements could also be satisfied if injunctions were adopted by an independent administrative body or would result from out-of-court settlement, subject to ex-post judicial review. Concerning the first alternative, although blocking could be ordered by an administrative body in the context of public enforcement, the same does not seem appropriate in the context of private enforcement, which involves determination of rights in a dispute between private parties. As regards to the second alternative, the availability of ex-post judicial review could run counter to the principle that the balance between the competing rights must be determined at the time of the adoption of the injunction. Otherwise, the issue of fundamental rights would only be examined at the stage of implementation of the injunction.[36]

17 It may therefore be argued that Article 47 of the Charter entails the requirement that blocking injunctions must be adopted by a judicial body. As a consequence, ISPs can neither voluntarily implement a blocking measure, nor agree to it in an out-of-court settlement. The same considerations should in principle apply to the extension of blocking measures.[37]

II. The position of defendant ISPs

1. ISPs as nominal defendants

18 In the context of blocking injunctions, the defendant ISPs are in a very unusual procedural position. They are "innocent intermediaries"[38] charged with the task of implementing the injunction. Their liability is not invoked and, at all events, they are shielded by the safe harbour applicable to mere conduit intermediaries under Article 12 of the E-Commerce Directive. Their connection to the legal dispute between the rightholder and the infringer is therefore not a matter of substance, but merely a matter of legal technique. The anomalous 'nominal defendant' position of the ISPs potentially leads to a procedural disadvantage, and might have to be readjusted in order to ensure the principle of equality of arms.

19 Equality of arms is a crucial element in the concept of a fair trial enshrined in Article 47 of the Charter. This principle requires that each party to the procedure is afforded a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage vis-à-vis the opponent. The aim of equality of arms is to ensure a balanced position between the parties to proceedings[39] (reflecting the French legal concept of "équilibre des droits des parties").[40] A procedural arrangement which puts

33 See opinions of AG Cruz Villalón in UPC Telekabel Wien (C-314/12, EU:C:2013:781, points 87 to 90) and of AG Szpunar in Mc Fadden (C-484/14, EU:C:2016:170, point 119).

34 See Article 3(3) and recital 11 of Regulation 2015/2120.

35 See opinion of AG Szpunar in Mc Fadden (C-484/14, EU:C:2016:170, point 119). Injunction formulated in general terms could be appropriate in some situations, see judgment in UPC Telekabel Wien (C-314/12, EU:C:2014:192, paragraph 52).

36 See opinion of AG Cruz Villalón in UPC Telekabel Wien (C-314/12, EU:C:2013:781, point 88).

37 The orders in Cartier incorporate a "sunset clause" such that the orders will cease to have effect at the end of a defined period "unless the ISPs consent to the orders being continued", see Cartier v BSkyB [2014] EWHC 3354 (Ch) [265].

38 The term borrowed from P. Husovec – see M. Husovec, Injunctions against innocent third parties: the case of website blocking, JIPITEC 4 (2012), p.116.

39 See judgments in Otis and Others (C-199/11, EU:C:2012:684, paras 71-72) and Sánchez Morcillo and Abril García (C-169/14, EU:C:2014:2099, para 49). The wording is borrowed from the Strasbourg case law, see ECtHR, De Haes and Gijsels v Belgium (19983/92).

40 See J.-P. Dintilhac, L'égalité des armes dans les enceinte judiciaires, Cour de cassation, Rapport 37 (2003).

one party – either applicant or defendant – at a substantial disadvantage constitutes a limitation to the rights guaranteed by Article 47 of the Charter. This consideration is relevant with regard to several aspects of blocking injunctions.

2. Liability for over-blocking

20 The first such tricky aspect concerns the lack of legal certainty with regard to the liability for over-blocking. Article 12 of the E-Commerce Directive limits the general liability of the ISPs, but only in relation to the infringements committed through the information transmitted in a network. The ISPs are not protected from the liability for over-blocking. Should the implementation of an injunction lead to over-blocking, the ISPs may be held liable with regard to Internet users. This lack of protection potentially undermines their neutral procedural position in the injunctive proceedings. Instead of accepting the order or adopting a neutral stance, the ISPs might be forced to oppose it on the grounds of their uncertain liability towards third parties. This might put the defendant ISPs in a disadvantageous position, since they would be required to oppose the order, without necessarily having access to the relevant information concerning the material infringement.

21 In his opinion in UPS Telekabel Wien, AG Cruz Villalón described similar concerns as the "ISP's dilemma".[41] He observed that if, in the interest of its customers' freedom of information, the ISP decides on a mild blocking measure, it must fear a coercive penalty. If it decides on a more severe blocking measure, it must fear a dispute with its customers. Since the ISP has no connection with the infringer and has itself not infringed the copyright – in other words, has no material connection to the dispute – the measure which forces it into such a dubious procedural situation cannot be said to strike a fair balance between the rights of the parties. In order to eliminate the ISP's dilemma, the injunctive order should define precisely what measures they are required to implement.

22 The same procedural disadvantage can be considered from the perspective of the principle of equality of arms, which entails a requirement that each party be given the possibility to present its case in the conditions that will not put it in a substantial disadvantage. In the context of application of Article 47 of the Charter to the administrative proceedings, the Court has held that in a situation where the defendant bears a procedural burden of proving a circumstance, and does not have access to relevant evidence, the court is required to use all procedures available, such as measures of inquiry, in order to safeguard the effective protection of its rights.[42] In the context of blocking injunctions, it may be argued that Article 47 of the Charter requires that the court take active measures in order to address the issue of liability for over-blocking. In particular, the court should define precisely the measures that have to be implemented by the ISP, in order to preserve their neutral procedural position in the proceedings.

3. Costs of litigation

23 The second aspect specific to the position of the ISPs relates to the repartition of costs in the injunctive proceedings.

24 The bundle of rights under Article 47 of the Charter includes a guarantee against excessively onerous costs for the participants of the judicial proceedings.[43] According to the case law of the Court of Justice – inspired by the long standing case law of the Strasbourg court – the requirement to pay court fees in civil proceedings is not in itself regarded as an incompatible restriction on the right of access to a court, but the amount of the court fees constitutes a material factor in determining whether or not a person enjoyed her right of access to a court.[44]

25 This guarantee primarily concerns financial restrictions on the access to a court, and therefore applies to the fees of application. However, it also reflects a wider principle, according to which individuals should not be prevented from seeking judicial protection merely by reason of the resulting financial burden. This principle comes into play, for instance, where a national court is called upon to make an order for costs against an unsuccessful party. The requirement that judicial proceedings should not be prohibitively expensive means that the persons should not be prevented from defending their rights before the court by reason of the financial burden that might arise as a result. This might include the capping of the costs for which the unsuccessful party may be liable.[45]

41 See opinion of AG Cruz Villalón in UPC Telekabel Wien (C-314/12, EU:C:2013:781, point 89).

42 The Court actually refers to the principle of effectiveness which is the corollary of Article 47. See judgment in Unitrading (C-437/13, EU:C:2014:2318, para 28).

43 See judgments in Orizzonte Salute (C-61/14, EU:C:2015:655, paras 72-79) and Toma (C-205/15, EU:C:2016:499, para 44).

44 See, for instance, ECtHR, Stankov v. Bulgaria (68490/01, para 52).

45 See, in the context of access to justice in environmental matters, judgment in Edwards (C-260/11, EU:C:2013:221, para 35).

26 Although these principles have been developed in relation to claimant's rights, there is no reason why they should not apply to the other party, defending its rights in the injunctive proceedings. This observation may apply to the ISPs facing the blocking injunction, since they are drawn into the proceedings due to a mere legal technicality and do not have any material interest in opposing the application. It may be argued that due to their position as nominal defendants, the ISPs should not bear the costs of proceedings. Since Article 47 of the Charter extends to pre-litigation procedures,[46] this observation also applies to any pre-litigation costs. In other words, if defendants are required to bear costs automatically, simply because of the exercise of the right to make submissions to the court, their right to a fair trial guaranteed by Article 47 might be compromised.

27 This touches upon a contentious issue. In the literature, it was observed that it would be disproportionate to require the ISPs to bear the applicant's costs.[47] However, in McFadden, the Court clarified that "taken in isolation" safe harbour under Article 12 of E-Commerce Directive does not shield the ISPs from the costs ordered in the injunctive proceedings.[48] It might be asked whether that guarantee would be different if Article 12 is applied in conjunction with the right to a fair trial. The repartition of costs in the context of blocking injunctions has also been considered by the UK courts. It appears now settled that the defendant ISPs – due to their unusual procedural position – do not have to bear the costs of an unopposed application.[49] This is however subject to the condition that the ISPs have consented to the order or at least have adopted a neutral stance. That reservation seems questionable, since it appears to penalise the defendants for pursuing their rights. Moreover, if the ISPs regularly decide not to oppose the application merely due the risk of costs liability, this might distort the application of the principle of proportionality. An undisputed application is more likely to be considered by the court as prima facie proportionate.[50]

46 See judgment in Alassini (C-317/08 to C-320/08, EU:C:2010:146, paras 55 and 57).

47 See Savola, Proportionality of Website Blocking, *op. cit.*, p. 127; and G. Spindler, Sperrverfügungen gegen Access-Provider – Klarheit aus Karlsruhe?, GRUR 2016, p. 459.

48 See para 78 of the judgment in McFadden (C-484/14, EU:C:2016:689).

49 See Cartier [2014] EWHC 3354 (Ch) [240].

50 See J. Riordan, The Liability of Internet Intermediaries, *op. cit.*, at 14.116.

III. The position of third parties

1. The fair trial guarantees for third parties

28 The guarantees stemming from the rights of the defence under Article 47 of the Charter, encompass the position of third persons whose rights may be affected by the judicial order. In several cases related to the mutual recognition of judicial decisions, the Court has clarified that the order adopted without a prior hearing of a third person whose rights may be affected is not manifestly contrary to the right to a fair trial guaranteed by Article 47 of the Charter, insofar as that third person is entitled to assert his rights before the court at a later stage.

29 In Gambazzi, in the context of a series of judicial decisions adopted without the defendant being present, the Court considered what legal remedies were available to the defendant in order to request the amendment or revocation of the provisionally adopted measures; namely, whether he had the opportunity to raise all the factual and legal issues, whether those issues were examined as to the merits in full accordance with the adversarial principle, and whether he could avail himself of procedural guarantees which gave him a genuine possibility of challenging the finally adopted measure.[51] In Meroni, the Court examined whether an asset freezing injunction issued without a prior hearing of all third persons whose rights may be affected ought to be regarded as manifestly contrary to the right to a fair trial in the light of Article 47 of the Charter. the Court observed that the contested order had no legal effect on a third person until he has received notice of it and that it was for the applicants seeking to enforce the order to ensure that the third persons concerned were duly notified of the order. Furthermore, once a third person not party to the proceedings has been notified of the order, he was entitled to challenge that order and request that it be varied or set aside.[52]

30 The principles established by the Court in relation to the fair trial rights of third affected parties are relevant to the discussion on the procedural safeguards in injunctive proceedings. The blocking injunctions affect a number of third parties who are not represented in the proceedings. This category comprises both internet users (customers of the defendant ISPs) and services providers – the operators of affected websites, including any websites that may be collaterally affected (for instance, those sharing the same IP address as the targeted site). The same also applies to the alleged infringers who, in relation to injunctive proceedings,

51 See judgment in Gambazzi (C-394/07, EU:C:2009:219, paras 41-44).

52 See judgment in Meroni (C-559/14, EU:C:2016:349, para 49).

are in a similar position as third parties.

31 It is also relevant that the breach of procedural safeguards stemming from Article 47 of the Charter may constitute the manifest breach of an essential rule of law in the EU legal order, and therefore grounds for refusal of recognition of judicial decision in another Member State on the grounds of the public policy clause.[53] In order to be effective, the Internet related injunctions in the context of the IP enforcement, might have to be applied on an EU-wide basis. This would be even more important if such injunctions were used in relation to an EU trademark. Such wider application can only be achieved – from the point of view of public order – if procedural standards stemming from Article 47 of the Charter are clearly defined and applied in a uniform manner in the EU.

32 From the point of view of the guarantees inherent in Article 47 of the Charter, the court must ensure that the affected parties are informed of the order and can effectively assert their rights by asking the court to vary or set aside the measure. In other words, those safeguards should ensure transparency and efficient ex-post review.

2. Transparency

33 Since the affected third parties may not be aware of the application for injunctions, it is essential that they receive a notice with appropriate information individually or, at least, through a general publication. This notice should enable them to ascertain the reason for the blocking (instead of returning error message), identify the applicant who obtained the order, and also inform them of the review procedure.[54] The relevant safeguards have been examined by Justice Arnold in Cartier, who held that the Internet page containing the information should not merely state that access to the website has been blocked by court order, but also identify the party or parties which obtained the order and indicate that the affected users have the right to ask the court to discharge or vary the order.[55] The requirement of transparency in this context informs third parties about the existence of restriction which is, quite evidently, a pre-condition for the exercise of the substantive fundamental rights by the affected internet users and services providers. It is therefore closely related to the existence of an effective review mechanism.

34 This requirement has already been incorporated in the blocking orders related to public enforcement[56] and is also reflected in the Council of Europe's recommendations on the use of internet filters.[57]

3. Effective review mechanism

35 The internet users and services providers whose rights are affected should have access to effective judicial remedy enabling them to challenge the blocking measure. This guarantee stems directly from the right to a court under Article 47 of the Charter, and is also closely linked to the general guarantees protecting the freedom of expression and the right to information.[58] It has already been introduced in the context of public blocking orders.[59]

36 An argument was raised in the literature that affected third parties should be given an opportunity to state their views, even before the decision is made.[60] This does not seem practically feasible – although in Cartier, Justice Arnold observed that, in theory, it would have been open to subscribers to the ISPs to apply to intervene in the case.[61]

37 In relation to the ex-post review mechanism, in UPC Telekabel Wien, the Court of Justice held that the national procedural rules must provide a possibility for internet users to assert their rights before the court, even ex-post, once the implementing measures are taken.[62] A similar requirement to ensure the existence of an effective ex-post review mechanism against traffic management measures

53 See, in relation to Article 34(1) of Regulation No 44/2001, judgments in Diageo Brands (C-681/13, EU:C:2015:471, para 50) and Meroni (C-559/14, EU:C:2016:349, para 46).

54 See, for instance, J. Riordan, The Liability of Internet Intermediaries, *op. cit.*, at 13.219-13.223 and 14.127.

55 See Cartier v BSkyB [2014] EWHC 3354 (Ch) [264] and FAPL v BT [2017] EWHC 480 Ch. [53].

56 In the context of measures combatting child pornography, pursuant to Article 25(2) of Directive 2011/93 "[website blocking] measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction".

57 Council of Europe's recommendation CM/Rec(2008)6, Guideline I states ; "when confronted with filters, users must be informed that a filter is active and, where appropriate, be able to identify and to control the level of filtering the content they access is subject to".

58 See ECtHR, Yıldırım v. Turkey (3111/10, para 37).

59 Pursuant to Article 25(2) of Directive 2011/93, the mandatory safeguards in the context of blocking measures must include the "possibility of judicial redress". According to Recommendation CM/Rec(2008)6, Guideline I, "[Internet users] should have the possibility to challenge the blocking or filtering of content and to seek clarifications and remedies".

60 See A. Marshoof, The blocking injunction, *op. cit.*, p. 645.

61 See Cartier v BSkyB [2014] EWHC 3354 (Ch) [263].

62 Judgment in UPC Telekabel Wien (C-314/12, EU:C:2014:192, para 57).

adopted by ISPs is reflected in the EU net neutrality rules.[63] In Cartier, Justice Arnold considered whether the injunctive order incorporates safeguards against abuse. First, those safeguards permitted the ISPs to apply to the court to discharge or vary the orders in the event of any material change of circumstances, including in respect of the costs, consequences for the parties, and effectiveness of the blocking measures. Secondly, they permitted the operators of the target websites to apply to the court to discharge or vary the orders. Thirdly, since it was debatable whether affected users could apply to discharge or vary the order under English procedural law, Justice Arnold held that orders should expressly permit affected subscribers to apply for such a remedy.[64] In FAPL, the order required a notice to be sent to each targeted hosting provider when one of its IP addresses was subject to blocking, and the operators were given permission to apply to set aside or vary the order, in the same way as the affected internet users and the operators of the target servers.[65]

38 It is debatable to what extent those EU legal provisions require an introduction of new national remedies. In Goldesel, the German BGH observed that the existing remedies are sufficient, since internet users can assert their rights against access providers on the basis of their contract with the ISP.[66] However, it is highly disputable whether such contractual, private law remedy would be sufficient in order to ensure effective review. Such a remedy is clearly insufficient with regard to collaterally affected website operators, who do not have contractual relations with the ISP[67].

39 Moreover, the adoption of new remedies might be necessary with regard to new, unorthodox types of injunctive orders, such as "live blocking orders". The review mechanism must ensure an effective and timely review. In view of this requirement, the injunctive order might have to envisage a special review mechanism with regard to the live blocking orders, which are directed at the websites that stream live content to consumers. Such orders may be adopted for a very limited period of time coinciding with the duration of the live event[68] and, therefore, any review arrangement must be extremely expedient.

4. Right to privacy and data protection

40 It is arguable whether the blocking of content available on the Internet requires to take into account the right to privacy of internet users. Thus, the BGH ruled, contrary to the opinion of the appellate court, that communications addressed to the general public do not fall within the sphere of privacy and, furthermore, the mere prevention of communication over the internet does not interfere with the right to privacy.[69]

41 Regardless of this wider debate, it seems evident that the implementation of an injunction may necessitate the adoption of adequate safeguards in relation to the right to the protection of personal data. Under the EU net neutrality rules (Article 3(4) of Regulation 2015/2120), any traffic management measure may entail processing of personal data only if such processing is necessary and proportionate to achieve the objectives set out in the permissible limitations (and, of course, must be carried out in accordance with the legislation on data protection). In the case of blocking measures, processing of personal data must be limited to what is necessary in order to comply with the court order.

42 The adequate safeguards are necessary to ensure that the knowledge obtained by the ISPs with regard to the circumstances of (blocked) communication does not interfere with internet users' right to privacy. Such knowledge must be obtained in an automated way, limited to what is necessary to block communication, recorded anonymously, using purely technical means, and deleted without a trace immediately after blocking a user's access.[70] Additional safeguards might be necessary if an injunction involves an update procedure and entails a regularly adapted list of target websites.

43 It may observed that any measures limiting the right to data protection must be provided by legislation, which should lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards against the risk of abuse.[71] It is debatable to what extent those requirements could be satisfied by a mechanism defined by a court's injunction. This aspect relates however to substantive fundamental

63 According to recital 13 of Regulation 2015/2120, any measures liable to restrict fundamental rights must be subject to adequate procedural safeguards, including effective judicial protection and due process.

64 See Cartier v BSkyB [2014] EWHC 3354 (Ch) [262]-[265].

65 See FAPL v BT [2017] EWHC 480 Ch. [27].

66 See BGH I ZR 174/14 – Goldesel [57].

67 See criticism of the approach adopted by the BGH to third party procedural rights, G. Spindler, Sperrverfügungen gegen Access-Provider, *op. cit.*, p. 457.

68 See FAPL v BT [2017] EWHC 480 Ch. The order came into force on 18 March 2017 and only endured until 22 May 2017, which was the end of the 2016/2017 Premier League season.

69 See BGH I ZR 174/14 – Goldesel [60]-[70]; and M. Schaefer, ISP liability for blocking access, *op. cit.*, p. 635.

70 See BGH I ZR 174/14 – Goldesel [68]; and M. Schaefer, ISP liability for blocking access, *op. cit.*, p. 635.

71 See judgment in Digital Rights Ireland and Others (C-293/12 and C-594/12, EU:C:2014:238, paras 53-54).

rights issues and is beyond the framework of the present analysis.

E. Conclusion

44 Website blocking is an invasive enforcement tool, which requires the adoption of rigorous procedural safeguards, particularly when it is used in the context of private enforcement. The conditions for injunctions have not been harmonised in EU law and remain subject to autonomous application of national law. They must nevertheless comply with the fundamental rights guaranteed by the EU Charter. The existing case law of the EU Court of Justice and the national courts puts the emphasis on substantive limitations on injunctions, stemming from the requirement to strike a fair balance between the fundamental rights of the rightholders and internet users. The particular nature of blocking injunctions justifies putting a stronger emphasis on procedural, rather than substantive safeguards. Procedural safeguards stemming from Article 47 of the Charter could constitute a minimum standard, which could be invoked in order to achieve a certain degree of uniformity across Member States. Since breach of Article 47 of the Charter constitutes a ground for refusal of recognition of judicial decision in another Member State, such a shift of approach – from substantive to procedural rights – might be particularly important if the rightholders sought to enforce internet related injunctions on an EU-wide basis.