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In search of legal certainty regarding 'effective redress' in international data transfers: Unpacking the conceptual complexities and clarifying the substantive requirements

Maria Tzanou[*] and Plixavra Vogiatzoglou[†]

Abstract

While effective redress has emerged as a decisive issue in the context of international data transfers, it is shrouded by legal uncertainty due to several conceptual and practical challenges. First, the CJEU rulings on the right to an effective (judicial) remedy raise issues regarding its role in the international domain as well as in relation to EU data protection primary and secondary law. Second, the extraterritorial application of substantive requirements for redress remains unclear and limited to *ad hoc* assessments. In particular, questions relating to the administrative and/or judicial nature of remedies as well as the according constitutive elements of redress are yet to be determinately answered. The present article aims to address this gap by proposing a roadmap of what effective redress *should* entail in the context of international data transfers by focusing on i) the EU autonomous definition of tribunal as developed within the CJEU case-law on Article 267 TFEU and, ii) the United Kingdom's Investigatory Powers Tribunal (IPT) as providing for an effective judicial remedy in the context of secret surveillance.

1. Introduction

Effective redress has emerged as an important issue of international data transfers since the CJEU's decision in *Schrems I*[1] where the 'essence' of the right to an effective remedy was found to have been violated. This line of case law was continued in *Schrems II*[2] with the Court concluding once again that effective redress had been breached. Yet, despite the significant attention that the right to an effective remedy has attracted in these seminal cases, there still remains significant uncertainty as to the substantive requirements of effective redress in the context of international data transfers. Indeed, the external application of the right to an effective (judicial) remedy, and its interpretation by the CJEU in this setting, including its interrelation with data protection, raises several conceptual and definitional questions. Moreover, the current knowledge in the area as it arises from the law, the case law and the European Data Protection Board's (EDBP's) guidelines is incomplete and *ad hoc*, mainly focusing on the shortcomings of specific mechanisms and solutions -such as the Privacy Shield Ombudsperson- and, thus, failing to lay down a comprehensive set of clear standards and expectations.

The present article has two purposes. It first aims to map the legal uncertainty surrounding effective redress in the context of international data transfers, by unpacking the complexities of applying Article 47 EUCFR in this regard, and by examining the substantive requirements for redress. More specifically, uncertainties relate to, among others, the content, function and scope of application of the right to an effective judicial remedy in the EU legal order and its links to EU data protection law. Furthermore, the constitutive elements that must be complied with so that a third country's court or body be considered as providing an effective remedy remain unclear. Second, the paper seeks to address this

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[1] Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650 (Schrems I).

[2] Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* [2020] ECLI:EU:C:2020:559 (Schrems II).

arising knowledge gap in the area by proposing a roadmap of what effective redress *should* entail in the international context through a comprehensive set of criteria that adapt the requirements of Article 47 EUCFR in this setting. It does so by undertaking a doctrinal examination of the legal conditions of an effective remedy focused on two main sources: i) the EU autonomous definition of a court, tribunal or body as has been developed within the context of the preliminary reference procedure under Article 267 TFEU and ii) the United Kingdom's (UK) Investigatory Powers Tribunal (IPT) as providing for an effective judicial remedy in the context of secret national security measures. The article finally refines these criteria to adjust them in the context of international data transfers.

The proposed roadmap aims to make two distinctive contributions. First, it advances a better degree of 'reckonability' of outcome[3] of the CJEU's review of the adequacy of third countries' effective remedies in the context of international data transfers. This is urgently needed as 'the legal situation is more unclear than ever' generating 'constant anxiety' to all those involved in the area.[4] Second , the roadmap provides various 'signposts' of what effective redress in this context should mean by offering a comprehensive set of criteria that go beyond *ad hoc* assessments of particular frameworks and instruments, whose mere purpose is to 'buy another couple of years'.[5] Indeed, the proposed roadmap offers a novel approach to understanding redress in the international data transfers context that attempts to address the conceptual and definitional intricacies surrounding the extraterritorial application of the right to judicial protection under Article 47 EUCFR.

The article is structured as follows: The following section 2 examines the content and scope of the EU fundamental right to effective (judicial) protection enshrined in Article 47 EUCFR. Section 3 explores the various definitional and conceptual challenges surrounding Article 47 EUCFR and its application in an international data transfers setting. Section 4 takes a closer look at the uncertainties relating to the substantial requirements for redress in an international data transfers context, i.e. the exact meaning of 'effective redress' and its constitutive elements. Section 5, drawing upon two new sources, the EU autonomous definition of a court, tribunal or body, and the IPT, puts forward a roadmap on how to address the discussed challenges and uncertainties. Accordingly, it puts forth our substantive answer to what 'effective redress' entails through a set of essential constitutive elements or factors that must be complied with, so that a third country's court, tribunal or body be considered to provide an effective remedy. The final section contains concluding remarks.

2. Effective judicial remedy and international data transfers

Article 47 EUCFR comprises a multi-layered right, establishing the right to an effective remedy and to a fair trial. Its first provision acts as *lex generalis*, in the sense that it must be exercised in accordance with the conditions set under the second and third paragraphs.[6] The rights to an effective remedy and to a fair trial are interconnected under Article 47 EUCFR, providing for substantial and procedural

[3] John Cotter, *Legal Certainty in the Preliminary Reference Procedure: The Role of Extra-Legal Steadying Factors* (Edward Elgar, 2022) 39.

[4] Hannah Ruschemeier, 'Nothing new in the west? The executive order on US surveillance activities and the GDPR', European Law Blog, 14.11.2022 https://europeanlawblog.eu/2022/11/14/nothing-new-in-the-west-the-executive-order-on-us-surveillance-activities-and-the-gdpr/#more-8662

[5] noyb – European Center for Digital Rights, 'Open Letter -Announcement of a New EU-US Personal Data Transfer Framework', 23 May 2022 https://noyb.eu/en/open-letter-future-eu-us-data-transfers

[6] Angela Ward, 'Article 47 - Right to an Effective Remedy and to a Fair Trial' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Second Edition, Hart Publishing 2021) pt C. Sources and Content of Article 47, written by D Shelton in the first edition, updated by C Rauchegger for the second edition.

safeguards to ensure that the participatory rights of proceedings parties are respected by national and European judicial authorities, and that violations of EU rights may be effectively redressed.[7]

The right to an effective remedy enjoys a long judicial tradition within the EU legal order. The CJEU first referred to the requirement for Member States to ensure effective remedies already in the mid-70s, on the basis of the Member States' obligation to sincere cooperation and the direct effect of EU law.[8] Soon after, the CJEU recognised the principle of effective judicial protection as a general principle of EU law deriving from the common national constitutional traditions.[9] Eventually, the principle was 'reaffirmed' in Article 47 EUCFR.[10] The exigency for effective remedies evolved from a principle closely related to the effectiveness and primacy of EU law, to a fully-fledged right for judicial remedies in order to protect EU provided rights and freedoms.[11] Article 47 EUCFR is deeply rooted in EU general principles, such as the rule of law and effectiveness of EU law,[12] and further linked to EU primary law[13].[14]

Article 47 EUCFR establishes a negative obligation upon Member States to protect individuals against 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness' of EU law[15], as well as the positive obligation to ensure direct and immediate judicial protection of rights arising from EU law. It requires that access to a court or tribunal, which is interpreted autonomously under EU law, is provided. In particular, the definition of tribunal has been developed in the context of proceedings under Article 267 TFEU and is equally applicable under Article 47 EUCFR.[16] The respective requirements will be elaborated upon in section 5, as they comprise the first building block for the roadmap put forth in this article. Furthermore, Article 47 CFREU, foresees a number of requirements which should be met in order to ensure that proceedings as a whole are fair, such as equality of arms, adversarial proceedings, reasoned decision and rights of defence.[17]

Insofar as its scope of application is concerned, in line with Article 51 EUCFR, the right to an effective remedy and a fair trial must be respected by Member States when applying EU law to the extent that

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[7] Giulia Gentile, 'Two Strings to One Bow? Article 47 of the EU Charter of Fundamental Rights in the EU Competition Case Law: Between Procedural and Substantive Fairness' (2020) 4 Market and Competition Law Review 169.

[8] Case C-45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECLI:EU:C:1976:191, paras 12-13.

[9] Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECLI:EU:C:1986:206, para 18

[10] See e.g. Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini and Others* [2010] ECLI:EU:C:2010:146, para 61.

[11] Ward (n 6) pt C. Sources and Content of Article 47, written by D Shelton in the first edition, updated by C Rauchegger for the second edition.

[12] See for example Sacha Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in Christophe Paulussen and others (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (TMC Asser Press 2016); Ward (n 6).

[13] In particular Consolidated version of the Treaty on European Union [2016] OJ C202 (TEU), arts 4(3) and 19(1).

[14] Ward (n 6) pt D. Specific Provisions-I. The Right to an Effective Remedy under the First Paragraph of Article 47, written and updated by H CH Hofmann.

[15] Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame* [1990] ECLI:EU:C:1990:257, paras 19-20.

[16] Case C-506/04 *Wilson* [2006] ECLI:EU:C:2006:587, para 44; Case C-274/14 *Banco de Santander* [2020] ECLI:EU:C:2020:17, para 51. See also Ward (n 6) pt D. Specific Provisions-I. The Right to an Effective Remedy under the First Paragraph of Article 47, written and updated by H CH Hofmann.

[17] ibid pt D. Specific Provisions-VI. Article 47(2)-A Fair and Public Hearing within a Reasonable Time, written and updated by D Sayers.

it does not encroach upon Member States' competences,[18] as well as by EU institutions[19]. The substantial and procedural protection foreseen within Article 47 EUCFR should, in principle, be the same, whether the violation of the EU right calling for the application of Article 47 EUCFR is generated by a Member State or an EU institution.[20] In other words, the requirements imposed by the right to an effective remedy must be met irrespective of whether a remedy is imposed by a national measure or an EU measure. Nonetheless, the constitutional differences between the national and EU level cannot be overlooked.[21] The requirement for effective judicial remedy stems from obligations found within the Treaties, such as Article 4(3) TEU on sincere cooperation and 19(1) TEU on national effective legal protection, which are specifically addressed to Member States and not EU institutions. Moreover, Article 47 EUCFR is mainly concerned with placing limits on national procedural autonomy, and is, therefore, tightly linked to the principles of equivalence and effectiveness, which are irrelevant in the context of EU remedies for challenging an EU measure. In fact, challenging an EU measure is regulated by the Treaties.[22] However, while the Charter and the Treaties share the same status of primary law, pursuant to the CJEU, Article 47 EUCFR 'is not intended to change the system of judicial review laid down by the Treaties'[23]. The EU remedies foreseen, that is the procedural rules on challenging an EU measure, are thereby *ipso facto* considered compliant with Article 47 EUCFR.[24] In this way, the CJEU seems to impose a higher level of intrusion of Article 47 EUCFR on national remedies than on EU remedies.[25] Matters become even more complex when the EU measure in question has an international, extraterritorial application. We further discuss this issue below under 3.2.

The right to an effective remedy and a fair trial is subject to limitations either through relevant EU legislation or under the conditions set in Article 52(1) EUCFR.[26] Accordingly, any measure limiting Article 47 EUCFR must be provided for by law, respect its essence, and, subject to the principle of proportionality, be necessary and genuinely meet objectives of general interest recognised by the EU. The CJEU has referred to the condition of respect for the essence of the right to an effective remedy and a fair trial in numerous rulings. More specifically, the essence of Article 47 EUCFR has been linked

[18] On issues regarding the practical application of Article 47 EUCFR and the Charter at large within Member States, see Kathleen Gutman, 'Article 47: The Right to an Effective Remedy and to a Fair Trial' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020).

[19] See also Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202 (TFEU), arts 263 and 267.

[20] Ward (n 6) pt D. Specific Provisions-IV. The Right to an Effective Remedy under the First Paragraph of Article 47 and Challenge to EU Measure, written and updated by A Ward.

[21] ibid.

[22] See i.a. TFEU, arts 263-267.

[23] Case C-205/16 P *Solar World* [2017] ECLI:EU:C:2017:840, para 67; Case C-560/18 P *Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych v Commission* [2020] ECLI:EU:C:2020:330, para 62.

[24] Ward (n 6) pt D. Specific Provisions-IV. The Right to an Effective Remedy under the First Paragraph of Article 47 and Challenge to EU Measure, written and updated by A Ward.

[25] Albertina Albors-Llorens, 'The Asymmetrical Impact of Article 47 of the Charter on National and EU Remedies' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Second Edition, Hart Publishing 2021).

[26] Case C-245/19 *État Luxembourgeois* [2020] ECLI:EU:C:2020:795 (État Luxembourgeois), para 60. See also Gutman (n 18); Ward (n 6) pt D. Specific Provisions-I. The Right to an Effective Remedy under the First Paragraph of Article 47, written and updated by H CH Hofmann.

to various of the elements therein, such as access to a court or tribunal,[27] judicial independence,[28] reasoned decision[29] and legal representation[30]. In this way, interfering with any of these elements, or arguably any of the Article 47 EUCFR elements, seems liable to adversely affect the essence of Article 47 EUCFR.[31] As the CJEU has further noted, '[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law'.[32] We further discuss the essence of Article 47 EUCFR in the context of international data transfers under 3.3.

A look at the CJEU's case law shows that Article 47 EUCFR comes into play at different operational levels in the context of international data transfers. First, it plays a role in the EU's internal procedural architecture of investigating complaints lodged by individuals regarding the adequacy of data protection provided in third countries. As held in *Schrems I*, national supervisory authorities (DPAs) have the right to investigate such complaints, but are not entitled to declare a Commission's adequacy decision invalid themselves.[33] Article 47 EUCFR serves as the fundamental rights' foundation for the judicial challenge of DPA's assessment of the Commission's adequacy decision regarding third countries.

The second operational level of Article 47 EUCFR in the context of international data transfers concerns the external examination of foreign law. The Court has clarified that the applicable standard of protection to ascertain the validity of the Commission's adequacy decisions consists of 'the requirements stemming from the GDPR read in the light of the Charter'.[34] Accordingly, Article 47 EUCFR may come into play in a twofold manner; first, as the GDPR foresees that effective redress must be in place, it should be in line with the Charter, including Article 47 thereof. Second, Article 47 EUCFR, as aforementioned, must be respected by the Commission, as an EU institution, in its adoption and implementation of an EU measure, the adequacy decision, which, in this case, has extraterritorial effect. However, applying Article 47 EUCFR in international data transfers through either of these venues encounters several conceptual and practical questions, limitations and uncertainties. The sections below delve into those.

[27] *État Luxembourgeois* (n 26), para 66 and case law cited therein.

[28] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117 (Associação Sindical dos Juízes Portugueses), para 41; Case C-216/18 *PPU Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586, para 48; Case C-192/18 *European Commission v Republic of Poland* [2019] ECLI:EU:C:2019:924, para 106.

[29] Joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* [2013] ECLI:EU:C:2013:518, para 134.

[30] Case C-314/13 *Peftiev and Others* [2014] ECLI:EU:C:2014:1645, paras 29-31.

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

[32] Case C-216/18 *PPU Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586, para 51; *Associação Sindical dos Juízes Portugueses* (n 28), para 36; *Schrems II* (n 2), para 187.

[33] *Schrems I* (n 1), paras 62-64.

[34] *Schrems II* (n 2), para 161.

3. Challenges in applying Article 47 EUCFR in international data transfers

3.1 Definitional intricacies

Various different terms are used within the EU secondary data protection legal framework to articulate effective remedy. In particular, Chapter V of the GDPR on international data transfers refers to 'effective administrative or judicial redress' as one of the elements to be taken into account when deciding on the adequacy of the level of protection in a third country,[35] and to 'effective legal remedies' where personal data are transferred not on the basis of an adequacy decision but subject to appropriate safeguards.[36] Conversely, Article 79(1) GDPR foresees the 'right to an effective judicial remedy against a controller or processor', similarly as in its predecessor Article 22 Directive 95/46/EC (DPD)[37]. The difference in wording raises the question whether all these terms refer to the same concept, and whether that concept is one and the same as the effective judicial remedy under Article 47 EUCFR.

Article 79(1) GDPR requires Member States to provide an effective judicial remedy for everyone who claims that their rights under the GDPR have been infringed. Its interpretation corresponds to Article 47 EUCFR.[38] In *Puškár*, the CJEU held that '[i]t follows that the characteristics of the remedy provided for in Article 22 [DPD] must be determined in a manner that is consistent with Article 47 [EUCFR]'.[39] Although the line of reasoning slightly differed amongst AG and CJEU, both their argumentations towards linking effective remedy under data protection law with Article 47 EUCFR relied on inherent EU structures that are specifically addressed to Member States, that is national procedural autonomy and cooperation, and EU law effectiveness. Finally, in *La Quadrature du Net* the CJEU directly stated that the right to an effective remedy under Article 47(1) EUCFR is explicitly guaranteed by EU data protection secondary law, i.e. Article 79(1) GDPR.[40]

Whereas Article 79(1) GDPR can be considered as laying down the same right to an effective judicial remedy as the one enshrined in Article 47(1) EUCFR, Articles 45 and 46 GDPR refer instead to 'effective administrative and judicial redress' and 'effective legal remedies' in the context of international data transfers. The requirements under the latter provisions arguably provide for a different, even lower, degree and nature of protection than Article 47 EUCFR; most importantly, opening up the possibility of non-judicial remedies.

In recent case law, the CJEU considered that,

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[35] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119 (GDPR), art 45(2)(a).

[36] GDPR, art 46(1).

[37] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281 (DPD).

[38] See also Waltraut Kotschy, 'Article 79. Right to an Effective Judicial Remedy against a Controller or Processor' in Christopher Kuner and others (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford University Press 2020).

[39] Case C-73/16 *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy* [2017] ECLI:EU:C:2017:725, paras 59-60.

[40] Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others v Premier ministre and Others* [2020] ECLI:EU:C:2020:791 (La Quadrature du Net), para 190.

> '[t]he level of protection of fundamental rights required by Article 46(1) [GDPR] must be determined on the basis of the provisions of that regulation, read in the light of the fundamental rights enshrined in the Charter [..] the factors to be taken into consideration in the context of Article 46 [GDPR] correspond to those set out, in a non-exhaustive manner, in Article 45(2) [GDPR] [..] appropriate safeguards, enforceable rights and effective legal remedies required by those provisions must ensure that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses are afforded a level of protection essentially equivalent to that guaranteed within the European Union by that regulation, read in the light of the Charter.'[41]

The *Schrems II* ruling thusly points towards an assimilation of the protection afforded under Articles 45(2) and 46(1) GDPR, Article 79(1) GDPR and, ultimately, Article 47(1) EUCFR. However, the theoretical foundation of this reasoning is questionable, as it seemingly ignores the terminological divergences under the GDPR and arguably overlooks that Article 47 EUCFR was designed primarily for the internal EU regime. It also raises questions about the exact nature of redress (judicial and/or administrative)[42] that should be guaranteed in international data transfers. Finally, the practical enforceability of ensuring respect for Article 47 EUCFR in the extraterritorial domain is equally challenging, as discussed below.

3.2 Extraterritorial application

A debate outside the realm of international data transfers has taken place regarding the so-called 'extraterritorial' application of the Charter.[43] Although the case law has not been clear in that regard, the dominant position seems to be that the Charter applies regardless of territorial criteria; what matters is whether a situation is covered by an EU competence.[44] In the case of international data transfers, said applicability derives from the Commission's powers to act in the data protection framework,[45] , in the context of adequacy decisions.[46] This approach is closely linked to the elevation of data protection to the level of a fundamental right that makes the EU's exercise of jurisdiction 'not just … permissive (discretionary), but also mandatory'.[47] This means that trans-border data flows could be regarded as part of the EU institutions fundamental rights 'protective duty'.[48] Macchi, however, considers that there are limits to the respect of EUCFR rights by EU institutions when adopting a measure: the EUCFR obligations upon EU institutions may be limited by the Treaties' delineation of EU competences, as well as by the factual ability of the EU to affect a third-country's (legal) system in

[41] *Schrems II* (n 2), paras 101, 104-105.

[42] See discussion below.

[43] See i.a. Angela Ward, 'Article 51 - Field of Application' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights : A Commentary* (Hart Publishing 2014); Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights : A Commentary* (Hart Publishing 2014); Eva Kassoti, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights : Some Reflections in the Aftermath of the Front Polisario Saga' (2020) 2 European journal of legal studies 117; Chiara Macchi, 'With Trade Comes Responsibility: The External Reach of the EU's Fundamental Rights Obligations' (2020) 11 Transnational Legal Theory 409.

[44] Moreno-Lax and Costello (n 43); Kassoti (n 43).

[45] On the basis of i.a. TFEU, art 16 and GDPR, art 45.

[46] On the basis of TFEU, art 16 and GDPR, art 45.

[47] Cedric Ryngaert and Mistale Taylor , 'Symposium on the GDPR and International Law: The GDPR as Global Data Protection Regulation ?' (2019) *AJIL Unbound* 5, 6.

[48] Christopher Kuner, *Transborder Data Flows and Data Privacy Law* (Oxford University Press, 2013) , 129–33.

compliance with public international law.[49] Specifically in relation to the right to an effective remedy, Neframi points out that the function of Article 47 EUCFR, pursuant to the CJEU jurisprudence, is to place limits on national procedural autonomy through a balancing exercise that takes into account the national legal order.[50] She thereby concludes that the guarantees stemming from Article 47 EUCFR 'only establish standards of judicial protection within the judicial system of the Union', while Article 47 EUCFR 'is not, and has never been, an autonomous Union objective, is not mirrored in a substantive EU-law provision, and, thus, cannot be projected into the external field'.[51] The scholarly debate thusly highlights the limitations in imposing the Article 47 EUCFR requirements outside the EU borders.

Against that background, the extent to which an EU measure may impose all the exigent elements of Article 47 EUCFR upon a third country in the context of international agreements, including the aforementioned negative and positive obligations, while respecting the procedural autonomy of the said third country, is questionable. Within the EU, a balancing exercise between national and EU procedural autonomy is foreseen and regulated through EU primary law. Nevertheless, as demonstrated above, Article 47 EUCFR is more concerned with the procedural autonomy of Member States, and the rigorousness of its application may already differ in EU measures, in comparison to national measures. What is more, in this case, the EU measure that should abide by Article 47 EUCFR, that is the adequacy decision for international data transfers, touches upon the procedural autonomy of a third country. Put differently, by virtue of the obligation imposed upon EU institutions, in casu the Commission, the third country must seemingly ensure the existence of an effective judicial remedy as enshrined in Article 47 EUCFR. Nevertheless, this article argues that the numerous substantive and procedural requirements encompassed within the right to an effective remedy and a fair trial under 47 EUCFR should not be imposed as such upon a third country.[52]

This follows the CJEU's recently developed flexible approach when reviewing foreign law. There are two possible ways to proceed in this regard: One approach would be to apply the analytical framework of Article 52(1) EUCFR, as developed internally, to external cases of interference with effective redress rights (we call this the *inflexible* approach).[53] A second way would be to flesh out an amended test on the merits for external redress issues 'if the differences between the internal and external settings so warrant'[54] (we call this the *flexible* approach).

The most noteworthy difference between the *Schrems I* and *Schrems II* judgments concerned the approach followed by the CJEU on its merits examination of the extraterritorial application of the right to effective redress.[55] In *Schrems I* the CJEU seemed to have followed the *inflexible* approach: it assessed the lack of effective redress on the US side on the basis of the 'essence' of Article 47 EUCFR,[56]

[49] Macchi (n 43).

[50] Eleftheria Neframi, 'Article 47 of the Charter in the Opinion Procedure: Some Reflections Following Opinion 1/17' (2021) 2021 6 European Papers - A Journal on Law and Integration 741.

[51] ibid.

[52] See our proposition under section 5.

[53] Maria Tzanou, 'Schrems I and Schrems II: Assessing the Case for the Extraterritoriality of EU Fundamental Rights' in Federico Fabbrini (et al.) (eds.) *Data Protection Beyond Borders Transatlantic Perspectives on Extraterritoriality and Sovereignty* (Hart Publishing, 2020), 114.

[54] Marko Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' (2015) 56 *Harvard International Law Journal* 81, 89.

[55] Tzanou (n 53).

[56] Maja Brkan, 'The Unstoppable Expansion of the EU Fundamental Right to Data Protection: Little Shop of Horrors? ' (2016) 23 (5) *Maastricht Journal of European and Comparative Law* 812.

which constitutes an absolute bar requirement under Article 52(1) EUCFR.[57] In *Schrems II*, the Court adopted the *flexible* approach: it constructed a four pronged test applicable to external surveillance interferences with fundamental rights by interpreting Article 52(1) EUCFR in this context.[58] The substance of the test illustrates that the Court might be willing to recognise potential differences between the internal and the external settings. Indeed, with regard to redress rights the test requires that foreign law imposes '*minimum* safeguards', so that the persons whose data has been transferred have '*sufficient* guarantees to protect effectively their personal data against the risk of abuse'.[59] The insistence on minimum and sufficient guarantees to prevent the risk of abuse demonstrates that the Court is aware of external constraints and willing to apply fundamental rights requirements more flexibly in the external context, while being cautious at the same time not to deprive them of their substance[60] by rendering their application so flexible 'that it ceases to have any impact or compromises the integrity of the whole regime'.[61]

3.3 Conceptual complexities: the essence of the right to an effective remedy

The Schrems judgments further raised a conceptual question regarding Article 47 EUCFR and its role vis-à-vis the right to data protection. While previous case law defined the essence of Article 47 EUCFR as including *inter alia* 'the possibility, for the person who holds that right, of *accessing a court or tribunal with the power to ensure respect for the rights* guaranteed to that person by EU law',[62] in *Schrems I*, the CJEU focused on the possibility of *exercising* a (violated) right, as part of the essence. In this regard, it held that 'legislation not providing for any possibility for an individual to pursue legal remedies *in order to have access to personal data relating to him or her, or to obtain the rectification or erasure of such data*' violates the essence of Article 47 EUCFR.[63] Under one interpretation of this ruling, emphasis is placed upon there being at least a possibility for a legal remedy; a complete deprivation of any legal avenue for redress violates the essence of the right to an effective remedy.[64]

Nevertheless, this pronouncement creates confusion as it explicitly assumes that the data subject's rights of access, rectification and erasure are protected by the 'essence' of Article 47 EUCFR. However, Article 8(2) EUCFR guarantees the same data subject rights by providing that '[e]veryone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.' It is unclear, therefore, why the Court did not consider a violation of the 'essence' of Article 8 EUCFR in cases where individuals lack data subject rights and concluded instead that this falls under the essence of Article 47 EUCFR. It seems that the reference to 'legal remedies' might signal the dividing line between Articles 8 and 47 EUCFR here. Yet, there is no definition of 'legal remedies' in the *Schrems* judgments- do these signify, for instance, only access to a court or an administrative authority? More importantly, why can't Article 8(2) EUCFR cover 'legal remedies' for the enforcement of data subjects

[57] Maria Tzanou, 'European Union Regulation of Transatlantic Data Transfers and Online Surveillance ' (2017) 17 (3*) Human Rights Law Review* 545, 556.
[58] Tzanou (n 53), 114.
[59] *Schrems II* (n 2), para 176. Emphasis added.
[60] *Schrems I* (n 1) ECLI:EU:C:2019:1145, Opinion of AG Saugmandsgaard Øe, para 249.
[61] Milanovic (n 54), 132.
[62] *État Luxembourgeois* (n 26), para 66 and case law cited therein.
[63] *Schrems I* (n 1), para 95; *Schrems II* (n 2), para 187. Emphasis added.
[64] Hilde K Ellingsen, 'Effective Judicial Protection of Individual Data Protection Rights: Puškár' (2018) 55 Common Market Law Review 1879.

rights (even before courts) and Article 47 EUCFR is needed in the equation (in fact, it is the only applicable fundamental right here)?

Moreover, a distinction should be made between, on the one hand, seeking an effective judicial remedy to ensure respect for a right, and, on the other hand, actually exercising a right.[65] Rights conferred by EU law may be lawfully subject to limitations, as is the case of data subject rights.[66] An effective judicial remedy does not entail the exercise of the right *per se*, rather it aims at conducting a judicial review of compliance with individuals' rights and the conditions for their lawful limitation. The primary concern in assessing respect for the essence of the right to an effective remedy should therefore lie, not with whether access to personal data can be guaranteed as such, but instead, with whether a judicial independent authority is able to examine potential violations of data subject's rights and, in case where such violations have been unlawfully imposed, order appropriate remedies. The CJEU seems to have missed this distinction when confounding the essence of Article 47 EUCFR to the pursuit of legal remedies for the exercise of data subject's rights.

This conceptual confusion between Articles 47 and 8 EUCFR does not only raise theoretical difficulties; it might have practical consequences as well. First, it can lead to the exclusion, from the scope of Article 8 EUCFR, of 'legal remedies' for the exercise of the data subject's rights to access, rectification and erasure, as these fall under Article 47 EUCFR. More importantly, it limits the scope of the 'essence' of Article 47 EUCFR in the context of international data transfers to the pursuit of legal remedies to obtain access, rectification and erasure of personal data. Such interpretation of Article 47 EUCFR appears unduly restrictive, when compared to the broad meaning of the essence provided by the CJEU in the EU context, as discussed above. In other words, while the essence has traditionally been linked to requirements such as access to court, independent tribunal and reasoned decision, in the international data transfers domain, its scope seems limited to the exercise of data subject's rights. Finally, this restrictive interpretation of Article 47 EUCFR might create confusion as to the exact meaning of effective redress in the context of international data transfers. This is evident in the EU-US data space. The recently announced 'Data Protection Review Court' (DPRC) established within the EU-US Data Privacy Framework[67] seems to offer -at least in name- a poor replication of the CJEU's redress requirement; the focus is on data protection rather than broader effective redress questions.

4 Uncertainties regarding the substantive requirements for redress in international data transfers

A further level of uncertainty regarding effective redress arises in the context of international data transfers: 1) What does 'effective redress' entail exactly?, and 2) What are the essential constitutive elements or factors that must be complied with so that a third country's court or body is considered

[65] Conversely, in other rulings, the CJEU has made a clearer distinction between the exercise of the data subject's rights to access and to rectification, and the exercise of the right to an effective remedy under Article 47 EUCFR. Opinion 1/15 *EU-Canada Agreement* [2017] ECLI:EU:C:2017:592 (Opinion 1/15), para 220; *La Quadrature du Net and Others* (n 40), para 190.

[66] See for example GDPR, art 23; Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L119/89, art 15.

[67] European Commission, Questions & Answers: EU-U.S. Data Privacy Framework, 7.10.2022 https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_6045.

to provide an effective remedy? This section briefly discusses these two questions before proffering our approach on how to address them.

First, it is questionable whether effective redress requires judicial remedies or whether redress before other bodies may be acceptable and sufficient. As discussed above, Article 45(2)(a) GDPR and Recital 104 GDPR refer to 'effective administrative *and* judicial redress for the data subjects whose personal data are being transferred' which must further be in line with Article 47 EUCFR.[68]

An examination of the case law reveals a more complex landscape. So far, the application of Article 47 EUCFR in an international context has been targeted to specific aspects thereof. When examining the EU-Canada PNR Agreement on transatlantic data transfers, the CJEU was satisfied with the possibility laid down in the Agreement for data subjects to seek judicial remedy under the third-country law.[69] It should be noted that, although the Agreement foresaw the provision of administrative redress as well under its Article 14(1), the CJEU assessed the right to redress only vis-à-vis the effective judicial redress provision under Article 14(2) of the Agreement. In the *Schrems II* ruling, the Court examined the foreseen Ombudsperson from the perspective of independence and binding nature of its decisions, but did not further investigate other Article 47 EUCFR elements.[70] It held in particular, that 'data subjects must have the possibility of bringing legal action before an independent and impartial *court* in order to have access to their personal data, or to obtain the rectification or erasure of such data'.[71] In a similarly restricted vein, the CJEU assessed the compatibility of tribunals established by an international trade agreement between the EU and Canada, by placing emphasis on the elements of accessibility and independence under Article 47(2) and (3) EUCFR.[72] The latter ruling prompted Neframi to question whether the guarantees provided by the different paragraphs of Article 47 EUCFR can be dissociated from each other; a question she responds in a negative manner.[73]

Complicating the matter even further, the EDPB observed in its Essential Guarantees Recommendations that 'in the same context, the CJEU considers that an effective judicial protection against such interferences can be ensured *not only by a court, but also by a body* which offers guarantees essentially equivalent to those required by Article 47 of the Charter'.[74] The EDPB did not clarify further the nature of this 'body', but there are valid grounds for the confusion created in this respect. The CJEU indeed used the term 'body' in *Schrems II*.[75] It did so when examining whether the Privacy Shield Ombudsperson was capable of addressing the finding of limitations with regard to the judicial protection available in the USA of persons whose personal data is transferred to that country. Indeed, the Ombudsperson was examined by the Court as a potential alternative to judicial redress because US law failed to grant data subjects '*rights actionable in the courts* against the US authorities'.[76]

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[68] Emphasis added.

[69] The PNR Agreement provided 'that any individual who is of the view that their rights have been infringed by a decision or action in relation to their PNR data may seek effective judicial redress, in accordance with Canadian law'. Opinion 1/15, paras 226-227.

[70] *Schrems II* (n 2), paras 195-196.

[71] Ibid, para 194. Emphasis added.

[72] Opinion 1/17 *EU-Canada CET Agreement* [2019] ECLI:EU:C:2019:341, para 191.

[73] Neframi (n 50).

[74] European Data Protection Board (EDPB), Recommendations 02/2020 on the European Essential Guarantees for surveillance measures, para 47.

[75] *Schrems II* (n 2), para 197.

[76] *Schrems II* (n 2), para 192. Emphasis added.

While the EDPB's interpretation of *Schrems II* reflects the recently adopted flexible approach towards external law requirements, it would not be possible to merely ignore and circumvent the clear requirements of Article 45(2)(a) GDPR that explicitly mention effective administrative *and* judicial redress and the fact that these must be read in the light of Article 47 EUCFR which mentions an effective remedy before an impartial tribunal. A similar concern was voiced by the Article 29 Working Party (29WP) in its Opinion on Privacy Shield. More particularly, the 29WP noted that '[i]n addition to the question whether the Ombudsperson can be considered a "tribunal", the application of Article 47(2) Charter implies an additional challenge, since it provides that the tribunal has to be "established by law"'.[77] Nevertheless, the 29WP went on and 'decided to elaborate further the nuances' of the legal redress requirements, 'with the principle of essential equivalency in mind – rather than assessing whether an Ombudsperson can formally be considered a tribunal established by law'.[78]

The above discussion shows that the issue of effective administrative *and/or* judicial redress remains unclear and lacks legal certainty despite the CJEU's case law and the 29WP and EDPB's interpretative guidelines on the matter.

Two further substantive effective redress requirements arose from *Schrems II* concerning the nature and powers of the court or 'body'; in particular, it: i) must be independent and impartial, and ii) should have the power to adopt decisions that are binding on the intelligence services. Are however independence and the power to adopt binding decisions the only requirements that a court, tribunal or body providing redress in the context of international data transfers should satisfy? Or, are there any further essential constitutive elements or factors that must be complied with so that a third country's court is considered to provide an effective remedy?

These questions raise significant legal uncertainty in the context of international transfers. Ironically, the partial answers offered to them by the CJEU and the EDPB demonstrate that attempts to address these issues are *ad hoc*, focusing on the shortcomings of specific mechanisms and solutions -such as the Privacy Ombudsperson[79]- rather than laying down a comprehensive set of general, clear standards and expectations. The next section aims to address this shortcoming by providing a roadmap on how these two questions should be approached and our substantive answer to these.

5. A new theory for effective redress in international data transfers

5.1 The roadmap

We propose a roadmap to answering the questions identified above by drawing on two main sources: i) the EU autonomous definition of a court, tribunal or administrative body as this has been developed within the context of the preliminary reference procedure under Article 267 TFEU and ii) the UK's Investigatory Powers Tribunal (IPT) as an effective judicial remedy in the context of national security measures. The roadmap is designed in such way so as to achieve two aims: provide for legal certainty while also accounting for the required flexibility in the area of international data transfers.

A first area of law that could offer an indication of the constitutive elements of a court or tribunal can be found in the EU preliminary reference system. This is important because, as discussed, further reliance on other aspects of EU primary law may help in dissolving the several conceptual and practical

[77] Article 29 Working Party, 'Opinion 01/2016 on the EU – U.S. Privacy Shield draft adequacy decision', 13 April 2016, 47.
[78] Ibid.
[79] *Schrems II* (n 2), para 195.

challenges regarding the applicability of Article 47 EUCFR in its entirety in an international context.[80] The term 'tribunal' is interpreted autonomously under EU law, and thereby takes the same meaning within Article 47 EUCFR as under Article 267 TFEU.[81] We submit that a closer look at the roots of this concept, namely Article 267 TFEU, offers a novel approach to consider effective redress in the context of international transfers by steering clear from the confusions identified above regarding the interpretation of Article 47 EUCFR (see 3.1) and its application at an international setting (see 3.2). Additionally, this approach would allow the CJEU to place emphasis on the notion of tribunal and the requirements set therein, without engaging the extensive applicability of Article 47 EUCFR and its essence, which may be impacted if any of the elements of effective remedy and fair trial are not properly foreseen (see 2 and 3.3). Moreover, such an approach to effective redress would allow for a clearer delineation between the rights to data protection and to effective remedy, without restricting their respective scope (see 3.3).

The CJEU has developed a rich case law over the years on the determinative factors of a 'court' or 'tribunal' within the meaning of Article 267 TFEU.[82] In this, the Court often had to examine whether public bodies that work 'in the grey area between administrative and judicial decisions'[83] could be considered as 'courts' or 'tribunals'. While this case law has been criticised in the past as 'casuistic, very elastic and not very scientific',[84] it can still provide useful pointers of relevant criteria to be taken into account in the determination of court, tribunal or body. These criteria include:

1. Whether the body is established by law. This criterion aims to ensure that the body has a sufficient legal basis and it has been interpreted flexibly by the Court to include both primary and secondary law.[85]
2. Whether it has permanent character, as opposed to a body that has been set up to resolve a specific existing dispute.[86]
3. Whether its jurisdiction is compulsory. This includes three elements: i) the decision of the body must be binding on the parties;[87] ii) it should not be possible to go to some other body to have the dispute settled;[88] and, iii) the parties to the dispute cannot themselves choose whether the case should be dealt with by the body in question.
4. Whether its procedure is *inter partes* or adversarial. The Court has attributed limited weight to this criterion.[89]

[80] See Neframi (n 50).

[81] See for example *Associação Sindical dos Juízes Portugueses* (n 28), para 38.

[82] Morten Broberg, 'Preliminary References by Public Administrative Bodies: When are Public Administrative Bodies Competent to Make Preliminary References to the European Court of Justice?' (2009) 15(2) European Public Law 207; Takis Tridimas, 'Knocking on Heaven's Door: Fragmentation, efficiency and defiance in the preliminary reference procedure' (2003) 40 *Common Market Law Review*, 9.

[83] Ibid, 208.

[84] See Case C-17/00 *De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort*, [2001] ECLI:EU:C:2001:651, Opinion of AG Colomer, para 14. See also Tridimas (n 82), 27.

[85] Broberg (n 82), 208.

[86] Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira* [2014] ECLI:EU:C:2014:1754 (Ascendi), para 23.

[87] See Joined cases C-110/98 to C-147/98 *Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AEAT)* [2000] ECLI:EU:C:2000:145, para 36.

[88] Ibid, para 35.

[89] Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECLI:EU:C:1978:49; Broberg (n 82) 212.

5. Whether it applies rules of law. This mean that the body must make its decisions on the basis of legally binding rules.[90]
6. Whether it can adopt a decision of a judicial nature. This excludes proceedings which are not of a 'judicial nature' or where a court is carrying out administrative functions rather than judicial ones.[91]
7. Whether it is independent and impartial.[92] Under this criterion, the Court examines whether the legal basis of the body ensures its independence in general, rather than in a particular case.[93] Externally, a body must function autonomously and independently from external factors, while internally, impartiality denotes the absence of prejudice or bias.[94]

Exceptionally, the Court has in the past accepted a preliminary reference from a national administrative body, where there was no possibility of appeal to its decisions before any judicial organ in that Member State, in order to ensure the proper functioning of EU (Community at the time) law.[95] Finally, it should be noted that the above list is not exhaustive and not all of the above criteria bear the same weight or importance.[96]

Before proceeding to discussing how these factors can play out when assessing effective redress in the context of international data transfers, here too, we must address the obvious questions that may be posed about the appropriateness of applying an internally developed framework to external relations. The answer is that we must proceed cautiously, acknowledging the differences between the two regimes. This requires that we delve a bit deeper in the underlying reasons behind the CJEU's case law on the determination of court or tribunal under Article 267 TFEU. As it has been astutely observed by a commentator, with regard to the preliminary reference system, 'the Court is less preoccupied with substantive standards of justice, i.e. whether the body in issue fulfils the requisite standards of fairness and independence, and more with a functional criterion, namely to make the preliminary reference procedure available to all judicial bodies responsible for dealing with questions of [EU] law.'[97] This motivation clearly cannot be applied to the international data transfer context, which requires a prioritisation of smooth data transfers while respecting fundamental rights requirements. This means, thus, that we need to refine and/ or adjust the CJEU's criteria to allow for their application to international data transfers taking into account the different objectives at stake as well as the essential equivalence requirement.

Before we present our proposed roadmap on the substantive requirements for redress, we focus on a second source that complements the interpretative guidance derived from Article 267 TFEU: the UK IPT. This is important because when assessing the adequacy of a third country, the Commission is obliged under Article 45(2)(a) to take account of 'the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, including concerning *public security, defence, national security* and *criminal law and the access of public authorities to personal data*'.[98] Indeed, international transfers often operate under the assumption that third country

[90] Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECLI:EU:C:1997:413 (Dorsch Consult), paras 32-33.
[91] Case C-363/11 *Epitropos tou Elegktikou Synedriou* [2012] ECLI:EU:C:2012:825, paras 26-32.
[92] Case C-377/13 Ascendi (n 86), para 23.
[93] Broberg (n 82), 209.
[94] Case C-506/04 *Wilson* [2006] ECLI:EU:C:2006:587, paras 49-52.
[95] Case C-246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECLI:EU:C:1981:218, paras 16-17.
[96] Tridimas (n 82), 27.
[97] Ibid, 28.
[98] Emphasis added.

authorities access the transferred commercial data for law enforcement and national security purposes and this constitutes a central focus of the CJEU's review of adequacy decisions. In fact, both Safe Harbour and Privacy Shield were invalidated because of the access by the US intelligence authorities to EU originating data without appropriate safeguards.[99] The IPT has been selected in this regard, because it is considered to provide an effective remedy in the context of national security surveillance. More specifically, the ECtHR has found that the IPT provides 'a robust judicial remedy to anyone who suspected that his or her communications had been intercepted by the intelligence services'[100] while the EDPB has noted that it 'functions as a proper court in the meaning of Article 47' EUCFR.[101]

A closer look, therefore, at the various characteristics of the IPT that confirm its effective remedy assessment is important within the context of the present discussion:

i) The IPT allows applicants to bring forward complaints of both specific incidences of surveillance and of the general Convention compliance of surveillance regimes. This allows individual standing in cases of secret surveillance independently as to whether a person has been subject to an interception notification. According to the ECtHR, this 'demonstrates the important role that [the IPT] can and does play in analysing and elucidating the general operation of secret surveillance regimes'.[102]
ii) The members of the Tribunal have held high judicial office or are qualified lawyers.
iii) The Tribunal has discretion to hold oral hearings, in public, where possible and in closed proceedings the Counsel to the Tribunal can make submissions on behalf of claimants who cannot be represented.
iv) When it determines a complaint the IPT has the power to award compensation and make any other order it sees fit, including quashing or cancelling any warrant and requiring the destruction of any records.
v) Its legal rulings are published on its own dedicated website, thereby enhancing the level of scrutiny afforded to secret surveillance activities.
vi) The IPT has broad jurisdictional powers including jurisdiction to consider any complaint about the Convention compliance either of the transfer of intercept material to third parties, or about the regime governing the transfer of intercept material.

The IPT has progressively evolved over the years from 'passively reviewing the law to actively intervening in it.'[103] It is worth noting that the IPT was recognised (before Brexit) as 'a court or tribunal of a Member State' within the meaning of Article 267 TFEU. Indeed, the *Privacy International*[104] judgment was rendered on a preliminary reference request submitted to the CJEU by the IPT.

[99] *Schrems I* (n 1) and *Schrems II* (n 2).

[100] Big Brother Watch and others v United Kingdom Apps nos 58170/13, 62322/14 and 24960/15 (ECtHR Chamber First Section, 10 September 2018) (Big Brother Watch I), para 265; (ECtHR Grand Chamber, 25 May 2021) (Big Brother Watch II), para 415.

[101] EBPB, Opinion 14/2021, para 25.

[102] Big Brother Watch I (n 100), para 255.

[103] Bernard Keenan, 'The Evolution Of Elucidation: The Snowden Cases Before The Investigatory Powers Tribunal' (2022) 85(4) *MLR* 906, 933.

[104] Case C-623/17 *Privacy International v. Secretary of State for Foreign and Commonwealth Affairs and Others*, ECLI:EU:C:2020:790.

5.2 The deriving substantive requirements

Combining the interpretative guidance drawn from these two sources through the lenses of essential equivalence, our answers to the two questions posed above are as follows:

First, we submit that under Article 45(2)(a) read in light of the EUCFR, an effective remedy must be ensured by a 'tribunal' which is an autonomous concept under EU law and must be interpreted in line with Article 267 TFEU. This article, therefore, adopts a narrower interpretation than the EDPB and argues that data subjects should be granted rights actionable in the third country's courts, independently of whether an administrative body offering some kind of *ex post facto* review exists. These rights could be available at a minimum level threshold; for instance, they could be limited to the possibility of challenging the administrative body's decisions before the courts or the possibility of data subjects to bring legal action before an independent and impartial court in order to verify the legality of processing, and, upon the legal conditions being applicable, have access to their personal data, or to obtain the rectification or erasure of such data.[105] The availability of some degree of judicial review is, therefore, imperative to comply with the effective redress requirements identified above. This means that, in our view, an administrative body -even if it satisfies the requirements of independence laid down by the CJEU in *Schrems II*-[106] would not be enough to comply with the right to effective remedy without some kind of actionable rights for individuals before courts that could involve at least a domestic right of appeal against the administrative body's decisions. This is supported by the CJEU's Article 267 TFEU case law where the CJEU has accepted preliminary references from national administrative bodies where their decisions could not be appealed before courts.

Second, we argue that there are further constitutive elements regarding a third country's court, tribunal or body providing effective redress in the context of international transfers than the ones explicitly mentioned in *Schrems II*. We consider that *as a minimum* at least the following criteria are important for a court, tribunal or body in the context of international data transfers:

1. It should be established by law.[107] While this factor has not been discussed by the CJEU, Article 47(2) EUCFR provides that 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal *previously established by law*.'[108] This means that the body should satisfy the rule of law requirements.
2. It should render binding decisions in a way that its jurisdiction is considered compulsory.
3. It should be independent and impartial in terms of its composition and the appointment of its members, its powers and the possibility of dismissal or revocation. Independence should be assessed in general -and not in specific cases- by looking at its legal basis.
4. It should apply rules of law and make its decisions on the basis of clear, accessible and foreseeable legal rules.[109] This criterion has only been alluded by the Court when it

[105] *Schrems II* (n 2), para 194.

[106] See Section 3.1 above.

[107] On a different view see Theodore Christakis, Kenneth Propp and Peter Swire, 'EU/US Adequacy Negotiations and the Redress Challenge: Whether a New U.S. Statute is Necessary to Produce an "Essentially Equivalent" Solution', 31.1.2022, European Law Blog https://europeanlawblog.eu/2022/01/31/eu-us-adequacy-negotiations-and-the-redress-challenge-whether-a-new-u-s-statute-is-necessary-to-produce-an-essentially-equivalent-solution/

[108] Emphasis added.

[109] *Dorsch Consult* (n 90), paras 32-33.

referred to the 'legal safeguards' that should accompany any 'political commitment' on which data subjects could rely.[110]

5. If it is an administrative body, there should be a right to appeal its decisions before the courts as seen above.

The IPT case study provides useful guidance on how the above criteria can be interpreted for redress mechanisms in cases of national security surveillance. For instance, while it is understandable that an *inter partes* procedure might be unfeasible in the context of national security surveillance measures, public proceedings could be held where possible and the body may publish its decisions (even if certain parts are redacted). Further elements pointing towards effective redress could also be considered here. These include the establishment of a counsel to the tribunal, as in the case of IPT, that would allow submissions on behalf of claimants who cannot be represented and the power to award compensation or make other binding orders (including allowing for access, rectification and erasure of personal data).

In conclusion, the proposed new substantive requirements for redress provide an -until now missing- benchmark of reviewing third countries' relevant regimes. For instance, it is clear that the announced Data Protection Review Court within the EU-US Data Privacy Framework falls short of the minimum requirements of effective redress[111] developed in this article: 1) it is based on an Executive Order (E.O),[112] which is an internal directive within the federal government -binding only on the executive, thus not a law; 2) its jurisdiction is limited -oddly- focusing on merely reviewing the 'determinations' made by the Civil Liberties Protection Officer (CLPO) as to whether a violation has occurred and an appropriate remediation has been decided. The DPRC itself will only issue 'determinations' in this regard, thus, making the 'binding nature' of its decisions disputable; 3) the DPRC will be established by regulations of the Attorney General and, therefore, remains a body within the US executive;[113] 4) it is unclear what rules of law the DPRC will apply. According to the E.O, the review shall be based on the classified *ex parte* record of the CLPO review and information or submissions provided by the complainant, the special advocate, or an element of the Intelligence Community.[114] None of these constitute legal rules foreseeable to the data subject; 5) while it is an executive body, there is no further appeal of its decisions before any US court.

5.3 Challenges and limitations

The substantive requirements for effective redress proposed here constitute a refinement and adjustment of the criteria developed by the CJEU in the context of Article 267 TFEU and the IPT's effective remedy characteristics adapted in the context of international transfers. They offer a comprehensive set of factors that provide legal certainty while also accounting for the required flexibility of 'essential equivalence' in this area. These factors are not to be assessed independently and separately from each other. On the contrary, they are closely interlinked and they operate on a

[110] *Schrems II* (n 2), para 196.

[111] See also Ian Brown and Douwe Korff, 'Data protection and digital competition', 11.11.2022 https://www.ianbrown.tech/2022/11/11/the-inadequacy-of-the-us-executive-order-on-enhancing-safeguards-for-us-signals-intelligence-activities/.

[112] Executive Order On Enhancing Safeguards For United States Signals Intelligence Activities, 7.10.2022 https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/07/executive-order-on-enhancing-safeguards-for-united-states-signals-intelligence-activities/?utm_source=link

[113] Ruschemeier (n 4).

[114] Executive Order (n 113) d(1)(D).

more general basis that requires an overall examination of the third country's judicial system, rather than a checklist of separate requirements that need to be individually ticked off.[115]

Despite the re-modelling of the proposed roadmap to adapt it to international data transfers, it should be acknowledged that there are certain context- specific challenges and limitations to this that need to be spelled out. These relate to two important interconnected issues: i) standing issues in third country jurisdictions and, ii) the function and operation of foreign surveillance systems.

Both are particularly pertinent in the US context and we, therefore, discuss them in this respect. The standing conditions for challenging US surveillance measures are extremely strict.[116] In this regard, the US Supreme Court held in *Clapper v Amnesty International USA* that neither individuals nor organizations have standing to bring a lawsuit under Section 702 of the Foreign Intelligence Surveillance (FISA) Amendments Act (FAA) because they cannot know whether they have been subject to surveillance or not.[117] Furthermore, the US foreign surveillance system is 'inherently discriminatory'[118] as it is designed to target non-US persons and is founded on the basis that US citizenship, residence or the presence of an individual on US soil, are 'criteria of categorical normative relevance' [119] with regard to the enjoyment of rights. Both these issues pose significant challenges to redress rights,[120] although neither has been examined in detail by the CJEU.

Nevertheless, it is submitted that these challenges are broader than redress issues and it might be erroneous to try to approach them through European-centred interpretative models. That being said, these overarching issues need to be dealt with as well as they lay the foundations for any framework of fundamental rights protection in third countries. A failure to address these overarching problems will mean that a judicial redress mechanism -even if it satisfies the factors mentioned above- cannot be effective in practice.

6. Conclusion

Effective redress in the context of international data transfers poses a number of questions regarding its scope, content and interrelationship with other rights, such as data protection. Even after several CJEU decisions on the matter, uncertainty still persists about what the substantive criteria of effective redress in international data transfers entail exactly.

This article has drawn interpretative lessons from the EU's autonomous definition of a court, tribunal or administrative body within the context of the preliminary reference procedure under Article 267 TFEU -that reflects the fundamental right to an effective remedy and to a fair trial under Article 47 EUCFR- and the IPT case study as an effective judicial remedy and adjusted them to the international data transfers context. It argued that the following substantive elements are required *as a minimum* to ensure effective judicial review in the international context: 1) a court, body or tribunal established by law; 2) its decisions should be binding; 3) it should be independent and impartial; 4) it should apply rules of law; 5) in case redress is available only before an administrative body, there should be a right to appeal its decisions before the third country's courts.

[115] EDPB (n 74), para 48.
[116] Tzanou (n 57), 551; Christakis, Propp and Swire (n 107) and references therein.
[117] 568 U.S.—(2013).
[118] Tzanou (n 57), 556.
[119] Milanovic (n 54), 89.
[120] See Christakis, Propp and Swire (n 107).

These elements not only provide legal certainty in the international data transfers; they also ensure respect of fundamental rights and the rule of law while taking into account flexibility concerns. Ultimately, they show that easy solutions do not exist in the -transatlantic- and transnational data transfer contexts. To paraphrase AG Tesauro: 'if redress is not effective, it does not become one simply because there is no better solution'.[121]

[121] AG Tesauro stated 'if a body is not a judicial body, it does not become one simply because there is no better solution'. *Dorsch Consult* (n 90) ECLI:EU:C:1997:245, Opinion of AG Tesauro, para 40.