

BlogDUE

The exercise of the discretionary clause in the Dublin system and its justiciability after the *AHY* judgment: it is only a matter of national law...but at what price!

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SUMMARY: 1. Introduction. – 2. A brief outline of the case-law of the Court of Justice on the discretionary clause. – 3. The *AHY* judgment. – 4. The reinterpretation (or misinterpretation) of the *MA* judgment. – 5. The interplay between the discretionary clause and the scope of application of EU fundamental rights. – 6. Not all is lost but... at what price!

1. The judgment rendered on 18 April 2024 by the Court of Justice (“Court” or “CJ”) in *AHY* (Case C-359/22) provided further clarifications on the justiciability of the discretionary clause set out in Article 17 (1) of the [Regulation \(EU\) No 604/2013](#) establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (“Dublin III Regulation”; for a general analysis on the Regulation see, *inter alia*, C. HRUSCHKA, F. MAIANI, *Dublin III Regulation (EU) No 604/2013*, in K. HAILBRONNER, D. THYM (eds.), *EU Immigration and Asylum Law. A Commentary*, München-Oxford-Baden, 2016, p. 1478 ff.). According to that provision, by way of derogation from the responsibility criteria set out in the Regulation, each Member State *may* decide to examine an application for international protection which would not otherwise fall under its responsibility according to the Dublin criteria (on the discretionary clause see, among others, C. FAVILLI, *L'applicazione della clausola di discrezionalità del regolamento Dublino tra reciproca fiducia e tutela dei diritti dei richiedenti asilo*, in E. SCISO (a cura di), *I flussi migratori e le sfide all'Europa*, Torino, 2020, p. 155 ff.). It is worth stressing that such a discretionary power may also be exercised where an earlier application has been lodged before the competent Member State, and even if the latter already rejected the request. It follows that the exercise of the discretionary clause represents an *alternative* both to take charge and to take back procedures laid down by the Dublin III Regulation; in other words, the Member State which is not responsible to examine the application under the Dublin criteria does have the *power* – and not the obligation – to initiate a take charge or a take back procedure (see Articles 21 on take charge procedures and Articles 23 and 24

on take back procedures; as it clearly emerges from the wording of these provisions, where a Member State considers not to be responsible for the application, it “*may*” request to the competent Member State to take charge or take back the applicant concerned).

The discretionary clause is deeply linked to the partial harmonisation characterising the EU asylum law. The relevant EU secondary law grants Member States a relevant margin of discretion allowing them to provide for *national* forms of protection broader than the international protection ruled by EU law (according to Article 3 of the Qualification Directive, Member States may introduce or retain more favourable standards for determining the conditions for granting international protection, provided that those standards are compatible with that directive; moreover, recital (15) of the directive recognises that the Member States are entitled to allow third-country nationals to remain in their territories on a discretionary basis on compassionate or humanitarian grounds; in this regard, cf. C. FAVILLI, *The standard of fundamental rights protection in the field of asylum: The case of the right to an effective remedy between EU law and the Italian Constitution*, in *Review of European Administrative Law*, 2019, p. 167 ff.). Against such a partially harmonised legal background, the discretionary clause reflects – as stated by the CJ itself – the principle that the recognition of the right to asylum is a *prerogative* of the Member States which EU law cannot but respect (cf. among others, judgments of 23 January 2019, Case C-661/17, *MA*, para. 60; of 5 July 2018, Case C-213/17, *X*, para. 61; and of 10 December 2013, Case C-394/12, *Abdullahi*, para. 57). In other words, the discretionary clause can be seen as the key opening the door for recognising broader forms of national protection set out by the national legal systems of the Member States.

After giving a brief outline of the case-law of the Court of Justice on the discretionary clause (section 2), this blog post will summarise the background of the *AHY* judgment and the CJ’s answers to the preliminary questions (section 3). Then, it will focus on the two main questionable points affecting the Court’s reasoning in *AHY*: firstly, the lack of coherence with its previous case-law on the discretionary clause, in particular the *MA* judgment (section 4); secondly, the interplay between the discretionary clause and the scope of application of EU fundamental rights (section 5). Finally, the blog post will frame the commented judgment in the previous case-law on the discretionary clause to stress that *AHY* can be seen as the ultimate and culminating piece of a case-law granting the Member States an increasing margin of manoeuvre about both the exercise of the discretionary clause and its justiciability. In conclusion, some brief concluding observations on the impact of such a case-law at the national and EU level will be provided (section 6).

2. To fully grasp the impact of the *AHY* judgment, the previous case-law on the discretionary clause must be mentioned. Three earlier decisions deserve particular attention.

First, in the famous [NS](#) case (Grand Chamber, judgment of 21 December 2011, Joined Cases C-411/10 and C-493/10) the CJ stated that the decision whether or not to examine an asylum application by making use of the discretionary clause constitutes implementation of EU law within the meaning of Article 51 (1) of the

Charter of Fundamental Rights of the EU (“the Charter”). Notably, according to the Court, the discretionary power conferred on the Member States by the said clause – which at that time was contained in the Dublin II Regulation – “forms *part of the mechanisms* for determining the Member State responsible for an asylum application provided for” by the Regulation (para. 68; emphasis added). The CJ came to this conclusion stressing that the use of the discretionary clause implies some “specific consequences” laid down in the Regulation; as a matter of fact, the Member State concerned becomes responsible within the meaning of the Dublin Regulation and assumes the obligations stemming from that responsibility.

Second, it is worth mentioning the [MA](#) judgment which, like *AHY*, originated from a preliminary ruling issued by the Irish High Court. On that occasion, the CJ focused on the scope of the right to an effective remedy against a transfer decision which, under Article 27 of the Dublin III Regulation, must be granted to applicants for international protection. Notably, the Court held that the said provision “does not require a remedy to be made available against the decision not to use the option set out in Article 17 (1) of that regulation, *without prejudice to the fact that that decision may be challenged at the time of an appeal against a transfer decision*” (para. 79; emphasis added). As it will be argued below, this meaningful statement (for the sake of brevity, hereinafter “the *MA* principle”) was significantly reinterpreted by the Court in the *AHY* judgment.

Finally, the [Ministero dell’Interno](#) (*Brochure commune - Refoulement indirect*) judgment must be recalled (judgment of 30 November 2023, Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21). This decision dealt, among others, with the risk of indirect refoulement following the transfer of an applicant for international protection to the competent Member State which previously rejected his/her application. On this occasion, the Court made a slight distinction between, on the one hand, the situation where the national judge of the transferring Member State, seized of an action for the annulment of a transfer decision under Article 27 of the Dublin III Regulation, disagrees with the interpretation made by the authorities of the competent Member State in relation to the material conditions for recognising the international protection and, on the other hand, the substantive assessment of a risk of indirect refoulement following the transfer of the applicant to the competent Member State which rejected his/her earlier application. The Court stated that, in the first case, the national judge has the power – but not the obligation under EU law – to declare its Member State as responsible to examine itself the application by virtue of the discretionary clause; by contrast, the national judge cannot compel the transferring Member State to apply such a clause on the ground that the Dublin transfer would expose the applicant to a risk of indirect refoulement. In other words, the CJ significantly narrowed down the scope of judicial review of the decision not to apply the discretionary clause, notably in case of indirect refoulement (on this judgment, cf. [S. MARINAI](#), *Obblighi informativi e fiducia reciproca tra stati membri nei trasferimenti Dublin: tra aperture e punti fermi fissati dalla corte di giustizia all'alba dell'accordo sul nuovo patto*, in *Diritto Immigrazione e Cittadinanza*, 2024, p. 1 ff.; [M. FERRI](#), *Nel nome della fiducia reciproca! La Corte di Giustizia si pronuncia sul rischio di refoulement indiretto nei trasferimenti Dublin: l'unica*

(e sempre più restrittiva) eccezione delle carenze sistemiche e le (limitate) prerogative del giudice nazionale, in *rivista.eurojus.it*, 2024, p. 40 ff.).

In the *AHY* judgment, the CJ further developed the restrictive approach characterizing *Ministero dell'Interno* which, not surprisingly, was issued by the same Chamber. More generally, as it will be argued in the conclusions, *AHY* represents the last (and culminating) episode of a case-law which has progressively granted the Member States a high margin of manoeuvre as regards the exercise of the discretionary clause and its justiciability.

3. The analysis of *AHY* must take into due account the specificities of the Irish system where the decision on the exercise of the discretionary clause is entrusted to a different authority than that competent on the decision on the transfer of the applicant to the competent Member State; these decisions can thus be challenged by two different remedies. More precisely, the transfer decision is taken by the International Protection Office (“IPO”) and the appeal against it must be brought before the International Protection Appeals Tribunal (“the IPAT”). By contrast, the decision on whether or not to exercise the discretionary clause is up to the Minister for Justice and can be challenged before the High Court. As underlined by the referring court (the High Court), such a system can be significantly problematic. Indeed, as it happened in the main proceedings, an applicant can ask for the application of the discretionary clause *after* his transfer was decided and the appeal against it rejected. It is not surprising that from a study requested by the Commission to assess the implementation of the Dublin III Regulation, it emerges that in Ireland legal advisors understand the discretionary clause as “almost a new process” ([European Commission](#), DG Migration and Home Affairs, *Evaluation of the Implementation of the Dublin III Regulation, Final report*, 2016, p. 35).

The case at the origin of the commented judgment concerns a Somali national – AHY – who, after the rejection of two applications for international protection in Sweden, filed another request in Ireland. The Irish authorities initiated a take back procedure to transfer AHY in Sweden and issued a transfer decision. The applicant brought an appeal before the IPAT against this decision and requested the application of the discretionary clause. After the dismissal of the appeal by the IPAT, AHY made an application to the Minister for Justice requesting again the use of the clause. The decision of the Minister to reject such a request was challenged by AHY before the High Court which raised the request for preliminary ruling.

With the first preliminary question, the referring court asked, in essence, whether Article 27 of the Dublin III Regulation entails the right to an effective remedy against a decision not to use the discretionary clause.

The CJ responded in the negative. Although Article 17 (1) must be qualified as an integral part of the mechanisms set out in the Dublin III Regulation for determining the responsible Member State, the Court stated that Article 17 (1) “*by its nature*, cannot be treated in the same way as the other criteria” laid down by the Regulation (para. 32). Such a difference is identified by the CJ in the circumstance that, according to its well-established case-law, the use of the discretionary clause is fully optional and EU law does not lay down any particular

condition for its exercise. By contrast, it is for the Member States to determine such conditions and in no circumstances EU law can oblige a Member State to make use of that clause. Since the decision whether or not to use the discretionary clause is not based on the binding criteria set out in the Dublin III Regulation, it “cannot be treated in the same way as a transfer decision, within the meaning of Article 27 (1)” (para. 43).

The CJ made two important specifications to (try to) ensure coherence between such a conclusion and its previous case-law.

Firstly, the Court relied on its jurisprudence on the scope of the remedy provided for by Article 27 of the Dublin III Regulation. The latter must be broadly interpreted in light of recital (19), according to which the effective remedy against the transfer decision “should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred”. Such a broad interpretation emerges in the [Ghezelbash](#) judgment where the Court stressed that the Dublin III Regulation significantly overturned the approach of the Dublin II Regulation by introducing and strengthening several rights ensuring the involvement of applicants in the procedure for determining the competent Member State (Grand Chamber, judgment of 7 June 2016, Case C-63/15; in this regard, cf. among others, S. MORGADES-GIL, *The Right to Benefit from an Effective Remedy against Decisions Implying the Return of Asylum-seekers to European Safe Countries*, in *European Journal of Migration and Law*, 2017, p. 255 ff.; E. SHARPSTON, *Shadow Opinion of Advocate-General Eleanor Sharpston QC - Case C-194/19 HA, on appeal rights of asylum seekers in the Dublin system*, in *EU Law Analysis*, 2021). In line with *Ghezelbash*, the Court elaborated a rich case-law where the remedy against the transfer decision has been interpreted as covering both the observance of the responsibility rules and the procedural safeguards laid down by the Regulation (cf. Grand Chamber, judgments of 7 June 2016, Case C-155/15, *Karim*; of 26 July 2017, Case C-670/16, *Mengesteab*, and of 25 October 2017, Case C-201/16, *Shiri*; in this regard, cf. among others, A. FAVI, *Il diritto a un ricorso effettivo nell’ambito del “sistema Dublino” alla luce del (mancato) dialogo tra Corte di giustizia e legislatore dell’Unione: note a margine della sentenza C-19/21, I.S., 6 dicembre 2022*, in *Quaderni AISDUE*, 2022, p. 141 ff.). In *AHY*, the Court made a significant distinction between that case-law and the case at hand. Notably, a couple of differences were spotted. First of all, in *Karim*, *Mengesteab*, and *Shiri* the CJ extended the scope of the remedy provided for by Article 27 to the infringement of provisions which, like the criteria set out in Chapter III of the Regulation, contributes to determining the competent Member State. Moreover, the Member State concerned has the obligation to apply these provisions. It follows that those provisions “confer on the applicant [...] a right to have that Member State comply with its obligations to that effect” (para. 41; emphasis added). By contrast, this is not the case for the discretionary clause.

Secondly, the CJ recalled the *MA* judgment. According to the Court, from the above-mentioned *MA* principle does not emerge that the possibility of challenging the decision not to use the discretionary clause throughout the appeal against a transfer decision “has its basis in EU law”; by contrast, that possibility “can only be based on national law” (paras 45-46; emphasis added).

By the subsequent preliminary question (the third one in the order for reference), the referring court asked in essence whether Article 47 of the Charter entails a suspensive effect on the implementation of the transfer decision pending the decision on the request to use the discretionary clause or the judicial remedy challenging that decision. In the alternative, the referring court asked whether the six-month time limit to proceed to the transfer of the applicant, as set out in Article 29 (1) of the Dublin III Regulation, starts from the acceptance of the request to take charge or to take back the person concerned or from the outcome of the judicial remedy against the transfer decision – where this remedy has a suspensive effect in compliance with Article 27 (3) – and not from the appeal against the decision, taken after the transfer decision, not to use the discretionary clause.

With regard to the first point, the Court upheld, in line with *NS*, that Article 17 (1) of the Dublin III Regulation must be qualified as “an integral part of the mechanisms” for determining the competent Member State; therefore, the decision not to use the discretionary clause entails the implementation of EU law within the meaning of Article 51 (1) of the Charter. Then, the CJ referred to its settled case-law according to which Article 47 of the Charter is applicable only in two cases: whether the right or freedom at issue is guaranteed by EU law or if the person concerned is the subject of criminal proceedings constituting an implementation of EU law. Thus, the Court found that the situation in the main proceedings cannot be regarded as integrating either of these two scenarios; therefore, Article 47 of the Charter does not apply. Notably, referring to the answer to the first preliminary question, the CJ recalled that, under EU law, there are no circumstances which oblige Member States to make use of the discretionary clause. It follows that an applicant for international protection has no right guaranteed by EU law to see the said clause applied.

Finally, the Court stated that the action challenging the decision not to use the discretionary clause has no suspensive effect. The CJ came to this conclusion by stressing the wording of Article 29 (1) of the Dublin III Regulation. The latter provision clearly identifies the *dies a quo* of the six-month time period with the acceptance of the request to take charge or take back procedures by the competent Member State or in the final decision on the appeal against the transfer decision where such an appeal has a suspensive effect.

4. The solution adopted by the CJ with respect to the first preliminary question is questionable from several points of view.

First, that solution turns out to be inconsistent with the *MA* judgment. As already mentioned, in *AHY* the Court stressed that the *MA* principle does not allow to conclude that the right to an effective remedy against the refusal to use the discretionary clause by appealing the transfer decision “has its basis in EU law”. Such a statement implies a significant and questionable reinterpretation (if not a real misinterpretation) of *MA*.

It is true that the *MA* principle does not explicitly identify in EU law the source to recognise the right to challenge the decision not to use the discretionary clause. Nevertheless, as it clearly emerges from paras 74-79 of the judgment, the Court elaborated the *MA* principle *by referring to EU law principles*. Notably, the Court struck a balance between two requirements: on one side, the objective of the rapid

processing of applications for international protection which discourages multiple remedies; on the other, the necessity to ensure the right to effective judicial protection. Since – as underlined by the Court in *MA* – the refusal to use the discretionary clause results in the adoption of a transfer decision, the right to effective judicial protection is guaranteed insofar as “the Member State’s refusal to use that clause may [...] be challenged at the time of an appeal against a transfer decision” (para. 78). In other words, the balance between the objective of the rapid processing of the application and the right to effective judicial protection implies that a specific remedy against the decision not to use the clause is not necessary. However, the Court reached such a solution because, in the case at issue, the refusal to use the discretionary clause could be challenged throughout the appeal against a transfer decision (in this sense, cf. the [Opinion](#) of Advocate General Pikamäe on *AHY* case). Maintaining that in *MA* the right to challenge the refusal to apply the discretionary clause at the time of the appeal against the transfer decision was not based in EU law, implies a significant and questionable reinterpretation (if not a real misinterpretation) of *MA*.

Second, the Court came to the said reinterpretation of *MA* without paying sufficient attention to the *specific features* of the Irish system and of the case at hand. As already mentioned, in the Irish system the decision on the discretionary clause is fully dissociated from the transfer decision. It follows that, as in the case at the origin of the *AHY* judgment, the decision rejecting the application of the clause may be taken by the Minister for Justice *after* the asylum administrative authority has already issued a transfer decision. Furthermore, as underlined by the Advocate General, the *MA* and *AHY* cases differ insofar as in *MA* it was the asylum administrative authority which refused to apply the clause and therefore issued the transfer decision. Despite their importance, the CJ significantly overlooked these aspects. Whilst in the first part of the judgment the Court seemed to consider the peculiarities of *AHY* and to circumscribe its interpretation to that specific case (paras 28 and 43), later on it affirmed – in a way going beyond the specific case – that the possibility of challenging the decision not to use the clause by appealing the transfer decision “can only be based on national law” (para. 46).

More generally, in *AHY* the Court did not seem to take into full account the real issue at the heart of the case on which, by contrast, the Advocate General specifically dwelled. From Pikamäe’s Opinion, it emerges that the question of the necessity to provide a specific remedy against the decision not to use the clause was deeply linked with the specificities of the Irish system, and notably the *interplay* between the transfer procedure and the procedure on the application of the discretionary clause. As stressed by the Advocate General, where the exercise of the discretionary clause is dissociated from the transfer decision and the request for the exercise of the discretionary clause can be submitted *after* the adoption of the transfer decision, the procedure on the discretionary clause can affect the validity of the earlier transfer decision. This peculiar system turns out to jeopardize the proper and efficient functioning of the Dublin cooperation. According to the Advocate General, the Dublin III Regulation precludes national systems providing for the said dissociation between the two procedures. Moving from this premise, he suggested that EU law does not require Member States to

provide for a *specific* remedy against the decision not to use the clause; but at the same time, Pikamäe did not deny that in *MA* the Court recognised the necessity to guarantee the right to an effective remedy against the decision not to use the clause. Such a nuanced position of the Advocate General is confirmed by the fact that he declared to be aware that his proposed interpretation would require Member States, first, to provide that the decision concerning the discretionary clause must be taken before the adoption of the transfer decision, and second, it would require “some Member States, such as Ireland, to review the allocation of powers between judicial authorities in order to ensure that the authority hearing the appeal against the transfer decision *has jurisdiction to examine the decision not to use that clause*” (point 85).

The solution taken by the Court in the *AHY* judgment prevents the negative effects of systems dissociating the exercise of the discretionary clause from the transfer decision. Nevertheless, this goal is pursued by sacrificing the coherence with *MA* and, above all, the protection of fundamental rights (see *infra* section 5). These latter would have been safeguarded by stating that EU law requires Member States to provide for a specific remedy against the decision not to apply the discretionary clause and specifying, at the same time, that EU law precludes national systems allowing the said dissociation between the transfer decision and the decision on the clause.

5. A second questionable point of the *AHY* judgment is represented by the reply to the third preliminary question and the passages (paras 51 and 52) where the CJ deals with the discretionary clause and the scope of application of EU fundamental rights.

As already recalled, the Court found that Article 47 of the Charter cannot be applied because, according to the CJ, the situation at hand in the main proceedings does not exemplify any of the two scenarios which entail the application of Article 47. Now, it is not easy to reconcile this conclusion with the Court’s finding in *NS*, reiterated also in *AHY*, that the use of the discretionary clause is “an integral part of the mechanisms” defined by the Dublin III Regulation for determining the competent Member State, and therefore falls within the scope of application of EU law and of the Charter.

From a theoretical point of view, the Court’s reasoning is likely to create a short circuit by opening the door to a kind of “grey zone” where EU law – and therefore the Charter – applies, but the right to effective judicial protection is not guaranteed. There is clearly a tension with the Court’s bold statement in the famous *Fransson* judgment that “situations cannot exist which are covered [...] by European Union law without those *fundamental rights being applicable*” (Grand Chamber, judgment of 26 February 2013, Case C-617/10, para. 21, emphasis added; on the scope of application of the Charter, see N. LAZZERINI, *La Carta dei diritti fondamentali dell’Unione europea. I limiti di applicazione*, Milano, 2018, spec. p. 183 ff.).

Could the Court avoid the short circuit (and enhance the protection of fundamental rights)? Three lines of reasoning were available, two based on Article 47 of the Charter and one on the right to be heard as a general principle of EU law.

Firstly, the Court could have paid a greater attention to the relevant rights guaranteed by the Dublin III Regulation. As a matter of fact, since the discretionary power is part of the mechanisms for determining the competent Member State under the Dublin system, the use of that power is placed *within* that system. It follows that all rights recognised by this latter, in particular procedural and information rights, must enjoy the effective judicial protection required by Article 27 of the Regulation, read in conjunction with Article 47 of the Charter (as for the role of Article 47 of the Charter in EU asylum law, cf. *inter alia*, D. THYM, *Judicial maintenance of the sputtering Dublin system on asylum jurisdiction: Jafari, A.S., Mengesteab and Shiri*, in *Common Market Law Review*, 2018, p. 549 ff.; M. RENEMAN, *No Turning Back ? The Empowerment of National Asylum and Migration Courts under Article 47 of the Charter*, in M. BONELLI, M. ELIANTONIO, G. GENTILE (eds.), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1. The Court of Justice's Perspective*, Oxford, 2022, p. 137 ff.). The circumstance that the application of the discretionary clause is not a pure national decision but retains a strong link with the Dublin system emerges from the fact that, as underlined by the CJ in *NS*, that decision gives rise to some specific consequences laid down by the Dublin Regulation itself. Moreover – in fact, first of all –, the procedural and information rights set out in Articles 4 and 5 of the Dublin III Regulation also cover the chance to use the discretionary clause (see Article 4, para. 1, lett. b), which provides that “As soon as an application for international protection is lodged within the meaning of Article 20 (2) in a Member State, its competent authorities shall inform the applicant of the application of this Regulation, and in particular of [...] the criteria for determining the Member State responsible, the hierarchy of such criteria in the different steps of the procedure and their duration, including the fact that an application for international protection lodged in one Member State can result in that Member State becoming responsible under this Regulation even if such responsibility is not based on those criteria”; see also Article 5 according to which “The interview shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 4”).

With specific regard to procedural and information rights, the *Ministero dell'Interno* judgment deserves to be recalled again. On that occasion, the CJ specified that the right to information and the right to the personal interview, respectively laid down by Articles 4 and 5 of the Dublin III Regulation, are procedural safeguards which must be afforded to the applicant concerned by a take back procedure. Therefore, “the remedy provided for in Article 27 (1) of the Dublin III Regulation against a transfer decision must, in principle, *be capable of relating to the infringement of the obligations contained*” in Articles 4 and 5 of the Dublin III Regulation (para. 110; emphasis added). On that occasion, the Court specifically referred to the appeal against the transfer decision. Nevertheless, the same safeguard must be afforded to the applicant who challenges a decision not to use the discretionary clause which was adopted – after the transfer decision – and without providing the applicant concerned with the said procedural rights. Insofar as the infringement of these rights does not affect the transfer decision but only impacts the decision not to use the discretionary clause, the applicant must be granted the right to challenge this latter decision *under EU law*.

Secondly, the Court could have applied, by analogy, its well-established case-law according to which where “the criminal proceedings at issue in the main proceedings amount to an implementation [...] of EU law, within the meaning of Article 51 (1) of the Charter, [the] referring court must also satisfy itself that the fundamental rights guaranteed by the Charter to the persons concerned in the main proceedings, in particular *those guaranteed in Article 47 of the Charter*, are respected” (Grand Chamber, judgment of 21 December 2021, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion*, para. 204; emphasis added). As it clearly emerges from this case-law, a criminal proceeding implementing EU law is enough to trigger the application of Article 47 of the Charter. Indeed, as remarked by a commentator, that provision is characterised by a wide scope which makes it difficult to distinguish between its scope and that of the Charter. Notably, “once there is a *sufficient link* to EU law for the Charter to apply at all, in accordance with the case law on Article 51, an effective remedy [...] has to be ensured” (A. WARD, *Article 47*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights, A Commentary*, Oxford, 2014, p. 1211 ff.; emphasis added). In *AHY*, the Court could have stressed the wide scope of Article 47 of the Charter and found that its application is triggered by the use of the discretionary clause, as “an integral part” of the mechanisms set out in the Dublin III Regulation. More generally, the solution taken by the CJ in *AHY* is quite inconsistent (*contra*, see C. WARIN, *Mapping obligations, rights and remedies in the (future) Common European Asylum System (C-359/22, AHY v Minister for Justice)*, in *EU Law Live*, 2024). After recalling that, in line with its case-law, Article 47 of the Charter is applicable not only according to a narrow interpretation of this provision – where the right or freedom at issue is guaranteed by EU law –, but also in line with a broad approach – where the person concerned is the subject of (criminal) proceedings constituting an implementation of EU law –, the Court ruled out the chance to apply this latter solution to the Dublin procedure without justifying it.

To sum up, two ways were available to find that the right to an effective remedy against the decision not to use the clause must be guaranteed *under EU law*. However, even adopting a narrow interpretation of the scope of Article 47 of the Charter, an alternative (although “less satisfying”) solution was possible in order to ensure compliance with the *Fransson* principle according to which in all situations ruled by EU law fundamental rights must be guaranteed. The Court could have reformulated the preliminary question and referred to the right to be heard as a general principle of EU law (as for the CJ’s power to reformulate preliminary questions, see among others, A. ADINOLFI, *L’accertamento in via pregiudiziale della validità degli atti comunitari*, Milano, 1997, p. 141 ff.; U. ŠADL, A. WALLERMAN, “*The referring court asks, in essence*”: *Is reformulation of preliminary questions by the Court of Justice a decision writing fixture or a decision-making approach?*, in *European Law Journal*, 2019, p. 416 ff.). As it is well known, the right to be heard is enshrined in Article 41 of the Charter which limits its applicability on institutions, bodies, offices and agencies of the Union. In line with the wording of this provision, the CJ has systematically rejected the option to extend its scope of application to the Member States (see among others, judgment of 21 December 2011, Case C- 482/10, *Cicala*, para. 28). Nevertheless,

according to a well-established case-law, “Article 41 of the Charter reflects a *general principle of EU law*, which is intended to apply to Member States when they implement that law” (see, among others, judgment of 22 September 2022, Case C-159/21, *Országos Idegenrendészeti Főigazgatóság e a.*, para. 35). Notably, the Court clarified that the right to be heard – which is in turn a general principle of EU law which Member States must respect in the implementation of that law – entails that every person must have the chance to make known his/her views to the administration before the adoption of any individual measure liable to affect him/her adversely (see, *inter alia*, judgment of 22 November 2012, case C-277/11, *M.M.*, para. 85; as for the right to be heard in the field of asylum, cf. M. B. MORARU, *The European Court of Justice shaping the right to be heard for asylum seekers, returnees, and visa applicants: an exercise in judicial diplomacy*, in *European journal of legal studies*, 2022, p. 21 ff.). Insofar as the decision to make use of the discretionary clause implements EU law, *at least* the right to be heard must be guaranteed by the national administrative authority before the adoption of such a decision.

By taking one of the three solutions discussed here, the Court could have safeguarded a full consistency between the discretionary clause and the protection of EU fundamental rights.

6. Despite these questionable points, the *AHY* judgment added a meaningful piece to the CJ’s case-law on the discretionary clause.

As mentioned above, the CJ has systematically stressed that the discretionary clause is a *prerogative* of the Member States which EU law must respect. Starting from this essential point, a wide margin of manoeuvre has been recognised by the CJ to the Member States in relation to the exercise of the discretionary clause and its judicial review.

Firstly, as already recalled, the Court systemically stressed that it is for the Member States to define the conditions where the discretionary clause applies.

Secondly, that discretion covers also the choice of the national authorities entitled with the power to apply the said clause. Each Member State can decide whether the exercise of the clause is reserved to the administrative authority or whether it is also up to the judiciary (in this regard, see judgment *MA*, cit., para. 65; see also the observations submitted by the European Commission in *Ministero dell’Interno*). Where the exercise of the discretionary clause is not a prerogative of the administration, the administrative decision refusing to apply the discretionary clause can be subject to full judicial review. As already recalled, in *Ministero dell’Interno*, the CJ clarified that in the specific circumstance where the judge hearing an action challenging the transfer decision disagrees with the interpretation of the authorities of the competent Member State in relation to the material conditions for the recognition of the international protection, the said judge has the *power* – not the obligation under EU law – to declare its Member State as responsible to examine itself the application by virtue of the discretionary clause. It follows that the Member States can entrust the judicial authority with the power to *fully assess* the administrative decision not to use the clause; in other words, the scope of justiciability of the clause is a matter of national law.

Finally, in *AHY*, the CJ stated that it is also up to national law to grant the possibility of challenging the decision not to use the discretionary clause throughout the appeal against the transfer decision. For the sake of clarity, it can be useful to specify the different focus of *Ministero dell'Interno* and *AHY*: the latter deals with the *source of the judicial review* of the decision on the discretionary clause; by contrast, in *Ministero dell'Interno*, the Court focused on the *scope* of the (possible) judicial review. After *AHY*, both of them are a matter of national law.

Against such a background, the *AHY* judgment can be seen as the ultimate and culminating moment of a case-law providing the Member States with an *increasing* margin of discretion about both the *exercise* of the discretionary clause and *its judicial review*.

To sum-up, the discretion inherent to the clause affects three elements whose definition is a matter of national law: a) *when* the discretionary clause must be applied by the national authorities, b) *whether* the decision not to apply the discretionary clause taken by the administrative authority can be challenged before the national judge asked to annul the transfer decision, and – if this is the case – c) *whether* the said national judge can fully *assess* the administrative decision and declare its Member State as responsible to examine itself the application. In other words, the protection of the right to asylum *through the discretionary clause* and its effective judicial protection are purely a matter of national law.

It is worth remarking that this case-law is perfectly in line with – and represents an *ex ante* legitimisation of – the new Regulation on asylum and migration management entered into force on 11 June 2024 and repealing the Dublin III Regulation in the context of the new Pact on Migration and Asylum ([Regulation](#) (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, PE/21/2024/REV/1, OJ L, 2024/1351, 22.5.2024). The new Regulation confirms the power of the Member States to use the discretionary clause (Article 35), but the right to challenge the decision on its application is ruled out (Article 43; more generally, the new Regulation is characterised by some significant restrictions of the scope of the right to an effective remedy which “back towards a purely intergovernmental framework” ([S. PEERS](#), *Taking Rights Half-Seriously: the New EU Asylum Laws*, in *Yearbook of European Law*, 2024, forthcoming; similarly, cf. [F. MAIANI](#), *Responsibility-determination under the new Asylum and Migration Management Regulation: plus ça change...*, in *Odysseus Network*, June 2024).

Before concluding, two main inferences can be drawn from the framework emerging from the case-law of the CJ (and the new Regulation on asylum and migration management).

Firstly, the wide margin of appreciation left to the Member States in relation to the discretionary clause paves the way to a fruitful synergy between EU law and the right to asylum as recognised under national law. In this regard, the Italian case is paradigmatic: the scope of the right to asylum is broader than the international protection under EU law (Article 10 (3) of the Italian Constitution and Article 19(1.1.) of the Legislative Decree 286/1998 “Consolidated law of the

provisions concerning the immigration and rules on the status of foreigners”; in this regard, cf. C. FAVILLI, *The standard of fundamental rights protection in the field of asylum*, cit.). This synergy clearly emerges from some national decisions taken by Italian courts following the *Ministero dell’Interno* judgment (see, among others, the [decree](#) taken by the Court of Trento on 29 February 2024 and the [orders](#) n. 10898 and 10903 of the Court of Cassation of 23 April 2024). Against this background, in spite of the *AHY* judgment, the Italian legal system must guarantee to the applicant the right to challenge the administrative decision not to apply the clause before the national judge hearing an action against the transfer decision (in this regard, it is worth mentioning the [decree](#) delivered by the Court of Florence on 23 May 2024. After extensively recalling the *AHY* judgment, the Court stated that the right to asylum and the right to the effective judicial protection, as enshrined in the Italian Constitution, imply that the applicant must be granted the right to challenge the administrative decision not to apply the clause before the national judge hearing an action against the transfer decision; moreover, according to the Court, this latter judge must fully review the administrative decision and incidentally assess whether the conditions for the grant of national protection, as set out in national law, are met).

Secondly, the wide margin of discretion left to the Member States by the CJ’s case-law and by the new Regulation on asylum and migration management is likely to jeopardize the harmonisation which the EU legislator should pursue in the asylum field in compliance with Article 78 TFEU (as for the “(dis)harmonisation” characterising some provisions of the new Pact on Migration and Asylum, cf. AA. VV., *Proposal for a regulation addressing situations of instrumentalization in the field of migration and asylum, Substitute impact assessment, European Parliamentary Research Service*, 2023, p. 51). With specific regard to the “Dublin system”, the wide margin of manoeuvre given to Member States in relation to the discretionary clause is likely to paradoxically compromise the historical and never-left objective of preventing the “asylum shopping” and “secondary movements” phenomena.

ABSTRACT (ITA)

Nella sentenza *AHY*, resa il 18 aprile 2024, la Corte di giustizia è tornata a pronunciarsi sulla giustiziabilità della clausola discrezionale prevista dal regolamento Dublin III. Il contributo si sofferma, in particolare, su due profili particolarmente problematici della sentenza. In primo luogo, il ragionamento svolto dalla Corte non risulta pienamente coerente con la propria precedente giurisprudenza in materia, in particolare con la sentenza *MA* che viene ad essere significativamente reinterpretata (se non, addirittura “riscritta”). In secondo luogo, la soluzione cui la Corte è giunta in *AHY* circa il rapporto tra la clausola discrezionale e l’ambito di applicazione dei diritti fondamentali nel diritto UE presenta numerosi profili di criticità. Dopo aver analizzato tali aspetti, il contributo evidenzia che la sentenza *AHY* rappresenta il momento culminante di una giurisprudenza tendente a riconoscere un crescente margine di discrezionalità agli Stati membri sia in relazione alle condizioni di esercizio della clausola che con riguardo alla sua giustiziabilità. Il post si conclude con alcune brevi considerazioni circa l’impatto di tale giurisprudenza negli ordinamenti nazionali e sul sistema comune europeo di asilo.

ABSTRACT (ENG)

In the *AHY* judgment (Case C-359/22), rendered on 18 April 2024, the Court of Justice provided further clarifications on the justiciability of the discretionary clause set out in the Dublin III Regulation. This blog post focuses on the two main problematic points affecting the judgment. Firstly, the Court’s reasoning is not fully coherent with its previous case-law on the discretionary clause, in particular with the *MA* judgment which, on that occasion, was significantly reinterpreted (if not really misinterpreted). Secondly, the solution taken by the Court in *AHY* on the interplay between the discretionary clause and the scope of application of EU fundamental rights is really questionable. After analysing these shortcomings, this blog post highlights that the *AHY* judgment can be seen as the ultimate and culminating moment of a case-law providing the Member States with an increasing margin of manoeuvre about both the exercise of the discretionary clause and its judicial review. Finally, the post remarks the impact of that case-law for both the national legal systems and the Common European Asylum System.