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The right to effective judicial protection in the EU legal order

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ABBREVIATIONS

ASJP	Associação Sindical dos Juízes Portugueses
CFI	Court of First Instance
CFR	Charter of Fundamental Rights of the European Union
CFSP	Common foreign and security policy
EAW	European Arrest Warrant
EU	European Union
ECJ	European Court of Justice
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECB	European Central Bank
FD	Framework Decision
GC	General Court
ISDS	Investor-state dispute settlement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

INTRODUCTION

Haltern has remarked that, since there was no Treaty basis for the ECJ's initial human rights jurisprudence, the ECJ had "invented, out of thin air, unwritten European human rights"¹. Rosas describes five stages in the development of human rights protection in the EU: (1) outside the competence of the ECJ (2) as part of general principles of Community law since 1969, (3) explicit reference to the ECHR since 1974–1979, (4) characterization of the ECHR as having "special significance" since 1989; and (5) reference to individual judgements of the ECtHR since the mid 1990s². The activism that the EU Courts are accused of originates very often from cases concerning human rights.³ As Muir has noted, "if one defines judicial activism as judicial decisions going beyond the legal framework created by political institutions, the Court's traditional case-law on fundamental rights is a prime of judicial activism. It is indeed largely accepted that the Court asserted the constitutional importance of fundamental rights in the EU legal order despite the original will of the Treaty makers"⁴. The entry into force of the Lisbon Treaty, 'constitutionalised' the principle of effective judicial protection in Article 19 TEU⁵ and Article 47 of the Charter of Fundamental Rights⁶. At the moment of their introduction, both provisions did not appear as groundbreaking changes to the EU legal framework. In the case of Article 19 TEU, the new provision was mostly considered to codify the Court of Justice's case law on effective judicial protection

¹ Haltern, U. "Integration Through Law." *European Integration Theory*. Eds. A. Weiner and T. Diez. Oxford: Oxford University Press, 2004, p. 183.

² Rosas, Allan. "With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts." *The Global Community Yearbook of International Law and Jurisprudence* (2005), pp. 203–230, p. 214

³ De Búrca, Gráinne. "The Evolution of EU Human Rights Law." *The Evolution of EU Law*. Eds. Paul Craig and Gráinne de Búrca. Oxford: Oxford University Press, 2011.

⁴ Muir, Elise. "The Court of Justice: a Fundamental Rights Institution Among Others." *Judicial Activism at the European Court of Justice*. Eds. Mark Dawson, Bruno De Witte and Elise Muir. Cheltenham: Edward Elgar, 2013, pp. 76–77.

⁵ Article 19(1) TEU, second paragraph, provides that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' (*italics added*). See *infra* section 2.2 for further details on the origin of the provision.

⁶ Article 47 of the Charter contains the fundamental right 'to an effective remedy and to a fair trial'.

when it comes to the role and responsibilities of national courts under Union law ⁷. One of the reasons for the introduction of the second sentence was to give formal recognition to the ‘division of tasks’ between national and European courts that the Court of Justice had elaborated in UPA ⁸. In this light, it can also be observed that in Article 19 TEU the concept of effective judicial protection only refers to ‘protection’ at the national level (it is the Member States that ‘must ensure effective judicial protection’), and not at EU level. Yet, despite the scarce attention dedicated to the provision in the aftermath of the entry into force of the Lisbon Treaty, few observers did already suggest that the introduction of Article 19 could lead to a further expansion of the Court’s case law on effective judicial protection. For example, Anthony Arnall noted in Article 19 a shift of the ‘tectonic plates of Union law’, suggesting that effective judicial protection could, after Lisbon, be considered ‘hierarchically superior’ to national procedural autonomy ⁹. Koen Lenaerts, President of the Court of Justice, also suggested at the time that the provision could have had ‘far-reaching implications’, insofar as it might have pushed the Court to force Member States to introduce new remedies before national courts, in order to guarantee to individuals, in all possible cases, the possibility to challenge EU acts through preliminary references on validity ¹⁰.

Since 2009, the CJEU has seemed to deal with the principle from the perspective of Articles 19 TEU and 47 of the Charter more often, instead of the general principle of effective judicial protection, as it arises from the constitutional traditions common to the Member States. Accordingly, the ECHR is shifting away from being a privileged source in order to elucidate what those common traditions actually are,

⁷ See e.g. C. Lacchi (n 31) 685 and M Bobek, ‘The effects of EU law in the national legal systems’ in C. Barnard and S. Peers, *European Union Law* (OUP 2018).
<https://www.uitgeverijparis.nl/nl/reader/206691/1001470591#voetnootnummer34>
accessed June 15, 2020

⁸ K. Lenaerts, ‘The rule of law and the coherence of the judicial system of the European Union’ (2007) 44 CMLRev 1625, also for a general overview of the Lisbon changes to the EU judicial system; Case C-50/00 P Unión de Pequeños Agricultores [2002] EU:C:2002:462.
<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=47107&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1070098>
⁹

⁹ A. Arnall, ‘The principle of effective judicial protection in EU law: an unruly horse?’ (2011) 36 *European Law Review* 51, no 68

¹⁰ K. Lenaerts, ‘The rule of law and the coherence of the judicial system of the European Union’ (2007) 44 CMLRev 1629, also for a general overview of the Lisbon changes to the EU judicial system

towards being a privileged source of interpretation of the provisions of the Charter ¹¹. This is the constitutional framework that slowly seems to be gaining more weight in the Court of Justice's case law on effective judicial protection.

A) ARTICLE 47 OF THE CHARTER: RIGHT TO AN EFFECTIVE REMEDY BEFORE AN IMPARTIAL TRIBUNAL

Article 47 of the Charter must be viewed in the light of its autonomy versus Articles 6 and 13 of the ECHR and its relationship / conflict with the principle of the effectiveness of Union law.

i) THE MEANING AND AUTONOMY OF ARTICLE 47 OF THE CHARTER VERSUS ARTICLES 6 AND 13 OF THE ECHR

As the Court has held, Article 47 of the Charter reaffirms the principle of effective judicial protection, which is a general principle of Union law stemming from the constitutional traditions common to the Member States¹² and which comprises various elements, including the rights of defense (which in turn embodies the right to be heard), the principle of equality of arms, the right of access to a court, and the right to be advised, defended, and represented ¹³.

This general principle is enshrined internationally in Articles 6 and 13 of the ECHR. In particular, it follows from the title and wording of Article 47 that the Charter recognizes, on the one hand, the right to an effective remedy provided for in Article 13 of the ECHR and, on the other, the right to a fair trial, which includes the right to an independent and an impartial court enshrined in Article 6 par. 1 of the

¹¹ Charter of Fundamental Rights of the European Union, art. 52(3), 2012 O.J. (C 326) 391; ECJ, Case C-279/09, DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, ECLI:EU:C:2010:811 (Dec. 22, 2010), <http://curia.europa.eu/juris/liste.jsf?num=C-279/09>; accessed June 17, 2021 ECJ, Case C-64/16, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, ECLI:EU:C:2018:117 (Feb. 27, 2018), <http://curia.europa.eu/juris/liste.jsf?num=C-64/16>; accessed June 17, 2021 ECJ, Case C-619/18, Comm'n. v. Poland, ECLI:EU:C:2019:531 (June 24, 2019), para. 58, <http://curia.europa.eu/juris/liste.jsf?num=C-619/18>. accessed June 17, 2021

¹² See, e.g., Case C-93/12, ET Agroconsulting-04-Velko Stoyanov v. Izpalnitelen direktor na Darzhaven fond 'Zemedelie,' 2013 E.C.R. I-432, para. 59; Case C-64/16, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, 2018 E.C.R. I-117, para. 35.

¹³ See, e.g., Case C-348/16, Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano, 2017 E.C.R. I-591, paras. 32–35.

ECHR ¹⁴. As is well known, after the entry into force of the Lisbon Treaty, the fundamental definition of the fundamental rights of EU law, within the meaning of the reference to the ECHR as interpreted by the case law of the Strasbourg Court and the constitutional traditions of the Member States, came to an end. The main, and increasingly exclusive, reference text is now the Charter. Especially for the principle of effective judicial protection, the Court has consistently accepted that Article 47 implements in Union law the protection afforded by Article 6 (1) and Article 13 of the ECHR. Therefore, only this provision can be invoked ¹⁵. Furthermore, as Advocate General Villalón pointed out in the case of Samba Diouf (C-69/10) ¹⁶, in declaring through Article 47 of the Charter an element of the Union, "the right to effective judicial protection, as expressed in Article 47 of the CFREU, has, through being recognised as part of European Union law by virtue of Article 47, acquired a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. In other words, once it is recognised and guaranteed by the European Union, that fundamental right goes on to acquire a content of its own, the definition of which is certainly shaped by the international instruments on which that right is based..... but also by the constitutional traditions from which the right in question stems and, together with them, the conceptual universe within which the defining principles of a State governed by the rule of law operate. This is in no way to disregard the very tradition represented by the *acquis* of over half a century of European Union law, which, as a system of law, has given rise to the development of its own set of defining principles...¹⁷"

ii] THE PRINCIPLE OF EFFECTIVE APPLICATION OF UNION LAW AS A LIMIT TO EFFECTIVE JUDICIAL PROTECTION

¹⁴ As specified in the explanations of the Charter, under Union law, the right to a fair trial does not apply only in disputes over civil rights and obligations. It is one of the consequences of the fact that the Union is a community of law, as the Court stated in judgment of 23 April 1986 *Parti écologiste "Les Verts" v European Parliament*. Case 294/83.
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61983CJ0294>
 accessed June20, 2021

¹⁵ C-682/15, *Berlioz Investment Fund SA*, 54, *Europese Gemeenschap v Otis NV and Others*. Case C-199/11, 46 -47, *Chalkor AE Epexergasias Metallon v European Commission*, Case C-386/10 P, 51

¹⁶ <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-69/10> accessed June17, 2021

¹⁷ opinion of AG Case C-69/10 *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=84208&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2846984>
 accessed July 22, 2021

In *Otis* (C-199/11), Court ruled that “... article 47 of the Charter of Fundamental Rights of the European Union does not preclude the European Commission from bringing an action before a national court, on behalf of the European Union, for damages in respect of loss sustained by the Union as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC or Article 101 TFEU.” This is despite the fact that the national court is bound by the Commission's decision finding an infringement of Article 101 TFEU, in which case the Commission is in an advantageous position versus the defendant companies¹⁸. Of particular interest is the case law on the relationship between effective judicial protection and mutual trust and recognition, which requires national courts to refrain from reviewing decisions issued by their counterparts. In *Trade Agency* (C-619/10)¹⁹ ECJ stated that “...Article 34(1) of Regulation No 44/2001, to which Article 45(1) thereof refers, must be interpreted as meaning that the courts of the Member State in which enforcement is sought may refuse to enforce a judgment given in default of appearance which disposes of the substance of the dispute but which does not contain an assessment of the subject-matter or the basis of the action and which lacks any argument of its merits, only if it appears to the court, after an overall assessment of the proceedings and in the light of all the relevant circumstances, that that judgment is a manifest and disproportionate breach of the defendant's right to a fair trial referred to in the second paragraph of Article 47 of the Charter, on account of the impossibility of bringing an appropriate and effective appeal against it...”. This issue arises with greater intensity in the field of judicial cooperation in criminal matters, where the European Arrest Warrant under the Council Framework Decision is the main expression of the principle of mutual trust. Thus ECJ stated (*Radu* C-396/11)²⁰ that “...the observance of Articles 47 and 48 of the Charter does not require that a judicial authority of a Member State should be able to refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued...”. To ensure the effectiveness of the application of EU law, in this case the European Arrest Warrant Mechanism, and to achieve the goal of making the Union an area of freedom, security and justice, based on the high level of trust that must exist between Member States, the demands of real judicial protection seem to be bending²¹.

¹⁸ <https://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=199/11&td=ALL> accessed June 28, 2021

¹⁹ <https://curia.europa.eu/juris/document/document.jsf?text=&docid=126427&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2855458> accessed August 17, 2021

²⁰ <https://curia.europa.eu/juris/liste.jsf?num=C-396/11&language=EN> accessed August 18, 2021

²¹ Η σχέση των άρθρων 19 ΣΕΕ και 47 του Χάρτη των Θεμελιωδών Δικαιωμάτων της ΕΕ υπό το πρίσμα της ανεξαρτησίας και της αποτελεσματικότητας της δικαστικής προστασίας
Ευγενία Β. Πρεβεδούρου (Καθηγήτρια Νομικής Σχολής Α.Π.Θ.)
<https://www.prevedourou.gr/η-σχέση-των-άρθρων-19-σεε-και-47-του-χάρτη-τω/>
accessed August 17, 2021

Effectiveness is also the key to understanding the different outcomes of Melloni (C-399/11) ²² and Jeremy F (C-168/13) ²³ concerning the review of convictions handed down in absentia. In Melloni, the Court held that “Article 53 of the Charter of Fundamental Rights of the European Union must be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution”. The opposite version would affect the effectiveness of the Framework Decision 2002/584, which aims to address the difficulties of mutual recognition of decisions taken in the absence of the person concerned, which are the result of disputes within the Member States over the protection of fundamental rights ²⁴. In Jeremy F (C-168/13), the Court held that, although Framework Decision 2002/584 does not regulate the possibility of providing for an appeal with suspensory effect against a decision to execute a European arrest warrant, it does not prevent Member States from providing for such an appeal ²⁵, provided that the implementation of the Framework Decision and the acceleration of judicial cooperation are not canceled, and (provided) that the final decision is taken within the time limits set by the Framework Decision itself ²⁶. A combined reading of the judgments in Melloni and Jeremy F shows that, where the right to effective judicial protection conflicts with the very effective application of Union law, the Court seeks to strike a reasonable balance, giving precedence to the effectiveness of Union law only in to the extent that the substance of the right to judicial protection is not invalidated. When required by the effectiveness of Union law, then the protection of the Charter becomes the absolute limit beyond which it cannot be exceeded. This is a fundamental difference from the ECHR system, which means that, despite being identical to Article 53 of the ECHR, the counterpart in Article 53 of the Charter does not always allow for the application of higher national standards of protection ²⁷. In

²² <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-399/11> accessed August 18, 2021

²³ <https://curia.europa.eu/juris/liste.jsf?num=C-168/13&language=EN> accessed August 18, 2021

²⁴ Melloni (C-399/11) par. 64

²⁵ Jeremy F (C-168/13) par 51 et seq

²⁶ Jeremy F (C-168/13) par 65 et seq

²⁷ see also opinion 2/13, REQUEST for an Opinion pursuant to Article 218(11) TFEU, made on 4 July 2013 by the European Commission <https://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=302609> 3 par. 189 “.....In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.....” accessed August 19, 2021

a case like *Melloni*, national courts must tolerate the procedural guarantees of other Member States that comply with the Union model, even if they fall short of their own constitutional requirements. In a case like *Akerberg Fransson* (C - 617/10) ²⁸, the combination of criminal and fiscal sanctions must be tolerated if the imposition of only one category of sanctions is not sufficiently effective, proportionate and dissuasive ²⁹. The binding EU model of judicial protection has as its absolute limit the supremacy, unity and effectiveness of Union law ³⁰.

B] STRENGTHENING DECENTRALIZED LEGAL PROTECTION: MAKING THE USE OF ARTICLE 19 TEU

The relationship between the two provisions is actively reflected in the *Berlioz* judgment: “ According to Article 47 of the Charter, entitled ‘Right to an effective remedy and to a fair trial’, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. The obligation imposed on the Member States in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, corresponds to that right”. In other words, in order to achieve the observance of the above fundamental right within the Union, article 19 par. 1 second part TEU imposes an obligation on Member States to provide the remedies and means necessary to ensure effective judicial protection in areas covered by Union law. This article aims to ensure that legal remedies are available in the Member States, so that every citizen concerned can enjoy such protection in all areas governed by Union law. This requirement is linked to the fact that judicial

²⁸ <https://curia.europa.eu/juris/document/document.jsf?text=&docid=134202&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3027985> accessed August 29, 2021

²⁹ *supra* note 28 “(par. 29)... That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 *Melloni* [2013] ECR, paragraph 60)...”

³⁰ In *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198) The CJEU answers the question whether Article 1(3) of the Framework Decision on the European arrest warrant must be interpreted as meaning that when there are strong indications that detention conditions in the issuing Member State infringe Article 4 of the Charter, the executing judicial authority must refuse surrender of the person against whom a European arrest warrant is issued. The CJEU rules that if, after a two-stage assessment, the executing judicial authority finds that there is a real risk of an Article 4 violation for the requested person once surrendered, the execution of the arrest warrant must initially be deferred and, where such a risk cannot be discounted, the executing judicial authority must decide whether or not to terminate the surrender procedure. This conclusion shakes the system of mutual trust upon which the principle of mutual recognition is built. accessed August 29, 2021

review of compliance with EU law is carried out not only by the Union's courts but also through cooperation with national courts. While, at first sight, it could be argued that this provision is primarily procedural in nature, the Court has used it very vigorously in two ways: to fill gaps in judicial protection and to guarantee the independence of judges ³¹.

ij FILLING GAPS IN JUDICIAL PROTECTION

The provision of the second subparagraph of Article 19 (1) TEU aims to fill gaps in judicial protection for disadvantaged parties. The explicit introduction of this obligation in the TEU, which already arose from the whole of EU law, is a direct reaction to the judgments of *Jégo-Quéré* (C-263/02 P) ³² and *Unión de Pequeños Agricultores* (C-50/00 P) ³³. Indeed, although the strict conditions for the admissibility of an action for annulment of acts of general application were regarded by the Court of First Instance itself (now the General Court of the Union) as a breach of the general principle of effective judicial protection, with consequent need for review ³⁴, in the context of appeals against the relevant decisions, considered that the abolition of these conditions by the judge would be tantamount to exceeding his powers ³⁵. It must be emphasized that, even after the amendment of Article 263 fourth sub TFEU with the Treaty of Lisbon, the individual can not challenge legislative acts of general and direct force before the ECJ either directly, due to the limitations of Article 263 TFEU, or incidentally by infringement of national implementing measures, as such measures are not provided for. Whereas, on the one hand, the ECJ considered that it could not deprive a restriction expressly provided

³¹ C-682/15, *BerliozInvestmentFundSA*, EU:C:2017:373, par. 44

³² *Commission of the European Communities v Jégo-Quéré & Cie SA*.
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002CJ0263> accessed August 29, 2021

³³ Judgment of the Court of 25 July 2002. *Unión de Pequeños Agricultores v Council of the European Union*.
<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62000CJ0050> accessed August 28, 2021

³⁴ Judgment of the Court of First Instance (First Chamber, extended composition) of 3 May 2002. *Jégo-Quéré & Cie SA v Commission of the European Communities*.
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62001TJ0177> par 50 accessed July 26, 2021

³⁵ see also Fr. Jacobs' opinion in case C-50/00, *Unión de Pequeños Agricultores*, EU:C:2002:197, par 71 et seq
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CC0050> accessed August 7, 2021

for in the Treaty of its practical effectiveness³⁶ and, on the other hand, the explanations for Article 47 of the Charter affects the conditions for the admissibility of legal aid, the gap in actual legal protection against Union legislation of direct force should be filled at Member State level. As the Court held in *Inuit*³⁷, the obligation of the Member States to provide for a system of legal remedies and procedures to ensure the right to effective judicial protection was reaffirmed in the second subparagraph of Article 19 (1) TEU. Due to its broad wording, it is not addressed to the judge but to the legislature, which should provide the appropriate remedies. In particular, Member States have a responsibility to provide for a system of remedies and remedies capable of ensuring effective judicial review.

Obviously these acts will not be directly challenged before the national courts, but the referral to the Court should be facilitated. However, neither the TFEU nor Article 19 TEU is intended to establish, at the level of national courts and to ensure the application of Union law, other means of legal protection other than those provided for by national law.

The situation would be different only if it were clear from the economy of the national law in question that there is no remedy which, even incidentally, ensures respect for the rights of citizens under EU law, or even if the only remedy access to justice was to force citizens to violate the law³⁸. In the final analysis, neither the fundamental right to judicial protection of article 47 of the Charter nor article 19 par. 1 second sub TEU defines that the citizen may, before the national courts, oppose these acts with the main claim being annulled³⁹.

³⁶ supra note 33 Judgment of the Court of 25 July 2002. *Unión de Pequeños Agricultores v Council of the European Union* (par. 44)

“Finally, it should be added that, according to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually. Although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually (see, for example, *Joined Cases 67/85, 68/85 and 70/85 Van der Kooy v Commission* [1988] ECR 219, paragraph 14; *Extramet Industrie v Council*, paragraph 13, and *Codorniu v Council*, paragraph 19), such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts.”

³⁷ In Case C-583/11 P <https://curia.europa.eu/juris/document/document.jsf?text=&docid=142607&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3092094> accessed August 4, 2021

³⁸ supra note 37 par. 103, 104 “..... As regards the remedies which Member States must provide, while the FEU Treaty has made it possible in a number of instances for natural and legal persons to bring a direct action, where appropriate, before the Courts of the European Union, neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law (Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 40). The position would be otherwise only if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully (see, to that effect, *Unibet*, paragraphs 41 and 64 and the case-law cited)...”

³⁹ supra note 37 par. 106

C] THE CONCEPT OF THE RIGHT TO EFFECTIVE JUDICIAL PROTECTION

The content of the right of effective judicial protection comprises a number of distinct building blocks, such as the right of access to court, the rights of defense, the right to a fair trial, the right to an independent court, the right to comprehensive judicial review, and so on. It has been argued that "the first real move to secure the right to judicial protection" is the Van Gend en Loos judgment, which recognized the principle of direct effect but also the right of individuals to have access to national courts to assert their Union rights. However, the Court first referred to the principle of effective judicial protection in the case of von Colson and KA ⁴⁰ whereas the question referred arose as to whether the provision of a national sanction was sufficient to ensure the protection of Union rights, as described in the relevant Directive. The Court, in the 23rd paragraph of its reasoning, ruled that "IT DOES ENTAIL THAT THAT SANCTION BE SUCH AS TO GUARANTEE REAL AND EFFECTIVE JUDICIAL PROTECTION". In the Johnston case ⁴¹, the Court developed the concept of effective judicial protection by including the right to effective judicial review and access to a competent court. In particular, Johnston was deprived of the possibility of an appeal in the present case in order to challenge a relevant decision of the Northern Ireland Police, made under the orders of the Chief Constable of the Royal Ulster Constabulary and therefore could not invoke its invalidity on based on discrimination on grounds of sex. The Court ruled, in paragraph 17 of its reasoning, that the Directive in question defines "THAT THE MEMBER STATES MUST TAKE MEASURES WHICH ARE SUFFICIENTLY EFFECTIVE TO ACHIEVE THE AIM OF THE DIRECTIVE AND THAT THEY MUST ENSURE THAT THE RIGHTS THUS CONFERRED MAY BE EFFECTIVELY RELIED UPON BEFORE THE NATIONAL COURTS BY THE PERSONS CONCERNED". The reasoning of this judgment clearly shows the great importance which the Court has attached to the legal protection of the rights of individuals, as enshrined in the Treaties, as otherwise Union law would have been deprived of its necessary effectiveness. This argument is based on the idea that at the political level integration is based on the activity of individuals while at the legal level the new legal order of the Union consists of a variety of subjects ⁴².

⁴⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61983CJ0014&from=en> accessed August 21, 2021

⁴¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61984CJ0222&from=EN> accessed August 27, 2021

⁴² That is, from the institutions, the Member States but also individuals, natural and legal persons

At the same time, an extension of the concept of effective judicial protection can be found in the Heylens case ⁴³, where it was stated that “...THE EXISTENCE OF A REMEDY OF A JUDICIAL NATURE AGAINST ANY DECISION OF A NATIONAL AUTHORITY REFUSING THE BENEFIT OF THAT RIGHT IS ESSENTIAL IN ORDER TO SECURE FOR THE INDIVIDUAL EFFECTIVE PROTECTION FOR HIS RIGHT THAT REQUIREMENT REFLECTS A GENERAL PRINCIPLE OF COMMUNITY LAW WHICH UNDERLIES THE CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES AND HAS BEEN ENSHRINED IN ARTICLES 6 AND 13 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS...”. In particular, as regards the provisions of the ECHR, it should be noted that Articles 6 and 13 thereof reflect the principle of effective judicial protection. Article 6 introduces the right to a proper administration of justice while Article 13 introduces the right to an effective remedy. The combined reference to these two articles was often used by the Court, and served as the basis for developing the concept of effective judicial protection in the cases cited above. However, the concept of judicial protection is broader under the provisions of Union law than it is under the provisions of the ECHR. This is clear from Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter), which provides: “ Right to an effective remedy and to a fair trial. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.” In accordance with the above, Article 47 of the Charter establishes the right to a fair and impartial tribunal and reflects all the rights and obligations arising from the Treaties, including administrative decisions of national authorities ⁴⁴. In addition to Article 47 of the Charter, which was mentioned, Article 51 § 1 is particularly important, according to which the right to effective judicial protection is not only upheld against the institutions of the Union but also against the Member States, when operate within the framework of the application of Union law ⁴⁵. Finally, it should be noted that according to the settled case law of the Court, the principle of effective judicial protection incorporates basic principles such as that of a fair trial and also refers to fundamental rights, such as defense, equality of arms, access to the courts, hearing

⁴³ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61986CJ0222&from=EN> accessed August 11, 2021

⁴⁴ Tridimas T. (2006), “The General Principles of EU Law”, Oxford University Press (Second Edition), Oxford, p. 453 - 455

⁴⁵ “The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law...”

and representation, etc..⁴⁶. Thus, effective judicial protection can be seen as an extension of the principle of effectiveness. The ECJ in the Alassini case⁴⁷ and in its subsequent cases seems to have shed light on the relationship between the above concepts. The Court has examined the principle of effectiveness and the principle of effective judicial protection separately and concluded that the principle of effectiveness and the associated principle of equivalence are aspects of the principle of effective judicial protection and incorporate the latter. A strict interpretation of the principle of effectiveness presupposes that national remedies and procedural requirements must not make the exercise of Union rights impossible or difficult⁴⁸. “IT IS FOR THE DOMESTIC LEGAL SYSTEM OF EACH MEMBER STATE TO DESIGNATE THE COURTS HAVING JURISDICTION AND TO DETERMINE THE PROCEDURAL CONDITIONS GOVERNING ACTIONS AT LAW INTENDED TO ENSURE THE PROTECTION OF THE RIGHTS WHICH CITIZENS HAVE FROM THE DIRECT EFFECT OF COMMUNITY LAW , IT BEING UNDERSTOOD THAT SUCH CONDITIONS CANNOT BE LESS FAVOURABLE THAN THOSE RELATING TO SIMILAR ACTIONS OF A DOMESTIC NATURE”⁴⁹. In addition, in the Alassini case the court treated the principle of effective judicial protection as a fundamental right. The Court justified the above acceptance with reference to the other fundamental rights and argued that they were not absolute and that they could be restricted for reasons of general interest provided that those measures complied with the principle of proportionality. This is a further confirmation of the importance of the principle of effective judicial protection⁵⁰. Member States are always bound by the obligation to provide effective remedies and procedures when administering the rights guaranteed by Union Law. Consequently, national rules which impede this right of individuals should be set aside⁵¹. The fact that effective judicial protection qualifies as a general principle of Union law allows the Court of Justice to use it to establish the jurisdiction of national

⁴⁶ Περάκης Μανώλης, Η δικαστική προστασία των θεμελιωδών δικαιωμάτων στην Ευρωπαϊκή Ένωση, Νομική Βιβλιοθήκη 2015, p. 260 -262

⁴⁷ <https://curia.europa.eu/juris/document/document.jsf?text=&docid=79647&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=117818> accessed August 1, 2021

⁴⁸ Craig P. και De Burca G. (2008), “EU Law: Text, Cases and Materials”, Oxford University Press (Fourth Edition), Oxford, p. 320

⁴⁹ Judgment of the Court of 16 December 1976. - Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland. - Reference for a preliminary ruling: Bundesverwaltungsgericht - Germany. - Case 33-76. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61976CJ0033&from=EN> par. 5 accessed August 1, 2021

⁵⁰ par. 63 <https://curia.europa.eu/juris/document/document.jsf?text=&docid=79647&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=123529> accessed August 1, 2021

⁵¹ Dougan M. (2004), “National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation”, Hart Publishing, Oxford, p. 55

courts so that individuals can have access to redress at national level. Thus, national procedural rules should be interpreted in the light of whether they ensure the protection of individuals ⁵².

The principle of effective judicial protection is a manifestation of the principle *ubi jus ibi remedium* ⁵³. This "remedy", which takes the form of an appeal, according to the above should be sufficient to ensure the protection of the rights granted by the Union and includes the right to judicial review before a competent judicial authority. This principle may include issues such as who bears the burden of proof or the obligation of national authorities to provide full justification for their decisions, but in any case, the most important aspect of the principle of effective judicial protection is access to a court, with the power to redress the violation of rights.

All of the above, combined with the fundamental principle of the supremacy of EU law over national law, make it clear that they form the basis for the importance of promoting and ensuring effective judicial protection of individuals within the EU and national legal order. In addition, this Union principle also governs the range of relations between the individual and the Member State, in the sense that the latter is obliged to ensure the implementation and respect of rights arising from Union law only when its action is observed in a field falling within Union law. The principle of effective judicial protection is, moreover, closely linked to the effective application of Union law and the compliance of Member States with the obligations imposed on them.

D) JUDICIAL PROTECTION OF INDIVIDUALS BY THE UNION JUDGE

ECJ consistently states that “..THE TREATY ESTABLISHED A COMPLETE SYSTEM OF LEGAL REMEDIES AND PROCEDURES DESIGNED TO PERMIT THE COURT OF JUSTICE TO REVIEW THE LEGALITY OF MEASURES ADOPTED BY THE INSTITUTIONS . NATURAL AND LEGAL PERSONS ARE THUS PROTECTED AGAINST THE APPLICATION TO THEM OF GENERAL MEASURES WHICH THEY CANNOT CONTEST DIRECTLY BEFORE THE COURT BY REASON OF THE SPECIAL CONDITIONS OF ADMISSIBILITY LAID DOWN IN THE SECOND PARAGRAPH OF ARTICLE 173 OF THE TREATY ⁵⁴”. These remedies are directly provided for in the provisions of the

⁵²Claes M. (2006), *The National Courts' Mandate in the European Constitution*, Hart Publishing, Oxford, σελ. 135 - 136

⁵³ Tridimas (2006) *supra* note 46, p. 422

⁵⁴ LES VERTS CASE par. 23

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61983CJ0294&from=EN>
accessed August 2, 2021

Treaties and concern the actions to be described below. This provides for direct scrutiny of the acts and omissions of the Member States and of the institutions by the central courts of the Union, as well as indirect scrutiny of the action of the Member States and of the institutions through the preliminary reference from the national to the central courts of the Union ⁵⁵. The Commission appears to be the "custodian" of the Treaties and is the only institution under Article 258 TFEU which has the power to bring an action against a Member State before the Court of Justice if it finds that the latter has breached its obligations under the Treaties. On the other hand, individuals are not entitled to bring an action provided for the Commission in the aforementioned Article, nor are those entitled to Articles 259 and 260 TFEU, as likewise, entitled to bring an action against the Commission if it fails to initiate proceedings of these articles, as it is considered that this move is at its discretion and is not considered an "omission of due legal action" ⁵⁶.

Individuals are provided with a number of remedies or remedies to challenge the lawfulness of a Union act or omission, in particular direct action for annulment and failure to act under Articles 263 and 265 TFEU respectively. At the same time, individuals are entitled to bring an action for damages for non-contractual liability of the Community before the Union Judge, as set out in Articles 268 and 340 TFEU. Concerning the action of annulment by individuals (fourth quotation of Article 263 TFEU) the ECJ case law gradually focused on the content and substance of the contested act, considering that each time it was necessary to examine whether the contested act was legally binding and whether it could affect the applicant's legal position ⁵⁷. This is why the legislator now uses the broad meaning of "act" instead of "decision" in the fourth paragraph of Article 263 TFEU (for example Case T-320/09 Planet, where the General Court ruled that whether a Commission act had legal effect on third parties could also be inferred from the content of an email ⁵⁸). As regards acts concerning natural or legal entities directly and individually ECJ stated that “...PERSONS OTHER THAN THOSE TO WHOM A DECISION IS ADDRESSED MAY ONLY CLAIM TO BE INDIVIDUALLY CONCERNED IF THAT DECISION AFFECTS THEM BY REASON OF CERTAIN ATTRIBUTES WHICH ARE PECULIAR TO THEM OR BY REASON OF CIRCUMSTANCES IN WHICH THEY ARE DIFFERENTIATED FROM ALL OTHER PERSONS AND BY

⁵⁵ Β. Χριστιανός, Ρ-Ε Παπαδοπούλου, Μ. Περάκης, ΕΙΣΑΓΩΓΗ ΣΤΟ ΔΙΚΑΙΟ ΤΗΣ ΕΥΡΩΠΑΙΚΗΣ ΕΝΩΣΗΣ, 2η έκδοση αναθεωρημένη, 2021, παρ. 832

⁵⁶ *supra* note 28, par. 701

⁵⁷ *supra* note 28, par. 765

case 60/81 IBM <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61981CJ0060&from=en> accessed August 2, 2021

case 307/81 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0307> accessed August 2, 2021

⁵⁸ *supra* note 28, par. 766,

see also judgment of the General Court case T 320/09 (par. 46 -47)

[https://curia.europa.eu/juris/document/document.jsf?](https://curia.europa.eu/juris/document/document.jsf?text=&docid=163862&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=458383)

[text=&docid=163862&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=458383](https://curia.europa.eu/juris/document/document.jsf?text=&docid=163862&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=458383) accessed August 2, 2021

VIRTUE OF THESE FACTORS DISTINGUISHES THEM INDIVIDUALLY JUST AS IN THE CASE OF THE PERSON ADDRESSED...”⁵⁹. Such cases are limited, eg when the decision has retroactive effect⁶⁰. Regulations adopted in this form may be successfully challenged by an action for annulment if they are in fact "decisions" because, according to the case law, the objective of the Treaty is “... TO PREVENT THE COMMUNITY INSTITUTIONS FROM BEING IN A POSITION , MERELY BY CHOOSING THE FORM OF A REGULATION , TO EXCLUDE AN APPLICATION BY AN INDIVIDUAL AGAINST A DECISION WHICH CONCERNS HIM DIRECTLY AND INDIVIDUALLY ; IT THEREFORE STIPULATES THAT THE CHOICE OF FORM CANNOT CHANGE THE NATURE OF THE MEASURE...⁶¹”. ECJ stated that “...A MEASURE DOES NOT CEASE TO BE A REGULATION BECAUSE IT IS POSSIBLE TO DETERMINE MORE OR LESS EXACTLY THE NUMBER OR EVEN THE IDENTITY OF THE PERSONS TO WHOM IT APPLIES AT ANY GIVEN TIME AS LONG AS IT IS ESTABLISHED THAT IT APPLIES TO THEM BY VIRTUE OF AN OBJECTIVE LEGAL OR FACTUAL SITUATION DEFINED BY THE MEASURE IN QUESTION IN RELATION TO ITS PURPOSE...⁶²”. ECJ recognizes the possibility of an individual appeal if there is an individual link between an otherwise regulatory provision and a person or a specific category of persons⁶³. Furthermore, the Court has held that an act of general application, such as a regulation, may, under certain circumstances, affect certain natural or legal

⁵⁹ ECJ 25/62 Plaumann
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61962CJ0025&from=EN>
accessed August 1, 2021

⁶⁰ ECJ 62/70 Bock V Commission <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61970CJ0062&from=HR>
accessed August 1, 2021

⁶¹ ECJ 789/79 and 790/79 Calpak V Commission <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61979CJ0789&from=HR>
accessed August 17, 2021
concerning a regulation restricting the possibility of granting production aid for specific products

⁶² case 97,99,193,215/86 Asteris V Commission
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61986CJ0097&from=GA>
accessed August 11, 2021

⁶³ case 309/89 Codorniu, Whereas ECJ stated that the applicant undertaking had an individual link to a regulation restricting the use of the word "cremant" in a particular category of sparkling wine because it had already lodged and used a graphic mark with that indication
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61989CJ0309&from=EN>
accessed August 3, 2021

persons ⁶⁴ individually and therefore have the character of an Act against them ⁶⁵. The relevant case law of the ECJ has been extended to the directives, leaving open the possibility of appealing against them, although in principle they bind only their addressees who are the Member States ⁶⁶. Regarding the effects of the admission of the plea of illegality, the inapplicability of the European Union's legal act, established by the plea of illegality, has binding effect only between the parties to the dispute" ⁶⁷. In the field of damages the Court of Justice decided that it has jurisdiction to award damages for non-contractual liability incurred by the EU for harm caused by certain restrictive measures in CFSP decisions ⁶⁸. In so doing, the Court of Justice further extends its jurisdiction within the CFSP. The Court interprets narrowly the limits to its jurisdiction provided for in arts 24 TEU and 275 TFEU ⁶⁹. Whereas before the entry into force of the Lisbon Treaty the Court clearly stated it had no jurisdiction to rule on any action for damages in the area of Common and Foreign Security Policy, under the Lisbon Treaty it has recognised its ability to rule on damages regarding restrictive measures adopted by the EU (Case C-239/12 P Abdulrahim ⁷⁰). In the case of non-discretionary acts, a mere breach of law (even if it is not 'sufficiently serious') should be sufficient to obtain compensation from the EU. However, the CJEU has interpreted the notion of 'illegality' narrowly, excluding, for instance, an incorrect interpretation of a regulation (cases 19, 20, 25, 30/69 Richez-Parise) or lack of diligence by the Commission in applying EU law (case T-178/98 Fresh Marine). In its earlier case law, the General Court theoretically accepted the possibility of EU liability for lawful acts, under specific circumstances. In Dorsch Consult (case T-184/95), it laid down three requirements

⁶⁴ In its judgment of 22 June 2021 the Grand Chamber of the Court of Justice ruled that Venezuela has legal standing to challenge a series of EU restrictive measures provided that the rest of the conditions of Art. 263 (4) TFEU are fulfilled. The ruling is an important development: (a) in the context of challenges to restrictive measures before EU courts; (b) more broadly, in the context of EU procedural law since it settles the question of whether third States have legal standing to challenge acts before EU courts; and c) in the context of judicial review of international sanctions imposed against Venezuela. See further analysis in <http://eulawanalysis.blogspot.com> accessed August 3, 2021

⁶⁵ Case 358/89 Extramet, concerning a regulation imposing an anti-dumping duty on imports of calcium metal from certain third countries and affecting a specific undertaking which was the main importer of that product. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61989CJ0358&from=EN> accessed August 4, 2021

⁶⁶ Case 298/89 Gibraltar <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61989CJ0298&from=HR> accessed August 7, 2021

⁶⁷ Decision EU Council v./ Busacca et C-434/98, ECLI:EU:C:2000:546, pt. 26.

⁶⁸ case C-134/19 P Bank Refah Kargaran v Council ECLI:EU:C:2020:793

⁶⁹ <https://www.europeanpapers.eu/en/europeanforum/in-name-rule-law-cjeu-further-extends-jurisdiction-cfsp-bank-refah-kargaran> accessed August 7, 2021

⁷⁰ <https://curia.europa.eu/juris/liste.jsf?num=C-239/12&language=EN> accessed August 6, 2021

for such possible liability: (1) unusual character of the damage; (2) special character of the damage; and (3) the fact that the lawful act was not justified by a general economic interest. The hypothetical possibility of EU liability for lawful acts was upheld in *Beamglow* (T-383/00), where the Court of First Instance specified that a damage is a typical if it exceeds the boundaries of economic risk typical for a given sector. Nonetheless, the issue of EU liability for lawful acts remained a theoretical question with no winning applicants. In later case law, the CJEU rejected the possibility of such liability (cases C-12 & 13/13 P *Buono*, paragraph 43 ⁷¹). However, in a different case, it explored the possibility of damages in cases of a lawful act impinging upon the essence of a fundamental right, such as the fundamental right to property (case C-120 & 121/06 P *FIAMM*, paragraph 184). However, *FIAMM* does not really allow for liability for lawful acts, 'but rather [refers] to the liability for the disproportionate limitations ... of the fundamental rights which infringe the EU standard specified in Article 52(1) CFR'.

E] THE AREA OF COMPETITION MARGIN OF APPRECIATION OF THE EU COMMISSION AND UNLIMITED REVIEW OF FINES i] THE FIRST PERIOD UNTIL 1980's

Another area, which stands out in the Court's case law is EU competition regulation. In *Chalkor*, the ecj started its analysis concerning judicial review in a competition law dispute by highlighting that, in addition to the review of legality, provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged in regard to the penalties laid down by regulations ⁷². In light of this, the failure to review the whole of the contested decision of the Court's own motion does not contravene the principle of effective judicial protection. Compliance with that principle does not require that the EU Courts – which are indeed obliged to respond to the pleas in law raised and to carry out a review of both the law and the facts – should be obliged to undertake of its own motion a new and comprehensive investigation of the file. The EU Courts have traditionally used two notions to justify maintaining limited powers of review of the EU Commission's competition law decisions: complex economic analysis and the Commission's margin of discretion.

⁷¹ "It is undisputed that, as EU law currently stands, a comparative examination of the Member States' legal systems does not permit the affirmation of a regime providing for non-contractual liability of the European Union for the lawful pursuit by it of its activities falling within the legislative sphere (see judgment in *FIAMM and Others v Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraphs 175 and 179)."

<https://curia.europa.eu/juris/document/document.jsf?jsessionid=04CB1F9030F4628595B3A01552F8164A?text=&docid=158549&page-Index=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9944189>

⁷² C-386/10 P, *Chalkor v Commission*, ecli:eu:C:2011:815, paragraph 53

"The judicial review of the decisions of the institutions was arranged by the founding Treaties. In addition to the review of legality, now provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged in regard to the penalties laid down by regulations"

Already in *Consten and Grundig*, the ecj found that judicial review of complex economic evaluations by the Commission (...) must take account of their nature by confining itself to an examination of the relevance of the facts and legal circumstances which the Commission deduces therefrom. This review must in the first place be carried in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based ⁷³. Whereas initially formulated in relation to Article 101 TFEU, this reasoning was later extended to cover cases involving Article 102 TFEU and merger reviews. Thus, in *Remia*, the ECJ noted that, when confronted with complex economic matters, the Court must “limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers” ⁷⁴. The EU Courts’ self-restraint in cases involving complex economic/technical matters is often accompanied by its corollary principle describing the Commission’s margin of discretion. Interestingly, this concept is used by the EU Courts both to justify deference to the Commission’s appraisals and to deploy a comprehensive judicial review that can lead to setting aside the Commission’s decision. In *Tetra Laval*, the Court of Justice found that while the EU Courts recognize that the Commission has a margin of appreciation in economic and technical matters, that does not mean that they must decline to review the Commission’s interpretation of economic and technical data. The EU Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it ⁷⁵. The normative framework defining competition law has not suffered many changes since its inception. At the same time, the fining policy applied by the European Commission in competition law cases has changed profoundly. The Commission imposed no fines between 1962 and 1969, when the first cartel decision has been adopted ⁷⁶. From that point until the 1980s, the fines imposed by the Commission remained very modest.

ii] THE PERIOD OF AGGRESSIVE FINING POLICY

This trend was replaced in the 1980s by an increasingly aggressive fining policy. In *Pioneer*, a decision that targeted five European subsidiaries and independent

⁷³ C-56/64, *Consten and Grundig v Commission of the eec*, ecl:eu:C:1966:41

⁷⁴ C-42/84, *Remia v Commission*, ecl:eu:C:1985:327

⁷⁵ C-12/03 P, *Commission v Tetra Laval*, ecl:eu:C:2005:87, paragraph 39

⁷⁶ European Commission. Case iv/26.045, *Quinine* [1969], oj L 192, p. 5

distributors of the Japanese manufacturer Pioneer, the Commission imposed the first fine exceeding 10 million US Dollars ⁷⁷. When Pioneer challenged this change of fining practice, the ECJ argued that the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation 17 if that is necessary to ensure the implementation of community competition policy. On the contrary, the proper application of competition rules requires that the Commission may at any time adjust the level of the fines to the needs of that policy ⁷⁸. The CJEU has the constitutional right to perform unlimited judicial review of the fines imposed by the Commission in competition law cases ⁷⁹. At the same time the CJEU's judicial review of fines became more deferential since the 1990s. In fact, the Commission's margin of discretion is invoked by the CJEU to justify everything from the Commission's use of the Fining Guidelines, to the analysis of mitigating circumstances and impact on the market. Consistently, the Commission's margin of appreciation in fining matters is justified by the need to ensure the deterrent effect of fines ⁸⁰. In *Archer Daniels Midland* the CFI was faced with the question whether the Fining Guidelines are compatible with the principle of non-retroactivity of criminal laws. The CFI noted that the principle of non-retroactivity of criminal laws, enshrined in Article 7 ECHR constitutes a general principle of Community law which must be observed when fines are imposed for infringement of the competition rules. The principle of non-retroactivity of criminal laws requires that the penalties imposed correspond with those fixed at the time when the infringement was committed. At the same time, the adoption of guidelines capable of modifying the general competition policy of the Commission as regards fines may fall within the scope of the principle of non-retroactivity ⁸¹. The CFI also highlighted that by adopting and publishing the Fining Guidelines, the Commission imposes a limit on its own discretion: "it cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations and legal certainty" ⁸². The CFI concluded however that "undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation that the

⁷⁷ European Commission. Case IV/29.595, *Pioneer Hi-Fi Equipment* [1980], OJ L 60, p. 21.

⁷⁸ C-100/80, *Musique Diffusion française v Commission*, quoted above, paragraph 100.

⁷⁹ Chapter 16 Case-law of EU Courts on the Right to an Effective Judicial Review

In: Due Process and Fair Trial in EU Competition Law

Author: Cristina Teleki

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16.2 Right to Judicial Review in Competition Law Cases – A Matter of Constitutional Design

⁸⁰ C-100/80, *Musique Diffusion française v Commission*, quoted above, paragraph 108

⁸¹ T-59/02, *Archer Daniels Midland v Commission*, ECLI:EU:T:2006:272, paragraph 42.

⁸² T-59/02, *Archer Daniels Midland v Commission*, quoted above, paragraph 43.

Commission will not exceed the level of fines previously imposed or the method of calculating the fines”⁸³.

In *kme Germany*, the Commission has fined the applicants for having organized a cartel in the air conditioning and refrigeration business. The applicants lodged an action for annulment, contesting the amount of the fine imposed on them and the fact that the Fining Guidelines used by the Commission for the calculation of the fines was a soft law instrument⁸⁴.

The CFI has, first of all, highlighted that whilst the Fining Guidelines “may not be regarded as rules of law, they nevertheless form rules of practice from which the Commission may not depart in an individual case without giving reasons which are compatible with the principle of equal treatment”⁸⁵.

The CFI stressed that its role when reviewing the legality of the fines imposed by the Commission was twofold: (1) to assess whether the discretion exercised by the Commission is in line with the method for calculating the fines established in the Guidelines, and in the contrary (2) to verify whether the departure is justified and supported by sufficient legal reasoning. The CFI also added that “the self-limitation on the Commission’s discretion arising from the adoption of the Guidelines is not incompatible with the Commission’s maintaining a substantial margin of discretion”⁸⁶. Furthermore, the CFI noted that the Commission’s duty was not to scientifically prove the impact of a cartel on a market, but rather “to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market”⁸⁷.

According to settled case-law, the gravity of an infringement has to be determined by reference to numerous factors, such as the particular circumstances of the case and its context; moreover, there is no binding or exhaustive list of the criteria which must be applied⁸⁸. The criteria for assessing the gravity of an infringement may include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which it is able to exert on the relevant market. Thus, on the one hand, the Commission can have regard both of the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and of the market share of the undertakings concerned on the relevant market, which gives an indication of the scale of the infringement. On the other hand, it is important not to attach on one or other of those figures an importance which is disproportionate in relation to other factors and the fixing of an

⁸³ T-59/02, *Archer Daniels Midland v Commission*, quoted above, paragraph 48.

⁸⁴ T-127/04, *kme Germany and Others v Commission*, ecli:eu:T:2009:142

⁸⁵ T-127/04, *kme Germany and Others v Commission*, quoted above, paragraph 33.

⁸⁶ T-127/04, *kme Germany and Others v Commission*, quoted above, paragraphs 34–35.

⁸⁷ T-241/01, *Scandinavian Airlines System v Commission*, ecli:eu:T:2005:296, paragraph 122.

⁸⁸ Order in C-137/95 P, *spo and Others v Commission*, ecli:eu:C:1996:130, paragraph 54.

appropriate fine cannot therefore be the result of a simple calculation based on total turnover ⁸⁹.

In addition, when determining the gravity of an infringement, particular account should be taken of the legislative background and economic context of the conduct complained of ⁹⁰. Also, in order to assess the actual effect of an infringement on the market the Commission must take as a reference the competition that would exist if there was no infringement ⁹¹. Where an infringement has been committed by several undertakings, the Commission must consider the relative gravity of the participation of each separate undertaking ⁹². The gravity of participation implies an analysis of the roles played by each undertaking in the infringement and the duration of their participation ⁹³.

In *Archer Daniels Midland*, the CFI has shown that the impact of a cartel on the market necessarily involves recourse to assumptions. In this respect, the Commission must in particular consider what the price of the relevant product would have been in the absence of a breach of competition law. However, when examining the causes of actual price developments, it is hazardous to speculate on the part played by each of those causes. In this situation, the Commission cannot be criticised for referring to the actual impact on the market of a cartel having an anti-competitive object, such as a price or sales quota cartel, even though it does not quantify that impact or provide any assessment in figures in this respect. Rather, the actual impact of a cartel on the market must be regarded as having been demonstrated if the Commission is able to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market ⁹⁴. In addition, having regard to the administrative and management costs associated with the sound functioning of a complex cartel, and taking account of the risks inherent in the cartel activities, it is reasonable to assume that when undertakings persist with the infringement over a long period of time, this indicates that the cartel members made a certain profit from that cartel which, in turn suggests that the cartel had an actual impact on the relevant market ⁹⁵. The Commission's discretion also extends to the seriousness of the infringement and its

⁸⁹ C-100/80, *Musique Diffusion française v Commission*, quoted above, paragraphs 120 and 121. T-77/92, *Parker Pen v Commission*, ecli:eu:T:1994:85, paragraph 94.

⁹⁰ C-40/73 (joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114–73), *Suiker Unie and Others v Commission*, ecli:eu:C:1975:174, paragraph 612. And C-219/95 P, *Ferriere Nord v Commission*, quoted above, paragraph 38.

⁹¹ C-40/73, *Suiker Unie and Others v Commission*, quoted above, paragraphs 619–620. T-347/94, *Mayr-Melnhof Kartongesellschaft v Commission*, ecli:eu:T:1998:101, paragraph 235.

⁹² *Ibid*, paragraph 623.

⁹³ C-49/92 P, *Commission v Anic Partecipazioni*, ecli:eu:C:1999:356, paragraph 150. And T-6/89, *Enichem Anic v Commission*, ecli:eu:T:1991:74, paragraph 264.

⁹⁴ T-59/02, *Archer Daniels Midland v Commission*, ecli:eu:T:2006:272, paragraphs 160–161.

⁹⁵ T-59/02, *Archer Daniels Midland v Commission*, ecli:eu:T:2006:272, paragraph 166.

composing elements ⁹⁶. The Commission also retains a large margin of discretion in relation to the application of aggravating and attenuating circumstances ⁹⁷.

The CFI noted that the adoption of the Guidelines has not rendered irrelevant the previous case-law under which the Commission enjoys a discretion as to whether or not to take account of certain matters when setting the amount of the fines. Thus, “in the absence of any binding indication in the Guidelines regarding the mitigating circumstances that may be taken into account, it must be concluded that the Commission has retained a degree of latitude in making an overall assessment of the extent to which a reduction of fines may be made in respect of mitigating circumstances” ⁹⁸.

Lastly, the Commission’s discretion extends to the cooperation offered by the members of a cartel during the proceedings ⁹⁹. This means that only an obvious error of assessment by the Commission is capable of being censured, since the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by the undertakings that are being investigated. The quality and usefulness of the cooperation is further qualified in relation to the contributions made by other undertakings ¹⁰⁰.

In the *Eco Swiss* case, concerning the review of arbitration awards, the Court found that an application for annulment of the award must be granted if it is contrary to Article 101 TFEU, where such an obligation exists for the national court in relation to domestic rules of public policy ¹⁰¹. Two aspects of the case may be distinguished. Firstly, the Court found Article 101 TFEU to be of equivalent status to the national rules of public policy, by reason of its significance for the achievement of the Union’s aims and particularly for the functioning of the internal market. The Article’s importance was also found to be underlined by its effect of automatic nullity in case of infringement. The second issue of importance for the Court’s decision was the limited possibility to obtain review in light of Union law pertaining to the fact that arbitration tribunals cannot send preliminary references to the Court of Justice. Thus, the only way to protect individuals’ Union rights in relation to arbitration awards is through a subsequent review of the award before the national court ¹⁰². *Eco Swiss* instigated a discussion on the role of public policy rules in the Union legal order. It was wondered whether certain EU provisions should be considered matters

⁹⁶ Joined cases T-101/05 and T-111/05, *basf v Commission*, ecli:eu:T:2007:290, paragraph 65.

⁹⁷ T-44/00, *Mannesmannröhren-Werke ag v Commission*, ecli:eu:T:2004:218, paragraph 307.

⁹⁸ T-127/04, *kme Germany and Others v Commission*, quoted above, paragraph 115.

⁹⁹ C-328/05, *sgl Carbon ag v Commission*, ecli:eu:C:2007:277, paragraph 88.

¹⁰⁰ T-127/04, *kme Germany and Others v Commission*, quoted above, paragraph 141.

¹⁰¹ Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, par. 41

¹⁰² *Ibidem*, paras 34, 36-37 and 40

of public policy and if so, which ones. Furthermore, the question arose whether a special form of European public policy had been created ¹⁰³

F] RIGHT TO CHALLENGE THE VALIDITY OF EU ACTS BEFORE NATIONAL COURTS THE PRELIMINARY RULING PROCEDURE ¹⁰⁴

The preliminary ruling procedure is an additional channel through which individuals are able to challenge the validity of Union acts. It is very important, where there is no remedy at Union level, that individuals have the possibility to enforce their Union rights before a national court. The process is indirect, with the national court formulating and referring the problem to the Court of Justice. The function of the procedure is to ensure the uniform interpretation and, consequently, the uniform application of Union law¹⁰⁵. Whilst Treaty provisions are unchallengeable by their very nature even before the Union courts, there are other directly applicable Union rules, which are possible to challenge before the national courts. In fact, Article 267(1)(b) TFEU is worded more broadly than Article 263 TFEU. The former allows review of the validity of ‘acts of the institutions, bodies, offices or agencies of the Union’ with no further qualification. Consequently, practically any act of the Union may be challenged through the preliminary ruling procedure ¹⁰⁶. Further, right to challenge the validity of Union acts before national courts does not depend on whether there are any national implementing measures ¹⁰⁷. It may also be noted that with the abolishment of the three-pillar structure, the Courts’ competences have widened significantly. The route to challenge Union law through the national courts is restricted in certain circumstances. It is not possible to challenge an act before the national court if the applicant could have challenged it directly on Union level but

¹⁰³ Hanna Schebesta, ‘Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom’, ERPL, vol. 4, 2010, pp. 847-880, at p. 866

¹⁰⁴ Effective Judicial Protection of Individuals A duty for the Court of Justice or the National Courts? Cecilia Sjöstrand <https://www.cfe.lu.se/sites/cfe.lu.se/files/2020-12/cfewp47.pdf> accessed August 21, 2021

¹⁰⁵ Case 66/80 SpA International Chemical Corporation v Amministrazione delle finanze dello Stato (ICC) [1981] ECR 1191, para 11;

¹⁰⁶ Case C-137/08 VB Pénzügyi Lízing Zrt. v Ferenc Schneider [2010] n.y.r., para 38 “As regards the provisions of European Union law which may be the subject of a ruling of the Court of Justice under Article 267 TFEU, it must be recalled that the Court of Justice has jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the European Union without exception..”

¹⁰⁷ Case C-491/01 The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd [2002] ECR I-11453, para 40

failed to do so ¹⁰⁸. If it is clear that the claimant has standing before the General Court, he must challenge the validity of the act within the two-month time limit prescribed in Article 263(6) TFEU either directly before the GC or before the national courts. However, according to the Court of Justice's ruling in TWD, if there is any doubt as to whether the applicant would have had standing under Article 263(4) TFEU the use of the indirect action is permissible. The requirement in this regard is 'undoubtedly clear'. Furthermore, the applicant in TWD had been expressly informed by the possibility to challenge the act within the sphere of the Union judiciary. It is not apparent whether this aspect of the case entails a separate subjective condition amounting to the knowledge of standing before the GC. Nonetheless, the Court has subsequently referred to the awareness of standing in later case law, indicating that this is in fact the case. A ruling of invalidity in a preliminary reference is, of course, binding on the referring national court ¹⁰⁹. It is further binding on all other courts and all authorities in the Member States, and it sets out the law *ab initio*. Instead of relaxing its own standing rules, the Court has required national courts to open up access for individuals under their duty of sincere cooperation and pursuant to the obligation to protect individuals' right to effective judicial protection. In Verholen ¹¹⁰, the Court stated that even though it was for the national rules to determine standing in the Member States' courts, these rules were not allowed to render the exercise of Union law rights virtually impossible. Consequently, if an individual's rights under EU law are at stake national rules must allow them standing. The Court applied this reasoning in practice in the Borelli case, where national procedural restrictions were denying jurisdiction to review a preparatory administrative decision, which was binding on the Commission when it took the final decision ¹¹¹. Thus, it is the national courts' duty to allow individuals to challenge the legality of EU acts. The success of relying on the Member States to ensure effective judicial protection is nonetheless dependent on their compliance and willingness to reform their legal systems when needed. The decentralised nature of the Union system brings about that the actual application of EU rules to specific cases usually is done on the national level. However, there are several reasons why the indirect action through the national courts should be questioned as being a satisfactory alternative to a direct action. Firstly, it is not within the national courts' mandate to declare a challenged Union act

¹⁰⁸ Case C-188/92 Textilwerke Deggendorf GmbH (TWD) v Commission and Germany [1994] ECR I-833, para 17

¹⁰⁹ Case 52/76 Luigi Benedetti Munari F.lli s.a.s. [1977] ECR 163, para 26

¹¹⁰ Judgment of the Court of 11 July 1991. - A. Verholen and others v Sociale Verzekeringsbank Amsterdam, par. 24
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61990CJ0087&from=en>
accessed August 7, 2021

¹¹¹ Case C-97/91 Oleificio Borelli SpA v Commission [1992] ECR I-6313, para 13
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61991CJ0097&from=en>
accessed August 21, 2021

invalid ¹¹². The right to effective judicial protection requires access to a court, which is competent to rule on the matter. Thus, a direct action for annulment is more appropriate than bringing the case before the national courts with their restricted mandate ¹¹³. Further, the detour through the national courts is burdensome on the applicant from several aspects, such as time and economy ¹¹⁴. The time the Court of Justice takes to answer a question for reference is added to the time in the national court, and if the procedure is too lengthy, national courts may be reluctant to use the procedure. Another problem with the preliminary ruling procedure, from the viewpoint of the individuals seeking redress, is the fact that the reference to the Court of Justice does not constitute a remedy for them. They do not have means to demand a reference, this lies within the power and discretion of the national court to make and the possibility for the applicant to influence the content of the question referred is very limited ¹¹⁵. Ultimately, the national court may even decide not to refer at all. There is further no insurance that the national court will not misinterpret and falsely define the bases for invalidity raised as unfounded ¹¹⁶. In addition, it is the national court that formulates the question and has the main role in the reference. The applicants have only an inferior role with their written observations and short oral submissions, unlike in the direct actions, where there is a full exchange of pleadings and the institution which adopted the measure is allowed to participate fully. The Court of Justice will furthermore not examine questions requested by the parties, where these have not been referred by the national court ¹¹⁷. Moreover, any interim relief granted by the domestic court is confined to the Member State in which the action is brought, unlike the relief awarded by the Court of Justice in accordance with Article 278-279 TFEU, which has effects in the whole territory of the Union ¹¹⁸. It is

¹¹² Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR 4199, para 20

¹¹³ Opinion of Advocate General Jacobs delivered on 21 March 2002 in Case C-50/00 P Unión de Pequeños Agricultores v Council of the European Union [2002] ECR I-6677, para 42.
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62000CC0050&from=HR>
 accessed August 22, 2021

¹¹⁴ AG Jacobs in UPA, para 44

¹¹⁵ Case C-332/92 Eurico Italia Srl, Viazzo Srl and F& P SpA v Ente Nazionale Risi [1994] ECR I-711, para 17; <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61992CJ0332&from=EN>
 A accessed August 1, 2021 G Jacobs in UPA, para 42.

¹¹⁶ AG Jacobs in UPA para 42

¹¹⁷ Case C-189/95 Criminal proceedings against Harry Franzén [1997] ECR I-5909, para 79;
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61995CJ0189&from=en>
 accessed August 6, 2021
 Case C-435/97 World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others [1999] ECR I-5613, paras 28-29
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61997CJ0435&from=en>
 accessed August 6, 2021

¹¹⁸ AG Jacobs in UPA, para 46

also in the interest of legal certainty that acts may not be invalidated a long time after their adoption when the Union Institution or the Member States have taken measures according to it. It is much more in line with this principle that Union acts are challenged within the time limit of two months laid down in Article 263(6) TFEU, since there is no time limit for bringing actions challenging the validity of EU acts regarding the preliminary ruling procedure ¹¹⁹. Another advantage of the direct actions is that the applications are published in the Official Journal. This enhances openness and transparency, which facilitates for interested parties to intervene in questions affecting them or in questions regarding acts against which they themselves might bring an action. Thus, several cases concerning the same issue will be dealt with simultaneously.

There are no direct sanctions if a national court fails to refer and the Court of Justice will not step in and give standing under Article 263(4) TFEU. This would, in fact, go beyond its competence and standing would be dependent on the rules in the applicants' relevant Member State. If the duty to refer is violated, the state may only be liable for damage if the breach is sufficiently serious and a causal link can be shown between the violation of the duty to refer and the damage ¹²⁰. Additionally, an award of damages does not remove the source of the problem and does not bring about a reference of the question to the Court of Justice.

Lastly, it has to be recalled that the action for annulment and the preliminary ruling procedure have different objectives and are within the Treaty two procedures independent of each other. The action for annulment is an autonomous form of remedy with its own objective and conditions differing from the purpose of the court-to-court procedure in Article 267 TFEU.

Therefore, the challenge of an act through the preliminary ruling procedure cannot fully substitute the direct action in Article 263 TFEU. There may still be instances where there is no national measure available to contest before the national courts and thus in those cases an individual will still be completely deprived of a remedy. Having to rely on breaching the rules and relying on their invalidity as a defence in subsequent administrative or criminal proceedings is not an adequate way of ensuring effective judicial protection. In fact, in relation to national law this procedure as an only way to obtain review in light of Union law was expressly discarded by the Court in *Unibet*. Nevertheless, the preliminary ruling procedure is an important alternative for individuals, due to the restricted standing in actions for annulment, with virtually no restrictions on private parties imposed by the Union. The scope of the acts to be challenged is also wider, giving individuals the possibility to challenge old acts and acts not available to contest under Article 263(4) TFEU. It may be mentioned that the ECtHR has had opportunity to express its view on the EU system of judicial review

¹¹⁹ AG Jacobs in *UPA*, para 48.

¹²⁰ Case C-224/01 *Gerhard Köbler v Austria* [2003] ECR I-10239, paras 33-36
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62001CJ0224&from=EN>
accessed August 6, 2021

in the *Bosphorus* case ¹²¹. It started by stating that the responsibility under the ECHR still lies on the Contracting Parties, regardless of whether the alleged infringement is a consequence of that state's obligations under other international agreements. However, if such an international organisation is deemed to ensure at least the protection afforded under the ECHR, the act or omission by a Member State undertaken pursuant to its participation in such an organisation is presumed to be in conformity with the ECHR. This holds true as long as the State is only implementing its obligations originating from that organisation. The presumption can be rebutted if the protection of rights covered by the ECHR is found manifestly deficient ¹²². After these statements, the ECtHR went on to examine the protection afforded under the EU legal system. The Court reiterated the case law on human rights from the European Court of Justice and referred to the EUCFR. The ECtHR further examined the mechanisms through which the observance of fundamental rights was guaranteed in the Union. The Court recognised the limited standing for individuals under Article 263(4) TFEU but accepted the alternative means of redress in actions for damages and the preliminary ruling procedure as sufficiently protecting their rights. It referred to the whole system of review in the EU as guaranteeing the compliance with Union rules, thus also the control exercised by actions brought by Member States and Institutions of the Union ¹²³. Consequently, the restriction on locus standi in Article 263(4) TFEU was not in itself found to be in breach of the ECHR, but a rebuttal of the presumption could be possible if the protection would be deemed as 'manifestly deficient', which, however, was not the case in *Bosphorus* ¹²⁴. Interestingly, the ECtHR stated 'The parties to the domestic proceedings have the right to put their case to the ECJ during the Article [267] process, a right, which is not absolute' ¹²⁵.

G] NATIONAL COURT'S DUTIES ¹²⁶

While the Court of Justice has the final word with regard to the interpretation of EU law, the national courts are the ones de facto applying it. They are in that capacity courts du droit commun and are imperative for the enforcement of Union law and for

¹²¹ *Bosphorus v. Ireland*, Application no. 45036/98, Judgment of 30 June 2005.
<https://www.eui.eu/Documents/DepartmentsCentres/AcademyofEuropeanLaw/Course-MaterialsHR/HR2009/DeWet/DeWetBackgroundReadingCase3.pdf>

¹²² *Ibidem*, paras 153-157

¹²³ *Ibidem*, paras 162-164

¹²⁴ *Ibidem*, para 166;

¹²⁵ *Ibidem* para 164

¹²⁶ Effective Judicial Protection of Individuals

A duty for the Court of Justice or the National Courts? Cecilia Sjöstrand <https://www.cfe.lu.se/sites/cfe.lu.se/files/2020-12/cfewp47.pdf> accessed August 17, 2021

the guarantee of effective judicial protection. According to the principle of sincere cooperation in Article 4(3) TEU, the Member States are obliged to take all appropriate measures in order to ensure the fulfilment of their Treaty obligations and facilitate the attainment of the Union's tasks. They are also required not to act in a way that would risk the 'attainment of the Union's objectives'. Inherent in the duty of sincere cooperation is thus an obligation for national courts to interpret national law in the light of Union law and to resolve any issues of incompatibility with EU law prevailing. This duty was expressly enunciated in *Simmenthal* with inspiration from the principles of primacy and direct effect. Any rule hindering the national court from setting aside a national provision incompatible with Union law in itself constitutes a breach of EU law ¹²⁷. However the obligations of the national courts do not include the creation of new remedies unknown to the legal system in question. With reference to *Factortame I*, the duty rather involves making the most appropriate remedy, already applied within the state available for the individuals trying to protect their Union rights ¹²⁸. The Court has clarified the issue in the case *Unibet* ¹²⁹. *Unibet* raises a number of intertwined themes related to the enforcement of Community law rights through national procedural provisions. Apart from addressing the principles of equivalence, effectiveness and the principle of state liability for breach of EC law, the ECJ was required to examine the principle of effective judicial protection, which has been subject to a controversial interpretation in the widely discussed cases *UPA* ¹³⁰ and *Jégo-Quéré* ¹³¹. In the shadow of those principles, and balancing the effectiveness of Community law against the autonomy of the Member States, the ECJ attempted to determine the extent to which, if at all, national procedural frameworks should be modified to satisfy the demands of the Community legal order. Due to its factual and legal circumstances, *Unibet* was an excellent opportunity for the Court to undertake a complex résumé of case-law related to the right to effective judicial protection as well as the rules concerning the availability of interim protection in national courts in cases involving EC law. For that reason, the issues discussed in *Unibet* reach far beyond Swedish law, and are significant from the perspective both of the European Community and the legislative and judicial bodies

¹²⁷ Judgment of the Court of 9 March 1978. *Amministrazione delle Finanze dello Stato v Simmenthal SpA*. Case 106/77. ECLI:EU:C:1978:49 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61977CJ0106&from=EN> accessed August 7, 2021

¹²⁸ Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others (Factortame I)* [1990] ECR I- 2433

¹²⁹ Case C-432/05, *Unibet (London) Ltd. and Unibet (International) Ltd. v. Justitiekanslern*, 2007 E.C.R. I-2271.

¹³⁰ Case C-50/00, *Unión de Pequeños Agricultores v. Council*, 2002 E.C.R. I-6677

¹³¹ Case C- 263/02, *Commission v. Jégo-Quéré*, 2004 E.C.R. I-3425. For a further appraisal, see Tim Corthaut, Case CFI May 3, 2002, *Jégo-Quéré v. Commission*, T-177/01 and C-50/00 P ECJ July 25, 2002, *Unión de Pequeños Agricultores v. Council*, 9 COLUM. J. EUR. L. 141 (2002)

of all Member States ¹³². Finally, Unibet is of great importance for individuals since it demonstrates the extent to which they may rely on the ECJ's support while trying to enforce their Community rights. Concerning the background of the case, UNIBET, who offers various games of chance via the Internet from the UK and Malta, wanted to promote its services among Swedish customers without organizing a lottery, or planning to establish a permanent basis for its activity immediate on Swedish territory. The Swedish Law on Lotteries, however, prohibits advertisement of foreign lotteries. The foregoing statute simultaneously allows legal promotion of lotteries to a limited extent. First, advertising may be conducted by entities that have obtained permission to organize a lottery within the territory of Sweden. Second, promotion of foreign lotteries is exceptionally permitted as well. One of the conditions for obtaining such permission is that the lottery is arranged as part of an international cooperation with Swedish participation within the field of lotteries. Unibet was unable fulfill these criteria. Therefore, it was not until the judgment in Gambelli ¹³³ that the company decided to place advertisements in a number of Swedish newspapers. This strategy was based on the assumption that the Swedish advertising ban infringed the freedom to provide services (Art. 49 EC). Sanctions for breaching that ban would thus be practically non-applicable. Nonetheless, Unibet was subsequently denied advertising in printed media, and moreover, deprived of the possibility to promote its services on the radio and on TV due to criminal charges brought by Swedish authorities against entities that published the advertisements. No administrative action or criminal proceedings were initiated against Unibet itself. Consequently, since no sanctions were imposed, there was no opportunity for Unibet to contest the legality of such sanctions in the light of Article 49 EC in a national court. In order to defend its rights, Unibet was thus forced to counterstrike. It lodged two claims in a civil court. The first claim concerned compensation of the loss Unibet incurred as a result of its inability to advertise its services in Sweden contrary to EC Law. It is beyond doubt that Swedish Law allows such a claim and that it was declared admissible by the competent national court. In the second claim, Unibet applied for a declaratory judgment stating that the company has the right to advertise its services within the territory of Sweden. The national court found that claim inadmissible under Swedish civil procedure because a claim for a declaratory judgment may be delivered only upon determination of the existence of a legal relationship between the claimant and the respondent. In Unibet no such relationship existed, and admission of the claim and subsequent decision on the right to advertise would force the national court to perform a kind of self-standing abstract examination of the compliance of the Law on Lotteries with EC Law. Such an examination falls outside the competence of the civil courts, which may only examine the compatibility

¹³² This was also demonstrated by the fact that 11 Member States submitted remarks and by in judgment handed down by the Grand Chamber

¹³³ Case C-243/01, Criminal proceedings against Piergiorgio Gambelli and Others, 2003 E.C.R. I-13031. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62001CJ0243>

of the national provisions with the EC Law incidentally in proceedings concerning claims provided for in the various national procedural rules. Unibet claimed, however, that the existing remedies in Swedish law, such as the action for damages, which it had already lodged, did not guarantee effective protection of its rights under Art. 49 EC. Therefore, the principle of effective judicial protection would require the national court to step outside the framework of national procedural law, and oblige it to hand down a judgment declaring that Unibet has a right to advertise its services. These arguments were rejected, however, and the claim for a declaratory judgment was accordingly declared inadmissible. After Unibet appealed against that decision, the case was to be decided finally by the Swedish Supreme Court (Högsta domstolen). The Högsta domstolen was also faced with two other appeals brought by Unibet concerning decisions denying interim protection. Specifically, in both proceedings Unibet applied for interim relief in the form of a lifting of the advertising ban with respect to Unibet until the final judgment was reached. In the proceedings concerning declaratory judgment, the national court refused interim protection due to its determination that Unibet's application for a declaratory judgment was inadmissible. Similarly, in the proceedings concerning compensation for the loss Unibet suffered due to the inability to advertise its services in Sweden, the national court determined that interim protection could not be granted because the applicant had not sufficiently demonstrated the incompatibility of the advertising ban with EC law. All three appeal proceedings eventually found themselves before the Swedish Supreme Court, which stated that its decision should be preceded by an analysis of national courts obligations with respect to the principle of effective judicial protection. In particular, the Högsta domstolen examined whether Community law required consideration of the claim for declaratory judgment and whether, as a result, the Högsta domstolen was to perform an abstract assessment of the compliance of national law with the EC law, even in cases where, under Swedish law, the factual and legal circumstances of the particular case made such an examination inadmissible. The Supreme Court also considered whether it was necessary to grant interim protection to Unibet, and what criteria should be applied in the claim for declaratory judgment, which the national court found inadmissible, and in the claim for compensation. The supreme court made a request for a preliminary ruling under Article 267 TFEU. Before answering the question referred by the Högsta domstolen the ECJ reviewed its body of law pertaining to the principle of effective judicial protection. That doctrine, derived from the common constitutional traditions of the Member States and protected under Arts. 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, constitutes a general principle of EC Law, and is also enshrined in Art. 47 of the Charter of Fundamental Rights ¹³⁴. The ECJ emphasized that the principle of loyalty expressed in Art. 10 EC, assigns the task of ensuring protection of individuals to the national courts acting in accordance with the institutional and procedural structure created by the

¹³⁴ Case C-432/05, Unibet (London) Ltd. and Unibet (International) Ltd. v. Justitiekanslern par 37

[https://curia.europa.eu/juris/document/document.jsf?](https://curia.europa.eu/juris/document/document.jsf?text=&docid=62136&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10706085)

[text=&docid=62136&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10706085](https://curia.europa.eu/juris/document/document.jsf?text=&docid=62136&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10706085)

Member States ¹³⁵. Further, the Court referred to its judgment in *Rewe II* ¹³⁶ and reiterated that, as a rule, there is no requirement to create new procedural remedies which are not present in national law. In order to protect EC-derived rights, one should use the existing procedural framework ¹³⁷. The ECJ, however, also declared, that if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed to ensure, even indirectly, respect for an individual's rights under Community law, then it may be necessary to create a new procedural remedy ¹³⁸. The Court re-asserted the duty of the Member States to provide a system of legal remedies and procedures that will guarantee observance of EC law ¹³⁹. At the same time, the ECJ stressed the fact that national rules should be adjusted only if national actions to safeguard an individual's rights under Community law are treated less favorably than those governing similar domestic actions (principle of equivalence), or if procedures render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) ¹⁴⁰. In addition, the national legislation must not undermine the right to effective judicial protection ¹⁴¹. The Court also made clear that national courts are bound to perform Community law–friendly interpretations of national procedural rules to ensure that individuals enjoy effective judicial protection to the largest possible extent ¹⁴². The ECJ restated the national court's finding that Swedish law does not provide for a self-standing action which seeks primarily to dispute the compatibility of a national provision with higher ranking legal rules ¹⁴³. As a matter of Swedish law, an examination of that kind is only admissible incidentally, within another feasible proceeding instituted before national court ¹⁴⁴. The foregoing rule applies both to claims derived from EC law and from national law ¹⁴⁵. According to the ECJ, the inadmissibility of such a free-standing action seeking to dispute the compatibility of national provisions with Community law does not violate the principle of equivalence ¹⁴⁶

¹³⁵ *Id.* at 38

¹³⁶ *Rewe II*, *supra* note 1

¹³⁷ *supra* note 134, at 40.

¹³⁸ *Id.* at 41

¹³⁹ *Id.* at 42

¹⁴⁰ *Id.* at 43

¹⁴¹ *Id.* at 42

¹⁴² *Id.* at 44

¹⁴³ *Id.* at 46

¹⁴⁴ *Id.* at 49

¹⁴⁵ *Id.* at 50

¹⁴⁶ *Id.* at 50–51

since any application for a declaratory judgment in the context of Community law that is inadmissible is also inadmissible with respect to rights derived from national law. On the other hand, where incidental examination is possible, EC law enjoys preferential treatment. That is because only manifest incompatibility with national law of a higher rank entitles the court adjudicating the case to suspend the national law in question. At the same time, even “regular” incompatibility of national legal provision with EC law obligates national court to disregard that provision ¹⁴⁷. The ECJ also examined whether the need to rely upon procedural possibilities and incidental control admissible under Swedish law rendered it practically impossible or excessively difficult to exercise rights conferred by Community law ¹⁴⁸. Within the context of the Swedish legal system as a whole, the ECJ concluded that Unibet had at least two means of prompting incidental review of the conformity of Swedish law with EC law. First, it could lodge a claim for compensation of loss, which was considered admissible under Swedish procedural provisions ¹⁴⁹. Within the framework of proceedings following such a claim, the national court should perform an examination of the compliance of the Law on Lotteries with EC law irrespective of the assessment of the merits of the case with regard to the requirements for damage and a causal link ¹⁵⁰. Second, Unibet could lodge a motion in administrative proceedings for a permission to advertise its services as an exception to the general ban on advertising. A negative decision regarding such a motion would be subject to review performed by a judicial authority that can also examine the conformity of the Law on Lotteries with the EC law ¹⁵¹. The existence of those two procedural possibilities led the ECJ to conclude that Unibet had at her disposal sufficient measures of protection ¹⁵². Therefore, under the circumstances of the case, the principle of effective judicial protection did not require the additional admissibility of an application for a declaratory judgment ¹⁵³. An opposite conclusion could only be drawn if the national court had conceded that such incidental examination in national proceedings would have been impossible ¹⁵⁴. The ECJ noted that the requirement of effective judicial protection would not be fulfilled if the examination of the conformity of national law with Community law would emerge only after Unibet violated provisions of national law and was forced to bear a threat of criminal or administrative liability ¹⁵⁵.

¹⁴⁷ *Id.* at 53

¹⁴⁸ *Id.* at 52

¹⁴⁹ *Id.* at 56 -57

¹⁵⁰ *Id.* at 59

¹⁵¹ *Id.* at 60

¹⁵² *Id.* at 64

¹⁵³ *Id.* at 65

¹⁵⁴ *Id.* at 65 in fine

¹⁵⁵ *Id.* at 64

ij ILLEGALITY OF A UNION ACT RAISED BEFORE THE NATIONAL COURT REVIEW OF ILLEGALITY

The review of legality of Union acts may be undertaken in different proceedings on Union level and is expressly within the competence of the Court of Justice of the European Union. However, the difficulty for private litigants to instigate proceedings directly before the Union Courts has made the role of national courts in these types of cases very important. The duty of national courts to uphold Union rights entails not only protecting those rights in relation to State action but also in relation to Union action. In addition, the principle of primacy and the need for uniformity imposes restrictions on the national courts when a Union measure is the subject of review. The basic requirements of reviewability of an act entail inter alia that it is binding, produces legal effects vis-à-vis third parties, is definitive and was taken by an EC Institution in the exercise of its competences ¹⁵⁶. In any case, the starting point when an EU act is at issue before the national court is a presumption of legality of every regulation. This follows from on the one hand, Articles 263, 264 and 277 TFEU, which reserve the competence of determining the validity of Union measures to the Union Courts. On the other hand, Article 267 TFEU lays down that the Court of Justice has the power at last instance to rule on the validity where such an action is pending before a national court ¹⁵⁷. Even though the possibility for national courts to rule on the validity of EU law is not expressly precluded by Article 267 TFEU, they are, according to Foto-Frost, not allowed to declare Union acts invalid ¹⁵⁸. The Court argued that otherwise, the main aim of the preliminary ruling procedure; the uniform application of EU law would be threatened. This would entail the risk of the whole EU legal order being undermined and legal certainty impaired. Since Article 263 TFEU confers exclusive jurisdiction on the European Court of Justice to declare a Union act void, the coherence of the Treaty system would necessitate that the power to rule on the validity of an act in a preliminary ruling procedure should be exclusively reserved to the same judiciary. That Court is also arguably in the best position to rule on the issue, since statements and written observations are submitted

¹⁵⁶ Case T-184/97 BP Chemicals Ltd v Commission [2000] ECR II-3145 par. 34 <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=45694&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1353902> accessed August 17, 2021

¹⁵⁷ Case 101/78 Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten [1979] ECR 623, paras 4-5. <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=89964&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1354602> accessed August 19, 2021

¹⁵⁸ Foto-Frost, par 15 <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=94312&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10712850> accessed August 19, 2021

to it. The same conclusion is warranted with regard to the effect of its ruling; if a national court was able to rule on the validity of a Union act, its judgment would only have legal effects within that Member State, whereas the rulings of the Union Courts are binding on all national courts in all Member States. Consequently, an act declared invalid is not to be applied by any court within the Union, without the need for each of them, respectively, to make a preliminary reference ¹⁵⁹. The case still left open the possibility for the national courts to temporarily disapply EU law through the grant of interim relief, further developed in *Factortame I*, *Zuckerfabrik* and *Atlanta*¹⁶⁰. Nevertheless, it may be argued that the national courts are, in fact, entitled to a certain degree of review of the legality of Union acts. This is, however, only to reach a negative result, i.e. only to find the basis for the challenge of validity unfounded. Therefore, a national court is competent to declare a Union act valid, and this gives national courts some mandate to review the validity of EU acts ¹⁶¹. Yet, a test similar to that of *acte clair* is not allowed in these cases. In the *Schul* case, the Court of Justice declared that even though an analogous measure already had been declared invalid by it, a national court could not deduce from this the invalidity of the measure before it ¹⁶². This is logical, since the national court in such a case would have a ‘serious doubt as to the validity’ of that measure. It seems as though the Court doubts the national courts’ ability to draw analogies from its case law, and earlier only supreme courts (or their equivalents) have been entrusted with a similar task ¹⁶³. Nonetheless, the interest of uniformity is important enough to result in such a conclusion, not to mention the fact that a declaration of invalidity in one Member State would not have effects in the rest of the Union. The route to review of validity through the national courts has still been criticised. Indeed, it is somewhat paradoxical to rely heavily on national courts to handle cases of invalidity when they are, in fact, not competent to give a ruling on the matter. It is also important to clarify that any review of a Union act is not allowed to be based on national law. In the case *Internationale Handelsgesellschaft*, the Court of Justice stated that ‘The validity of a [Union] measure or its effects within a Member State cannot be affected by [...] the

¹⁵⁹ Foto-Frost, supra note 158, paras 15-18

¹⁶⁰ Foto-Frost, supra note 158, para 19

¹⁶¹ Foto-Frost, supra note 158, paras 14-15; Case C-27/95 *Woodspring District Council v Bakers of Nailsea Ltd* [1997] ECR I- 1847, paras 19-20; Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association (IATA) v Department for Transport* [2006] ECR I-403, paras 29-32

¹⁶² Case C-461/03 *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] ECR I- 10513, paras 19 and 25.
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=56528&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10715444>
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 accessed August 19, 2021

¹⁶³ See Case 77/83 *Srl CILFIT and others and Lanificio di Gavardo SpA v Ministero della sanità* [1984] ECR 1257.

constitution of that State or the principles of the national constitutional structure’¹⁶⁴. Thus, national courts may not review the constitutionality of the Treaties or any other EU legislation, not even if their national jurisdiction would confer such a power upon them, e.g. in their capacity of constitutional courts. The only basis for review of the validity of EU law is Union law itself - the Treaties and higher Union law, such as the general principles of Union law and, finally, international law. Fundamental rights have arguably acquired a stronger position with the creation of the CFR, which is of the same dignity as the Treaties, and the ratification of the ECHR. The Court of Justice’s approach in this context has consequently evolved towards a higher reliance on the EUCFR and the ECHR. This is indicated by the judgment in DEB¹⁶⁵. The case concerned effective judicial protection and the Court, after stating the usual bases for the principle, went on to undertake a detailed examination of Article 47 of CFR and the case law of the ECtHR¹⁶⁶. Accordingly, this case points towards an extensive and express reliance on the case law of the Human Rights Court, reaffirming the close connection of the CFR with the ECHR.

ii] INTERIM MEASURES

The effectiveness of the alternative route for challenging the validity of an EU act through the preliminary ruling procedure is dependent on the national courts’ powers to grant interim protection for the individuals’ right while awaiting the answer from the Court of Justice. This is especially so with regard to the principle ‘where there is an EU right there should be a corresponding EU remedy’. Moreover, the Court also referred to the importance of ensuring the full effectiveness of Union law and the effective judicial protection of individuals’ rights under Union law¹⁶⁷. In other words, also the possibility of provisionally suspending the application of a contested Union act must be awarded the applicants. The granting of interim relief in national courts

¹⁶⁴ Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, para 3

¹⁶⁵ *supra* note 11, Case 279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland [2010]

¹⁶⁶ *Ibidem*, para 60

¹⁶⁷ Factortame I, Case C-213/89 The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others (Factortame I) [1990] ECR I- 2433, para 21; <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=96746&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10722244>

Case C-226/99 Siples Srl, in liquidation v Ministero delle Finanze and Servizio della Riscossione dei Tributi - Concessione Provincia di Genova - San Paolo Riscossioni Genova SpA [2001] ECR I- 277, paras 17-20

is essentially a matter for the national procedural law to determine. However, the Court has intervened in cases where it thought the judicial protection of individuals' rights to an effective remedy was at stake. The following cases are of importance in this respect.

The first case on the issue was *Factortame I*, in which the national courts were found to have an obligation to grant interim measures in relation to a potentially incompatible national act. The Court based this duty on the need for the protection of rights derived from Union law, even though the national procedural rules would have excluded such an action by the national judge.

In *Zuckerfabrik* the question regarded the provisional suspension of national measures implementing Union law ¹⁶⁸. Such an action would in practice suspend the application of EU law itself, but the possibility for that was not excluded by the Court in *Foto- Frost*. The Court found that the right to effective judicial protection necessitated the availability of interim protection for individuals. If individuals could not get suspension of enforcement of the rule while awaiting the reply by the Court of Justice, the right to challenge the validity of Union law through the preliminary ruling procedure would be compromised. Since the basis of the case was Union law, the coherence of the system of interim protection warranted a result compatible with the judgment in *Factortame I* ¹⁶⁹. At *Unibet* the Court determined that EC law does not require national courts to provide interim relief with respect to an action that is inadmissible in that legal system, at least not in cases where Community law does not undermine that inadmissibility ¹⁷⁰. Interim relief would be required if the admissibility of a legal remedy aimed at ensuring protection of individual's EC-derived rights were uncertain under national law applied in accordance with the requirements of Community law. If this situation arose, the principle of effective judicial protection may require the national court to grant appropriate interim protection to ensure protection of those rights before the question of admissibility of the remedy at hand has been solved ¹⁷¹. With respect to the need to issue interim relief in cases involving claims for compensation, the ECJ stressed that the court seised of a dispute governed by Community law must be able to grant the interim relief sought in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law ¹⁷². According to the principle of procedural autonomy, the national court determines the appropriateness of applying interim measures. In doing so, the national court will apply its national law in accordance with the principles of equivalence and effectiveness ¹⁷³. Thereby,

¹⁶⁸Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] ECR I-415

¹⁶⁹ *Ib.*, paras 16-20

¹⁷⁰ Case C-432/05, *Unibet (London) Ltd. and Unibet (International) Ltd. v. Justitiekanslern* par. 73

¹⁷¹ *Ib.* par 72

¹⁷² *Ib.* par. 76

¹⁷³ *Ib.* par. 80-82

the ECJ highlighted the difference between the initial situation of Unibet and the situations presented in *Zuckerfabrik Süderdithmarschen* ¹⁷⁴ in which the national courts decided on the suspension of national measures adopted pursuant to a Community legal act suspected to conform with higher-ranking EC law. In those events, as in declaring acts of EC law void, national courts must apply uniform, ECJ-specified criteria to suspend the application of those acts. The foregoing rules, however, do not apply in proceedings, like in *Unibet*, in which the claimant seeks provisional measures related to the potential nonconformity of national law with EC law ¹⁷⁵. In *Atlanta*, the national courts' powers to grant interim relief were widened ¹⁷⁶. In this case, the interim measure sought was the grant of import licences additional to quotas prescribed by an allegedly illegal EEC Regulation. The interim relief would in essence have the effect of rendering a Union measure inapplicable while its validity was examined by the Court of Justice. The Court stated that the interim protection available in national courts has to be the same, irrespective if the applicants seek suspension of a national measure based on a Union act or 'settling or regulating the disputed legal positions or relationships for their benefit' ¹⁷⁷. Deduced from the case law above, there are two types of cases where interim protection may be awarded. The first type is when a national rule is challenged, on the basis of its alleged incompatibility with Union law (*Factortame I*) and the second type concerns cases where the validity of a Union act is at issue (*Zuckerfabrik/Atlanta*). The Court of Justice did not give any lead on what conditions should be applied in the first type of case, only in the second. With the ruling in *Unibet*, it is now clear that the Court distinguishes between the two types of situations and that in cases where a national rule's compatibility with EU law is at issue, the conditions for granting interim relief are governed by national law ¹⁷⁸. Before a description of the conditions for the *Zuckerfabrik/Atlanta*-type situation, it should be mentioned that the availability of interim measures is dependent on a reference for a preliminary ruling being made. It is prohibited to grant interim relief if no question is sent to the Court of Justice. It is of great importance for the sake of the coherence of Union law that the granting of relief suspending an allegedly illegal EU rule is subject to uniform conditions in all the Member States. The conditions for obtaining interim measures in such cases were set out in *Zuckerfabrik* and further clarified in *Atlanta*. The main concern of the Court was to ensure the uniform application of EU law by making these requirements correspond to the ones governing the Court's own possibilities of granting such relief

¹⁷⁴ Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, 1991 E.C.R. I-415.

¹⁷⁵ Case C-432/05, *Unibet (London) Ltd. and Unibet (International) Ltd. v. Justitiekanslern* par. 79

¹⁷⁶ Case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761.

¹⁷⁷ *Ib* paras 16-20.

¹⁷⁸ *Unibet*, *supra* note 79, paras 78-81

in direct actions before it ¹⁷⁹. The conditions to be applied by the national courts are the following:

(1) The national court must have serious doubts as to the validity of the Union regulation and must state the reasons for why it should be found illegal ¹⁸⁰.

(2) The national court must refer the question of validity of the Union regulation at issue to the Court of Justice if the question is not already before it. If the Court has ruled in relation to the regulation at hand, this case law has to be respected, and already disqualified grounds for invalidity may not be relied upon again ¹⁸¹.

(3) Urgency: is the interim relief necessary in order to avoid serious and irreparable damage to the applicant ¹⁸²?

(4) Due account must be taken of the Union's interests and also of the discretion enjoyed by the Union institutions who were responsible for the regulation. ¹⁸³

The damage must be liable to materialise before the Court has been able to rule on the validity of the contested Union measure, and there would be no possibility open for the applicant to make good the damage if the measure was to be declared invalid ¹⁸⁴. The application of regulations must also not be suspended without proper guarantees, both with regards to the full effectiveness of Union law and the Union's economic interests ¹⁸⁵. Furthermore, the cumulative effect of a larger number of national courts granting interim measures and the special features of the applicant's situation must be taken into account to assess the potential damage to the regime established by the regulation ¹⁸⁶. It is of great importance that the national courts are cautious in granting interim relief. The allowing of such a measure in one Member State does not hinder the application of the contested regulation in the rest of the Member States. There is thus a possible threat to the uniform application of Union law and risk of distortion of competition. Therefore, national courts should only grant interim relief if the effective protection of the individuals' rights cannot be attained at a Union level. It is moreover important that the interim protection afforded does

¹⁷⁹ Zuckerfabrik, par 27; Atlanta, par 39

¹⁸⁰ Ibidem, paras 23-24 and paras 35-36 respectively

¹⁸¹ Ibidem, para 24 and paras 38, 46 respectively.

¹⁸² Ibidem, para 28 and para 40 respectively

¹⁸³ Atlanta case, para 37

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61993CJ0465&from=EN>

“ The national court must take into account here the extent of the discretion which, having regard to the Court's case-law, the Community institutions must be allowed in the sectors concerned.”
accessed August 19, 2021

¹⁸⁴ Zuckerfabrik, par 29; Atlanta, par 41

¹⁸⁵ Ibidem, paras 30, 32 and paras 42, 45 respectively

¹⁸⁶ Atlanta, par 44

not undermine the suspended EU rules' effect completely ¹⁸⁷. Some of the conditions have proved to be a cause for critique, since it would be very expensive and time-consuming to seek interim relief in all the Member States of the Union. The protection afforded at Union level through Article 278-279 TFEU is much more effective and safeguards the interests of the individual more adequately ¹⁸⁸.

iii] EX OFFICIO APPLICATION OF EU LAW

The procedural law of the different Member States is decisive of the national judges' tasks and role in the judicial process, including their power to raise issues of their own motion. This power can also vary between different types of judicial proceedings. The judges' freedom to raise issues of their own motion is usually more restricted in cases concerning civil matters.

However, the impact of EU law on this field is noticeable, especially since the Court of Justice in some cases has extended the power of national courts to raise issues of their own motion in order, *inter alia*, to ensure the legal protection of Union rights. The following cases show the development of this duty on national courts. Verholen stated that the national courts are allowed to raise issues of Union law of their own motion, provided that they have the right to do so in relation to national law ¹⁸⁹.

In *Salonia*, the Court made clear that the national court is always allowed to consider arguments for invalidity of an EU act, and, on basis of this, send a question for preliminary ruling to the Court of Justice, even though none of the parties has asked for it ¹⁹⁰.

In *van Schijndel* the ECJ was asked whether a national court was under the obligation to raise an issue of Union law in civil proceedings before it ¹⁹¹. The Court referred to the national judges' freedom under the domestic rules to raise issues of national law in the same situation. If such an obligation exists in relation to binding national rules, the same applies to binding Union law ¹⁹². However, the Court did

¹⁸⁷ *Zuckerfabrik*, par 31

¹⁸⁸ AG Jacobs in *UPA*, par. 46

¹⁸⁹ Verholen, para 16

<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=97128&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10735564> accessed August 19, 2021

¹⁹⁰ Case 126/80 *Maria Salonia v Giorgio poidomani and Franca Baglierim née Giglio* [1981] ECR 1563, para 7.

¹⁹¹ Joined Cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705, paras 13-14

¹⁹² *Ibidem*, para 13

not stop there. It stated that where the national law only grants a discretion upon the judges to apply national law on their own motion, this discretion turns into an obligation vis-à-vis Union law, or, in the words of Jans et al: ‘a national discretion implies a [Union] duty’¹⁹³. The basis for this obligation was found in Article 4(3) TEU and the requirement of ensuring the protection granted individuals pursuant to directly effective Union law¹⁹⁴. The Court then went on to examine the national rule at issue and found that it was compatible with EU law. In the balancing test carried out the principle of judicial passivity as the underlying aim of the national regulation was upheld, since the national courts were not required to ‘abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party [...] bases his claim’¹⁹⁵.

Peterbroeck concerned the right to take into account arguments based on Union law ex officio when their use by the applicants was precluded due to being raised too late¹⁹⁶. The Court of Justice found the rule incompatible with Union law, under the test of effectiveness, due to the special features of the rule. Firstly, the Cour d’Appel was the first court in the procedure competent to make a preliminary reference. Secondly, the period for raising new arguments had already run out previous to the hearing before this court. Finally, there appeared to be no other court in different stages of the proceedings that would be capable of ex officio taking into account the compatibility of the contested national measure with Union law¹⁹⁷. Although van Schijndel and Peterbroeck seem similar, the outcome was not the same. However, it seems as though Peterbroeck made the situation unclear as regards to which factors should be considered decisive of the ex officio obligation. Apart from the special circumstances of the case also the restriction on the preliminary ruling procedure by the national rules at hand seem to have been of importance. Indeed, in van Schijndel, the Court recalled the inapplicability of national rules hindering the preliminary ruling procedure. In that case Mr van Schijndel and Mr van Veen had actually had the opportunity to raise their arguments in two courts¹⁹⁸. Van der Weerd and others seems to have clarified some of the questions raised above¹⁹⁹. The Court clearly

¹⁹³ Van Schijndel, Joined cases C-430/93 and C-431/93.
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61993CJ0430&from=EN>
para 14 accessed August 18, 2021

¹⁹⁴ Van Schijndel, par. 14

¹⁹⁵ Ibidem, paras 19-22

¹⁹⁶ Case C-312/93 Peterbroeck, van Campenhout & Cie SCS v Belgian State [1995] ECR I-4599

¹⁹⁷ Ibidem, paras 16-20

¹⁹⁸ Case 166/73 Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Rheinmühlen II) [1974] ECR 33, paras 2-4; Van Schijndel, supra note 113, para 18

¹⁹⁹ Joined Cases C-222/05 to C-225/05 J. Van der Weerd and Others v Minister van Landbouw, Natuur en Voedselkwaliteit [2007] ECR I-4233, para 40

distinguished Peterbroeck from other case law on the merit of its circumstances and the result of those precluding the possibility to rely upon a plea based on EU law. Accordingly, the main rule in *van Schijndel* applies: the party autonomy principle, the protection of legal certainty and the proper conduct of proceedings may be a valid limit in the effectiveness balance as long as the party relying on Union law has had a real possibility to raise the issue before the national court. The obligation of ex officio application is consequently only required where there are special circumstances, as we shall see below. The Court found the only difference between *van der Weerd* and *van Schijndel* to be the level of the national courts in the national judicial hierarchy in the former case, namely its position as court of first and last instance. No distinction was made with regard to the fact that *van Schijndel* concerned civil proceedings and *van der Weerd* administrative proceedings. Balancing national procedural autonomy with the principles of effectiveness and equivalence is a very important task, and the case law on the ex officio application of EU law by national courts shows the approach adopted by the Court of Justice. The reconciliation of the two opposing interests of procedural autonomy and effective protection of Union rights has been done through the procedural rule of reason test. This test is carried out by weighting the restriction of a particular EU right against the aim behind the national rule claimed to be legitimate. The examination is not to be made in a vacuum, but with the specific factual circumstances of the case taken into consideration. The Court formulates it in the following manner:

‘each case which raises the question whether a national procedural provision renders application of [Union] law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct or procedure, must, where appropriate, be taken into consideration.’²⁰⁰

The test under the principle of equivalence is also made with regard to the national rules’ role and underlying aim in that system. This has been confirmed by the Court of Justice in its case *Bulicke* ²⁰¹. The Court has taken on a more strict approach on the obligation on national courts to raise issues of EU law in certain areas. It argues that some situations clearly warrant a departure from the *van Schijndel* principle ²⁰². With regard to consumer protection law, in the *Océano Grupo* case, the Court held that the national court must be able to raise points of EU law in relation to unfair contract terms so that the aims of Directive 93/13 on unfair terms in consumer contracts can be guaranteed, ensuring the objective of protecting a weaker

²⁰⁰ *Peterbroeck*, par. 14; *Van Schijndel*, par 19, Confirmed in Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-957, para 39; Case C-246/09 *Susanne Bulicke v Deutsche Büro Service GmbH* [2010] n.y.r., para 29

²⁰¹ *Bulicke*, par. 35

²⁰² *Van der Weerd* par. 40

party in unbalanced relations ²⁰³. The Court qualified this requirement further in *Cofidis*, where national courts were obliged to apply Union law ex officio also at later stages of the proceedings, when the plaintiff already had had the opportunity to raise EC law but failed to do so due to unawareness or deterrence ²⁰⁴. With the judgment in *Mostaza Claro*, the Court brought up consumer protection law in relation to public policy in an action for annulment of an arbitration award ²⁰⁵. The case concerned the Unfair Terms Directive dealt with in *Océano Grupo* and *Cofidis*. The Court mentioned both the principle of effectiveness and the principle of equivalence, but the application of those principles was not expressly described. The Court referred to its judgments in the previous consumer cases, which had been decided under an effectiveness approach, but not by expressly relying on the effectiveness/equivalence test ²⁰⁶. The Court then confirmed the public policy character of the Directive by using the reasoning in *Eco Swiss*. The characteristics of EU consumer protection were examined in the same way as competition law had been in that case. The public policy character of consumer protection law followed from its fundamental role for the attainment of Union objectives, specifically the aim of improving the standard of living and the quality of life in its territory. Accordingly, the national court was required to raise and examine the issue of unfairness of the contract term ²⁰⁷.

The case *Asturcom* dealt with the same Directive ²⁰⁸. The Court once again affirmed consumer protection as having public policy character, but this time through the express application of the principle of equivalence ²⁰⁹. This case also concerned proceedings in relation to an arbitration award. *Asturcom* was, however, distinguished from *Mostaza Claro* by the fact that the consumer had not participated in the arbitration proceedings, nor challenged the arbitration award in court ²¹⁰. It seems as though the ex officio raising of consumer protection concerns in this case could not be imposed by mere reference to earlier case law on the area. It is also possible that the Court made an attempt to streamline its consumer protection case law with its general case law concerning ex officio application of EU law. Anyhow, the Court carried through a complete effectiveness and equivalence reasoning. The consumer's passivity was considered in relation to the review under the principle of effectiveness, but the Court did not discover any issues of concern with the national

²⁰³ Joined Cases C-240/98 to C-244/98 *Océano Grupo* [2000] ECR I-4941, para 26

²⁰⁴ Case C-473/00 *Cofidis SA v Jean-Louis Fredout* [2002] ECR I-10875, para 34

²⁰⁵ Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421.

²⁰⁶ *Ibidem*, paras 24-29; See also Case C-243/08 *Pannon GSM Zrt. v Erzsébet Suskiné Győrfi* [2009] ECR I-4713, para 31- 32

²⁰⁷ *Mostaza Claro*, paras 34-38

²⁰⁸ *Asturcom*, <https://curia.europa.eu/juris/liste.jsf?num=C-40/08> accessed August 13, 2021

²⁰⁹ *Ibidem*, paras 49-52

²¹⁰ *Ibidem*, paras 33

time limits and accepted the importance of the principle of *res judicata* ²¹¹. The case was, as mentioned, decided in relation to the equivalence principle. The Court affirmed the duty on national courts to apply EU law of its own motion where national procedural rules would impose such a duty or discretion in relation to national public policy ²¹². It would seem as though the public policy concept only applies in the context of arbitration proceedings. However, in *Manfredi* the Court referred to the public policy character of Articles 101 and 102 TFEU with reference to *Eco Swiss* in context of a national damages action ²¹³. Finally, it may be mentioned that the obligation to examine the unfairness of a contractual term was qualified by the Court in *Pannon*, where it held that such an undertaking is to be carried out where the national court ‘has available to it the legal and factual elements necessary for that task’ ²¹⁴. Further, the Court does not have to exclude the term of its own motion if the applicant, after being informed of it, does not wish to invoke the unfairness of the term ²¹⁵. The case law presented above shows a development of a new approach towards the limits of national procedural autonomy. This is indicating a higher sensitivity to the domestic rules’ place in the national legal order since the rules are reviewed in light of their aims and role in that system. *Van der Weerd* is a good example of an attempt to clarify and reaffirm the principles governing national courts’ duty to apply Union law *ex officio*. As regards the principle of effectiveness, the procedural rule of reason in *Peterbroeck and van Schijndel* is used when determining whether a national rules’ impact makes individuals’ exercise of Union rights excessively difficult or virtually impossible. A rule, which is justifiable by reference to for example the principle of party autonomy, is accepted so long as the parties have been ‘given a genuine opportunity to raise a plea based on [Union] law before a national court’ ²¹⁶. The application of the principle of equivalence has also been subject to some developments. The strict approach of this principle takes its starting-point in the EU law claim at hand, comparing it to an equivalent situation governed by national law. The standard set in this case is that of EU law. The case law above concerning public policy is departing somewhat from these presuppositions, since this approach begins by setting out the national notion of public policy. Subsequently, the EU rule is tested against this notion to determine whether it possesses a similar importance. In terms of *ex officio* application of Union law, the Court thus first determines the conditions governing this at the national level

²¹¹ *Asturcom*, supra note 122, paras 35-36 and 39-47

²¹² *Ibidem*, para 53

²¹³ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA* [2006] ECR I-6619, para 31

²¹⁴ *Pannon*, supra note 131

²¹⁵ *Ibidem*, para 33

²¹⁶ *Van Schijndel*, supra note 113, para 18; *Eco Swiss*, supra note 127, paras 34 and 40; *Van der Weerd*, supra note 121, para 41.

and then examines whether the Union rules at issue enjoy comparable dignity. Consequently, the national rule is the standard applied. Hence public policy is not a self-standing requirement, but a part of the test under the principle of equivalence. This is also confirmed by the judgment in *Asturcom* on the area of consumer protection law. The status as public policy was justified with reference to that principle. Accordingly, it seems as though consumer protection no longer is a separate line of cases but is subject to the procedural rule of reason test in the same way as other areas of EU law.

Conclusively, the Court of Justice has extended the duties of national courts to help protect individuals' rights under Union law by requiring them to raise issues of EU law of their own motion. The focus of the procedural rule of reason test of the rules adopted pursuant to national procedural autonomy is also the protection of the right to obtain review of Union law. The national rules are failing the test if they do not provide a chance for individuals to raise a plea of EU law in the domestic proceedings. The duty to raise such issues *ex officio* provides for a way to remedy such a possible national limitation. In some cases, the rules on Union level are of such dignity to make them equal to national public policy. Whilst national procedural autonomy is the starting point, the principles of effectiveness and equivalence need to be fulfilled in order to ensure the effective judicial protection of Union rights. The Court of Justice has made the application of these principles more flexible by taking into account all circumstances in order to ensure that the application of EU law is effective.

H] THE NEW ERA ON EFFECTIVE JUDICIAL PROTECTION ²¹⁷

The objective of this section is to identify and analyze instances in which the principle has been used in a more innovative manner, often outside the ordinary context of domestic procedures for the adjudication of EU law rights - this is true in particular for the rule of law cases - and with fairly surprising results. It is worth underlining that all cases discussed in detail are Grand Chamber cases, a common

²¹⁷ Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature, Matteo Bonelli - Assistant Professor, Faculty of Law, Maastricht University. Review of European Administrative Law (REALaw) 2019 / 2 (December) 1

<https://www.uitgeverijparis.nl/nl/reader/206691/1001470591>

accessed August 1, 2021

feature that may illustrate both the relevance of the decisions and, perhaps more importantly, that the presence of effective judicial protection is not merely a coincidence, but a conscious choice of the Court: judges in Luxembourg seem today willing to give an expansive reading of the principle.

i] EFFECTIVE JUDICIAL PROTECTION AS A FUNDAMENTAL RIGHT

As noted earlier, Article 47 of the Charter contains a fundamental right to effective judicial protection. As all other rights of the Charter, Article 47 applies both to EU institutions and the Member States, but to the latter only when they are implementing EU law in the sense of Article 51 of the Charter, as clarified in Åkerberg Fransson²¹⁸. Article 47 has been defined as the ‘most important provision of the Charter’ aside from Article 51²¹⁹, and most frequently mentioned by national courts in their preliminary references to the Court of Justice²²⁰. The right to effective judicial protection is not absolute, and can be limited under the conditions of Article 52(1) of the Charter²²¹. The introduction of Article 47 has contributed to three developments in the use of effective judicial protection as a fundamental right vis-à-vis the Member States²²². In a first set of cases, Article 47 is used as guidance for the interpretation of EU procedural legislation and a benchmark for the validity of EU law and indirectly of national law. The Samba Diouf case is in this respect an excellent example: the Court was asked to assess whether the measures taken by Luxembourg in implementing Directive 2005/85 on minimum standards for granting and withdrawing refugee status complied with Article 47 of the Charter²²³. Thus, if equivalence and effectiveness lose relevance when the EU adopts procedural norms - in other words, they only apply in the absence of common EU procedural norms²²⁴ -

²¹⁸ Case C-617/10 Åkerberg Fransson [2013] EU:C:2013:105.
<https://www.uitgeverijparis.nl/nl/reader/206691/1001470591#voetnootnummer38>
accessed August 17, 2021

²¹⁹ D. Shelton, ‘Article 47’ in S. Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing 2014) 1209.

²²⁰ See Fundamental Rights Agency, ‘Opinion - Challenges and opportunities for the implementation of the Charter of Fundamental Rights’ (FRA, 30 September 2018) <https://fra.europa.eu/en/opinion/2018/charter-training> accessed 21 October 2019.

²²¹ For an analysis of the limitation conditions, see e.g. Case C-73/16 Puškar [2017] EU:C:2017:725.

²²² Of course, the right to effective judicial protection can be claimed also against EU institutions. See e.g. Case C-334/12 RX-II Jaramillo [2013] EU:C:2013:134.

²²³ Case C-69/10 Samba Diouf [2011] EU:C:2011:524.

²²⁴ Unless EU procedural norms only set minimum requirements, as is the case in the environmental policy area. See M Eliantonio, ‘The relationship between EU secondary rules and the principles of effectiveness and effective judicial protection in environmental matters: towards a new dawn for the “language of rights”?’ (2019) 2 REALaw, forthcoming.

effective judicial protection does not, and remains a parameter that can be used to assess those EU procedural norms and their national implementation, for example in the area of migration and asylum ²²⁵. More specifically the CJEU received a preliminary question asking whether the right to an effective remedy against decisions taken on applications for asylum, and, more generally, the general principle of the right to an effective remedy, must be interpreted as meaning that they preclude rules as a result of which no separate judicial remedy exists against the decision of the competent national authority to examine an application for asylum under an accelerated procedure ²²⁶. The Court recalled that the effectiveness of a remedy depends on the administrative and judicial system of each Member State seen as a whole and that the principle of judicial protection affords an individual a right of access to a court or tribunal, but not to a number of levels of jurisdiction ²²⁷. On the facts of the case, the CJEU noted that the procedure to be applied for the examination of the application for asylum, viewed separately and independently from the final decision which grants or rejects the application for asylum, is a measure preparatory to the final decision. As such, an absence of a remedy does not constitute a breach of the right to an effective remedy, “provided, however, that the legality of the final decision adopted in an accelerated procedure – and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded – may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application” ²²⁸.

A second development is that the Court found the fundamental right to effective judicial protection applicable also in horizontal relationships. In *Egenberger*, a case brought on the basis of Directive 2000/78 on non-discrimination in access to employment, the Court found first that effective judicial protection requires full judicial review of churches’ decisions that religion constitutes a ‘genuine, legitimate and justified occupational requirement’, and second that it can be invoked also in horizontal disputes between private individuals. In this respect, the Court concluded that Article 47 ‘is sufficient in itself and does not need to be made more specific by

²²⁵ For other examples: Case C-348/16 *Moussa Sacko* [2017] EU:C:2017:591; Case C-585/16 *Alheto* [2018] EU:C:2018:584; Case C-556/17 *Torubarov* [2019] EU:C:2019:626. The cases show that even when EU law sets only minimum standards and leaves discretion to the Member States, the latter still need to comply with Article 47 of the Charter.

²²⁶ C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration*, ecli:eu:C:2011:524

²²⁷ *Ibid* par. 46 and 69

²²⁸ *Ibid* par. 69

provisions of EU or national law to confer on individuals a right which they may rely on as such’²²⁹.

If these first two developments were fairly straightforward and predictable after the adoption of the Charter, a third set of decisions might push Article 47 in a less anticipated direction. In addition to the more ordinary function just described and generally to its role as a ‘benchmark’ for assessing procedures established for protecting other Union rights, effective judicial protection could also work as a self-standing fundamental right. In other words, some recent decisions of the Court suggest that it may become applicable even when an individual does not have a claim under another right derived from the Charter or other Union law, as long as the situation at stake falls within the scope of EU law, thus making the Charter applicable on the basis of Article 51 EUCFR²³⁰. Despite the broad drafting of Article 47 - broader in particular when compared to Article 6 and 13 ECHR - this would be a surprising development. The standard position seemed to be that ‘an individual cannot rely on the Charter in the abstract without there being a right he can invoke before a national court’²³¹. In simpler terms, effective judicial protection could not be the only right claimed by the individual, in the sense that a claim under Article 47 had to be linked to a claim under another right deriving from Union law. After all, this is what the text of the provision expresses in quite straightforward terms: ‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy’.

The table started to turn, however, already in *Texdata Software*, where the Court considered the applicant’s claim under Article 47 of the Charter without reflecting on whether another right deriving from Union law was at stake: the CJEU simply ascertained that the Charter was applicable, and then proceeded with analyzing whether the national provisions complied with Article 47 of the Charter. The Court followed a similar approach in the *Liivimaa* case²³².

In *Berlioz*, however, the Court might have pushed its position even further, in particular in terms of the consequences it created. *Berlioz*, a joint stock company

²²⁹ Case C-414/16 *Egenberger* [2018] EU:C:2018:257, para. 78. “Secondly, it must be pointed out that, like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.”

The Court thus affirmed the ‘self-standing’ nature of Article 47. See L Lourenço, ‘Religion, discrimination and the EU general principles’ gospel: *Egenberger*’ (2019) 56 CMLRev 193, 199.

²³⁰ In this sense, a certain degree of connection with EU law is always required: when this is missing, the Charter, and therefore also Article 47, are not applicable. For a frequently discussed example, see Case C-206/13 *Siragusa* [2014] EU:C:2014:126.

²³¹ See T. Konstadinides, *The Rule of Law in the European Union – the internal dimension* (Hart Publishing 2017) 129-130. See also M. Krajewski, ‘Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma’ (2018) 3 *European Papers* 395.

²³² Case C-562/12 *Liivimaa Lihaveis MTÜ* [2014] EU:C:2014:2229.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=157808&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11277504>

accessed August 21, 2021

based in Luxembourg, argued before the Court Administrative of Luxembourg *inter alia* that its right to an effective remedy under Article 47 of the Charter had been breached, since it could not challenge in substance an information order issued by the tax authorities. This order was issued following a request for information of the French tax administration authorities, on the basis of Directive 2011/16. Non-compliance with the information order resulted in a fine for the company, on the basis of the national law of Luxembourg transposing the Directive. Clearly, the Directive in question did not confer rights to individuals, as it only provided the modes for administrative cooperation between Member States' tax authorities. At the same time, the presence of the Directive implied that the situation fell within the scope of Union law, thus making the Charter in principle applicable, including Article 47. Following in substance the Opinion of Advocate General Wathelet, the Court concluded that Berlioz could rely on Article 47 and that it must have been able to challenge the information order before an independent court. While the Advocate General explicitly argued that Article 47 is 'automatically applicable' when the Charter is applicable and not 'conditional upon the alleged violation of a right or freedom guaranteed by the law of the Union'²³³, the Court was more prudent. It still concluded that Berlioz had a right to an effective remedy, but it did not explicitly say that Article 47 is an 'automatically applicable' right. The Court strived to identify a general principle of Union law of 'protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person'²³⁴ and argued that [T]hat protection may be invoked by a relevant person, such as Berlioz, in respect of a measure adversely affecting him, such as the information order and the penalty at issue in the main proceedings, so that a relevant person can rely on a right guaranteed by EU law, within the meaning of Article 47 of the Charter, giving him the right to an effective remedy²³⁵. Formally, there is therefore another right deriving from Union law that triggers the application of Article 47. It is however striking that this other right is an unwritten general principle, not explicitly claimed by the company nor mentioned in the order of reference of the national court. While the Court's approach still signal a certain caution, the following step, namely the automatic application of the right to effective judicial protection envisaged by Advocate General Wathelet, does not seem too far-fetched although, as will be argued in the next section, it would have profound consequences.

²³³ See Case C-682/15 *Berlioz* [2017] EU:C:2017:373, Opinion of AG Wathelet, para. 51: 'the question to be answered by the Court is quite simply whether the application of the Charter automatically renders Article 47 applicable or whether the applicability of that article is conditional upon the alleged violation of a right or freedom guaranteed by the law of the Union'.

²³⁴ Case C-682/15 *Berlioz* [2017] EU:C:2017:373, para 50.
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=190721&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3433053> accessed August 17, 2021

²³⁵ *Ibid*, para. 51.

ii) EFFECTIVE JUDICIAL PROTECTION AS A RULE OF LAW PRINCIPLE

The rule of law includes an effective judicial protection of rights conferred by EU law ²³⁶. In a second version, the principle operates as ‘a concrete expression’ of the value of the rule of law ²³⁷. Here the key provision is Article 19 TEU, often read in conjunction with Article 2 TEU, the latter stating that the rule of law is one of the founding values of the Union. It operates in this version as a more structural principle ²³⁸, with important effects on the EU constitutional system as a whole, affecting the relationship between the Union and Member States, and between the Court of Justice and national courts. In this guise, the principle can operate both at EU and at national level. To start with an example at the EU level, there is a recent set of decisions where the Court used Article 19 TEU, also combined with Article 47 of the Charter, in order to affirm and bolster its jurisdiction in the CFSP ²³⁹. The Rosneft case is the most remarkable of these decisions ²⁴⁰. In Rosneft, the Court was *inter alia* asked to determine whether it had jurisdiction on preliminary references from national courts challenging the validity on a CFSP Decision imposing restrictive measures. As it is widely known, even after Lisbon, the Court does not have full jurisdiction over the CFSP ²⁴¹. It can however review the ‘boundaries’ of the CFSP, monitoring compliance with Article 40 TEU ²⁴², as well as the legality of restrictive measures against natural or legal persons. Ordinarily, and as explicitly suggested by Article 275 TFEU (according to which the Court has jurisdiction ‘to rule on proceedings, brought

²³⁶ NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES
Commission Notice on access to justice in environmental matters (2017/C 275/01)

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0818\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0818(02)&from=EN) accessed August 1, 2021

²³⁷ See Case C-64/16 Associação Sindical dos Juízes Portugueses [2018] EU:C:2018:117, para. 32. “Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals ..”

²³⁸ See also Common Market Law Review, ‘Editorial Comments: EU law between common values and collective feelings’ (2018) 55 CMLRev 1329, 1334: ‘the shift from a functional reading to a structural reading of Article 19 TEU is achieved in the name of “the rule of law”’.

²³⁹ See, in general, on the recent attitude of the CJEU on CFSP cases, G Butler, ‘The Coming of Age of the Court’s Jurisdiction in the Common Foreign and Security Policy’ (2017) 13 European Constitutional Law Review 673.

²⁴⁰ Case C-72/15 Rosneft [2017] EU:C:2017:236. For a comment, see M. Cremona, “‘Effective Judicial Review is of the Essence of the Rule of Law’: Challenging Common Foreign and Security Policy Measures before the Court of Justice’ (2017) 2 European Papers 671.

²⁴¹ See Article 24(1) TEU, second sentence.

²⁴² Article 40 TEU states that ‘The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union’.

in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality' of restrictive measures) , the latter type of actions reach the Court of Justice (more precisely, the General Court) through direct annulment actions. In *Rosneft*, however, the question of the validity of a CFSP restrictive measures decision arose in the context of domestic proceedings before a British court. The first key question for the Court was thus whether it had jurisdiction over the preliminary reference raised by the national court. The Court concluded in the affirmative. First, it tackled a less controversial point, namely whether it could monitor if the Decision at stake complied with Article 40 TEU. As the Treaties do not specify how questions regarding Article 40 should be assessed, the Court easily affirmed that 'the Court has jurisdiction to give a ruling on a request for a preliminary ruling concerning the compliance of Decision 2014/512 with Article 40 TEU' ²⁴³. More challenging was the second part of the assessment, considering that - as noted above - Article 275 TFEU might at a first, literal reading suggest that the Court could only review the validity of restrictive measures in the context of annulment procedures under Article 263 TFEU. In order to overcome the textual limitations of Article 275 TFEU, the Court put in place a broad construction. It first argued that in the 'complete system of legal remedies' created by the Treaties ²⁴⁴, 'requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, a means for reviewing the legality of European Union acts' ²⁴⁵. Preliminary rulings, thus, '[play] an essential part in ensuring effective judicial protection' ²⁴⁶. To support this construction, largely based on the 'old' logic of cases such as *Les Verts*, *UPA* and *Inuit* ²⁴⁷, the Court added a second and more innovative building block to its reasoning of the Court. It made reference to a set of provisions including: Article 19 TEU, which assigns to the Court the responsibility to ensure that EU law 'is observed', Article 47 of the Charter, containing the right to effective judicial protection and in general to the value of the rule of law contained in Article 2 TEU. Read together, these basic principles of EU law allowed the Court to conclude that 'it would be contrary to [...] the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of Article 275 TFEU' ²⁴⁸. A similar reliance on the rule of law, the principle of effective judicial protection, and Article 19 TEU could be found also in

²⁴³ Case C-72/15 *Rosneft* [2017] EU:C:2017:236, para. 63.

²⁴⁴ *Ibid*, paras 66-67.

²⁴⁵ *Ibid*, para. 68.

²⁴⁶ *Ibid*, para. 71.

²⁴⁷ The three cases are all mentioned in para. 66 of the *Rosneft* decision.

²⁴⁸ Case C-72/15 *Rosneft* [2017] EU:C:2017:236, paras 75 and 81. The Court adds also another block a contrario: had the Court not affirmed jurisdiction, it would have been up to the national courts to assess the validity of restrictive measures, and this would be against the established case law of the Court and the unity of Union law.

another key ‘jurisdictional’ ²⁴⁹ case of the Court in the CFSP, namely *H v Council* ²⁵⁰. The Luxembourg Court found that it had jurisdiction over staffing cases even when the latter are set in the context of the CFSP. Thus, Article 19 TEU and the principle of effective judicial protection have been used in this context to expand the jurisdiction of the Court over EU measures, specifically CFSP measures.

Although the right to an effective legal remedy constitutes a general principle of EU law and was reaffirmed by the Charter, it can only be enforced when the subject-matter of the dispute in the main proceedings is connected with the EU law. In *Chartry*, the Court noted that a dispute between a Belgian national and the Belgian State concerning taxation of activities carried out within the territory of that Member State, was not connected in any way with the provisions of the EC Treaty on the free movement of persons, of services, or of capital ²⁵¹. Moreover, that dispute did not concern the application of national measures by which that Member State implement EU law ²⁵².

In the case *deb* ²⁵³, the CJEU was asked whether the right to effective judicial protection entails legal aid for legal persons in the form of dispensation from payment of the costs of proceedings or from provision of security for costs before an action is brought. The CJEU highlighted that “the assessment of the need to grant that aid must be made on the basis of the right of the actual person whose rights and freedoms as guaranteed by EU law have been violated, rather than on the basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid” ²⁵⁴. The Court showed that the principle of effective judicial

²⁴⁹ G. Butler (n 55) 676.

²⁵⁰ Case C-455/14 P *H v Council* [2016] EU:C:2016:569
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=181843&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11284756>

accessed August 3, 2021 “....In that regard, it must be noted that, as is apparent from both Article 2 TEU, which is included in the common provisions of the EU Treaty, and Article 21 TEU, concerning the European Union’s external action, to which Article 23 TEU, relating to the CFSP, refers, the European Union is founded, in particular, on the values of equality and the rule of law The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law....”

²⁵¹ C-457/09, *Claude Chartry v Belgian State*, ecli:eu:C:2011:101.

²⁵² C-457/09, *Claude Chartry v Belgian State*, quoted above, paragraphs 22–26

²⁵³ *supra* note 11

²⁵⁴ *Ibid* par. 42

protection may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer ²⁵⁵.

iii]FROM THE INFLUENCE OF THE “ *Associação Sindical de Juízes Portugueses*” CASE LAW TO THE MONITORING OF THE POLISH JUDICIAL REFORM ²⁵⁶

On 24 June 2019, the Court of Justice of the European Union (CJEU) delivered its much-awaited judgment in *Commission v. Poland* ²⁵⁷, declaring that Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) of the Treaty of the European Union (TEU). This judgment was the outcome of an infringement proceeding initiated by the Commission against Poland in response to its reform of the Law on the Supreme Court that lowered the mandatory retirement age of judges. In a move without precedent, the CJEU suspended the application of the Law until the delivery of the judgment as an interim measure, and eventually held that Poland had infringed the obligation to respect judicial independence. This judgment was grounded on a bold reading of Article 19(1) TEU, which has become a powerful instrument to monitor respect for judicial independence in domestic legal systems. In that regard, *Associação Sindical dos Juízes Portugueses (ASJP)* ²⁵⁸, decided about a year earlier on 27 February 2018, represents the seminal case. *ASJP* was brought by an association of judges to challenge a law reducing the salaries of public sector workers in Portugal meant to reduce budget deficits to meet the requirements to qualify for EU financial assistance. The CJEU seized the occasion to uphold the principle of judicial independence as a primary obligation for the Member

²⁵⁵ Ibid par. 59 - 62 “..In the light of all of the foregoing, the answer to the question referred must be that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve. In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant’s capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.”

²⁵⁶ Torres Pérez A. From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence. *Maastricht Journal of European and Comparative Law*. 2020;27(1):105-119. doi:10.1177/1023263X19892185

²⁵⁷ Case C 619/18 *Commission v. Poland*, EU:C:2019:531

²⁵⁸ Case C-64/16 *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117

States under the second subparagraph of Article 19(1) TEU. As a result, evaluating the domestic judicial structure against the backdrop of judicial independence fell under the CJEU's jurisdiction. This construction was later reaffirmed in cases such as *Minister for Justice and Equality (LM)* ²⁵⁹, *Achmea* ²⁶⁰, *Escribano Vindel* ²⁶¹, reaching full momentum in *Commission v. Poland*, the first case in which the CJEU found a breach of judicial independence on grounds of the second subparagraph of Article 19(1) TEU ²⁶². In *ASJP*, the CJEU had crafted a new instrument to monitor domestic legal systems at a moment when legislative reforms in Poland (among other countries) posed a major threat to judicial independence ²⁶³. While such a bold interpretation of Article 19(1) TEU can be celebrated from the perspective of the rule of law, it might be questioned from the standpoint of the Member States' procedural autonomy. At the same time, the EU Charter of Fundamental Rights (the Charter), which contains the right to an effective remedy and a fair trial in Article 47, was marginalized to the extent that it was merely used as a hermeneutic tool.

²⁵⁹ Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586.

²⁶⁰ Case C-284/16 *Achmea*, EU: C:2018:158.

²⁶¹ Case C-49/18 *Carlos Escribano Vindel*, EU: C:2019:106.

²⁷¹ <https://eur-lex.europa.eu/legal-content/el/TXT/?uri=CELEX:62019CJ0791>

The European Commission brought an action before the Court of Justice seeking a declaration that, in adopting the new disciplinary regime applicable to judges of the Sąd Najwyższy (Supreme Court, Poland) and to judges of the ordinary courts, Poland has failed to fulfil its obligations under EU law. By its judgment the Court of Justice upheld all the complaints made by the Commission and found that Poland had failed to fulfil its obligations deriving from EU law. accessed August 1, 2021

²⁶³ L. Pech and S. Platon, 'Judicial independence under threat: the Court of Justice to the rescue in *ASJP*', 55 *Common Market Law Review* (2018), p. 1827-1854, 1849

iv] PRIMARY OBLIGATION TO ENSURE JUDICIAL INDEPENDENCE UNDER EU LAW

The ECJ's judgment in the case of *Associação Sindical dos Juizes Portugueses* (Case C-64/16) is noteworthy for two reasons. First, it is arguably the most important judgment since *Les Verts* as regards the principle of the rule of law in the EU legal system. Secondly, it comes close to being the EU equivalent of the US Supreme Court case of *Gitlow* as regards the principle of effective judicial protection (*Gitlow*²⁶⁴ led to the progressive application of the US federal Bill of Rights to all state norms even when the states act within their own sphere of competence).

With respect to the rule of law, in a couple of inspired and inspiring paragraphs, the Court offers a neat digest of the essential functions and features of this fundamental value in the EU's legal framework. One of the most innovative and welcome aspects of this judgment is its conclusion on a combined reading of Article 2 TEU (values on which EU is based and common to its Member States), Article 4(3) TEU (principle of sincere cooperation) and Article 19(1) TEU (principle of effective judicial protection of individuals' rights under EU law): "...The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law ... It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection. ... In order for that protection to be ensured, maintaining [a national] court or tribunal's independence is essential...". The Court's ruling in Case C-64/16 establishes a general obligation for Member States to guarantee and respect the independence of their national courts and tribunals. What is particularly noteworthy is that the Court has done this solely based on Article 19(1) TEU read in light of Article 2 and Article 4(3) TEU. This reasoning should hopefully lead the Polish government to stop repeating the claim that it can introduce whatever judicial 'reforms' it sees fit as the organisation of national judiciaries falls outside EU competence. More specifically in 2014, the Portuguese legislature introduced a temporary reduction in the remuneration paid to the persons working in the Portuguese public administration, including judges. The *Associação Sindical dos Juizes Portugueses* (ASJP), acting on behalf of members of the *Tribunal de Contas*

²⁶⁴ GITLOW v. PEOPLE OF THE STATE OF NEW YORK
<https://www.law.cornell.edu/supremecourt/text/268/652> accessed July 23, 2021

(Court of Auditors), decided to challenge the salary-reduction measures on the main ground that they would infringe ‘the principle of judicial independence’ enshrined, not only in the Portuguese Constitution, but also in EU law, in the second subparagraph of Article 19(1) TEU (‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’) and Article 47 of the EU Charter of Fundamental Rights (Right to an effective remedy and to a fair trial). This issue was then subsequently referred by the Portuguese Supreme Administrative Court to the ECJ for a preliminary ruling. What is particularly noteworthy is that the ECJ focused exclusively on Article 19(1) TEU, which the Court described as giving ‘concrete expression to the value of the rule of law stated in Article 2 TEU’ having previously recalled that mutual trust between national courts ‘is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded’. On the basis of a combined and powerful reading of Articles 2, 4(3) and 19(1) TEU, the Court underlines, more than ever before, the duties of national courts under the EU Treaties and in particular, their duty to ensure ‘that in the interpretation and application of the Treaties the law is observed’ while repeatedly observing that in order for the EU legal system to operate efficiently and for individuals to continue to benefit from the principle of the effective judicial protection of their EU rights, it is essential that national courts remain independent. Whilst the outcome of the case itself is not surprising, it is the Court’s approach which is particularly noteworthy. Before concluding that the ‘salary-reduction measures at issue in the main proceedings cannot be considered to impair the independence of the members of the Tribunal de Contas’, the Court referred to a number of criteria which must guide national courts should they have to review measures which are alleged to infringe judicial independence: Are the measures specific to judges? Are the measures justified by an overriding reason of public interest? Can they be considered to weaken their independence? On the basis of these criteria, the Court concluded that ‘the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Tribunal de Contas’.

v. From effective legal protection...

The expansive understanding of Article 19(1) TEU is heavily grounded on the rule of law as a fundamental value on which the EU is founded (Article 2 TEU). As a fundamental value, the rule of law requires that the legal system provide to individuals the right to challenge before a court acts of public authorities in the fields covered by EU law. Relatedly, the CJEU declared that Article 19 TEU ‘gives concrete expression to the value of the rule of law stated in Article 2 TEU’²⁶⁵ and that ‘the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.’²⁶⁶ Moreover, the CJEU indicated that mutual trust between the Member States and in particular the respective courts derives from sharing the set of common values contained in Article 2 TEU. The mutual trust argument was not fully developed in *ASJP*, but it was key in the *LM* case²⁶⁷, which involved a European arrest warrant (EAW) requesting the transfer of a person to Poland with a view to criminally prosecuting him. The person concerned was arrested in Ireland, and he claimed that, if surrendered, there was a real risk he would be denied his right to a fair trial as a consequence of the legislative reforms of the justice system in Poland. Indeed, he relied on the Commission’s reasoned proposal of 20 December 2017 submitted in accordance with Article 7(1) TEU regarding the rule of law in Poland. The CJEU recalled that the EAW mechanism is based on mutual trust between Member States, which, in turn, is founded on the premise that the courts of other Member States meet the requirement of effective judicial protection, including independence and impartiality²⁶⁸. Thus, the obligation to ensure effective judicial protection stemming from Article 19(1) TEU is essential for securing mutual trust and the adequate functioning of the EAW. Eventually, the CJEU admitted that the existence of a real risk that the person in respect of whom a EAW has been issued would suffer a breach of his fundamental right to an independent tribunal would enable, exceptionally, the executing judicial authority to refrain from surrendering that person²⁶⁹. The argument in *ASJP* regarding Article 19(1) TEU was complemented with a reference to the principle of sincere cooperation in Article 4(3) TEU²⁷⁰. The obligation to ensure judicial review applies not only to the CJEU, but also to national courts, as a joint enterprise²⁷¹. Following the second subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring effective judicial

²⁶⁵ *Ibid.*, para. 32.

²⁶⁶ Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 36.

²⁶⁷ Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)*, para. 46-59.

²⁶⁸ *Ibid.*, para. 58.

²⁶⁹ *Ibid.*, para. 59.

²⁷⁰ Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 34.

²⁷¹ *Ibid.*, para. 33.

protection for individual parties in the fields covered by EU law ²⁷². Indeed, the States' obligation to provide effective remedies to ensure the rights conferred upon individuals by EU law under the principle of cooperation was already settled case law ²⁷³.

Still, the CJEU had acknowledged that the procedural rules regarding remedies were a matter for the domestic legal order of each Member State under the principle of procedural autonomy. At the same time, the CJEU required that the domestic remedies in place fulfil the principles of equivalence and effectiveness in order to secure the principle of effective judicial protection ²⁷⁴. The CJEU had also declared that effective judicial protection was a general principle of EU law enshrined in Articles 6 and 13 ECHR ²⁷⁵. In *ASJP*, the CJEU took a step further by claiming that this principle was established in the second subparagraph of Article 19(1) ²⁷⁶. The CJEU concluded that 'every Member State must ensure that the bodies which, as "courts or tribunals" within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection ²⁷⁷. This

²⁷² Ibid., para. 34.

²⁷³ Already in 1976, in Case C-33/76 *Rewe*, EU:C:1976:188, para. 5, the CJEU declared: 'Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.' See also, Case C-432/05 *Unibet*, EU:C:2007:163, para. 38

²⁷⁴ Case C-168/05 *Mostaza Claro*, EU:C:2006:675, para. 24: 'According to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member States, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).'

²⁷⁵ Case C-432/05 *Unibet*, para. 37

²⁷⁶ Case C-64/16 *Associação Sindical dos Juizes Portugueses*, para. 35. "The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter..."

²⁷⁷ Ibid., para. 37. "It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection."

same conclusion was reproduced in *Commission v. Poland* ²⁷⁸. This paragraph is key for the new interpretation of the second subparagraph of Article 19(1) TEU. If in the past it was understood that domestic courts, as European courts, had to provide remedies to guarantee the effectiveness of the rights of individuals under EU law, now the content of the Member States' obligation is expanded. The obligation under Article 19(1) TEU involves not only the effectiveness of the judicial remedies provided, but also that the 'courts or tribunals' themselves meet basic prerequisites for effective judicial protection. At the same time, the competence of the CJEU also expands. If in the past the CJEU had examined specific procedural rules under the principles of equivalence and effectiveness to ensure the principle of effective judicial protection, now also the rules on the organization and structure of the judiciary are placed under the oversight of the CJEU from the perspective of the rule of law.

vi....to judicial independence

The next step taken by the CJEU was to claim that one of the requirements of effective judicial protection is judicial independence. In order to justify this move, in *ASJP*, the CJEU referred to the right to an effective remedy (Article 47 of the Charter) and to the preliminary reference procedure (Article 267 TEU) ²⁷⁹. With regard to the preliminary reference procedure, the CJEU claimed that the requirements of effective judicial protection include judicial independence since only independent courts can activate the preliminary ruling procedure. The CJEU argued that the independence of domestic courts is 'essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that [...] that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, the criterion of independence' ²⁸⁰. There is, however, a flaw in this argument. It is one thing to say that only courts and tribunals can activate this mechanism, and that independence is

²⁷⁸Case C-619/18 *Commission v. Poland*, para. 55. "More specifically, every Member State must, under the second subparagraph of Article 19(1) TEU, ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection (judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 37, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 52)"

²⁷⁹ In contrast, in *Commission v. Poland*, the obligation to respect judicial independence is grounded solely on Article 47 of the Charter, while the reference to the preliminary ruling procedure is moved to the general reasoning pertaining to the principle of effective judicial protection. Case C-619/18 *Commission v Poland*, para. 45

²⁸⁰ Case C-64/16 *Associação Sindical dos Juizes Portugueses*, para. 43.

an essential requirement of a body that aspires to serve as a court or tribunal. It is another thing altogether to say that judicial independence is an obligation that derives from the preliminary ruling mechanism. If a body is not independent, the consequence is that it does not qualify to make a preliminary reference ²⁸¹. In short, in the context of the preliminary reference, independence is a criterion in the determination of whether a body may make use of the preliminary reference, not an obligation to be met, let alone a general obligation for all domestic adjudicatory bodies. Moreover, substantiating an obligation of judicial independence based on the case law on Article 267 TFEU ²⁸² presents an additional problem. Indeed, the concept of independence has been interpreted leniently in the context of preliminary references in order to expand the range of bodies that can submit references to the CJEU ²⁸³. As Tridimas argued, the CJEU is less concerned with substantive standards of fairness and independence, and more with making the preliminary reference available to all bodies dealing with EU law ²⁸⁴. For instance, in *Gabalfrisa* ²⁸⁵ the CJEU accepted a reference by a regional economic and administrative court from Spain, even though its members may be removed from office by the Minister of Economic Affairs and Finance ²⁸⁶. More recently, however, the CJEU has shown a stricter attitude. For instance, in *TDC* ²⁸⁷ it argued that the referring body could not be regarded as independent since its members could be removed from office by the Minister, who also had the power to appoint them ²⁸⁸. Furthermore, there is another strand of case law in which the CJEU has interpreted the concept of judicial independence in the context of Directives requiring the possibility of effective remedy before a court or tribunal ²⁸⁹. In any event, the CJEU built an obligation to respect judicial independence on the grounds of Article 19(1) TEU.

In that respect, the main argument relies on Article 47 of the Charter. In *ASJP*, the CJEU claimed that judicial independence was essential in order to ensure the right to an effective remedy by referring to Article 47 of the Charter ²⁹⁰. This was a

²⁸¹ M. Bonelli and M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary', 14 *European Constitutional Law Review* (2018), p. 622-643, 633

²⁸² Case C-64/16 *Associação Sindical dos Juizes Portugueses*, para. 44

²⁸³ M. Bonelli and M. Claes, 14 *EuConst* (2018), p. 638.

²⁸⁴ T. Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', 40 *Common Market Law Review* (2003), p. 9-50, 28.

²⁸⁵ Case C-110/98 to 147/98 *Gabalfrisa SL and Others*, EU:C:2000:145.

²⁸⁶ *Ibid.* para. 23

²⁸⁷ Case C-222/13 *TDC A/S*, EU:C:2014:2265.

²⁸⁸ *Ibid.* para. 34-36

²⁸⁹ Case C-506/04 *Graham J. Wilson*, EU:C:2006:587; Case C-175/11 *D. and A.*, EU:C:2013:45

²⁹⁰ Case C-64/16 *Associação Sindical dos Juizes Portugueses*, para. 41.

point of contention in *ASJP* between Advocate General Saugmansgaard and the CJEU. Indeed, the Advocate General had claimed that the ‘the concept of “effective judicial protection” within the meaning of the second subparagraph of Article 19(1) TEU must not be confused with the “principle of judicial independence”²⁹¹.’ The Advocate General argued that the purpose and wording of Articles 19(1) TEU and 47 of the Charter differed. He also pointed out that the right to effective judicial protection and the right to an independent judge were stated separately in Article 47 of the Charter, a distinction that resembles the way that Article 13 ECHR protects the right to an effective remedy while Article 6 ECHR the right to a fair trial. The Advocate General distinguished between the obligation of the Member States to provide a system of remedies as related to the right to effective judicial protection and the right to a fair trial before an independent court²⁹². Contrariwise he CJEU argued that Article 47 ‘refers to the access to an “independent” tribunal as one of the requirements linked to the fundamental right to an effective remedy²⁹³. Indeed, the text of Article 47 of the Charter connects the right to an effective remedy with the requirement of judicial independence when it states that: ‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.’ Moreover, earlier in the judgment, the CJEU claimed that Article 19(1) TEU established effective judicial protection as a general principle of EU law stemming from the constitutional traditions common to the Member States, enshrined in Articles 6 and 13 ECHR, and reaffirmed by Article 47 of the Charter²⁹⁴. Does it follow that the content of Article 19(1) is equivalent to the content of Article 47 of the Charter? Or can a distinction be made between judicial protection as a general principle of EU law and as a fundamental right? Ultimately, what is the relationship between Article 19(1) TEU and Article 47 of the Charter as regards of their content? The judgment in *Commission v. Poland* has not provided additional clarification regarding the relationship between Article 19(1) TEU and Article 47 of the Charter. Advocate General Tanchev clearly distinguished between one and the other in terms of their scope of application and claimed that Article 19(1) applied to the case,

²⁹¹ Opinion of Advocate General Saugmansgaard Øe in Case C-64/16 *Associação Sindical dos Juízes Portugueses*, EU:C:2017:395, para. 64

²⁹² *Ibid.*, para. 66-67.

²⁹³ Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 41.

²⁹⁴ *Ibid.* para. 35.

whereas Article 47 of the Charter did not. According to the Advocate General, the relationship was one of complementarity ²⁹⁵

Notwithstanding the above discussion, the CJEU did not develop a separate analysis. The judgment focuses on Article 19(1) TEU as the parameter of control. At the same time, following *ASJP*, the CJEU interprets Article 19(1) by making reference to Article 47 of the Charter ²⁹⁶. Indeed, if anything, in *Commission v. Poland*, the CJEU reinforces the connection between Article 19(1) TEU and Article 47 of the Charter from the perspective of individual rights. In order for the right of individuals to obtain effective judicial protection, courts ought to be independent: That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded ²⁹⁷. Hence, the CJEU assigned a new role to Article 19(1) TEU by drawing a link between the rule of law (Article 2 TEU) and the right to an effective remedy and to a fair trial (Article 47 of the Charter). The obligation to provide remedies that ensure the effective protection of the rights conferred upon individuals by EU law has given rise to an obligation to ensure the independence of domestic courts. One might wonder whether all aspects of the right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter are now protected by virtue of Article 19(1) TEU. May any individual claim that the right to trial within a reasonable time has been infringed on the grounds of Article 19(1) TEU? Or the right to be advised, defended and represented, or to legal aid? The same reasoning as in *ASJP* could be followed: in order to ensure effective judicial protection to individuals, justice must be administered in due time, and individuals ought to be represented by a lawyer. Indeed, all tenets of Article 47 of the Charter might be considered relevant in ensuring judicial protection in terms of Article 19(1) TEU. As a result, Article 19(1) could provide grounds to challenge not only rules undermining the independence of the judiciary from a structural perspective, but also any rules or acts undermining the rights protected by Article 47 of the Charter. That is, unless the CJEU limits the potential reach of this interpretation in future cases.

²⁹⁵ Opinion of Advocate General Tanchev in Case C-619/18 *Commission v. Poland*, EU:C:2019:325, para. 58. “The Court’s judgment in *ASJP* should not be considered as diminishing the Charter or Article 47 thereof. It appears to be an elegant and coherent solution which respects the limits of the Charter vis-à-vis the Member States, while advancing the EU system of judicial protection and protecting the core values of the EU as established in

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Article 2 TEU. () By virtue of that judgment, Article 19(1) TEU constitutes an autonomous standard for ensuring that national measures meet the requirements of effective judicial protection, including judicial independence, which complements Article 47 of the Charter (and other provisions of the Charter as the case may be..”

²⁹⁶ Case C-619/18 *Commission v. Poland*, para. 54, 57.

²⁹⁷ *Ibid.*, para. 58.

Indeed, Advocate General Tanchev has argued in several opinions ²⁹⁸ concerning Polish cases that the content of the second subparagraph of Article 19(1) TEU ought to be confined to ‘structural breaches which compromise the essence of judicial independence.’, whereas individual or particular breaches of the independence of judges are to be dealt under Article 47 of the Charter, when that applies. Nonetheless, the CJEU has not circumscribed the content of Article 19(1) TEU in terms of the severity or the extent of the breach so far.

I] THE SCOPE OF APPLICATION OF ARTICLE 19 (1) AND THE CHARTER

The obligation to ensure judicial independence stemming from the second subparagraph of Article 19(1) TEU applies ‘in the fields covered by Union law.’ In *ASJP*, the CJEU clearly distinguished this clause from ‘implementing Union law’ within the meaning of Article 51(1) of the Charter ²⁹⁹. Hence, Article 19(1) may apply even if the Charter does not.

ij ‘In the fields covered by Union law’

According to the CJEU, in order to determine the scope of application of Article 19(1) TEU what needs to be ascertained is whether a court may rule ‘on questions concerning the application or interpretation of EU law ³⁰⁰.’ In the Portuguese case in question, although the CJEU held that the domestic court was to verify applicability, the CJEU also understood that ‘questions relating to EU own resources and the use of financial resources from the European Union may be brought before the “Tribunal de Contas ³⁰¹,”’ and that such questions may address the application or interpretation of EU law. In *Commission v. Poland*, the CJEU clearly confirmed the application of the second subparagraph of Article 19(1) TEU: ‘In the present case, it is common ground that the Sąd Najwyższy (Supreme Court) may be called upon to rule on questions concerning the application or interpretation of EU law and that, as a “court or tribunal”, within the meaning of EU law, it comes within the Polish judicial system in the “fields covered by Union law” within the meaning of the second subparagraph of

²⁹⁸ see also OPINION OF ADVOCATE GENERAL TANCHEV delivered on 6 May 2021 Case C-791/19, *European Commission v Republic of Poland* https://curia.europa.eu/juris/document/document_print.jsf?docid=240848&text=&dir=&doclang=EN&part=1&occ=first&mode=req&pageIndex=0&cid=226655 accessed July 22, 2021

²⁹⁹ Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 29.

³⁰⁰ Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 40.

³⁰¹ *Ibid.*, para. 39.

Article 19(1) TEU, so that that court must meet the requirements of effective judicial protection ³⁰².’ The Polish government had contested the applicability of Article 19(1) TEU. Its argument was grounded on the principle of conferral and claimed that the organization of the national justice system constituted a competence reserved exclusively to the Member States ³⁰³. Moreover, the government argued that this case differed from *ASJP* in that it did not involve domestic legislation that was passed to reduce an excessive budget deficit as part of an agreement for financial assistance by the EU ³⁰⁴. In its ruling, the CJEU distinguished the allocation of competences from the scope of application of EU law and it maintained that although the organization of the justice system falls within the competences of the States, the States must comply with the obligations deriving from EU law when exercising that competence ³⁰⁵. At the same time, the CJEU pointed out that the fact that the austerity measures in *ASJP* had been adopted due to requirements linked to the elimination of the excessive budget deficit in the context of an EU financial assistance programme was irrelevant for the applicability of Article 19(1) TEU ³⁰⁶. Hence, the fact that courts may potentially rule on questions concerning the application or interpretation of EU law is enough to bring them into the field covered by EU law, thereby making the obligation to respect judicial independence enforceable. Indeed, there is no need to show that the referring court is applying EU law in the specific case or that it has applied EU law in the past. As a result, the scope of application of Article 19(1) TEU has great potential for expansion. Nearly all domestic courts might ultimately be bound by the EU principle of judicial independence, given that EU law has penetrated the different areas of the law. Even constitutional courts may well come under the supervisory powers of the CJEU, since they might encounter questions regarding the interpretation of EU law, as attested by the preliminary references that have been submitted to the CJEU by several constitutional courts ³⁰⁷. As such, reforms of the judicial system that undermine the structural conditions for judicial independence may fall within the remit of the CJEU. Under the second subparagraph of Article 19(1) TEU, the CJEU becomes competent to monitor the domestic rules on the organization of the judiciary against the backdrop of not only judicial independence, but also potentially any of the contents of Article 47 of the Charter, as argued above. The cases might reach the CJEU through direct challenges by the Commission, such as in *Commission v. Poland*, at a moment in which legal reforms not only in Poland, but also in Hungary, Romania or Bulgaria threaten judicial independence. Indeed, the

³⁰² Case C-619/18 *Commission v Poland*, para. 56.

³⁰³ *Ibid.*, para. 38

³⁰⁴ *Ibid.*, para. 40

³⁰⁵ *Ibid.*, para. 52.

³⁰⁶ *Ibid.*, para. 51.

³⁰⁷ M. Dicosola, C. Fasone and I. Spigno (eds.), ‘Special issue – Preliminary References to the Court of Justice of The European Union by Constitutional Courts’, 16(6) *German Law Journal* (2015).

Commission lodged an infringement procedure on the grounds of Article 19(1) TEU against Poland targeting the reform of the law on Ordinary Courts that lowered the retirement age of judges ³⁰⁸ in addition to the infringement procedure regarding the new disciplinary regime for Polish judges ³⁰⁹. Hence, Article 19(1) TEU is becoming a powerful tool to fight against the backsliding of the rule of law. The CJEU might also be called to intervene through the preliminary reference procedure for an interpretation of Article 19(1) TEU, as long as the referring court might potentially apply or interpret EU law. The question arises whether a preliminary reference regarding the requirements of judicial independence would be admissible in cases where the substance is wholly unrelated to EU law. In *ASJP*, the dispute in the main proceedings concerned whether the salary-reducing measures adopted in the context of the crisis could undermine judicial independence. This was also the case in *Escribano Vindel*, in which a Spanish judge claimed that the salary cuts adopted to reduce public deficit infringed the principle of judicial independence, as well as the right to non-discrimination on grounds of age. Hence, the dispute in the main proceedings involved the compatibility between domestic legislation on judges' salaries and the principle of judicial independence. But what about those cases before domestic courts that concern the application of domestic law where doubts emerge regarding the independence of the court? Would a preliminary reference be admissible then? According to settled case law, the CJEU may refuse to issue a ruling on a question referred by a national court only 'where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it' ³¹⁰. If the substance of the case is not connected with EU law, it could be argued that the interpretation of Article 19(1) TEU bears no relation to the actual facts of the main action or its purpose, since this Article is aimed at ensuring effective judicial protection of the rights granted by EU law.

Following *ASJP*, however, one could argue that the obligation stemming from Article 19(1) TEU always applies to courts that might potentially apply or interpret EU law. Therefore, even in cases wholly unrelated to EU law from a substantive perspective, if the court has doubts about the fulfilment of the requirements of judicial independence under EU law, then a reference may be admitted. The referring court should show how the interpretation of the rules on independence is relevant for

³⁰⁸ Case C-192/18 *Commission v. Poland*, EU:C:2019:924

see also "Does Poland infringe the principle of effective judicial protection? Recent developments in the CJEU" Femke Gremmelprez, PhD Researcher and Academic Assistant, Department of European, Public and International Law, Research group Ghent European Law Institute <http://eulawanalysis.blogspot.com/2019/04/does-poland-infringe-principle-of.html> accessed July 22, 2021

³⁰⁹ JUDGMENT OF THE COURT Case C-791/19 (Grand Chamber) 15 July 2021

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62019CJ0791&from=el> accessed July 22, 2021

³¹⁰ Case C-62/14 *Gauweiler*, EU:C:2015:400, para. 25; Case C 399/11 *Melloni*, EU:C:2013:107, para. 29.

it to hand down its judgment in the case at hand ³¹¹. Taking a more nuanced perspective, it could be argued that referrals ought to be admitted only when the concern regarding the independence of the court bears a structural quality, rather than a flaw affecting only the case at hand (such as the impartiality of one of the judges because of a previous relationship with one of the parties). A structural shortcoming would undermine the capacity of the court to ensure effective judicial protection also in cases in which EU law would apply. Case in point, the admissibility of two preliminary references submitted by two Polish district courts regarding the new disciplinary regime of judges has been contested ³¹². The substance of the cases was not connected to EU law since one concerned the civil liability of the State Treasury and the other organized crime. In both, the referring courts were afraid that, in the event of a particular decision, disciplinary proceedings would be initiated against the members of the formation ruling in that case. Indeed, in the oral hearing, the CJEU specifically requested that the parties address the issue of admissibility in light of paragraph 40 of the ASJP judgment.⁶¹ In his Opinion, Advocate General Tanchev concluded that the requests for a preliminary ruling were inadmissible because the Court cannot issue advisory opinions on general or hypothetical problems under Article 267 TFEU ³¹³, a position shared by the Commission. On March 26 2020 , the CJEU released its judgment ³¹⁴. According to the Court’s interpretation, Article 19(1)(2) TEU creates obligations for every Member State court which is potentially in the situation of applying EU law irrespective of whether they are actually applying it in the case at hand – de facto this compromises every Member State court. This broad interpretation of Article 19 TEU’s scope can be justified by a recourse to the functioning of the preliminary reference procedure as well as to the value of the rule of law enshrined in Article 2 TEU (³¹⁵ ³¹⁶). The Court’s judgment in *Miasto Łowicz* can be seen as a further consolidation of this jurisprudence. The CJEU states that “the second subparagraph of Article 19(1) TEU is intended inter alia to apply to any national body which can rule ... on questions concerning the application or

³¹¹ L. Pech and S. Platon, 55 *CMLRev* (2018), p. 1842.

³¹² Case C-558/18 *Miasto Łowicz* and Case C-563/18 *Prokuratura Okręgowa w Płocku* .

³¹³ Opinion of Advocate General Tanchev in Joined Cases C-558/18 and C-563/18 *Miasto Łowicz*, para. 86. 94, 99-119, 118.

³¹⁴ <https://curia.europa.eu/juris/document/document.jsf?text=&docid=224729&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=933033> accessed July 23, 2021

³¹⁵ Spieker, Luke Dimitrios: *Commission v. Poland – A Stepping Stone Towards a Strong “Union of Values”?*, *VerfBlog*, 2019/5/30, <https://verfassungsblog.de/commission-v-poland-a-stepping-stone-towards-a-strong-union-of-values/>, DOI: [10.17176/20190708-143659-0](https://doi.org/10.17176/20190708-143659-0). accessed July 24, 2021

³¹⁶ Spieker, L. (2019). Breathing Life into the Union’s Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis. *German Law Journal*, 20(8), 1182-1213. doi:10.1017/glj.2019.84 accessed July 25, 2021

interpretation of EU law” (para. 34). The Court then confirms that this applies in principle also to the referring judges. As such, the Polish government is under a general obligation to refrain from applying a disciplinary regime that violates their judicial independence. The open question was, whether the Member States’ substantial obligation to guarantee the independence of any Member State judge irrespective of the subject in the case at hand corresponds to a procedural right of any Member State judge to refer infringements on his or her judicial independence to the CJEU, irrespective of the subject matter in the case at hand. According to the CJEU’s judgment – not every judge in every procedure is in the position to remedy potential violations of judicial independence with a reference to Luxembourg. According to Article 267 TFEU, a preliminary ruling must be “necessary” to enable the referring court “to give judgment” in the main proceedings. The CJEU has no jurisdiction to render mere advisory opinions. Generally, the CJEU leaves a large margin of appreciation to the referring court when determining this relevance. Yet, this deference has its limits. The Court explains that “there must ... be a connecting factor between that dispute and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required for the decision to be taken by the referring court” (para. 48). To recall, the cases in the main proceedings concerned issues of public expenditure and criminal law. As such, they were “not substantively connected” to Article 19(1)(2) TEU. This is also the crucial difference with regard to the ASJP case, in which the referring court had to rule on the legality of a remuneration of judges and its compatibility with Article 19(1)(2) TEU ³¹⁷.

ii) Effects and possible further avenues

The decisions of the Court just described seem to have a second effect. While upholding effective judicial protection throughout the Union, the Court is also bolstering its own role in the EU judicial scheme and partially re-designing it. Effective judicial protection can thus become a tool for the Court of Justice to be recognized as the apex court in the system, responsible for guaranteeing the unity and coherence of EU law and ultimately the smooth functioning of the entire legal order.

Some tendencies in this sense may emerge by again reading Rosneft, ASJP, and Achmea. In Rosneft, one of the rationales for accepting jurisdiction over CFSP

³¹⁷ Spieker, Luke Dimitrios: *The Court gives with one hand and takes away with the other: The CJEU’s judgment in Miasto Łowicz*, *VerfBlog*, 2020/3/26, <https://verfassungsblog.de/the-court-gives-with-one-hand-and-takes-away-with-the-other/>, DOI: [10.17176/20200327-005553-0](https://doi.org/10.17176/20200327-005553-0) accessed July 24, 2021

preliminary references was that, in the opposite case, judicial review would have been left to the national courts. This was the solution Advocate General Kokott had envisaged in her View on Opinion 2/13: the Advocate General argued that, as it concerned CFSP, accession was compatible with Union law and did not require broadening the scope of the Court's competences, considering that responsibilities for effective judicial protection could be left to the national courts. The Court seemed to reject this possibility already in Opinion 2/13, where it claimed that the ECHR accession agreement failed to take into account the specific characteristics of the Court's judicial review in CFSP matters, and it did so more explicitly in *Rosneft*, assuming jurisdiction in preliminary references on restrictive measures. The need to protect the unity and coherence of the EU judicial system, as well as the fact that the Court of Justice is 'best placed' to give a ruling on validity, called on the Court to reach this conclusion, which allows it to protect 'the essential objective of Article 267 TFEU, which is to ensure that EU law is applied uniformly by the national courts and tribunals'. Thus, by extending judicial protection for individuals against the EU legal acts, the Court also expands its jurisdiction and protects its role as the only court in the legal order in charge to rule on validity of Union legal acts, whether they are adopted under the CFSP or not. This concern with protecting the structure of the European judiciary, in particular the preliminary ruling system, is also evident in *ASJP*. It has been already pointed out how the Court construed a broad scope of application of Article 19 TEU, making it applicable to the case at stake, and then proceeded by building into it an obligation to guarantee judicial independence. The Court found crucial support for this second step precisely in Article 267 TFEU. It argued that 'The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU'. The concern for judicial independence is thus, at least partially, a functional one: protecting the EU legal order, maintaining the possibility for national courts to engage in judicial dialogue with the Court of Justice, and consequently defending the position of the Court itself.

In *Achmea* ³¹⁸, this instrumental concern is even more explicit. ISDS clauses included in bilateral investment treaties between Member States de facto excluded the possibility that the Court of Justice could intervene in questions concerning the interpretation and application of Union law, as the arbitral tribunals created by those treaties could not participate to the EU judicial system and in particular to its 'keystone', the preliminary reference procedure. The Court quite explicitly argued, in paragraph 58, that the ISDS provision of the treaty is called into question by 'the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU'. Once again, in the ruling of the Court there is a concern with the effectiveness of Union law, the coherence of the EU legal order, and implicitly for the position of the Court within it.

³¹⁸ Emanuele Cimiotta, The First Ever Interpretative Preliminary Ruling Concerning the Validity of an International Agreement Between EU Member States: The *Achmea* Case <https://www.europeanpapers.eu/en/europeanforum/first-interpretative-preliminary-ruling-on-international-agreement-achmea-case> accessed July 23, 2021

This is not to say that the Court is operating only, or even primarily in an instrumental way in order to bolster its own standing. Yet, the result is that the Court not only guarantees crucial EU values, but re-designs the Union legal system in a way that puts it, if not at the top of the pyramid, at least at the very center of the network, to use a more ‘dialogical’ metaphor. The obligation to ensure judicial protection in Article 19 TEU becomes thus much more than a codification of the national courts’ mandate, but a crucial rule on the European judiciary, and has at least the potential to guide its progressive federalization.

In some of the rulings, effective judicial protection appears and is used by the Court as a fundamental right, to be found in Article 47 of the Charter, a provision that the Court seems willing to interpret in an expansive manner. In other decisions, effective judicial protection operates as a rule of law principle. Here the key provision is Article 19 TEU, which the Court has found to be applicable not only when a situation falls within the material scope of Union law, but also more generally ‘in the fields covered by Union law’. It is still difficult to grasp exactly all obligations it imposes on Member States in this guise, but certainly it calls for maintaining the independence of national courts and for not disempowering national bodies called to interpret and apply Union law. Effective judicial protection in Union law now plays a crucial role well beyond the context in which it first emerged, namely that of domestic procedures for the adjudication of Union rights.

Most of these developments seem dictated by a true concern over individual rights and the rule of law. In particular in ASJP and Rosneft the Court moved to fill clear gaps in the EU legal system, at the level of national or EU courts, seemingly making it more ‘complete’. However the Court’s decisions have two other effects, regardless of whether or not this is the intention of the judges in Luxembourg. First, national procedural autonomy is further reduced; the reach of Union law extends even deeper to the structuring and functioning of the national judicial systems, affecting areas that clearly fall outside the Union’s legislative competences. Secondly, these decisions protect the Court’s of Justice position in the European judiciary’s scheme and even bolster it.

It is therefore likely that further developments will be subject to an intense scrutiny, and they might also raise questions on the Court’s approach to effective judicial protection at the EU level. The Court, while very keen to exploit the potential of effective judicial protection in creating new obligations for Member States, expanding the reach of Union law, and defending its own position in the European judicial system, has almost constantly rejected arguments based on effective judicial protection when presented at the EU level. Famously, the Court rejected the applicant’s and Advocate General Jacobs’ pleas based on effective judicial protection in UPA, when it comes to individual standing in direct annulment actions ³¹⁹. More recently, it rejected effective judicial protection arguments in the context of judicial

³¹⁹ *supra* note 8

review of soft law measures ³²⁰. Arguments based on effective judicial protection also failed in the context of judicial review of Eurocrisis measures ³²¹.

Conclusively starting from the Portuguese Judges case, the ECJ has operationalised the concept of the rule of law – one of the EU values enshrined in Article 2 TEU, and specifically fleshed out the meaning of judicial independence as the core of this value. As the Court put it in the *Repubblika* judgment ³²², compliance with Article 2 values 'is a condition for the enjoyment of all of the rights' by a Member State. The Court provided a clear link between Article 2 TEU and Article 19 TEU. Article 47 of the Charter, providing the right of access to justice, is limited as to its scope of application by Article 51 of the same Charter – Member States are bound by it only insofar as they are 'implementing EU law'. By contrast, Article 19 TEU is broader, as it applies to 'fields covered by Union law' (*Portuguese Judges* case, para. 29, 37). Importantly, the Court clearly declared that Article 19 TEU has direct effect, i.e. it can be applied directly by national courts, and forms the basis for disapplying a national measure that breaches the rule of law and specifically the principle of judicial independence (Case C-824/18 A.B.; opinion of AG Bobek of 20 May 2021 in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, para. 19). In *Repubblika*, the ECJ introduced a dynamic approach to judicial independence, ruling that Article 19(1) TEU precludes reforms that would reduce such independence. Regardless, therefore, of a certain minimum threshold of such independence that follows from EU law, Member States are precluded from reducing its level following their accession to the Union ³²³.

³²⁰ See Case C-16/16 P *Belgium v Commission* [2018] EU:C:2018:79. For a negative assessment of the Court's final decision, see A. Arnulf, 'EU Recommendations and Judicial Review' (2018) 14 *European Constitutional Law Review* 609, 618.

³²¹ Case C-370/12 *Pringle* [2012] EU:C:2012:756, para. 182 "....Articles 4(3) TEU and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principle of effective judicial protection do not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or the ratification of that treaty by those Member States..."

³²² *Repubblika v Il-Prim Ministru* (C-896/19)
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=240084&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=12878480>
accessed July 20, 2021

³²³ European Court of Justice case law on judicial independence
[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696173/EPRS_BRI\(2021\)696173_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696173/EPRS_BRI(2021)696173_EN.pdf)
accessed July 20, 2021

J) Judicial Independence and the European Arrest Warrant ³²⁴

The European Arrest Warrant Framework Decision (EAW FD) has changed the landscape of inter-state cooperation in criminal matters within the EU. The EAW implements the principle of mutual recognition in criminal matters. An arrest warrant issued by Member State 'A' (issuing state) and addressed to Member State 'B' (executing state) against person 'X' should be recognised and executed by the latter – with subsequent surrender of 'X' from 'B' to 'A' - without further formalities unless grounds for refusal apply. Automaticity in judicial cooperation rests on the principle of mutual trust: in this context, the rebuttable presumption that member states, save in exceptional circumstances, comply with fundamental rights. Unlike extradition, the EAW – and mutual recognition in criminal matters more broadly - place cooperation entirely in the hands of the judiciary. Against that background, judicial independence represents a pre-condition for the healthy functioning of the mechanism. In a system operating on the basis that trust and surrender are the rule, the identification of the exceptions and their *modus operandi* is key to its proper understanding.

i) The Concept of Judicial Authority: Between Independence and Effective Protection

The multifaceted relevance of judicial independence in judicial cooperation begins – logically and chronologically – with issuance of the EAW. Firstly, there is the independent judicial supervision ³²⁵ that must be guaranteed throughout the EAWs procedures – from issuing to execution - to ensure effective judicial protection. Secondly, there are the requirements that the issuing judicial authority must possess to issue a valid EAW.

Since an EAW must be based on a national arrest warrant (Article 8(1)(c) EAW FD), the effective judicial protection must be guaranteed during procedures related to both the (1) national, and (2) European, arrest warrants. The judicial authority competent to issue an EAW must review observance of the conditions necessary for the issuing of the warrant - including its proportionality. Such a level of protection must be ensured even where the EAW is based on a national decision delivered by a judge or a court. Where the EAW was issued by a judicial authority that is not itself a

³²⁴ Judicial Independence and the European Arrest Warrant. Systemic Challenges and Ways Forward, Dr Leandro Mancano, Senior Lecturer in EU Law, Edinburgh Law School TUESDAY, 29 JUNE 2021
<http://eulawanalysis.blogspot.com/2021/06/>
accessed July 23, 2021

³²⁵ JUDGMENT OF THE COURT 30 May 2013 In Case C-168/13 PPU
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=137836&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10076201>
accessed July 23, 2021

court or tribunal, that decision must be capable of being the subject to judicial review³²⁶.

Public prosecutor can be considered judicial authorities – even though they are not courts or tribunals - as long as there are statutory rules and an institutional framework capable of guaranteeing their independence, and preventing their exposure to external directions. Even if the public prosecutor was exposed to the risk of instructions from the executive in the specific case at the basis of the EAW, the warrant could be validly issued in the presence of effective judicial supervision³²⁷. Such oversight, which could take the form of e.g. judicial review of the EAW decision, must be in place in the issuing State and activated before execution of the EAW³²⁸.

ii] The Exceptional Circumstances Doctrine: The Level of Probability Required by the Two-Step Test

The EAW FD mandates (Article 3) or allows (Article 4) the executing judicial authorities to refuse execution of the arrest warrant and surrender in certain cases. Most of these exceptions do relate to fundamental rights (e.g. ne bis in idem), but their wording clearly points to, for example, possible issues of coordination between different States' laws. They are not concerned with a Member State's systemic failure of fundamental rights protection. The suspension of the EAW vis-à-vis a Member State by the European Council is mentioned in recital 10 (non-legally binding) of the Framework Decision, and requires a finding of serious and persistent breach of the EU values. This reveals, perhaps, the EU legislature's confidence in the Member States' capacity for maintaining the rule of law standards required by EU membership. No specific or general clause is provided for in the text of the FD, allowing a national court to refuse surrender due to concerns related to the person's fundamental rights in the issuing State.

Relying on Article 1(3) EAW FD, the Court has introduced a two-step test to challenge the presumption of mutual trust. The test was firstly devised in the context

³²⁶ JUDGMENT OF THE COURT (Grand Chamber) 27 May 2019

In Joined Cases C-508/18 and C-82/19 PPU

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=214466&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=23051090>

accessed July 20, 2021

³²⁷ JUDGMENT OF THE COURT 9 October 2019, In Case C-489/19 PPU,

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=218890&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10066336>

accessed July 23, 2021

³²⁸ JUDGMENT OF THE COURT 10 March 2021 In Case C-648/20 PPU

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=238710&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10066508>

accessed July 20, 2021

of inhuman and degrading treatments ³²⁹ and then applied to cases where the independence of the judicial authority issuing the EAW was in doubt. The Court found that, as a first step, the executing judge must verify the existence of systemic deficiencies, in the issuing State, of the right to an independent tribunal. Secondly, precise and specific elements must show that systemic deficiencies are liable to have an impact at the level of the State's courts with jurisdiction over the proceedings, and substantial grounds must emerge for believing that the person will run a real risk, having regard to their personal situation, the nature of the offence involved and the factual context at the basis of the EAW ³³⁰.

The test has been criticised because of its allegedly insurmountable nature, compounded by the Court's recent ruling ³³¹ where it stated that systemic deficiencies alone do not constitute sufficient ground to refuse execution. Semantic accuracy and the Court's wording suggest that these two levels of probability not be conflated. Relatedly, the features that the evidence must possess (precision and specificity) must be understood together with the milder level of probability of the consequences attached to them (liable to impact the competent court). Furthermore, the areas from whence the substantial grounds must emerge (personal situation, nature of the offence, factual context) are indicative and not cumulative. The test is not as constrictive as it might seem, and the executing authorities have certainly leeway when assessing the real risk to the person's right to an independent tribunal.

iii] THE CASE OF EUROPEAN INVESTIGATION ORDER

³²⁹ see the judgment in *Aranyosi and Căldăraru* supra note 30

³³⁰ JUDGMENT OF THE COURT 25 July 2018 In Case C-216/18 PPU

[https://curia.europa.eu/juris/document/document.jsf?](https://curia.europa.eu/juris/document/document.jsf?text=&docid=204384&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=605177)

[text=&docid=204384&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=605177](https://curia.europa.eu/juris/document/document.jsf?text=&docid=204384&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=605177)

Mutual trust and independence of the judiciary after the CJEU judgment in LM – new era or business as usual? WEDNESDAY, 15 AUGUST 2018 **Dr hab Agnieszka Frąckowiak-Adamska**, Faculty of Law, University of Wrocław

<http://eulawanalysis.blogspot.com/2018/08/mutual-trust-and-independence-of.html>

accessed July 25, 2021

³³¹ JUDGMENT OF THE COURT 17 December 2020 In Joined Cases C-354/20 PPU and C-412/20 PPU

[https://curia.europa.eu/juris/document/document.jsf?](https://curia.europa.eu/juris/document/document.jsf?text=&docid=235719&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=972740)

[text=&docid=235719&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=972740](https://curia.europa.eu/juris/document/document.jsf?text=&docid=235719&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=972740)

[1](https://curia.europa.eu/juris/document/document.jsf?text=&docid=235719&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=972740) accessed July 23, 2021

The CJEU's approach taken in the case of the European Investigation Order was different ³³². In particular, the CJEU had to deal with the question (referred to it by the Vienna Regional Court for criminal matters) of whether its case law on the European Arrest Warrant, according to which the German Public Prosecutor's Office was not considered sufficiently independent to issue an EAW, should be applied to the interpretation of Directive 2014/41/EU on the EIO. The CJEU denied this and justified its conclusion by clarifying essential differences between the FD EAW and the EIO Directive:

- The EIO Directive expressly specifies the concept of “issuing judicial authority” where the public prosecutor is named next to the judge, court, or investigative judge entitled to issue EIOs. The public prosecutor is also one of the authorities empowered to validate an EIO stemming from other authorities that are not a judge, court, investigative judge, or prosecutor;
- The issuance and validation of an EIO and its execution are subject to distinct procedures and guarantees that ensure the fundamental rights protection of the person concerned;
- The EIO and the EAW pursue different objectives. While an EAW strongly interferes with the right to liberty of the person concerned, an EIO's investigative measures are less intrusive.

In the light of these differences, the CJEU concluded that the criteria for the independence of the issuing judicial authority in the context of an EAW cannot be transferred to the EIO. By contrast, the EIO also covers the public prosecutor's offices of a Member State, even though they are in a relationship of legal subordination to the executive of that Member State, which exposes them to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting an EIO ³³³

CONCLUSION

Judicial protection serves as the meta-norm for governing the EU judicial architecture resting on the two pillars of the EU judicature and the Member States

³³² JUDGMENT OF THE COURT (Grand Chamber) 8 December 2020 In Case C-584/19 <https://curia.europa.eu/juris/document/document.jsf?text=&docid=235181&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10068132>
accessed July 28, 2021

³³³ CJEU: German Public Prosecutor's Office Considered “Issuing Judicial Authority” in the EIO Context 9 February 2021 Thomas Wahl <https://eucrim.eu/news/cjeu-german-public-prosecutors-office-considered-issuing-judicial-authority-in-the-eio-context/>
accessed July 23, 2021

judicatures. Judicial protection prioritises individual rights created in EU law. These rights are to be protected if contested in name of collective interests either of the European Union or a Member State and in the same manner before all courts of the EU or of the Member States. Judicial protection-as-norm directs an expansion of the EU judicial architecture along three dimensions, horizontally towards full review by the Court of all acts of the political institutions, vertically towards central-uniform jurisdiction and procedure for national courts, and towards coordination between both pillars. Judicial protection welds the organisationally separate EU and Member States judicatures into one coherent judicial function, on which the rule of law in the EU comes to rest.

This meta-norm of judicial protection becomes progressively institutionalised, through the Charter of Fundamental Rights, the Treaty on the European Union, and the related doctrine of the Court of Justice. Charter art. 47 formalises a fundamental right of judicial protection at the core of judicial protection then is the individual right. It defines the federal question in EU law. This is a thick, evaluative concept. The Court is responsible for concretising this fundamental right into requirements, by balancing the principle of effective rights protection with any countervailing general objectives of an orderly procedure. These requirements become standards for the procedural legislatures of the European Union and the Member States.

Institutional judicial protection furthermore becomes a hard or formal meta-norm within the primary law, not at the disposition of the High Contracting Parties. Hence, the Treaties must not include rules incompatible with an effective protection of individual rights, and even less secondary law. Judicial protection overrides all conflicting principles, aiming at preserving non-justiciable decision-making of the EU's political institutions, the procedural autonomy of the Member States, or their mutual trust. This elevated, constitutional status of judicial protection is justified, as a matter of positive law and normatively. Judicial protection makes human dignity—in the sense of individual self-determination within the perimeter of EU law rights—actual rather than aspirational. This includes all rights-holders, EU citizens and third-country nationals, in the process of European integration³³⁴. This includes all rights-holders, EU citizens and third-country nationals, in the process of European integration. Their rights are taken rights seriously in a Dworkinian sense: when a right is contested in the name of collective interests, or other private interests, judicial protection minimises the error costs. Judicial protection, then, instantiates a novel category of hard, or constitutional meta-norms, with transformative potential for the EU legal order.

³³⁴ Roeben, V. (2020). Judicial Protection as the Meta-Norm in the EU Judicial Architecture. *Hague Journal on the Rule of Law*, 12(1), 29-62. <https://doi.org/10.1007/s40803-019-00085-3>, <https://doi.org/10.1007/s40803-019-00085-3> accessed July 29, 2021

Recent developments make clear how important the role of the judge is in the context of European integration. With the recent use of Article 19 (1) TEU, the Court is shielding the independence of national judges. At the same time, it expects Member States to address a sensitive institutional challenge. This is an obligation to ensure genuine judicial protection in areas governed by Union law. In a much clearer way than it did in the Unibet judgment, the Court now bases the relevant obligation on the explicit provision of Article 19 TEU. Failure to do so may result in an action for failure to fulfill obligations and a conviction in the Member State concerned. In order to ensure the application of Union law, proceedings for infringement of Article 258 TFEU are obviously easier to implement and, consequently, more effective than the political procedure of Article 7 TEU, which requires the unanimity of the Member States. The judge undoubtedly has effective means of dealing with the rule of law crisis in the European Union. However, while it can protect its survival at this stage of its development, it is certainly not in a position to ensure its development and evolution, which require political will and decisive competence³³⁵.

³³⁵ Η σχέση των άρθρων 19 ΣΕΕ και 47 του Χάρτη των Θεμελιωδών Δικαιωμάτων της ΕΕ υπό το πρίσμα της ανεξαρτησίας και της αποτελεσματικότητας της δικαστικής προστασίας
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<https://www.prevedourou.gr/η-σχέση-των-άρθρων-19-σεε-και-47-του-χάρτη-τω/>
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