Effective judicial protection – in the service of effectiveness or procedural protection?

1 Introduction

There is a dual role for effective judicial protection: on the one hand, protection of the beneficiary of EU law (general principle) and on the other, protection of the integrity of the proceedings (fundamental right). The present article focuses on the tension between these two prerogatives, tracing priorities made between them in the case-law of the Court of Justice.

The present article is structured around three themes drawing on the findings of my PhD thesis.

The first theme revisits the rise of the principle of effective judicial protection, first as general principle of EU law and then as fundamental right. Chapter 2 maps its evolution, from requiring various levels of effectiveness in order to safeguard the rule of EU law, to the duty to provide judicial protection of individuals litigating before Member State courts. This includes particular requirements on national courts (once seized) to ensure the quality of protection, and the creation of new remedies in the name of effective judicial protection. A discussion ensues on the altered constitutional status of the principle of effective judicial protection in the wake of the Lisbon Treaties. This overview provides background and terminological distinctions necessary for an in-depth discussion about the relationship between effective judicial protection on the one hand, and alternative legal bases for limitations to Member States' procedural autonomy on the other.

While these themes have already been broadly commented in the scholarship, the future of the *Rewe* principles was unsure, the role of Art. 19(1) TEU remained somewhat enigmatic, and unconventional legal bases for effective judicial protection were on the rise at the time when I defended my PhD thesis. This article follows up on these issues in its Chapter 3, discussing the contemporary relationship between *Rewe*-effectiveness and effective judicial protection, as well as alternative legal bases including the remedial mandate foreseen by Art. 19(1)TEU.

A third theme is addressed in Chapter 4, examining the practical consequences of a contemporary "fundamental rights approach" to effective judicial protection. Three types of conflicts are considered that are symptomatic to this approach: tensions between various guises of procedural protection; tensions between procedural protection and effectiveness of substantive EU law, and tensions between individual procedural protection and the effectiveness of EU procedural frameworks. While the effectiveness of substantive EU law and the requirements of effective judicial protection are not systematically opposed,[1] the chapter focuses on situations where they do conflict or where there is at least a tension between their respective beneficiaries.

While the status of the right to judicial protection has ostensibly been reinforced, Chapter 5 argues that codification in the Charter may in fact have activated a decline in *de facto* individual

[1] Tensions are similarly traced by S. Prechal (2016), while H. C.H. Hofmann (2014 a), 1222, emphasizes convergence in their common endeavor to "avoid situations of denial of justice in cases of rights under EU law"; see also Opinion of Advocate General Wahl in *Sanchez Morcillo and Abril García (I)*, C-169/14, EU:C:2014:2110, 77-78.

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protection.[2] This contradiction is explained by recourse to available avenues for justifications of encroachments on *Rewe*-effectiveness, effective judicial protection, and full effect(iveness).

2 Enjoyment of rights cannot be effective unless protected by courts

Although judicial protection by courts has come to the foreground since the Lisbon codification, the requirement dates to early case-law of the Court of Justice. The tenets of primacy and direct effect, laid down in *Costa v. Enel* and *van Gend en Loos*,[3] presupposed that once individuals are in a position to rely on Community law rights, the national judicial system will provide the framework for litigating, and remedies sufficient to ensure their protection.[4] The notion of legal protection accordingly forms part of the constitutional framework of Union law, with an intrinsic connection to its original cornerstones.[5]

The first explicit reference to effective judicial protection was made much later, in the 1984 judgment in *Von Colson*, requiring that remedies against gender discrimination be "real and effective" in the form of sanctions by which individuals can avail themselves before courts.[6] The principle of equal treatment laid down in Union secondary law was to be upheld by effective sanctions, requiring Member States to provide direct and immediate court protection.[7] Effective judicial protection was promoted to general principle of EU law in the case of *Johnston*, which expressly referred to a "right" to effective judicial remedies, allowing beneficiaries of Community law to "pursue their claims by judicial process" (referred to as judicial control).[8] The Court of Justice recognized that the protection provided through EU secondary law[9] was in its turn based on the protection foreseen by Arts. 6 and 13 ECHR. Therefore, the national court was not only dealing with a directive, but also with a general principle of law in the light of which the former had to be interpreted.[10] As per *Johnston,* the status of the principle of effective judicial protection indicated that it would apply even without the existence of a codified rule in secondary legislation.[11]

Any uncertainties as to whether such an interpretation was correct came to be obviated by the *Heylens* case,[12] where the invoked substantive provision was a fundamental Treaty right, whilst

[2] On the development of effective judicial protection from general principle to codified and self-standing fundamental right, see section 2.3 of the present work.

[3] CJEU judgment in *Costa v. E.N.E.L.*, 6/64, EU:C:1964:66, pp. 593-94 (primacy); CJEU judgment in *van Gend en Loos v. Administratie der Belastingen*, 26/62, EU:C:1963:1, p. 13 (direct effect).

[4] M. Burley and W. Mattli (1993), 60-62; L.M. Ravo (2012), 107ff.

[5] See M. Dougan (2011 a), 409. For a similar take on CJEU judgment in *Costa v. E.N.E.L.*, 6/64, EU:C:1964:66, regarding the inter-embeddedness of the doctrine of primacy and autonomy in national judges' decentralized enforcement, see D. Simon (2000), 323-38, 247-48.

[6] CJEU judgment in *Von Colson and Kamann v. Land Nordrhein-Westfalen*, 14/83, EU:C:1984:153, 22-23; see further M. Klamert (2014), 79-83.

[7] CJEU judgment in *Von Colson and Kamann v. Land Nordrhein-Westfalen*, 14/83, EU:C:1984:153, 18.

[8] CJEU judgment in *Johnston*, 222/84, EU:C:1986:206, 17-18; see further A. Arnull, 'The Beat Goes On', *E.L. Rev.*, 12 (1987); A. F. M. Brenninkmeijer (1994), 113ff.; A. Arnull (2011), 52-53.

[9] Art. 6 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14/2/1976, 40.

[10] CJEU judgment in *Johnston*, 222/84, EU:C:1986:206, 18-19.

[11] See further S. Prechal and R. Widdershoven (2011 a), 286; A. Arnull (2011), 53.

[12] CJEU judgment in *Heylens*, 222/86, EU:C:1987:442.

there was no codified right of access to court contained in the Treaty at the time.[13] It would subsequently be clarified that the right to effective judicial protection extended to all areas of primary and secondary EU law.[14] This scope of the principle served the protection of individuals in all Union litigation, be they litigating before Union courts or Member State courts acting as Union organs.[15]

2.1 Mere access is not enough: Requirements on the judiciary

The rulings in *Johnston* and *Heylens* had already clarified that for the protection of Union rights to be considered effective, individuals must be able to turn to national courts to vindicate them.[16] Once access to courts had been ensured, this earlier case-law did not disclose what was required for the protection granted by a court to be considered effective in itself. This would alter in the 2000's when the Court of Justice "moved beyond the mere problem of 'access to justice' and expressed views on how national procedure should be regulated"[17]: The time was ripe to lay down what can be expected of rulings delivered by national courts in order to deem judicial protection secured. Access to a court is redundant if the seized court does not have the necessary powers to grant appropriate procedural protection under national law. A series of rulings formulated requirements that can all be said to ascertain a certain *quality* and *scope* of the review to be carried out by national courts.

First of all, referring back to earlier definitions of courts/tribunals within the meaning of Art. 267 TFEU,[18] the Court clarified which requirements on judicial bodies are to be utilized when ascertaining whether an individual has been granted effective judicial protection, and whether a Member State has fulfilled its obligation to provide effective legal remedies in the fields covered by EU law.[19]

Secondly, the judiciary must be independent and impartial, requirements corresponding to those of the ECtHR.[20] The independence of judges entrusted to ensure compliance with EU law has been

[13] Ibid., 14.

[14] CJEU judgment in *Kraus*, C-19/92, EU:C:1993:125, 40 (freedom of establishment); CJEU judgment in *MRAX*, C-459/99, EU:C:2002:461, 101 (right of residence for third country nationals); CJEU judgment in *Borrell*, C-104/91, EU:C:1992:202 (freedom of establishment and freedom to provide services).

[15] See e.g. S. Prechal and R. Widdershoven (2011 a), 287.

[16] CJEU judgment in *Heylens*, 222/86, EU:C:1987:442; CJEU judgment in *Johnston*, 222/84, EU:C:1986:206.

[17] P. van Cleynenbreugel (2012 b), 92, referring to CJEU judgment in *Boxus and Others*, joined cases C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667.

[18] Namely, whether such a body has compulsory jurisdiction, whether its procedures are *inter partes*, whether it applies rules of law, and whether it is independent and impartial; CJEU judgment in *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, C-506/04, EU:C:2006:587, 48. See also CJEU judgment in *Vaassen-Goebbels v. Beambtenfonds voor het Mijnbedrijf*, 61/65, EU:C:1966:39; CJEU judgment in *Pardini v. Ministero del commercio con l'estero*, 338/85, EU:C:1988:194; CJEU judgment in *Pretore di Salò v. X*, 14/86, EU:C:1987:275; CJEU judgment in *François De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort*, C-17/00, EU:C:2001:651.

[19] This connection between Art. 267 TFEU and Art. 19(1) TEU was developed in CJEU judgment in *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117, 38-41 and CJEU judgment in *Slowakische Republik v. Achmea BV*, C-284/16, EU:C:2018:158.

[20] CJEU judgment in *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, C-506/04, EU:C:2006:587, 48-49 with comments in H. C.H. Hofmann, (2014 a). See, more recently, CJEU judgment

explicitly linked to "the very essence of the rule of law", therefore also activating Art. 19(1) TEU.[21] The equality of arms between litigants has been maintained as an integral component of effective judicial protection, whereas it has recently triggered an additional legal basis in Art. 20 CFR by linking the notion of procedural equality to the general principle of equality before the law.[22] It has also been established that it should not only be *possible* to apply for review by an organ designated by a Member State as a court or tribunal, but such bodies must also, in order to comply with the principle of effective judicial protection a) fulfill the criteria of a court or tribunal within the meaning of the ECHR, and b) be competent to review the matter of Union law that the affected party wishes to have examined – even if this entails review of the case both in fact and in law.[23]

In the same spirit, the Court of Justice has named various other ways in which national obstacles render litigation before national courts too cumbersome.[24] These requirements bore implications not only for individuals' fundamental access to national courts, but also for their possibilities of litigating *successfully*. In so doing, the notion of effective judicial protection was expanded so as not only to enable an individual to litigate on Union rights, but to have his case dealt with in a way that fulfilled the quality criteria laid down by the ECtHR.[25]

The introduced requirements had the view of ensuring that individuals could effectively rely on EU law provisions before national courts. What sets these requirements aside from those which would

in *TDC A/S v. Erhvervsstyrelsen*, C-222/13, EU:C:2014:2265, 30-32; CJEU judgment in *Ramón Margarit Panicello*, C-503/15, EU:C:2017:126, 37-38; CJEU judgment in *Online Games Handels GmbH*, C-685/15, EU:C:2017:452, 60-62; CJEU judgment in *Soufiane El Hassani*, C-403/16, EU:C:2017:960, 40; CJEU judgment in *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117, 35-44.

[21] CJEU judgment in *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117, 36-41; see V. Roeben (2019), 10-11.

[22] CJEU judgment in *Direcția Generală Regională a Finanțelor Publice Brașov v. Vasile Toma*, C-205/15, EU:C:2016:499, 35-36; cf. CJEU judgment in *Bashar Ibrahim,* joined cases C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, 66. Art. 20 CFR states that "Everyone is equal before the law."

[23] CJEU judgment in *Europese Gemeenschap v. Otis NV and Others,* C-199/11, EU:C:2012:684, 49; CJEU judgment in *Berlioz Investment Fund SA,* C-682/15, EU:C:2017:373, 53-59. These requirements do not give access to a certain level in the court hierarchy; CJEU judgment in *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, C-69/10, EU:C:2011:524, 69; cf. CJEU judgment in *Moussa Sacko*, C-348/15, EU:C:2017:591, 40-49, pinioning the scope of review so as not to entail an unlimited right to be heard.

[24] 1) By rules concerning burden of proof: CJEU judgment in *Enderby v. Frenchay Health Authority and Secretary of State for Health*, C-127/92, EU:C:1993:859, 13-19; CJEU judgment in *Specialarbejderforbundet i Danmark v. Dansk Industri (Royal Copenhagen)*, C-400/93 EU:C:1995:155, 26. Neither case explicitly relies on effective judicial protection, yet this is inherent in the reasoning of the judgments, cf. *Royal Copenhagen* (26); 2) By requirements on the provision of legal aid CJEU judgment in *Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland (DEB)*, C-279/09, EU:C:2010:811; CJEU judgment in *Vladimir Peftiev*, C-314/13, EU:C:2014:1645. 3) By demanding that pre-trial procedures and out-of-court settlements not precondition or preclude subsequent access to court CJEU judgment in *Alassini and Others*, C-317/08, EU:C:2010:146. 4) By requiring that decisions delivered by national authorities include their reasons, in order for the affected individual to be able to defend his case before a court.CJEU judgment in *Mellor*, C-75/08, EU:C:2009:279.

[25] CJEU judgment in *Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland (DEB)*, C-279/09, EU:C:2010:811, 30-31; CJEU judgment in *Claude Chartry v. État belge*, C-457/09, EU:C:2011:101, 25; CJEU judgment in *KME Germany and Others v. Commission*, C-272/09 P, EU:C:2011:810, 92-94; CJEU judgment in *Chalkor v. Commission*, C-386/10 P, EU:C:2011:815, 51-54; see further H. C.H. Hofmann (2014 a).

otherwise fall under the notion of effectiveness? The types of quality controls thus introduced would analogously be applicable to obstacles that in earlier case-law may have been interpreted as capable of making the exercise of Union rights "virtually impossible or excessively difficult".[26] The point of interest at hand is nevertheless *judicial* proceedings, whereas the principle of effectiveness required that means be provided for individuals to effectively have their Union law rights guaranteed, whether by public authorities or in the context of court proceedings.[27]

Effective judicial protection thus *sharpened* the principle of effectiveness in the sense that access to court was considered necessary in order to ensure the effectiveness of Union law.[28] This is partly explained by the fact that up until 2009, the principle of effective judicial protection had not yet been equipped with an autonomous Treaty basis. Even though it was recognized as a general principle of EU law (and, from 2000, codified in the Charter), Member States' duties stemming from it traditionally had to be traced back to Treaty obligations.[29]

2.2 The creation of new remedies to ensure *de facto* judicial protection

In earlier case-law concerning national procedural autonomy, the duty of loyal co-operation had not overtly required the creation of new remedies under national law.[30] The case-law of 2007 and onwards nevertheless clarified a point to which earlier rulings had only alluded – namely national judges' obligation, under certain circumstances, to provide remedies previously unavailable to them. Under the principle of remedial autonomy, the *use* of a remedy is the responsibility of the national judge, whereas the responsibility for the *existence* of a remedy is incumbent on the national legislator.[31]

It would nevertheless successively become clear that if remedies necessary to ensure the principle of effectiveness were not available under national law,[32] then the seized court must not only set the latter aside, but also take positive measures to provide adequate and appropriate remedies (prompting an ancillary legislative obligation to create such remedies for future use). In *Francovich*, the Court had found that in order to ensure individuals full protection of Union rights, national courts must be able to grant damages for breaches of EU law.[33] The "no new remedy-rule" would, in *Unibet,* be sustained as long as there were other, even indirect, remedies available to individuals

[26] See e.g. CJEU judgment in *Fantask and Others v. Industriministeriet*, C-188/95, EU:C:1997:580, 47-48.

[27] CJEU judgment in *Trustees of the BT Pension Scheme,* C-628/15, EU:C:2017:687, 54-59 (together with the requirement of full effectiveness).

[28] J. H. Jans, R. de Lange, S. Prechal, and R. J. G. M. Widdershoven (2007), 50-51; S. Prechal and N. Shelkoplyas (2004), 591.

[29] In the context of national procedural autonomy, the relevant Treaty bases were substantive provisions paired with the duty of sincere co-operation. In this light, it was logical for requirements on access to courts to be founded on the principle of effectiveness.

[30] As the principle of loyal co-operation requires Member State organs to do what is possible, within the constraints of their existing powers, to ensure the correct implementation of Union law; CJEU judgment in *Rewe v. Landwirtschaftskammer für das Saarland*, 33/76, EU:C:1976:188, 5; CJEU judgment in *Comet BV v. Produktschap voor Siergewassen*, 45/76, EU:C:1976:191, 16; CJEU judgment in *The Queen v. Secretary of State for Transport, ex parte Factortame*, C-213/89, EU:C:1990:257, 19-23; CJEU judgment in *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v. Hauptzollamt Kiel*, 158/80, EU:C:1981:163.

[31] On remedial autonomy, see S. Prechal and K. Cath (2014), 180-81; M. Claes (2006), 144; J-U. Franck (2017), 1875.

[32] In these cases, interim relief and action for damages.

[33] CJEU judgment in *Francovich and Bonifaci v. Italy*, joined cases C-6/90 and C-9/90, EU:C:1991:428.

suffering legal losses due to incompatibility between Union and Member State law.[34] An individual seeking to establish an infringement of his Union law rights, should however under no circumstances have to subject himself to personal legal risks by violating national law in order to be able to seize a national judge.[35]

The no new remedy-rule has undergone additional modifications in the post-Lisbon era, especially as interpreted in several Opinions[36] in light of the codification of the duty to provide effective remedies.[37] Advocate General Wathelet has underscored the importance of legal certainty in litigants' choice between existing remedies.[38] Remedies provided under national law must be assessed autonomously in terms of their capacity to provide judicial protection:[39]

> If […] a Member State makes a number of legal remedies available to individuals, the second subparagraph of Article 19(1) TEU requires that each of those remedies ensure effective legal protection, and a legal remedy cannot offer 'effective' protection unless the conditions in accordance with which it may be used and achieve a positive outcome are known in advance.

The above reasoning is in line with the *Unibet* dictum insofar that the evaluation of sought remedies must account for the existence of other remedies under national law. Yet, Art. 19(1) TEU provides a sharper tool of evaluation: Remedies must – following Wathelet's position – both individually and in interface with each other ensure effective judicial protection.

A distinct line of case-law has sought to ensure that third parties not be excluded from judicial protection in national litigation.[40] In its initial case-law on standing in environmental proceedings, the Court of Justice linked rights of participation to rules granting access to review in secondary EU law and non-Treaty instruments, without mentioning the general principle of effective judicial protection.[41] In the event that fundamental access to court was barred due to restrictive rules on standing, the Court of Justice required that national courts make the review procedure available

[34] CJEU judgment in *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*, C-432/05, EU:C:2007:163, 47-50, 64.

[35] Ibid.

[36] See e.g. Advocate General Mazák in his Opinion in *Banca Antoniana Popolare Veneta*, C-427/10, EU:C:2011:595 and Opinion of Advocate General Jääskinen in *Bundeswettbewerbsbehörde v. Donau Chemie AG and Others*, C-536/11, EU:C:2013:67, especially 66-70.

[37] Art. 19(1) TEU.

[38] On the retroactive barring of claims due to modifications in time limitations, see Opinion of Advocate General Wathelet in *Test Claimants (III) in the Franked Investment Income Group Litigation*, C-362/12, EU:C:2013:538, 76.

[39] Opinion of Advocate General Wathelet in *Test Claimants (III) in the Franked Investment Income Group Litigation*, C-362/12, EU:C:2013:538, 48-50: "As soon as taxpayers choose one of the national legal remedies available […] or have recourse to the only national legal remedy available, they must come under the protection offered by the general principles of EU law. […] The fact that the litigants could have chosen another cause of action, fully consistent with the principles of equivalence and effectiveness, is irrelevant in that regard."

[40] Opinion of Advocate General Jääskinen in *Bundeswettbewerbsbehörde v. Donau Chemie AG and Others*, C-536/11, EU:C:2013:67, 66-70; CJEU judgment in *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd*, C-263/08, EU:C:2009:631, 39, 52; CJEU judgment in *ClientEarth v. The Secretary of State for the Environment, Food and Rural Affairs*, C-404/13, EU:C:2014:2382.

[41] CJEU judgment in *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd*, C-263/08, EU:C:2009:631; CJEU judgment in *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel)*, C-115/09, EU:C:2011:289.

when the Aarhus Convention so required, which included allowing environmental organizations standing to bring claims before national courts.[42] While not overtly requiring the creation of new remedies, in effect a cause of action was made available to new groups of litigants.[43] Although the relevant standing rights were initially based solely on secondary law, the principle of effective judicial protection was evoked to require national courts to grant collective bodies standing in EU environmental law cases.[44] Art. 19(1) TEU in conjunction with Art. 47 CFR laid the ground for requiring a "wide access to justice".[45]

The *Rewe* formula, precluding national procedural law from posing unacceptable obstacles to the application of Union law, had been formulated negatively and therefore – at least in principle – had limited capacity to activate positive obligations. Pairing the principle of effective judicial protection with the remedial mandate nevertheless consolidated a language of positive obligations to make available previously inaccessible remedies in the sphere of national procedural autonomy. Even though national courts were earlier expected to overcome obstacles to the effectiveness of Union law by merely setting aside national procedural obstacles, room has been created for indicating *what* the national legislators should put in the place of the disapplied national rules.[46] The principle of effective judicial protection in this way "works as a standard entailing positive (procedural) obligations and which could give rise to new remedies and national powers."[47] The principal addressee of the requirement of effective judicial protection is the seized court, whereas such calls on national courts will have to be supported also by the addressees of Art. 19(1) TEU – national legislators.[48]

[42] CJEU judgment in *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel)*, C-115/09, EU:C:2011:289.

[43] Ibid., 50; see also CJEU judgment in *Lesoochranárske zoskupenie VLK (Brown Bear)*, C-240/09, EU:C:2011:125, 52, commented by M. Eliantonio in 'Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011', *CMLR*, 49 (2012), 767-91; CJEU judgment in *Boxus and Others*, joined cases C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, 57; see comments in e.g. P. van Cleynenbreugel (2012 b), 93ff.; L.M. Ravo (2012), 116ff.

[44] CJEU judgment in *Lesoochranárske zoskupenie VLK (Brown Bear)*, C-240/09, EU:C:2011:125; CJEU judgment in *Lesoochranárske zoskupenie VLK (II)*, C-243/15, EU:C:2016:838, 54-62; see also CJEU judgment in *ClientEarth*, C-404/13, EU:C:2014:2382, 52.

[45] CJEU judgment in *Lesoochranárske zoskupenie VLK (II)*, C-243/15, EU:C:2016:838, 54-62. Consumer case-law has nonetheless taken an increasingly restrictive stance on standing for consumer associations: CJEU judgment in *Pohotovost' s.r.o. v. Miroslav Vašuta (II)*, C-470/12, EU:C:2014:101; CJEU judgment in *EOS KSI Slovensko*, C-448/17, EU:C:2018:745; CJEU judgment in *Asociación de Consumidores Independientes de Castilla y León*, C-413/12, EU:C:2013:800, 50; CJEU judgment in *Jorge Sales Sinués v. Caixabank*, joined cases C-381/14 and 385/14, EU:C:2016:252; see comments by C. Warin, 'Individual Rights and Collective Interests in EU Law: Three Approaches to a Still Volatile Relationship', *CMLR*, 56 (2019), 478-80.

[46] On the "narrow" version of direct effect, requiring a replacement norm, see S. Prechal, 'Direct effect, indirect effect, supremacy and the evolving constitution of the European Union', in *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*, ed. by Barnard, C. (New York: Oxford University Press, 2007), 44-45.

[47] J. Krommendijk (2016), 1405, W. van Gerven (2000), 534.

[48] On the division of responsibilities between judiciary and legislative instances, see earlier work in D. Simon (2000), 247.

2.3 Convergence of effectiveness and effective judicial protection

Up until the Lisbon Treaties, the foundation for the principle of effective judicial protection was incorporated in Union law through both the common constitutional traditions of the Member States and through Art. 6 ECHR, to which all Member States were and are contracting parties. As constitutional principle, and as International Treaty Law principle binding on the contracting parties, it should be complied with by the Union and by its Member States when they carry out their obligations under Union law.[49]

In the post-Lisbon era, the legal basis of the principle became easier to discern. Art. 47 CFR had already codified (for the purposes of Union law) the contents of the principle, including detailed obligations inspired by the requirements of Art. 6 ECHR:

> 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 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.

The principle was strengthened not only by the CFR's elevated legal status post-Lisbon, but also by Art. 19(1) TEU, laying down the remedial mandate incumbent on national legislators: "Member States shall provide remedies sufficient to ensure the effective legal protection in the fields covered by Union law."[50] Such remedies are today understood to correspond to the requirements enumerated in Art. 47 CFR.[51]

The reinforced legal status of the principle of effective judicial protection may bridge the competence gap represented by the absence of Union procedural standards. As a result of primary law codification of the principle of effective judicial protection, it cannot as easily be argued that procedural rules are absent in Union law as soon as there exists no applicable secondary law procedural framework:[52]

[49] It has appeared, since the 1980's, in a variety of secondary law instruments, e.g. Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30/12/1989, 33; Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24/4/2002, 33; Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 229, 29/6/2004, 35; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13/12/2005, 13.

[50] Art. 19(1) TEU.

[51] CJEU judgment in *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117, 29-37; CJEU judgment in *Carlos Escribano Vindel v. Ministerio de Justicia,* C-49/18, EU:C:2019:106, 62, as anticipated by S. Prechal and R. Widdershoven (2011 b), 37. Note, however, that Art. 19(1) TEU pertains to judicial *and* administrative bodies, as opposed to the principle of effective judicial protection.

[52] P. van Cleynenbreugel (2012 b), 91.

> national courts are directly obliged to carry out this review as a matter of EU law. Since 'effective judicial protection' constitutes a directly valid extension of EU law itself, the scope of national procedural autonomy, a principle applied in the *absence* of EU law on the matter, is limited.

This fundamental shift has also brought about a potential change in possibilities for justification of rules that would otherwise have to be set aside under the duty of sincere co-operation. A proportionality test of kinds, according to which some procedural obstacles were deemed necessary for e.g. the proper conduct of proceedings, was in the 1990's introduced through the *van Schijndel* formula – the procedural "rule-of-reason".[53] Similarly, national procedural or institutional rules that encroach on effective judicial protection can be justified.[54] The latter balancing act is more complex than the former, not the least because it entails weighing effective judicial protection as a self-standing value against other procedural safeguards; many of which form part of what can be described as Member State-specific guarantees for effective judicial protection of *any* litigating individual. It is, from this perspective, intuitive that justifications under the fundamental rights approach would, in practice, prove capable of shortcutting procedural protection – in contrast to the *van Schijndel* formula which, by design and purpose, bolstered procedural protection under national law. Several examples of this will be given in Chapter 5 below, which considers available justifications under *inter alia* the fundamental rights approach and their consequences for individual procedural protection.

In sum, the protection of individuals seeking enforcement of EU law was also – at least formally – bolstered through the right to effective judicial protection, initially entailing access to courts, and subsequently requirements of judicial independence, equality of arms etc. Art. 19(1) TEU, requiring effective remedies to be provided in the fields covered by EU law, has increasingly been joined to Art. 47 CFR, laying down a right to effective judicial protection. These principles incorporate both the priorities of effectiveness and procedural protection by courts, deriving legal authority from sources beyond EU law. Yet, the protection of substantive rules of EU law is not always the same as the protection of procedural rights of individuals[55] – in fact, as will be demonstrated in Chapter 4, individual procedural rights may in instances be at odds with the effective enforcement of EU law.

3 Relationship between effective judicial protection and other legal bases

Ancillary authority for demanding compliance with the principle of effective judicial protection has been sought in multiple legal sources. A new perspective transpires in the recent emphasis on mutual trust in shared common values (particularly Art. 2 TEU).[56] In this vein, requirements on

[53] CJEU judgment in *van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten*, joined cases C-430/93 and C-431/93, EU:C:1995:441; CJEU judgment in *Peterbroeck, Van Campenhout & Cie v. Belgian State*, C-312/93, EU:C:1995:437.

[54] CJEU judgment in *Alassini and Others*, C-317/08, EU:C:2010:146; see e.g. L. M. Ravo (2012), 118: "where the principle of effective judicial protection was applied, the Court appeared to be more committed to grant effectiveness of the right of the individual to judicial protection as such, rather than linking its reasoning to the effectiveness of EU law. In such cases, the application of the principle was linked to a fundamental right and implied a balance between competing interests".

[55] O. Dubos (2015 b), 21.

[56] CJEU judgment in *Associação Sindical dos Juízes Portugueses,* C-64/16, EU:C:2018:117, 30-32; see also CJEU judgment in *Slowakische Republik v. Achmea BV*, C-284/16, EU:C:2018:158, 34; CJEU judgment in CJEU judgment in *LM (Judicial independence in Poland),* C-216/18 PPU, EU:C:2018:586 (both pairing Art. 2 with Art. 19(1) TEU).

court proceedings have been paired with legal bases, standards, and values above and beyond Art. 47 CFR: viz. the rule of law, placing minimum standards on the national judiciaries (Art. 2 TEU), equality before the law/non-discrimination (Arts. 20 and 21 CFR),[57] and Art. 19(1) TEU, which will be considered in the forthcoming section.

3.1 Linking the remedial mandate to effective judicial protection

The spider-net of Union-based requirements on national courts has been described as confusing, perhaps unavoidably so considering the opacity of the issues of competence and role division in the area of procedural law.[58] It was accordingly welcomed that the Lisbon Treaties introduced, if not a new legal basis, then at least a codified clarification of the role of national judges.[59] Art. 19(1) TEU states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law", an addition that was intended to ensure that the complementarity between the national courts' and the Court of Justice's supervision managed to deliver a "complete system of legal remedies".[60] Art. 19(1) TEU prescribes a distinct obligation (national judges included) to provide legal protection in the fields covered by EU law. The provision describes the mandate of national courts, rather than defining the notion of judicial protection itself. Essentially it links judicial protection to substantive Union prerogatives. At the same time, both Art. 51(1) CFR and Art. 19(1) TEU remind that the fields covered by EU law are granted effectiveness through the provision of a remedy,[61] so that judicial protection and effectiveness of rules and rights under EU law converge in the mandate of the national judge.[62]

Art. 19(1) TEU has been ascribed the "potential to provide the CJEU at the very least with a legitimate legal basis for its existing system of remedies which would in turn grant the national courts a stronger mandate for engaging in their enforcement role."[63] As professed by the European Parliament:[64]

[57] E.g. CJEU judgment in *Direcția Generală Regională a Finanțelor Publice Brașov v. Vasile Toma*, C-205/15, EU:C:2016:49; CJEU judgment in *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:1179; CJEU judgment in *Slowakische Republik v. Achmea BV*, C-284/16, EU:C:2018:158; CJEU judgment in *Carlos Escribano Vindel v. Ministerio de Justicia*, C-49/18, EU:C:2019:106; CJEU judgment in *Bashar Ibrahim,* joined cases C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, 66. These developments will be considered in Chapter 5.

[58] S. Drake (2016), 13.

[59] Ibid., 28.

[60] CJEU judgment in *Inuit Tapiriit Kanatami*, C-283/11 P, EU:C:2013:625, 92, referring in particular to the review of the legality of Union legislation to be carried out by the Court of Justice and the national courts. On the function of Art. 19(1) TEU, see more recently CJEU judgment in *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117, 32; CJEU judgment in *Carlos Escribano Vindel v. Ministerio de Justicia,* C-49/18, EU:C:2019:106, 62.

[61] Art. 19(1) TEU: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law"; Art. 51(1) CFR: "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing* Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers" (here emphasized).

[62] CJEU judgment in *Carlos Escribano Vindel v. Ministerio de Justicia*, C-49/18, EU:C:2019:106, 62.

[63] S. Drake (2016), 28.

[64] European Parliament resolution of 9 July 2008 on the role of the national judge in the European judicial system (2007/2027(INI)), OJ C 294 E, 3/12/2009, 27, point 2: EU law.

> Community law remains a dead letter if it is not properly applied in the Member States, including by national judges, who are therefore the keystone of the European Union judicial system and who play a central and indispensable role in the establishment of a single European legal order.

The implications of the "new" Art. 19 TEU venture further still than this potential normative force. In its function as legal basis, Art. 19(1) has been proposed to supplement the *Rewe* principles, and to require courts to carry out judicial review even beyond what followed the principle of effective judicial protection.[65] The dual codification of national judges' "remedial mandate"[66] in Art. 19(1) TEU and the principle of effective judicial protection in Art. 47 CFR to some extent solved the problem of basing positive obligations on the principle of effectiveness: Again, when the principle of effectiveness is paired with the duty to provide legal protection (as a quasi-independent legal Treaty basis), the prospective reach for positive obligations becomes wider.[67]

Increasingly referred to in recent case-law,[68] Article 19(1) TEU may therefore give fuel to imposing positive obligations on Member States, particularly so as to require new remedies and expand the powers of national courts.[69] It has even been proposed that Art. 19(1) could reasonably replace the duty of sincere co-operation as legal basis for the *Rewe* principles, which would strengthen them

[65] Opinion of Advocate General Mazak in *Banca Antoniana Popolare Veneta*, C-427/10, EU:C:2011:595; Opinion of Advocate General Jääskinen in *Bundeswettbewerbsbehörde v. Donau Chemie AG and Others*, C-536/11, EU:C:2013:67; Opinion of Advocate General Wahl in *Macinský and Macinská*, C-482/12, EU:C:2013:765, 67 at fn. 26; Opinion of Advocate General Wathelet in *Test Claimants (III) in the Franked Investment Income Group Litigation*, C-362/12, EU:C:2013:538.

[66] Member States are, similarly to procedural autonomy, said to enjoy remedial autonomy, in their choice of sanctions and remedies under national procedural law. It is "first and foremost for the national legal order to provide appropriate remedies" – because decentralized enforcement is in the hand of national courts which are bound by the national legal framework, and because Union law does not provide for separate remedies to sanction breaches of Union law; M. Claes (2006), 144. The notion of "remedial mandate" is in the present work used to denote the responsibilities incumbent on national judges both when choosing between available remedies provided by the national legislator, and when stepping in to fill gaps in legal protection where individuals lack avenues for enforcing their Union law-derived rights. The notion of remedial mandate thus hinges onto the notion of remedies and the context of remedial autonomy (as earlier defined).

[67] On the one hand, *Unibet* maintains Art. 4(3) TEU as legal basis also for principle of effective judicial protection, yet nonetheless paves the road for an obligation, in exceptional cases, to create new remedies; CJEU judgment in *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*, C-432/05, EU:C:2007:163 with comments in A. Arnull (2011), 54. On the other hand, the Member-State side of principle of effective judicial protection enshrined in Art. 19(1) TEU and Art. 47 CFR has been proposed as an independent legal basis for the creation of new remedies; P. van Cleynenbreugel (2012 b), 94; see also V. Roeben, 'Judicial Protection as the Meta-Norm in the EU Judicial Architecture', *Hague J Rule Law* (2019), https://doi.org/10.1007/s40803-019-00085-3, 10-11.

[68] CJEU judgment in *Texdata Software GmbH*, C-418/11, EU:C:2013:588, 78; CJEU judgment in CJEU judgment in *Liivimaa Lihaveis MTÜ v. Eesti-Läti programmi 2007-2013 Seirekomitee*, C-562/12, EU:C:2014:2229, 68; CJEU judgment in *ClientEarth v. The Secretary of State for the Environment, Food and Rural Affairs*, C-404/13, EU:C:2014:2382, 52; CJEU judgment in *Lesoochranárske zoskupenie VLK (II)*, C-243/15, EU:C:2016:838, 50; CJEU judgment in *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117, 32; CJEU judgment in *Slowakische Republik v. Achmea BV*, C-284/16, EU:C:2018:158, 50-55.

[69] J. Krommendijk (2016), 1405.

but also grant them a greater measure of legitimacy and legality in the form of a less constrained legal basis.[70]

It was, *inter alia*, in light of the Charter's alignment with the Treaties[71] and potential coupling with Art. 19(1) TEU, that the Lisbon reform showed promise to strengthen the principle of effective judicial protection. Whereas some uncertainty initially prevailed as to whether Art. 19(1) TEU required "only" the provision of effective remedies and *legal* (as opposed to *judicial*) protection, it has been clarified that the system of mutual trust charges Member States with ascertaining that matters of EU law are dealt with by a judicial system governed by the rule of law and thus assumed to fully meet the requirements of Art. 47 CFR.[72] The forthcoming section will trace the emergence of a sharper and at the same time more nuanced principle of effective judicial protection, in comparison to its closest sibling, the principle of effectiveness.

3.2 Complementarity between *Rewe*-effectiveness and effective judicial protection

It is sometimes asserted that the principles of effectiveness and effective judicial protection "enshrine", "embody" or mutually reinforce each other.[73] Is possible to delineate (more or less) distinctive takes on their interrelationship in the case-law and scholarship.

There is, first of all, the understanding that the principle of effective judicial protection represents an umbrella requirement including – but not limited to – the *Rewe* criteria of equivalence and effectiveness. Effectiveness should consequently fall under the principle of effective judicial protection – an "aspect or sub-principle" of the latter.[74] Failure to comply with either of the *Rewe* criteria then represents an encroachment on effective judicial protection; a view that appears to be on the decline in the case-law of the Court of Justice, although it prevails in some Opinions.[75]

A second interpretation is that the principle of effective judicial protection is a sub-category of the principle of effectiveness – the former representing an extension of the *Rewe* criteria.[76] This

[70] S. Drake (2016) 30; cf. H. C.H. Hofmann (2014 a), on the constraint placed on Art. 47 CFR by Art. 52(2) CFR, to the effect that Art. 47 CFR must be interpreted "under the conditions and within the limits" defined by the Treaties.

[71] Pursuant to Art. 6(1) TEU, "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted on 12 December 2007, which shall have the same legal value as the Treaties."

[72] CJEU judgment in *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117, 29-37, CJEU judgment in *Slowakische Republik v. Achmea BV*, C-284/16, EU:C:2018:158, 34; see comments by V. Roeben (2019), 9-11.

[73] See e.g. Opinion of Advocate General Cruz Villalón in *Coty Germany GmbH*, C-580/13, EU:C:2015:243, fn. 16; CJEU judgment in *Alassini and Others*, C-317/08, EU:C:2010:146, 46.

[74] J. Krommendijk (2016), 1409.

[75] CJEU judgment in *i-21 Germany*, joined cases C-392/04 and C-422/04, EU:C:2006:586, 170; CJEU judgment in *Unibet*, C-432/05, EU:C:2007:163, 37-44; CJEU judgment in *Impact v. Minister for Agriculture and Food and Others*, C-268/06, EU:C:2008:223, 48; CJEU judgment in *Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland (DEB)*, C-279/09, EU:C:2010:811, 29, 33, 58-59; Opinion of Advocate General Jääskinen in *Liivimaa Lihaveis*, C-562/12, EU:C:2014:155, 47, 57; Opinion of Advocate General Bot in *ET-Agrokonsulting-04*, C-93/12, EU:C:2013:172, 30; Opinion of Advocate General Jääskinen in *Orizzonte Salute,* C-61/14, EU:C:2015:307, 24.

[76] J. H. Jans, R. de Lange, S. Prechal, and R. J. G. M. Widdershoven (2007), 51; S. Prechal and N. Shelkoplyas (2004), 591; see e.g. CJEU judgment in *Unibet (London) Ltd and Unibet (International) Ltd v.*

perspective regards the *Rewe*-requirements as *umbrella*: effective judicial protection must be safeguarded in order to conclude that the effectiveness leg of the *Rewe* test has been complied with.[77] The reasoning is more intuitive than it may appear at first glance; since judicial claims before courts is but one of several paths for vindicating rights. The legal bases of the respective principles have been reconciled in the following way: The obligation of Art. 19(1) TEU to provide a system of judicial/legal remedies that sufficiently ensures substantive Union rights is ancillary to the responsibility of Member States to construct their more detailed rules of procedure in a manner that at the same time complies with the *Rewe* principles.[78]

A third understanding – that the three principles are cumulative and must all be met – is founded on case-law in which the Court of Justice tests the three principles autonomously, requiring compliance on all counts.[79] National procedural rules complying with the *Rewe* test, "even without representing an obstacle to the enforcement of EU law before national courts, may still be regarded as a substantive infringement of the principle of judicial protection, when their application determines a restriction to one of the rights enshrined in the principle."[80] This third interpretation recognizes effective judicial protection as a self-standing rule with various legal bases, aside from the duty of sincere co-operation.[81]

The *Rewe* principles and the principle of effective judicial protection have, fourthly, been understood as *separate or subsidiary sets of requirements*, to be tested independently or alternatively.[82] Separation between the two tests may in practice lead to different outcomes due to their varying levels of protection.[83] In this vein, compliance with the *Rewe* criteria has been assessed without bringing effective judicial protection into the picture.[84] In other instances – and this appears

Justitiekanslern, C-432/05, EU:C:2007:163, 37-38 and CJEU judgment in *Silvia Georgiana Câmpean*, C-200/14, EU:C:2016:494, 70, in which separate legal bases for the *inter alia* the principle of effective judicial protection were considered, whereas the Court of Justice took its conclusive point of departure in the duty of sincere co-operation.

[77] CJEU judgment in *Orizzonte Salute,* C-61/14, EU:C:2015:655, 48.

[78] S. Prechal and R. Widdershoven (2011 a), 293; in this vein, see CJEU judgment in *ET Agrokonsulting-04-Velko Stoyanov v. Izpalnitelen direktor na Darzhaven fond «Zemedelie» - Razplashtatelna agentsia*, C-93/12, EU:C:2013:432 and CJEU judgment in *Orizzonte Salute*, C-61/14, EU:C:2015:655.

[79] E.g. CJEU judgment in *Alassini and Others*, C-317/08, EU:C:2010:146, 50-66 (see discussion in S. Prechal and R. Widdershoven (2011 a), 293); CJEU judgment in *Banif Plus Bank Zrt v. Csaba Csipai,* C-472/11, EU:C:2013:88, 26-29; CJEU judgment in *Direcția Generală Regională a Finanțelor Publice Brașov v. Vasile Toma*, C-205/15, EU:C:2016:49, 54-59 (ambiguous on the relationship between *Rewe*-equivalence and Arts. 20 and 21 CFR, 35-38).

[80] L. M. Ravo (2012), 111.

[81] S. Prechal and R. Widdershoven (2011 b), 37.

[82] CJEU judgment in *Mono Car Styling SA, in liquidation v. Dervis Odemis and Others*, C-12/08, EU:C:2009:466, 49; CJEU judgment in *Alassini and Others*, C-317/08, EU:C:2010:146, 47-60, 61-66; cf. CJEU judgment in *Silvia Georgiana Câmpean*, C-200/14, EU:C:2016:494, 56, 69-70, where encroachment on the *Rewe* principles obviated the need to examine compliance with the Charter, notwithstanding the latter's potential applicability.

[83] Opinion of Advocate General Szpunar in *Finanmadrid EFC SA v. Jesús Vicente Albán Zambrano and Others*, C-49/14, EU:C:2015:746, 89-95; cf. Opinion of Advocate General Wahl in *Sanchez Morcillo*, C-169/1, EU:C:2014:2110, 77-78, where the two tests were separated, albeit not leading to opposing outcomes.

[84] CJEU judgment in *Evelyn Danqua v. Minister for Justice and Equality*, C-429/15, EU:C:2016:789; CJEU judgment in *EOS KSI Slovensko*, C-448/17, EU:C:2018:745; CJEU judgment in *Nikolay Kantarev v. Balgarska Narodna Banka,* EU:C:2018:807, 118ff.

to be the contemporary trend – requirements on the judiciary have been exclusively handled as a matter of judicial protection under the remedial mandate.[85] One rationale for separating effective judicial protection from *Rewe*-effectiveness is that the respective principles pursue different objectives. The principle of effectiveness seeks to promote substantive Union law in the context of decentralized enforcement. Effective judicial protection, on the other hand, seeks to safeguard the judicial status of litigants either as individual fundamental right,[86] or to preserve the rule of law at a common Union standard.[87]

3.3 Components of effective judicial protection

The principle of effective judicial protection encompasses elements that are both connected to the possibility of vindicating substantive rights and to what was above referred to as elements of *quality* of court proceedings.[88] The principle has thus been broken down into two elements, the first pertaining to effectiveness with the objective of avoiding obstacles to reliance on rights derived from EU law, whereas the second one intended to more generally guarantee respect for the rule of law and the proper conduct of proceedings.[89] It has for this reason been suggested that the two elements of the principle also differ in scope of applicability: the requirement of effectiveness applies only within the area of *implementation or enforcement* of rights under EU law, whereas procedural protection ostensibly remains applicable "irrespective of its effects on EU law."[90]

A potential tension between the elements pertaining to enforcement by courts of substantive rights and those put in place to ensure procedural justice and judicial integrity is contained already in the three legs of Art. 47 CFR, which protects:

1. the "right to an effective remedy" (hinging on the procedural protection of substantive rights granted under Union law);
2. the right to a "fair and public hearing […] by an independent and impartial tribunal" (linking to the characteristics and quality of the said protection);
3. the right to legal representation, so as to ensure effective access to justice.[91]

These components of effective judicial protection correspond to standards and concepts of national and international law, capable of intervening both as competing layers of rights and as interpretative

[85] I.e. paired with Art. 19(1) TEU; CJEU judgment in *Associação Sindical dos Juízes Portugueses,* C-64/16, EU:C:2018:117, 35-36; CJEU judgment in *LM (Judicial independence in Poland),* C-216/18 PPU, EU:C:2018:586, both commented by V. Roeben (2019), 10-11.

[86] See e.g. L. M. Ravo (2012), 109-10.

[87] V. Roeben (2019), 5, 11-12.

[88] J. Krommendijk (2016), 1406; L. M. Ravo (2012), 102; see most recently CJEU judgment in *Carlos Escribano Vindel v. Ministerio de Justicia*, C-49/18, EU:C:2019:106.

[89] L. M. Ravo (2012), 111; see more recently CJEU judgment in *Associação Sindical dos Juízes Portugueses,* C-64/16, EU:C:2018:117.

[90] L. M. Ravo (2012), 112. This interpretation does not follow strictly from e.g. the Charter, which remains applicable within the scope of substantive EU law, albeit in a wider sense than only its "implementation"; see Art. 51(1) CFR, construed widely in *Åklagaren v. Hans Åkerberg Fransson,* C-617/10, EU:C:2013:105, CJEU judgment in *Eugenia Florescu v. Casa Județeană de Pensii Sibiu*, C-258/14, EU:C:2017:448, 48 and CJEU judgment in *Associação Sindical dos Juízes Portugueses,* C-64/16, EU:C:2018:117, 29-34.

[91] Art. 47 CFR. On the second and third legs of effective judicial protection under Union law, see e.g. F. Wilman (2015), 41ff.

substance for the Union-origin right. This is illustrated *inter alia* by the threshold rule of Art. 53 CFR:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Art. 6(3) TEU also bridges standards of judicial protection originating in national law, incorporating domestic conceptions of its substance and hence increasing the level of complexity.[92] Insofar as fundamental rights contained in the Charter are duplicated in national law or in the ECHR, the double layering should – in theory[93] – promote a higher level of individual protection. For the purposes of the forthcoming chapters, effective judicial protection based on conceptions stemming from national law is as far as possible distinguished from its Union law origins. It might have been more appropriate to choose a different term to describe norms of judicial protection originating in national law. This would alas have detracted from additional authority resulting from convergence between national and Union notions.

4 A fundamental rights approach to effective judicial protection

Effective judicial protection is abstruse not only in relationship to the principle of effectiveness, but – as seen above – also contains ambiguities in and of itself. While Dougan has noted that the principle of effectiveness primarily serves Union law beneficiaries,[94] a transversal purview for the principle of effective judicial protection has been suggested by other scholars.[95]

This possibility of tensions between competing claims to effective judicial protection will be discussed in the present chapter. Section 4.1 discusses instances of tension between procedural protection derived from legal sources at different levels. Section 4.2 compares this type of clash with instances where the effectiveness of EU *substantive* law was weighed against *procedural* protection granted under Member State law. Section 4.3 considers tensions between *individual* procedural protection on the one hand, and the effectiveness of *EU procedural mechanisms* on the

[92] As laid down in Art. 6(3) TEU, the rights of the Charter endorse constitutional traditions of the Member States as well as the meaning prescribed by the ECHR: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." See also Preamble, CFR: "This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights."

[93] Albeit subject to a restrictive interpretation in CJEU judgment in *Stefano Melloni v. Ministerio Fiscal*, C-399/11, EU:C:2013:107.

[94] M. Dougan (2011 a), 425 and (2012), 116.

[95] V. Roeben (2019), 1; L. M. Ravo (2012), 118. By contrast, J-U. Franck (2017), 1876-77, suggests that effective judicial protection cannot protect public interests in enforcement against individual litigants, whereas the principle of effectiveness is capable of protecting interests on both sides.

other. Reviewing the case-law in these perspectives reveals legitimate prerogatives above and beyond the procedural protection of beneficiaries of EU substantive law.

4.1 Procedural protection vs. (other) procedural protection

The Brussels Convention and Brussels I Regulation have prompted tensions between the rights of defense and the right to bring proceedings on the basis of Art. 47 CFR, as codified in EU secondary instruments.[96] While a fundamental rights approach – which permeated this case-law – has perhaps promoted procedural protection for a wider circle of beneficiaries, we may be surprised by who benefits from it *in casu*.

Lindner and *A v. B* concerned the procedural protection of defendants *in absentia*, whose right to be heard etc. was addressed by the designation of guardians *ad litem*, yet not necessarily fully safeguarded. On the other side were the interests of the claimants who would not be able to bring claims unless the national court asserted jurisdiction. While this was a situation to which *substantive* EU law was essentially neutral,[97] the applicants in both cases had attempted to rely on the Brussels I Regulation in pursuit of the defendants. The interest in access to a court seizing jurisdiction was consequently on the side of the applicants, whereas the procedural interests of the defendants were jeopardized through adjudication in their absence – both procedural components of effective judicial protection finding themselves on a colliding path.

The Court of Justice's fundamental rights approach "with the view to ensuring a fair balance between the rights of the applicant and those of the defendant"[98] was in the present cases pivotal:[99]

> the requirement that the rights of the defence be observed, as laid down also in Article 47 of the Charter of Fundamental Rights of the European Union, must be implemented in conjunction with respect for the right of the applicant to bring proceedings before a court in order to determine the merits of its claim.

Procedural rights of applicants were weighed against those of defendants, not under the rule-of-reason, but instead as a matter of effective judicial protection.[100] On both sides of the scale were considerations tightly linked to ensuring access to court – on the defendants' side, the right to be heard, and on the applicants', the right to bring proceedings before a competent court. If the balance would have been struck in favor of absolute protection of the absent defendant, this would not give due consideration to the protection of the applicant, who "runs the risk of being deprived of all possibility of recourse", in contrast to a defendant remaining free to oppose the judgment, should

[96] CJEU judgment in *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, C-394/07, EU:C:2009:219 (on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention), OJ L 299, 31/12/1972, 32); CJEU judgment in *Hypoteční banka a.s. v. Udo Mike Lindner*, C-327/10, EU:C:2011:745; CJEU judgment in *A v. B and Others*, C-112/13, EU:C:2014:2195 (both concerning Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), OJ L 012, 16/01/2001, 1).

[97] See L. M. Ravo (2012), 120.

[98] Ibid., 121, in reference to CJEU judgment in *Hypoteční banka a.s. v. Udo Mike Lindner*, C-327/10, EU:C:2011:745.

[99] CJEU judgment in *Hypoteční banka a.s. v. Udo Mike Lindner*, C-327/10, EU:C:2011:745, 49.

[100] Ibid.; CJEU judgment in *A v. B and Others*, C-112/13, EU:C:2014:2195, 61.

he later choose to make an appearance.[101] The Court of Justice, designating the interests of creditors to initiate proceedings as an "objective of public interest", deemed disproportionate favoritism of the consumer a denial of justice.[102] A precedent was thus set for balancing the judicial protection of litigants on both sides.[103]

Case-law on *ex officio* review has followed a similar track. The right to be heard is illustrative also in this context by forming, on the one hand, an integral component of the right to defense whereas it must, on the other hand, be weighed against procedural rules relating to the ambit of the proceedings – the latter ensuring procedural stability with regards to the litigation object.

In the ruling in *Banif Plus,* the *Rewe* principles in conjunction with the requirement of full effect formed the basis for an obligation of *ex officio* review to the benefit of the consumer.[104] Yet, the principle of effective judicial protection activated the right to be heard as procedural safeguard, to be enjoyed also by the opposing party. The ruling thus isolated elements dealt with under the fundamental rights approach, in which equation substantive prerogatives of Union law (consumer protection) did not figure.[105] In *Benallal*, two procedural requirements were likewise balanced against each other, this time without recourse to the effectiveness of underlying substantive rights: the right to be heard versus rules limiting access to higher courts.[106] The *Benallal* judgment, however, ultimately deferred to national procedural law, leaving to the national court to ascertain whether the principle of equivalence requires *ex officio* consideration of the right to be heard.[107] The choice of deference was consistent with a stance that would be reinforced in subsequent case-law – namely, that the right to defense does not entail an absolute right to be heard.[108]

In *Online Games,*[109] procedural protection in one guise was also weighed against another. Although the case was *not* neutral to substantive effectiveness of EU law (*ex officio* review favoring administrative enforcement of EU law *against* an individual), the circumstances of the case more explicitly than before juxtaposed one type of procedural prerogative (truth-seeking) with another (judicial impartiality).[110] The Court of Justice accordingly considered whether the national court could carry out *ex officio* review without repudiating its impartiality. Although there were limits to

[101] CJEU judgment in *Hypoteční banka a.s. v. Udo Mike Lindner*, C-327/10, EU:C:2011:745, 54.

[102] Ibid., 51 and 55; see similar reasoning in CJEU judgment in *A v. B and Others*, C-112/13, EU:C:2014:2195, 60.

[103] The claimants' right to bring proceedings was somewhat less pronounced in CJEU judgment in *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, C-394/07, EU:C:2009:219, which nevertheless emphasized that the right to be heard is not absolute, 29.

[104] CJEU judgment in *Banif Plus Bank Zrt v. Csaba Csipai,* C-472/11, EU:C:2013:88, 26-28.

[105] Ibid., 29-36.

[106] CJEU judgment in *Abdelhafid Bensada Benallal v. État belge*, C-161/15, EU:C:2016:175.

[107] Ibid., 34-35; see also CJEU judgment in *Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland (DEB)*, C-279/09, EU:C:2010:811, 60-62 and *Orizzonte Salute,* C-61/14, EU:C:2015:655, 77, deferring to the national court.

[108] E.g. CJEU judgment in *Moussa Sacko*, C-348/15, EU:C:2017:591, 38-40.

[109] CJEU judgment in *Online Games Handels GmbH*, C-685/15, EU:C:2017:452.

[110] Cf. CJEU judgment in *Heemskerk BV and Firma Schaap v. Productschap Vee en Vlees*, C-455/06, EU:C:2008:650.

courts' truth-seeking mission; within these limits, arguments relating to judicial impartiality could not shield individual litigants from *ex officio* review in their disadvantage.[111]

4.2 Procedural protection vs. effectiveness of EU substantive law

A line of case-law concerning penalties for tax fraud activated tensions between fundamental rights under the Charter and effectiveness of Union *substantive* law, as opposed to procedural safeguards.[112] In *Taricco,* short statutory limitations allowed the defendants in the main proceedings to avoid prosecution, why the referring court sought to have ascertained whether such impunity in effect constituted a violation of EU law. Observations had been submitted to the Court of Justice based on Art. 49 CFR, affirming the principle of non-retroactive penalties in criminal law and requiring criminal sanctions to be lawful and proportionate. With additional reference to the case-law of the EctHR, the Court of Justice rejected the tenet that statutory limitations cannot be applied against defendants for time-barred felonies.[113] The Court deemed the relevant limitation periods for VAT fraud offences liable to prevent "the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the EU", demanding that the national court give full effect to the relevant treaty provisions, if need be by disapplying national legislation.[114]

The argument based on Art. 49 CFR was dealt with by stating *tout court* that Union law must be granted full effect,[115] whereas in other cases, avenues for justification were foreseen. In e.g. *Belvedere*,[116] statutory limitations benefitted the defendants in the national proceedings, who would be able to walk away from the demands of the tax authorities, whereas the effective application of Union provisions would suffer setbacks because VAT could consequently not be collected. The Court of Justice weighed the effectiveness of Union fiscal legislation against the interests of individual parties in having proceedings brought against them within reasonable time, relying specifically on Art. 47 CFR in reference to procedural requirements derived from the ECHR. Although the codified avenues for limiting Charter rights were not evoked, the Court's *de facto* consideration of the circumstances and stakes of the case allowed the conclusion that the relevant limitations to the effectiveness of the collection of VAT taxes were justified.[117] The present examination prompts the observation that while Arts. 47 and 49 CFR are not always capable of promoting procedural protection of litigants over Union law effectiveness, a fundamental rights

[111] Ibid., 64-67.

[112] CJEU judgment in *Åklagaren v. Hans Åkerberg Fransson*, C-617/10, EU:C:2013:105; CJEU judgment in *Ivo Taricco and Others*, C-105/14 EU:C:2015:555; CJEU judgment in *Luca Menci*, C-524/15, EU:C:2018:197; CJEU judgment in *M.A.S.*, C-42/17, EU:C:2017:936.

[113] CJEU judgment in *Ivo Taricco and Others*, C-105/14 EU:C:2015:555, 55.

[114] Ibid., 58; see also CJEU judgment in *M.A.S.*, C-42/17, EU:C:2017:936, 36-38.

[115] CJEU judgment in *Ivo Taricco and Others*, C-105/14 EU:C:2015:555, 57. The argument made by the Court on the absence of violation of the ECHR is not convincing, as the ECtHR case-law to which the Court of Justice referred, concerned the *extension* of statutory limitations under the prohibition against retroactive criminal sanctions, whereas what the Court of Justice in effect was proposing was the *disapplication* of such limitations.

[116] CJEU judgment in *Ufficio IVA di Piacenza v. Belvedere Costruzioni Srl*, C-500/10, EU:C:2012:186; see further L. M. Ravo (2012), 120.

[117] Cf. CJEU judgment in *M.A.S.*, C-42/17, EU:C:2017:936, 48ff.

approach to justifications is crystallizing in parallel with the fundamental rights approach to judicial protection, a notion that will be developed in section 5 below.

4.3 Individual procedural protection vs. effectiveness of EU procedural mechanisms

In the context of the European arrest warrant, the effectiveness of EU law features in a different guise than the effectiveness of *substantive* EU law (as examined in the previous section). This line relates rather to what we may call effectiveness of EU procedural mechanisms or frameworks, in which effective judicial protection figures as a quasi-substantive right. The point of interest is hence the balancing exercise between, on the one hand, individual procedural protection and, on the other hand, effective judicial protection as quasi-substantive right or standard.

The seminal ruling in *Melloni* concerned a defendant's surrender between authorities of two Member States.[118] While surrender would have allowed the arrest warrant to function effectively, the rights of defense were ostensibly jeopardized by the level of procedural protection prescribed in the issuing state.[119] The spirit of judicial co-operation demanded mutual trust between Member States (exhibited through surrender) for the system to be efficient.[120]

Although the ruling was controversial at the time of its delivery, a series of judgments weighing fundamental rights against the functioning of the arrest warrant have since confirmed it.[121] The recent ruling in *TC* pinpointed a clash between the Framework decision and Charter rights: essentially, extensive and unforeseeable time-periods for detention would only be contrary to the Charter in the face of inhuman or degrading detention conditions.[122] Below this pain threshold,[123]

[118] CJEU judgment in *Stefano Melloni v. Ministerio Fiscal*, C-399/11, EU:C:2013:107; see further E. Spaventa, 'The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures', A Study for the European Parliament's PETI Committee (15/02/2016); E. Dubout, 'Le niveau de protection des droits fondamentaux dans l'Union européenne: unitarisme constitutif versus pluralisme constitutionnel – Réflexions autour de l'arrêt Melloni', *Cah. dr. eur.,* 49 (2013), 293-317; D. Ritleng, 'De l'articulation des systèmes de protection des droits fondamentaux dans l'Union. Les enseignements des arrêts Akerberg Fransson et Melloni', *Revue trimestrielle de droit européen,* 49 (2013), 267-92.

[119] Member States are precluded from refusing surrender, save under specific circumstances; Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 28/07/2002, 20; see CJEU judgment in *LM (Judicial independence in Poland),* C-216/18 PPU, EU:C:2018:586, 73-79; CJEU judgment in *Pal Aranyosi*, joined cases C-404/15 and C-659/15 PPU, EU:C:2016:198, 82; see comments by S. Prechal, 'Mutual Trust Before the Court of Justice of the European Union', *Mutual Recognition and Mutual Trust: Reinforcing EU Integration? (Second Part) European Papers* 2 (2017 b), 87f.

[120] CJEU judgment in *Stefano Melloni v. Ministerio Fiscal*, C-399/11, EU:C:2013:107, 59: "by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order […] rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State."

[121] E.g. CJEU judgment in *Minister for Justice and Equality v. Francis Lanigan,* C-237/15 PPU, EU:C:2015:474; CJEU judgment in *Pal Aranyosi*, joined cases C-404/15 and C-659/15 PPU, EU:C:2016:198; CJEU judgment in *IK,* C-551/18 PPU, EU:C:2018:991, 67-70.

[122] CJEU judgment in *TC,* C-492/18 PPU, EU:C:2019:108, 77; see also CJEU judgment in *ML/Generalstaatsanwaltschaft,* C-220/18 PPU, EU:C:2018:589; CJEU judgment in *RO (Brexit/European arrest warrant)*, C-327/18 PPU, EU:C:2018:733.

[123] And other grounds for mandatory and optional non-execution; Recital 13 Preamble and Arts. 3-4 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 28/07/2002, 20.

disparate standards of judicial protection between Member States is something that we must perhaps live with. It is consequently not up to each Member State to weigh the arrest warrant's effectiveness against the interest in safeguarding procedural protection at each executing State's standard. When asked specifically, in *Ognyanov II*, whether Member States cooperating in the Framework decision on enforcement of criminal sentences[124] could offer more lenient sentencing than foreseen by EU law,[125] the Court of Justice underscored that the system of mutual trust would be undermined by any executing state granting sentence reductions not prescribed by the issuing state.[126]

These difficulties are perhaps symptomatic to mechanisms like the European arrest warrant, whose reliance on a system of mutual trust and recognition has evolved into a presumption of compliance with a defined standard of judicial protection[127] from which collaborating Member States can deviate only exceptionally.[128] Yet, mutual trust is not reserved for the area of EU criminal law.[129] In Opinion 2/13, the Court customized the *Melloni* take on Art. 53 CFR for wider interpretational purposes:[130]

> 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.

Particularly, disparate standards of procedural protection cannot be permitted to overturn the effectiveness of the preliminary reference procedure.[131] The referring court in *Ognyanov I* had worried that its preliminary reference necessitated it to voice premature opinions on factual and legislative elements prior to its sentence, giving rise to doubts about its impartiality.[132] Without exactly juxtaposing national procedural protection and EU law effectiveness, the Court still dismissed the notion of protection evoked by the national court as safeguard for effective judicial

[124] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 5/12/2008, 27.

[125] CJEU judgment in *Atanas Ognyanov (II),* C-554/14, EU:C:2016:835, 54.

[126] Ibid., 51.

[127] See e.g. A. Efrat, 'Assessing Mutual Trust among EU Members: Evidence from the European Arrest Warrant', *JEPP* (2018), https://doi.org/10.1080/13501763.2018.1478877, 1.

[128] As in CJEU judgment in *LM (Judicial independence in Poland),* C-216/18 PPU, EU:C:2018:586, 73-79; cf. CJEU judgment in *Pal Aranyosi*, joined cases C-404/15 and C-659/15 PPU, EU:C:2016:198, 82.

[129] On mutual trust within the European Asylum system, see e.g. CJEU judgment in *Bashar Ibrahim,* joined cases C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219 and S. Prechal (2017 b), 77f. With respect to the failed agreement on EU accession to ECHR, see ibid., 91f.

[130] CJEU Opinion *delivered pursuant to Article 218(11) TFEU,* 2/13, EU:C:2014:2454, 189.

[131] Ibid., 192-199; CJEU judgment in *Slowakische Republik v. Achmea BV*, C-284/16, EU:C:2018:158, 34-37, 58.

[132] CJEU judgment in *Atanas Ognyanov (I),* C-614/14, EU:C:2016:514, 13. See also CJEU judgment in *Emil Milev*, C-310/18 P, EU:C:2018:732, where pre-trial assessments as to "reasonable grounds" were not considered contrary to the presumption of innocence enshrined in *inter alia* Art. 47 CFR, as long as no provisional statement on the defendant's guilt was made.

protection because it was contrary to the co-operation required by the national court in formulating its preliminary reference.[133]

In conclusion, the interest in effectiveness of Union law was given priority over procedural protection provided under national law, insofar as this should come at the expense of collaboration in Union law frameworks. The present section has explained this phenomenon by reference to the proper functioning and efficacy of procedural mechanisms founded on a presumption of mutual trust. Still, mutual trust was only part of the equation whereas, additionally, the Court of Justice relied on various legal bases in the Charter as well as in secondary EU law to justify encroachments on procedural protection. In the forthcoming analysis, available justifications for obstacles to *Rewe*-effectiveness will be compared with the fundamental rights approach to limitations, based directly on the Charter or on provisions of secondary law supplementing Charter rights.

5 Balancing effectiveness against procedural protection via objective justifications

The procedural rule-of-reason for a long time remained commonplace for weighing a substantive EU right against the *raisons d'être* behind a national procedural obstacle. The forthcoming section (5.1) traces prioritizations between effectiveness and procedural protection within the auspices of the rule-of-reason, conceived to introduce a component of proportionality in the *Rewe* formula.[134] Even in this case-law, the underlying rationale was sometimes *de facto* effective judicial protection.[135] Yet, the *van Schijndel* formula cannot be used to justify encroachments on the principle of effective judicial protection, despite common denominators.[136] Section 5.2 considers instances where fundamental rights were limited on the basis of interpretations of the Charter's horizontal provisions. Most of these rulings also hinged on provisions of EU secondary law, where the "substantive" rule or right in itself included the objective of access to court (i.e. a quasi-substantive right, subject to codified modalities). Related balancing exercises have been prescribed in the context of institutional autonomy (considered in section 5.3) – relying neither on the rule-of-reason, nor on lawful and proportionate limitations of Charter rights.

5.1 Justifications for procedural obstacles based on the rule-of-reason

In its seminal ruling in *van Schijndel*, the Court of Justice found that national courts, when considering whether the setting aside of a national procedural rule would be necessary to ensure the correct application of EU law, must balance the triggered Union right against the interest of procedural protection, insofar as it is embedded in or justifies the existence of the contested national procedural rule.[137] Although the Court sometimes required the national judge to prioritize the

[133] CJEU judgment in *Atanas Ognyanov (I),* C-614/14, EU:C:2016:514, 23-25.

[134] CJEU judgment in *Levez v. Jennings Ltd*, C-326/96, EU:C:1998:577, 44 (equivalence); CJEU judgment in *Van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten*, joined cases C-430/93 and C-431/93, EU:C:1995:441, 19 (effectiveness).

[135] See e.g. Opinion of Advocate General Jacobs in *Peterbroeck, Van Campenhout & Cie v. Belgian State*, C-312/93, EU:C:1995:437, 43.

[136] CJEU judgment in *Alassini and Others*, C-317/08, EU:C:2010:146, 63, with case-law there cited.

[137] CJEU judgment in *Van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten*, joined cases C-430/93 and C-431/93, EU:C:1995:441, 19.

effective application of EU law,[138] the rule-of-reason was frequently left to the national judge to apply, without clear instruction as to where to strike the balance – yet with the implicit go-ahead to prioritize procedural rules of national law when justified and proportionate.[139] The Court of Justice thus accepted that procedural protection may sometimes prevail over Union law effectiveness, as long as this was not done automatically, but only after careful consideration of the competing interests at stake.

Particularly in case-law relating to consumer protection, the Court has been hesitant to allow national procedural principles to trump Union law effectiveness (thereby also trumping the legal interests of procedurally vulnerable litigants).[140] Yet, under the procedural rule-of-reason, the consumer case-law dealt not only with the issue of Union law effectiveness versus procedural protection of individuals, but also with the effective protection of consumers versus the procedural protection of creditors.[141] The rule-of-reason has triggered forfeiture of the consumer protection foreseen in Union secondary legislation, taking into account inertia on the side of the consumer party.[142] Following this divergence, Advocate General Szpunar has proposed that the rule-of-reason be applied, to the effect of "strik[ing] a balance between the notion that a court should compensate for a procedural omission on the part of a consumer who is unaware of his rights and the notion that it should make up fully for the consumer's total inertia."[143]

The consumer case-law can be said to have prioritized, on balance, the coinciding procedural *and* substantive protection of the consumer (based on the protective prerogative in the Union consumer legislation), whereas it will exceptionally allow the procedural protection of an opposing commercial party to prevail in the face of reasonable justifications.[144]

The above analysis has considered the balancing test between substantive and procedural protection under the rule-of-reason. The examined case-law nevertheless additionally activates the effective

[138] CJEU judgment in *Peterbroeck, Van Campenhout & Cie v. Belgian State*, C-312/93, EU:C:1995:437.

[139] E.g. CJEU judgment in *Van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten*, joined cases C-430/93 and C-431/93, EU:C:1995:441, 22; CJEU judgment in *van der Weerd and Others v. Minister van Landbouw, Natuur en Voedselkwaliteit*, joined cases C-222/05 to C-225/05, EU:C:2007:318, 33.

[140] As noted by S. Weatherill, (2011), section IV), "the introduction of the *consumer* into the fact pattern typically diminishes the Court's willingness to respect national procedural autonomy and its concern for legal certainty."

[141] CJEU judgment in *Banco Español de Crédito SA v. Joaquín Calderón Camino*, C-618/10, EU:C:2012:349*,* 51.

[142] CJEU judgment in *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, C-40/08, EU:C:2009:615, 39, 48; CJEU judgment in *Monika Kušionová v. SMART Capital a.s.*, C-34/13, EU:C:2014:2189, 56; CJEU judgment in *ERSTE Bank Hungary Zrt. v. Attila Sugár,* C-32/14, EU:C:2015:637, 62-63.

[143] Opinion of Advocate General Szpunar in *Finanmadrid EFC SA v. Jesús Vicente Albán Zambrano and Others*, C-49/14, EU:C:2015:746, 43. In the end, though, the Advocate General prioritized the effectiveness of Union law through the protection of the consumer, over the interests of legal certainty enshrined in the principle of *res judicata* underlying the contested national procedural rule (77) – a solution also ultimately favored by the Court albeit without reference to the rule-of-reason (CJEU judgment in *Finanmadrid EFC SA v. Jesús Vicente Albán Zambrano and Others*, C-49/14, EU:C:2016:98, 55).

[144] However, the *van Schijndel* formula was not utilized in rulings where such was the outcome; CJEU judgment in *Hypotečni banka a.s. v. Udo Mike Lindner*, C-327/10, EU:C:2011:745; CJEU judgment in *Banif Plus Bank Zrt v. Csaba Csipai,* C-472/11, EU:C:2013:88; CJEU judgment in *Biuro podróży 'Partner',* C-119/15, EU:C:2016:987, 27.

judicial protection of litigants, including consumers, under Art. 47 CFR. The forthcoming section will examine the implications of a related balancing exercise carried out *outside* the auspices of the *Rewe* test.

5.2 Art. 52(1) CFR and modulation of judicial protection in EU secondary law

In the case-law examined in the present section, the effectiveness of EU secondary law was put to the test through claims based on the Charter, including its Art. 47. Provisions in EU secondary law, either codifying the right to effective judicial protection or containing context-specific limitations to it, were assessed by recourse to Art. 52(1) CFR:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The principle of proportionality is one of several requirements on limitations to Charter rights. Despite common denominators with the rule-of-reason, differences in both rationale and protective capacity are revealed already by the provision's reference to recognition of objectives by the Union and the protection of "others".

Case-law concerning legal protection of tenderers in public procurements have contributed to defining the Charter's protective scope, clarifying the requirements on any restrictions on fundamental rights. National regulations were in *Orizzonte* considered against the *Rewe*-requirements of effectiveness and equivalence; however, the justification exercise was not based on the *van Schijndel* rule-of-reason, instead considering Art. 47 CFR in light of mechanisms and safeguards contained in secondary law. The matter of compliance with the Charter was there activated by applicable secondary legislation in which effective judicial protection represented a key objective.[145] The relevant test was, as per Advocate General Jääskinen, whether national rules posing obstacles to access to court under Art. 52(1) CFR satisfy "the principle of proportionality, namely pursuit of a legitimate purpose, necessity, aptness for purpose, and confinement to what is required to secure the legitimate purpose".[146]

Although the Directive must be interpreted in light of the Charter, the answer as to whether effective judicial protection had been safeguarded coincided with the examination of the *Rewe* principles. The Court considered the rationale of the court fees, taking into account the Directive's purposes and objectives:[147]

[145] CJEU judgment in *Orizzonte Salute,* C-61/14, EU:C:2015:655; CJEU judgment in *SC Star Storage SA and Others,* joined cases C-439/14 and C-488/14, EU:C:2016:688, both concerning Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20/12/2007, 31; see Recital 36: "This Directive respects the fundamental rights and observes the principles recognised by the [Charter]. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the [Charter]."

[146] Opinion of Advocate General Jääskinen in *Orizzonte Salute,* C-61/14, EU:C:2015:307, 36.

[147] CJEU judgment in *Orizzonte Salute,* C-61/14, EU:C:2015:655, 73.

> Such levying contributes to the proper functioning of the judicial system, since it amounts to a source of financing for the judicial activity of the Member States and discourages the submission of claims which are manifestly unfounded or which seek only to delay the proceedings.

Without express mention of proportionality in its examination of the court fees, the Court found the latter justified only when linked clearly to additional costs for the seized court, due to the enlargement of the ambit of the proceedings.[148] This was in line with the solution proposed by the Advocate General; namely, whether the levying of court fees was justified and proportionate (albeit implying that it formed part of the *Rewe*-effectiveness test rather than a test of justified limitations of Charter rights). Whereas the Advocate General had envisaged that compliance with Art. 47 CFR be appraised by recourse to Art. 52(1) CFR, it is not clear whether the Court of Justice's insistence on the *Rewe* principles was to be interpreted as activating the traditional procedural rule-of-reason.[149]

Advocate General Sharpston observed in *Star Storage* that the relevant litigation fees constituted a limitation to Art. 47 CFR, prompting an examination of the requirements of Art. 52 CFR.[150] The Court of Justice followed this methodology, examining particularly the prevalence of objective interests and proportionality. The former prompted the Court of Justice to recognize the combating of abuse of remedies as an objective interest contributing to the proper administration of justice.[151] The latter proportionality test hinged on whether the amounts imposed could reasonably be borne by the applicant or were prohibitively dissuasive, i.e. making litigation excessively costly (an inquiry which we can recognize from *Orizzonte*).[152]

These cases gave two indications about legitimate justifications for encroachments on the right to effective judicial protection.

Firstly, when deriving effective judicial protection directly from secondary Union legislation with the explicit objective of safeguarding Art. 47 CFR (i.e. as a quasi-substantive right), the justification exercise is to be carried out not pursuant to *van Schijndel*, but under Art. 52(1) CFR – or at least in the spirit of the latter.[153] Although recourse to the *Rewe* test may still be relevant in the future, justifications under the fundamental rights approach have been on the rise in the decade following *Varec* and *Alassini*,[154] and continue to be in subsequent case-law concerning modulations of effective judicial protection in EU secondary law.[155]

[148] Ibid., 74-74: "Those objectives justify the multiple application of court fees such as those at issue in the main proceedings only where the subject-matter of the actions or supplementary pleas are in fact separate and amount to a significant enlargement of the subject-matter of the dispute that is already pending. By contrast, if that is not the case, an obligation of additional payment of such court fees because of the submission of such actions or pleas is contrary to the availability of legal remedies ensured by Directive 89/665 and to the principle of effectiveness."

[149] As noted by J. Krommendijk (2016), 1407.

[150] Opinion of Advocate General Sharpston in *SC Star Storage SA and Others*, joined cases C-439/14 and C-488/14, EU:C:2016:307, 37-38.

[151] CJEU judgment in *SC Star Storage SA and Others,* joined cases C-439/14 and C-488/14, EU:C:2016:688, 53.

[152] Ibid., 55-63.

[153] Ibid.; CJEU judgment in *Orizzonte Salute,* C-61/14, EU:C:2015:655.

[154] CJEU judgment in *Alassini and Others*, C-317/08, EU:C:2010:146, 62ff.; CJEU judgment in *Varec SA v. Belgian State*, C-450/06, EU:C:2008:91.

[155] CJEU judgment in *TC,* C-492/18 PPU, EU:C:2019:108, 77.

Secondly, it is not evident that justification under the Charter will, in practice, bolster the procedural protection of individuals. The two alternative scenarios drawn up by Advocate General Szpunar in *Finanmadrid* pinpointed the differences between the rule-of-reason and justification under the fundamental rights approach.[156] Relying on effective judicial protection pursuant to the Charter impacted the rights of defense in the Opinion's hypothetical Art. 47 test – the latter including, under certain circumstances, the possibility of holding proceedings in the absence of the defendant.[157] This comparison indicated that the principle of effectiveness may benefit a litigant relying on favorable procedural rights granted in EU secondary law,[158] whereas the fundamental right laid down in the Charter potentially offers a lower level of protection.[159]

The risk of reduced individual protection appears particularly tangible when applicable secondary legislation contains provisions upon which such limitations can be construed and justified. Returning to *Melloni*, its restrictive outcome in fact hinged not primarily on Art. 53 CFR, but on rules contained in the European arrest warrant itself, whose compliance with the Charter was analyzed in detail:[160]

> the solution which the EU legislature found, consisting in providing an exhaustive list of the circumstances in which the execution of a European arrest warrant issued in order to enforce a decision rendered *in absentia* must be regarded as not infringing the rights of the defence, is incompatible with any retention of the possibility for the executing judicial authority to make that execution conditional on the conviction in question being open to review in order to guarantee the rights of defence of the person concerned.

The Framework decision, in other words, granted effective judicial protection as a quasi-substantive right, albeit equipped with limitations in the exhaustive list to which the Court referred in the above quotation. The modalities of the level of judicial protection can thus be derived from the conditions under which surrender may be refused in order to safeguard defendants' rights. The subsequent rulings in *M.* and *Moussa Sacko* in this respect aligned with *Melloni* by relying on limitations to the right to be heard contained in secondary Union law (even without considering compliance with the Charter requirements contained in Art. 52(1) CFR).[161]

[156] Opinion of Advocate General Szpuar in *Finanmadrid EFC SA v. Jesús Vicente Albán Zambrano and Others,* C-49/14, EU:C:2015:746, 94-95.

[157] This was subject to the *proviso* that reasonable attempts had been made to summon the defendant and that the decision delivered *in absentia* be susceptible to review (Opinion of Advocate General Szpuar in *Finanmadrid EFC SA v. Jesús Vicente Albán Zambrano and Others,* C-49/14, EU:C:2015:746, 94-95), i.e. the same requirements as recalled in CJEU judgment in *Hypotečni banka a.s. v. Udo Mike Lindner*, C-327/10, EU:C:2011:745.

[158] As was the case in e.g. CJEU judgment in *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, C-40/08, EU:C:2009:615; CJEU judgment in *Banco Español de Crédito SA v. Joaquín Calderón Camino*, C-618/10, EU:C:2012:349 and CJEU judgment in *Finanmadrid EFC SA v. Jesús Vicente Albán Zambrano and Others*, C-49/14, EU:C:2016:98.

[159] Subsequently confirmed in e.g. CJEU judgment in *Moussa Sacko*, C-348/15, EU:C:2017:591, 38-40-49.

[160] CJEU judgment in *Stefano Melloni v. Ministerio Fiscal*, C-399/11, EU:C:2013:107, 58.

[161] CJEU judgment in *M. v. Minister for Justice and Equality*, C-560/14, EU:C:2017:101; CJEU judgment in *Moussa Sacko*, C-348/15, EU:C:2017:591, 44-45.

5.3 Balancing effectiveness against legal certainty under the full effect approach

A final method for justifications of procedural obstacles is found in a line of case-law relating to full effect(iveness). Even though it is most commonly used in substantive EU law contexts,[162] the principle has had a renaissance in the presence of procedural and institutional obstacles.[163] For the latter purposes, the principle of full effect has been described in the scholarship as wider than that of *Rewe*-effectiveness.[164] It resembles the procedural rule-of-reason insofar that it envisages a balancing test between EU law effectiveness and national expressions of procedural protection, taking into account national law to fill out the notions of legal certainty and legitimate expectations.[165] This approach, on its face, promised broad possibilities and lent interpretative substance to justifying "institutional" obstacles to Union law effectiveness.[166] The Court of Justice, however, took as starting point a common status and recognition of the principle of legal certainty,[167] and would later clarify that this balancing test hinged on interpretations and understandings derived from Union law and jurisprudence,[168] whereas (by comparison) the procedural rule-of-reason test deferred to national law to fill the notions thereunder protected with content.[169] The result of this was that "[o]nly aspects of national procedural law that coincide with the general principles of Community law are protected under the principle of procedural autonomy and may therefore limit the full effect of Community law."[170] The principles of legality, legitimate expectations and legal certainty were, in principle, permitted to encroach on the full effect of Union law "*since* those principles form part of the legal order of the Community."[171]

The full effect requirement has also proven potent in cases dealing not with *institutional* autonomy within the meaning of this work, but rather *procedural* autonomy. The rulings in *Taricco* and *A v. B* required national courts to disapply procedural provisions, even without mentioning avenues for

[162] E.g. CJEU judgment in *Dansk industri*, C-441/14, EU:C:2016:278.

[163] Institutional autonomy: e.g. CJEU judgment in *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, C-119/05, EU:C:2007:434. Procedural autonomy: e.g CJEU judgment in *Banif Plus Bank Zrt v. Csaba Csipai,* C-472/11, EU:C:2013:88, 28, CJEU judgment in *Ernst Georg Radlinger v. Finway a.s.,* C-377/14, EU:C:2016:283, 79.

[164] J. Krommendijk (2016), 1404.

[165] CJEU judgment in *Deutsche Milchkontor*, joined cases 205 to 215/82, EU:C:1983:233, 30.

[166] J. M. Davidson, (2008), 113-26, 119.

[167] CJEU judgment in *Deutsche Milchkontor*, joined cases 205 to 215/82, EU:C:1983:233, 31: "The first point to be made in this regard is that the principles of the protection of legitimate expectation and assurance of legal certainty are part of the legal order of the Community. The fact that national legislation provides for the same principles to be observed in a matter such as the recovery of unduly-paid Community aids cannot, therefore, be considered contrary to that same legal order".

[168] See e.g. CJEU judgment in *Stichting ROM-projecten v. Staatssecretaris van Economische Zaken*, C-158/06, EU:C:2007:370, 24-26.

[169] E.g. CJEU judgment in *Shirley Preston v. Wolverhampton Healthcare NHS Trust*, C-78/98, EU:C:2000:247, 62-63.

[170] J. M. Davidson, 'The Full Effect of Community Law – An Increasing Encroachment upon National Law and Principles', *REALaw,* 1 (2008), 113-26, 119, refers to procedural autonomy also in reference to case-law that, in this work, sorts under institutional autonomy: CJEU judgment in *Stichting ROM-projecten v. Staatssecretaris van Economische Zaken*, C-158/06, EU:C:2007:370.

[171] CJEU judgment in *Stichting ROM-projecten v. Staatssecretaris van Economische Zaken*, C-158/06, EU:C:2007:370, 24 (here emphasized). See commentary by E. Paunio *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (New York: Routledge, 2016), 67.

justification.[172] In yet other case-law applying the full effect approach, the Court separated the *Rewe* principles, the full effect requirement and the Charter right of effective judicial protection, whereas it proceeded to a single balancing test between the consumer imperative and the right to be heard, apparently opting for the fundamental rights justification test while dispensing with the others.[173] Also in *M.A.S.*, the full effect approach was used whereas the ruling's discussion about justifications incorporated a fundamental rights language; in the latter context, the Court emphasized its dual basis under national and Union law.[174] The fundamental rights approach and the full effect approach to justifications in this respect converge.[175]

Although the balancing exercise between effectiveness and legal certainty are similar under the application of the respective full effect(iveness) and *Rewe* requirements, the *van Schijndel* rule-of-reason is, in conclusion, more generous towards the interests of procedural protection, both due to its deference to the national judge, and, inter-relatedly, to national notions filling the concept of procedural protection with a content whose modification is reserved for the national legislator.[176] Therefore, the need is lesser than under the full effect approach to examine whether the protected national notion is normatively endorsed by the Treaties or the Union legislator. By comparison, justification under the fundamental rights approach to limitations may be said to *presume* dual recognition or legal basis (at Union and Member State level), while justification under the full effect approach *requires* it.

6 Conclusion

The answer as to how the balance was struck between Union law effectiveness and procedural protection depended on a variety of factors, whereas no overall choice or priority was made between the substantive and procedural sides of effective judicial protection. The above examination draws particular attention to three pivotal factors:

1. Whether the principle was seen as a general principle or a fundamental right;
2. Its origin and legislative context;
3. Available rules allowing limitations and justifications.

On the first issue (*general principle or fundamental right*), the Court of Justice balanced the interest of judicial protection against other procedural tenets serving as justification for limitations under the fundamental rights approach. The Court referred to various sources of effective judicial protection: its reinforced legal status as EU primary law, constitutional traditions of the Member

[172] CJEU judgment in *Ivo Taricco and Others*, C-105/14 EU:C:2015:555, 58; CJEU judgment in *A v. B and Others*, C-112/13, EU:C:2014:2195, 36-46.

[173] CJEU judgment in *Banif Plus Bank Zrt v. Csaba Csipai,* C-472/11, EU:C:2013:88, 27-30.

[174] CJEU judgment in *M.A.S.*, C-42/17, EU:C:2017:936, 47-52.

[175] This is not surprising in view of the requirement in Art. 52(1) CFR that limitations to fundamental rights "meet objectives of general interest recognized by the Union".

[176] This difference is perhaps not surprising since areas characterized by a greater degree of Member State autonomy, as has been institutional autonomy compared to procedural autonomy (C. Kakouris (1997), 1411), will also, where necessary, have to be grappled with sharper tools.

States, Art. 6 ECHR;[177] and increasingly, the remedial mandate[178], equality before the law[179] (Art. 20 CFR) and respect for the rule of law[180] (Art. 2 TEU). The fundamental rights perspective has in other words gained ground. Its status of fundamental right did not in itself change the constituent elements of effective judicial protection. However, the latter's advent has to a certain point been accompanied by the decline of the principle of effectiveness. I use the word decline because effective judicial protection has not entirely replaced the principle of effectiveness, whereas the parameters for and legal consequences of choosing between them has become increasingly opaque.[181]

In practice, the fundamental rights perspective did not necessarily bring about stronger individual procedural protection,[182] the latter primarily hinging on the origin of effective judicial protection as applicable in a given case. The examination of the second issue *(source and legislative context)* demonstrated the function and *de facto* vigor of the horizontal limitations and threshold rules contained in the Charter. Particularly case-law on the European arrest warrant presented a three-way clash between the effectiveness of Union secondary law, judicial protection under Art. 47 CFR (which was presumed to be safeguarded by participating Member States and the Union legislator), and judicial protection through the right to a fair trial pursuant to national law. The system of mutual trust singularly tilted the balance in favor of effectiveness of EU law over procedural safeguards pursuant to Member State law – both with respect to the arrest warrant and to other EU procedural frameworks.[183]

The level of protection depended on the third factor listed above – namely the premises of *rules allowing limitations* to the effectiveness of EU law, its full effect, and the right to effective judicial protection.

The *van Schijndel* formula gave rise to far-reaching possibilities to justify encroachments on substantive protection. The rule-of-reason accordingly proved capable of tilting the balance towards procedural protection over effectiveness of EU law. Whereas the principle of effectiveness (at least once equipped with this rule-of-reason) displayed a sensitive and nuanced approach towards national procedural safeguards, the fundamental rights approach – in addition to proportionality – required recognition and legitimacy as Union law prerogatives. This finding supports the

[177] E.g. CJEU judgment in *Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland (DEB)*, C-279/09, EU:C:2010:811, 29-31.

[178] Art. 19(1) TEU: CJEU judgment in *Associação Sindical dos Juízes Portugueses,* C-64/16, EU:C:2018:117; CJEU judgment in *Carlos Escribano Vindel v. Ministerio de Justicia*, C-49/18, EU:C:2019:106.

[179] Art. 20 CFR: CJEU judgment in *Direcția Generală Regională a Finanțelor Publice Brașov v. Vasile Toma*, C-205/15, EU:C:2016:499, 36.

[180] Art. 2 TEU: CJEU judgment in *Associação Sindical dos Juízes Portugueses,* C-64/16, EU:C:2018:117, 32-36.

[181] S. Prechal (2017 a), 396; see e.g. CJEU judgment in *Banif Plus Bank Zrt v. Csaba Csipai* C-472/11, EU:C:2013:88; CJEU judgment in *Orizzonte Salute,* C-61/14, EU:C:2015:655.

[182] CJEU judgment in *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, C-69/10, EU:C:2011:524, 65; CJEU judgment in *Orizzonte Salute*, C-61/14, EU:C:2015:655.

[183] CJEU judgment in *Atanas Ognyanov (II),* C-554/14, EU:C:2016:835; CJEU judgment in *Associação Sindical dos Juízes Portugueses,* C-64/16, EU:C:2018:117, 30.

proposition that the *Rewe* formula had greater potential for safeguarding procedural protection under national law than does the Charter.[184]

Still, the *van Schijndel* formula – despite common denominators – does not lend itself to justification for encroachments on the *right* to (as opposed to *principle* of) effective judicial protection.[185] Along with a fundamental rights approach to procedural obstacles has accordingly followed a fundamental rights approach to justifications, under which Charter provisions frequently figure as benchmark for EU secondary law. Encroachments on procedural protection following the fundamental rights approach were often founded on horizontal provisions of the Charter allowing limitations to its Art. 47. Although encroachments on fundamental rights are to be interpreted restrictively, both Art. 52 and 53 CFR were construed in a way that limited individuals' procedural protection. In response to preliminary references implicitly or explicitly evoking the threshold rule contained in Art. 53 CFR, the Court of Justice allowed the effectiveness of EU law to trump national procedural safeguards. In *Melloni, Ognyanov I and II,* the Court again dismissed the referring court's measures to provide a higher level of judicial protection than that prescribed by EU law, insisting that national courts abide by EU procedural frameworks. [186]

The Charter's horizontal provisions paired with secondary EU law consequently appear to have provided a lower level of individual procedural protection as compared to competing notions in national law. This was explained *inter alia* by recourse to competition between beneficiaries of effectiveness on the one hand and procedural protection on the other, arguing that they do not always coincide even when secondary Union law identifies its beneficiaries. When EU secondary law granted effective judicial protection, based on the Charter but adding modalities, the latter facilitated far-reaching limitations to the procedural protection of individuals. [187] In conclusion, the fundamental rights approach to effective judicial protection did not always *de facto* strengthen the latter when secondary law designates not only beneficiaries, but also modalities capable of limiting individual judicial protection, which may tilt the balance towards ensuring the public interest in the efficient conduct of proceedings.[188] On occasion, the requirements of the Charter were weighed against Union secondary law even without referring to possible justifications for limitations based on the Charter's own provisions.[189]

Comparisons between the respective prospects for justification under the rule-of-reason, and the balancing test for the requirement of full effect, indicated that the former is more "generous" or deferential than the latter towards national procedural safeguards. There are, however, indications that also the full effect requirement is in the process of being usurped by the fundamental rights

[184] See e.g. J. Krommendijk (2012), 1395.

[185] CJEU judgment in *Alassini and Others*, C-317/08, EU:C:2010:146, 63, with case-law there cited.

[186] CJEU judgment in *Stefano Melloni v. Ministerio Fiscal*, C-399/11, EU:C:2013:107, 58; CJEU judgment in *Atanas Ognyanov (I),* C-614/14, EU:C:2016:514, 25; CJEU judgment in *Atanas Ognyanov (II),* C-554/14, EU:C:2016:835.

[187] CJEU judgment in *Orizzonte Salute,* C-61/14, EU:C:2015:655; CJEU judgment in *Stefano Melloni v. Ministerio Fiscal*, C-399/11, EU:C:2013:107.

[188] CJEU judgment in *Orizzonte Salute*, C-61/14, EU:C:2015:655, 73; CJEU judgment in *SC Star Storage SA and Others*, joined cases C-439/14 and C-488/14, EU:C:2016:688; CJEU judgment in *Moussa Sacko*, C-348/15, EU:C:2017:591, 44-45.

[189] CJEU judgment in *A v. B and Others*, C-112/13, EU:C:2014:2195, questions 2 and 3 (47-61).

approach, at least with respect to avenues for justification.[190] In case-law applying the full effect approach, the Court's guidelines for the balancing exercise has lately integrated a fundamental rights language.[191] On a comparative note, the full effect formula had in principle *required* duplication or overlap between national and EU law, whereas the fundamental rights approach *presume* such a dual basis.

7 Outlook

The present article has accused the fundamental rights approach of promising *inter alia* improved procedural protection while delivering (as usual) Union law effectiveness. Still, with its increased emphasis on due process,[192] equality of arms,[193] equality before the law,[194] judicial independence[195] and the rule of law,[196] perhaps it cannot be credibly vied that the Court of Justice does not take individual procedural protection seriously.[197]

> the view that procedural and remedial law always serves the substantive effectiveness of EU law has by now been refined. While, for instance, effective judicial protection may look like a vehicle for the effectiveness of EU [law], in reality, this principle has a self-standing meaning and may equally protect against EU law and limit its effectiveness.

van Cleynenbreugel has made the case that due process is increasingly built into the institutional design of EU law enforcement, where procedural fairness is regarded as a policy goal instead of an imposed threshold.[198] The previous chapter demonstrated horizontal provisions available under the fundamental rights approach to be untenable as thresholds in their conventional sense,[199] whereas the underlying framework (i.e. the Charter rights) to which these threshold rules apply, places due process in the foreground.

van Cleynenbreugel's proposal is that if we cherish procedural fairness, we might get effectiveness *pro bono*:[200]

[190] CJEU judgment in *Banif Plus Bank Zrt v. Csaba Csipai,* C-472/11, EU:C:2013:88; CJEU judgment in *M.A.S.*, C-42/17, EU:C:2017:936, 48ff.

[191] Ibid.

[192] P. van Cleynenbreugel (2015), 45.

[193] CJEU judgment in *Banif Plus Bank Zrt v. Csaba Csipai* C-472/11, EU:C:2013:88, 29-36, CJEU judgment in *Sanchez Morcillo and Abril García (I),* C-169/14, EU:C:2014:2099, 48-50.

[194] CJEU judgment in *Direcția Generală Regională a Finanțelor Publice Brașov v. Vasile Toma*, C-205/15, EU:C:2016:499, 35ff.; CJEU judgment in *Bashar Ibrahim,* joined cases C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, 66.

[195] CJEU judgment in *Associação Sindical dos Juízes Portugueses,* C-64/16, EU:C:2018:117, 45-52; CJEU judgment in *Carlos Escribano Vindel v. Ministerio de Justicia*, C-49/18, EU:C:2019:106, 61ff.

[196] V. Roeben (2019), 32; CJEU judgment in *Associação Sindical dos Juízes Portugueses,* C-64/16, EU:C:2018:117; 30-36.

[197] S. Prechal (2017 a), 403.

[198] At least in EU competition law; P. van Cleynenbreugel (2015), 44, 68-72.

[199] Particularly Art. 53 CFR pursuant to CJEU judgment in *Stefano Melloni v. Ministerio Fiscal*, C-399/11, EU:C:2013:107 *et seq.*, but, as argued in Chapter 5, also Art. 52(1) and perhaps Art. 52(3) CFR.

[200] P. van Cleynenbreugel (2015), 71, refers to such measures of increased objective legitimacy as a "sweetener".

> As complementary standards, justice requirements guarantee a *procedurally sound* framework through which a perception of *fairness* is attached to efficient outcomes. Fairness necessarily complements without completely replacing effectiveness considerations.

It could, in this vein, be expected that a perception of legitimacy of the EU fundamental rights framework may render national judges more willing to participate in the preliminary reference procedure, i.e. making EU law more enforceable: If national judges see an opportunity to promote individual procedural rights, cooperation in the enforcement of EU law will empower them as "public" *vigilantes* – i.e. a rationalist means to achieve enforcement.[201] Insofar as the EU legal framework is perceived by national courts as legitimate in its priorities and construction, a similar argument can be advanced with respect to participation in the preliminary reference system. Both mechanisms of "reciprocal empowerment"[202] between the Court of Justice and the national judiciary have the same endgame: increased effectiveness of EU law.

It is increasingly observed that institutionalization of the norm of effective judicial protection has brought about a federalization of the Union judicature.[203] A corollary image is the Court of Justice as constitutional court, scrutinizing Member States' as well as the EU legislature's compliance with fundamental rights protection (including procedural rights). Yet, the Court's recent dealings with common constitutional values of the EU – including references to mutual trust[204] – is capable of cutting both ways. In the context of the European arrest warrant, presumptions of compliance with fundamental rights in fact led to reduced scrutiny.[205] On the other hand, rather functionalist justifications previously accepted[206] have been superseded by case-law in which fundamental rights encroachments were concretely – and sometimes strictly – reviewed.[207]

The surge in references as of late to presumptions of compliance with the foundational values enumerated in Art. 2 TEU have arguably placed the Court's standards of review in the spotlight. It is an urgent undertaking for future research to tackle the flipside of presumptions of compliance with procedural standards; i.e. to systematize the avenues for rebutting them.[208] Propositions that

[201] Cf. M. Burley and W. Mattli (1993), 63-64, depict a purposive appeal from the Court of Justice to national courts to protect the "little guy" or the underdog against the state.

[202] Ibid., 64-65.

[203] V. Roeben (2019), 32.

[204] Viz. Art. 2 TEU, see CJEU judgment in *Slowakische Republik v. Achmea BV*, C-284/16, EU:C:2018:158, 34; CJEU judgment in *Bashar Ibrahim,* joined cases C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, 83ff.; CJEU judgment in *Associação Sindical dos Juízes Portugueses,* C-64/16, EU:C:2018:117, 30-32.

[205] CJEU judgment in *Minister for Justice and Equality v. Francis Lanigan,* C-237/15 PPU, EU:C:2015:474, 36-42.

[206] CJEU judgment in *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, C-69/10, EU:C:2011:524, 65.

[207] CJEU judgment in *Liivimaa Lihaveis MTÜ v. Eesti-Läti programmi 2007-2013 Seirekomitee*, C-562/12, EU:C:2014:2229, 72-76; CJEU judgment in *Vladimir Peftiev*, C-314/13, EU:C:2014:1645, 25-29; CJEU judgment in *E.G. v. Republika Slovenija,* C-662/17, EU:C:2018:847, 50; CJEU judgment in *Bashar Ibrahim,* joined cases C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, 88-89. See also, within the European arrest warrant framework, CJEU judgment in *LM (Judicial independence in Poland),* C-216/18 PPU, EU:C:2018:586, 44-47, prescribing exceptional derogation from the presumption of compliance with Art. 47 CFR, subject to review by the national court.

[208] S. Prechal (2017 b), 85-90; see also A. Efrat (2019) 16f., presenting statistical evidence against the mutual trust presumption in practice; namely (without revealing the causality) a strong correlation between the

limitations to Art. 47 CFR should be reviewed particularly intensely,[209] that serious interferences prompt stricter review,[210] and that its intensity should take account of the beneficiary of the fundamental right *vis-à-vis* the interests shielded by the limitation[211] draw attention to the layers involved in the Court of Justice's judicial scrutiny. As observed by Prechal: "Finding a fair balance between two (fundamental) rights is arguably a different issue than balancing the protection of a right and an objective of general interest."[212]

With respect to the intensity of review, encroachments on e.g. judicial protection (be they prescribed by the EU or the national legislator within the scope of application of EU law[213]), must be distinguished from unilateral attempts to derogate from fundamental rights limitations laid down in EU secondary law. The latter, in effect, do not at all represent a restriction, but rather a (professed) domestic advancement of individual rights.[214] Such "derogations" do not conceptually fall under the fundamental rights approach to justifications, but should rather be subjected to moderate scrutiny by the Court of Justice.

quality of issuing States' fundamental rights records and executing States' participation through surrender. Logically, the better avenues for rebuttal are regulated, the lesser the risk for informal derogations.

[209] J-U. Franck (2017), 1877.

[210] CJEU judgment in *Bashar Ibrahim,* joined cases C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, 88-90.

[211] S. Prechal (2016), 153.

[212] Ibid.

[213] CJEU judgment in *Hampshire County Council v. C.E. and N.E.,* joined cases C-325/18 PPU and C-375/18 PPU, EU:C:2018:739, 63-75.

[214] As were relevant in CJEU judgment in *Stefano Melloni v. Ministerio Fiscal*, C-399/11, EU:C:2013:107; CJEU judgment in *Atanas Ognyanov (I),* C-614/14, EU:C:2016:514; CJEU judgment in *Atanas Ognyanov (II),* C-554/14, EU:C:2016:835; CJEU judgment in *Bashar Ibrahim,* joined cases C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219.