

Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature

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Abstract

Effective judicial protection emerged as a EU law principle in the 1980s, operating alongside the Rewe principles of equivalence and effectiveness as a standard to assess national procedures for the enforcement of EU law. This article argues that the codification of effective judicial protection in Article 19 TEU and 47 of the Charter, operated by the Lisbon Treaty, has stimulated an evolution of the principle, which is evident in the recent case law of the Court of Justice. Today, effective judicial protection operates not only as a procedural principle, but also as a more substantive and structural one, and has generally acquired broader constitutional relevance. This evolution has crucial effects on the EU legal order: most importantly, it affects the division of competences between Member States and the EU, and between the Court of Justice and national courts.

I. Introduction

Effective judicial protection is a long-standing principle of Union law, a key pillar of a ‘Union based on the rule of law’.¹ The principle first appeared in the Court of Justice case *Johnston*² more than thirty years ago, and has been used since then, mostly alongside the principles of equivalence and effectiveness – as a benchmark for assessing national procedural rules applicable to the enforcement of EU law. The entry into force of the Lisbon Treaty, which has ‘constitutionalised’ the principle of effective judicial protection in Article

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¹ See Article 2 Treaty on the European Union (TEU); and famously Case C-294/83 *Les Verts* [1986] EU:C:1986:166.

² Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] EU:C:1986:206.

19 TEU³ and Article 47 of the Charter of Fundamental Rights,⁴ has then stimulated further reflections on the subject. The academic debate has pointed out that the Court of Justice's case law on effective judicial protection has not always been consistent, in particular when it comes to the relationship between the principles of effective judicial protection, effectiveness, and equivalence. Furthermore, it remains difficult to precisely ascertain what the 'reach' of the principle of effective judicial protection in domestic legal orders is, what demands it puts on Member States' authorities, and how it relates to the notion of 'national procedural autonomy'.⁵ Finally, the growing body of procedural rules created by the EU legislator raises further questions on the relationship between such rules and the three principles constructed by the Court of Justice.⁶

These uncertainties surrounding the concept of effective judicial protection, its relationships with other EU core principles and rules, and in general its relevance in the Union's legal order, continue to foster meaningful academic discussion.. Recent case law from the Court of Justice provides new material for the debate. In a series of landmark decisions, delivered in very different fields of Union law - anti-discrimination law (*Egenberger*⁷), common foreign and security policy (*Rosneft*⁸), judicial review of austerity measures (*Associação Sindical dos Juízes Portugueses*⁹), and arbitration agreements (*Achmea*¹⁰) – the Luxembourg Court has extensively relied on the principle of effective judicial protection. Despite some common trends,¹¹ these rulings have little in common, especially since even the principle of effective judicial protection itself has been applied in different fashions and with different results. Yet, altogether, the decisions illustrate and contribute to the evolution of a principle whose nature and role within the Union legal order are gradually changing. It will be argued that, if originally effective judicial protection worked as a 'procedural' principle used as a standard to assess national procedures applicable when individuals

³ Article 19(1) TEU, second paragraph, provides that 'Member States shall provide remedies sufficient to ensure *effective legal protection* in the fields covered by Union law' (italics added). See *infra* section 2.2 for further details on the origin of the provision.

⁴ Article 47 of the Charter contains the fundamental right 'to an effective remedy and to a fair trial'.

⁵ Whether it is even possible to speak of a principle of 'national procedural autonomy' is controversial. See CN Kakouris, 'Do the Member States possess judicial procedural "autonomy"?' (1997) 34 *CMLRev* 1389; M. Bobek, 'Why there is no principle of procedural autonomy of the Member States' in B. de Witte and H. Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2011); DU Galetta, *Procedural Autonomy of the Member States: Paradise Lost?* (Springer 2010).

⁶ See further contributions to this special issue.

⁷ Case C-414/16 *Egenberger* [2018] EU:C:2018:257.

⁸ Case C-72/15 *Rosneft* [2017] EU:C:2017:236.

⁹ Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117.

¹⁰ Case C-284/16 *Achmea* [2018] EU:C:2018:158.

¹¹ See e.g. the link between effective judicial protection and the preliminary ruling mechanism, a point developed *infra* in section 5.2.

claim a right deriving from EU law, it is now becoming a more ‘substantive’ principle of a constitutional nature.

This contribution has two main goals. First, it strives to explain how the Court of Justice used the principle of effective judicial protection in its recent decisions and why this reliance on effective judicial protection fosters an evolution of the principle. In this respect, the next pages underline how the principle can appear and function in two main guises: as a fundamental right, guaranteed by Article 47 of the Charter of Fundamental Rights; as a principle deriving from the rule of law, established by Article 19 TEU, which in turn is a ‘concrete expression’¹² of Article 2 TEU, the provision affirming the founding values of the European Union. Secondly, the contribution reflects on the broader constitutional consequences of the Court’s increasing reliance on the principle of effective judicial protection, which has significantly broadened the principle’s scope of application and content. The emphasis will be on the impact of this evolution on the relationship between the national and the European legal order.

The article has four sections. Section 1 maps the origin of the principle of effective judicial protection in the EU legal order and presents what can be defined as the ‘traditional’ version of the principle; section 2 discusses the Court’s recent decisions in which effective judicial protection appears as a fundamental right or as a rule of law principle. The paper continues by looking at how the evolution of the principle is modifying its status and content (section 3) whilst following that, section 4 reflects on what impact the principle’s evolution may have on the EU legal order as a whole. The conclusion aims to sketch some possible future steps of the evolution.

2. The origins of the principle of effective judicial protection

As noted above, the principle of effective judicial protection is certainly not a recent addition to the Court of Justice’s toolkit. The Court began to use it already before the Maastricht Treaty and has constantly referred to it ever since. With the Lisbon Treaty, effective judicial protection finally found explicit recognition in EU primary law. This section briefly reflects on the birth of effective judicial protection in the case law of the Court and on the traditional ‘procedural’ relevance of the concept, and describes how the Treaty of Lisbon has constitutionalised it.

¹² Case C-64/16 *Associação Sindical dos Juizes Portugueses* [2018] EU:C:2018:117, para. 32.

2.1. The case law of the Court

After a first brief reference to the concept in *von Colson*,¹³ the Court explicitly relied on effective judicial protection for the first time in *Johnston*, although it used a slightly different formulation ('effective judicial remedy'). The case concerned the interpretation of Directive 76/207, which in Article 6 required Member States to introduce in their legal system measures enabling individuals to challenge possible cases of discrimination (on equal treatment for men and women in access to employment) through 'judicial process'. The Court concluded that Article 6 of the Directive reflected a general principle of law, a common constitutional tradition of the Member States also laid in down in Articles 6 and 13 of the ECHR: the 'right to an effective judicial remedy', or to effective judicial protection. It then concluded that a national provision such as that in place in the United Kingdom, limiting access to the judicial process, was 'contrary to the principle of effective judicial control'.¹⁴

It was the Court's recognition of effective judicial protection as an EU general principle that paved the way to a first evolution of the concept. Soon, effective judicial protection started being used as a standard to assess national procedures applicable when individuals claim a right deriving from EU law, even in the absence of a provision (such as Article 6 of Directive 76/207) codifying the general principle in a norm of secondary law.¹⁵ The Court thus added another benchmark to the principles of equivalence - requiring that procedures in place at the domestic level for claims deriving from EU law are not less favorable than those in place for national law - and effectiveness - requiring that procedures in place do not make the enforcement of EU rights impossible or excessively difficult - already established by the landmark *Rewe* decision.¹⁶ Altogether, the three concepts formed a 'body of principles that national courts must apply when asked to uphold a right conferred on a litigant by Union law'¹⁷ and were part of the 'second generation' issues defining the national courts' mandate in the Union legal order.¹⁸

¹³ See Case C-14/83 *von Colson* [1984] EU:C:1984:153, para. 23. Here, the Court held that although 'full implementation' of Directive 76/207/EEC on gender discrimination on access to employment 'does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection'.

¹⁴ Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] EU:C:1986:206, para. 20.

¹⁵ See e.g. Case C-222/86 *UNECTEF v Georges Heylens* [1986] EU:C:1987:442.

¹⁶ Case 33/76 *Rewe* [1976] EU:C:1976:188.

¹⁷ A. Arnall, 'The principle of effective judicial protection in EU law: an unruly horse?' (2011) 36 *European Law Review* 51.

¹⁸ M. Claes, *The National Court's Mandate in the European Constitution* (Hart Publishing 2006).

The relationship between the three concepts has however never been entirely clear.¹⁹ As several authors note, the Court has not always been consistent and has never precisely explained what the added value of effective judicial protection would be, when added to equivalence and effectiveness.²⁰ Academic writings offer different interpretations. On the one hand, Bobek²¹ as well as other authors²² imply that effectiveness and effective judicial protection are almost equivalent. In a similar fashion, Prechal and Widdershoven argue that effective judicial protection could in part be seen simply as a 'more robust manifestation' of effectiveness,²³ though they admit that effective judicial protection 'for another part' also worked as a 'self-standing general principle of law'.²⁴ Under this first reading, the principle of effective judicial protection could be considered mostly a 'corollary'²⁵ of the principle of effectiveness, adding little else to it. It was implicit in the principle of effectiveness, so the argument went, that in some cases Member States were required 'to go beyond simple equivalence and to make a particular type of procedure or remedy available'.²⁶

Other authors suggest that, on the other hand, effective judicial protection works as a separate and stricter standard for review of national domestic procedures.²⁷ In particular, the value of adding effective judicial protection to the set of principles used by the Court would be that, although only in limited circumstances, effective judicial protection could pave the way for the creation of new

¹⁹ See, generally, on the evolution of the Court's case law: M. Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in P. Craig and G. De Búrca, *The Evolution of EU Law* (OUP 2011).

²⁰ The 'internal' relationship between equivalence and effectiveness is also still to be fully unmasked. See M. Bobek (n 5).

²¹ Ibid. See also his recent Opinion in Case C-89/17 *Banger* [2018] EU:C:2018:570, Opinion of AG Bobek, para. 100: 'for all practical purposes, however, I fail to see what in fact Article 47 of Charter would add, in the realm of *judicial* remedies, to what was not (or rather could not have been, if such a question ever arose), part of the principle of effectiveness'.

²² D. Leczykiewicz, "Effective Judicial protection" of human rights after Lisbon: should national courts be empowered to review EU secondary law? (2010) 35 *European Law Review* 326; M. Accetto and S. Zlepting, 'The Principle of Effectiveness: Rethinking its Role in Community Law' (2005) 11 *European Public Law* 375.

²³ S. Prechal and R. Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 4 *REALaw* 31, 39.

²⁴ In his contribution to this special issue, Rob Widdershoven further argues that the effective judicial protection test is 'more stringent' than the effectiveness test, in particular because it may have 'positive effects', that is to say that it can force national courts 'to provide for access and remedies not existing in national law'.

²⁵ D. Leczykiewicz (n 22) 333.

²⁶ M. Bobek (n 5).

²⁷ A. Arnall (n 17); J. Krommendijk, 'Is there light on the horizon? The distinction between "Rewe effectiveness" and the principle of effective judicial protection in Article 47 of the Charter after *Orizzonte*' (2016) 53 *CMLRev* 1395. Even AG Bobek now admits that effective judicial protection poses stricter standards, although he maintains that it should not be seen as a separate benchmark and should be assessed together with effectiveness: see Case C-89/17 *Banger* [2018] EU:C:2018:570, Opinion of AG Bobek, para. 101.

actions and remedies.²⁸ Despite the fact that the Court has repeatedly held that EU law does not require the creation of new procedures for the enforcement of Union rights,²⁹ this result has been produced in some instances. *Factortame*, when the Court required British courts to acknowledge the concept of ‘interim relief’, is perhaps the most meaningful example. In *Factortame*, while it was not the central point of the decision, the Court made at least an ‘allusion’³⁰ to the concept of effective judicial protection in order to support its conclusions. The Court was then more explicit in *Unibet*, where it concluded that:

[W]here it is uncertain under national law, [...] whether an action to safeguard respect for an individual’s rights under Community law is admissible, the *principle of effective judicial protection* requires the national court to be able, none the less, at that stage, to grant the interim relief necessary to ensure those rights are respected.³¹

In any event, the case law of the Court of Justice does not give a clear answer on which of the two views is correct. For example, in its *Orizzonte Salute* decision, the Court seems to suggest that effective judicial protection would be implicit in the concept of effectiveness, rather than providing another or an additional standard for review,³² thus supporting the first view described above. On the other hand, cases like *Impact*³³ could be seen as subsuming the *Rewe* criteria into the principle of effective judicial protection, with the latter assuming overwhelming importance. It has thus always remained difficult to precisely understand the relationship between the three concepts.

2.2. The Lisbon Treaty

With the Treaty of Lisbon, effective judicial protection became an EU primary law principle. Once again, however, it appears in the Treaties with a slightly different wording. A first reference can be found in Article 19 TEU: the second sentence of Article 19(1) requires Member States to ‘provide remedies sufficient to ensure *effective legal protection* in the fields covered by Union law’. Secondly, Article 47 of the Charter established a fundamental right ‘to an *effective remedy* and to a fair trial’.

At the moment of their introduction, both provisions did not appear as groundbreaking changes to the EU legal framework. In the case of Article 19

²⁸ A. Arnulf (n 17), in particular referring to Case C-432/05 *Unibet* [2007] EU:C:2007:163.

²⁹ See e.g. Case C-583/11 *Inuit* [2013] EU:C:2013:625.

³⁰ S. Prechal and R. Widdershoven (n 23) 33.

³¹ See Case C-432/05 *Unibet* [2007] EU:C:2007:163. According to C. Lacchi, ‘Multilevel judicial protection in the EU and preliminary references’ (2016) 53 *CMLRev* 679, 683, *Unibet* confirms that already in *Factortame* the Court’s reasoning was linked to effective judicial protection.

³² See C-61/14 *Orizzonte Salute* [2015] EU:C:2015:655 and J. Krommendijk (n 27).

³³ Case C-268/06 *Impact* [2008] EU:C:2008:223.

TEU, the new provision was mostly considered to codify the Court of Justice's case law on effective judicial protection when it comes to the role and responsibilities of national courts under Union law.³⁴ One of the reasons for the introduction of the second sentence was to give formal recognition to the 'division of tasks' between national and European courts that the Court of Justice had elaborated in *UPA*.³⁵ In this light, it can also be observed that in Article 19 TEU the concept of effective judicial protection only refers to 'protection' at the national level (it is the Member States that 'must ensure effective judicial protection'), and not at EU level. Yet, despite the scarce attention dedicated to the provision in the aftermath of the entry into force of the Lisbon Treaty, few observers did already suggest that the introduction of Article 19 could lead to a further expansion of the Court's case law on effective judicial protection. For example, Anthony Arnall noted in Article 19 a shift of the 'tectonic plates of Union law', suggesting that effective judicial protection could, after Lisbon, be considered 'hierarchically superior' to national procedural autonomy.³⁶ Koen Lenaerts, the current President of the Court of Justice, also suggested at the time that the provision could have had 'far-reaching implications', insofar as it might have pushed the Court to force Member States to introduce new remedies before national courts, in order to guarantee to individuals, in all possible cases, the possibility to challenge EU acts through preliminary references on validity.³⁷

As for Article 47 of the Charter, the provision was not revolutionary either. As already noted, the Court had already found in *Johnston* that effective judicial protection was a common constitutional principle, expressed also in the ECHR. On close inspection, however, Article 47 has a broader scope than Articles 6 and 13 ECHR. The first paragraph, corresponding to Article 13 ECHR, requires effective judicial protection of 'rights and freedoms guaranteed by the law of the Union' in contrast to rights and freedoms 'set forth in this Convention', which is to say that even an ordinary right (i.e. one that is not mentioned in the Charter) can trigger the application of Article 47 in the EU legal system; and it calls for an effective remedy before 'a tribunal', rather than before 'a national authority'. Furthermore, in contrast to Article 6 ECHR, paragraph 2 of Article 47 establishing fair trial rights is not limited to cases concerning the determination of civil rights and obligations and criminal charges. All considered, therefore, although the Treaty of Lisbon did not revolutionize the legal frame-

³⁴ See e.g. C. Lacchi (n 31) 685 and M Bobek, 'The effects of EU law in the national legal systems' in C. Barnard and S. Peers, *European Union Law* (OUP 2018).

³⁵ K. Lenaerts, 'The rule of law and the coherence of the judicial system of the European Union' (2007) 44 *CMLRev* 1625, also for a general overview of the Lisbon changes to the EU judicial system; Case C-50/00 P *Unión de Pequeños Agricultores* [2002] EU:C:2002:462.

³⁶ A. Arnall (n 17) 68.

³⁷ K. Lenaerts (n 35) 1629.

work, it offered a platform for the evolution of the case law that we are witnessing today.

3. The Court of Justice and effective judicial protection: some recent decisions

This section discusses recent decisions of the Court of Justice on effective judicial protection, first looking at cases in which effective judicial protection appears as a fundamental right, and then at cases in which it is used as a structural principle linked to the value of the rule of law. The objective of this section is not to offer an exhaustive overview of the Court's case law, but to identify and analyze instances in which the principle has been used in a more innovative manner, often outside the ordinary context of domestic procedures for the adjudication of EU law rights - this is true in particular for the rule of law cases - and with fairly surprising results. It is worth underlining that all cases discussed in detail are Grand Chamber cases, a common feature that may illustrate both the relevance of the decisions and, perhaps more importantly, that the presence of effective judicial protection is not merely a coincidence, but a conscious choice of the Court: judges in Luxembourg seem today willing to give an expansive reading of the principle.

3.1. Effective judicial protection as a fundamental right

As noted earlier, Article 47 of the Charter contains a fundamental right to effective judicial protection. As all other rights of the Charter, Article 47 applies both to EU institutions and the Member States, but to the latter only when they are implementing EU law in the sense of Article 51 of the Charter, as clarified in *Åkerberg Fransson*.³⁸ Article 47 has been defined as the 'most important provision of the Charter' aside from Article 51,³⁹ and the FRA's data show that it is the right most frequently mentioned by national courts in their preliminary references to the Court of Justice.⁴⁰ The right to effective judicial protection is not absolute, and can be limited under the conditions of Article 52(1) of the Charter.⁴¹

³⁸ Case C-617/10 *Åkerberg Fransson* [2013] EU:C:2013:105.

³⁹ D. Shelton, 'Article 47' in S. Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing 2014) 1209.

⁴⁰ See Fundamental Rights Agency, 'Opinion - Challenges and opportunities for the implementation of the Charter of Fundamental Rights' (FRA, 30 September 2018) <https://fra.europa.eu/en/opinion/2018/charter-training> accessed 21 October 2019.

⁴¹ For an analysis of the limitation conditions, see e.g. Case C-73/16 *Puškar* [2017] EU:C:2017:725.

The introduction of Article 47 has contributed to three developments in the use of effective judicial protection as a fundamental right vis-à-vis the Member States.⁴² In a first set of cases, Article 47 is used as guidance for the interpretation of EU procedural legislation and a benchmark for the validity of EU law and indirectly of national law. The *Samba Diouf* case is in this respect an excellent example: the Court was asked to assess whether the measures taken by Luxembourg in implementing Directive 2005/85 on minimum standards for granting and withdrawing refugee status complied with Article 47 of the Charter.⁴³ Thus, if equivalence and effectiveness lose relevance when the EU adopts procedural norms - in other words, they only apply in the absence of common EU procedural norms⁴⁴ - effective judicial protection does not, and remains a parameter that can be used to assess those EU procedural norms and their national implementation, for example in the area of migration and asylum.⁴⁵

A second development is that the Court found the fundamental right to effective judicial protection applicable also in horizontal relationships. In *Egenberger*, a case brought on the basis of Directive 2000/78 on non-discrimination in access to employment, the Court found first that effective judicial protection requires full judicial review of churches' decisions that religion constitutes a 'genuine, legitimate and justified occupational requirement', and second that it can be invoked also in horizontal disputes between private individuals. In this respect, the Court concluded that Article 47 'is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such'.⁴⁶

If these first two developments were fairly straightforward and predictable after the adoption of the Charter, a third set of decisions might push Article 47 in a less anticipated direction. In addition to the more ordinary function just described and generally to its role as a 'benchmark' for assessing procedures established for protecting *other* Union rights, effective judicial protection could also work as a self-standing fundamental right. In other words, some recent

⁴² Of course, the right to effective judicial protection can be claimed also against EU institutions. See e.g. Case C-334/12 *RX-II Jaramillo* [2013] EU:C:2013:134.

⁴³ Case C-69/10 *Samba Diouf* [2011] EU:C:2011:524.

⁴⁴ Unless EU procedural norms only set minimum requirements, as is the case in the environmental policy area. See M Eliantonio, 'The relationship between EU secondary rules and the principles of effectiveness and effective judicial protection in environmental matters: towards a new dawn for the "language of rights"?' (2019) 2 *REALaw*, forthcoming.

⁴⁵ For other examples: Case C-348/16 *Moussa Sacko* [2017] EU:C:2017:591; Case C-585/16 *Alheto* [2018] EU:C:2018:584; Case C-556/17 *Torubarov* [2019] EU:C:2019:626. The cases show that even when EU law sets only minimum standards and leaves discretion to the Member States, the latter still need to comply with Article 47 of the Charter.

⁴⁶ Case C-414/16 *Egenberger* [2018] EU:C:2018:257, para. 78. The Court thus affirmed the 'self-standing' nature of Article 47. See L Lourenço, 'Religion, discrimination and the EU general principles' gospel: *Egenberger*' (2019) 56 *CMLRev* 193, 199.

decisions of the Court suggest that it may become applicable even when an individual does not have a claim under another right derived from the Charter or other Union law, as long as the situation at stake falls within the scope of EU law, thus making the Charter applicable on the basis of Article 51 EUCFR.⁴⁷ Despite the broad drafting of Article 47 - broader in particular when compared to Article 6 and 13 ECHR - this would be a surprising development. The standard position seemed to be, as Konstadinides put it, that 'an individual cannot rely on the Charter in the abstract without there being a right she can invoke before a national court'.⁴⁸ In simpler terms, effective judicial protection could not be the *only* right claimed by the individual, in the sense that a claim under Article 47 had to be linked to a claim under another right deriving from Union law. After all, this is what the text of the provision expresses in quite straightforward terms: '*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy*'.

The table started to turn, however, already in *Texdata Software*, where the Court considered the applicant's claim under Article 47 of the Charter without reflecting on whether another right deriving from Union law was at stake: the CJEU simply ascertained that the Charter was applicable, and then proceeded with analyzing whether the national provisions complied with Article 47 of the Charter. The Court followed a similar approach in the *Liivimaa* case.⁴⁹

In *Berlioz*, however, the Court might have pushed its position even further, in particular in terms of the consequences it created. *Berlioz*, a joint stock company based in Luxembourg, argued before the *Cour Administrative* of Luxembourg *inter alia* that its right to an effective remedy under Article 47 of the Charter had been breached, since it could not challenge in substance an information order issued by the tax authorities. This order was issued following a request for information of the French tax administration authorities, on the basis of Directive 2011/16. Non-compliance with the information order resulted in a fine for the company, on the basis of the national law of Luxembourg transposing the Directive. Clearly, the Directive in question did not confer rights to individuals, as it only provided the modes for administrative cooperation between Member States' tax authorities. At the same time, the presence of the Directive implied that the situation fell within the scope of Union law, thus making the Charter in principle applicable, including Article 47.

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

⁴⁸ See T. Konstadinides, *The Rule of Law in the European Union – the internal dimension* (Hart Publishing 2017) 129-130. See also M. Krajewski, 'Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena's Dilemma' (2018) 3 *European Papers* 395.

⁴⁹ Case C-562/12 *Liivimaa Lihaveis MTÜ* [2014] EU:C:2014:2229.

Following in substance the Opinion of Advocate General Wathelet, the Court concluded that *Berlioz* could rely on Article 47 and that it must have been able to challenge the information order before an independent court. While the Advocate General explicitly argued that Article 47 is ‘automatically applicable’ when the Charter is applicable and not ‘conditional upon the alleged violation of a right or freedom guaranteed by the law of the Union’,⁵⁰ the Court was more prudent. It still concluded that *Berlioz* had a right to an effective remedy, but it did not explicitly say that Article 47 is an ‘automatically applicable’ right. The Court strived to identify a general principle of Union law of ‘protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person’⁵¹ and argued that

[T]hat protection may be invoked by a relevant person, such as *Berlioz*, in respect of a measure adversely affecting him, such as the information order and the penalty at issue in the main proceedings, so that a relevant person can rely on a right guaranteed by EU law, within the meaning of Article 47 of the Charter, giving him the right to an effective remedy.⁵²

Formally, there is therefore another right deriving from Union law that triggers the application of Article 47. It is however striking that this other right is an unwritten general principle, not explicitly claimed by the company nor mentioned in the order of reference of the national court. While the Court’s approach still signal a certain caution, the following step, namely the automatic application of the right to effective judicial protection envisaged by Advocate General Wathelet, does not seem too far-fetched although, as will be argued in the next section, it would have profound consequences.

3.2. Effective judicial protection as a rule of law principle

In a second version, the principle operates as ‘a concrete expression’ of the value of the rule of law.⁵³ Here the key provision is Article 19 TEU, often read in conjunction with Article 2 TEU, the latter stating that the rule of law is one of the founding values of the Union. It operates in this version as a more structural principle,⁵⁴ with important effects on the EU constitutional system as a whole, affecting the relationship between the Union and Member

⁵⁰ See Case C-682/15 *Berlioz* [2017] EU:C:2017:373, Opinion of AG Wathelet, para. 51: ‘the question to be answered by the Court is quite simply whether the application of the Charter automatically renders Article 47 applicable or whether the applicability of that article is conditional upon the alleged violation of a right or freedom guaranteed by the law of the Union’.

⁵¹ Case C-682/15 *Berlioz* [2017] EU:C:2017:373, para 50.

⁵² *Ibid.*, para. 51.

⁵³ See Case C-64/16 *Associação Sindical dos Juizes Portugueses* [2018] EU:C:2018:117, para. 32.

⁵⁴ See also *Common Market Law Review*, ‘Editorial Comments: EU law between common values and collective feelings’ (2018) 55 *CMLRev* 1329, 1334: ‘the shift from a functional reading to a structural reading of Article 19 TEU is achieved in the name of “the rule of law”’.

States, and between the Court of Justice and national courts. In this guise, the principle can operate both at EU and at national level.

To start with an example at the EU level, there is a recent set of decisions where the Court used Article 19 TEU, also combined with Article 47 of the Charter, in order to affirm and bolster its jurisdiction in the CFSP.⁵⁵ The *Rosneft* case is the most remarkable of these decisions.⁵⁶ In *Rosneft*, the Court was *inter alia* asked to determine whether it had jurisdiction on preliminary references from national courts challenging the validity on a CFSP Decision imposing restrictive measures. As it is widely known, even after Lisbon, the Court does not have full jurisdiction over the CFSP.⁵⁷ It can however review the ‘boundaries’ of the CFSP, monitoring compliance with Article 40 TEU,⁵⁸ as well as the legality of restrictive measures against natural or legal persons. Ordinarily, and as explicitly suggested by Article 275 TFEU (according to which the Court has jurisdiction ‘to rule on proceedings, *brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty*, reviewing the legality’ of restrictive measures)⁵⁹, the latter type of actions reach the Court of Justice (more precisely, the General Court) through direct annulment actions. In *Rosneft*, however, the question of the validity of a CFSP restrictive measures decision arose in the context of domestic proceedings before a British court. The first key question for the Court was thus whether it had jurisdiction over the preliminary reference raised by the national court.

The Court concluded in the affirmative. First, it tackled a less controversial point, namely whether it could monitor if the Decision at stake complied with Article 40 TEU. As the Treaties do not specify how questions regarding Article 40 should be assessed, the Court easily affirmed that ‘the Court has jurisdiction to give a ruling on a request for a preliminary ruling concerning the compliance of Decision 2014/512 with Article 40 TEU’.⁶⁰ More challenging was the second part of the assessment, considering that - as noted above - Article 275 TFEU might at a first, literal reading suggest that the Court could only review the validity of restrictive measures in the context of annulment procedures under

⁵⁵ See, in general, on the recent attitude of the CJEU on CFSP cases, G Butler, ‘The Coming of Age of the Court’s Jurisdiction in the Common Foreign and Security Policy’ (2017) 13 *European Constitutional Law Review* 673.

⁵⁶ Case C-72/15 *Rosneft* [2017] EU:C:2017:236. For a comment, see M. Cremona, “Effective Judicial Review is of the Essence of the Rule of Law”: Challenging Common Foreign and Security Policy Measures before the Court of Justice’ (2017) 2 *European Papers* 671.

⁵⁷ See Article 24(1) TEU, second sentence.

⁵⁸ Article 40 TEU states that ‘The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union’.

⁵⁹ Emphasis added.

⁶⁰ Case C-72/15 *Rosneft* [2017] EU:C:2017:236, para. 63.

Article 263 TFEU. In order to overcome the textual limitations of Article 275 TFEU, the Court put in place a broad construction.

It first argued that in the ‘complete system of legal remedies’ created by the Treaties,⁶¹ ‘requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, a means for reviewing the legality of European Union acts’.⁶² Preliminary rulings, thus, ‘[play] an essential part in ensuring effective judicial protection’.⁶³ To support this construction, largely based on the ‘old’ logic of cases such as *Les Verts*, *UPA* and *Inuit*,⁶⁴ the Court added a second and more innovative building block to its reasoning of the Court. It made reference to a set of provisions including: Article 19 TEU, which assigns to the Court the responsibility to ensure that EU law ‘is observed’; Article 47 of the Charter, containing the right to effective judicial protection and in general to the value of the rule of law contained in Article 2 TEU. Read together, these basic principles of EU law allowed the Court to conclude that ‘it would be contrary to [...] the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of Article 275 TFEU’.⁶⁵

A similar reliance on the rule of law, the principle of effective judicial protection, and Article 19 TEU could be found also in another key ‘jurisdictional’⁶⁶ case of the Court in the CFSP, namely *H v Council*.⁶⁷ The Luxembourg Court found that it had jurisdiction over staffing cases even when the latter are set in the context of the CFSP. Thus, Article 19 TEU and the principle of effective judicial protection have been used in this context to expand the jurisdiction of the Court over EU measures, specifically CFSP measures.

The second line of cases to be discussed relates to the relationship between the EU and the national legal orders. Broadly speaking, the Court here relied on Article 19 TEU and on the principle of effective judicial protection to guarantee that national courts can participate to the ‘European judiciary’. It has done so by protecting their possibilities to act as ‘Union courts’ and to send preliminary references to the Court of Justice. Here, the key reference is to the second sentence of the first paragraph of Article 19 TEU, which calls on the Member States to ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’.

⁶¹ Ibid, paras 66-67.

⁶² Ibid, para. 68.

⁶³ Ibid, para. 71.

⁶⁴ The three cases are all mentioned in para. 66 of the *Rosneft* decision.

⁶⁵ Case C-72/15 *Rosneft* [2017] EU:C:2017:236, paras 75 and 81. The Court adds also another block *a contrario*: had the Court not affirmed jurisdiction, it would have been up to the national courts to assess the validity of restrictive measures, and this would be against the established case law of the Court and the unity of Union law.

⁶⁶ G. Butler (n 55) 676.

⁶⁷ Case C-455/14 P *H v Council* [2016] EU:C:2016:569.

The first ruling to be considered is the ‘Portuguese judges’ case, or *ASJP*.⁶⁸ Although little anticipated, this was one of the more impactful decisions taken by the Court in 2018. The story is by now quite well known: the Court found that EU primary law, and more specifically Article 19 TEU, contains an obligation to guarantee the independence of national courts that act ‘in the fields covered by Union law’. In doing so, the Court offered the perfect platform for the Commission to start infringement actions against Poland in order to tackle the controversial reforms of the judiciary adopted in the country.⁶⁹ The Commission immediately followed through, starting an infringement action on the Polish reform of the Supreme Court system, ultimately decided by the Court of Justice in June 2019: in *Commission v Poland*, the Luxembourg Court found, for the first time ever, an infringement of the obligation to guarantee judicial independence contained in Article 19(1) TEU.⁷⁰

In the Court’s complex and controversial construction developed in *ASJP*, Article 19 TEU and the principle of effective judicial protection contained therein play two fundamental roles: first, they allow the Court to affirm its jurisdiction on the national measures under discussion; second, they provide the standard for reviewing those measures, namely the principle of judicial independence. These two elements are central also to the discussion developed in this paper, as they perfectly show the way in which the principle of effective judicial protection is evolving.

First, it is now evident that Article 19 TEU and effective judicial protection expand the reach of Union law. The obligation to guarantee effective judicial protection applies ‘to the fields covered by Union law’, a new ‘sphere’ of EU law that is broader than the ordinary ‘scope of EU law’.⁷¹ All bodies potentially called to interpret and apply Union law at the national level fall in this sphere of Union law, so the Court affirms, because of their function as ‘Union courts’ and irrespective of whether or not they are, in the specific case, concretely interpreting or applying EU law (in other words, even if the concrete case they have before them is a purely internal one).⁷² This is an impressive extension of the scope of the principle and of the obligation deriving from Article 19 TEU.

⁶⁸ For a more detailed analysis, see M. Bonelli and M. Claes, ‘Judicial Serendipity: How Portuguese judges came to the rescue of the Polish Judiciary’ (2018) 14 *European Constitutional Law Review* 622.

⁶⁹ On the Polish reforms, see W. Sadurski, *Poland’s Constitutional Breakdown* (OUP 2019).

⁷⁰ See Case C-619/18 *Commission v Poland* [2019] EU:C:2019:531.

⁷¹ Case C-64/16 *Associação Sindical dos Juizes Portugueses* [2019] EU:C:2018:117, para. 29.

⁷² Most recently, this very broad reading of the ‘material scope’ of Article 19 TEU has been confirmed by AG Tachev in Joined Cases C-558/18 and C-563/18 *Miasto Łowicz* [2019] EU:C:2019:775, Opinion of AG Tachev. While the AG considered the reference inadmissible because the referring court failed to provide to the CJEU with enough factual and legal material to determine whether there has been a breach of Article 19, he still concluded that the situation under observation (the Polish regime of disciplinary proceedings against judges) fell within the scope of Article 19 TEU, see para. 86 ff.

The Court continues by expanding the substantive content of the principle. Here Luxembourg refers again to some of the provisions already mentioned in *Rosneft*: Article 2 TEU, Article 47 of the Charter, and common constitutional traditions. These provisions help in creating the ‘requirements of effective judicial protection’⁷³ that Member States are obliged to meet when they entrust national bodies with the interpretation and application of Union law. Specifically, one of these requirements is that of independence, which the Court develops also through references to Article 267 TFEU - the Court has since long held that only ‘independent’ bodies may send preliminary references to Luxembourg - and again to Article 47 of the Charter, this time where it contains a fundamental right to an independent court, and despite the fact that the latter is not applicable to the case at stake. Both aspects are remarkable. The Court greatly expands the scope of application of the principle of effective judicial protection under Article 19 TEU and then also expands its substantive content so as to include a requirement of judicial independence. It is now evident that, when linked to the value of the rule of law, effective judicial protection requires much more than what it did when it originally appeared alongside equivalence and effectiveness.

The Court significantly relied on the findings in *ASJP in another important decision taken a few weeks later, Achmea*.⁷⁴ The context was however fundamentally different: Luxembourg had to decide on the compatibility of an intra-EU arbitration agreement with EU law. It concluded that those agreements are not compatible with EU law, and the principle of effective judicial protection was an important reason to explain why they were not compatible, along with some crucial reflections based on the ‘autonomy’ of the Union legal order. What was at stake in the ruling was an investor-state dispute settlement (ISDS) mechanism included in a bilateral investment treaty concluded by the Netherlands and Slovakia, before the latter’s accession to the EU. The problem for the Court was that the arbitral tribunal could be called to interpret and apply Union law,⁷⁵ but it did not fulfill the conditions of Article 267 TFEU for sending preliminary references to the Union court.⁷⁶ It was thus barred from participating to the European judicial system, as the Court found it could not be considered a court or tribunal ‘of a Member State’ or a ‘common’ court like the Benelux court.⁷⁷ Furthermore, the possibility to appeal the arbitral award before an ordinary court could not be considered an adequate alternative, because it only envisaged

⁷³ Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2019] EU:C:2018:117, para. 37.

⁷⁴ Case C-284/16 *Achmea* [2018] EU:C:2018:158.

⁷⁵ *Ibid.*, para. 41.

⁷⁶ *Ibid.*, para. 45. This point is however not so straightforward, as the Advocate General, on the other hand, suggested that the arbitral body could qualify as a court under Article 267 TFEU. Regardless of its feasibility and desirability, this would arguably be the main alternative to the Court’s decision: recognizing that arbitral bodies are allowed to refer preliminary questions to the Court of Justice.

⁷⁷ *Ibid.*, para. 48.

a limited form of judicial review, based purely on national law without the possibility to consider EU law arguments.⁷⁸

The Court made several references to Article 19 TEU to support its conclusions. First, it used the provision in the opening paragraph of the analysis, reflecting on the ‘structured network of principles, rules and mutually interdependent legal relations’ of the EU judicial system.⁷⁹ Article 19 TEU in particular served as a reminder that ‘it is for the *national* courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law’.⁸⁰ The provision then came back in paragraph 55 of the ruling, where it was used to distinguish commercial arbitration (generally accepted by the Court) from arbitration agreements such as those at stake in *Achmea* (found, on the other hand, to undermine the autonomy of Union law). While the former originates in the free will of the parties, treaty-based ISDS are created by treaties

[B]y which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law [...], disputes which may concern the application or interpretation of EU law.⁸¹

The result is that there is no guarantee that these disputes are resolved ‘in a manner that ensures the full effectiveness of EU law’.⁸² In other words, the Court concluded that Member States cannot remove ‘EU-law disputes’ from the jurisdictional system they are required to set up in accordance with Article 19 TEU, second sentence, as interpreted in *ASJP*. Article 19 TEU thus limits the autonomy of the Member States in organizing their judicial systems.

This second line of the evolution is very far-reaching, as well as somewhat surprising, considering that the introduction of Article 19 TEU mostly seemed to be – although admittedly with some exceptions - a consolidation of the previous case law of the Court rather a fundamental revolution of the Union’s legal order.⁸³ The recent judgments, which are also effectively the first interpretations of Article 19 TEU, are however truly groundbreaking. They expand both the

⁷⁸ Ibid, para. 53.

⁷⁹ Ibid, para. 33. This newly coined paragraph has since then been used in other two landmark decisions of the Court: Case C- 621/18 *Wightman* EU:C:2018:999 and Opinion 1/17 (*CETA*) [2019] EU:C:2019:341.

⁸⁰ Case C-284/16 *Achmea* [2018] EU:C:2018:158, para. 36 (emphasis added).

⁸¹ Ibid, para. 55. In paragraph 57, the Court distinguished also the arbitration agreement at issue in *Achmea* (concluded by two Member States) from arbitration agreements included in EU international agreements. This anticipates the conclusion of Opinion 1/17 (*CETA*) [2019] EU:C:2019:341, in which the Court found the ISDS mechanism included in the trade agreement with Canada compatible with EU law. See in particular paras 126-127, in which the Court distinguished the *CETA* situation from *Achmea*.

⁸² Case C-284/16 *Achmea* [2018] EU:C:2018:158, para. 56.

⁸³ See discussion *supra*, section 2.2.

scope and the content of the principle of effective judicial protection, which has become a judicially enforceable (and enforced)⁸⁴ rule of law principle (as well as a fundamental right, as seen in the earlier sub-section).

4. Effective judicial protection today: an evolving principle

The decisions of the Court analyzed in the previous section illustrate an ongoing evolution of the concept of effective judicial protection in EU law. The process began already with the entry into force of the Treaty of Lisbon, but has accelerated more recently. This evolution has already produced significant effects, demonstrating that the principle of effective judicial protection has a fundamental relevance even in contexts fundamentally different from those in which it had originally emerged, namely those of domestic procedures for the adjudication of EU law and the Union's limits to national procedural autonomy. The principle of effective judicial protection in the Union legal order cannot be understood anymore purely as a further, perhaps even more intense, manifestation of the principle of effectiveness. It has acquired a broader constitutional relevance and may appear both as a fundamental right and as a concrete expression of the rule of law.

As a fundamental right, the principle of effective judicial protection is enshrined in Article 47 of the Charter. The provision, as analyzed earlier, has a broader scope than the corresponding Articles of the ECHR (Articles 6 and 13). Furthermore, it posits requirements that go beyond the simple combination of equivalence and effectiveness and that are inherent to its nature as a fundamental right protected by the Charter.⁸⁵ Firstly, in contrast to equivalence and effectiveness, the fundamental right to effective judicial protection remains relevant also after the adoption of EU procedural norms.⁸⁶ Secondly, it is applicable also in horizontal relationships.⁸⁷ These are all but groundbreaking developments, yet they reveal that effective judicial protection under Article 47 of the Charter poses additional demands compared to the traditional *Rewe* test.

A third, more groundbreaking but also more controversial development might be produced if the Court would further push the line it followed in *Berlio*. As explained in the previous section, in that decision the Court found Article 47 of the Charter applicable even if the company did not clearly demonstrate the existence of another right deriving from EU law, which would normally and

⁸⁴ See Case C-619/18 *Commission v Poland* [2019] EU:C:2019:531.

⁸⁵ On Article 47 as a 'fully-fledged' right, see L. Lourenço (n 46) 200.

⁸⁶ Case C-69/10 *Samba Diouf* [2011] EU:C:2011:524; Case C-556/17 *Torubarov* [2019] EU:C:2019:626.

⁸⁷ Case C-414/16 *Egenberger* [2018] EU:C:2018:257.

textually be the condition for the applicability of the fundamental right to effective judicial protection. While the Court still strived to acknowledge the existence of a general principle of protection against arbitrary or disproportionate intervention by public authorities, the Opinion of the Advocate General argued that Article 47 should cease to be an ‘accessory right’⁸⁸ and should become automatically applicable once it is established that the situation at stake falls within the scope of Union law. The same approach has been suggested by other members of the Court, in their official⁸⁹ or academic⁹⁰ capacity. Should the Court follow the suggested interpretation, the result would be that, for Article 47 to become applicable, an individual would not need to find support in another provision of EU law conferring rights to an individual:⁹¹ it would be sufficient to demonstrate that the Charter is applicable because the situation falls within the scope of EU law, and the protection of Article 47 would be automatically triggered.

This possible step would reflect deeper changes in the nature of EU law, which now reaches well beyond the internal market and the individual rights conferred by the four freedoms. EU legislation currently covers several other substantive areas and may more and more often *limit* rights of individuals, rather than conferring new rights to them. Maintaining a strict link between the fundamental right to effective judicial protection, on the one hand, and the need to show the existence of another right deriving from EU law, on the other hand, could thus limit the impact of effective judicial protection in these second types of situations, which could however often be precisely those more in need of (effective judicial) protection.⁹² It would also lead to an implicit alignment of the text of Article 47 of the Charter with Article 19 TEU, which does not use the expression rights deriving from Union law but of effective judicial protection ‘in the fields covered by Union law’. Yet, as will be argued in the next section, this step might have profound consequences in national legal orders and finds some opposition even within the Court of Justice itself.

Effective judicial protection is then a concrete expression of the rule of law, one of the founding values of the Union. The Court has used it in this second

⁸⁸ See e.g. H. Hofmann, ‘Article 47’ in S. Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing 2014) 1215.

⁸⁹ Case C-33/17 *Čepelnik* [2018] EU:C:2018:896, Opinion of AG Wahl.

⁹⁰ See S. Prechal, ‘The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?’ in C. Paulussen and others (eds), *Fundamental Rights in International and European Law* (TMC Asser Press 2016) 148: ‘the real question is ... whether in a concrete case one needs to establish first the existence of a right or freedom arising from EU law that needs to be protected before Article 47 applies. In my opinion, the answer is no, for a number of reasons’.

⁹¹ An alternative reading might be that the correct application of EU law by national authorities is in itself an individual right, which triggers the applicability of Article 47 of the Charter.

⁹² See S. Prechal (n 90) 148: ‘the guarantees laid down in that Article [Article 47] also protect those who seek to defend themselves against the enforcement of EU law provisions. Obviously, a party that contests an obligation stemming from EU law is entitled to a fair trial, without there being a need to establish that a right or freedom has been violated’.

sense with various results: extending jurisdiction over the CFSP, imposing on the Member States a requirement to guarantee judicial independence, and ruling on the compatibility of ISDS in bilateral investment treaties with Union law. All these three cases show that effective judicial protection is capable of playing a fundamental role, along other basic principles of the Union legal order, in cases that primarily do not concern national procedures for the adjudication of Union rights.

The post-Lisbon evolution raises also new questions on the related principles of equivalence and effectiveness and their relationship with effective judicial protection. The other two principles still remain relevant, as the case law of the Court continues to show. Much will depend, in the short term, on how national courts will phrase their questions in preliminary references.⁹³ They will probably tend to refer to the concept of effective judicial protection when a case concerns the specific position of a specific individual, and still concentrate on equivalence and effectiveness when the core interest is the ‘scheme’ of procedures.⁹⁴

In the longer term, however, the Court will most likely be called to develop a more coherent approach to the relationship between the three principles, as well as to further reflect on the interplay between these principle and EU legislative procedures.⁹⁵ If equivalence can logically remain an independent, separate standard, the key question is whether the effective judicial protection test could simply replace the test of effectiveness and capture all questions that are currently addressed under it. This would possibly allow the Court to present its intervention as motivated by a genuine concern with the position of individuals and with the protection of their rights under Union law, rather than a more instrumental interest related to the smooth functioning of the Union legal order.⁹⁶ But it seems that some questions would remain more problematic or even impossible to capture under the effective judicial protection principle, if the latter was meant the main benchmark of the Court for assessing national

⁹³ See, in general, on the growing importance of the order for reference of national courts, N. Wahl and L. Prete, ‘The Gatekeepers of Article 267 TFEU: On Jurisdiction and Admissibility of References for Preliminary Rulings’ (2018) 55 *CMLRev* 511.

⁹⁴ For two examples: see Case C-234/17 *XC and others* [2018] EU:C:2018:853; Case C-378/17 *Commissioner of An Garda Síochána* [2018] EU:C:2018:979. On the latter, see N. Lazzarini, ‘Jurisdiction of Statutory Bodies to Disapply National Law, or Nothing’: Procedural Primacy taking over Procedural Autonomy in the CJEU’s Judgment *Minister for Justice and Equality and Commissioner of the Garda Síochána*’ (2019) 1 *REALaw* 197, noting that while the preliminary question was formulated on the basis of the principles of equivalence and effectiveness, the answer of the Court relied mainly on the principle of primacy of EU law.

⁹⁵ On the topic, see the other contributions to this special issue.

⁹⁶ On the different values underlying equivalence and effectiveness, on the one hand, and effective judicial protection, on the other, see S. Prechal and R. Widdershoven (n 23). Using the ‘Article 47 test’ has the additional benefit of coordinating the approach of the Court of Justice to that of the ECHR under the corresponding Article 6. See R. Widdershoven, ‘National Procedural Autonomy and General EU Law Limits’ (2019) 2 *REALaw*, forthcoming, in this special issue.

procedural law.⁹⁷ When there is no clear right conferred to individuals, such as for example in environmental procedures, could effective judicial protection cover cases currently captured under the principle of effectiveness?⁹⁸ If the Court, as it seems by reading *Berlioz*, is willing to interpret Article 47 as a self-standing, ‘automatic’ fundamental right, then these questions could as well fall under the principle of effective judicial protection, but it is not yet clear just how far the Court is willing to push its case law.⁹⁹

More fundamentally, though, ‘effectiveness’ works not only as a benchmark for national domestic procedures, but it also has a crucial role in securing the primacy of EU law.¹⁰⁰ In this respect, it can actually play *against* individual rights, as Member States may be called to interfere with fundamental rights in order to secure the effectiveness of Union law.¹⁰¹ Here effectiveness – in this looser sense - and effective judicial protection might actually end up conflicting with each other. The Court is thus called to rationalize its approach to the two principles.

5 The impact of the evolution on the EU’s constitutional order

The principle of effective judicial protection, while it continues to play its ‘procedural’ role alongside equivalence and effectiveness, with the recent decisions of the Court has also acquired greater constitutional relevance, operating, depending on the case at stake, as a fundamental right or as a rule of law principle. As illustrated in the previous sections, the two key provisions that support this evolution of the principle are Article 47 of the Charter and Article 19 TEU.

What is the impact of this evolution on the EU legal order and what effects does it produce? In the first place, the recent case law of the Court opens up further possibilities for individuals to rely on effective judicial protection. As a fundamental right, it has been seen that effective judicial protection can now operate in horizontal relationships (*Egenberger*) and even when it is not at least

⁹⁷ See also R. Widdershoven (n 96), concluding that ‘the direct test on *Rewe* effectiveness will not disappear completely’.

⁹⁸ I am grateful to Mariolina Eliantonio on this point.

⁹⁹ Case C-403/16 *El Hassani* [2017] EU:C:2017:960, Opinion of AG Bobek, further discussed *infra*, shows that even within the Court there are different views on the topic.

¹⁰⁰ See, on this broader importance of the principle of ‘effectiveness’, F. Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56 *The Modern Law Review* 19. See also U. Sadl, ‘National courts and the effectiveness of EU law’ in B. de Witte and others, *National Courts and EU Law - New Issues, Theories and Methods* (Edward Elgar 2016) on a distinction between effectiveness as *effect utile* and the *Rewe* effectiveness.

¹⁰¹ See for example the role played by effectiveness in cases such as Case C-399/11 *Melloni* [2013] EU:C:2013:107 and Case C-105/14 *Taricco* [2015] EU:C:2015:555.

immediately clear if EU law confers any other right to an individual (*Berliozy*). But also as rule of law principle, effective judicial protection has allowed the Court to expand its jurisdiction in the CFSP, or helped in establishing an obligation to guarantee the independence of national courts (*ASJP*).

The losers in this evolution might however be the Member States, with the important exception of national courts, which are in contrast further protected against executive and legislative interference in particular by the *ASJP* line of cases. Had there been any doubt, it is now crystal clear that effective judicial protection is 'hierarchically superior' to national procedural autonomy.¹⁰² In broader terms, this evolution could call into question the division of competences between the EU and the Member States and potentially generate a further competence creep by the EU into areas reserved to national law. To a critical reader of the Court, it could easily seem that the Court is not actually concerned with protecting individuals, their fundamental rights, and the rule of law, but that these positions are taken instrumentally to bolster its own standing as the apex court of the EU judicial system. In the next pages, the contribution assesses the impact of the evolution on some of these critical junctures of the Union legal order.

5.1. National (procedural) autonomy and the division of competences

As widely known, the idea of national procedural autonomy was expressed in *Rewe*, where the Court affirmed that, subject to the principles of equivalence and effectiveness:

[I]t is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law.¹⁰³

The Court did not use at first the wording '(national) procedural autonomy', which is an academic creation adopted only later,¹⁰⁴ but never precisely defined, by the Court. However, while the mantra of procedural autonomy was constantly repeated, the Court progressively reached further-reaching results, including

¹⁰² A. Arnulf (n 17) 68, noting a centralizing effect of 'judicial protection'. See also V. Roeben, 'Judicial Protection as the Meta-norm in the EU Judicial Architecture' (2019) *Hague J Rule Law* <https://doi.org/10.1007/s40803-019-00085-3> accessed 21 October 2019, defining judicial protection 'as the new meta-norm for the EU judicial architecture'.

¹⁰³ On further limits to procedural autonomy other than the *Rewe* principles, see also A. Wallerman, 'Can two walk together, except they be agreed? Preliminary references and (the erosion of) national procedural autonomy' (2019) 44 *European Law Review* 159, focusing on the principle of sincere cooperation.

¹⁰⁴ See e.g. Case C-234/17 *XC and others* [2018] EU:C:2018:853.

for example the rulings in *Factortame* on interim relief or *Francovich* on state liability.

Most of the decisions discussed in this contribution further bite into national procedural autonomy and perhaps, more importantly and more generally, into Member States' spheres of competences.¹⁰⁵ The key question is indeed not one of 'autonomy', which may not be the correct term, as was already noted; or, in any case, it is evident that national 'autonomy' is far from being complete, and only operates after the requirements of equivalence and effectiveness have been fulfilled.¹⁰⁶ Rather, it is one of competences: 'effective judicial protection' is a possible tool for EU intervention in Member States' legal orders even when and where the Union lacks explicit legislative competences. This is most evident in *ASJP* and *Achmea*. In the two decisions, the Court did not simply want to ensure that procedures for the adjudication of Union law met the requirements of effective judicial protection. It imposed obligations that come some steps before the concrete procedures and concern the structuring and organization of the national judiciaries. The starting point of national procedural autonomy itself is challenged, namely that it was up to the Member States to identify 'which specific national bodies should be competent in the Member States, as well as how these bodies should be entrusted with the powers to implement Union law requirement',¹⁰⁷ or that 'it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction'.¹⁰⁸ Even in these respects, Member States are not entirely autonomous anymore. Those bodies (potentially) called to interpret and apply Union law must be bodies that fall into the definition of 'courts or tribunals' under Union law, meaning that they must be able to fulfill the requirements of Article 267 TFEU for sending preliminary references to the Court of Justice. This means, for example, that a state cannot envisage that administrative bodies take EU-law based final decisions not fully reviewable before a 'court', or more concretely that Member States cannot 'outsource' EU law matters to ISDS via bilateral investment treaties.¹⁰⁹

¹⁰⁵ The main exceptions are the CFSP decisions that only have relevance at EU level.

¹⁰⁶ See C.N. Kakouris and M. Bobek (n 5), both concluding that procedural autonomy is not a correct expression and that Member States are not fully autonomous when it comes to providing EU law remedies. See also W. van Gerven, 'Of rights, remedies and procedures' (2000) 37 *CMLRev* 501, which suggests using the language of competences rather than autonomy, which is a misplaced term.

¹⁰⁷ See M. Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 127, referring to Cases C-51 to 54/71 *International Fruit Company* [1971] EU:C:1971:128.

¹⁰⁸ K. Lenaerts (n 35) 1645.

¹⁰⁹ See Case C-284/16 *Achmea* [2018] EU:C:2018:158. See, in general, on the impact of *Achmea* J.H. Pohl, 'Intra-EU Investment Arbitration after the *Achmea* Case: Legal Autonomy Bounded by Mutual Trust?' (2018) 14 *European Constitutional Law Review* 767; S. Centeno Huerta and N. Kuplewatzky, 'On *Achmea*, the autonomy of EU law, mutual trust and what lies ahead' (2019) 4 *European Papers* 61; C. Eckes, 'Some reflections on *Achmea*'s broader consequences for investment arbitration' (2019) 4 *European Papers* 79.

Certainly, it is not effective judicial protection alone that produces these results: the principle of autonomy of Union's law was another decisive factor for the Court's conclusions in *Achmea*, for example. And it can also be added that this might not be an entirely new story, as correctly pointed out by Dougan: 'the "core narrative" on national remedies and procedural rules does not represent the only or the whole story of the interaction between Union law and the national systems of judicial protection'.¹¹⁰ This is to say that, already since the first decades of the integration process, the Union legal order has imposed upon national legal orders other additional requirements than equivalence and effectiveness, the most obvious of which derive from the principles of primacy and direct effect of EU law.¹¹¹ What is new, nonetheless, is the degree of the reach of the Union legal order in the national one and the fact that effective judicial protection now poses demands not directly linked to the material competences of Union law, as in *ASJP*: evidently, national courts must be independent not only when they decide on a EU-law case; they must always be independent because of the function they play in the European judiciary.¹¹²

The developments related to effective judicial protection as a fundamental right are further limiting domestic autonomy as well, despite the fact that the adoption of the Charter was not meant to create new obligations on the Member States.¹¹³ For once, the focus on effective judicial protection means that the Court can review national measures even after the adoption of EU procedural norms. While equivalence and effectiveness were deemed to apply only in the absence of EU law on the subject, Article 47 can also be a standard for national measures implementing EU procedural norms. Thus, the *Samba Diouf* line of cases can be seen as a further restriction to national procedural autonomy.¹¹⁴

The further delimitation of national procedural autonomy is even more evident in the *Berlioz* type of situation, where no remedy exists and Member States are called to introduce them precisely because of the requirements deriving from effective judicial protection. Furthermore, if the Court were to accept the broad interpretation of Article 47 offered by Advocate General Wathelet in *Berlioz*, or by his colleague Wahl in *Čepelnik* ('any individual must have the right to institute proceedings before national courts to challenge the legality of any decision or other national measure relative to the application to him of the

¹¹⁰ M. Dougan (n 19) 430.

¹¹¹ See again Case C-378/17 *Commissioner of An Garda Síochána* [2018] EU:C:2018:979.

¹¹² See also Case C-556/17 *Torubarov* [2019] EU:C:2019:626, Opinion of AG Bobek, para. 54.

¹¹³ As stressed in Article 51 of the Charter.

¹¹⁴ See also P. van Cleynenbreugel, 'Case note on Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*' (2012) 49 *CMLRev* 327, 337: 'The Court thus directly interferes with Member States' discretion to adapt their national systems in conformity with newly identified EU adequate judicial protection requirements. In so doing, Samba Diouf challenges the classic division of procedural competences between the EU and its Member States'.

EU rules’),¹¹⁵ this would clearly have profound consequences for the Member States. In a critical opinion on the development, Advocate General Bobek made the point that this choice would lead to the imposition of further obligations on the Member States, in stark contrast to what is affirmed by Article 51 of the Charter.¹¹⁶ The consequence of explicitly acknowledging that Article 47 does not require another right deriving from EU in order to be actionable would be that EU law would ‘impose an obligation on the Member States to provide for judicial appeal in any and every question governed by EU law’.¹¹⁷ This would obviously further reduce the procedural autonomy of the Member States. For example, if it were held that the alleged breach of ‘mere legal interests’ would trigger the applicability of Article 47 and thus entitle individuals to effective judicial protection, the Member States where legal standing depends on the violation of a subjective right might have to readjust their procedural rules.

It is not yet clear, also in light of the different views within the Court itself, what direction this line of cases will take. Rulings like *Berlioz* or the earlier *Textdata Software*, in which the Court finds way around the ‘right deriving from Union law’ criterion for the activation of Article 47 of the Charter, might remain exceptional. In general, there does not seem to be a systemic deficit in terms of access to justice that must be addressed through loosening the requirement of the ‘other’ right under Article 47. While concentrating on effective judicial protection could help the Court to rationalize its assessment,¹¹⁸ the risk of a strong interference with domestic competences remains. Furthermore, it is not easy to grasp what the objective of such development could be: creating a common remedy for the adjudication of EU-law related interests would clearly fall outside the competences of the EU and of the Court. At the same time, it is undeniable that a certain tension remains. To limit or deny the applicability of Article 47 in cases in which EU law imposes obligations on individuals, rather than conferring rights to them, might be considered paradoxical, even if in line with explicit wording of the provision, as those situations are arguably those in which individuals need ‘judicial protection’ the most. The Court is thus called to strike a difficult balance. Whatever direction it takes – a looser or stricter interpretation of Article 47 – it needs to better explain its choices and improve the consistency of its approach.

In contrast, the rationales behind the lines of cases where effective judicial protection is linked to the value of the rule of law are more evident and coherent. In *Rosneft* and in other CFSP cases, the CJEU relies on effective judicial protection to expand its purview over cases where otherwise individuals would risk

¹¹⁵ See Case C-33/17 *Čepelnik* [2018] EU:C:2018:896, Opinion AG Wahl, para. 97.

¹¹⁶ See Case C-403/16 *El Hassani* [2017] EU:C:2017:960, Opinion of AG Bobek.

¹¹⁷ *Ibid.*, para. 78.

¹¹⁸ See *supra* section 3.

not receiving judicial protection at all. In this manner, it addresses one of the most crucial gaps in the EU's allegedly 'complete' system of remedies, namely its limited jurisdiction on CFSP-related issues.¹¹⁹ In *ASJP*, the Court acted again to tackle a systemic rule of law problem, only this time at the level of the Member States. As argued elsewhere, the main rationale for the Court's ruling is finding a way to address the controversial judicial reforms in Poland and perhaps also Hungary,¹²⁰ and the following decisions show that the new tool can be extremely powerful and successful.¹²¹ Finally, in *Achmea* there is a solid rationale too. Bilateral investment treaties like the one between the Netherlands and Slovakia were signed before accession and, to put it bluntly, were a sign of *distrust* of Western Member States towards the judiciary of Eastern Member States.¹²² The situation had not been remedied after accession, and the Court decided to make clear that Member States courts, as long as they are independent and thus belong to the European judiciary, must be trusted.

5.2. The Court of Justice's position in the European judiciary

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

Some tendencies in this sense may emerge by again reading *Rosneft*, *ASJP*, and *Achmea*. In *Rosneft*, one of the rationales for accepting jurisdiction over CFSP preliminary references was that, in the opposite case, judicial review would have been left to the national courts. This was the solution Advocate General Kokott had envisaged in her View on *Opinion 2/13*:¹²³ the Advocate General argued that, as it concerned CFSP, accession was compatible with Union law and did not require broadening the scope of the Court's competences, considering that responsibilities for effective judicial protection could be left to

¹¹⁹ Though the situation remains far from perfect. See S Poli, 'The Common Foreign Security Policy after *Rosneft*: Still imperfect but gradually subject to the rule of law' (2017) 54 *CMLRev* 1799.

¹²⁰ See M. Bonelli and M. Claes (n 68).

¹²¹ See Case C-619/18 *Commission v Poland* [2018] EU:C:2019:531.

¹²² See also C. Eckes (n 109) 11: 'the very establishment of such alternative dispute settlement mechanisms demonstrates a level of mistrust' and K. Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) *Yearbook of European Law* <https://doi.org/10.1093/yel/yez002> accessed 21 October 2019, 10: 'following accession ... distrust can no longer be the premiss characterizing the relations between Member States'.

¹²³ See View of AG Kokott in *Opinion 2/13 (ECHR)*, paras 95-103.

the national courts. The Court seemed to reject this possibility already in *Opinion 2/13*, where it claimed that the ECHR accession agreement failed to take into account the specific characteristics of the Court's judicial review in CFSP matters, and it did so more explicitly in *Rosneft*, assuming jurisdiction in preliminary references on restrictive measures.¹²⁴ The need to protect the unity and coherence of the EU judicial system, as well as the fact that the Court of Justice is 'best placed' to give a ruling on validity, called on the Court to reach this conclusion, which allows it to protect 'the essential objective of Article 267 TFEU, which is to ensure that EU law is applied uniformly by the national courts and tribunals'.¹²⁵ Thus, by extending judicial protection for individuals against the EU legal acts, the Court also expands its jurisdiction and protects its role as the *only* court in the legal order in charge to rule on validity of Union legal acts,¹²⁶ whether they are adopted under the CFSP or not.

This concern with protecting the structure of the European judiciary, in particular the preliminary ruling system, is also evident in *ASJP*. It has been already pointed out how the Court construed a broad scope of application of Article 19 TEU, making it applicable to the case at stake, and then proceeded by building into it an obligation to guarantee judicial independence. The Court found crucial support for this second step precisely in Article 267 TFEU. It argued that 'The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU'.¹²⁷ The concern for judicial independence is thus, at least partially, a functional one: protecting the EU legal order, maintaining the possibility for national courts to engage in judicial dialogue with the Court of Justice,¹²⁸ and consequently defending the position of the Court itself.

In *Achmea*, this instrumental concern is even more explicit. ISDS clauses included in bilateral investment treaties between Member States *de facto* excluded the possibility that the Court of Justice could intervene in questions concerning the interpretation and application of Union law, as the arbitral tribunals created by those treaties could not participate to the EU judicial system and in particular to its 'keystone', the preliminary reference procedure.¹²⁹ The Court quite explic-

¹²⁴ See Case C-72/15 *Rosneft* [2017] EU:C:2017:236, para. 77.

¹²⁵ *Ibid.*, para. 80.

¹²⁶ As affirmed in the landmark Case C-314/85 *Foto Frost* [1987] EU:C:1987:452.

¹²⁷ Case C-64/16 *Associação Sindical dos Juizes Portugueses* [2018] EU:C:2018:117, para. 43.

¹²⁸ See K. Lenaerts (n 122) 4: as acknowledged also by the President of the Court Koen Lenaerts, 'by protecting national judges' independence through Article 19 TEU ... by extension, [the Court] preserves the uniformity and effectiveness of EU law which the preliminary ruling procedure seeks to achieve'

¹²⁹ Case C-284/16 *Achmea* [2018] EU:C:2018:158, para. 37. In this sense, the preliminary reference procedure acts as the 'institutional backbone' of the principle of effectiveness. See C. Eckes (n 109).

itly argued, in paragraph 58, that the ISDS provision of the treaty is called into question by ‘the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU’. Once again, in the ruling of the Court there is a concern with the effectiveness of Union law, the coherence of the EU legal order, and implicitly for the position of the Court within it.

This is not to say that the Court is operating only, or even primarily in an instrumental way in order to bolster its own standing. As noted in the previous paragraphs, there are actually genuine concerns at the basis of the Court’s approach. Yet, the result is that the Court not only guarantees crucial EU values, but re-designs the Union legal system in a way that puts it, if not at the top of the pyramid, at least at the very center of the network, to use a more ‘dialogical’ metaphor. The obligation to ensure judicial protection in Article 19 TEU becomes thus much more than a codification of the national courts’ mandate,¹³⁰ but a crucial rule on the European judiciary, and has at least the potential to guide its progressive federalization.

6. Conclusion and possible further avenues

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

Most of these developments seem dictated by a true concern over individual rights and the rule of law. In particular in *ASJP* and *Rosneft* the Court moved to fill clear gaps in the EU legal system, at the level of national or EU courts, seemingly making it more ‘complete’. However, this paper has demonstrated

¹³⁰ See M. Claes (n 18)

that the Court's decisions have two other effects, regardless of whether or not this is the intention of the judges in Luxembourg. First, national procedural autonomy is further reduced; the reach of Union law extends even deeper to the structuring and functioning of the national judicial systems, affecting areas that clearly fall outside the Union's legislative competences. Secondly, these decisions protect the Court's of Justice position in the European judiciary's scheme and even bolster it.

It is therefore likely that further developments will be subject to an intense scrutiny, and they might also raise questions on the Court's approach to effective judicial protection at the EU level.¹³¹ The Court, while very keen to exploit the potential of effective judicial protection in creating new obligations for Member States, expanding the reach of Union law, and defending its own position in the European judicial system, has almost constantly rejected arguments based on effective judicial protection when presented at the EU level. Famously, the Court rejected the applicant's and Advocate General Jacobs' pleas based on effective judicial protection in *UPA*, when it comes to individual standing in direct annulment actions.¹³² More recently, it rejected effective judicial protection arguments in the context of judicial review of soft law measures.¹³³ Arguments based on effective judicial protection also failed in the context of judicial review of Eurocrisis measures.¹³⁴ Thus, if the Court wants to withstand the criticism that sooner or later its case law will raise, it might be called to reconsider some of its own cases on effective judicial protection at the EU level. The Court could thus be called to focus more intensely also on 'direct' effective judicial protection in Luxembourg.

¹³¹ Already after *Unibet*, Arnall criticized the position of the Court in this respect. See A. Arnall, 'Case Note - Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*, judgment of the Grand Chamber of 13 March 2007' (2007) 44 *CMLRev* 1763, 1776: 'The Court's own failure to adopt the approach it so enthusiastically commends to others is immensely damaging to the cohesion of the Community legal order and threatens to undermine the spirit of cooperation which has been such an important feature of its relations with national courts'.

¹³² See Case C-50/00 P *Unión de Pequeños Agricultores* [2002] EU:C:2002:462, and the Opinion of AG Jacobs in the same case.

¹³³ See Case C-16/16 P *Belgium v Commission* [2018] EU:C:2018:79. For a negative assessment of the Court's final decision, see A. Arnall, 'EU Recommendations and Judicial Review' (2018) 14 *European Constitutional Law Review* 609, 618.

¹³⁴ Case C-370/12 *Pringle* [2012] EU:C:2012:756, para. 186.