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From periphery to core: The influence of regulatory context on judicial protection in EU environmental, equality, and asylum law

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General introduction

There is broad recognition that the scope of European Union ('EU') legislative acts has significantly increased over time. The Draghi Report highlights the proliferation of rules adopted by the Union institutions between 2019 and 2024, concluding that the EU adopted 13,000 legal acts during this period.[1] This phenomenon entails an expansion in both the number and scope of rules of EU secondary legislation setting out procedural guarantees governing the administrative and judicial enforcement of EU law (also referred here as 'administrative obligations' and 'obligations of judicial protection').[2] This development is closely linked to the expansion of substantive EU law, as procedural rules usually serve to ensure the enforcement and judicial protection of EU rights at the national level. Few, if any, policy areas remain untouched by the increasing 'proceduralisation' of EU secondary law.[3] This is particularly true in policy areas where the Treaties empower the Union institutions to establish common procedural rules, typically through minimum standards, such as asylum law,[4] judicial cooperation in civil matters,[5] and criminal justice.[6] But it also holds true in other policy areas. Indeed, the EU has established harmonised procedural obligations across a broad

[1] Draghi, *The Future of European Competitiveness : A Competitiveness Strategy for Europe* (European Commission, 2024), p. 69. However, De Boissieu and Sarocchi show that this increase concerns in large part regulatory, rather than legislative, acts (De Boissieu and Sarocchi, 'Législation Européenne: Les Critiques d'Inflation Normative face à la Réalité des Données' Les Echos (26 February 2025), available at <Opinion | Législation européenne : les critiques d'inflation normative face à la réalité des données | Les Echos> (last accessed, 18 March 2025).

[2] For further details, see Dubos, 'The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism' (2015) 9 Review of European Administrative Law 7, 8-9; Eliantonio and Muir, 'Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU law' (2015) 8 Review of European Administrative Law 177.

[3] Broadly speaking, the concept of 'proceduralisation' refers to the development of harmonised procedural standards. While this paragraph refers to the adoption of harmonised procedural rules by means of secondary law, whether it be directives or regulations, the following paragraphs clarify that the European Court of Justice has also played a key role in developing common procedural rules. See further Eliantonio and Muir, 'Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU law'.

[4] Article 78(2)(d) TFEU. For further details, see Tsourdi, 'Of Legislative Waves and Case Law: Effective Judicial Protection, Right to an Effective Remedy and Proceduralisation in the EU Asylum Policy' (2019) 12 Review of European Administrative Law 143.

[5] Article 81(2) TFEU.

[6] Article 82(2) TFEU. For further details, see Mitsilegas, 'The Impact of Legislative Harmonisation on Effective Judicial Protection in Europe's Area of Criminal Justice' (2019) 12 Review of European Administrative Law 117.

range of policy areas,[7] including consumer protection,[8] competition law,[9] digital services regulation,[10] environmental law,[11] data protection,[12] and equality law (especially in the employment sphere).[13]

Initially, the breadth of legislative harmonisation of national administrative and judicial procedures was limited, though it expanded progressively over time.[14] The growing scope of common procedural rules established by secondary law is a sign of the maturation of the EU legal order. It represents a significant departure from the situation that prevailed in the early stages of European integration. It is worth remembering, in this respect, that the EU lacks a general competence to harmonise rules on the administrative and judicial enforcement of EU law at the national level.[15]

In the absence of specific harmonised rules, the Member States retain the competence to establish specific procedures and remedies for the enforcement of EU law before national courts and tribunals. The concept of 'national procedural autonomy' underscores the significant role of national procedural law within a regulatory environment devoid of common procedural rules.[16] However, the exercise

[7] For an overview of the different types of administrative obligations established by secondary law across 18 regulatory fields of EU law, see the tables available at <https://www.eulegalstudies.uliege.be/cms/c_8012264/en/eulegalstudies-eudaimonia?id=c_8012264> (last accessed, 2 April 2025).

[8] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of Union consumer protection rules, [2019] OJ L 328/7.

[9] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L 11/3.

[10] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act), [2022] OJ L 277/1, Arts. 49-60.

[11] Eliantonio, 'The Proceduralisation of EU Environmental Legislation: International Pressures, Some Victories and Some Way to Go' (2015) 8 Review of European Administrative Law 99; 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) 12 Review of European Administrative Law 95.

[12] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119/1. For further details, see Galetta and De Hert, 'The Proceduralisation of Data Protection Remedies under the EU Data Protection Law: Towards a More Effective and Data Subject-Oriented Remedial System' (2015) 8 Review of European Administrative Law 125.

[13] Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation and amending Directives 2006/54/EC and 2010/41/EU, [2024] OJ L 1/14.

[14] On that topic, see Dubos, 'The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism', supra note 2.

[15] Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 501, 502.

[16] Lenaerts and Gutiérrez-Fons, 'A Constitutional Perspective' in Schütze and Tridimas (eds), *Oxford Principles of European Union Law, Volume 1* (Oxford University Press, 2018), p. 119.

of national procedural competence is subject to well-established limits derived from EU law, which have been fleshed out through the principles of equivalence and effectiveness. Since their recognition by the Court in the 1970s,[17] these principles have been complemented by the Court's growing reliance on the general principle of effective judicial protection, later enshrined in Article 19 TEU and codified as a fundamental right to an effective remedy in Article 47 of the Charter of fundamental rights of the European Union ('the Charter').[18]

Building on that fundamental right and the principles derived from EU primary law, the Court of Justice of the European Union ('the Court') has played a key role in shaping EU-wide procedural standards and remedies, particularly in areas such as state liability,[19] the right of access to a judge,[20] and interim relief.[21] By drawing on the constitutional traditions common to the Member States and the case law of the European Court of Human Rights,[22] the Court was able to develop such remedies, while being attentive to maintaining the distribution of competences between the European Union and its Member States. Scholarly debates have accordingly centred on the Court's role, particularly regarding whether its jurisprudence can be reconciled with the Member States' procedural traditions.[23]

Over time, however, the EU legislature has become more involved in this area, establishing harmonised procedural standards – including administrative obligations and obligations of judicial protection – through secondary law. This development raises topical questions about the respective roles of the EU legislature, the Court, and the Member States in shaping procedural standards governing access to justice and judicial

[17] On the interaction between the principles of effectiveness and equivalence and the general principle of effective judicial protection, see Prechal and Widdershoven, 'Redefining the Relationship Between "*Rewe*-Effectiveness" and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 31; Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12 Review of European Administrative Law 5; 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 Common Market Law Review 1395.

[18] On the impact of that principle on national procedural autonomy, see Bonelli, 'Effective Judicial Protection in EU Law : An Evolving Principle of a Constitutional Nature' (2019) 12 Review of European Administrative Law 35; Roeben, 'Judicial Protection as the Meta-norm in the EU Judicial Architecture' (2020) 12 The Hague Journal on the Rule of Law 29; Wildemeersch, 'L'Avènement de l'Article 47 de la Charte des Droits Fondamentaux et de l'Article 19, Paragraphe 1, Second Alinéa, TUE. Un Droit Renouvelé à la Protection Juridictionnelle Effective' (2021) Cahiers de Droit Européen 867.

[19] Case C-6/90, *Francovich and Bonifaci v Italy*, EU:C:1991:221; Joined Cases C-46/93 and C-48/93, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen/ Secretary of State for Transport, ex parte Factortame and Others*, EU:C:1996:79.

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

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

[22] See, e.g., Case C-222/84, *Johnston*, para 18; Case C-46/93, *Brasserie du pêcheur*, esp. paras 80, 85.

[23] On that topic, see Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States' in De Witte and Micklitz (eds), *The European Court of Justice and Autonomy of the Member States* (Intersentia, 2012), p. 305; Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach' (2021) 23 Cambridge Yearbook of European Legal Studies 128; Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 Common Market Law Review 1629, esp. pp. 1634 et seq.

remedies for the enforcement of EU law before national courts. Where harmonised procedural rules exist, the Court primarily engages in statutory interpretation of those rules. However, the principles of effectiveness and equivalence remain relevant, especially in the absence of legislative harmonisation.[24] Similarly, the general principle of effective judicial protection continues to play a key role in guiding the interpretation of secondary provisions that grant discretion to the Member States, such as minimum harmonisation directives, and thus sets boundaries on national procedural autonomy.[25]

Against this background, this thesis investigates how the adoption of harmonised rules has contributed to the development of robust positive obligations of judicial protection extending beyond the core requirements derived from EU primary law – particularly in strengthening the right of access to a judge.[26] It argues that the intensity of these obligations, as formulated by the Court, depends on the scope and level of detail of harmonised procedural rules. More specifically, the thesis adopts the following research hypothesis as a starting point: *the emergence of legislative procedural obligations – including administrative and obligations of judicial protection – expands the scope for judge-made positive obligations of judicial protection grounded in EU secondary legislation, extending beyond the core features of effective judicial protection derived from EU primary law.* Testing this hypothesis will make it possible to answer the main research question, which aims to distinguish the core and peripheral elements underlying the fundamental right to effective judicial protection.

To achieve this, this thesis seeks to distinguish legislative additions that may be considered 'peripheral' from the core features of the fundamental right to an effective judicial remedy, as enshrined in Articles 19 TEU and 47 of the Charter, across three policy areas: environmental, equality, and asylum law. By doing so, it seeks to gain a better understanding of the core of this right and to identify the obligations of judicial protection imposed on the Member States when they implement EU law. The findings from these complementary case studies will be compared to differentiate between:

(i) **Transversal obligations of judicial protection**, which form part of the core – or, in the words of the Charter, the 'essence'[27] – of that right and remain unaffected by the regulatory context; and

[24] See, e.g., Case C-144/23, *Kubera*, EU:C:2024:881, para 47.
[25] Bonelli, Article 47, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in Bonelli, Eliantonio and Gentile (eds), *Article of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022), pp. 86-87.
[26] For a similar view, see Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU: Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States' in Mak and Kas (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing, 2023), esp. pp. 143 et seq.
[27] Art. 52(1) of the Charter: '[a]ny 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'.

(ii) **Sector-specific obligations** shaped by the regulatory framework of each policy area and supplementary to the core obligations.

Investigating these case studies will shed light on how the regulatory context has influenced the development of positive obligations of judicial protection. Each case study focuses on a distinct regulatory framework that has, in its own way, allowed the Court of Justice to develop robust positive obligations, extending beyond the requirements of effective judicial protection typically found in EU primary law.

Chapter 2 will explore how the Aarhus Convention has influenced the development of obligations of judicial protection in the field of environmental law.[28] This chapter will show that the interplay between the Convention and EU secondary legislation has allowed the Court to develop strengthened obligations of judicial protection, particularly in relation to standing for individuals and environmental NGOs wishing to enforce EU environmental law before domestic courts.[29] In doing so, the Court has empowered individuals and collective entities to bring national public authorities to court for their failure to comply with EU environmental law. Consequently, the case law articulating positive obligations of judicial protection in environmental matters reflects an objective conception of justice focused on upholding the rule of law across the EU Member States.

Chapter 3 will subsequently show how the Court, relying on the EU Charter, has strengthened the judicial enforceability of equal treatment rights derived from secondary law in private law disputes. It will explain that the Court has interpreted the Charter's framework – particularly its horizontal provisions and relevant Charter provisions establishing equal treatment rights – to identify the obligations of judicial protection imposed on the Member States in this area. As a result, national courts and tribunals are expected to enforce EU law guarantees of equal treatment directly in private law disputes between individuals.[30] Chapter 3 will subsequently explain how the adoption of legislative provisions on access to labour information has also allowed the Court to extend similar guarantees of information to areas not covered by relevant secondary law provisions.[31]

Chapter 4 will examine the development of positive obligations of judicial protection in the field of asylum law. In that area, the EU legislature has established a complex procedural framework for the administrative processing of asylum requests

[28] UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters, Aarhus, Denmark, 25 June 1998.
[29] See, e.g., Case C-240/09, *Lesoochranarske zoskupenie VLK ('Brown Bears I')*, EU:C:2011:125; C-243/15, *Lesoochranarske zoskupenie VLK ('Brown Bears II')*, EU:C:2016:838; Case C-873/19, *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, EU:C:2022:857.
[30] See, e.g., Case C-144/04, *Werner Mangold v Rüdiger Helm*, EU:C:2005:709; Case C-555/07, *Seda Kücükdeveci v Swedex Gmbh & Co. KG*., EU:C:2010:21; Case C-648/16, *Max-Planck*, EU:C:2018:874; Joined Cases C-569/16 and C-570/16, *Bauer*, EU:C:2018:871.
[31] Case C-715/20, *K.L.*, EU:C:2024:139.

under Directive 2013/32.[32] This Directive also establishes detailed obligations for the judicial review of administrative action, which the Court of Justice has further clarified and fine-tuned over time. Based on Article 46(3) of the Directive, the Court has conferred robust powers on national judges tasked with scrutinising the enforcement of EU asylum law. Specifically, this harmonised framework has enabled the Court to develop robust positive obligations of judicial protection, requiring national courts and tribunals to conduct a comprehensive and novel appraisal of the international protection needs of asylum seekers, if necessary, by adopting appropriate procedural measures.[33]

Chapter 5 will compare the findings collected in these three case studies. It will conclude that the development of positive obligations of judicial protection by the Court is directly influenced by the regulatory context of these three case studies, including the relevant procedural rules and the nature of the rights and interests they underpin. More specifically, it shows that the Court has drawn on existing sectoral procedural rules to carve out detailed, tailored requirements that align with the normative aspirations of each policy field. Comparing the obligations developed in each policy area will also allow for the identification of transversal obligations of judicial protection, which apply to the Member States when they implement EU law in all areas of EU law and remain unaffected by the regulatory framework of specific policy areas.

All three case studies have been selected because they offer a complementary and distinct perspective on how the Court has been able to develop positive obligations of judicial protection within the framework of secondary law provisions containing varying kinds of obligations. The overarching aim of this thesis is to examine how the Court has developed obligations of judicial protection in those fields, to better understand what it considers to be the core features of the fundamental right to an effective judicial remedy.

Furthermore, these three case studies fall within the scope of the overarching ERC EUDAIMONIA project, of which this thesis forms an integral part. Findings from that project indicate that the EU legislature has become more involved with respect to the institutional design of administrative – and, to a lesser extent, quasi-judicial or judicial – bodies. In contrast, the policy areas examined in this thesis contain comparatively fewer such administrative obligations than other, more heavily regulated fields.[34]

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[32] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60.

[33] See, e.g., Case C-69/10, *Samba Diouf*, EU:C:2011:524; Case C-348/16, *Sacko*, EU:C:2017:591; Case C-585/16, *Alheto*, EU:C:2018:584; Case C-556/17, *Alekszij Torubarov v Bevandoriasi és Menekültügyi Hivatal ('Torubarov')*, EU:C:2019:626.

[34] This is particularly true in policy areas such as competition law and data protection. For further details, see the comparative tables of institutional design obligations drafted within the framework of the ERC EUDAIMONIA research project, available at <https://www.eulegalstudies.uliege.be/cms/c_8012264/en/eulegalstudies-eudaimonia?id=c_8012264> (last accessed, 26 March 2024).

Consequently, national judges are likely to play an increasingly prominent role in ensuring the effective protection of EU law rights in these areas. For that reason, they represent particularly instructive case studies for understanding and conceptualising how both core and peripheral requirements of effective judicial protection shape the obligations weighing on the Member States in organising their judicial frameworks in compliance with EU law.

The different case studies contribute to answering the following main research question:

To what extent do the legislative obligations requiring the Member States to ensure access to justice in the harmonised policy areas of environmental, equality, and asylum law help uncover the core features of the fundamental right to an effective remedy and shape the obligations imposed on the Member States flowing from that core?

This thesis addresses this main research question by answering the following sub-sections:

- How has the European Court of Justice developed obligations of judicial protection based on EU primary law, and how has it shaped the Member States' judicial systems in this context? What are the limits of this framework (Chapter 1)?
- How has the recognition of access to justice rights for environmental associations and individuals under the Aarhus Convention influenced the expansion of obligations of judicial protection beyond the core guarantees of effective judicial protection under EU primary law (Chapter 2)?
- How has the recognition of equal treatment guarantees, especially in the employment sphere, shaped the development of obligation of judicial protection beyond the core guarantees of effective judicial protection under EU primary law (Chapter 3)?
- How has the harmonisation of administrative and judicial procedural rules in asylum law contributed to the development of obligations of judicial protection beyond the core guarantees of effective judicial protection under EU primary law (Chapter 4)?
- How do these case studies help distinguish between the core and the periphery of the fundamental right to an effective judicial remedy, and what are the implications of this distinction for the Member States' competences to organise their judicial systems in less harmonised areas (Chapter 5)?

The analysis follows a doctrinal, black-letter approach to the Court's case law establishing obligations of judicial protection in the fields of environmental, equality, and asylum law. Each case study also engages with contemporary doctrinal debates on

the relevant case law. This analytical framework is innovative because it considers not only the obligations developed under EU primary law – particularly the general principle of effective judicial protection, as enshrined in Article 47 of the Charter – but also those established under EU secondary legislation. Accordingly, the period of this enquiry corresponds to the emergence and gradual expansion of secondary law provisions governing access to justice for enforcing EU law before national courts in these three areas. This approach allows for a more comprehensive understanding of the obligations of judicial protection developed in these three policy areas while disentangling the complex interplay of different legal norms in shaping these obligations.

This thesis emphasizes that this approach contrasts sharply with traditional academic literature, which has focused primarily – if not exclusively – on the obligations of judicial protection developed by the Court under EU primary law.[35] By doing so, previous scholarship has applied a monolithic framework to this question, which tends to overlook the role of regulatory context, particularly legislative procedural obligations, in shaping positive obligations of judicial protection. By comparing and contrasting the obligations developed across these three policy areas, this thesis adopts an original vantage point to identify the core constitutional features of the right to an effective judicial remedy, which apply across the board when the Member States implement EU law, even in areas largely lacking common procedural rules. By the same token, this approach also allows to analyse, conceptualise, and better distinguish 'peripheral' obligations of judicial protection, which are shaped by the regulatory context of each policy area.

[35] On that topic, see Safjan and Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-Level Challenge through the Lens of Article 47 CFREU' (2014) 33 Yearbook of European Law 3; Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best is Yet to Come?' (2019) 20 German Law Journal 884; Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU: Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States' in op. cit. supra note 26.

Chapter 1: National procedural autonomy in an era of expanding legislative proceduralisation: Revisiting and reframing the classical doctrines

1. Introduction

The Court of Justice of the European Union ('the Court') has traditionally been hailed as the motor of European integration.[36] This is especially true in the field of remedies.[37] Much scholarly attention has therefore been devoted to the role of the Court in shaping common procedures and remedies under European Union ('EU') primary law. The classical, or 'core',[38] narrative on national procedural autonomy reflects the predominant emphasis on the obligations of judicial protection developed by the Court under EU principles, including the principles of effectiveness and equivalence, and the general principle of effective judicial protection (referred together as 'EU principles' or 'EU core principles').

This approach continues to dominate contemporary discussions on the relationship between EU law and national procedural autonomy. Over time, the Court has adopted a more positive and comprehensive conception of the obligations of judicial protection weighing on the Member States. The development of positive standards of judicial protection has prompted renewed doctrinal scrutiny of the interaction between EU law and national procedural autonomy.[39] The positivisation of case law has been analysed through the prism of the evolving Treaty framework on judicial protection. It is widely believed that the introduction of Articles 47 of the EU Charter of fundamental rights ('the Charter') and 19 of the Treaty on European Union ('TEU') has been a key building block for the creation of positive obligations of judicial protection.

However, this thesis seeks to nuance the prevailing academic view that (over)emphasises the role of the Court – with the help of the principles derived from EU primary law – in shaping positive obligations of judicial protection. To do so, this chapter revisits and reframes the analytical framework traditionally applied to examine the development of such obligations. It addresses the following research sub-question: how has the European Court of Justice developed obligations of judicial protection

[36] See, e.g., Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1; Mancini, 'The Making of a Constitution for Europe' (1989) 26 Common Market Law Review 595; Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403; Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' (2016) 79 Law and Contemporary Problems 117.

[37] Van Gerven, 'Toward a Coherent Constitutional System within the European Union' (1996) 2 European Public Law 81, 96.

[38] Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before the National Courts' in Craig and De Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press, 2011).

[39] The concept of positive obligations of judicial protection is defined below, in section 3.1.

based on EU primary law, and how has it shaped the Member States' judicial systems in this context? What are the limits of this framework?

To this end, this chapter begins by clarifying the concept of national procedural. It explains how this concept continues to subsist despite the growing procedural demands introduced by EU law. National procedural autonomy is conceptualised as an object of review, shaped by the evolving demands of EU law, whether grounded in secondary or primary law (section 2.1). This chapter then explores how the Court has developed obligations of judicial protection grounded in EU primary law. According to the classical narrative, the gradual positivisation of case law has been conceptualised through an analysis of the evolving standards of review applied by the Court – reflecting a progressive shift from the principle of effectiveness (section 2.2), towards a more exacting and comprehensive understanding of judicial protection, anchored in the general principle of effective judicial protection (section 2.3).

This chapter subsequently argues that the analytical framework prevailing in academic literature no longer offers an accurate and comprehensive account of the relevant case law, as it often overlooks the role of legislative procedural requirements in the development of positive obligations of judicial protection. It explores how the obligations articulated by the Court continued to expand in recent years to encompass not only procedural and remedial, but also institutional obligations (section 3.1).[40] Furthermore, it explains that this development has been conceptualised as a by-product of the evolving Treaty framework on judicial protection, which now enshrines the general principle of effective judicial protection under Articles 19 TEU and 47 of the Charter (section 3.2). In doing so, however, the classical narrative neglects the influence of secondary law in shaping such obligations. Accordingly, the prevailing analytical framework should be revamped in order to provide a more accurate depiction of the case law articulating positive obligations of judicial protection.[41] To achieve this,

[40] Although the distinction between procedural, remedial, and institutional matters is difficult to pinpoint, it is useful to clarify that the category of procedural rules includes the rules governing the conditions and limits under which individuals may bring legal actions in cases of EU law infringements. These rules may address time limits, costs of proceedings, etc. The category of remedial provisions defines the type of actions that individuals can bring for the enforcement of EU law, as well as the powers vested in national judges responsible for ensuring the enforcement of EU law at the domestic level. This includes rules on the type of remedies available to the judiciary. Finally, institutional provisions concern the organisational features of national bodies competent to adjudicate claims brought by individuals affected by breaches of EU law. This category encompasses rules on the nature (i.e., judicial or quasi-judicial) and composition of such bodies (including rules on the appointment and dismissal of its members).

[41] For a similar view, see Episcopo, 'The Vicissitudes of Life at the Coalface' in Craig and De Burca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press, 2021), p. 296. That approach finds echo in several recent doctrinal accounts, which have similarly attempted to uncover the impact of these EU principles on national procedural autonomy through a cross-sectoral perspective. See, amongst others, (2019) 12 Review of European Administrative Law no. 2; Matteo Bonelli, Mariolina Eliantonio and Giulia Gentile (eds), *Article 47 of the Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022).

the following chapters of this thesis will examine the role of common procedural rules established by secondary law in the development of judge-made obligations of judicial protection across three policy areas: environmental, equality, and asylum law (section 3.3).

As mentioned in the general introduction of this thesis, the case-studies conducted in this context will demonstrate that the positivisation of case law has been driven by the expanding scope and level of detail of harmonised procedural rules set out by secondary law. By interpreting these rules, the Court has been able to define robust obligations of judicial protection that extend beyond the core requirements of judicial protection derived from EU primary law. Comparing and contrasting the obligations developed by the Court across the areas of environmental, equality, and asylum law will thus enable to distinguish between (i) transversal obligations of judicial protection, which impose uniform requirements on the Member States irrespective of the scope of procedural harmonisation set out by secondary law; and (ii) sector-specific obligations, which derive from harmonised procedural standards established by secondary law.

2. Revisiting the classical narrative on national procedural autonomy

This section revisits the classical narrative about the early, or formative, case law on national procedural autonomy. It shows that the classical narrative has focused almost exclusively on the evolution of procedural demands developed over time by the European Court of Justice, based on EU primary las. In the words of Episcopo, the analytical framework applied in that context presupposed a:

> 'reciprocal relationship between the object (rules of national procedural autonomy), the standard (equivalence and effectiveness) and the type (external and residual) of scrutiny performed by the ECJ'.[42]

The story depicted by the classical narrative describes how these EU core principles framed or circumscribed national procedural autonomy in areas covered by EU law.[43] This section demonstrates that the early case law gave rise to negative obligations of judicial protection. Beyond the disapplication of national law, the Court of Justice did not usually instruct national judges to adjust national procedural law according to a positive standard of judicial protection. At the same time, this section also addresses the positivisation of EU judicial protection discernible – albeit somewhat implicitly – in various early judgments on national procedural autonomy. It explains that the

[42] Episcopo, 'The Vicissitudes of Life at the Coalface' in op. cit. supra note 41, p. 286.
[43] Bonelli, 'Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature' (2019) 12 Review of European Administrative Law 35, 36.

creation of EU-wide procedures and remedies has prompted academic commentators to reflect on the prospect of developing a more positive understanding of the EU obligations of judicial protection based on the general principle of effective judicial protection.

This section is structured as follows: the first sub-section attempts to reconcile the concept of national procedural autonomy with the expanding procedural expectations formulated by EU law. It explains that the concept of national procedural autonomy conceals a dynamic and reflexive interaction between EU law and national procedural law. National procedural autonomy should thus be viewed as the object of scrutiny, subject to the procedural standards emanating from EU law. The second sub-section shows that the early case law on national procedural autonomy gave rise to negative obligations of judicial protection. National judges were instructed to disapply national law, but EU law did not usually prescribe any standard of judicial protection. On several occasions, the Court nevertheless hinted at the possibility of developing a more positive conception of EU judicial protection by virtue of the general principle of effective judicial protection. This section demonstrates, however, that the Court refrained from instructing national judges to directly adjust national procedural law to align with the EU standard of judicial protection.

2.1. The concept of national procedural autonomy: A misnomer?

From the outset, it is useful to reflect on the significance of the classical doctrines on the decentralised enforcement of EU law for conceptualising the mandate originally conferred upon national judges by EU law. I do not wish to restate the point made more accurately elsewhere.[44] The bottom line can be summarised as follows: the principles of direct effect, indirect effect, and primacy essentially endowed national judicial actors with the prerogative to police and secure the enforcement of EU law by national public authorities.[45] By the same token, they were entrusted with the task of ensuring judicial protection of the rights granted to individuals by EU law. National judges became a key cog in the EU system of judicial protection; they were portrayed as '*juges de droit commun*' of the EU legal order.[46]

[44] On that topic, see Prechal, 'National Courts in EU Judicial Structures' (2006) 25 Yearbook of European Law 429; Schütze, *European Union Law*, ch 11 (3rd edn, Oxford University Press, 2021).
[45] Schütze, 'Conclusion: Article 267 TFEU and EU Federalism' (2023) 15 European Journal of Legal Studies, CJEU Special Issue 221, 223: in the words of Schütze, '[t]his functional integration of national courts into the European judiciary has, with the Lisbon Treaty, been textually endorsed in Article 19 TEU'.
[46] On that topic, see, e.g., Claes, *The National Court's Mandate in the European Constitution* (Hart Publishing, 2006).

Historically, the powers and prerogatives attributed to national judges entrusted with the task of overseeing the application of EU law by (other) domestic actors were limited. Beyond the requirements emanating from the principles of primacy, direct effect, and indirect effect, EU law has traditionally prescribed little in terms of specific procedures and remedies governing the domestic enforcement of EU law. It is worth remembering that the Treaty drafters have historically devoted little attention to the legislative harmonisation of procedural matters. For better or worse, the Treaties do not include a general clause authorising the EU legislature to regulate the procedural rules and remedies governing the domestic enforcement of EU law across the wide spectrum of policy fields falling under the purview of EU law. Admittedly, recent Treaty amendments have included detailed provisions allowing the EU institutions to harmonise certain procedural matters in specific policy sectors (such as, for instance, asylum law,[47] or criminal defence rights[48]). It is fair to acknowledge, however, that the introduction of specific provisions conferring competence upon the EU legislature to adopt sectoral procedural rules came about relatively recently in the process of European integration. The Treaties remained oblivious to the concerns voiced by more recent Treaty iterations in favour of greater legislative harmonisation in procedural matters. The Member States were therefore left to their own devices when it came to the procedural and remedial rules governing the enforcement of EU law at the instigation of concerned individuals;

Originally, the mandate of national judges was thus fleshed out by reference to existing national procedural and remedial rules.[49] To put it bluntly, they were competent to do what national law allowed them to do. As Lenaerts aptly framed it, the European Union used to 'piggyback' on the procedural rules and remedies prevailing in domestic judicial systems to ensure the correct application of EU law.[50] Beyond the requirements originating from direct effect, indirect effect, and primacy,[51] EU law prescribed relatively little in terms of positive procedural and remedial obligations. The concept, or principle, of 'procedural autonomy' was coined by the academic community to acknowledge the Member States' competence to define the procedural arrangements governing the domestic enforcement of claims grounded on EU law in the absence of harmonised rules on such matters. This expression was subsequently

[47] Art. 78(2)(d) TFEU.
[48] Art. 82 TFEU.
[49] Episcopo, 'The Vicissitudes of Life at the Coalface' in op. cit. supra note 41, p. 277.
[50] Lenaerts, Maselis and Gutman, *EU Procedural Law* (Oxford University Press, 2014), p. 107
[51] Of course, the principle of direct effect provides that individual applicants could rely on directly effective provisions before national courts. As such, that requirement constitutes a basic minimum guarantee of judicial protection available to individuals affected by an infringement of EU law. However, there have been long-standing debates about whether this entitlement may be complemented by additional remedies, such as the right to initiate legal proceedings in the event of infringements of EU law. On that topic, see Eilmansberger, 'The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 Common Market Law Review 1199.

taken up by the Court and continues to prevail to this day.[52] The traditional mantra is encapsulated in the following excerpt from *Peterbroeck*:

> '[i]n the absence of [European Union] rules governing a matter, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions [principle of equivalence] nor render virtually impossible or excessively difficult the exercise of rights conferred by [EU] law [principle of effectiveness]'.[53]

A great deal has been made over time about whether the concept of procedural autonomy truly offers a useful vantage point for reflecting on the interaction between national procedural law and the procedural expectations deriving from EU law.[54] This concept was described by Bobek as a misnomer, or a 'charade', concealing the increasing demands expressed by EU law in relation to national procedural and remedial law.[55] As he put it,

> 'in the area of domestic enforcement of EU law, the area is either harmonised or the Member States are obliged to ensure the enforcement is equivalent and/or effective. In this area, there is no autonomous space of the Member States'.[56]

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[52] Originally, the notion of 'procedural autonomy' was not spelled out explicitly by the Court: see, e.g., Case C-33/76, *Rewe v Landwirtshcaftskammer für das Saarland*, EU:C:1976:188, para 5. In fact, that concept was crafted by the academic community, though it has become commonplace to find explicit allusions to that notion in the case law: see, e.g., Case C-213/13, *Impresa Pizzarotti*, EU:C:2014:2067, para 54.

[53] Case C-312/93, *Peterbroeck, Van Campenhout & Cie v Belgian State*, EU:C:1995:437, para 12.

[54] On that topic, see, amongst others, Kakouris, 'Do the Member States Possess Judicial Procedural "Autonomy"?' (1997) 34 Common Market Law Review 1389; Prechal, 'Community Law in National Courts: The Lessons from Van Schijndel' (1998) 35 Common Market Law Review 681, 685; Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 501, 502 (suggesting that 'it might therefore be better to abandon the term procedural *autonomy* and to speak of procedural *competence* of Member States. For indeed, competence in procedural matters remains the prime responsibility of the Member States so long as, as Prechal points out, no Community rules have been enacted and direct [EU] competence is absent'); Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' (2004) 9 European Law Journal 599; Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence" of the EU Member States* (Springer, 2010); Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach', supra note 23, 144 (suggesting that the term 'national procedural authority' describes more accurately 'the existence of such *prima facie* authority without the confusing overtones of a special kind of untouchability that "autonomy" implies'); Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022), p. 97-98 (suggesting a 'softer' understanding of national procedural autonomy).

[55] Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States' in op. cit. supra note 23, p. 320.

[56] Ibid, p. 305.

Over time, the procedural demands emanating from EU law have indeed intensified, prompting some commentators to predict the 'demise' of national procedural autonomy.[57] Arnull even went as far as to suggest that:

> '[i]f there was once an implication that national law would normally be left to its own devices, this is emphatically no longer the case'.[58]

A strict emphasis on an absolutist and static vision of national procedural autonomy explains much of the challenge in reconciling this concept with the expanding procedural demands expressed by EU law, whether based on EU primary or secondary law.

In view of the gradual expansion of the scope of EU common procedural requirements, one should perhaps abandon any attempt to define core national procedural and remedial matters as immune from the influence of EU law. To be sure, the Court itself never subscribed to an absolutist and static conception of national procedural autonomy. Since its introduction by the Court, the concept of procedural autonomy has been understood as a 'default option', prevailing in the absence of common procedural rules.[59] This allowed space for the development of common procedural rules under the aegis of EU secondary law. In parallel, the Court has consistently emphasised that the scope of national procedural autonomy could be circumscribed by reference to the principles of effectiveness and equivalence. In later judgments, the general principle of effective judicial protection was also established as an additional constraint on national procedural autonomy (though the added value of this principle has been questioned at times).[60] National procedural autonomy can thus

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[57] Arnull, 'Remedies before National Courts' in Schütze and Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order*, vol 1 (Oxford University Press, 2018), pp. 1023 et seq.

[58] Arnull, 'Article 47 CFR and National Procedural Autonomy' (2020) 45 European Law Review 681, 683.

[59] For a similar view, see Platon, 'L'Autonomie Institutionnelle des Etats Membres de l'Union Européenne: Parent Pauvre ou Branche Forte du Principe d'Autonomie Institutionnelle et Procédurale?' in Potvin-Solis (ed), *Le Statut d'Etat Membre de l'Union Européenne : Quatorzièmes Journées Jean Monnet* (Bruylant, 2018), p. 471 ; Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in op. cit. supra note 54, p. 85. Halberstam similarly opined that the Court subscribed to 'permissive' national procedural autonomy (which he distinguished from 'prescriptive' national procedural autonomy), see Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy', supra note 23, 130-132.

[60] Over time, the coexistence of the principle of effectiveness and the principle of effective judicial protection ignited long-standing debates about the added value of effective judicial protection (compared to the traditional test of effectiveness). As we shall see, those debates have intensified following the incorporation of the principle of effective judicial protection into the Treaties by Articles 47 of the Charter and 19 TEU. On that topic, see Prechal and Widdershoven, 'Redefining the Relationship between *Rewe*-effectiveness and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 31; Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States' in op. cit. supra note 23; 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 Common Market Law Review 1395.

be described as an 'object of review', subject to the (growing) demands of judicial protection emanating from EU primary and secondary law.[61]

It follows that the relationship between national procedural law and the requirements of judicial protection stemming from EU law has never been one of exclusivity; in other words, the sphere of procedural and remedial matters was not meant to remain the sole preserve of the Member States.[62] Ultimately, the concept of procedural autonomy reflects a dynamic and reflexive interaction between national procedural traditions and the expanding procedural demands expressed by EU law. That relationship is both reflexive, in the sense that the requirements of effective judicial protection emanating from EU law reflect, or accommodate, diverse national procedural traditions within an EU-wide procedural framework; and dynamic, in the sense that national procedural law is progressively adjusted and refined through the procedural requirements of EU law.

2.2. The shifting geometry of effectiveness in EU law

The classical narrative described by many legal scholars places predominant focus on the 'central role' played by the Court of Justice in developing obligations of judicial protection, with the support of EU principles derived from primary law.[63] One need hardly recall the statement of Van Gerven, who opined that:

> '[i]f the ECJ has been an activist court, then it is most certainly in the field of judicial remedies'.[64]

The classical narrative tells the story of how the Court progressively developed EU-wide procedures and remedies with the backing of (open-ended) EU principles. Beyond its chronological account, one of the defining features of this narrative lies in its emphasis on these principles. Initially, the relevant case law was dominated by the twin-principles of equivalence and effectiveness. This is the reason why, as Episcopo puts it:

> 'one characterizing feature of the core narrative is the prevalent attention it reserves to the *Rewe/Comet* test'.[65]

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[61] Episcopo, 'The Vicissitudes of Life at the Coalface' in op. cit. supra note 41, p. 286.
[62] For a similar argument, see Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States', REALaw.blog (24 January 2023), available at <Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States, by Matteo Bonelli – (realaw.blog)> (last accessed, 29 August 2024).
[63] Craufurd Smith, 'Remedies for Breaches of EU Law in National: Legal Variations and Selection' in Craig and De Búrca (eds), *The Evolution of EU Law* (1st edn, Oxford University Press, 1999), p. 287.
[64] Van Gerven, 'Toward a Coherent Constitutional System within the European Union' (1996) 2 European Public Law 81, 96.
[65] Episcopo, 'The Vicissitudes of Life at the Coalface' in op. cit. supra note 41, p. 285.

More specifically, the variations in the case law identified by the core narrative have been conceptualised through the lens of distinct – and at times inconsistent or overlapping[66] – standards of review applied by the Court under the principle of effectiveness and the general principle of effective judicial protection (while the principle of equivalence has been relegated to the periphery of case law and academic literature).[67]/[68]

For the sake of clarity, it is useful to recall that this core narrative identifies three successive periods in relation to the relevant case-law on national procedural autonomy.[69] The first stage was characterised by the Court's deference to national procedural autonomy. The test of minimum effectiveness, which held that national procedural rules could not make the exercise of EU law rights 'virtually impossible or excessively difficult',[70] exemplified this deferential approach. The Court's stance reflected concerns about maintaining the vertical balance of power between the EU and its Member States in procedural matters. As Craufurd Smith explained,

> 'the Court's establishment of common Community rules … would have struck deeply at national sensitivities – legal procedures, professional expectations, and approaches varying markedly (as they continue to do today) across the common law-civil law divide'.[71]

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[66] For further details, see Craufurd Smith, 'Remedies for Breaches of EU Law in National Courts' in op. cit. supra note 63, pp. 293 et seq.

[67] In contrast, Van Cleynenbreugel attempted to distinguish different strands of jurisprudence based on the standard of review employed by the Court, irrespective of the temporal dimension of case-law. This led him to differentiate four strands of case law, based on the intensity and outcome of the assessment carried out by the Court in that context. Each strand corresponds to a specific standard of scrutiny, which he describes as 'marginal review', 'intermediate review', 'negative comprehensive review', and 'positive comprehensive review' (Van Cleynenbreugel, 'National Procedural Choices before the Court of Justice of the European Union' in Gruszczynski and Werner (eds), *Deference in International Courts and Tribunals*, ch 10 (Oxford University Press, 2014). Michal Bobek also opined that the case-law in this area 'resists any conceptualisation'. More generally, the former AG seems reticent about the idea that the case-law of the Court on judicial protection may be conceptualised through an area-dependent lens of analysis. His reticence appears to rest on the case-specific nature of (most of) the Court's judgments (Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States' in op. cit. supra note 23, pp. 310 et seq.).

[68] Episcopo, 'The Vicissitudes of Life at the Coalface' in op. cit. supra note 41, p. 294.

[69] On that topic, see Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation*, chs 5-6 (Hart Publishing, 2004); Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press, 2006); Craig and De Búrca, *EU Law: Text, Cases and Materials* (6th edn, Oxford University Press, 2018), p. 305, 328; Steiner and Woods, *EU Law* (Oxford University Press, 2009), 8.3; Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 Irish Jurist 13, 14; Schütze, *European Union Law*, supra note 44, pp. 417 et seq. To be sure, it is perhaps useful to add that some commentators have suggested that the case law resists 'any categorization' (see, for instance, Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States' in op. cit. supra note 23, p. 310).

[70] Case C-199/82, *Amministrazione delle finanze dello Stato v San Giorgio SpA*, EU:C:1983:318, para 14.

[71] Craufurd Smith, 'Remedies for Breaches of EU Law in National Courts' in op. cit. supra note 63, p. 298.

It is usually suggested that the early 1990s marked a period of intense judicial interference in national procedural law. Drawing inspiration from the constitutional traditions common to some Member States,[72] the Court was able to dictate the creation of several EU-wide remedies. The development of self-standing judicial remedies, such as the action for state liability, epitomises the priority afforded to 'full' or 'effective' protection of EU law rights over respect for national procedural autonomy during this second stage.[73] Craufurd Smith opined that the second stage in case law could be seen as:

> 'a simple development of the law, the less exacting "practical impossibility" test, with its presumption of institutional autonomy, gradually giving way to a test of "effectiveness", necessitating a "full" or high level of protection of Community rights'.[74]

Based on that standard, the Court developed several remedies, such as the right to bring judicial review proceedings for breaches of EU law,[75] and the faculty to seek interim relief.[76]

It is assumed that the third stage was characterised by a significant recalibration in favour of national procedural autonomy.[77] That trend was illustrated by the establishment of a procedural 'rule of reason',[78] or 'balancing' test,[79] in *Van Schijndel* and *Peterbroeck*. The procedural rule of reason was designed to strike a balance between, on the one hand, the requirements of effective (judicial) protection of EU rights and, on the other hand, the 'basic principles' and interests underlying national

[72] Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 Common Market Law Review 1629, 1632 et seq. In their contribution, Lenaerts and Gutiérrez-Fons explained how the Court was able to develop state liability 'on the basis of a comparative methodology' grounded in the legal traditions common to the Member States.

[73] Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse' (2011) 36 European Law Review 51, 52; Tridimas, 'Enforcing Community Rights in National Courts: Some Recent Developments' in O'Keeffe and Bavasso (eds), *Liber Amicorum in Honour of Lord Slynn of Hadley: Judicial Review in European Union Law* (Kluwer Law International, 2000), p. 466.

[74] It is worth noting that she acknowledged that the Court continued to rely on alternative standards of review in some cases. For further details, see Craufurd Smith, 'Remedies for Breaches of EU Law in National Courts' in op. cit. supra note 63, p. 308. In turn, the third stage could be viewed as a by-product of the shift to the procedural rule of reason, or 'balancing' test (Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States' in op. cit. supra note 23, p. 312).

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

[76] Case C-213/89, *The Queen v Secretary of State for Transport, ex parte Factortame*, EU:C:1990:257, para 21.

[77] Compare with Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States' in op. cit. supra note 23, p. 310.

[78] Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12 Review of European Administrative Law 5, 10.

[79] Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States' in op. cit. supra note 23, p. 312.

procedural law.[80] This approach was encapsulated in the following excerpt from *Peterbroek*:

> 'each case which raises the question of whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration'.[81]

Leaving aside the variations in case law, it should be emphasized that the mandate of national courts and tribunals was usually framed negatively by the principle of effectiveness. Beyond the disapplication of national procedural rules, there was relatively little in terms of what national judges were explicitly required to do under EU law.[82] The negative dimension of the jurisprudence was clearly displayed in *Simmenthal*, where the national referring court was invited to disapply domestic procedural provisions that could hinder the correct application of EU law.[83] Any procedural 'impediments to the full effectiveness' of EU law had to be disapplied by the national judge handling the case.[84]

The negative undertones of that judgment persisted over time, particularly as the Court regularly refrained from articulating a specific standard of judicial protection. The principle of (minimum) effectiveness, in fact, was hardly conducive to the development of a positive understanding of the procedures and remedies that should be

[80] See, e.g., Joined Cases C-430/93 and C-431/93, *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten*, EU:C:1995:441, para 19; Case C-312/93, *Peterbroeck, Van Campenhout & Cie v Belgian State*, EU:C:1995:437, para 14. On that topic, see Episcopo, 'The Vicissitudes of Life at the Coalface' in op. cit. supra note 41, pp. 283 et seq.

[81] Case C-312/93, *Peterbroeck, Van Campenhout & Cie v Belgian State*, EU:C:1995:437, para 14.

[82] This prompted legal scholars to distinguish between 'material primacy' and 'structural primacy' (Claes, *The National Court's Mandate in the European Constitution*, supra note 46, p. 100). A similar distinction was made between 'direct' and 'indirect collision' (Ortlep and Verhoeven, 'The Principle of Primacy Versus the Principle of National Procedural Autonomy' (2012) Netherlands Administrative Law Library 4). The concept of 'direct collision' refers to situations where a legal vacuum emerges following the setting aside of an incompatible national provision, and EU law provides an alternative standard that can be applied instead of national law. In contrast, the concept of 'indirect collision' refers to situations in which EU law does not provide a directly available alternative standard of judicial protection. In these circumstances, the material incompatibility must be 'resolved in the light of the principle of procedural autonomy'. In other words, 'EU law does not serve as a rule which provides a material outcome for the case, but as a principle, leading to a balance between the effectiveness of EU law, on the one hand, and the background and aim of national law which restricts this effectiveness of EU law on the other'.

[83] Case C-106/77, *Amministrazione delle finance dello Stato v Simmenthal*, EU:C:1978:49, paras 21-22.

[84] Ibid, para 23.

made available for the judicial enforcement of EU law rights. Widdershoven observed, in this respect, that:

> '[i]n most cases, the direct test on effectiveness does not lead to the amendment or disqualification of the procedural rules concerned'.[85]

He similarly noted that the procedural rule of reason test seldom led to a modification of national procedural law. According to him,

> '[i]n most cases the assessment boils down to whether the procedural provision can reasonably be justified by the basic principles mentioned, a question which in most cases is answered in the positive'.[86]

This led Beijer to argue that:

> 'within these "negative" limitations, Member States are, in principle, free to apply their own procedural standards and rules if EU (secondary) law does not prescribe particular procedural standards which must be provided for at national level'.[87]

2.3. The distinction between effectiveness and effective judicial protection: A framework for understanding the positivisation of case law?

Following the advent of the principle of 'judicial control' in *Johnston*,[88] much has been made of whether the general principle of effective judicial protection could support a more positive stance from the Court of Justice in procedural matters. For example, Van Gerven advocated for a more prescriptive conception of the remedies to be available at the domestic level. According to him, the standard of practical impossibility prevailing under the principle of effectiveness would indeed:

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[85] Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 78, 10.
[86] Ibid, 11.
[87] Beijer, *The Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Intersentia, 2017), p. 266.
[88] Case C-222/84, *Johnston*, EU:C:1986:206, para 18. The principle of effective judicial protection was subsequently employed as a self-standing general principle of EU law capable of being applied on its own even in the absence of a secondary provisions codifying (more specific) access to justice requirements. See, e.g., Case C-222/86, *UNECTEF v Georges Heylens*, EU:C:1987:442, paras 14-15; Case C-432/05, *Unibet*, EU:C:2007:163; Case C-234/17, *XC and* Others, EU:C:2018:853, para 51; Case C-379/18, *Deutsche Lufthansa*, EU:C:2019:1000, para 61. On that topic, see also AG Sharpston in C-664/15, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation ('Protect')*, EU:C:2017:760, para 88.

> ‘allow for too many insufficiencies in, and too large disparities between, the Member States in the judicial enforcement of Community law and of Community rights derived therefrom’.[89]

This prompted him to suggest applying a ‘more demanding approach’ to remedies,[90] one that would look ‘more positively and constructively to the level of enforcement of Community rights’.[91]

The argument put forward by Van Gerven was echoed in several early judgments on national procedural autonomy. On multiple occasions, the Court of Justice more explicitly outlined the standard of judicial protection that should be established at the domestic level. The judgments delivered in *Unibet* and *Factortame* are often cited to illustrate the positive dimension of the relevant case law on remedial matters.[92] In these judgments, the Court alluded to the possibility of developing new remedies beyond those explicitly provided by national law.

Of course, it is undeniable that the formulation employed by the Court was cautious. In *Unibet,* for instance, the Court appeared reluctant to interfere too much in national procedural law. It instructed the Member States to establish a new remedy:

> ‘only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual’s rights under Community law’.[93]

In spite of this, the Court formulated an obligation for the Member States to establish a new, self-standing cause of action when no such remedy existed at the domestic level. Warin suggested that *Unibet* represented:

> ‘a first hint towards the possibility that there might be more than just a negative obligation’.[94]

Viewed together, *Unibet* and *Factortame* can thus be seen as examples of the development of positive obligations under the general principle of effective judicial

[89] Van Gerven, ‘Of Rights, Remedies and Procedures’, supra note 54, 530.
[90] Van Gerven established a distinction between ‘constitutive’ and ‘executive’ remedial rules, and procedural rules. According to him, the category of remedial rules should be subject to the more demanding test of ‘adequate’ protection, while the category of procedural rules ‘stricto sensu’ should continue to be tested against the requirements of minimum effectiveness – that is, the ‘practical impossibility test’ – and equivalence.
[91] Van Gerven, ‘Of Rights, Remedies and Procedures’, supra note 54, 533.
[92] Case C-432/05, *Unibet*, EU:C:2007:163; Case C-221/89, *The Queen v Secretary of State for Transport, ex parte Factortame*, EU:C:1991:320.
[93] Case C-432/05, *Unibet*, para 41.
[94] Warin, *Individual Rights under European Union Law: A Study on the Relation Between Rights, Obligations and Interests in the Case Law of the Court of Justice* (Nomos, 2019), pp. 184-185.

protection.[95] In the wake of these judgments, the debate has shifted to the distinction between the principle of effectiveness, as established in *Rewe/Comet*, and the general principle of effective judicial protection, as established in *Johnston*. These principles were seen by some legal commentators as expressing distinct standards of review of national procedural autonomy.[96] According to Episcopo,

> 'the general principle of effective judicial protection represents another interpretative tool through which the Court carries out some interconnected, yet logically distinct, operations'.[97]

The onus therefore shifted to disentangling the distinct layers of judicial protection deriving from the principles of effectiveness and effective judicial protection. For instance, Prechal and Widdershoven argued that:

> 'the principle of effective judicial protection implies both a *negative* and a *positive* obligation. Here a "negative obligation" means that national provisions which fail to satisfy the requirements of the principles of effectiveness or effective judicial protection must be set aside. In other words, they are eliminated. The positive obligation, on the other hand, is that new national powers and remedies have to be created'.[98]

However, there is, in my view, one element that should not be overlooked: even when the Court was bold enough to develop positive remedies, such as the right of access to justice, the responsibility for establishing those remedies primarily fell on the shoulders of the national legislature.[99] In other words, the obligations of judicial protection

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[95] For a similar argument, see Hofmann, 'A Commentary on Article 47 of the Charter and the Member States' (2022) Law Working Paper Series 2022-005, 30; Widdershoven and Prechal, 'Redefining the Relationship Between "*Rewe*-effectiveness" and Effective Judicial Protection', supra note 60, 41. Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in op. cit. supra note 54, pp. 90-91.

[96] For a similar argument, see Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 78, 19; Opinion of AG Campos Sánchez-Bordona in Case C-171/15, *Connexxion Taxi Services BV*, EU:C:2016:506, para 65. Interestingly, he also stresses in paragraph 66 that this trend is, 'as is logical, more pronounced where the EU legislature has adopted harmonising provisions, specifically in relation to the judicial review of certain decisions of national authorities'. Other commentators have suggested that the principle of effective judicial protection constitutes a mere corollary of effectiveness: Opinion of AG Bobek in Case C-89/17, *Banger*, EU:C:2018:570, paras 100-101 (although he acknowledged that 'since the entry into force of the Charter, Article 47 has been developing in a more robust manner. Reviewing the case-law of the Court, it would indeed appear that Article 47 of the Charter currently sets a higher standard than the principle of effectiveness'); Opinion of AG Kokott in Case C-73/16, *Puškár*, EU:C:2017:253, para 51.

[97] Episcopo, 'The Vicissitudes of Life at the Coalface' in op. cit. supra note 41, p. 294.

[98] Prechal and Widdershoven, 'Redefining the Relationship Between "*Rewe*-effectiveness" and Effective Judicial Protection', supra note 60, 41.

[99] In those circumstances, the Court essentially instructed national judges to disapply conflicting national provisions, without spelling out positive obligations to adjust and/or modify national procedural law to establish the remedy envisioned by the Court. For instance, in *Factortame*, the national referring court was simply required to set aside a national provision precluding it from granting interim relief. The Court

imposed on national judges by virtue of EU principles were essentially framed in a negative fashion. Beyond this, the 'no-new-remedy' rule meant that the competence to establish adequate remedies for the purpose of applying and enforcing EU law fell upon national legislative assemblies.[100]

Once again, the example of *Unibet* is instructive. That judgment fell short of requiring the national referring court to adjust national procedural law to conform with the EU standard of judicial protection. Instead, the national referring court was called upon to:

> 'interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the State, in such a way as to enable those rules, whenever possible, to be implemented in such a manner as to contribute to the attainment of the objective, referred to at paragraph 37 above, of ensuring effective judicial protection of an individual's rights under Community law'.[101]

The responsibility to create new remedies fell on the Member States as a whole, particularly their national legislative assemblies.[102] As Beijer put it,

> '"[n]ew national powers or remedies" would need to be created, requiring the Member States to take certain actions, *potentially of a legislative kind*'.[103]

Admittedly, the relevant judgments on national procedural autonomy seemed to express 'implicit positive obligations', as described by De Witte.[104] By articulating a negative duty to disapply national procedural provisions deemed incompatible with EU law, the Court may have sought to ensure the development of positive remedies

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merely suggested that this finding could have positive implications for the powers of national judges (Case C-213/89, *The Queen v Secretary of State for Transport, ex parte Factortame*, EU:C:1990:257, paras 20-21). A similar story unfolded in *Johnston*, where the Court held that the national legislation was contrary to the general principle of effective judicial protection, without formulating positive recommendations about what the national judge had to do to live up to the expectations of EU law (Case C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, esp. para 19).

[100] See, e.g., Case C-158/80, *Rewe v Hauptzollamt Kiel (Butter-buying cruises)*, EU:C:1981:163, para 44; Case C-432/05, *Unibet*, EU:C:2007:163, paras 40-41.

[101] Case C-432/05, *Unibet*, para 44.

[102] For a similar view, see Leloup and Spieker, 'Rethinking Primacy's Effects' (2024) 61 Common Market Law Review 913, 946.

[103] Beijer, *The Limits of EU Fundamental Rights Protection by the EU*, supra note 87, p. 266 (emphasis added).

[104] De Witte, 'The Strange Absence of a Doctrine of Positive Obligations under the EU Charter of Rights' (2020) n°4 Quaderni costituzionali 854, 856. Prechal and Widdershoven observed, in that respect, that the relevant case law gave rise to 'potential' positive procedural obligations (Prechal and Widdershoven, 'Redefining the Relationship Between "*Rewe*-effectiveness" and Effective Judicial Protection', supra note 60, 41-42). Bonelli similarly opined that 'while the Court of Justice has often repeated that EU law does not require the creation of new procedures for the enforcement of Union rights, its case law has produced precisely that consequence numerous times' (Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in op. cit. supra note 54, pp. 90-91).

(beyond those prescribed by national law). However, it should be emphasised that De Witte's concept rests on a monolithic conception of the state, which tends to overlook the distinct roles and responsibilities assigned to various branches of state power regarding the domestic enforcement of EU law. To put it bluntly, De Witte's approach treats the state as a coherent whole, rather than as an entity constituted by distinct organs.[105] An interesting parallel can be drawn with the monolithic conception of the state underlying the doctrine of positive obligations developed by the European Court of Human Rights based on some of the human rights enshrined in the European Convention on Human Rights.

Viewed from this perspective, the specificity of the concept of positive and/or negative obligations of judicial protection developed within the framework of this thesis arises from its emphasis on the mandate granted to national judges involved in the domestic enforcement of EU law. It should be clear that the case law discussed in this section framed the powers and prerogatives of national judges in a negative manner. The obligations imposed on national judges can therefore be seen as negative obligations of judicial protection.[106] In cases where a national procedural rule conflicted irremediably with the requirements of EU law, the principle of primacy dictated that the national judge had to disapply the relevant rule. Beyond disapplication, EU law did not require the national judge to directly apply the EU standard of judicial protection without legislative backing. To be sure, I do not wish to rule out the possibility that a national judge could adjust or modify national law in the absence of legislative intervention. However, the key point is that this prerogative was not conferred on national judges *as a matter of EU law*. Their competence to do so ultimately depended on the mandate granted to them *under national law*.

[105] This conception also underpins the concept of positive obligation devised by Beijer (Beijer, *The Limits of EU Fundamental Rights Protection by the EU*, supra note 87, esp. p. 264). One of the striking features of the conception adopted by Beijer is its emphasis on the development of positive obligations grounded in fundamental rights. In contrast, the theoretical model developed within the framework of this thesis extends beyond obligations derived solely from EU fundamental rights and incorporates those arising from other sources, such as secondary law and international law. On that topic, see also Backé, 'The Positive Obligations Doctrine: A Means of Effective Fundamental Rights Protection in EU Member States' (2024) 31 Maastricht Journal of European and Comparative Law 147.

[106] Leloup and Spieker similarly established a distinction between primacy's 'positive effect' and 'negative effect', see Leloup and Spieker, 'Rethinking Primacy's Effects', supra note 102.

3. The case law on positive obligations of judicial protection: A missed opportunity to reimagine national procedural autonomy?

Overall, the previous section underscored the predominant focus on the role of the Court of Justice in developing obligations of judicial protection. The classical narrative's near-exclusive emphasis on EU primary law in framing the Court's interpretative efforts clearly reflects this. The previous section explained how legal scholars have attempted to conceptualise fluctuations in the case law on national procedural autonomy through the lens of the distinct standards of review applied by the Court – rooted in the principles of effectiveness and equivalence, as well as the general principle of effective judicial protection.

This section reflects on the difficulty of departing from this analytical framework. It demonstrates that the classical narrative continues to exert a decisive influence on contemporary doctrinal accounts, shaping how obligations of judicial protection are understood. Over the past few years, the Court has not shied away from developing positive standards of judicial protection, especially in policy areas such as asylum, criminal, and environmental law. This section explains that recent judgments on judicial protection reflect a distinct evolution of the mandate attributed to national judges by EU law. Beyond the disapplication of national procedural law, national judges are now directly instructed to adjust national procedural law to conform with positive standards of judicial protection (section 3.1).

This section suggests that the academic literature has yet to fully embrace the challenge of reframing the analytical framework used to study the interaction between EU law and national procedural autonomy. For better or worse, the development of positive obligations of judicial protection continues to be analysed through the lens of the evolving Treaty landscape of judicial protection (section 3.2). However, this section demonstrates that this approach no longer provides a comprehensive and accurate account of the relevant case law on national procedural autonomy. More specifically, the classical narrative's emphasis on EU primary law overlooks other legal tools and principles through which EU law interferes with national procedural autonomy. While this approach identifies obligations of judicial protection developed by the Court under EU primary law, it neglects the role of secondary law in shaping positive obligations of judicial protection (section 3.3).

In this context, this thesis aims to scrutinise how the scope of harmonised procedural requirements has contributed to the development of positive obligations of judicial protection in environmental, equality, and asylum law. Based on these three case studies, it will demonstrate that the expansion of harmonised procedural requirements in secondary law – both in scope and detail – has driven the development of positive obligations of judicial protection, extending beyond the core constitutional features of

effective judicial protection derived from EU primary law. More specifically, the Court has interpreted harmonised procedural standards in secondary law to develop detailed, sector-specific obligations of judicial protection tailored to the regulatory context of each policy area. Examining the obligations developed across these three areas will then make it possible to distinguish between (i) transversal obligations of judicial protection, which apply to the Member States across all areas of EU law and remain unaffected by the regulatory context of specific policy areas; and (ii) sector-specific obligations, which are shaped by reference to harmonised procedural standards established in secondary law.

3.1. The development of positive obligations of judicial protection grounded in Article 47 of the Charter

From the outset, it is worth reflecting on the evolution of the Treaty framework on judicial protection. With the entry into force of the Lisbon Treaty, the general principle of effective judicial protection has ascended to the status of written primary law.[107] It is now formally recognised as a fundamental 'right to an effective judicial remedy and to a fair trial' by Article 47 of the Charter. Based on Article 6 TFEU, this provision 'shall have the same legal value as the Treaties'. Moreover, the general principle of effective judicial protection imposes an obligation on Member States to offer 'remedies sufficient to ensure effective legal protection in the fields covered by Union law' under Article 19 TEU. Together, both provisions have reshaped the constitutional framework governing the judicial enforcement of EU law at the national level, turning the obligation to provide effective remedies into a written provision of EU primary law.

It is widely believed that the new constitutional framework established by the Lisbon Treaty provided a stronger constitutional basis for developing positive obligations of judicial protection (whether through legislative intervention or judicial interpretation).[108] Over the last few years, the Court has indeed increasingly developed positive obligations of judicial protection. More specifically, the general principle of effective judicial protection, as set out in Article 47 of the Charter, has underpinned the creation of positive standards of judicial protection in several policy areas, including

[107] Arnull, 'The Principle of Effective Judicial Protection in EU Law', supra note 73, 69.
[108] For a similar argument, see also, amongst others, Beijer, 'Active Guidance of Fundamental Rights Protection by the Court of Justice of the European Union: Exploring the Possibilities of a Positive Obligations Doctrine' (2015) 8 Review of European Administrative Law 127, 138-139.

environmental protection,[109] labour law,[110] and immigration and asylum law.[111] In the wake of these judgments, it has been suggested that the new Treaty framework on judicial protection had empowered the Court to develop a more positive and comprehensive conception of EU standards of judicial protection.

The development of positive obligations of judicial protection has unfolded against the backdrop of a broader recalibration of the relationship between primacy and direct effect. For clarity, it should be recalled that much has been written about the interaction between these principles and what it entails for the broader constitutional dimension of European integration.[112] For the most part, the Court remained somewhat oblivious to the theoretical concerns raised by legal scholars and members of the Court in this respect. The jurisprudence generally seemed inspired by pragmatism, dictated by the circumstances of each case.[113] In other words, the Court never systematically (or even explicitly) addressed lingering controversies about whether the doctrine of primacy could realistically be dissociated from the doctrine of direct effect for the purposes of

[109] Case C-240/09, *Brown Bears I*, EU:C:2011:125; C-243/15, *Brown Bears II*, EU:C:2016:838; Case C-873/19, *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, EU:C:2022 :857. On that topic, see Tecqmenne, 'Turning "Public Interest Litigation" into a Positive Obligation Deriving from Article 47 of the Charter: *Deutsche Umwelthilfe*' (2023) 60 Common Market Law Review 1745.

[110] Case C-193/17, *Cresco Investigation*, EU:C:2019:43; Joined Cases C-569/16 and C-570/16, *Bauer*, EU:C:2018:871; Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, EU:C:2018:257.

[111] Case C-403/16, *El Hassani*, EU:C:2017:960; Joined Cases C-924/19 PPU and C-925/19/PPU, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (*'FMS'),* EU:C:2020:367; Case C-556/17, *Torubarov*, EU:C:2019:626. On that topic, see Slowik, 'Multiple Sources of Right to an Effective Remedy in EU Migration and Asylum Law: Towards Common Standards on Judicial Protection?' (2024) 31 Maastricht Journal of European and Comparative Law 27; Van Cleynenbreugel, 'Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration, Judgment of the Court of Justice* (Second Chamber) of 28 July 2011' (2012) 49 Common Market Law Review 327.

[112] On that topic, see, e.g., Van Gerven, 'Of Rights, Remedies and Procedures', supra note 54, 501; Dougan, 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy' (2007) 44 Common Market Law Review 931; Avbelj, 'Supremacy or Primacy of EU Law: (Why) Does it Matter?' (2011) 17 European Law Journal 744; Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in Barnard (ed), *The Fundamentals of EU Law Revisited: Assembling the Impact of the Constitutional Debate* (Oxford University Press, 2007), esp. pp. 44 et seq.; Lenaerts and Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 European Law Review 287; Lenaerts and Corthaut, 'Towards an Internally Consistent Doctrine on Invoking Norms of EU Law' in Prechal and Van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press, 2008); Wildemeersch, 'Primauté, Vous Avez Dit Primauté? Sur l'Invocabilité des Directives dans les Litiges entre Particuliers' (2018) Revue des Affaires Européennes 541; Episcopo, 'The Vicissitudes of Life at the Coalface' in op. cit. supra note 41, p. 292.

[113] For a similar argument, see Sarmiento, 'The Essential Content of EU Fundamental Rights' (2020) 3 Quaderni costituzionali 851, 854.

producing distinctive effects within the domestic legal orders of the Member States (be it from a normative,[114] or empirical standpoint).[115]

This issue was nevertheless settled once and for all in *Poplawski II*.[116] The Court was keen to emphasize that:

> 'a national court's obligation to disapply a provision of its national law which is contrary to a provision of EU law, if it stems from the primacy afforded to the latter provision, is nevertheless dependent on the direct effect of that provision in the dispute pending before that court. Therefore, a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect'.[117]

It follows that the obligation to disapply national law can only arise in situations involving a conflict between national law and a provision of EU law that has direct effect.

I do not wish to dwell on whether *Poplawski II* genuinely reflects a novel conception of the interaction between direct effect and primacy, or whether it simply confirms past

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[114] In some ways, the debate about the interaction between direct effect and primacy reflects deeper tensions and disagreements over how to balance the requirements of uniformity (under the principle of effectiveness) and diversity (under the principle of conferral). On one view, reducing primacy to nothing more than a remedy to be applied in relation to directly effective provisions would represent a significant blow to the uniformity of EU law. It would, in particular, create a category of provisions whose enforcement could not be pursued before national judges through offensive remedies (such as, for example, the duty to disapply national law). On another view, the conflation of both doctrines reflects concerns over the limits of European integration. It seeks, in particular, to circumscribe the duty to disapply national legislations to cases where an alternative legal provision is readily available (and enforceable) within EU law. On that topic, see Miasik and Szwarc, 'Primacy and Direct Effect – Still Together: *Poplawski II*' (2021) 58 Common Market Law Review 571; De Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Craig and De Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press, 2021), pp. 205 et seq.

[115] It strikes me that scholars hold vastly different, and in some cases conflicting, views on the reality of the case law in this area. In some ways, it almost seems as though some scholars project their own expectations about what is normatively appealing onto descriptive accounts of the relevant case law. In other words, what is considered evident appears to depend on one's own normative stance regarding the appropriate interaction between primacy and direct effect. For instance, compare Simon and Rigaux, 'L'Arrêt *Poplawski 2*: Accroc Limité ou Ebranlement General dans la Mise en Œuvre de la Primauté par le Juge National ?' (2019) Europe n°10, 5-12 and Coutron, 'Invocabilité du Droit de l'Union Européenne: Une Doctrine Enfin Assumée par la Cour de Justice dans l'Arrêt *Poplawski*' (2020) Revue Trimestrielle de Droit Européen n°2, 274-278.

[116] On the implications of that judgment, see Bobek, 'Institutional Report: National Courts and the Enforcement of EU Law' in *National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order* (Eleven International Publishing, 2020), p. 62: '[w]hilst it is true that the ruling was only concerned with one particular instrument, namely framework decisions, the reasoning employed by the Court relied on systematic arguments concerning the EU legal system as a whole'; Craig and De Búrca, *EU Law: Text, Cases, and Materials* (7th edn, Oxford University Press, 2020), pp. 309-310.

[117] Case C-573/17, *Poplawski II*, EU:C:2019:530, para 68. That statement was reiterated in Case C-414/16, *Egenberger*, EU:C:2018:257, para 79; Case C-752/18, *Deutsche Umwelthilfe*, EU:C:2019:1114, para 42.

case law.[118] For present purposes, it is important to note that this development co-exists with the progressive expansion of the scope of direct effect.[119] As direct effect continues to evolve, the difference between the two theoretical models traditionally used by legal scholarship to conceptualise the obligations of national courts – namely, the 'primacy' and the 'trigger model' – appears increasingly difficult to sustain conceptually.[120] As discussed in subsequent chapters,[121] the onus of the enquiry into the intended effects of EU law appears to have shifted – from a focus on whether a provision has direct effect, to a more contextual assessment that considers both the nature of the provision being invoked and the type of proceedings in which enforcement is sought.

Be that as it may, the recalibration of the relationship between direct effect and primacy has profound repercussions in the field of judicial protection. It is now settled case law that the general principle of effective judicial protection enshrined in Article 47 of the Charter has direct effect.[122] As a result, this principle may serve as an autonomous legal basis for establishing positive obligations of judicial protection – even in the absence of secondary legislation on such matters.

To be clear, this is not to suggest that such positive obligations emerged entirely out of the blue or were absent from earlier judgments within the three-period framework established by the classical narrative. Several judgments, including *Unibet* and *Factortame*, had already illustrated the gradual positivisation of judicial protection – albeit through the establishment of negative obligations, as outlined in section 2.3. For this reason, the periodisation proposed by the classical narrative – and adopted in this chapter – should be approached with caution. The aim is not to impose a rigid temporal framework, but rather to provide a clear, didactic way of conceptualizing how judicial protection has gradually assumed a more positive dimension. In any event, this incremental evolution resists strict chronological categorisation and, as this thesis will

[118] On that topic, see De Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in op. cit. supra note 114, p. 206: 'the linkage between direct effect and primacy in framing the duties of national courts was *reaffirmed* by the CJEU in the recent *Poplawski* judgment' (emphasis added).
[119] On that topic, see Chapter 2, Section 2.
[120] Craig and De Búrca, *EU Law: Text, Cases and Materials* (5th edn, Oxford University Press, 2011), p. 260: 'in normative terms, the primacy model places supremacy in the driving seat, with direct effect being relevant only in relation to substitution effects, while the trigger model places direct effect in the driving seat, with supremacy being the remedial manifestation of using directly effective EU rights in national courts. This is a real difference. It can nonetheless be overstated. The more cases are characterised as being about substitution effects, the more the primacy model demands direct effect stricto sensu as a trigger for supremacy. The more the trigger model broadens direct effect by embracing not only subjective rights produced by clear, precise, unconditional EU law, but also "any situation in which community law produces independent effects within the national legal systems", the less stringent does the trigger become, and the greater the prominence accorded to supremacy'.
[121] For further details, see Chapter 2, Section 2 and Chapter 3, Section 3.1.
[122] See, e.g., Case C-414/16, *Egenberger*, EU:C:2018:257, para 78; Case C-556/17, *Torubarov*, EU:C:2019:626, para 56; Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, para 161; Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*, para 140.

demonstrate, has been facilitated by the emergence and progressive expansion of harmonised procedural obligations established by secondary law.

Building on these earlier developments, recent judgments increasingly reflect this positive dimension of the general principle of effective judicial protection, confirming that it generates positive obligations of judicial protection in the context of national judicial proceedings. As Bonelli put it,

> '[i]f the first manifestations of the principle of effective judicial protection in the EU legal order could be defined as a shield and not as a sword … today effective judicial protection as provided by Article 47 acts more and more often as a sword as well. In other words, the Court of Justice does not stop at disapplication, but sets out what must be done by the national court'.[123]

Put differently, the national judiciary is not only instructed to disapply national provisions that are deemed incompatible with EU law but is also called upon to directly apply the relevant obligation of judicial protection derived from EU law.

Beyond positivisation, the relevant case law also significantly expands the reach of the general principle of effective judicial protection. Article 47 of the Charter is indeed the most frequently cited Charter provision in the jurisprudence of the Court.[124] It has accordingly been described as the 'star' provision of the Charter.[125] A closer analysis of the case-law reveals that Article 47 of the Charter has come to play a prominent role in supporting three distinct jurisprudential developments.[126]

First, this provision has been relied upon by the Court to define the conditions governing the right of access to justice available to individuals to enforce substantive EU law provisions. This includes matters such as time limits,[127] legal aid,[128] and standing. The case law on standing to enforce environmental law offers a paradigmatic illustration of that jurisprudential trend.[129] As we shall see, that case law illustrates the far-reaching demands posed by the general principle of effective judicial protection in

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[123] Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in op. cit. supra note 54, pp. 93-94. On that topic, see also Prechal, 'Effective Judicial Protection: Some Recent Developments – Moving to the Essence' (2020) 13 Review of European Administrative Law 175, 181.

[124] Reichel, and Toggenburg, 'References for a Preliminary Ruling and the Charter of Fundamental Rights: Experiences and Data from 2010 to 2018' in Bobek and Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing, 2020), p. 475.

[125] Groussot and Thor Pétursson, '*Je t'aime… Moi non Plus* : Ten Years of Application of the EU Charter of Fundamental Rights' (2022) 59 Common Market Law Review 239, 243. By contrast, they observe that the social provisions of the Charter remain the 'weak links' in the 'case study of integration through (rule) of law'.

[126] On that topic, see also Episcopo, 'The Vicissitudes of Life at the Coalface' in op. cit. supra note 41, pp. 300 et seq.

[127] See, e.g., Case C-664/15, *Protect*.

[128] See, e.g., Case C-279/09, *DEB*, EU:C:2010:811.

[129] See, e.g., Case C-240/09, *Brown Bears I*; Case C-243/15, *Brown Bears II*; Case C-664/15, *Protect*; Case C-873/19, *Deutsche Umwelthilfe*.

relation to national procedural rules governing the enforcement of EU law (beyond the existence of narrowly-construed subjective rights).[130]

Second, the general principle of effective judicial protection has been relied upon by the Court 'in conjunction' with EU secondary law provisions dealing with procedural matters.[131] This development goes hand in hand with the gradual 'proceduralisation' of EU law, described below.[132] Over time, the Court has recognised that the general principle of effective judicial protection may limit the autonomy retained by the Member States when they implement the (minimum) procedural standards established through secondary or international law.[133] This means that the principle may be employed to expand the scope of EU obligations of judicial protection beyond the requirements explicitly enshrined in secondary law. This raises challenging questions about the interplay between EU primary and secondary law in the field of judicial protection.

Third, the Court has relied on Article 47 of the Charter to formulate recommendations about the institutional set-up of national bodies involved in patrolling the application of EU law at the domestic level. While the case law on national procedural autonomy has traditionally left these matters to the discretion of the Member States, recent judgments have addressed:

> 'first and foremost […] institutional powers and government structures and not […] substantive rights, processes or remedies'.[134]

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[130] Eliantonio, 'The Relationship between EU Secondary Rules and the Principles of Effectiveness and Effective Judicial Protection in Environmental Matters' (2019) 12 Review of European Administrative Law 95, 114-115.

[131] Bonelli, 'Article 47 and the (Procedural) Autonomy of the Member States' in op. cit. supra note 54, p. 86.

[132] On that topic, see Dubos, 'The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism' (2015) 8 Review of European Administrative Law 7; Eliantonio and Muir, 'Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law' (2015) 8 Review of European Administrative Law 177.

[133] In the field of migration and asylum protection, see: Case C-69/10, *Samba Diouf*, EU:C:2011:524; Case C-348/16, *Sacko*, EU:C:2017:591; Case C-585/16, *Alheto*, EU:C:2018:584; Case C-556/17, *Torubarov*, EU:C:2019:626; in the field of consumer protection: Case C-600/19, *Ibercaja Banco*, EU:C:2022:394; Joined Cases C-693/19 and C-831/19, *SPV Project 1503*, EU:C:2022:395; Case C-725/19, *Impuls Leasing România*, EU:C:2022:396; Case C-869/19, *Unicaja Banco*, EU:C:2022:397; in the field of public procurement: Case C-497/20, *Randstad Italia SpA v Umana SpA and Others*, EU:C:2021:1037. Contrast with Caranta, 'The Interplay Between EU Legislation and Effectiveness, Effective Judicial Protection and the Right to an Effective Remedy in EU Public Procurement Law' (2019) 12 Review of European Administrative Law 63, esp. 92-93: '[i]f *Orizzonte Salute*, *Start Storage* and *Cooperativa animazione Valdocco* are of any guide, reference to Article 47 of the Charter is today actually strengthening the procedural autonomy of the Member States. Reasoning in terms of proportionality along the lines of Article 52 of the Charter lessens the pursuit of *effet utile* of the existing provisions of EU secondary law'. For a similar argument, see Martufi, 'Effective Judicial Protection and the European Arrest Warrant: Navigating Between Procedural Autonomy and Mutual Trust' (2022) 59 Common Market Law Review 1371.

[134] Tridimas, 'The General Principles of EU Law and the Europeanisation of National Laws' (2020) 13 Review of European Administrative Law 5, 22.

Admittedly, the relevant case law mostly arose in the context of the rule-of-law backsliding that has plagued the EU over the past decade or so.[135] However, it is also relevant beyond the rule-of-law context.[136] In several judgments, such as *Berlioz*,[137] *Etat Luxembourgeois*,[138] and *El Hassani*,[139] the Court developed more or less detailed requirements regarding the organisational features of national bodies involved in the enforcement of EU law, particularly in relation to their independence and impartiality, as established by Article 47(2) of the Charter.

3.2. The new Treaty framework on judicial protection: A constitutional impetus towards strong(er) judicial inroads into national procedural autonomy?

Taken together, the three lines of case law described above indicate that the general principle of effective judicial protection – which is now enshrined in Articles 19 TEU and 47 of the Charter – may have acquired distinctive constitutional significance as a 'structural'[140] or 'meta'[141] principle governing the interaction between EU law and national procedural autonomy. In the wake of these judgments, much has been made of the evolving Treaty framework on judicial protection. The crux of the matter has

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[135] See, amongst (many) other judgments, Case C-64/16, *Associação Sindical dos Juízes Portugueses ('ASJP')*, EU:C:2018:117; Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2019:531; Case C-896/19, *Repubblika v Il-Prim-Ministru*, EU:C:2021:311; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociatja "Forumul Judecãtorilor din România"*, EU:C:2021:393; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, EU:C:2021:1034. On that topic, see Spieker, 'Breathing Life into the Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182; Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) 38 Yearbook of European Law 3; Scheppele, Kochenov and Grabowska-Moroz, 'EU Values are Law After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 Yearbook of European Law 3; Pech and Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments Since the Portuguese Judges Case* (Swedish Institute for European Policy Studies, 2021); Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice' (2022) 18 European Constitutional Law Review 30; Bast and Von Bogdandy, 'The Constitutional Core of the Union: on the CJEU's New, Principled Constitutionalism' (2024) 61 Common Market Law Review 1471.

[136] Scarcello, 'Effective Judicial Protection and Procedural Autonomy Beyond Rule of Law Judgments: *Randstad Italia*' (2022) 59 Common Market Law Review 1445, esp. 1461-1462: distinguishing between Article 19 TEU, which is primarily concerned with a 'broadly functioning judiciary', while Article 47 of the Charter requires a 'more detailed assessment of the specific rights' of individuals affected by breaches of EU law.

[137] Case C-682/15, *Berlioz Investment Fund*, EU:C:2017:373.

[138] Joined Cases C-245/19 and C-246/19, *Etat Luxembourgeois (Droit de recours contre une demande d'information en matière fiscale)*, EU:C:2020:795.

[139] Case C-403/16, *El Hassani*, EU:C:2017:960.

[140] Bonelli, 'Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature', supra note 43,, 51.

[141] Roeben, 'Judicial Protection as the Meta-norm in the EU Judicial Architecture' (2020) 12 The Hague Journal on the Rule of Law 29.

revolved around disentangling the relationship between the principles of effective judicial protection and effectiveness,[142] effective judicial protection and Article 47 of the Charter,[143] Article 47 of the Charter and Article 19 TEU,[144] as well as identifying the 'essence' of Article 47.[145]

The analytical framework applied in this context does not fundamentally depart from the approach that has dominated the classical narrative on national procedural autonomy. The analysis rests on an assessment of the evolution of the case law, which seeks to uncover whether the adoption of the Lisbon Treaty marks the dawn of a new age for the judicial protection of individuals. As Prechal put it, the enquiry turns on the following question: '[w]hat has the Charter changed?'.[146] In other words, the ambition is quite simply to map out the degree of continuity and change discernible 'between pre- and post-Lisbon case law' on judicial protection.[147]

Against this background, the relevant judgments formulating positive obligations of judicial protection are seen as indicating a shift to a new era in the case law on judicial protection. The development of positive and more comprehensive obligations of judicial protection – spanning procedural, remedial and institutional matters – is viewed as a corollary of the evolving (Treaty) landscape of judicial protection. Arnull illustrates the approach dominating academic literature on this topic.[148] According to him,

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[142] On that topic, see Widdershoven, 'National Procedural Autonomy and General EU Law', supra note 78; Krommendijk, 'Is There Light on the Horizon?', supra note 60, 1395; Engström, 'The Principle of Effective Judicial Protection after the Lisbon Treaty' (2011) 4 Review of European Administrative Law 53.

[143] On that topic, see Wildemeersch, 'L'Avènement de l'Article 47 de la Charte des Droits Fondamentaux et de l'Article 19, Paragraphe 1, Second Alinéa, TUE. Un Droit Renouvelé à la Protection Juridictionnelle Effective' (2021) Cahiers de Droit Européen 867.

[144] On that topic, see Prechal, 'Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?' in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022).

[145] On that topic, see, Prechal, 'Effective Judicial Protection', supra note 123, 175; Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 German Law Journal 779; Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case Law of the Court of Justice of the European Union: The Best is Yet to Come?' (2019) 20 German Law Journal 884.

[146] Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in Paulussen Takacs, Lazic and Van Rompuy (eds), *Fundamental Rights in International and European Law* (Springer, 2016).

[147] Bonelli, Eliantonio and Gentile, 'Conclusions' in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022), p. 277.

[148] For a similar argument, see, Van Cleynenbreugel, 'The Confusing Constitutional Status of Positive Procedural Obligations in EU Law' (2012) 5 Review of European Administrative Law 91, 101; Bonelli, 'Effective Judicial Protection in EU Law', supra note 43, 40-42; Bonelli, Eliantonio and Gentile, 'Conclusions' in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022), p. 274; Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 78, esp. 27;

> '[t]here has always been room for debate about the precise point at which the case law of the Court can be said to have moved from one phase to another. With the benefit of hindsight, however, it is now clear that a distinct new phase began with the entry into force of the Lisbon Treaty in 2009 and the conferral of treaty status on the Charter'.[149]

Bonelli similarly suggested that the developments described above arose:

> 'as logical consequences of the codification of the principle of effective judicial protection in the Treaty and in the Charter with the Treaty of Lisbon'.[150]

It is also interesting to observe that Bonelli linked the expansion of the general principle of effective judicial protection – which, as mentioned above, now includes institutional safeguards – to the new Treaty framework established by Articles 19 TEU and 47 of the Charter.[151]

Viewed from this perspective, recent doctrinal accounts align squarely with the analytical framework prevailing under the classical narrative, which has focused on the evolution of judge-made standards of judicial protection grounded in EU core principles. Of course, there is no denying that the adoption of the Lisbon Treaty – and concomitant entry into force of the Charter – coincided temporally with a period of renewed emphasis on the development of positive standards of judicial protection. However, beyond contemporaneity, there is nothing to suggest that this would have been impossible without the adoption of the Lisbon Treaty, particularly under the pre-existing general principle of effective judicial protection. The issue, as Bobek and Adams-Prassl framed it, is one of 'path dependency'.[152] It is equally plausible to consider that the case law on positive obligations of judicial protection reflects a natural evolution of the case law on national procedural autonomy.

Other factors beyond Treaty change may also have exerted a decisive influence on the evolution of the case law.[153] In this respect, it is interesting to observe that the case law on positive standards of judicial protection coincided temporally with the rule-of-law backsliding discernible in some Member States, which reveals a reluctance on the

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Beijer, 'Active Guidance of Fundamental Rights Protection by the Court of Justice of the European Union', supra note 108, 138-9: 'the general principle of effective judicial protection… and the requirement of the principle of loyal cooperation … constitute arguably much weaker bases than is now seen in EU primary law'.

[149] Arnull, 'Article 47 CFR and National Procedural Autonomy' (2020) 45 European Law Review 681, 682.

[150] Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in op. cit. supra note 54, p. 82.

[151] Ibid, p. 86.

[152] Bobek and Adams-Prassl, 'Conclusion' in Bobek and Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing, 2020), pp. 572-573.

[153] On that topic, see also Episcopo, 'Deconstructing the CJEU's Jurisprudence to Enable Judicial Dialogue' in Mak and Kas (eds), *Civil Courts and the European Polity* (Hart Publishing, 2023).

part of national institutional actors – most notably the executive – to comply with EU law. In this context, the development of positive standards of judicial protection has empowered national judges to disregard or challenge national obstacles to their competence to assess the (in)compatibility of national law with EU law.[154]

It is also worth emphasizing that some of the obligations developed in recent judgments were already apparent prior to the adoption of the Lisbon Treaty. For example, in *Unibet*,[155] the Court had already adopted a particularly far-reaching view of the procedural adjustments required at the domestic level in situations where there was no judicial remedy against a violation of EU law. As we shall see,[156] the field of environmental law similarly displays an undeniable element of continuity: in that area, the Aarhus Convention has been used to fill gaps in the fragmented regulatory landscape of access to environmental justice. More specifically, the Convention has inspired the judicial development of a right of access to justice for individuals and collective entities involved in environmental protection. Viewed from this perspective, the relevant judgments articulating positive obligations of judicial protection do not appear to depart fundamentally from the case law developed over time by the Court. In fact, they align with, or build upon, relevant judgments delivered prior to the adoption of the Lisbon Treaty.[157] In these circumstances, I find it difficult, if not impossible, to establish a definitive causal connection tying the approach prevailing in recent judgments to a change or evolution in the Treaty framework on judicial protection.

3.3. Reframing the classical narrative on national procedural autonomy in a context of expanding procedural harmonisation

In addition to the elements mentioned above, there is growing recognition in the academic literature that the analytical framework applied by the classical narrative provides a somewhat misleading lens for studying the interaction between national procedural autonomy and EU law.[158] To be sure, the classical narrative once offered an accurate depiction of the case law on national procedural autonomy. After all, the early

[154] See, e.g., Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*.
[155] Case C-432/05, *Unibet*, EU:C:2007:163.
[156] For further details, see Chapter 2.
[157] The relevant case law on the standing of NGOs is instructive. The approach taken by the Court reflects a contextual interpretation of the principle of effective judicial protection, whereby the material content of that principle was defined – even before the adoption of the Lisbon Treaty – by reference to the Aarhus Convention. At the same time, the relevant judgments have progressively embraced a more positive conception of the powers vested in national judges: the latter are now required to grant standing to recognised NGOs, even if it means disapplying conflicting national legislations.
[158] On that topic, see also Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in Craig and De Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press, 2011).

case law arose in an environment lacking common rules on procedural matters. Over time, however, the regulatory landscape has evolved significantly. This phenomenon is particularly evident in the expanding 'proceduralisation' of EU law, where the scope and level of detail of common procedural rules established by secondary law have increased significantly.

This trend has manifested particularly through the adoption of secondary law provisions governing the enforcement of various EU policies (including, for example, asylum law,[159] environmental protection,[160] consumer protection,[161] and public procurement[162]). In certain policy areas, the scope of harmonised procedural rules has also expanded under the influence of international law and EU primary law. In the field of environmental law, for example, the Aarhus Convention has played a significant role in shaping standing rules for individuals and collective entities involved in environmental protection. Additionally, the EU Charter has provided a relevant framework for the judicial enforcement of EU fundamental rights, further contributing to the development of harmonised obligations of judicial protection. This is particularly evident in the enforcement of equality rights in the employment sphere, as set out in the Charter, in horizontal proceedings.

As the scope of common procedural rules established by secondary law expands, the classical narrative's near-exclusive emphasis on EU principles no longer provides an accurate framework for conceptualising the development of positive obligations of judicial protection. Specifically, this analytical framework often overlooks the role of secondary law in shaping these obligations. This calls for further scrutiny of how these procedural rules drive or frame the development of common procedural standards and remedies,[163] as well as the continued relevance of EU primary law – particularly the

[159] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, [2013] OJ L 180/60.
[160] See, e.g., Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, [2003] OJ L 156/17. On that topic, see Eliantonio, 'The Proceduralisation of EU Environmental Legislation: Internal Pressures, Some Victories and Some Way to Go' (2015) 8 Review of European Administrative Law 99.
[161] See, e.g., Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules, [2019] OJ L 328/7. On that topic, see Magdalena Tulibacka, 'Proceduralisation of EU Consumer Law and its Impact on European Consumers' (2015) 8 Review of European Administrative Law 51.
[162] 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 work contracts, [1989] OJ L 395/33.
[163] The past few years have seen an increased doctrinal emphasis on the interaction between secondary law and primary law guarantees of judicial protection (see, e.g., Gutman, 'The Role of Article 47 of the EU Charter of Fundamental Rights in the Field of Non-Discrimination: Onwards and Upwards'; Reneman, 'No Turning Back? The Empowerment of National Asylum and Migration Courts under

core components of the right of access to justice derived from the principles of effectiveness and equivalence, along with the general principle of effective judicial protection – in the context of expanding legislative procedural harmonisation.

Similarly, Episcopo called for a critical discussion of the 'movable boundaries' of national procedural autonomy.[164] According to her, the classical narrative's emphasis on EU primary law is likely to:

> 'downplay other fundamental tools through which EU law impinges on domestic remedial and procedural rules, namely: the adoption of European legislation and the effectiveness-based interpretation of primary and secondary law'.[165]

Episcopo followed in the footsteps of Dougan, who had suggested that the traditional analytical lens should incorporate other legal parameters to offer a more accurate and detailed account of the interaction between national procedural traditions and EU law. Dougan opined that the core narrative remained oblivious to the growing role of the EU legislature in shaping national procedures and remedies.[166] Other legal scholars have similarly suggested that the Court' approach may be influenced by the degree of procedural harmonisation achieved through secondary law.[167]

To provide a more accurate and comprehensive account of the EU obligations of judicial protection and their interaction with national procedural autonomy, one that acknowledges the role of the EU legislature in shaping judicial protection, it is necessary to expand the analytical framework. The analysis should go beyond the

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Article 47 of the Charter'; Martufi, 'Article 47 of the Charter and the European Arrest Warrant: Chronicle of a Death Foretold?'; Poli, 'Article 47 of the Charter of Fundamental Rights in the Common Foreign and Security Policy: Does it Afford an Adequate Protection of the Right to Effective Judicial Protection to Private Parties?'; Krämer, 'Article 47 of the Charter and Effective Judicial Protection in Environmental Matters: The Need to Grant Civil Society the Right to Defend the Environment'; Caranta, 'Article 47 of the EU Charter of Fundamental Rights in the Field of Public Procurement: Time to Take the Charter Seriously?'; Kalintiri, 'Article 47 of the EU Charter of Fundamental Rights in EU Competition Enforcement: A Quantitative and Qualitative Assessment'; Pantazatou, 'The Evolution of the Right to an Effective Remedy and to a Fair Trial in Direct and Indirect Taxation: Are We There yet?', these contributions can be found in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022)). However, it should be stressed that the lens of enquiry applied in this context has focused primarily on disentangling the layers of protection offered by primary and secondary law, with the aim of identifying the added value of Article 47 of the Charter. It is suggested here that the interaction between these two layers of norms is more complex than previously suggested. More specifically, the degree of harmonisation achieved by secondary law may influence the scope of positive obligations of judicial protection established under primary law.

[164] Episcopo, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before National Courts' in op. cit. supra note 41, p. 285.

[165] Ibid, p. 285.

[166] Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in op. cit. supra note 158.

[167] Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU: Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States' in Mak and Betül (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing, 2023).

current emphasis on EU primary law by including harmonised procedural rules established by secondary law in the assessment. This would help clarify the respective roles of the Court, the EU legislature, and other EU political institutions in shaping positive obligations of judicial protection, especially in the context of expanding legislative proceduralisation.

Against this background, it is useful to remind that this thesis aims to broaden the analytical framework traditionally applied for studying this question beyond the current near-exclusive emphasis on EU primary law. More specifically, this thesis will test the following research hypothesis across the fields of environmental, equality, and asylum law: *the expansion of the scope and level of detail of harmonised procedural obligations established by secondary law has contributed to the development of judge-made robust obligations of judicial protection, extending beyond the core constitutional features of effective judicial protection derived from EU primary law*. A close analysis of these obligations in those three fields – whose selection has been justified in the introductory chapter – will illustrate and highlight the complex and sector-specific interplay between primary and secondary law in shaping positive obligations of judicial protection. This analysis will clarify the distinction between (i) the core components of the right to effective judicial protection, rooted in EU primary law; and (ii) peripheral obligations of judicial protection, shaped by the regulatory frameworks of specific policy areas.

To achieve this, this thesis will examine the obligations of judicial protection in three policy areas, each characterised by varying obligations of judicial protection, as highlighted in the introductory chapter. In the field of environmental protection, procedural harmonisation is 'piecemeal' and 'fragmented',[168] with a focus on procedural participatory rights and access to justice for individuals and NGOs, under the influence of the Aarhus Convention. In equality law, procedural harmonisation has historically been limited,[169] but it has recently expanded, particularly concerning workers' information rights. In asylum policy, the Asylum Procedures Directive provides detailed procedural guarantees for asylum seekers, especially regarding the scope of review by national judges (Article 46(3) of the Directive).

[168] Karageorgou, 'The Scope of the Environment-Related Disputes in the Light of the Aarhus Convention and EU Law: Tensions between Effective Judicial Protection and National Procedural Autonomy' in Jerzy Jendroska and Magdalena Bar (eds), *Procedural Environmental Rights: Principle X in Theory and Practice* (Intersentia, 2018), pp. 233-234.

[169] For further details, see Kollonay-Lehoczky, 'Enforcing Non-Discrimination' in Rasnaca, Koukiadaki, Bruun and Lörcher (eds), *Effective Enforcement of EU Labour Law* (Hart Publishing, 2022).

4. Conclusion

This chapter has addressed the following research sub-question: how has the European Court of Justice developed obligations of judicial protection based on EU primary law, and how has it shaped the Member States' judicial systems in this context? What are the limits of this framework? In answering these questions, the chapter demonstrated that the analytical framework prevailing in academic literature fails to fully capture the role of legislative procedural requirements in shaping positive obligations of judicial protection. Specifically, the classical narrative on national procedural autonomy focuses primarily – if not exclusively – on the obligations of judicial protection developed by the Court under EU primary law, thereby overlooking the role of harmonised procedural requirements established by secondary law in shaping such obligations.

In this context, this chapter maintained that the analytical framework for studying the interaction between EU law and national procedural traditions should be adjusted to capture the full scope of obligations imposed on the Member States in designing and organising their judicial systems. This revised analytical framework will clarify the distinction between (i) transversal obligations of judicial protection, grounded in EU primary law, which apply to the Member States irrespective of sectoral procedural obligations established by secondary law; and (ii) peripheral obligations of judicial protection, shaped by the procedural frameworks of the three policy areas examined here.

To achieve this, this thesis will examine how common procedural rules established by secondary law have influenced the development of judge-made obligations of judicial protection in environmental, equality, and asylum law. By comparing these three case studies, it will distinguish between transversal and sector-specific obligations of judicial protection. The insights gleaned in this context will demonstrate that the increasing scope and specificity of harmonized procedural rules set out in secondary law have facilitated the positivisation of case law, enabling the Court to establish stronger obligations that extend beyond those derived from EU primary law.

Chapter 2: Who will stand up for the environment? The influence of the Aarhus Convention on access to environmental justice in the EU

1. Introduction

This chapter explores the influence of the Aarhus Convention in shaping the right to obtain access to justice in environmental matters. It demonstrates how the Convention, in conjunction with secondary law provisions, has guided the Court in defining robust obligations of judicial protection, particularly regarding the standing of individuals and environmental non-governmental organisations ('NGOs') before national courts and tribunals. Drawing on the standards established by the Convention, the Court has empowered these actors to access justice and hold national public authorities accountable for breaches of EU environmental law. The relevant case law articulating detailed obligations of judicial protection in this area thus underscores a commitment to an objective conception of justice, ensuring the effective enforcement of EU environmental law at the national level.

The emergence of access to justice guarantees in environmental law has taken place against the backdrop of a legal framework traditionally resistant to a rights-based narrative. Judicial protection in environmental matters has thus been framed around collective environmental interests rather than subjective rights. De Búrca explained that the 'language of rights' initially failed to penetrate into the realm of environmental law.[170] Speaking of rights in this context was even depicted as an instance of 'conceptual pollution' by Prechal and Hancher.[171] The reason for this is relatively straightforward: the objective underpinning most legislative provisions on environmental matters has never been to protect subjective rights. One would be hard-pressed to find, within the regulatory universe of EU environmental law, specific legislative provisions explicitly conferring subjective rights upon individuals (beyond the procedural participatory guarantees inspired by the Aarhus Convention).[172] In fact, most – if not all – environmental legislation is geared towards safeguarding collective

[170] De Búrca, 'The Language of Rights and European Integration' in More and Shaw (eds), *New Legal Dynamics of the European Union* (Oxford University Press, 1995). For a similar argument, see also Hilson, 'The Visibility of Environmental Rights in the EU Legal Order: Eurolegalism in Action?' (2018) 25 Journal of European Public Policy 1589.

[171] Prechal and Hancher, 'Individual Environmental Rights: Conceptual Pollution in EU Environmental Law' in Somsen (ed), *Yearbook of European Environmental Law* (Oxford University Press, 2002). For a similar argument, see also Reid, 'Pitfalls in Promoting Environmental Rights' and Gill-Pedro, 'EU Environmental Rights as Human Rights: Some Methodological Difficulties Facing European Courts', both contributions can be found in Bogojević and Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing, 2018).

[172] UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters ('Aarhus Convention').

and diffuse interests inherent in the preservation of the environment.[173] The Charter of fundamental rights of the European Union ('the Charter') similarly evinces a certain reluctance to embrace a regulatory approach framed explicitly around environmental rights. It spells out a principle encouraging different public authorities to strive for a 'high level of environmental protection',[174] rather than establishing a subjective entitlement for individuals affected by environmental harm.[175]

In recent years, however, the 'language of rights' has gained prominence in the Court's case law on environmental matters, especially under the influence of the Aarhus Convention.[176] This development reflects a broader trend towards the increased use of fundamental rights-based approaches in environmental litigation.[177] The growing prevalence of the narrative of rights in the realm of EU environmental law ties into unresolved issues about the rights and remedies available to individuals affected by breaches of EU environmental law.[178] A great deal of uncertainty originates from the conceptual ambiguity underpinning the debate about environmental rights and remedies. This ambiguity is manifest first and foremost at the level of semantics. Various conceptions of rights coexist in academic literature, which exacerbates the degree of confusion about the conceptual underpinnings of environmental rights and remedies.[179] This chapter employs the distinction between objective and subjective

[173] When that is done, remarkably little attention is given to the institutional design and enforcement structures accompanying those obligations. As such, compared to many other fields governed by EU law, environmental law somewhat neglects the trend towards increasingly streamlined administrative enforcement determined by EU secondary law. On that tendency, see Bois, 'The Most Dangerous Branch? The EU-led Constitutionalisation of Independent Public Authorities and the Reshuffling of the Balance of Powers in the Member States', EUDAIMONIA Working Paper 2025/2, available at <www.eulegalstudies.uliege.be> (last accessed, 15 April 2025). For an illustration of this shortcoming in the field of water, see Jancewicz, 'Does the European Union Need a Drought Directive? A Legal Perspective' (2024) 130 Teise 55.

[174] Article 37 of the Charter states that '[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

[175] On the potential of Article 37 of the Charter to support a fundamental rights approach to environmental protection, see, e.g., Bogojević, 'EU Human Rights Law and Environmental Protection: The Beginning of a Beautiful Relationship?' in Douglas-Scott and Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing, 2019).

[176] 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) 12 Review of European Administrative Law 95.

[177] On that topic, see Bogojević, 'Human Rights of Minors and Future Generations: Global Trends and EU Environmental Law Particularities' (2020) 29 Review of European, Comparative & International Environmental Law 191.

[178] For further details, see Lenaerts, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 European Law Review 287; Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Primacy' (2007) 44 Common Market Law Review 931; Eilmansberger, 'The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 Common Market Law Review 1199; Dougan, 'Addressing Issues of Protective Scope within the *Francovich* Right to Reparation' (2017) 13 European Constitutional Law Review 124.

[179] The distinction between substantive vs procedural rights is often employed. See, e.g., Krommendijk and Sanderink, 'The Role of Fundamental Rights in the Environmental Case Law of the CJEU' (2023)

rights. On the one hand, objective rights are designed to uphold the rule of (environmental) law by ensuring that national public authorities comply with their obligations under EU environmental law. These rights are thus intended to serve the broader collective interest in environmental protection. On the other hand, subjective rights empower individuals to seek judicial redress when their own legal interests have been harmed by a breach of EU environmental law.

Against this background, this chapter addresses the following research sub-question: how has the Aarhus Convention influenced the expansion of obligations of judicial protection beyond the core guarantees of effective judicial protection under EU primary law? To this end, section 2 provides a brief overview of the main procedural guarantees established by the Aarhus Convention, with a particular focus on standing requirements for individuals and NGOs (section 2.1). It then explains that these guarantees were implemented inconsistently by the EU legislature, thus leading to a fragmented landscape of access to environmental justice (section 2.2). Section 3 analyses how the Court navigated this fragmented legal framework regarding access to individual justice. It demonstrates that the case law has progressively evolved – from an initial focus on the ability to invoke EU environmental law in existing judicial proceedings (section 3.1), to a growing emphasis on standing rights for individuals, under the influence of the Aarhus Convention (section 3.2). However, this section explains that the Court remains reticent to fully embrace subjective environmental rights, particularly with respect to the right to compensation for health-related damages caused by breaches of EU environmental law (section 3.3). Section 4 then discusses the Court's approach to standing requirements for environmental associations, particularly NGOs. It shows how the Court's approach to individual standing, outlined in the previous section, may lead to shortcomings in ensuring access to environmental justice (section 4.1). It also examines how the Court, building on the Aarhus Convention, has transformed 'public interest litigation' into a positive obligation derived from Article 47 of the Charter (4.2).

Overall, the insights gleaned in this chapter demonstrate that the Aarhus Convention has provided a relevant harmonised framework for developing objective environmental rights and remedies. By drawing on the standing requirements established under the Convention, the Court has developed detailed obligations of judicial protection tailored to the specific regulatory context of EU environmental law. Indeed, these procedural obligations are primarily geared towards protecting collective environmental interests, rather than conferring subjective rights. By empowering individuals and collective entities to enforce EU environmental law at the national level, the Court also

2 European Law Open 616, esp. 618 et seq.; Thieffry, 'La Montée en Puissance (en Trompe l'Oeil?) de la Charte des Droits Fondamentaux en Matière Environnementale' (2020) Revue Trimestrielle de Droit Européen 455. Dougan, in turn, made a distinction between 'right of standing to enforce in the general interest' and 'personal individual right' (Dougan, 'Who Exactly Benefits from the Treaties? The Murky Interaction between Union and National Competence over the Capacity to Enforce EU Law' (2009-2010) 12 Cambridge Yearbook of European Legal Studies 73, 95).

safeguarded the core of the right to effective judicial protection. Specifically, it ensured that administrative authorities acting within the scope of EU environmental law are subject to judicial scrutiny before national courts. Viewed from this perspective, the relevant case law reflects an objective conception of justice centred on upholding the rule of (environmental) law.

2. The Aarhus Convention: A promising but underexploited framework for judicial protection in environmental matters

It is useful to acknowledge, from the outset, that the difficulty in identifying the rights and remedies available to individuals affected by a breach of EU environmental law ties into long-standing controversies about the relationship between direct effect and the conferral of subjective rights. The field of environmental law has provided a suitable playground to (re)shape the contours of the doctrine of direct effect. It has served as a test case for embracing an objective conception of direct effect, thereby overcoming the narrow emphasis on subjective rights that had seemingly shaped the doctrine of direct effect since *Van Gend en Loos*.[180] The reason for this is simple: most, if not all, provisions on environmental protection are meant to safeguard collective environmental interests, rather than the rights or interests of clearly identifiable individuals or groups of individuals. By acknowledging that such provisions could produce direct effect, the Court confirmed the 'objective conceptualization' of direct effect that had already been apparent in judgments such as *CIA* and *Pfeiffer*.[181]

As discussed in Chapter 1,[182] the expansion of direct effect entails that the distinction between direct effect and primacy – once central to doctrinal efforts to identify the effects of EU law – is no longer fully relevant for conceptualising the obligations of national courts in enforcing EU law. Specifically, the discussion about appropriate remedies seems to have shifted from focusing on whether a provision has direct effect to a more contextual assessment of the underlying interests and the type of proceedings in which a given provision is being enforced. In the area of environmental law, the public law dimension of secondary law provisions has led to an objective approach

[180] Gallo, 'Rethinking Direct Effect and Its Evolution: A Proposal' (2022) 1 European Law Open 576, 582.
[181] Squintani and Lindeboom, 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction Between Obligations and Mere Adverse Repercussions' (2019) 38 Yearbook of European Law 18, 24. However, Coutron argues that these judgments owe more to the principle of primacy than direct effect (Coutron, 'Invocabilité du Droit de l'Union Européenne: Une Doctrine enfin Assumée par la Cour de Justice dans l'Arrêt *Poplawski*' (2020) Revue Trimestrielle de Droit Européen 274).
[182] Section 3.1.

focused on assessing whether national public authorities are complying with their obligations under EU environmental law.

However, the Court's broad understanding of direct effect left open salient questions regarding individuals' ability to enforce EU law in national judicial review proceedings.[183] It has, in particular, attracted fierce criticism because it did not clarify the intended beneficiaries of many EU law provisions, as well as the remedies available to them for enforcing these provisions at the national level. The reason for this is relatively straightforward: traditionally, the very concept of right presupposes that its scope must be ascertainable with sufficient precision, both in terms of content and beneficiaries.[184] The flipside of the objective approach outlined above is that, based on directly effective provisions, it is not always possible to determine with precision the intended beneficiaries of EU law provisions. By dissociating the doctrine of direct effect from the existence of subjective rights, the Court complicated the task of identifying the beneficiaries of EU provisions, and the remedies available to them. Much ink has been spilled on this matter.[185] The challenge is particularly potent in environmental law (though it is not limited to that field), because most environmental provisions remain silent on the remedies available for enforcing them before national courts. The preliminary step of identifying whether an environmental provision enjoys direct effect does in fact tell us little about the intended beneficiaries of such provisions, as well as the remedies that should be available to them in relation to the judicial enforcement of these provisions.[186]

In this context, the Aarhus Convention has provided a valuable harmonised framework for articulating detailed guarantees of access to justice in environmental matters. The Convention sets out specific procedural rights designed to strengthen the ability of individuals and civil society organisations to enforce environmental law. Its emphasis on remedies tailored to the collective dimension of environmental law – most notably through a generous approach to standing – resonates with the objective conception of direct effect adopted by the Court. As such, the Convention has been the main driving force behind the establishment of detailed guarantees of access to justice by secondary law. However, its implementation across the EU legal order has been

[183] On that issue, see Warin, *Individual Rights under European Union Law: A Study on the Relation Between Rights, Obligations and Interests in the Case Law of the Court of Justice* (Nomos, 2019).
[184] Prechal, 'Protection of Rights: How Far?' in Prechal and Van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press, 2008), p. 163.
[185] See, amongst (many) others, Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 501; Rüffert, 'Rights and Remedies in European Community Law: A Comparative Perspective' (1997) 34 Common Market Law Review 307; Eilmansberger, 'The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link', supra note 178, 1199; Dougan, 'Addressing Issues of Protective Scope Within the *Francovich* Right to Reparation', supra note 178, 124; Warin, *Individual Rights under European Union Law*, supra note 183.
[186] Beljin, 'Rights in EU Law' in Prechal and Van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press, 2008), pp. 117-122; Dougan, 'Who Exactly Benefits From the Treaties', supra note 179, 81.

inconsistent, resulting in significant gaps and divergences amongst the Member States. These deficiencies hinder the development of a clear and uniform procedural framework within the EU legal order, thereby limiting the practical enforceability of environmental law before national courts.

This chapter explores how the Aarhus Convention has influenced the establishment of objective rights and remedies that empower individuals and collective entities to access justice for enforcing EU environmental law, even in the absence of legislative harmonisation. To this end, this section outlines the Convention's key provisions on the standing of individuals and collective entities – particularly environmental NGOs – to enforce environmental law (section 2.1). It then demonstrates that these guarantees were implemented within the EU legal order in an inconsistent manner, leading to a fragmented landscape for accessing environmental justice across the Member States (section 2.2). The subsequent sections explore how the Court, drawing on the guarantees established by the Convention, has addressed these shortcomings by developing positive obligations of judicial protection that empower individuals and NGOs to enforce environmental law before national courts.

2.1. Access to justice and standing rights under the Aarhus Convention

The Aarhus Convention is structured around three sets, or pillars, of environmental procedural rights: a right of access to environmental information, a right to participate in environmental decision-making and a right of access to justice in environmental matters. The first pillar of rights concerns the right to access to environmental information, which must be made available to the 'public' at large (Art. 4).[187] In contrast, the personal scope of the second pillar, which gives substance to the right of public participation in environmental decision-making, is limited to the 'public concerned' (Art. 6(2)). The 'public concerned' is defined in Article 2(5) as including:

> 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making'.

Crucially, that provision also specifies that:

> 'non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'

within the meaning of that provision. The right of public participation is further limited in its material dimension. Specifically, that right concerns two categories of decisions: decisions on whether to authorise activities listed in Annex I of the Convention (Art.

[187] Unless, of course, one of the grounds for refusal cited in Art. 4(3) and (4) is satisfied.

6(1)(a)) and decisions on proposed activities not listed in that Annex, but which may have a significant effect on the environment (Art. 6(1)(b)).

Both sets of rights are complemented by a third pillar granting a right of access to justice. It is important to highlight that the Aarhus Convention features specific provisions to define the circle of beneficiaries to whom these rights accrue. One of the key objectives underpinning the creation of these rights was to encourage individuals and civil society to participate in environmental decision-making and hold public authorities accountable for failing to protect the planet's ecosystems adequately.[188]

However, the personal scope of these rights varies considerably. Whereas for environmental information requests is granted to 'any person' (Art. 9(1)), the right of access to justice in relation to decisions subject to public participation requirements is limited to a specific group within the 'members of the public concerned'. Only those members who have a 'sufficient interest' (Art. 9(2)(a)) or can demonstrate 'impairment of a right' (Art. 9(2)(b)) may be granted access to justice in these cases.

These requirements were introduced to reflect the varying approaches to standing prevailing at the national level.[189] Broadly speaking, there are two models governing access to justice. One approach, found in German legal systems (or similar systems), is based on the identification of individual rights protected by law. The other, prevailing in legal systems such as France, protected by the relevant provision *as a matter of law*. On the other hand, adopts an approach based on a broader notion of interest, where access to court depends on whether the individual's interest has been affected by the infringement of a relevant norm *as a matter of fact*.

It is for states to define these conditions in accordance with the 'national law'. However, this does not mean that they have unfettered discretion. The requirements must be interpreted in the light of the objective of providing the public concerned with wide access to justice.[190] Unfortunately, many Member States, who are also contracting parties to the Convention and are therefore bound by it, do not always recognise the interests guaranteed by the Convention in granting individuals and collective entities

[188] That objective reflects the commitment expressed by Principle 10 of the Rio Declaration on Environment and Development. That principle reads as follows: '[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided'.

[189] Whereas some national legal orders, mostly German legal systems such as Germany and Austria, apply a right-based approach to access to court, others, such as France, have developed an approach based on the broader notion of interest. On that topic, see Warin, *Individual Rights under European Union Law*, op. cit. supra note 183, pp. 42 et seq.; Wennerås, *The Enforcement of EC Environmental Law* (Oxford University Press, 2007), pp. 108 et seq.

[190] Boyle, 'Human Rights and the Environment: Where Next?' in Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2015), p. 217.

access to justice in environmental matters. As the Commission duly observed in its Notice on access to environmental justice,

> 'the application of the 'impairment of rights doctrine' … has presented challenges because environmental protection usually serves the general public interest and does not usually aim at expressly conferring rights on the individual'.[191]

Barriers to access to justice remain at the national level, particularly in relation to 'public interest litigation'. Some Member States have adopted restrictive stances on access to justice for environmental NGOs. In this context, one of the most interesting features of the Convention is the creation of standing guarantees for environmental NGOs under Article 2(5) of the Convention. Based on that provision,

> 'non-governmental organisations promoting environmental protection and meeting any requirements under national law' must be deemed to have an interest, or right, within the meaning of the category of the 'public concerned'.

Thus, the Convention establishes a presumption that environmental NGOs meeting the relevant national requirements must be granted access to justice under Article 9(2) of the Convention.

Furthermore, Article 9(3) of the Convention provides a lays down a general right of access to justice applicable beyond the situations covered by the other provisions. At a first glance, that provision appears to grant states a wider margin of discretion in defining the personal scope of this right, as it only stipulates that 'members of the public' must be granted access to judicial review 'where they meet the criteria, if any, laid down in national law'. Unlike Article 9(2) of the Convention, this provision does not emphasise the objective of providing broad access to justice, nor does it specify that NGOs ought to be granted special status.[192]

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[191] European Commission, 'Commission Notice on Access to Justice in Environmental Matters' (Communication) C (2017) 2616 final 16, para 102.

[192] However, see Opinion of Advocate General Sharpston in Case C-664/15, *Protect Natur*, EU:C:2017:760, para 42: '[u]nlike Article 9(2), [Article 9(3)] does not expressly deal with *locus standi* for environmental organisations. To my mind, a plausible explanation for the latter is that the draftsman of the Aarhus Convention, having carefully explained (in Article 9(2)) that, for the purposes of judicial review, environmental organisations meeting the requirements of Article 2(5) were to be *deemed* to satisfy the procedural requirement of 'having a sufficient interest' or 'maintaining the impairment of a right' (whichever was the criterion for *locus standi* for the Contracting Party concerned), felt that he had already given sufficient guidance on that particular point'.

2.2.Gaps in the implementation of the Aarhus Convention in the EU legal order

While the Aarhus Convention represents a valuable framework articulating detailed guarantees of access to justice in environmental matters, its implementation across EU legislation remains inconsistent. Indeed, the Aarhus Convention is a mixed international agreement, meaning that it was adopted by the then-European Community, as well as its Member States. As a party to the Convention, the European Union is therefore bound to comply with its provisions. The signature of the Aarhus Convention has thus led to significant legal developments at the EU level. This is not to say that participatory rights were not already partially recognised in the EU legal framework prior to the conclusion of the Aarhus Convention. However, it is clear that when the Aarhus Convention was adopted, the EU legislative framework on public participation was still in its infancy.[193] Against this background, the Aarhus Convention has been the main driving force behind the establishment of procedural participatory rights by secondary law in the field of EU environmental law.

This process materialised through the adoption of two directives addressing the implementation of Aarhus-inspired participatory rights into the EU legal order. On the one hand, Directive 2003/4 aimed to integrate the Aarhus provisions on access to environmental information.[194] On the other hand, Directive 2003/35 ('the Public Participation Directive'[195]) incorporated the Aarhus-inspired public participation requirements, particularly Article 6 and Article 9(2) and (4), into the pre-existing EU legal framework on public participation. For this purpose, the participatory obligations in the EIA Directive,[196] as well as in Directive 96/61 ('the IPPC Directive),[197] were modified and improved in line with Article 6 of the Aarhus Convention.[198] Moreover,

[193] For an account about the legislative framework on participatory duties prior to the adoption of the Aarhus Convention, see Krämer, *Focus on European Environmental Law* (Sweet & Maxwell, 1992), pp. 18-23.
[194] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, [2003] OJ L 41/26.
[195] Directive 2003/35/EC of the European Parliament and the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, [2003] OJ L 156/17.
[196] For the interests of clarity and rationality, that Directive was subsequently replaced following the adoption of a new EIA Directive in 2011 (Directive 2011/92/EC of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, [2012] OJ L 26/1.
[197] Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, [1996] OJ L 257/26. That Directive, too, has been repealed and replaced by a new IPPC Directive in 2010 (Directive 2010/75/EC of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast), [2010] OJ L 334/17.
[198] See especially Articles 1(2), 2(3) and 6(2)-(6) of Directive 85/337, and Articles 2(13)-(14) and 15(1) and (5) of Directive 96/61.

these provisions were complemented by specific provisions implementing the access to justice requirements derived from Article 9(2) of the Convention.[199]

However, the picture that emerges from the EU legal framework on participatory requirements shows a fragmented and incomplete implementation of the Aarhus Convention into the EU legal order. While the EU has adopted legislative instruments aimed at aligning EU environmental law with the first (access to information) and second (public participation) pillars of that Convention, these instruments fall short of harmonising the participatory rights guaranteed by the Convention in a comprehensive and cross-cutting manner, particularly concerning public participation and access to justice.[200]

It is regrettable that these public participation requirements were not included in every relevant legislative instrument on environmental matters – specifically, instruments dealing with activities that may have a significant effect on the environment under Article 6(1)(b) of the Aarhus Convention. Consider, for instance, Directive 2000/60 ('the Water Framework Directive'[201]). Although this Directive introduces an obligation to prevent the deterioration of water quality and may therefore concern activities affecting the environment, it does not explicitly provide for public involvement in such activities.[202] Similarly, there are doubts about whether the public participation requirements in Article 6(3) of the Habitats Directive fully comply with the Aarhus Convention, as this provision only mandates public participation for potentially harmful projects 'if appropriate'. Quite surprisingly, these directives also fail to establish a right of access to justice regarding such activities, despite the requirements for judicial review in conformity with the Convention.

These examples illustrate the insufficient implementation of the access to justice guarantees provided by the Aarhus Convention at the EU level.[203] In a similar vein, the EU has been criticised for the lack of a specific provision on access to justice in Directive 2001/42 concerning strategic environmental assessment ('the SEA Directive'[204]). The recast Drinking Water Directive also lacks provisions on access to

[199] Article 10a of Directive 85/337 and Article 15a of Directive 96/61.
[200] Karageorgou, 'The Scope of the Environment-Related Disputes in the Light of the Aarhus Convention and EU Law: Tensions between Effective Judicial Protection and National Procedural Autonomy' in Jendroska and Bar (eds), *Procedural Environmental Rights: Principle X in Theory and Practice* (Intersentia, 2018), pp. 233-234.
[201] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for community action in the field of water policy, [2000] OJ L 327/1.
[202] Article 14(1) does nevertheless provide that 'Member States shall encourage the active involvement of all interested parties in the implementation of this Directive'.
[203] For further details, see Poncelet, 'Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?' (2012) 24 Journal of Environmental Law 287, 289-291.
[204] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, [2001] OJ L 197/30.

justice related to its provisions.[205] More importantly, the EU has failed to integrate the comprehensive right of access to justice enshrined in Article 9(3) of the Aarhus Convention into the EU legal framework. Despite the Commission's attempt to introduce a proposal to this end,[206] the Member States have consistently rejected the harmonisation of conditions governing legal standing for individuals and NGOs in environmental matters.

After years of resistance, the proposal was eventually withdrawn in 2014. The Member States considered the proposal 'overly intrusive' into their national judicial systems. These concerns were linked to the fact that the proposal sought to create a right of access to justice beyond the minimum requirements set out in Article 9(3) of the Convention. By incorporating the legal standing requirements of Article 9(2) into the more general right of access to justice in Article 9(3), the proposal could be seen as imposing more stringent standing requirements on the Member States.[207] These concerns were also likely heightened by the significant disparities among the Member States regarding the conditions governing legal standing.[208]

3. Bridging the gaps (I): Individual access to justice in the shadow of the Aarhus Convention

The previous section highlighted the significant gaps that persist with respect to access to justice in environmental matters. While the Aarhus Convention offers a relevant harmonised framework for articulating detailed obligations of judicial protection in this area, its implementation across EU environmental legislation has been inconsistent. This section explores how the Court of Justice addressed these gaps by empowering individuals to access justice for enforcing EU environmental law. It shows how the Court, drawing on a statutory interpretation of EU environmental legislation, particularly in the areas of air and water pollution, has developed specific standing requirements for individuals 'directly concerned' by infringements of these provisions. Although not always cited explicitly, the Aarhus Convention has served as authoritative support in the interpretation of secondary law, particularly in recent judgments (sections 3.1-3.2). Furthermore, this section explains that the Court has refrained from

[205] This is perhaps surprising considering the fact that the preamble to this Directive explicitly states that 'The effectiveness of this Directive and its aim of protecting human health in the context of the Union's environment policy require that natural or legal persons, or where appropriate their duly constituted organisations, be able to rely on it in legal proceedings' (See recital 47 in the preamble to this Directive).
[206] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' COM (2003) 624 Final 2003/0246 (COD).
[207] However, see Opinion of AG Sharpston in Case C-664/15, *Protect Natur*, EU:C:2017:760, para 42.
[208] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' COM (2003) 624 Final 2003/0246 (COD), 8-9.

developing more robust guarantees of judicial protection, particularly by empowering individuals to assert subjective rights, such as the right to compensation in cases of damages resulting from breaches of EU environmental law. The relevant case law establishes objective rights that empower individuals to access justice for enforcing EU environmental law, in the shadow of the Aarhus Convention (section 3.3).

3.1. Invoking EU environmental law in national judicial proceedings: Early judicial recognition of individual concern

In the early judgments, much of the debate centred on whether EU environmental provisions could simply be invoked by individuals in existing national judicial proceedings. The core issue revolved around the following question: can individuals rely on these provisions in national judicial review proceedings? In this context, the Court did not need to explicitly address the issue of standing to enforce environmental provisions. Accordingly, the Aarhus Convention played little to no role in these judgments, particularly those delivered prior to its adoption and subsequent implementation within the EU legal order.

Consider, by way of illustration, the so-called German saga that unfolded in the early nineties.[209] The German saga concerned the transposition of three environmental directives into German law (namely Directive 80/779,[210] Directive 82/884,[211] and Directive 75/440,[212] referred to collectively as 'the Directives'). The German authorities decided to implement these directives through administrative circulars. However, the Commission argued that the adoption of these administrative circulars was insufficient to bring national law into compliance with the directives. The reason for this was simple: at the time, administrative circulars were not recognized as having 'unquestionable binding force' in the German legal order.[213] There was, in particular, some uncertainty in German academic literature and case law about whether technical circulars (such as those employed to implement the environmental directives at issue) were binding in the context of national judicial proceedings. In that context, the Court insisted that:

[209] Case C-361/88, *Commission v Germany*, EU:C:1991:224, Case C-59/89, *Commission v Germany*, EU:C:1991:225; Case C-58/89, *Commission v Germany*, EU:C:1991:391.
[210] Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates, [1980] OJ L 229/30.
[211] Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air, [1982] OJ L 378/15.
[212] Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States, [1975] OJ L 194/26.
[213] Case C-361/88, *Commission v Germany*, para 21.

> 'where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely upon them before the national courts'.[214]

Specifically, regarding the Air Quality Directive (Directive 80/779), the Court further opined:

> 'whenever the exceeding of the limit values could endanger human health, the persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights'.[215]

Because the limit values were set out in a technical administrative circular, it could not be established with certainty that they produced binding legal effects. The consequences were clear: individuals were not placed in a position to rely upon them, where appropriate, before national courts. The Court of Justice concluded that Germany had not adequately transposed the environmental directives at issue.

It has been suggested that these judgments reflected a tendency in the jurisprudence to recognise that at least those provisions adopted to protect human health – such as those relating to air quality[216] and drinking water[217] – could give rise to individual rights for those 'concerned' by an infringement of these provisions. After all, the objective of by these directives was clear: they aimed to protect human health. One could argue that this objective evinced a normative intention to protect, at least partially, individual health-related interests. The Court itself seemed to subscribe to that view. On multiple occasions, it stated that it was precisely because the directives at stake 'intended to create rights for individuals' that the 'persons concerned' had to be able to rely upon them in national judicial proceedings.

Viewed from this perspective, these early judgments sparked a tendency in legal scholarship to distinguish between anthropocentric and eco-centric legislative instruments. This approach is supported by a number of opinions written by various members of the Court in their official capacity. Advocate General Kokott is one of the most prominent figures supporting this approach. In *Waddenzee*, she took the view that, in contrast to legislative instruments intended to protect public health, those with a more eco-centric outlook could not give rise to individual rights. Specifically regarding the Habitats Directive, which is intended to protect natural habitats and species rather than individual or broader human interests, she posited:

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[214] Ibid, para 15.
[215] Ibid, para 16.
[216] Directive 2008/50 of the European Parliament and of the Council of 21 May 2008 on ambient air quality and clean air for Europe, [2008] OJ L 152/1 ('Air Quality Directive').
[217] Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast), [2020] OJ L 435/1 ('Drinking Water Directive').

> '[u]nlike in the case of rules on the quality of the atmosphere or water, the protection of common natural heritage is of particular interest but not a right established for the benefit of individuals. The close interests of individuals can be promoted only indirectly, as a reflex so to speak'.[218]

It followed that individuals could not rely upon the minimum guarantees arising from the principle of effectiveness in relation to such provisions. Indeed, the principle of effectiveness applies only in relation to rights which individuals derive from EU law.

This finding allows me to briefly reflect on the consequences for access to justice if one were to adopt the normative intention approach in relation to 'pure' environmental provisions. As mentioned earlier, these provisions are primarily intended to protect collective interests. We shall see that a strict emphasis on identifying legally protected individual interests in relation to such provisions would prevent them from giving rise to corresponding rights deserving of judicial protection. Considering the logic underpinning the principle of effective judicial protection, whereby the existence of a right is a necessary pre-requisite for guaranteeing access to justice, this approach might, in turn, seriously complicate access to justice concerning such environmental provisions.

It must be stressed that even the provisions specifically adopted to protect human health have little to do with individual rights (or interests, for that matter). If one takes, for instance, the Air Quality Directive, which was at issue in some of the judgments mentioned above, it is important to note that this secondary legislation sets out emission limits and values that Member States must respect. I find it difficult to understand how these provisions could be construed as protecting individual rights *as a matter of law*. As established by the Court, such legislative provisions aim to protect *human or public* health. In other words, the normative aim underlying such provisions is to protect collective and diffuse interests, rather than the health of any specific individual. Consequently, they may be deemed to protect individuals 'only by reflex'. Therefore, they cannot be deemed to give rise to subjective rights in accordance with the German *Schutznorm* doctrine.[219]

In spite of the reluctance expressed by legal scholars subscribing to the 'normative intention' approach, the Court of Justice has clarified that the right to rely upon EU law accrues to 'concerned individuals', even in relation to provisions that have very little to do with the protection of individual rights. This recognition occurred in *Kraaijeveld*. In this judgment, the Court held that 'those concerned' must have the possibility to rely on the obligation of public national authorities to conduct an impact assessment in the

[218] Opinion of AG Kokott in Case C-127/02, *Waddevereniging and Vogelsbeschermingvereniging*, EU:C:2004:60, para 143.
[219] Warin, *Individual Rights under European Union Law*, op. cit. supra note 183, pp. 197-198.

context of national judicial proceedings.[220] A similar formulation was also employed in relation to the obligation, set out in Article 6(3) of the Habitats Directive, to assess the implications of proposed projects on the conservation objectives of protected areas.

In *Waddenzee*, the Court was called upon to determine whether individuals or NGOs could rely on provisions concerning the conservation of natural habitats and species before national courts. The provisions at issue – namely, Article 6(2) and (3) of the Habitats Directive – could hardly be deemed to generate subjective rights. As Advocate General Kokott put it:

> '[t]he objective of protection laid down by Article 6(2) and (3) of the habitats directive is to conserve habitats and species within areas which form part of Natura 2000. Unlike in the case of rules on the quality of the atmosphere or water, the protection of common natural heritage is of particular interest but not a right established for the benefit of individuals'.[221]

Moreover, Article 6(3) left a considerable margin of discretion to the competent national authorities in implementing the obligation to preserve the integrity of the site concerned. Despite this, the Court concluded that:

> 'it would be incompatible with the binding effect attributed to a directive by Article 249 EC to exclude, in principle, the possibility that the obligation which it imposes may be relied on by *those concerned*'.[222]

In other words, the Court established the right for 'those concerned' to enforce this provision in national legal proceedings challenging the legality of administrative action. According to the Court, the competent national court must be capable of:

> 'ascertaining whether, failing transposition into national law of the relevant provision of the directive concerned, the national authority which has adopted the contested measure has kept within the limits of its discretion set by the provision'.[223]

In the light of these judgments, the key takeaway is this: individuals 'concerned' by the infringement of a rule of EU environmental law must be able to rely on such provisions in national judicial review proceedings. The Court's primary concern is ensuring that administrative actions falling within the scope of EU environmental law are subject to

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[220] Case C-72/95, *Kraaijeveld and Others*, EU:C:1996:404, para 56. See also Case C-361/88, *Commission v Germany*, EU:C:1991:224, para 16; Case C-58/89, *Commission v Germany*, EU:C:1991:391, para 14; Case C-59/89, *Commission v Germany*, EU:C:1991:225, para 19.

[221] Opinion of AG Kokott in Case C-127/02, *Waddenzee*, EU:C:2004:60, para 143. AG Kokott inferred from the foregoing that the individuals concerned could rely on these provisions only in circumstances where 'avenues of legal redress against measures infringing the abovementioned provisions [were] available to them under national law'.

[222] Case C-127/02, *Waddenzee*, EU:C:2004:482, para 66.

[223] Ibid, para 66.

judicial oversight by national courts or tribunals, at the instigation of individuals 'concerned' by a breach of EU environmental law. The distinction between eco-centric and anthropocentric legislative instruments has no bearing on the right of individuals 'concerned' by a breach of these rules to rely on them. However, as we shall see, this distinction remains contentious. In some ways, the Court has cultivated ambiguity about whether anthropocentric provisions, in contrast to 'pure' environmental provisions, may give rise to rights deserving of judicial protection.

With the benefit of hindsight, it is possible to conclude that these judgments laid the groundwork for identifying the relevant standard of 'direct concern' that was later used to define the protective scope of EU environmental provisions. At the same time, the Court in these judgments left unresolved questions about the appropriate remedies available to 'concerned individuals' in the event of non-compliance with these directives. It was not immediately apparent, in particular, whether the Court intended in these judgments to define the category of individuals entitled to initiate judicial proceedings for the enforcement of EU environmental law. In some cases, the Court seemed merely to take up the formulation used by the referring court in its request for a preliminary ruling.[224] This meant that the legal interest held by the applicants was not defined by the Court itself, but rather by the referring court, within the scope of Union law.

In a similar vein, Dougan observed in relation to *Kraaijeveld* that it remained unclear whether the Court intended to define the protective scope of the relevant provision by referring to the standard of 'concerned person'. In his view, these doubts arose from the fact that the issue of defining the protective scope of EU law provisions did not explicitly come up during national proceedings. According to Dougan,

> 'the Court was never confronted with a national rule flatly denying standing to enforce Directive *85/337/EEC* to an otherwise 'concerned person', on the grounds that they lacked a specific legal interest in the relevant dispute, as required under the applicable domestic administrative law. In such circumstances, it was difficult to predict whether the 'concerned person' test really represented an authoritative statement of the protective scope of Directive 85/337/EEC'.[225]

Similarly, in *Craeynest*, the question posed by the national referring court was based on the premise that the applicants were 'directly affected' by the exceedance of limit values. This means that the interest held by the applicant was not defined by the Court but rather by the referring court, based on national standing rules. While this

[224] See also Krämer, 'Direct Effect in EU Environmental Law: Towards the End of a Doctrine?' in Peeters and Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing, 2020), p. 188.
[225] Dougan, 'Who Exactly Benefits From the Treaties', supra note 179, 105.

observation is limited to the scope of the present enquiry, it remains an interesting point. It suggests that the Court may not always second-guess the referring court's own assessment of the interests held by the applicant concerning the correct application of EU law. This position may be justified because the issue is incidental or does not arise explicitly during national proceedings. Indeed, why would the Court feel the need to address the protective scope of EU law provisions when the referring court's assessment, based on national law, clearly favours recognizing an interest in the enforcement of EU law? Pål Wennerås similarly reasoned that:

> 'the ECJ will readily find this condition fulfilled for the sake of ensuring the effectiveness of those Community rules. Often, it will not even review the interest requirement, but presume the existence of a relevant interest'.[226]

At the same time, though, this suggests that any attempt to construe an autonomous definition of the concept of EU law right – closely connected to the notion of (individual) interest – may remain somewhat deceptive because the protective scope is, to some extent, determined by reference to national idiosyncrasies. In such circumstances, I find it difficult to consider that the requirement of individual interest is an intrinsic part – and hence a constitutive element – of the notion of EU law right.

The following section explains that when the assessment conducted by the national referring court threatens to undermine the correct application of EU law at the instigation of concerned individuals, the Court does not hesitate to intervene and dictate the outcome of that assessment. This is especially true in circumstances where national standing rules seriously complicate, or preclude, individuals from gaining access to judicial review proceedings related to the enforcement of EU environmental provisions. The obvious example here is the *Schutznorm* doctrine (and other assimilated national doctrines). Based on this doctrine, legal persons, such as environmental associations, cannot obtain standing in general (on the grounds that they cannot invoke subjective rights deserving of judicial protection). Furthermore, natural persons cannot derive subjective rights from environmental provisions. Consequently, an individual seeking to invoke environmental provisions in judicial proceedings involving national public authorities is not allowed to bring proceedings for that purpose. However, that individual may invoke such provisions in existing proceedings if they can demonstrate that another of their subjective rights has been infringed. At the same time, the German *Schutznorm* doctrine does not allow legal actions aimed solely at the general interest to be brought before national courts. The consequences are clear: individual access to justice in environmental matters is severely restricted.

[226] Wennerås, *The Enforcement of EC Environmental Law*, op. cit. supra note 189, p. 25.

3.2. Individual access to justice and the role of the Aarhus Convention in shaping standing in EU environmental law

This section explains that the Court progressively developed additional remedies beyond merely providing the right to invoke EU environmental provisions before national courts and tribunals. It has also articulated a right to bring judicial proceedings for the enforcement of such provisions. Importantly, the Court has fine-tuned the criteria governing access to justice by narrowing the class of individuals entitled to have access to justice for the enforcement of EU environmental provisions. By drawing on a statutory interpretation of EU environmental law – particularly in the areas of air and water pollution – the Court has empowered individuals who are 'directly concerned' by an infringement of these provisions to enforce them before national courts. Although the Aarhus Convention was not always explicitly referenced, its guarantees served as an authoritative source of guidance in shaping specific standing requirements, especially in recent judgments.

The Convention played little to no role in *Janecek*. In Janecek, the Court was asked to determine whether individuals could derive an actionable right from the obligation to establish air quality plans when the limit values in the Air Quality Directive were exceeded. In the main proceedings, the city of Munich had failed to ensure compliance with the particulate matter PM10 limit values set by the Directive. The applicant, Mr. Janecek, sought to obtain a judicial order requiring the city of Munich to prepare an air quality action plan to address the exceedances of the limit values. The German referring court expressed doubts about whether Mr. Janecek could derive a personal right to compel the creation of an action plan under the Air Quality Directive. Based on the German *Schutznorm* doctrine, it appeared that subjective rights enforceable in national judicial proceedings could not be derived from this provision.[227] In this context, the Court ruled that 'natural or legal persons directly concerned' by exceedances of the limit values or alert thresholds for certain pollutants must be able to rely on the obligation to draw up an action plan before the competent national courts.[228] According to the Court, the individuals concerned could, if necessary, bring an action before the competent national courts.

Jan Hans opined that the judgment in *Janecek* suggests the Court had 'departed from the principle of procedural autonomy' by adopting a stricter interpretation of the

[227] The observations submitted by the Austrian government are instructive. They reveal that, based on the Schutznorm doctrine, it was possible to infer a legally enforceable right from the provisions on limit values because the latter essentially aim to protect human health. On the contrary, it was suggested that the obligation to set up an action plan was not intended to establish a personal right for the sake of concerned individuals (Case C-237/07, *Janecek*, EU:C:2008:447, para 29-30).
[228] Case C-237/07, *Janecek*, para 39.

concept of 'interested party' than was applicable in Germany at the time.[229] In order to grant rights based on these provisions, the circle of beneficiaries should thus be defined as encompassing 'directly concerned legal or natural persons'.

A similar formulation was employed in *ClientEarth*. The Court took the view that:

> 'the natural or legal persons directly concerned by the limit values being exceeded … must be in a position to require the competent authorities, *if necessary by bringing an action before the courts having jurisdiction*, to establish an air quality plan which complies with the second subparagraph of Article 23(1) of Directive 2008/50, where a Member State has failed to secure compliance with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by Article 22 of the Directive'.[230]

This statement was reiterated in subsequent judgments. In summary, the Court's position is that any natural or legal person who is 'directly concerned' by the infringement of a rule pertaining to EU environmental law must be able to require the competent authority to observe such obligations, where necessary, by bringing judicial proceedings.[231] In other words, the protective scope of these provisions is defined by reference to 'directly concerned' legal or natural persons. This raises the question: how should 'directly concerned' individuals be identified?

The judgment in *Wasserleitungvervand Nördliches Burgenland and Others* is instructive. The applicants in the main proceedings used water containing nitrate levels exceeding the level set by Directive 91/776 ('the Nitrates Directive').[232] They requested that the Austrian Ministry modify the 2012 Nitrate Action Programme Regulation to reduce the nitrate level in the groundwater in question. They wished to invoke the obligations under the Nitrates Directive. However, their request was ruled inadmissible on the grounds that they did not possess 'individual substantive rights' under the national provisions implementing the Directive. This decision was based on the *Schutznorm* doctrine, according to which the relevant provisions did not demonstrate an intention to protect the interests of individual applicants. The national referring court also seemed reluctant to grant standing, inter alia because the situation did not present a direct threat to public health.

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[229] Hans, 'Harmonization of National Procedural Law via the Back Door? Preliminary Comments on the ECJ's Judgment in *Janecek* in a Comparative Context' in Bulterman, Hancher, McDonnell and Sevenster (eds), *Views of European Law from the Mountain* (Kluwer Law International, 2009), pp. 272-275.
[230] Case C-404/13, *ClientEarth*, EU:C:2014:2382, para 56 (emphasis added).
[231] See also Case C-723/17, *Craeynest and Others*, EU:C:2019:533, para 32; Case C-197/18, *Wasserleitungsvervand Nördliches Burgenland and Others*, EU:C:2019:824, para 32.
[232] Council Directive 91/676/EEC of 12 December 1991 concerning the protection against pollution caused by nitrates from agricultural sources, [1991] OJ L 375/1.

In its judgment, the Court provided much-needed clarity on the 'direct concern' requirement. The judgment revealed that the assessment of whether individuals are 'directly concerned' by an infringement of an EU environmental Directive should be based on the purpose and relevant provisions of that Directive, as asserted before the referring court.[233] By drawing on a statutory interpretation of the Directive, the Court was able to define the circle of beneficiaries who can enforce its provisions before national courts.

In its analysis of the Nitrates Directive, the Court determined that the Directive's objective was to reduce and prevent water pollution caused by nitrates from agricultural sources. According to Article 2(j), the term 'pollution' includes the:

> 'discharge, directly or indirectly, of nitrogen compounds from agricultural sources into the aquatic environment, the results of which are such as to cause … interference with other legitimate uses of water'.

The Directive, therefore, sought to address activities involving the discharge of nitrogen compounds that could 'interfere with the legitimate use of the water'.[234] An undue interference with legitimate water use could only arise if the nitrate levels in groundwater exceeded the limit of 50 mg/l set by the Directive. In other words, it is because the nitrate levels in the groundwater in question exceed the limits set by the Directive that the water is susceptible to interfere with its legitimate use. This explains why any individual using that groundwater would be directly concerned by an exceedance of that limit. The Court concluded that:

> 'a natural or legal person having the option of drawing and using groundwater is directly concerned by that threshold being exceeded or the risk of it being exceeded, which is capable of limiting that person's option by interfering with the legitimate use of that water'.[235]

As a result, the national referring court was instructed to grant standing to the applicants, as the exceedance of the nitrate level established by the Directive interfered with their legitimate use of the water.[236]

This interpretation was supported by reference to the Aarhus Convention, particularly its Article 9(3). As Advocate General Kokott emphasised,

[233] Case C-197/18, *Wasserleitungsvervand Nördliches Burgenland and Others*, para 35.
[234] Case C-197/18, *Wasserleitungsvervand Nördliches Burgenland and Others*, para 39.
[235] Ibid, para 40.
[236] Ibid, para 43.

> '[t]his interpretation of the concept of concern … constitutes a correct implementation of the obligations stemming from Article 9(3) of the Aarhus Convention'.[237]

According to the Advocate General,

> 'the applicants in the main proceedings are all concerned by pollution of groundwater, because of their wells, and thus satisfy the conditions laid down in Article 2(5) of the Aarhus Convention'.[238]

For these reasons, the Court concluded that the right of access to justice established by Article 9(3) of the Convention would be 'deprived of all useful effect, and even of its very substance', if the applicants, as 'members of the public concerned', were denied the ability to enforce these provisions before national courts.[239]

A similar story unfolded in *Land Nordrhein-Westfalen*, but this time, the question addressed to the Court concerned Directive 2000/60 ('the Water Framework Directive'). As in previous cases, familiar issues arose: the German *Schutznorm* doctrine appeared to complicate access to justice for the individuals concerned. The referring court observed, in particular, that these individuals could not derive subjective rights from the provisions of the Water Framework Directive, as these provisions 'establish[ed] water-management objectives', and 'serv[ed] exclusively the public interest'.[240] The applicants claimed that the prohibition on deterioration of the status of bodies of groundwater (Art. 4(1)(b) of the Directive) was disregarded, or not properly examined, in the procedure leading to the authorisation of a motorway construction plan. More specifically, the competent authority did not monitor the implications of the project in question for the status of the bodies of water before the project was approved. That endeavour was carried out afterwards. This meant that the results of that study were not disclosed to the public before the approval of the construction plan.

The Court reiterated the principle elaborated in C-197/18: in order to identify the individuals directly concerned by an infringement of Article 4(1(b) of the Water Framework Directive, the purpose of the directive and the content of that provision must be carefully considered.[241] Based on this analysis, the Court concluded that the Directive was not only aimed at achieving good status for all EU surface waters and groundwater by reducing pollution. It also 'pursue[d] the specific objective of protecting groundwater as a resource for human use'.[242] In other words, it sought to

[237] Opinion of AG Kokott in Case C-197/18, *Wasserleitungsvervand Nördliches Burgenland and Others*, EU:C:2019:824, para 58.
[238] Opinion of AG Kokott in Case C-197/18, *Wasserleitungsvervand Nördliches Burgenland and Others*, EU:C:2019:824, para 61.
[239] Case C-197/18, *Wasserleitungsvervand Nördliches Burgenland and Others*, para 34.
[240] Case C-535/18, *Land Nordrhein-Westfalen*, EU:C:2020:391, para 44.
[241] Ibid, para 125.
[242] Ibid, para 128.

ensure water of sufficient quality for human consumption. The definition of 'water pollution' supported this conclusion. Water pollution included:

> 'any introduction of substances into the water which may be harmful to human health or the quality of aquatic ecosystems, in such a way that there is *interference with… water or its legitimate use*'.[243]

In some ways, the Directive's objective was intended to 'allow the legitimate use of groundwater'.[244] This also implied that any deterioration in the status of water bodies could interfere with the legitimate use of that water. This also explains why any individual who draws and uses groundwater is directly concerned by the deterioration of the status of that water. As the Court put it:

> '[a] person who has the right to draw and use groundwater is using that water legitimately. That persons is, therefore, directly concerned by the infringement of the obligations to enhance and to prevent the deterioration of the status of bodies of groundwater that supply his or her source since that infringement is capable of interfering with its use'.[245]

To put it succinctly, the Water Framework Directive grants individuals an entitlement to use water in a legitimate manner – that is, free of pollution. Any infringement of the provisions of this Directive interferes with the exercise of that right. It should therefore give rise to a right, on the part of individuals allowed to use the groundwater concerned, to institute judicial proceedings to ensure respect for their entitlement to use non-polluted water.[246]

It is surprising that the Court failed to mention explicitly the Aarhus Convention to support its interpretation of the Water Framework Directive. This omission highlights that the requirement of direct concern is primarily grounded in a statutory interpretation of the relevant EU legislation. However, it is worth noting that the Court relied extensively on its previous judgment in Case C-197/18 to bolster its findings. As discussed above, in that case, the Aarhus Convention was used as an authoritative source of inspiration to support the Court's interpretation of the Nitrates Directive. Indirectly, the Convention thus seems to have played a supporting role in shaping the Court's development of specific standing requirements in that judgment.

[243] Art. 2(33) of the Water Framework Directive (emphasis added).
[244] Ibid, para 131.
[245] Ibid, para 132.
[246] For a similar argument, see AG Kokott in Case C-197/18, *Wasserleitungsverband Nördliches Burgenland and Others*, para 50.

3.3. Towards a subjective right to clean air? State liability and individual claims for health-related environmental harm in air pollution cases

It should be clear by now that the case law has mostly revolved around the creation of access to justice rights available to individuals affected, or directly concerned, by a breach of EU environmental law. The Court's approach did not fundamentally depart from the 'generous approach' described by Dougan. According to him, the Court's approach has been to 'harness' the services of concerned individuals to secure the enforcement of EU environmental rules.[247] In recent judgments, the Aarhus Convention has been used as authoritative support for the Court's interpretation of secondary law provisions, thereby facilitating access to justice for individuals affected by infringements of these provisions.

By offering concerned individuals the right to initiate proceedings related to the enforcement of environmental provisions, the Court appeared primarily focused on empowering these individuals to act on behalf, or for the sake, of the environment. After all, the applicants involved in the cases analysed above essentially sought to bring national public authorities to court for their lack of compliance with EU environmental law. Beyond the right to initiate judicial proceedings in the general interest, the Court also equipped national judges with additional procedural tools, including the possibility of issuing orders or imposing financial penalties, to guarantee that EU environmental provisions are respected.[248] These tools are essentially meant to empower national judges to ensure the judicial enforcement of obligations established by relevant secondary legislation in the field of environmental protection.

At the same time, it is fair to acknowledge that the judgments analysed above point towards the creation of remedies that revolve more prominently around the judicial protection of individual rights or interests. It has been suggested that these judgments reflect a tendency in jurisprudence to recognise that at least those provisions adopted to protect human health – such as, for example, those related to air quality[249] and drinking water[250] – could give rise to subjective rights for the benefit of those concerned by a breach of these provisions. The Court itself seemed to subscribe to that view. In many instances, it stated that it was precisely because the directives at stake 'intended to create rights for individuals' that the 'persons concerned' had to be able to rely upon

[247] Dougan, 'Who Exactly Benefits from the Treaties?', supra note 179, 94.
[248] Case C-752/18, *Deutsche Umwelthilfe*, EU:C:2019:1114, para 30; Case C-404/13, *ClientEarth*, EU:C:2014:2382, para 58.
[249] Directive 2008/50 of the European Parliament and of the Council of 21 May 2008 on ambient air quality and clean air for Europe, [2008] OJ L 152/1 ('Air Quality Directive').
[250] Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast), [2020] OJ L 435/1 ('Drinking Water Directive').

them in national judicial proceedings, if necessary by bringing legal proceedings. In the judgment delivered in C-197/18, the Court identified individual interests protected by the Nitrates Directive. One could therefore consider the possibility of developing a genuine subjective right to clean air or water, deserving of financial compensation for individuals affected by a breach of these provisions. This section accordingly addresses the following questions: does the infringement of an environmental provision give rise to additional remedies (beyond the right to initiate proceedings)? And can individuals affected by a breach of EU environmental law bring claims for financial compensation for state liability under EU law before national courts?

As a matter of EU law, state liability rests on three conditions: the applicant must demonstrate that the rule infringed was 'intended to confer rights on individuals', the breach must be sufficiently serious, and there must be a causal link between the damage and the breach of that provision.[251] The 'intention to confer rights' criterion is based on the German *Schutznorm* doctrine. It reflects the purpose of state liability under EU law, which is primarily concerned with securing judicial protection of individual rights.[252] Viewed from that perspective, this requirement is particularly relevant in the field of environmental law. In fact, most environmental provisions are primarily geared towards the general interest in the protection of the environment (rather than the interests of individuals). They do not seem to be intended to confer rights on individuals. Nevertheless, the Court has alluded to the possibility that some environmental provisions may give rise to a claim for monetary reparation.[253] This ties into unresolved issues about the type of rights and remedies available to individuals in relation to the judicial enforcement of environmental provisions. As Dougan put it, the Court:

> 'sometimes seems unclear about how to distinguish situations where Union law confers upon the claimant a personal individual right, from those where it might seem more appropriate to recognise merely a right of standing to enforce in the general interest. That distinction can be especially important as regards the remedy which should be made available to the claimant, and as regards whether he or she should be entitled to seek compensation as a matter of Union law'.[254]

Based on the judgments analysed above, it could be inferred that provisions inspired by health concerns give rise to a subjective right to claim reparation for losses resulting from a breach of these provisions. The crux of the matter can be summarised as follows: in these judgments, the Court appeared to develop subjective rights available to

[251] Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, EU:C:1991:428, paras 40 et seq.; Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, EU:C:1996:79, para 51.
[252] Dougan, 'Addressing Issues of Protective Scope within the Francovich Right to Reparation', supra note 178, 124-5.
[253] Case C-420/11, *Leth*, EU:C:2013:166, esp. paras 33 et seq.
[254] Dougan, 'Who Exactly Benefits from the Treaties?', supra note 179, 96-7.

'directly concerned' individuals. The protective scope of the relevant provisions was deemed to protect human interests – specifically, human health and the right to use water free of pollution. Based on this, the Court developed far-reaching procedural guarantees to secure judicial protection of the rights stemming from such provisions. This included not only the right to initiate proceedings but also an obligation on the national court seized of the matter to take necessary measures, including issuing an order, to secure compliance with EU environmental law.[255]

In *Deutsche Umwelthilfe*, the Court even suggested that the principle of state liability could apply in relation to breaches of the air pollution standards in the Air Quality Directive. It stressed that this principle:

> 'applies to *any case in which a Member State breaches EU law*, whichever public authority is responsible'.[256]

This prompted legal scholars to argue that environmental provisions explicitly intended to 'protect human health' reflect a normative intention to protect individual health-related interests.[257] This interpretation follows from the Court's insistence in the judgments analysed above (sections 4.1. and 4.2.) that the objective underlying the adoption of such legislative provisions is specifically to protect human health. In *Deutsche Umwelthilfe* (C-752/18) the Court was keen to emphasise once again that:

> '[t]he right to an effective remedy is all the more important because, in the field covered by Directive 2008/50, failure to adopt the measures required by that directive would endanger human health'.[258]

In other words, the Court's reasoning was based on the premise that the relevant provisions were 'intended' or 'designed' to protect human interests and, in particular, 'public health',[259] 'human health',[260] or even 'human beings against the effects of lead in the environment'.[261] Viewed from this perspective, the Air Quality Directive seemed to confer a 'right to breathe clean air' upon 'directly concerned' individuals.[262] Similarly, the analysis conducted above shows that the Court derived a right to use non-polluted water from the directives setting thresholds for groundwater and surface water pollution (i.e., the Water Framework Directive and the Nitrates Directive). In some

[255] See, e.g., Case C-404/13, *ClientEarth*, para 58; Case C-752/18, *Deutsche Umwelthilfe*, para 30.
[256] Case C-752/18, *Deutsche Umwelthilfe*, paras 54-55 (emphasis added).
[257] Beljin, 'Rights in EU Law' in op. cit. supra note 186, p. 114.
[258] Case C-752/18, *Deutsche Umwelthilfe*, para 38. See also, e.g., Case C-404/13, *ClientEarth*, para 55.
[259] Case C-58/89 *Commission v Germany*, para 14; Case C-237/07, *Janecek*, para 38.
[260] Case C-361/88, *Commission v Germany*, para 16
[261] Case C-59/89, *Commission v Germany*, para 19.
[262] Taddei, 'Case C-723/17 Craeynest: New Developments for the Right to Clean Air in the EU' (2020) 32 Journal of Environmental Law 151; Misonne, 'The Emergence of a Right to Clean Air: Transforming European Union Law Through Litigation and Citizen Science' (2021) 30 Review of European,Comparative & International Environmental Law 34.

ways, this suggests that these directives give rise to a 'right to have access to safe water'.

It could therefore be inferred that the normative intention – or purpose – of these provisions is to protect individual interests.[263] The Court's approach was arguably warranted, given that such provisions essentially aim to protect human interests (in the form of (public) human health) that can be individualised in favour of 'directly concerned' persons. More specifically, the relevant directives exhibit an anthropocentric approach to the environmental protection. Consider, for instance, Directive 2008/50 ('the Air Quality Directive'). Although that Directive was adopted based on Article 191 TFEU (then-Article 175 of the EC Treaty), it is intended to:

> 'reduce pollution to levels which minimize harmful effects on human health … and the environment as a whole'.[264]

Because it is at least partially intended to protect human-related interests, the Air Quality Directive should be conducive to the conferral of subjective rights upon individuals affected by an infringement of its provisions. As we shall see, that approach also explains why, in contrast, any attempt to create individual rights in relation to 'pure' environmental provisions might be ruled out based on the normative intention approach.[265]

The Commission also seemed to concur with this approach when it stated that the reasoning in *Janecek* was justified by reference to the objectives of the Air Quality Directive. The Commission suggested that this approach may, therefore, be reiterated in relation to other EU secondary legislations that have the protection of human health among their objectives.[266] Quite surprisingly, the Commission even declared that individuals could derive a right to have their health protected from such provisions.[267] This position aligns with the 'normative intention approach' advocated by some legal scholars.[268] A similar line of reasoning was indeed formulated by Advocate General Kokott in *Craeynest and Others*. She reasoned that:

> 'Directive 2008/50 is based on the assumption that exceedance of the limit values leads to a large number of premature deaths. The rules on ambient air quality

[263] Beljin, 'Rights in EU Law' in op. cit. supra note 186, p. 114.
[264] Recital 1 in the preamble to Directive 2008/50.
[265] Hilson, 'Community Rights in Environmental Law: Rhetoric or Reality?' in Holder (ed), *The Impact of EC Environmental Law in the United Kingdom* (John Wiley & Sons, 1997), pp. 51-68.
[266] European Commission, 'Commission Notice on Access to Justice in Environmental Matters' (Communication) C (2017) 2616 final 16.
[267] Ibid, 16.
[268] That emphasis on the normative intention underlying some environmental measures also seems to be reflected in some ways in the preamble to the Drinking Water Directive, which emphasises that access to environmental justice ought to be granted '*particularly* in respect of a Directive which has the *objective of protecting human health* from the adverse effects of any contamination of water *intended for human consumption*' (recital 47 in the preamble to that Directive).

> therefore put in concrete terms the Union's obligations to provide protection following from the fundamental right to life under Article 2(1) of the Charter and the high level of environmental protection required under Article 3(3) TEU, Article 37 of the Charter and Article 191(2) TFEU'.[269]

By the same token, AG Kokott hinted that the provisions on air quality are intrinsically linked to the fundamental right to life set out in Article 2 of the Charter.[270] Does that necessarily mean, however, that they should give rise to a subjective right to claim reparation for damages?

This question was referred to the Grand Chamber of the Court in Case C-61/21 – *Ministre de la Transition écologique et Premier Ministre (Responsabilité de l'Etat pour la pollution de l'air)*.[271] The stakes were high. The applicant in the main proceedings suffered serious health problems caused by the deterioration of ambient air quality in the Paris agglomeration. He claimed that the deterioration of air quality resulted from the French authorities' failure to comply with the air pollution thresholds established by Arts. 13 and 23 of the Air Quality Directive.[272] His claim for damages was, however, rejected on the grounds that the relevant provisions of the Air Quality Directive did not create a right for individuals to obtain compensation for damages suffered as a result of an infringement of these provisions. Much of the debate revolved around whether the relevant provisions were:

> 'intended to confer rights on individuals capable of entitling them to compensation from a Member State'.[273]

The Grand Chamber concluded that Articles 13 and 23 of the Air Quality Directive were not intended to confer rights on individuals. In support of this conclusion, it opined that these provisions were geared towards the general objective of protecting human health and the environment, rather than the interests of clearly defined individuals.[274] The Court stated that these provisions did not allow for the consideration that:

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[269] Opinion of Advocate General Kokott in Case C-723/17, *Craeynest and Others*, EU:C:2019:168, para 53. In a similar vein, it is important to stress that the European Pillar of Social Rights explicitly recognises the 'right to access essential services of good quality, including water'. That emphasis on the narrative of rights is also apparent in the preamble to the Drinking Water Directive (see, e.g., recitals 4, 33, 34 and 35).

[270] Krommendijk and Sanderink, 'The Role of Fundamental Rights in the Environmental Case Law of the CJEU', supra note 179, 621.

[271] Case C-61/21, *Ministre de la Transition écologique et Premier Ministre (Responsabilité de l'Etat pour la pollution de l'air)*, EU:C:2022:1015.

[272] The question as reformulated by the Court also involved other provisions.

[273] Case C-61/21, *Ministre de la Transition écologique et Premier Ministre (Responsabilité de l'Etat pour la pollution de l'air)*, para 42.

[274] Ibid, para 55.

> ‘individuals or categories of individuals are … implicitly granted, by reason of those obligations, rights the breach of which would be capable of giving rise to a Member State’s liability for loss and damage caused to individuals’.[275]

This judgment was depicted as a significant ‘step back’ in the judicial protection of rights.[276] Mario Pagano suggested that this judgment was difficult to reconcile with the traditional mantra of the Court, which aims to confer directly enforceable rights upon individuals to encourage them to engage in ‘altruistic litigation’ for the sake of environmental protection (or, more generally, the correct application of EU law).[277] By failing to recognise a right to claim reparation in respect of violations of air quality standards, the Court suppressed the incentive for individuals to contribute to the implementation of these standards at national level. Jasper Krommendijk and Dirk Sanderink similarly advocated for of a human rights-based approach to the protection of the environment before the Court. This approach would, they suggested, go a long way towards ensuring respect for the environmental standards expressed by EU secondary law.[278]

This judgment illustrates the difficulty of translating collective, diffuse environmental interests into directly enforceable subjective environmental rights.[279] It is my understanding that this judgment ultimately reflects the Court’s reluctance to expand the requirements of judicial protection of environmental law beyond the current emphasis on remedies primarily focused on the judicial protection of the collective interests intrinsic to the defence of the environment. As a remedy geared towards the judicial protection of subjective rights, state liability does not squarely align with the Court’s current emphasis on objective rights in the field of environmental law. At the end of the day, the Court appears primarily concerned with developing specific remedies conducive to the judicial protection of the collective interests underpinning most of the legislative provisions adopted in the field of environmental protection.

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[275] Ibid, para 56.

[276] Krommendijk and Sanderink, ‘The Role of Fundamental Rights in the Environmental Case Law of the CJEU’, supra note 179, 622.

[277] Pagano, ‘Human Rights and Ineffective Public Duties: the Grand Chamber Judgment in *JP v. Ministre de la Transition écologique*’ European Law Blog (2 February 2023), available at <https://europeanlawblog.eu/wp-content/uploads/2023/01/Blogpost-72023.pdf> (last accessed, 6 May 2025).

[278] Krommendijk and Sanderink, ‘The Role of Fundamental Rights in the Environmental Case Law of the CJEU’, supra note 179, 625 et seq.

[279] On that topic, see Tecqmenne, ‘A Subjective Right to Breathe Clean Air, At Last? The Promises and Perils of the Right of Compensation’ in Eliantonio, Kulovesi, Peeters and Savaresi (eds), *Greening Europe and the Rule of Law: Opportunities for and Limits to EU’s Legal Power* (Edward Elgar Publishing, forthcoming).

4. Bridging the gaps (II): The role of the Aarhus Convention in shaping 'public interest litigation' under EU law

Overall, the insights gleaned in the previous section reveal a clear trend in the Court's case law towards establishing individual guarantees of access to justice in the field of environmental law, shaped – at least indirectly or implicitly – by the Aarhus Convention. This section explores how the Convention has influenced the development of positive obligations of judicial protection in environmental law, by enabling the Court to empower environmental NGOs to enforce EU environmental law before national courts. To this end, this section first explains that the Court's approach to individual access to justice may create gaps in access to justice, particularly in relation to 'pure' or 'eco-centric' EU environmental legislation (section 4.1). It then examines how the Court addressed those gaps. By drawing on the general principle of effective judicial protection, informed by the Aarhus Convention, the Court has been able to transform 'public interest litigation' into a positive obligation of judicial protection. This obligation is now grounded in Article 47 of the Charter, ensuring robust guarantees of access to justice in environmental matters (section 4.2).[280]

4.1. The challenge of deriving individual access to justice from 'pure' environmental provisions

The analysis conducted in the previous section demonstrates that the requirement of 'direct concern' – which underpins individual access to justice – rests on a statutory interpretation of the relevant provisions of secondary law.[281] By examining both the purpose of the Directive and the content of the relevant provisions, the Court inferred a normative intention to protect human interests, specifically human health and the legitimate use of water. Even if these provisions do not expressly confer subjective rights, they are nonetheless intended to safeguard general human interests. Individuals may seek judicial redress only where their own interests align with the collective interests protected by these provisions. In other words, individual access to justice is

[280] On that topic, see also Ryall, 'Access to Justice in Environmental Matters in the Member States of the EU: the Impact of the Aarhus Convention' Jean Monnet Working Paper 5/16 <https://www.jeanmonnetprogram.org/wp-content/uploads/JMWP-05-Ryall.pdf> (last accessed 2 February 2022), 5: '[t]he access to justice obligations guaranteed by the Convention have enabled the Court to flesh out specific elements of the principle of effective judicial protection as it applies to environmental law enforcement in the Member States'.

[281] Opinion of AG Kokott in Case C-197/18, *Wasserletungsverband Nördliches Burgenland and Others*, para 47.

not 'conditioned by the existence of an intention to protect individual interests',[282] but rather by the protection of human interests that coincide with those held by the applicant.

Based on this interpretation, the legal interests protected by those provisions must be ascertained to determine whether they correspond to the factual interests held by individual applicants. The identification of the beneficiaries of these rights depends on the factual elements presented to the national courts seized of a claim involving an infringement of these provisions. This does not mean, however, that the examination in this context is purely factual. In essence, individual access to justice stems from the alignment between, on the one hand, the collective interests protected by the relevant provision and, on the other hand, the interests held by the applicant in the light of factual circumstances presented to the referring court.[283] Wennerås similarly opined that the Court will examine in this context whether:

> 'a plaintiff is affected by an interest protected by [EU] provisions and, if so, it would seem that national courts are obliged to grant standing'.[284]

However, it is fair to acknowledge that the approach adopted by the Court in this context may be ill-suited to secure individual access to justice in relation to eco-centric or pure environmental provisions. The normative intention underlying the adoption of these pieces of legislation can hardly be equated with the protection of individual interests, or even more broadly conceived human interests. If the normative intention approach prevailed for such provisions, the only reasonable conclusion would be to consider that they cannot give rise to access to justice.

Take, for example, the Habitats Directive. One cannot help but notice that it is primarily intended to protect nature and biodiversity. The consequences arising from a breach of its provisions may not always materialise directly in the form of interests accruing to specific individuals. To put it differently, these consequences are often too incidental or remote to affect individual interests directly (coinciding with the purposes set out by such 'eco-centric' provisions).

To be clear, it is necessary to acknowledge that some of its provisions can affect individual interests, but these interests may not necessarily coincide with the ecological interests protected by the Habitats Directive. Consider, for instance, Article 6(3) of that Directive. This provision deals with the carrying out of a plan or project likely to have a significant effect on the integrity of protected sites. It states that such projects may

[282] Warin, 'Individual Rights and Collective Interests in EU Law: Three Approaches to a Still Volatile Relationship' (2019) 56 Common Market Law Review 463, 468.
[283] For a similar argument, see Micklitz, 'The ECJ Between the Individual Citizen and the Member States: A Plea for a Judge-Made European Law on Remedies' in Micklitz and De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012), p. 380.
[284] Wennerås, *The Enforcement of EC Environmental Law*, op. cit. supra note 189, p. 111.

not be proceed before an assessment has been conducted to determine their impact on the site concerned. Depending on the findings, the proposed plan or project may be approved or rejected. The outcome of the decision-making process described in Article 6(3) may affect the interests held by those individuals wishing to carry out the relevant plan or project.

Similarly, the prohibition laid down in Article 12(1)(a) of that Directive against:

> 'all forms of deliberate capture or killing of specimens of [protected] species in the wild'

may affect the interests of certain categories or groups of individuals, such as individual hunters or associations of hunters. If anything, though, I find it quite unlikely that these individual interests may coincide with the ecological interests protected by the Habitats Directive. The interests shared by these individuals or groups belong to the private and/or economic sphere. They can hardly be seen as coinciding with or furthering the aims and purposes established by the Habitats Directive. Moreover, these interests arise from the circumstances of the case and do not stem from a convergence between the protective scope of the relevant provisions and the interests of the individuals 'concerned'.

Two conclusions can be drawn from these observations. First, the approach adopted by the Court in judgments such as *Janecek* and *Kraaijeveld* may not be as readily applicable to 'pure' or 'eco-centric' legislative provisions. Second, and perhaps more importantly, this approach – or more generally any approach that focuses too strictly on the identification of *individual* interest (or even more broadly conceived human interests) – seems ill-suited to ensure that the ecological *collective* interests protected by these provisions are adequately protected through legal redress. There may, of course, be instances in which the pursuit of individual interests aligns with and furthers the protection of collective interests, but this will not always be the case. It follows that a strict emphasis on individual interests could undermine the original intent of the EU legislature, as only individual – economic, property[285] – interests may be effectively represented and defended in legal action, to the detriment of the public interest protected by environmental measures.[286]

In a nutshell, any approach that focuses too heavily on the protection of individual rights – or interests for that matter – appears ill-suited to ensure effective judicial protection of the collective interests underpinning most environmental provisions. The position expressed by Advocate General Sharpston in *Protect Natur* epitomises the

[285] On that topic, see Winter, 'Property Rights and Nature Conservation' in Charles-Hubert Born, Cliquet, Schoukens, Misonne and Van Hoorick (eds), *The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?* (Routledge, 2015).
[286] Opinion of AG Sharpston in Case C-664/15, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation*, EU:C:2017:760, para 85.

inherent tension between individual and collective interests. Advocate General Sharpston opined that:

> 'unless the substantive rights of individuals happen to coincide with the public interest and unless those individuals decide to bring an action to enforce those rights before a competent authority or a court, no one can act to protect the environment'.[287]

This explains why a more generous approach to the issue of legal standing is warranted in relation to 'pure' environmental provisions. Granting access to justice to certain actors, such as NGOs specialised in environmental matters, is indeed necessary. This is particularly important given the vital role played by legal actions brought by individuals and environmental associations in the proper implementation of EU environmental law.[288] At the same time, the Court must:

> 'guard against pursuing an overly generous approach, which would amount in practice to an *actio popularis* alien to virtually every national legal system'.[289]

For that purpose, there must be some criteria to circumscribe the class of beneficiaries that should be granted access to justice to enforce EU environmental provisions at the domestic level.

This issue was precisely addressed in the judgments analysed in the following section. In those judgments, the crux of the matter revolved around identifying the protective scope of the relevant environmental provisions. At the Member State level, this scope was often defined narrowly by reference to the *Schutznorm* doctrine, a principle rooted in German constitutional law and applied, to varying degrees, in other legal systems influenced by the German legal tradition, such as Austria and Slovakia.[290] More specifically, the barriers to access to justice primarily stemmed from a national emphasis on the identification of legally protected individual interests as a prerequisite for standing. These restrictive national rules thus reflect 'structural' issues regarding how access to courts is conceptualized within certain national legal orders.[291] As a result, where environmental NGOs were unable to derive subjective rights from EU

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[287] Ibid, para 79. For a similar argument, see Commission, 'Commission Notice on Access to Justice in Environmental Matters', para 101.
[288] Wennerås, *The Enforcement of EC Environmental Law*, op. cit. supra note 189, pp. 113-114. Compare with Opinion of AG Jacob in Case C-58/89, *Commission v Germany*, EU:C:1991:197, para 34: '[i]t is true that the public at large, as well as ecologists and environmental pressure groups, have a general interest in water quality, and indeed in the respect for Community law. However, it does not follow that enforceable rights must be made available to them in the national courts'.
[289] Dougan, 'Who Exactly Benefits from the Treaties', supra note 179, 90-94.
[290] Warin, *Individual Rights under European Union Law*, op. cit. supra note 183, p. 63.
[291] Bobek, 'National Courts and the Enforcement of EU law' in Botman and Langer (eds), *National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order* (FIDE Congress Publications, Eleven International Publishing, 2020), p. 83.

environmental provisions, they were effectively barred from seeking judicial enforcement before national courts.

4.2. Turning 'public interest litigation' into a positive obligation deriving from Article 47 of the Charter

This Court addressed these shortcomings in access to justice in the judgments analysed in this section. Specifically, this section explores how the Court has used the Aarhus Convention – particularly the guarantees of access to justice enshrined in Article 9 – to elevate 'public interest litigation' to the level of a positive obligation incumbent upon national legal systems in all areas of EU environmental law. In this context, 'public interest litigation' refers to legal proceedings brought by collective entities – typically environmental NGOs – not for the protection of subjective rights, but to uphold the rule of environmental law in the collective interest. As this section demonstrates, this obligation, firmly rooted in Article 47 of the Charter, now constitutes a self-standing legal basis for guaranteeing access to justice in environmental matters.

The doctrinal analysis conducted in this section will proceed in two main steps, corresponding to the different steps followed by the Court when assessing restrictive national standing rules.[292] The first step concerns the identification of a 'right guaranteed by EU law' for the purposes of Article 47 of the Charter (section 4.2.1.). This section demonstrates that, in line with past case law, the Court adopted a conception of 'right' that is significantly broader than the (narrow) emphasis on subjective rights found in German law. However, this approach generates some uncertainty when it comes to the protective scope of such rights. The second step addresses the requirements arising from the effective judicial protection of these rights (4.2.2.). This section shows that the Court has relied on Article 47 of the Charter, shaped by the Aarhus Convention, to progressively turn 'public interest litigation' into a directly effective obligation deriving from EU law.

[292] That approach was also followed by AG Kokott in *Brown Bears II* (AG Kokott in Case C-243/15, *Brown Bears II*, EU:C:2016:491, paras 30 et seq.).

4.2.1. The concept of 'right guaranteed by the law of the Union': A broad or narrow understanding?

To determine whether the right to an effective judicial remedy prescribed by Article 47 of the Charter applies, two cumulative conditions must be satisfied. In the first place, the scope of Charter rights, as far as they concern the actions of Member States, is defined in Article 51(1) of the Charter. According to that provision, the rights featured in the Charter are binding upon the Member States 'only when they are implementing Union law'. In other words, there can be no situation governed by EU law in which the Charter does not apply.[293] This implies that EU fundamental rights are meant to apply only when another EU law provision applies.[294] More specifically, the Court must be satisfied that:

> 'the provisions of EU law in the area concerned [impose a] specific obligation on Member States with regard to the situation at issue'.[295]

In the second place, the right to an effective judicial remedy enshrined in Article 47 of the Charter applies only in relation to the enforcement of other 'rights or freedoms guaranteed by EU law'. As such, that provision gives rise to an 'accessory' right, whose scope of application presupposes the existence of another right granted by EU law. Therefore, to determine whether the enforcement of EU law provisions is subject to the principle of effective judicial protection, it is necessary to ask, first, whether the situation at stake falls within the scope of EU law, and, second, whether it involves a right guaranteed by EU law.

Since the entry into force of the Charter, legal scholarship has diverged considerably on whether Article 47 of the Charter may apply to national procedures governing the enforcement of provisions dealing with environmental matters.[296] The application of Article 47 in this context depends on the approach adopted to identify 'rights' for the purposes of that provision. Some commentators have argued that this provision rests upon the existence of 'concrete, discernible' individual rights or freedoms.[297] This

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[293] Lenaerts and Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in Peers, Tamara Hervey, Kenner and Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), p. 1568.

[294] Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375, 378-380; Rossi, '"Same Legal Value as the Treaties"? Rank, Primacy and Direct Effects of the EU Charter of Fundamental Rights' (2017) 18 German Law Journal 771, 778-783.

[295] Case C-467/19 PPU, *Spetsializirana prokuratura (Présomption d'innocence)*, EU:C:2019:776, para 41.

[296] Bonelli, 'Effective Judicial Protection in EU Law : An Evolving Principle of a Constitutional Nature' (2019) 12 Review of European Administrative Law 35, 53-54; For an account drafted before the entry into force of the Charter (and, hence, focusing on the general principle of effective judicial protection), see Wennerås, *The Enforcement of EC Environmental Law*, op. cit. supra note 189, pp. 84 et seq.

[297] Opinion of AG Bobek in Case C-403/16, *El Hassani*, EU:C:2017:659, paras 73 et seq.

narrow interpretation is closely tied to the wording of Article 47 of the Charter, which refers to the violation of 'rights or freedoms guaranteed by the law of the Union'.[298] It is also linked to national legal doctrines that make access to justice conditional on identifying subjective rights (such as the *Schutznorm* doctrine). To apply the requirements of effective judicial protection, it would therefore be necessary to determine whether the relevant provision reflects a normative intention to protect the interests of clearly identifiable individuals. This would allow the identification of a legal bond, whereby the obligation imposed on the debtor directly translates into a subjective right (and corresponding remedy) for the benefit of these individuals (as the creditors of that obligation).[299]

The right to public participation set out in Article 6(4) of the Environmental Impact Assessment Directive provides a suitable example to illustrate this approach. According to that provision,

> '[t]he *public concerned* shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the *competent authority or authorities* before the decision on the request for development consent is taken".

This provision enables to identify a legal bond between the individual beneficiaries of the right to participate ("the public concerned") and the addressee(s) of the obligation to provide for public participation ("the competent authority or authorities"). Based on the right to effective judicial protection, the subjective right created by this provision should translate into an entitlement accruing to the "public concerned" to initiate legal proceedings for its enforcement.

A strict emphasis on identifying subjective individual rights would prevent most environmental provisions from triggering the right to effective judicial protection set out in the Charter. Since environmental provisions are generally intended to protect collective, rather than individual, interests, they may not readily confer individual rights within the meaning of Article 47 of the Charter (especially according to a narrow understanding of 'right').[300] Consider, for example, Article 6(1) of the Habitats Directive. This provision establishes an obligation to adopt appropriate measures for the conservation of protected areas. It aims to protect nature and biodiversity, rather than the interests of specific individuals or classes of individuals. Based on this provision, it would be difficult to identify specific beneficiaries whose interests are legally protected by it. Therefore, it seems that Article 6 of the Habitats Directive does

[298] Ibid, para 76.
[299] For a recent judgment illustrating that approach, see Case C-353/20, *Skeyes*, EU:C:2022:423, paras 38 et seq.
[300] Eliantonio, 'The Relationship between EU Secondary Rules and the Principles of Effectiveness and Effective Judicial Protection in Environmental Matters', supra note 176, 97.

not give rise to a subjective right based on the strict understanding described above. As a result, that provision may not so readily trigger the requirements of effective judicial protection expressed in Article 47 of the Charter.

Other commentators have nevertheless pleaded for aligning the material scope of Article 47 with the scope of Union law described in Article 51 of the Charter.[301] This implies that the right to an effective judicial remedy could lose its 'accessory' character and become an automatic, self-standing fundamental right. Accordingly, the requirements of effective judicial protection would automatically be triggered if the situation falls within the scope of Union law, regardless of whether a subjective right is found to exist for the purposes of Article 47.

The judgment in *Berlioz* is often cited in support of this approach.[302] The case can be summarised as follows: Berlioz, a company based in Luxembourg, was fined for refusing to provide information requested by the Luxembourg tax administration. In subsequent proceedings, Berlioz sought to challenge the validity of the information order underlying that penalty. However, the competent judge declined to review the legality of that order. The referring court queried whether Berlioz could rely upon Article 47 of the Charter to derive a right to bring proceedings concerning the validity of the information order. It was not immediately clear whether Berlioz could rely on a "right guaranteed by EU law" within the meaning of Article 47. After all, the order for information had been issued in response to a request for an exchange of information made by the French tax administration under Directive 2011/16.[303] As the Court pointed out, the purpose of that Directive was to establish procedures for cooperation between national tax authorities, and it did not confer subjective rights upon individuals.[304]

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[301] Opinion of AG Wathelet in Case C-682/15, *Berlioz Investment Fund SA*, EU:C:2017:2, paras 50 et seq.; Opinion of AG Wahl in Case C-33/17, *Čepelnik*, EU:C:2018:311. AG Wathelet seems to establish a distinction between the category of 'right guaranteed by the law of the Union' and the more specific category of 'specific subjective rights' (para 63: 'according to Article 51(1) thereof, the Charter can be relied on as against Member States only when they are implementing Union law. Consequently, recognition of the applicability of the Charter already necessarily implies the existence of a *right guaranteed by the law of the Union*. To require that that rule of EU law, which entails the applicability of the Charter, should also confer a *specific subjective right* capable of having been breached in the case of the person concerned seems to me to contradict the liberal intention that underpins Article 47 of the Charter' (emphasis added)). For a similar argument, see Prechal, 'The Court of Justice and Effective Judicial Protection: What has the Charter Changed?' in Paulussen, Takacs, Lazíc, Van Rompuy (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (TMC Asser Press, 2016), pp. 148 et seq.

[302] Case C-682/15, *Berlioz Investment Fund*, EU:C:2017:373. On standing, see Ellingsen, *Standing to Enforce European Union Law before National Courts* (Hart Publishing, 2021); Dougan, 'Who Exactly Benefits from the Treaties?', supra note 179, 73.

[303] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, [2011] OJ L 64/1.

[304] Case C-682/15, *Berlioz*, paras 46-47.

In contrast to Advocate General Wathelet, who had opined that the right to effective judicial review could apply even in the absence of a subjective right,[305] the Court strived to identify a right for the purposes of Article 47 of the Charter. It isolated a right based on the general principle of protection against arbitrary or disproportionate intervention by public authorities.[306] Surprisingly, this right had not been invoked by the applicant, nor was it mentioned in the order for reference.

Viewed from this perspective, *Berlioz* feeds into the Court's tendency in recent judgments to consider that Article 47 is applicable even:

> 'if it is not at least immediately clear if EU law confers any other right to an individual'.[307]

The next step would be to explicitly recognize that the requirements of effective judicial protection can be triggered even without another subjective right. To put it simply, Article 47 of the Charter would apply once any EU law provision is at stake. This is the approach recommended by Advocate General Wathelet in *Berlioz*. The Advocate General argued that the right to effective judicial review should apply provided the situation falls within the scope of Union law, as defined in Article 51 of the Charter.[308] The mere existence of a specific obligation imposed on the Member States would suffice to render Article 47 applicable.[309]

In the field of environmental law, the implications of this approach could be significant. If maintained, there would be nothing to prevent environmental provisions from being subject to the requirements of effective judicial protection expressed by Article 47 of the Charter, even if these provisions do not confer subjective rights on individuals. They could be subject to judicial protection if they impose an unconditional obligation imposed on national public authorities.

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[305] Opinion of AG Wathelet in Case C-682/15, *Berlioz*, paras 51 et seq.

[306] Ibid, para 51. See also Joined Cases C-245/19 & C-246/19, *État luxembourgeois v B* and *Etat Luxembourgeois v B, C, D, F.C., A (Droit de recours contre une demande d'information en matière fiscale)*, EU:C:2020:795, paras 56-59.

[307] Bonelli, 'Effective Judicial Protection in EU Law', supra note 296, 54-55. See also Case C-418/11, *Texdata Software GmbH*, EU:C:2013:559, paras 75 et seq.; Case C-562/12, *Liivima Lihaveis MTÜ v Eesti-Läti programmi 2007-2013 Seirekomitee* and *Eesti Vabariigi Siseministeerium*, EU:C:2014:2229, paras 61 et seq.

[308] AG Wathelet takes the view that the notion of 'implementation', upon which the application of the Charter is based, 'necessarily implies' the existence of a right guaranteed by Union law (Opinion of AG Wathelet in Case C-682/15, *Berlioz*, para 63).

[309] The requirement of specificity follows from recent judgments dealing with the limits of Charter application. See, e.g., Case C-467/19 PPU, *QR, Spetsializirana prokuratura, YM, ZK, HD*, EU:C:2019:776, para 41; Joined Cases C-609/17 & C-610/17, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry* and *Auto- ja Kuljetusalan Työntekijäliitto (AKT) ry v Satamaoperaattorit ry*, EU:C:2019:981, para 53. On that topic, see Tecqmenne, 'Minimum Harmonisation and Fundamental Rights: A Test-Case for the Identification of the Scope of EU Law in Situations Involving National Discretion?' (2020) 16 European Constitutional Law Review 493.

The judgments discussed in this chapter clarify that the notion of 'right' should be understood in a broad manner. In *Brown Bears I*, the Grand Chamber of the Court considered whether an environmental association could derive a right to bring proceedings from EU law and, particularly Article 9(3) of the Aarhus Convention. In the main proceedings, an environmental association sought access to judicial proceedings regarding a derogation from the system of protection under Articles 12 and 16 of the Habitats Directive concerning some protected species, including brown bears. The request was rejected on the grounds that the association could not rely on subjective rights as defined by Slovak law.

However, the Court ruled that the relevant provisions of the Habitats Directive conferred rights, the enforcement of which was subject to the principles of effectiveness and equivalence, alongside the requirements of effective judicial protection.[310] In support of that finding, the Court referred to the obligations established under Articles 12 and 16 of the Habitats Directive.[311] These obligations were deemed to confer rights on individuals, although the Court offered no explanation about why that was the case.[312] The lack of engagement with the concept of 'right' was somewhat surprising, given that the provisions in question were not directly concerned with conferring individual rights. This judgment could therefore be interpreted to mean that the mere existence of an obligation imposed on national public authorities by EU law is sufficient to make the requirements of effective judicial protection applicable. At the same time, it is fair to acknowledge that the Court did not make any explicit allusion to the Charter, let alone the principle of effective judicial protection. The reasoning displayed in the judgment was underpinned by considerations oscillating between the 'effectiveness' of environmental law and the 'effective judicial protection of the rights conferred by EU law' in this context.[313]

Viewed from this perspective, the judgment did relatively little to clarify the rather opaque relationship between the principle of effectiveness and the principle of effective judicial protection.[314] An often-rehearsed argument is that, in contrast to the principle of effectiveness, which focuses on ensuring the effective application of EU law, the

[310] Case C-240/09, *Brown Bears I*, para 36.
[311] Case C-240/09, *Brown Bears I*, para 37.
[312] Ibid, paras 47 et seq.
[313] Ibid, paras 48-50.
[314] Eliantonio, 'The Relationship Between EU Secondary Rules and the Principles of Effectiveness and Effective Judicial Protection in Environmental Matters', supra note 176, 109. On the relationship between these principles, see, e.g., Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before the National Courts' in Craig and De Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press, 2011); Prechal and Widdershoven, 'Redefining the Relationship Between *Rewe*-Effectiveness and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 31; 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 Common Market Law Review 1395; Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12 Review of European Administrative Law 5.

principle of effective judicial protection aims to guarantee the legal protection of individual rights conferred by EU law.[315] In this context, the field of environmental law offers a:

> 'unique "playground" for distilling the possible differences between the seemingly more 'objective' principle of effectiveness … and the right-based principle of effective judicial protection and Article 47 of the Charter'.[316]

The argument runs as follows: given that most environmental provisions are designed to protect collective interests, it is not immediately clear how they could create directly enforceable individual rights. Consequently, these provisions might seem incapable of triggering the application of the principle of effective judicial protection. In contrast, the principle of effectiveness could capture such provisions, because it is primarily concerned with the effective application of EU law. However, in *Brown Bears I*, the Court seemed to conflate the assessment carried out under both principles, suggesting that both principles were underpinned by considerations related to the effective application of EU law. At the same time, it remained quite unclear whether the Court's approach could have broader implications for Article 47 of the Charter.

The reasoning adopted in the subsequent *Brown Bears II* judgment created additional confusion about whether Article 47 of the Charter could apply in the absence of another subjective right. In that case, an environmental association was prevented from participating in administrative proceedings concerning the construction of an enclosure in an area protected under the Habitats Directive. According to Slovak law, the status of party to the proceedings could only be granted to those whose rights were affected by the project. Consequently, the NGO concerned was unable to challenge the authorisation for (non-)compliance with Article 6(3) of the Habitats Directive. The Court was asked to determine whether the standing requirements were compatible with Article 47 of the Charter. The Grand Chamber developed a subjective right to public participation based a combined reading of Article 6(3) of the Habitats Directive, read in the light of Article 6(2)(b) of the Aarhus Convention. Identifying this right allowed the Court to later assess the national standing rules in the light of Article 47 of the Charter. This judgment generated expectations that the Court would 'strive to read a "right" into the situation brought before it' to justify applying Article 47 of the Charter.[317] After all, the right identified by the Court corresponded to the subjective

[315] See, amongst others, Wennerås, *The Enforcement of EC Environmental Law*, op. cit. supra note 189, pp. 84 et seq; Prechal and Widdershoven, 'Redefining the Relationship Between *Rewe*-Effectiveness and Effective Judicial Protection', supra note 60, 42; Eliantonio, 'The Relationship Between EU Secondary Rules and the Principles of Effectiveness and Effective Judicial Protection in Environmental Matters', supra note 176, 97.

[316] Eliantonio, 'The Relationship Between EU Secondary Rules and the Principles of Effectiveness and Effective Judicial Protection in Environmental Matters', supra note 176, 97; Bonelli, 'Effective Judicial Protection in EU Law', supra note 296, 53-54.

[317] Eliantonio, 'The Relationship Between EU Secondary Rules and the Principles of Effectiveness and Effective Judicial Protection in Environmental Matters', 112.

participatory right carved out by reference to Article 6(3) of the Habitats Directive, interpreted in the light of Article 6(2)(b) of the Convention.[318] Therefore, a combined reading of these provisions did indeed create a subjective right for the purposes of Article 47 of the Charter.

However, it is worth mentioning that the Court emphasised that the category of EU law rights includes the right to:

> 'rely in legal proceedings on the rules of national law implementing EU environmental law and the rules of EU environmental law having direct effect'.[319]

Crucially, this conclusion extended beyond the subjective participatory rights identified based on Article 6(3) of the Habitats Directive. The rights subject to the requirements of effective judicial protection also encompassed the rules of national law derived from Article 6 of the Habitats Directive.[320] For example, this included the rule requiring an environmental assessment for any plan or project likely to have a significant effect on a protected area. What mattered most, to identify a right within the meaning of Article 47, was the existence of a directly effective provision of EU environmental law or a national provision implementing EU law. This judgment hinted that the material scope of the right to effective judicial protection set out in Article 47 of the Charter could include the enforcement of provisions that have little to do with the conferral of subjective rights.

In *Deutsche Umwelthilfe*, the Grand Chamber reaffirmed the broad, or objective, conception of 'right' under Article 47 of the Charter. This was made clear when the Court stated, in paragraph 65 of its judgment, that:

> 'where a Member State lays down rules of procedural law applicable to the matters referred to in Article 9(3) of the Aarhus Convention concerning the exercise of the rights that an environmental organisation derives from Article 5(2) of Regulation No 715/2007 … the Member State is implementing EU law for the purposes of Article 51(1) of the Charter and must, therefore, ensure compliance, inter alia, with the right to an effective remedy, enshrined in Article 47 thereof'.[321]

By the same token, it confirmed that the mere existence of an obligation imposed on national public authorities by EU law is sufficient to trigger the requirements of effective judicial protection. More importantly, this finding applied even though the provision at issue did not give rise to subjective rights for clearly identifiable

[318] Case C-243/15, *Brown Bears II*, para 52.
[319] Ibid, para 59.
[320] Ibid, para 60.
[321] In doing so, the Grand Chamber reiterated the findings expressed by a smaller chamber formation in *Protect* (See Case C-664/15, *Protect*, para 44).

individuals. The objective underlying the provision prohibiting 'defeat devices' was to reduce pollution produced by cars and thereby ensure a high level of environmental protection.[322] Although the provision did not aim to protect individual rights or interests, but rather collective interests relating to the improvement of air quality,[323] the Grand Chamber ruled that it gave rise to a right deserving judicial protection under Article 47 of the Charter.[324]

Viewed from this perspective, *Deutsche Umwelthilfe* reiterated the broad, or objective, approach that already characterized much of the case law on EU law rights before the adoption of the Charter.[325] The judgments analysed in this section clarified that the category of EU law rights encompasses, in a broad sense, any environmental provision with direct effect, as well as national provisions implementing Eu environmental law.[326] This means that the requirements of effective judicial protection under Article 47 of the Charter are not limited to protecting individual rights, but may be seen as a means to promote the effective application and implementation of EU law provisions within national legal orders. In other words, the fundamental right to an effective judicial remedy, traditionally viewed as a '"benchmark" for assessing procedures established for protecting *other* rights' deriving from EU law, has acquired a 'self-standing' status.[327] It may now apply even in the absence of another individual subjective right under EU law. The implications for national remedial autonomy are significant, especially in Member States where standing is conditional upon the violation of subjective rights. As we will see in the next section, these Member States

[322] Case C-873/19, *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, para 57.

[323] It could be suggested that the objective underpinning the Regulation is intrinsically related to protection of human health and should accordingly give rise to subjective rights for the sake of individuals concerned by the breach of its provisions. That would be consonant with a tendency, in legal scholarship, to consider that secondary provisions intended to protect (at least partially) human-related interests exhibit a normative intention of conferring subjective rights upon individuals. However, it is worth pointing out that this line of reasoning did not feature in that judgment (and has also been rejected in a recent judgment dealing with secondary law on air quality, see Case C-61/21, *JP v Ministre de la Transition Ecologique* and *Premier Ministre (Responsabilité de l'Etat pour la pollution de l'air)*, EU:C:2022:1015). On that topic, see Beljin, 'Rights in EU Law' in op. cit. supra note 186, p. 114; Opinion of AG Kokott in Case C-61/21, *Ministre de la Transition Ecologique and Premier Ministre (Responsabilité de l'Etat pour la Pollution de l'Air)*, EU:C:2022:359, paras 72 et seq.

[324] Case C-873/19, *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, para 65.

[325] Wennerås, *The Enforcement of EC Environmental Law*, op. cit. supra note 189, p. 87; Jacobs, 'The Evolution of the European Legal Order' (2004) 41 Common Market Law Review 303, 308.

[326] Case C-664/15, *Protect*, para 39. See also, e.g., Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, EU:C:2011:289, paras 48-59; Case C-243/15, *Brown Bears II*, paras 59-60. This seems in line with the general approach of by the Court, which is to consider that rights arise as a by-product of sufficiently clear, precise and unconditional EU obligations. See, amongst others, Episcopo, 'Deconstructing the CJEU's Jurisprudence to Enable Judicial Dialogue' in Mak and Kas (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing, 2023), p. 84; Hofmann, 'Article 47' in Peers, Hervey, Kenner and Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2021), pp. 1268-1269.

[327] Bonelli, 'Effective Judicial Protection in EU Law', supra note 296, 43-44.

may need to introduce new remedies to allow NGOs to challenge the enforcement of all EU environmental provisions.

4.2.2. Defining the protective scope of EU environmental law: Who has standing to enforce 'pure' environmental provisions?

The analysis carried out above demonstrates that the European Court of Justice has adopted a broad approach when it comes to the identification of EU (environmental) rights subject to effective judicial protection. In doing so, the Court confirmed the 'objective' conception that already dominated much of the case law concerning the general principle of effective judicial protection, even before the adoption of the Charter. According to this approach, what matters most is not so much (or not only) safeguarding individuals' rights and liberties. Judicial review focuses on the (objective) control of the legality of acts adopted by the Member States, assessing them in the light of their (hierarchically superior) obligations deriving from EU law. This approach is hardly surprising and corresponds to the dominant stance taken by the Court in relation to the identification of EU law rights.[328]

To support that argument, allow me to quote former Advocate General Francis Jacobs, who wrote some time ago (and extra-judicially), that:

> '[t]he Court's approach, historically at any rate, has not been to promote the rights of individuals for their own sake or as a matter of ideology; its approach has been essentially pragmatic and *the recognition of individuals' right has been almost instrumental, being necessary to ensure the effectiveness of the legal order*' (emphasis added).[329]

This approach has led the Court to recognise rights deserving of judicial protection in relation to provisions that have little to do with the creation of individual rights. The foregoing considerations clarify that the category of EU law rights broadly encompasses any environmental provision having direct effect, as well as, surprisingly, national provisions that implement EU environmental law into national law. This applies regardless of whether these provisions can be construed as giving rise to individual rights from a 'normative intention' standpoint.

Viewed from this perspective, the Court's approach illustrates the demands posed by the right to effective judicial protection in relation to national procedural law, even beyond the existence of subjective rights originating from EU law. It reflects an

[328] For a similar argument, see Wennerås, *The Enforcement of EC Environmental Law*, op. cit. supra note 189, p. 87.
[329] Jacobs, 'The Evolution of the European Legal Order', supra note 325, 308.

unwavering commitment to ensuring that the Member States establish adequate procedures for the decentralised judicial review of compliance with EU law provisions. The principle is clear: once an (objective) right guaranteed by EU law is identified, the Member States must provide a remedy for the beneficiaries of that right. More specifically, individuals must have access to judicial review proceedings, if necessary by initiating new proceedings, to examine whether the competent national authorities have complied with their obligations under EU environmental law.[330] The Grand Chamber of the Court further specified that this obligation is intrinsic to the essence of Article 47 of the Charter.[331]

The implications for national procedural autonomy could be far-reaching, particularly in Member States that adhere to the *Schutznorm* doctrine. These Member States must ensure access to justice for individuals and NGOs regarding the enforcement of EU environmental provisions, even if they assert any subjective right based on these provisions. However, this does not mean that 'everyone' must be granted the right to bring proceedings on any question of Union law.[332] In other words, the Court's approach does not come close to establishing an *actio popularis*.[333] Admittedly, there remains some uncertainty regarding the identification of the holders of environmental rights (and the corresponding remedies). This uncertainty turns on the question of who should have standing to enforce environmental provisions. It is important to stress that this uncertainty arises in part from the Court's broad conception of the notion of 'right'. In contrast to the 'normative intention' approach, the broad conception reflected in these judgments does not enable to systematically identify a:

[330] Beyond the right to initiate review proceedings, the national judiciary must take 'all necessary measures', including an order or a financial penalty, in order to guarantee that EU environmental provisions are respected. However, the obligation to make other remedies available comes into play only if these remedies are already provided by national law and are not contrary to other fundamental rights provided by the Charter (Case C-237/07, *Dieter Janecek v Freistaat Bayern*, paras 38-39; Case C-404/13, *ClientEarth*, paras 55-58; Case C-723/17, *Craeynest and Others*, para 56; Case C-752/18, *Deutsche Umwelthilfe eV v Freistaat Bayern*, EU:C:2019:1114, para 30). By contrast, the ECJ has ruled out the possibility that state liability could be established as a matter of EU law in relation to infringements of EU environmental law (Case C-61/21, *Ministre de la Transition Ecologique* and *Premier Ministre (Responsabilité de l'Etat pour la pollution de l'air)*, para 62). The ECJ nevertheless left open the possibility that state liability may be established on the basis of national law. That possibility was taken up in two recent judgments delivered by the Administrative Tribunal of Paris (judgments of 16 June 2023, Tribunal Administratif de Paris (n°2019924 and 2019925)).

[331] Joined Cases C-245/19 & C-246/19, *État luxembourgeois (Droit de recours contre une demande d'information en matière fiscale)*, para 66.

[332] AG Bobek alluded to a similar idea when he opined that 'if the drafters had intended the first paragraph of Article 47 to be a universally applicable provision, triggered by Article 51(1), irrespective of any *concrete* rights or freedoms, they would have simply provided that "everyone has the right to an effective remedy before a tribunal", omitting any further specifications or limits' (Opinion of AG Bobek in Case C-403/16, *El Hassani*, para 76).

[333] Case C-873/19, *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, para 74.

> 'right or claim of a person that the addressee of a legal provision comply with the legal order contained therein [that] translates into remedies that enable the holder of this right to enforce the legal obligation in question before a Court'.[334]

Or, to put it differently, holding that environmental provisions give rise to rights whose enforcement is subject to Article 47 of the Charter comes with a caveat. Under this provision, it is often difficult to identify the category of individuals, or group of individuals, who should be granted access to national review proceedings to rely on it. This raises the following questions: who should be entitled to initiate legal proceedings to enforce such provision? Should the entitlement accrue to 'any individual' seeking to challenge:

> 'the legality of any decision or other national measure relative to the application to him [or her] of'

that EU provision, as suggested by Advocate General Wahl in another context?[335] Or, should that entitlement be restricted to a clearly identifiable individual or group of individuals?[336] And if so, how should these individuals be identified among the general public?

In the absence of harmonization at the EU level, the traditional view posited that the issue of legal standing should be determined by the Member States in the exercise of their competence to organize their national judicial systems as they see fit.[337] This solution derived from the landmark judgments delivered in *Verholen* and *Unibet*. In these judgments, the Court declared that:

> '[w]hile it is, in principle, for national law to determine an individual's standing and interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection'.[338]

Over time, the requirements arising from the right to effective judicial protection have come to take precedence over the autonomy retained by the Member States in this area. Anthony Arnull has suggested that the Member States

[334] Eilmansberger, 'The Relationship Between Rights and Remedies in EC Law', supra note 178, 1242.
[335] Opinion of AG Wahl in Case C-33/17, *Čepelnik*, para 97. However, see Dougan, 'Who Exactly Benefits from the Treaties?', supra note 179, 90.
[336] Opinion of AG Bobek in Case C-403/16, *El Hassani*, para 82; Opinion of AG Kokott in Case C-61/21, *Ministre de la Transition écologique and Premier Ministre (Responsabilité de l'État pour la pollution de l'air)*, EU:C:2022:359, paras 95 et seq.
[337] Dougan, 'Who Exactly Benefits from the Treaties?', supra note 179, 83.
[338] Joined Cases C-87/90, C-88/90 and C-89/90, *Verholen and Others v Sociale Verzekeringsbank Amsterdam*, EU:C:1991:314, para 24; Case C-432/05, *Unibet*, para 42.

> ‘continue to enjoy autonomy only in the sense that it is for them to decide how to ensure effective judicial protection within their domestic legal systems of rights conferred on litigants by Union law’.[339]

This development is also discernible in relation to legal standing in environmental matters. Time and again, the European Court of Justice has had the opportunity to deal with restrictive standing rules, mostly based on the *Schutznorm* doctrine. The bottom line is the following: any natural or legal person that is ‘directly concerned’ by the infringement of a rule belonging to EU environmental law must be:

> ‘in a position to require the competent authorities to observe such obligations, if necessary by pursuing their claims by judicial process’.[340]

This, of course, raises the question of how to identify the NGOs that are ‘directly concerned’ by an infringement of EU environmental law. As established above, the approach adopted by the Court in relation to individual standing appears ill-suited to ensure compliance with ‘pure’ environmental EU law provisions (section 4.4.). In this context, the Court has relied on Article 47 of the Charter, interpreted in the light of the Aarhus Convention, to identify the NGOs entitled to seek legal redress for non-compliance with environmental provisions. By the same token, it progressively turned ‘public interest litigation’ into a positive obligation stemming from Article 47 of the Charter.

In *Brown Bears I*, the Grand Chamber considered, for the first time, that a national standing rule depriving NGOs of access to review proceedings in environmental matters was incompatible with the requirements arising from the effective judicial protection of environmental law. In the main proceedings, an environmental association was denied access to review proceedings in relation to the enforcement of some provisions of the Habitats Directive. Although that association satisfied the requirements of Article 2(5) of the Aarhus Convention, meaning it should have been granted access to justice under Article 9(3) of the Convention, it was denied this possibility because it could not derive subjective rights from these provisions. In this context, the referring court was instructed to interpret its national law with a view:

> ‘to enabl[ing] [such] environmental protection organization… to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law’.[341]

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[339] Arnull, ‘Remedies before National Courts’ in Schütze and Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order*, vol 1 (Oxford University Press, 2018), p. 1025.
[340] See, e.g., Case C-237/07, *Janecek*, para 39; Case C-197/18, *Wasserleitungsverband Nördliches Burgenland, Robert Prandl and Others*, para 32.
[341] Case C-243/15, *Brown Bears II*, para 51.

By relying on a combination of the principles of effectiveness and effective judicial protection, the Court ruled that an environmental association satisfying the conditions of Article 2(5) of the Convention must, as far as possible, be granted access to justice in relation to the enforcement of EU environmental law.

This approach was reiterated in *Brown Bears II*. On that occasion, the Grand Chamber clarified that Article 47 of the Charter must be interpreted in accordance with the requirements established by Article 9(2) of the Aarhus Convention. The reason for this was straightforward:

> 'Article 47 of the Charter, read in conjunction with Article 9(2) and (4) of the Aarhus Convention, enshrine[d] the right to effective judicial protection'.[342]

In other words, both provisions expressed the same right to effective judicial protection. Consequently, the right enshrined in Article 47 of the Charter had to be read in conjunction with the more specific guarantees of access to justice set out in the Convention.

The Court subsequently analysed whether the applicant NGO could derive a right of legal action from Article 9(2) of the Convention. Since a decision based on Article 6(3) of the Habitats Directive concerned activities likely to have significant effects on the environment, such decisions fell within the scope of Article 9(2) of the Convention.[343] Under this provision, any environmental association meeting the requirements prescribed by Article 2(5) of the Convention must be granted access to court to challenge the legality of such decisions. Consequently, it was incumbent upon the Member States to confer a right to bring a legal action upon any environmental organization meeting the conditions set out in Article 2(5) of the Convention in order to challenge a decision for compliance with Article 6(3) of the Habitats Directive.[344] The Court thus clarified that the obligation to turn 'public interest litigation' into a reality was grounded in Article 47 of the Charter, interpreted in the light of Article 9(2) of the Aarhus Convention. At the same time, however, the Court did not specify whether Article 47 of the Charter supported a duty to set aside national standing rules conflicting with the (non-directly effective) requirements of the Aarhus Convention.

The Court took this approach one step further in the *Protect* judgment. The judgment is unequivocal: if national standing rules are incompatible with the requirements of effective judicial protection derived from Article 47 of the Charter, it falls to the referring court to disapply, if necessary, these illegal rules. In support of this conclusion, the Court initially held that a national standing rule precluding an NGO from accessing review proceedings related to the enforcement of EU environmental

[342] Ibid, para 73.
[343] Ibid, paras 56-57.
[344] Ibid, paras 58-61.

law was contrary to the requirements arising from Article 47 of the Charter, interpreted in conjunction with the Aarhus Convention. More specifically, the Court held that Article 9(3) of the Convention would be deprived of:

> 'its *very substance* , if it had to be conceded that, by imposing those conditions, certain categories of "members of the public", *a fortiori* "the public concerned", such as environmental organisations that satisfy the requirements laid down in Article 2(5) of the Aarhus Convention, were to be denied of *any* right to bring proceedings'.[345]

In other words, the Court considered that members of the public must at least have the *possibility* of raising legal challenges to determine whether those rules have been complied with. However, this mere possibility transitioned into a *genuine right* to initiate proceedings in situation where the environmental organization concerned satisfied the requirements of Article 2(5) of the Convention. As a member of the 'public concerned', such environmental organization had to:

> 'be able to contest before a court a decision granting a permit project that may be contrary to the obligation to prevent the deterioration of the status of bodies of water as set out in Article 4 of Directive 2000/60'.[346]

The NGO concerned was nevertheless denied access to national review proceedings in relation to that provision. Consequently, the standing rules at issue were incompatible with Article 47 of the Charter, interpreted in conjunction with Article 9(3) of the Convention. The Court subsequently carved out a duty to set aside these standing requirements notwithstanding the fact that Article 9(3) of the Convention lacked direct effect. From that judgment, it has accordingly been inferred that the application of the doctrine of primacy had been decoupled from the requirements of direct effect.[347] Because the Court was able to construe a duty to set aside national provisions contrary to Article 9(3) even though that provision lacked direct effect, the doctrine of primacy, or so the argument went, did not only apply to directly effective provisions. Additionally, it could also apply to any EU provision, irrespective of whether such a provision possessed direct effect.

Viewed from this perspective, the case law analysed here cannot be dissociated from long-standing debates about the interaction between the principles of direct effect and

[345] Case C-664/15, *Protect*, para 46 (emphasis added).
[346] Ibid, para 58.
[347] Krämer, 'Direct Effect in EU Environmental Law: Towards the End of a Doctrine?' in op. cit. supra note 224, pp. 192-195. For a similar view, see Squintani and Perlaviciute, 'Access to Public Participation: Unveiling the Mismatch Between What Law Prescribes and What the Public Wants' in ibid, pp. 136-137; Peeters and Eliantonio, 'On Regulatory Power, Compliance and the Role of the Court of Justice in EU Environmental Law' in ibid, p. 487.

primacy.[348] More specifically, *Protect* fits within a line of judgments that seemed to validate the proposition that the principle of primacy could play out even if the relevant provision lacked the attributes to produce direct effect. *Mangold* and *Kücükdeveci* also spring to mind in that context.[349] These judgments appeared to suggest that EU directives could, alone or in conjunction with EU general principles, give rise to a duty to set aside conflicting national laws in the context of horizontal disputes.[350] At the same time, they could not produce direct horizontal effect, in the sense of creating subjective rights and obligations invokable as such in horizontal settings. Put differently, a provision that was deemed incapable of producing (horizontal) direct effect could nevertheless be relied upon to disapply the impugned national norm.[351] It has accordingly been suggested that *Mangold* and *Kücükdeveci* owed more to the principle of primacy than to direct effect. Similarly, it has been suggested that the judgment handed down in *Protect* gave expression to the principle of primacy. The reason for this was simple: even if they lacked direct effect, the provisions stemming from Article 9(3) of the Aarhus Convention seemed to form the basis for the disapplication of the impugned national norm.

A closer look at the Court's reasoning, nevertheless, clarifies that the duty to set aside did not result from the mere application of Article 9(3) of the Convention. Whilst the Court conceded that Article 9(3), '*in itself*, ha[d] no direct effect in EU law', it also stressed that:

> 'that provision, *read in conjunction* with Article 47 of the Charter, impose[d] an obligation to ensure effective judicial protection of the rights conferred by EU law'.[352]

[348] On that topic, see Lenaerts and Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 European Law Review 287; Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 Common Market Law Review 931.

[349] Case C-144/04, *Werner Mangold v Rüdiger Helm*, EU:C:2005:709; Case C-555/07, *Seda Kücükdeveci v Swedex Gmbh & Co. KG*., EU:C:2010:21.

[350] That view was rejected in subsequent judgments. The Court confirmed that it is the general principle as such (or, for that matter, the relevant Charter right) that justifies the disapplication of conflicting national provisions. The requirements expressed by secondary law remain relevant to reconstruct the content of the relevant primary law norm (see, e.g., Case C-176/12, *Association de Médiation Sociale*, EU:C:2014:2, paras 36, 49; Case C-122/17, *David Smith v Patrick Meade and Others*, EU:C:2018:631, paras 44 et seq.). On that topic, see Lazzerini, '(Some of) the Fundamental Rights Granted by the Charter May Be a Source of Obligations for Private Parties: *AMS*' (2014) 51 Common Market Law Review 907, esp. 921-23.

[351] Lazzerini, 'The Horizontal Application of the General Principles of EU Law: Nothing Less than Direct Effect' in Ziegler, Neuvonen and Moreno-Lax (eds), *Research Handbook on General Principles of EU Law: Constructing Legal Orders in Europe (*Edward Elgar Publishing, 2022), p. 176.

[352] Case C-664/15, *Protect*, para 45 (emphasis added).

The Court's insistence that Article 9(3) did not have direct effect *in itself* seemed to suggest that the legal effects of that provision could be strengthened if it were *combined* with another EU law provision.[353] And indeed, the Court subsequently considered that:

> 'denying environmental organizations *any* right to bring an action against such a decision to grant a permit, … [was] contrary to the requirements flowing from a *combined reading* of Article 9(3) of the Aarhus Convention and Article 47 of the Charter'.[354]

That statement clarified that the obligation of disapplication formulated by the Court was not grounded in Article 9(3) alone but rather arose from a combination of that provision and Article 47 of the Charter.[355]

The Grand Chamber's judgment in *Deutsche Umwelthilfe* shed further light on the interplay between Article 47 of the Charter and Article 9 of the Aarhus Convention. In many ways, this judgment aligns closely with the Court's earlier judgment in *Protect*. As a matter of principle, *Deutsche Umwelthilfe* reaffirmed that the Member States must ensure access to justice for recognized NGOs in relation to the domestic enforcement of EU environmental law. The novelty of that judgment lies in its finding that the Member States cannot rely on their margin of discretion to exclude an entire category of administrative decisions from the scope of the right to bring proceedings under Article 9(3) of the Aarhus Convention. Following the *Brown Bears I* judgment, the German legislature introduced a specific legal framework allowing NGOs to access environmental justice even in the absence of a subjective right (Paragraph 3 UmwRG). However, influenced perhaps by lobbying efforts from car manufacturers, the legislature deliberately excluded decisions concerning product approvals from the material scope of that right.

The Grand Chamber sanctioned that exclusion. More specifically, the discretion retained by the Member States in implementing Article 9(3) of the Convention was circumscribed by reference to Article 47 of the Charter. In para 69 of this judgment, the Court took the view that:

> '[a]lthough they imply that Member States retain discretion as to the implementation of that provision, the words "criteria, if any, laid down in its national law" in Article 9(3) of the Aarhus Convention cannot allow those States to impose criteria so strict that it would be effectively impossible for

[353] Sobotta, 'New Cases on Article 9 of the Aarhus Convention' (2018) 15 Journal for European Environmental & Planning Law 241, 254-255.
[354] Case C-664/15, *Protect*, para 52.
[355] This seems to give credence to the suggestion proffered by Sophie Robin-Olivier, who had opined that the legal effects of EU norms rest on a combination of legal norms (Robin-Olivier, 'The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections' (2014) 12 ICON 165, esp. pp. 168 et seq. As we shall see, it can nevertheless be inferred from subsequent judgments that the duty to set aside conflicting national provisions is ultimately rooted in Article 47 of the Charter.

environmental associations to challenge the acts or omissions that are the subject of that provision'.

Because the rule at issue would precisely deny NGOs *any* right to bring proceedings to enforce the prohibition against 'defeat devices' laid down in Article 5(2) of Regulation 715/2007, it was contrary to the requirements flowing from a combined reading of Article 9(3) of the Convention and Article 47 of the Charter.[356] As such, that exclusion constituted a limitation on the right to an effective remedy featured in Article 47 of the Charter.[357] If the national referring court were unable to interpret national law in a way that is consistent with the requirements arising from that right, there would remain only one possibility: the duty to set the impugned norm aside. According to the Court, that duty rested upon the referring court by virtue of Article 47 of the Charter itself. Consequently, the referring court was instructed to offer standing to NGOs approved by national law, if necessary, by disapplying the disputed national legal norm.

Viewed from that perspective, *Deutsche Umwelthilfe* illustrates the positive and dimension of the right to effective judicial protection enshrined in Article 47 of the Charter. Following the entry into force of the Lisbon Treaty, some commentators anticipated that the formal constitutionalisation of the principle of effective judicial protection (through Articles 47 of the Charter and 19 TEU) could support the creation of more 'intrusive' procedural standards.[358] The judgment under consideration seemingly confirmed the more 'prescriptive' undertones of the case law post-Lisbon.[359] Whereas past judgments grounded in the general principle of effective judicial protection merely imposed a duty of consistent interpretation upon national judges,[360] *Deutsche Umwelthilfe* went a step further. Based on the Court's judgment, it was incumbent upon the referring court (and, more generally, national authorities) to grant standing to recognized NGOs in relation to the judicial enforcement of environmental law provisions. In the main proceedings, the consequences for national remedial autonomy were readily apparent: that judgment created a new cause of action beyond those already available at national level (or, from another perspective, it extended the scope of pre-existing national remedies to cover matters that were previously excluded from their scope).

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[356] Case C-873/19, *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, para 71.
[357] Ibid, para 72.
[358] For a similar argument, see, amongst others, Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse' (2011) 36 European Law Review 51, 68; Van Cleynenbreugel, 'The Confusing Constitutional Status of Positive Procedural Obligations in EU Law' (2012) 5 Review of European Administrative Law 81, 91.
[359] Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022), pp. 96 et seq.; Bonelli, Eliantonio and Gentile, 'Conclusions' in ibid, pp. 274-275.
[360] Case C-240/09, *Brown Bears I*.

This finding brings us to another clarification brought about by the judgment. In the wake of *Protect*, it has often been suggested that the legal effects of Article 9(3) of the Convention had been bolstered by reference to the right to effective judicial protection.[361] According to Eliantonio, the Court in this judgment read Article 9(3) in the light of Article 47 of the Charter.[362] Widdershoven similarly opined that Article 47 had been employed as a 'means of interpretation strengthening the judicial protection' guarantees offered by the Aarhus Convention. In his view,

> 'the Court applied an Article 47 CFR consistent interpretation of Article 9(3) of the Aarhus Convention'

to ensure access to justice for NGOs.[363] That suggestion may be implicitly grounded in the EU hierarchy of norms. After all, international agreements concluded by the EU (and its Member States) rank at an intermediary level between primary and secondary law.[364] Based on a conventional understanding of the hierarchy of norms, it makes sense to interpret the lower norms originating from the Aarhus Convention in the light of the hierarchically superior guarantees offered by Article 47 of the Charter.

However, it can be inferred from *Deutsche Umwelthilfe* that it is the right to effective judicial protection *as such* which dictated the outcome of that judgment. As the Court has recently established, Article 47 of the Charter:

> 'is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such'.[365]

In other words, this provision is directly effective. As a result, it may give rise to an obligation to set aside conflicting national provisions. Viewed from this perspective, it is not so much the legal effects of Article 9(3) that are 'strengthened' or 'bolstered' by Article 47 of the Charter. Rather, it is Article 47, enriched by reference to the Aarhus Convention, in particular its Article 9(3), that activates the duty to set aside any incompatible national provision. This means that the substantive content of Article 47 of the Charter is shaped by the specific guarantees outlined in Article 9(3) of the

[361] For a similar argument, see Sobotta, 'New Cases on Article 9 of the Aarhus Convention', supra note 353, 254-255; Neframi, 'La Charte dans l'Action Extérieure de l'Union Européenne' in Iliopoulou-Penot and Xenou (eds), *La Charte des Droits Fondamentaux, Source de Renouveau Constitutionnel Européen* (Bruylant, 2020), pp. 169-170.
[362] Eliantonio, 'The Relationship Between EU Secondary Rules and the Principles of Effectiveness and Effective Judicial Protection in Environmental Matters', supra note 176, 113.
[363] Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 314, 18-19.
[364] Lenaerts and Gutiérrez-Fons, *Les Méthodes d'Interprétation de la Cour de Justice de l'Union Européenne* (Bruylant, 2021), p. 93.
[365] Case C-414/16, *Egenberger*, EU:C:2018:257, para 78; Case C-556/17, *Torubarov*, EU:C:2019:626, para 56.

Convention; in some ways, this provision exerts an 'indirect effect' on the higher norm of the Charter.[366]

It is unfortunate that the Court did not explicitly expound on the normative foundation of its approach to identifying the substantive content of the right to effective judicial protection in the light of the standards expressed in the Aarhus Convention. In this regard, support could be found in Articles 52(3) and 53 of the Charter, as well as Article 6(3) TEU.[367] However, it is fair to acknowledge that none of those provisions explicitly require that the content of Charter rights be developed in the light of international agreements. Taken together, these provisions nonetheless highlight the significant role of international human rights law in the interpretation of EU fundamental rights.[368]

As established by past judgments, the identification of EU fundamental rights (in the form of general principles) has traditionally been carried out by reference to:

> 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'.[369]

This principle is reiterated in the Preamble of the Charter, which states that the Charter:

> 'reaffirms… the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States'.[370]

Seen in this light, the provisions mentioned above support an interpretation of EU fundamental rights that is grounded in, or at least inspired by, international treaties for the protection of human rights.[371] This is particularly significant when an international treaty provides more extensive protection than the guarantees recognized at the EU level. These provisions provide authority for the approach adopted in *Deutsche Umwelthilfe* regarding the interaction of Article 47 of the Charter and Article 9(3) of the Aarhus Convention. Since Article 9(3) contains more detailed and specific guarantees of effective judicial protection, it can be used to put flesh on the bones of the right enshrined in Article 47 of the Charter.

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[366] Schütze, 'Direct Effects and Indirect Effects of Union Law' in Schütze and Tridimas (eds), *Oxford Principles of European Union Law*, vol 1 (Oxford University Press, 2018), p. 293.
[367] For a similar argument, see Lenaerts and Gutiérrez-Fons, 'The General System of EU Environmental Law Enforcement' (2011) 30 Yearbook of European Law 3, 36.
[368] Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar Publishing, 2018), pp. 30 et seq.
[369] See, e.g., Case C-4/73, *Nold KG v Commission*, EU:C:1974:51, paras 12-13; Case C-44/79, *Hauer/Land Rheinland-Pfalz*, EU:C:1979:219, para 15.
[370] The explanations relating to the Charter also make various references to international treaties for the protection of human rights as sources of guidance for the interpretation of Charter provisions.
[371] There is nothing here that should be taken as meaning that international human rights law may justify a departure from EU primary law. For further details, see Lenaerts and Gutiérrez-Fons, 'The General System of EU Environmental Law Enforcement', supra note 367, 91-93.

5. Conclusion

This chapter has addressed the following research sub-question: how has the recognition of access to justice guarantees – particularly standing rights – for individuals and environmental NGOs under the Aarhus Convention influenced the development of obligations of judicial protection beyond the core guarantees enshrined in EU primary law? It has demonstrated that, alongside secondary law provisions, the Convention has played a pivotal role in shaping objective environmental rights, enabling both individuals and collective entities to enforce EU environmental law before national courts. Specifically, it has served as a crucial source of inspiration, allowing the Court to develop robust obligations of judicial protection concerning the standing of individuals and environmental NGOs.

By enabling such actors to challenge administrative actions under EU law before national courts, the Court has shown a clear commitment to preserving the essence of the right to an effective judicial remedy in environmental law. In doing so, it has ensured that national administrative authorities acting within the scope of EU environmental law are subject to court control – an essential component of this right.[372] Admittedly, the Court has never explicitly acknowledged that its judgments on standing touched upon the essential content of the right to effective judicial protection. However, it has emphasised that this right would be deprived of its 'very substance' if members of the public concerned – such as NGOs and individuals – were denied any possibility of bringing proceedings in relation to breaches of EU environmental law, as would occur under the Schutznorm doctrine.[373] In this context, there is a reasonable case to be made that the core of that right was jeopardised. It is this concern for the core of effective judicial protection that has emboldened the Court to articulate positive remedies, particularly by affirming standing rights for individuals and NGOs.

The core of the right to effective judicial protection was protected – at least in relation to individual access to justice – through a statutory interpretation of relevant environmental legislation, especially in the areas of air and water pollution. The Aarhus Convention has been employed in this context as a relevant source of inspiration guiding the interpretation of the relevant legislative provisions, particularly in recent judgments. Where statutory interpretation alone proved insufficient, the Court resorted to the principle of effective judicial protection – now codified in Article 47 of the

[372] Opinion of AG Bobek in Case C-403/16, *El Hassani*, EU:C:2017:659, para 110. While the Court never explicitly acknowledged that the relevant judgments on standing touched upon the essential content of the right to an effective judicial remedy, it is interesting to observe that it was keen to insist that referred in *Protect* to the 'very substance' of Article 9(3) of the Aarhus Convention to support the obligation to set aside a national legislation barring NGOs from having any access to justice in relation to EU environmental law (Case C-664/15, *Protect*, para 46).
[373] Case C-664/15, *Protect*, para 46.

Charter – to uphold that core. The content of that principle, as applied in environmental matters, was thus fleshed out by reference to the standing requirements established by the Convention. The resulting case law reflects an objective conception of justice geared towards the effective enforcement of EU environmental law at the national level.

However, this chapter has also shown that the Court remains reluctant to fully embrace subjective environmental rights, particularly in relation to individuals' ability to seek compensation for environmental harm, such as that caused by air pollution. The Court should thus be commended for developing specific procedural rights and remedies that not only align with the overarching goals of EU environmental law, but also reflect the nature of the interests underpinning its regulatory framework – namely, its primary emphasis on protecting collective interests. Indeed, the procedural mechanisms established in the shadow of the Aarhus Convention are not designed to confer subjective rights on individuals, but to address the collective societal needs inherent in the enforcement of EU environmental law.

Chapter 3: A resounding victory for direct horizontal effect? Exploring the remedial dimension of the case law on the horizontality of EU equality rights

1. Introduction

This chapter explores how the adoption of equal treatment guarantees in the employment sphere through secondary law has strengthened their judicial enforceability in domestic judicial proceedings between private parties. It explains how the Court has drawn on the Charter of fundamental rights of the EU ('the Charter') to strengthen the judicial enforceability of equality rights derived from secondary law, allowing individual workers to assert their rights in disputes against other individuals – particularly their employers. Additionally, this chapter demonstrates that the Court has relied on legislative provisions concerning access to labour-related information to expand similar guarantees beyond the explicit scope of secondary law. In doing so, the Court has underscored the importance of transparency and access to information as essential tools for allowing individual workers to enforce their rights before domestic courts, even where secondary law remains silent on this matter.

These developments have significantly enhanced the judicial protection afforded to individual workers in employment-related equality disputes. Historically, the field of EU equality law in the field of employment has indeed been characterised by a relatively limited degree of procedural harmonisation.[374] Article 153 of the Treaty on the Functioning of the EU ('TFEU') reflects the EU's primary emphasis on the adoption of (minimum) substantive standards in areas such as working conditions, equality between men and women, and workers' health and safety. Despite the absence of a specific Treaty provision on procedural harmonisation, the procedural demands emanating from EU secondary law have gradually increased over time.[375] The development of procedural requirements unfolded 'incidentally',[376] as a by-product of

[374] For present purposes, the field of EU equality law is understood to encompass legislation adopted within the framework of social policy, as governed by Title X, TFEU. The specificity of this policy area lies in its emphasis on strengthening the principle of equal treatment in the field of employment, primarily through legislative measures that establish detailed labour standards on matters such as pay, working time, access to information, and work-life balance. These provisions reflect a distinctive normative concern with protecting the weaker party in the employment relationship – namely, the worker. This understanding of equality law as protecting weaker parties corresponds to the way in which equality law has been selected as a sector covered in the EUDAIMONIA project, in the framework of which this thesis has been drafted.

[375] On that topic, see Lörcher, 'Access to Justice' in Rasnaca, Koukiadaki, Bruun and Lörcher (eds), *Effective Enforcement of EU Labour Law* (Hart Publishing, 2022).

[376] Eliantonio and Muir, 'Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law' (2015) 8 Review of European Administrative Law 177.

the harmonisation of substantive labour standards.[377] In recent years, this trend has expanded to cover sub-fields of equality law, such as working conditions,[378] and pay transparency.[379] The bottom-line, however, can be summarised as follows: historically, there was relatively little in terms of specific procedures and remedies prescribed by EU law concerning the enforcement of equality rights at the national level. The dominant approach has been to confer substantive equality rights through directives without providing specific remedies and procedures for enforcing these rights at the national level.[380] As a result, the scope of procedural autonomy retained by the Member States in equality law was relatively broad.

The debate about appropriate procedural tools and remedies emerged from concerns that the existing national enforcement tools – or lack thereof – would create a gap in the judicial protection of EU equality rights at the domestic level. After all, these rights have traditionally had limited enforcement potential at the national level.[381] The distinction between rights and principles, as expressed by Article 52(5) of the Charter, reflects the Member States' reluctance to recognise equality rights in the employment sphere as a source of subjective rights and obligations in national proceedings. The limited enforceability of these rights is also linked to a broader discussion about the type of powers conferred upon national judges regarding the protection of fundamental rights. For the sake of clarity, it is useful to remember that the prevailing conception in most Member States is that national judges can sanction national laws for their incompatibility with fundamental rights, but they cannot engage in positive lawmaking or fill the shoes of the legislature in protecting fundamental rights.[382] In other words, the traditional mantra assumes that national judges can bark, but never bite. This approach reflects a general reluctance to embrace an explicit positive conception of the role and powers of national judges in fundamental rights matters, which has fuelled national resistance against the doctrine of horizontality of fundamental rights. The

[377] This includes rules on access to redress, as well as rules on evidence. For further details, see Kollonay-Lehoczky, 'Enforcing Non-Discrimination' in Rasnaca, Koukiadaki, Bruun and Lörcher (eds), *Effective Enforcement of EU Labour Law* (Hart Publishing, 2022).

[378] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Parliament, [2019] OJ L186/105.

[379] Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, [2023] OJ L 132/1.

[380] Koukiadaki, 'Remedies and Sanctions in EU Labour Law' in Rasnaca, Koukiadaki, Bruun and Lörcher (eds), *Effective Enforcement of EU Labour Law* (Hart Publishing, 2022), p. 38.

[381] Jacobs, 'The Enforcement Structure for EU Labour Law' in ibid, p. 26: '[i]f one approaches this problem from the point of view of the individual worker (and leaving aside the well-paid), it is clear that most workers are not in a position to easily launch lawsuits to invoke their labour law rights'. The author goes on to mention several elements complicating individual access to justice in labour law, including the costs of proceedings, as well as the level of education of individual workers.

[382] On that topic, see De Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing, 2014); Safjan, 'The Horizontal Effect of Fundamental Rights in Private Law – On Actors, Vectors and Factors of Influence' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation - Liber Amicorum for Hans Micklitz* (Springer, 2014).

difficulty is further compounded by the Member States' resistance to acknowledging the full and unconditional justiciability of equality rights.

Initially, there was little in terms of what EU law could do to address national limitations on the judicial enforceability of EU equality rights derived from secondary law. This limitation owed much to the choice of directives as the preferred regulatory device to define the material content of equality rights at the EU level.[383] The prohibition of the horizontal direct effect of directives created an 'insurmountable obstacle' to the enforcement of these rights at the instigation of individuals seeking to enforce their rights in the context of horizontal proceedings.[384] Against this background, the Court has progressively developed enforcement tools aimed at strengthening the judicial protection of individuals affected by breaches of their rights. The doctrine of horizontal direct effect of fundamental equality rights has served as a 'safety net' for claimants seeking to enforce their rights in domestic judicial proceedings against other private parties.[385] This doctrine has increased the prospect of seeking judicial review of domestic law based on existing EU equality rights.[386] Over the past few years, the Court has even hinted that some fundamental equality rights may generate subjective rights and obligations directly enforceable in horizontal proceedings.[387]

Against this background, this chapter explores the Court's case law on the enforceability of employment-related equality rights before national courts. In doing so, it addresses the following research sub-question: how has the recognition of equal treatment guarantees, especially in the employment sphere, shaped the development of obligation of judicial protection beyond the core guarantees of effective judicial protection under EU primary law? This chapter begins by clarifying that the concept of horizontality encompasses various horizontal effects, each reflecting different conceptions of the national judge's role in safeguarding fundamental rights (section 2.1). It then argues that each of these conceptions corresponds to a distinct judicial remedy (section 2.2). Against this conceptual background, this chapter examines the early case law on horizontality, demonstrating that the role of national judges was

[383] Adams-Prassl, 'Article 47 CFR and the Effective Enforcement of EU Labour Law: Teeth for Paper Tigers?' (2020) 11 European Labour Law Journal 391, 397.
[384] Ibid, 397.
[385] Ellis and Watson, *EU Anti-Discrimination Law* (Oxford University Press, 2012), p. 302.
[386] Muir, 'The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from *Mangold* to *Bauer*' (2019) 12 Review of European Administrative Law 185, 207.
[387] Bailleux, 'L'Effet Direct Horizontal des Droits Fondamentaux. Le Critère du Pouvoir-Savoir, Ligne Claire de la Jurisprudence ?' (2019) Revue des Affaires Européennes 329, 332 : '[l]e droit fondamental, que l'on savait invocable dans le cadre d'un contentieux "objectif" dit de "légalité", peut désormais être invoqué dans un litige entre particuliers (et plus largement dans tout type de contentieux subjectif) lorsqu'il se double d'un droit "subjectif"'.

initially defined in a negative manner – namely, as requiring an objective or abstract assessment of the compatibility of national law with EU equality rights (section 2.3).[388]

This chapter goes on to explain that recent judgments on horizontality reflect a more positive conception of the role of national judges, one centred on the enforcement of subjective rights and obligations in disputes between private parties. It highlights the Court's sensitivity to national legal traditions in the judicial enforcement of equality rights. This is reflected in its distinction between rights-conferring and non-rights conferring Charter provisions, which is based on a statutory interpretation of the Charter (section 3.1). However, this binary distinction partly obscures the debate on appropriate remedies for enforcing equality rights in horizontal settings (section 3.2). This chapter further shows that the Court has embraced a more comprehensive understanding of horizontality, allowing the Member States to preserve their own conception of the role of national judges within this framework (section 3.3). Finally, it explores how the procedural rights and remedies developed by the Court align with recent legislative efforts on information rights. In doing so, the Court appears responsive to the normative concerns of equality law, namely to protect individual workers (section 3.4).

Overall, this chapter demonstrates how the Court, drawing on a statutory interpretation of the Charter, has strengthened the judicial enforceability of equality rights derived from EU secondary law. Specifically, it explains that the Court's conception of horizontality embodies a subjective conception of justice, oriented towards the judicial protection of equality rights granted to workers under EU law. This emphasis on subjective rights also explains why the core of the right to effective judicial protection – identified in the previous chapter as requiring judicial oversight of administrative action – has had limited relevance in this area. Unlike environmental law, which is primarily concerned with public law obligations, equality law focuses on enabling individual workers to assert their rights in horizontal disputes, particularly against private employers. As a result, the public law dimension embedded in the core of effective judicial protection does not fit seamlessly within this framework. In such circumstances, the Court has drawn on traditional doctrines – such as direct effect – to develop remedies suited to the nature of equality rights and the procedural context of

[388] Admittedly, the judgment delivered in *Simmenthal* militated in favour of a decentralised, or diffuse judicial enforcement of EU fundamental rights (Case C-106/77, *Amministrazione delle finance dello Stato v Simmenthal*, EU:C:1978:49). The implications of this judgment for the division of powers at the domestic level were discussed (extensively) by other legal commentators. It was also touched upon briefly in Chapter 1, Section 2.1. For the sake of the present discussion, it suffices to mention that the stance adopted by the Court in *Simmenthal* was difficult to square with the model of centralised judicial review of national law prevailing at the domestic level. On that topic, see Hofmann, 'Conflicts and Integration – Revisiting *Costa v Enel* and *Simmenthal II*' in Azoulai and Maduro (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2008); Drake, 'The Principle of Primacy and the Duty of National Bodies Appointed to Enforce EU Law to Disapply Conflicting National Law: *An Garda Síochána*' (2020) 57 Common Market Law Review 557.

equality law. While these doctrines may be deemed to embody basic requirements of judicial protection, the Court has yet to establish a clear connection between them and that right – let alone its 'essential content'. That being said, the story developed in this chapter echoes the Court's approach in the field of environmental law. In both cases, the Court appears mindful of developing procedural rights and remedies that reflect the normative concerns of the policy area in question. To achieve this, the Court has drawn on existing procedural frameworks established by secondary law in these fields. In EU equality law, the emphasis on protecting individual workers has grounded a conception of justice that enables them to enforce their rights in court proceedings against other private parties. It has also led the Court to develop information rights to allow workers to seek judicial redress for the violation of their rights.

2. A barking (watch)dog that never bites: National judges as negative censors in EU equality law

As touched upon in the introduction, the mandate of national judges involved in the enforcement of EU equality rights has traditionally been framed by reference to classical doctrines on the decentralized enforcement of EU law. Despite the prohibition on horizontal direct effect of directives, the Court acknowledged that some equality rights could, in fact, produce legal effects in the context of private employment relationships, if they gave expression to general principles emanating from EU primary law. Legal commentators embarked on a quest to decipher and systematize the judgments delivered by the Court, hoping to clarify the scope of the so-called doctrine of horizontal direct effect of EU equality rights.

The theoretical – one might even say dogmatic – undertones of the debate may have obscured the practical dimension of these judgments. After all, the doctrine of horizontal direct effect essentially revolves around the type of remedies available to individuals affected by an infringement of their rights. Viewed from another perspective, it is primarily concerned with the obligations imposed on national judges involved in the domestic enforcement of these rights. An enquiry into the jurisprudence of the Court is therefore directly relevant to the present discussion about the procedural rules and remedies developed by the Court in the field of equality law. This chapter explains that the conception of horizontality crafted by the Court reflects a subjective understanding of justice geared towards the judicial protection of individual equality rights conferred upon workers by EU law. To that end, it retraces the evolution of the case law on horizontality. It shows that the early case law reflected an objective conception of justice, centred on the abstract assessment of the compatibility of national law with EU fundamental rights, and the disapplication of national legal norms deemed incompatible with EU law. This chapter also demonstrates that recent judgments on

horizontality reflect a more subjective conception of justice, focused more explicitly on the judicial protection of equality rights in employment law disputes between private parties. National judges are no longer, or not only, called upon to disapply incompatible national legal norms; they are also instructed to enforce self-standing subjective rights and obligations emanating from EU law.

With this in mind, this section revisits past and ongoing debates about the early judgments on horizontal direct effect. It reflects on how distinctive national legal and political traditions regarding the role of judges influenced the debate on horizontal direct effect. To that end, this section initially sets out to deconstruct the notion of horizontal direct effect, explaining that it conceals a variety of horizontal effects that reflect diverse conceptions of the role of the judiciary. The broader notion of horizontality is thus suggested in its stead (section 2.1). This section also explains that the early judgments on horizontality fuelled long-lasting debates about the powers accruing to national judges in their endeavour to ensure the correct application of fundamental equality rights at the domestic level (section 2.2). To be sure, a great deal of academic literature also questioned whether the European Court of Justice had overstepped its mandate.[389] The aim was quite simply to 'stop the European Court of Justice'.[390]

Be that as it may, this section also shows that the debate addresses the implications of these judgments for the powers available to national judges in the area of fundamental rights protection (section 2.3). It explains that the early case law on horizontal direct effect expressed a negative conception of the powers attributed to national judges; they were essentially called upon to disapply conflicting national legislation without setting out the positive implications of a finding that national law was illegal. In a nutshell, these judgments articulated an objective conception of justice

[389] Tridimas, 'Horizontal Effects of General Principles: Bold Rulings and Fine Distinctions' in Bernitz, Groussot and Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International, 2013); Mazak and Moser, 'Adjudication by Reference to General Principles of EU Law: A Second Look at the *Mangold* Case Law' in Adam, de Waele, Meeusen, and Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, 2015); Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press, 2012), esp. p. 45; Horsley, *The Court of Justice as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press, 2018).

[390] Herzog and Gerken, 'Stop the European Court of Justice' EUObserver (10 September 2008), available at <https://euobserver.com/opinion/ar046a11ea> (last accessed, 6 May 2025). The gist of that criticism was directed towards one aspect of the judgment in particular: the problematic interaction between the general principle of equal treatment irrespective of age and the Equal Treatment Directive. The Court was criticised for overstepping the boundaries of its judicial mandate, and venturing into the troubled waters of judicial law-making, because it (allegedly) invented a general principle of equal treatment on the grounds of age. On that topic, see Opinion of AG Geelhoed in case C-13/05, *Chacon Navas*, EU:C:2006:184, para 56; Opinion of AG Jarabo Colomer in Joined Cases C-55/07 and C-56/07, *Michaeler*, EU:C:2008:248, para 21; Mazak and Moser, 'Adjudication by Reference to General Principles of EU Law: A Second Look at the *Mangold* Case Law' in op. cit. supra note 389, pp. 61-86; Horsley, *The Court of Justice as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press, 2018), p. 237.

focusing on the abstract assessment of the compatibility of national legal provisions with the general principle of equal treatment on the grounds of age, and the correlative duty to disapply national legal norms deemed incompatible with that principle. As we shall see, these judgments could be considered to express 'implicit positive obligations', in the sense attributed to that term by De Witte (section 2.4).[391] Nonetheless, the crux of the matter is that national judges were not directly instructed to enforce these obligations in the context of private law disputes. This responsibility fell primarily to the legislature. The obligation incumbent upon national judges could therefore be framed negatively; in a nutshell, the early judgments on horizontality expressed negative obligations of judicial protection.

2.1. One size does not fit them all: A typology of horizontal effects

It is perhaps fair to acknowledge from the outset that the term 'horizontal direct effect' never explicitly appeared in the Court's case law on the application of fundamental rights in horizontal settings.[392] Instead, legal scholars and members of the Court developed the notion. As we shall see, commentators have indeed grappled with the issue of defining precisely what this concept actually means in practice. The very idea of 'horizontal direct effect' conceals one essential element: 'horizontality' can encompass different realities. To put it differently, fundamental rights can produce various effects in the context of disputes between private parties. Perhaps, then, the term 'horizontal effects', or 'horizontality', should be used instead to reflect the broad spectrum of ways in which fundamental rights may produce 'radiating effects' within the area of private law relationships.[393] There is indeed room to accommodate a broader range of possibilities within the expression 'horizontal effects', or 'horizontality', compared to the narrower expression 'horizontal direct effect'. Broadly speaking, the

[391] For the sake of clarity, it is useful to understand that the concept of 'implicit positive obligation' coined by De Witte tells us relatively little about the role of national judges in the decentralised enforcement of EU law. It rests on a monolithic conception of the state which remains somewhat oblivious to the respective roles and responsibilities attributed to the various branches of state power when it comes to the domestic enforcement of EU law. To put it bluntly, the conception espoused by De Witte approaches the state as a coherent whole, rather than an entity constituted by distinct organs. A parallel may in fact be drawn with the monolithic conception of the state prevailing under the doctrine of positive obligations developed by the European Court of Human Rights on the basis of (some of) the human rights laid down in the European Convention on Human Rights. The specificity of the concepts of positive and/or negative procedural obligations developed in the context of this chapter originates from its emphasis on the obligations and duties weighing upon national judges in the decentralised enforcement of EU labour rights.

[392] Bobek, 'Institutional Report: National Courts and the Enforcement of EU Law' in Botman and Langer (eds), *National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order* (FIDE Congress Publications, Eleven International Publishing, 2020), p. 66.

[393] Colombi Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights' (2019) 15 European Constitutional Law Review 294.

notion of horizontality therefore denotes the capacity of fundamental rights to affect, modify, or alter the rights and obligations of the parties to a private law relationship. It addresses the various ways in which fundamental rights may produce normative effects in that context.

It may be useful to mention the distinction between 'exclusion' and 'substitution'. The categories of 'exclusion' and 'substitution' correspond to different conceptions or effects of horizontality. On the one hand, the idea of 'exclusion' is closely associated with the private law notion of 'indirect horizontal effect'.[394] It denotes the capacity of fundamental rights norms belonging to EU law to serve as a benchmark, or parameter, for assessing the legality of (hierarchically lower) provisions of national law governing the relationship between two private parties. On the other hand, the idea of substitution corresponds to the private law notion of 'direct horizontal effect'. Among EU law scholars, it is sometimes viewed as an emanation of 'pure' horizontal direct effect, or applicability, of fundamental rights.[395] Viewed from this perspective, substitution entails the capacity of EU fundamental rights norms to create self-standing subjective rights and obligations that can be invoked in the context of disputes between individuals.

Although it has never been explicitly mentioned by the Court, the distinction between exclusion and substitution is often used by legal scholars to describe the various horizontal effects produced by EU legal norms in domestic judicial review proceedings. The case law on the horizontality of EU fundamental rights is a case in point. It emerged against the backdrop of lingering disagreements about whether directives could produce exclusionary effects in disputes between private parties. Despite the well-known prohibition on the horizontal direct effect of directives,[396] the Court began acknowledging that unimplemented directives could, in fact, produce

[394] On that topic, see Hartkamp, 'The Concept of (Direct and Indirect) Horizontal Effect of EU law: The Terminology of European Law Scholars and of Private Law Scholars Compared' in Bernitz, Groussot and Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International, 2013). Mirjam De Mol observes that '[t]he reason for these differing qualifications is not that there is another view on the relationship between EU law and national law, but rather another focus. Instead of measuring the effect of EU law on the proceedings before the national court, these private lawyers measure the effect of EU law on the private legal relationship itself. In the case of a horizontal substitution effect the EU norm interferes directly with the private legal relationship. In the case of a horizontal exclusion effect the interference of EU law with the private legal relationship is indirect, namely through national (private) law' (De Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?' (2011) 18 Maastricht Journal of European and Comparative Law 109, 111).

[395] Dougan, 'General Report: National Courts and the Enforcement of EU Law' in Botman and Langer (eds), *National Courts and the Enforcement of EU Law* (FIDE Congress Publications, Eleven International Publishing, 2020), p. 36.

[396] See, e.g., Case C-152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*, EU:C:1986:84, para 48; Case C-91/92, *Faccini Dori v Recreb*, EU:C:1994:292, para 24; Case C-192/94, *El Corte Inglés v Blazquez Rivero*, EU:C:1996:88, paras 16-17.

some form of horizontal effects in certain circumstances.[397] This jurisprudence represented a significant blow to the coherence of the 'no-horizontal-direct-effect' rule.[398]

One of the suggestions put forward by commentators and Advocate Generals alike to preserve the coherence of the rule was to dissociate exclusionary from substitutionary effects.[399] On the one hand, the category of exclusion was viewed as an emanation of the principle of primacy. On the other hand, the principle of direct effect was considered to involve substitutionary effects. In other words, the principles of direct effect and primacy were deemed conceptually distinct, reach creating different normative effects in relation to the enforcement of EU law in the national legal orders of the Member States. While the principle of primacy merely involved the exclusion of conflicting national legislation (through disapplication), the principle of direct effect presupposed that the relevant EU norm created subjective rights that could produce substitutionary effects within the domestic legal orders. In the latter case, the impugned national norm would not simply be removed; it would be replaced by the relevant EU legal norm.

It was argued that the Court's case law would not impinge upon the prohibition of horizontal direct effect of directives by acknowledging that directives could produce exclusionary, rather than substitutionary, effects. In practice, the effects of unimplemented directives on private law relationships would be merely 'incidental'; they would occur indirectly as a result of the disapplication of the national norm (and the concomitant application of another national legal norm). In other words, it was not the directive itself that would create rights and duties directly invocable in domestic judicial proceedings between individuals.[400] It should come as no surprise, in this context, that the question posed to the Court in the early judgments on horizontality (i.e., *Mangold* and *Kücükdeveci*) was precisely whether directives, viewed alone or in conjunction with general principles, could produce exclusionary effects at the domestic level. In those judgments, the Court failed to address explicitly whether directives could

[397] See, e.g., Case C-194/94, *CIA Security International v Signalson and Securitel*, EU:C:1996:172 ; Case C-129/94, *Ruiz Bernaldez*, EU:C:1997:628; Case C-443/98, *Unilever Italia SpA v Central Food SpA*, EU:C:2023:33.

[398] 'Editorial Comments: Horizontal Direct Effect – A Law of Diminishing Coherence?' (2006) 43 Common Market Law Review 1.

[399] See, e.g., Opinion of AG Saggio in Joined Cases C-240 to 244/98, *Océano Grupo Editorial and Salvat Editores*, EU:C:1999:620; Opinion of AG Alber in Case C-343/98, *Collino and Chiappero*, EU:C:2000:23; Opinion of AG Léger in Case C-287/98, *Linster*, EU:C:2008:3; Opinion of AG Ruiz-Jarabo Colomer in Joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, EU:C:2003:245, paras 21 et seq.; Opinion of AG Kokott in Joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, EU:C:2004:624. On that topic, see also Craig and De Búrca, *EU Law: Text, Cases and Materials* (5th edn, Oxford University Press, 2011), pp. 207 et seq.

[400] Craig and De Búrca, *EU Law: Text, Cases and Materials* (2011), p. 207.

produce exclusionary effects on their own.[401] As we shall see, this development ties into past and current debates about whether the distinction between exclusion and substitution offers a useful vantage point to assess the Court's jurisprudence on the (horizontal) effects of EU law in the domestic legal orders of the Member States.

Beyond the dichotomy of exclusion versus substitution, it is possible to identify other forms of horizontal effects. Notably, one could describe the horizontal effect produced through conform interpretation of national law in the light of EU fundamental rights (occurring in the context of private law proceedings). It follows from *Pfeiffer* that, in the absence of horizontal direct effect of directives, national courts are nonetheless under a duty to interpret existing national provisions, so far as possible, in conformity with the relevant directive, even in the context of private law disputes between individuals.[402] For better or worse, the duty of consistent interpretation is commonly referred to by EU law scholars as an 'indirect effect' of EU law norms.[403] However, this terminology does little to alleviate the conceptual opacity surrounding the doctrine of horizontality. In effect, it closely resembles the 'indirect horizontal effect' used by private law scholars to describe a vastly different phenomenon: the capacity of a norm to serve as a standard of legality with respect to national law. For the purposes of this discussion, it will be referred to as 'conform interpretation'. Moreover, it is worth noting that other legal tools may be directly relevant to the question of the effects produced by fundamental rights in the realm of private law relationships. One such tool is state liability for (non-)compliance with fundamental rights.

In *Cresco Investigation*, Advocate General Bobek strongly advocated for state liability to address the Member States's failure to meet the fundamental rights standards enshrined in the Charter.[404] In his view, this suggestion was warranted because most cases on horizontal effects revolve around the public law issue of whether national legislation complies with Charter rights and provisions. In these cases, the conduct of the private individual involved in the proceedings is not inherently constitutive of an alleged illegality, at least under national law. Ultimately, the breach of fundamental rights is attributable to the competent national authority (in most cases, the legislature). The essence of Bobek's argument can be summarised as follows: since the breach

[401] The Court later clarified in *Poplawski II* that EU directives cannot be relied upon on their own for the sake of excluding incompatible national legal norms in the context of horizontal proceedings (Case C-573/17, *Poplawski II*, EU:C:2019:530, para 67).
[402] Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others*, EU:C:2004:584, para 115.
[403] Schütze, 'Direct Effects and the Indirect Effects of Union Law' in Schütze and Tridimas (eds), *Oxford Principles of European Union Law*, vol 1 (Oxford University Press, 2018), pp. 291 et seq.; Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford University Press, 2007); Haket, 'The EU Law Duty of Consistent Interpretation in German, Irish and Dutch Courts' (DPhil thesis, University of Utrecht, 2019), p. 1.
[404] Opinion of AG Bobek in Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, EU:C:2018:614, esp. paras 114 et seq.

originates from national law, rather than the behaviour of a private party, the responsibility should be lie with the state to compensate for the breach (through damages). To put it bluntly:

> '[t]here must be a remedy, but it lies against the state in the form of a damages action'.[405]

2.2. Unpacking the remedial dimension of horizontality

Although Bobek's suggestion was not subsequently taken up by the European Court of Justice, it holds some undeniable truth(s). More generally, his opinion provides valuable insights into the practical significance of the debate on horizontal effects. This is especially true with respect to the assumption that the case law on horizontal effects primarily revolves around the *type of remedy or procedure* that should be made available to individuals when a breach of a given Charter right is attributable to national legislation. According to Bobek, most cases dealing with the horizontal effects of Charter rights must be 'understood as seeking clarity on the precise remedies that must be available' to individuals in those circumstances.[406]

There is a natural tendency in academic literature to (attempt to) formulate grand theories and principles to describe the effects produced by EU law within the domestic legal orders of the Member States. The complexity of the debate can sometimes conceal or obscure one essential element: in most cases, the core issue revolves around very concrete and practical questions about the type of procedure or remedy that should be available to individuals for the (judicial) enforcement of EU law at the national level. Consider, for instance, the duty to set aside or disapply conflicting national legislation. The story depicted in the preceding paragraphs shows that there have been long-standing doctrinal debates about whether this duty is rooted in the principle of primacy or the principle of direct effect – and what that means for the broader constitutional significance of the European integration project. At the same time, it is fair to acknowledge the following: from the standpoint of claimants – or, for that matter, most legal practitioners – it matters relatively little whether that obligation is grounded in one of these principles, or even both, as established in *Poplawski II*.[407] Viewed from this perspective, the duty to disapply conflicting national legislation constitutes a

[405] Ibid para 192.
[406] Ibid, para 149.
[407] Case C-573/17, *Poplawski II*, EU:C:2019:530, paras 58 et seq. On that judgment, see Miasik and Szwarc, 'Primacy and Direct Effect – Still Together: *Poplawski II*' (2021) 58 Common Market Law Review 571.

remedy to be administered by the national judge when it is impossible to interpret the relevant national legislation in conformity with EU law. As Dougan put it,

> 'the principle of primacy is virtually inseparable, if not altogether indistinguishable, from its remedy of disapplication'.[408]

Viewing the duty to disapply as one remedy among a panoply including other remedies presents the undeniable advantage of shifting the emphasis to a discussion about the appropriate remedy to compensate for the illegality of national law. It is an invitation to explore alternative pathways – beyond, or perhaps in combination with, the duty to disapply – by which the claimant may be afforded judicial protection in cases where a breach of fundamental rights originates in public law but has repercussions in the realm of private law relationships.[409] Clearly, there is more than one legal avenue to obtain judicial redress for a breach of fundamental rights in such circumstances. Other remedies may be available to cure the illegality of the impugned national legislation. These include, for instance, the duty to interpret national law in conformity with EU law, the creation of individual subjective rights (and correlative obligations) enforceable in disputes between individuals, or, as Bobek rightly points out, the possibility of seeking financial compensation for damage or loss incurred as a result of that illegality.

Opting for one of these remedies also shifts the focus to a discussion about the powers attributed to national judges. This brings us to the second, and perhaps most important, contribution of Bobek to the debate on horizontality: his attempt to situate that debate within the broader constitutional landscape of the European Union. In his view, there is indeed:

> 'a considerable qualitative difference between, on the one hand, stating that a bill of rights might be used for review of compatibility and potential setting aside of conflicting legislation, as well as that it may be the source of conform interpretation reaching into horizontal situations too and, on the other hand, making the provisions of that bill of rights the *source of direct obligations* for private parties, irrespective of and/or in the absence of statutory provisions. That is also why, to my knowledge, in a number of legal systems, the national bill of rights would perform precisely those two functions, perhaps even coupled with the setting out of positive obligations that the State must assume. However, even if reaching into private law relationships in those ways, fundamental rights would still not be endowed, quite wisely, with horizontal direct applicability'.[410]

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[408] Dougan, 'Primacy and the Remedy of Disapplication' (2019) 56 Common Market Law Review 1459, 1466. For a similar view, see Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 501, 503.
[409] Dougan, 'Primacy and the Remedy of Disapplication', 1464-5.
[410] Opinion of AG Bobek in Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, para 140.

The reason for this is intrinsically related to the separation of powers between the different branches of government:

> '[b]ill of rights tend to be quite abstract and thus vague, as is the Charter. They are generally in need of further legislation to give them justiciable content. Imbuing those provisions with horizontal direct effect in and of themselves, for the rights and obligations of private individuals, opens the door to extreme forms of judicial creativity'.[411]

These (lengthy) excerpts shed light on one essential element about the doctrine of horizontality: the various manifestations of horizontality not only reflect different remedies for individuals but also reveal different conceptions of the role and prerogatives attributed to the national judiciary in protecting fundamental rights.

This ties into the complex issues surrounding how diverse national conceptions of the role of national judges in fundamental rights matters influence past and current controversies about the case law on horizontality. To clarify, it may be useful to briefly outline the main conception of constitutional justice that has developed in Europe over time. The prevailing classical mantra in most Member States is that judicial review of legislative statutes in the light of fundamental rights primarily involves a negative and abstract endeavour. The mandate of national (constitutional) judges charged with safeguarding fundamental rights is often framed in negative terms: they are seen as negative legislators. In other words, national judges can bark, but never bite – they can strike down national laws for their incompatibility with fundamental rights, but they cannot engage in positive lawmaking or assume the role of the legislature in the protection of fundamental rights.[412] Judicial control in this context generally focuses on an abstract appraisal of the (in)compatibility of national laws with fundamental rights norms.[413]

The flipside of this approach is that individuals cannot easily derive subjective rights and obligations from fundamental rights. Most Member States remain reluctant to adopt a more positive conception of the role and powers of national judges in this area. This is especially true in the context of private law relationships. The national reports

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[411] Ibid, para 141.

[412] To be sure, the considerations spelled out in this section are by no means intrinsic to the mandate of constitutional judges. This conception is influenced by secular ideas inherited from the Enlightenment and the French Revolution. To name but a few, Jacques-Jacques Rousseau and Montesquieu left their mark on continental legal thinking, especially with respect to the conception of the judiciary as being 'the mouthpiece of the law'.

[413] Of course, there are some exceptions. In Germany, for instance, individuals are explicitly authorised to bring judicial review proceedings in relation to alleged violations of their subjective fundamental rights in concrete situations. The German Basic Law spells out a subjective and concrete approach to the judicial review of statutes on account of fundamental rights. Even in Germany, however, the doctrine of horizontality has failed to penetrate deeply into legal culture. On that topic, see Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights', supra note 393.

gathered for the FIDE Congress held in The Hague in 2020 reveal that the national legal culture in several Member States:

> 'exhibits a more general reluctance to admit, or even overt resistance to, the proposition that fundamental rights should ever apply in purely private contexts'.[414]

The following section will therefore examine how national legal traditions regarding the role of judges in fundamental rights matters influenced doctrinal debates in the early judgments on horizontality.

2.3. Tracing the origins of horizontality: Early judgments and the indirect horizontal effect of EU equality rights

This section explains that the early judgments on horizontality reflect a negative conception of the powers conferred on national judges in enforcing EU equality rights. Ultimately, the case law gives expression to 'indirect horizontal effect'. In a nutshell, these judgments reflect an approach whereby EU fundamental rights generate legal effects through the intermediary of (the disapplication of) national legal provisions governing the rights and obligations of the parties in private law relationships. To illustrate this point, the present section focuses on two judgments: *Mangold* and *Kücükdeveci*. Taken together, these judgments represent the early or formative judgments on the doctrine of horizontality of EU fundamental rights. They connect to long-standing debates about the powers attributed to national judges in relation to the enforcement of EU law.

Viewed from the perspective of claimants, the crux of the matter concerns the type of remedies available to them when they seek to enforce the rights they derive from the EU principle of equal treatment in national court proceedings involving another private party, namely their employer. Ultimately, this section demonstrates that these judgments reflect a reluctance to embrace a positive conception of the powers vested in national judges involved in the implementation and/or enforcement of EU fundamentals equality rights. They give expression to a negative conception of the powers attributed to national judges in the assessment of the compatibility of national law with these rights. Therefore, this mandate did not fundamentally depart from the prerogatives conferred upon national (constitutional) judges in the course of an

[414] Dougan, 'General Report: National Courts and the Enforcement of EU Law' in op. cit. supra note 395, p. 36. The difficulty is further compounded by the Member States' reluctance to acknowledge that fundamental social rights (of the type developed in the relevant case law) can serve as legal benchmarks for the assessment of the compatibility of national law.

objective, or abstract, judicial review of the compatibility of national law with (national) fundamental rights.

2.3.1. The material issue: Does national law comply with the principle of equal treatment irrespective of age?

A great deal has already been said and written over the years about these early judgments. Since I do not wish to rehearse much of what has already been discussed elsewhere, the analysis will be relatively brief. In both cases, the main issue concerned the assessment of the compatibility of national law with the prohibition of discrimination on the ground of age, as set out in Article 6 of Directive 2000/78 ('the Equal Treatment Directive'). The case in *Mangold* concerned German legislation that allowed the conclusion of successive fixed-term contracts (without limitations) for employees who were 52 years old or older at the start of their employment relationship. The Grand Chamber of the Court found that the legislative scheme constituted a prohibited discrimination under the Directive. It concluded, in particular, that the German legislation established a difference in treatment based on age. Although this difference was motivated by legitimate concerns over the employability of older persons, the Court found that the national legislation was neither appropriate nor necessary to achieve this objective. This conclusion was reached because, as the Court stated, the age of the worker was the only criterion for applying a fixed-term employment contract.[415] Other relevant individual factors, such as prior employment history or the duration of unemployment, were not considered by the national legislature.[416] The national legislation was, therefore, deemed incompatible with the prohibition of discrimination established by the Equal Treatment Directive.

Similarly, the national legislation in *Kücükdeveci* provided that any period of employment completed before the age of 25 would not be considered when calculating the notice period for the termination of employment. In the main proceedings, Ms Kücükdeveci was dismissed by her private employer after ten years of employment, seven of which were completed before she turned 25. She sought to avail herself of periods of employment completed before reaching that age. To that end, she challenged the compatibility of national law with the prohibition of discrimination on the basis of age established by the Equal Treatment Directive. Unsurprisingly, the Grand Chamber of the Court found the national provision at issue to be discriminatory, and thus prohibited by Article 6 of the Directive. The Court reasoned that the rule introduced a difference in treatment based on the age at which the employee began their service with

[415] Case C-144/04, *Mangold*, para 65.
[416] Ibid, para. 64.

the employer.[417] The legitimate aim invoked by the referring court was to increase flexibility for employers in managing personnel and to enhance the personal or occupational mobility of young workers. However, because the rule did account for the employees' age at the time of dismissal, the Court deemed the national rule inappropriate for achieving this legitimate aim.[418]

2.3.2. The remedial issue: What kind of remedies are available to individuals affected by a breach of the principle of equal treatment on the grounds of age?

The assessment of the compatibility of national law with EU law concealed another, perhaps more problematic, issue regarding the type of that the national judiciary should administer to compensate for a breach of EU law. In *Mangold*, the deadline for implementing the Equal Treatment Directive had not yet passed when the illegal act was passed into law. As a result, the Directive did not have direct effect.[419] A similar issue arose in *Kücükdeveci*. Unlike *Mangold*, the period for implementing the Directive had already passed. Nevertheless, the national referring court expressed doubts about the implications a finding of incompatibility might have in the German legal order. It is useful to acknowledge that the duty of conform interpretation – which should be applied before the duty to disapply national legal norms – was somewhat unhelpful in this context. In both cases, the national referring court was adamant that the national legislation could not be interpreted in conformity with the general principle of equal treatment based on age. Thus, the issue arose of whether the referring court was bound to disapply national legislation deemed incompatible with the Equal Treatment Directive.[420]

The question asked to the Court in these cases reflected a broader doctrinal confusion regarding the effects of directives in horizontal settings. While the prohibition of horizontal direct effect had already been established in a series of seminal judgments, the Court's jurisprudence also hinted at the possibility that directives could impose additional obligations on individuals.[421] The distinction between exclusion and substitution, which was touched upon above, played a crucial role in debates about the horizontal effects of unimplemented directives. Legal scholars used this distinction to

[417] Case C-555/07, *Kücükdeveci*, paras 29-30.
[418] Ibid, para 40.
[419] The Court rightly pointed out that the Member State concerned had to refrain from adopting any measure that could frustrate the attainment of the result prescribed by the Directive.
[420] Case C-144/04, *Mangold*, para 30.
[421] In fact, the Court acknowledged that EU directives could produce incidental or triangular direct effect, in the sense that the disapplication of a legal norm in the context of vertical proceedings could affect the rights and obligations of a third private party. On that topic, see Dashwood, '*From* Van Duyn *to* Mangold *via* Marshall: *Reducing Direct Effect to Absurdity*?' (2007) 9 Cambridge Yearbook of European Legal Studies 81, 94 et seq.

address the diminishing conceptual coherence of the prohibition on horizontal direct effect of directives. While there was little doubt that directives could not produce direct horizontal effect in the strict sense – namely, by creating subjective rights and obligations enforceable in horizontal proceedings – it was suggested that directives, either alone or in conjunction with EU general principles, could give rise to a duty to disapply conflicting national laws in horizontal disputes.

Against this background, both *Mangold* and *Kücükdeveci* revolved around the same issue: can the Equal Treatment Directive, or the general principle of equal treatment on the ground of age,[422] be invoked in disputes between private parties to set aside a conflicting national provision? In both cases, the Grand Chamber of the Court went to great lengths to ensure that individuals would be afforded judicial protection in national courts. Despite the (well-established) absence of horizontal direct effect of directives, the Court held that the general principle of non-discrimination on grounds of age required the disapplication of the conflicting national norm. This outcome was based on the distinction between, on the one hand, the general principle – which the Court found to derive from international instruments and the common constitutional traditions of the Member States – and, on the other hand, the Equal Treatment Directive, which merely '[gave] expression' to this principle.[423] Based on this distinction, the Grand Chamber concluded that it was the general principle, not the Directive, that triggered the disapplication of incompatible national rules.

After *Mangold*, there was some uncertainty regarding whether the outcome was based on the Equal Treatment Directive or the general principle. The judgment in *Mangold* focused predominantly, if not exclusively, on the compatibility of national law with the Equal Treatment Directive. The general principle of equal treatment regardless of age was only mentioned in the later stages of the judgment to overcome the absence of horizontal direct effect of directives. This fuelled suggestions that it was the directive itself, rather than the general principle, that produced horizontal direct effect.

In *Kücükdeveci*, the Court was more explicit.[424] In that case, the referring court sought clarification on whether the general principle or the Directive served as the basis for assessing the compatibility of national law with EU law. The Court was clear in its response, stating that:

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[422] As highlighted by Takis Tridimas, the questions referred to the Court of Justice in *Mangold* did not even mention the existence of that general principle (Tridimas, 'Horizontal Effects of General Principles' in op. cit. supra note 389, p. 219).

[423] Case C-144/04, *Mangold*, para 74; Case C-555/07, *Kücükdeveci*, paras 20, 50.

[424] However, see Tinière, 'L'Invocabilité des Principes de la Charte des Droits Fondamentaux dans les Litiges Horizontaux' (2014) Revue des Droits et Libertés, who opined that *Kücükdeveci* could also be taken to mean that EU directives can produce exclusionary effects in horizontal settings by themselves (that is to say, irrespective of whether they are read in combination with a general principle of EU law).

> 'it was the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether European Union law precludes national legislation such as that at issue in the main proceedings'.[425]

The Grand Chamber reiterated this distinction when it considered the remedial implications of finding national law incompatible with EU law. While the Equal Treatment Directive was deemed incapable of producing horizontal direct effect, it could still give rise to a duty of consistent interpretation of national law. Nevertheless, the national referring court was instructed to protect individuals wishing to rely on the principle of non-discrimination on the grounds of age by disapplying the incompatible national legal norm.[426] Several legal commentators suggested that the Court thereby acknowledged the *de facto* horizontal effect of the Equal Treatment Directive.[427]

The distinction between exclusion and substitution once again proved to be a key building block to conceptualise the obligations weighing on national judges with respect to the enforcement of the principle of non-discrimination on the ground of age. This discussion reflected long-standing debates about the interaction between direct effect and primacy.[428] It has often been suggested that *Mangold* and *Kücükdeveci* owed more to the principle of primacy than direct effect.[429] However, the opposite view also garnered significant support in academic literature. Some commentators argued that *Mangold* and *Kücükdeveci* gave expression to the principle of direct effect.[430] For

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[425] Case C-555/07, *Kücükdeveci*, para 29.
[426] Ibid, para 51.
[427] De Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination', supra note 394, 123; Pech, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez'* (2012) 49 Common Market Law Review 1841, 1876.
[428] Section 2.1.
[429] Lazzerini, 'The Horizontal Application of the General Principles of EU Law: Nothing Less Than Direct Effect' in Ziegler, Neuvonen and Moreno-Lax (eds), *Research Handbook on General Principles of EU Law: Constructing Legal Orders in Europe* (Edward Elgar Publishing, 2022), p. 176; Reich, 'The Public/Private Divide in European Law' in Hans-Wolfgang Micklitz and Fabrizio Cafaggi (eds), *European Private Law After the Common Frame of Reference* (Edward Elgar Publishing, 2010), p. 74; Pech, 'Between Judicial Minimalism and Avoidance', supra note 427, 1879; Opinion of AG Bobek in Case C-193/17, *Cresco Investigation*, esp. paras 119 et seq.
[430] Muir, 'Of Ages in – and Edges of – EU Law' (2011) 48 Common Market Law Review 39, 56; Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 European Law Review 479, 485. An argument in that sense was alleged to derive from the formal belonging of the Charter to the realm of EU primary law. Because the Charter enjoys the same legal status as the Treaties (Art. 6, TFEU), its provisions should be capable of producing horizontal direct effect, in the same way as Articles 157 TFEU was deemed to produce horizontal direct effect in *Defrenne* (see Case C-43/75, *Defrenne*, EU:C:1976:56). Interestingly, Dougan similarly establishes a parallel between *Mangold* and *Defrenne* (Dougan, 'In Defence of Mangold?' in Arnull, Barnard, Dougan and Spaventa (eds), *A Constitutional Order of States? Essays in Honour of Alan Dashwood* (Hart Publishing, 2011), p. 227. On that topic, see also De Mol, '*Dominguez*: A Deafening Silence' (2012) 8 European Constitutional Law Review 280, 293-294; Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights', supra note 393, 301-302; Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 European Law Journal 657, 661-662.

example, Dougan coined the term 'collateral direct effect' to describe how the doctrine actually worked in practice.[431]

Ultimately, the views expressed by both doctrinal models followed broadly similar lines. As Elise Muir put it, the distinction boiled down to 'the categorization of the adverse effects of incidental judicial review on individuals'.[432] According to one view, it matters relatively little whether EU law produces exclusionary, as opposed to substitutionary, effects in horizontal proceedings. After all, the disapplication of national law necessarily entails that the rights and obligations intrinsic to the legal relationship between private parties are modified by virtue of EU law.[433] These exclusionary effects could therefore be depicted as an instance of (horizontal) direct effect.[434] According to another view, the mere setting aside of national legislation did not derive from direct effect but rather from the principle of primacy.

In either case, the bottom line can be summarised as follows: in these judgments, the principle of equal treatment was used as a standard for the objective, or abstract, assessment of the legality of national law.[435] It matters relatively little whether the solution developed by the Court was grounded on primacy, direct effect, or a combination of both. The 'public law' dimension of the matter under consideration also means that fundamental social rights were not used to derive subjective rights and obligations directly enforceable in the context of private law disputes, independently of the existence of some other national legal norm. Only the latter situation could be described as an expression of 'direct' or 'pure' horizontal effect, as defined in section 2.1.[436] Using the term 'horizontal direct effect' to describe the early judgments is

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[431] Dougan, 'In Defence of Mangold?' in ibid. On that topic, see Dougan, 'General Report: National Courts and the Enforcement of EU Law' in op. cit. supra note 395, p. 35.

[432] Muir, 'Of Ages in – and Edges of – EU Law', supra note 430, 89.

[433] Dashwood, 'From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?', supra note 421, 103; Prechal, 'Horizontal Direct Effect of the EU Charter of Fundamental Rights of the EU' (2020) 66 Revista de Derecho Communitario Europea 407, 410.

[434] The necessity to maintain the normative coherence of the trigger model has presumably prompted legal scholars to suggest that EU law could also produce substitutionary effects in horizontal settings, in the sense ascribed to that term in this chapter. On that topic, see Craig, 'The Legal Effect of Directives: Policy, Rules and Exemptions' (2009) 34 European Law Review 349, 369; Spaventa, 'The Horizontal Application of Fundamental Rights as General Principles of Union Law' in Arnull, Barnard, Dougan and Spaventa (eds), *A Constitutional Order of States? Essays in Honour of Alan Dashwood* (Hart Publishing, 2011), p. 210.

[435] Compare Opinion of AG Bobek in Case C-193/17, *Cresco Investigation*, para 129 with Dougan, 'General Report: National Courts and the Enforcement of EU Law' in op. cit. supra note 395, p. 35.

[436] Fornasier, 'The Impact of EU Fundamental Rights on Private Relationships: Direct or Indirect Effect?' (2015) 23 European Review of Private Law 29, esp. 31-32: '[t]he model of *direct effect* rests on the proposition that fundamental rights – at least, some of them – bind not only the state but also private individuals […] [F]undamental rights may also impose obligations on private parties. The model of *indirect effect*, on the other hand, presumes that fundamental rights bind solely the state'; Safjan and Miklaszewicz, 'Horizontal Effect of the General Principles of EU law in the Sphere of Private Law' (2010) 18 European Review of Private Law 475, 477-8. The authors distinguish between, on the one hand, the category of direct horizontal effect, whereby fundamental rights give rise to subjective rights

therefore misleading. As Leczykiewicz observes, the Court in these judgments 'is not assessing [private] conduct but reviews normative content of Union or national law'.[437] This explains why private law scholars would prefer the term 'indirect horizontal effect' to describe the Court's case law.[438]

Based on the foregoing considerations, the crux of the matter can be summarised as follows: in the early judgments on horizontality, the role of national courts was conceptualised negatively. National courts were not under the obligation to secure judicial protection of subjective rights and obligations directly available to individuals affected by a breach of their social rights in horizontal proceedings. EU law merely prescribed that they had to disapply conflicting national legal norms, without specifying the positive implications that might arise from such a finding of illegality. Marek Safjan similarly opined that:

> 'the influence of fundamental rights by means of CJEU decisions on private law relationships […] essentially assume[d] a two-tier form. The process [is] effectuated through national law, not by a direct structuring of the existing horizontal relationships, as sometimes occurs in the decisions of national civil courts ruling on disputes between individual parties. It is therefore possible to speak of the horizontal effect of fundamental rights in terms of an indirect effect (through legal acts), although the form and intensity of this impact may not be homogenous'.[439]

2.4. Interim conclusion

This section revisited the early case law on the horizontality of EU fundamental equality rights. It explained that the concept of horizontality encompasses various horizontal effects, reflecting different conceptions of the role of judges in matters concerning fundamental rights. The debate about the early jurisprudence was therefore framed as a discussion about the role of national judges in the application and enforcement of EU fundamental equality rights.

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that can be 'applied directly as grounds for potential claims against the other party to the contract, and … [can] influence or shape the content of' the contract; and, on the other hand, indirect horizontal effects. The latter category is said to encompass two 'separate forms': first, horizontal effects arising from the application of 'general clauses' of private law (e.g., good faith, principles of justice, etc.); and second, the interpretative duty to seek an interpretation most consistent with fundamental rights.

[437] Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights', supra note 430, 489.

[438] On that topic, see Hartkamp, 'The Concept of (Direct and Indirect) Horizontal Effect of EU law: The Terminology of European Law Scholars and of Private Law Scholars Compared' in op. cit. supra note 394.

[439] Safjan, 'The Horizontal Effect of Fundamental Rights in Private' in op. cit. supra note 382, p. 139.

To be sure, the picture depicted in this section also highlighted that the debate also revolved around the limits of the mandate of the European Court of Justice in interpretating the material content of the right to equal treatment on the grounds of age (under primary law). Additionally, the debate touched upon the powers available to national judges to ensure the judicial protection of individual rights in horizontal proceedings between two private parties. In essence, the mandate conferred on national judges was framed negatively. Beyond the disapplication of conflicting national legal provisions, EU law provided little in terms of positive rights or remedies directly enforceable in national court proceedings.

Of course, this does not mean that the Court's judgments were not intended to have positive implications in domestic law. Bruno De Witte, for instance, opined (albeit in the context of free movement law) that the Court has traditionally formulated 'implicit' or disguised positive obligations.[440] By inviting national judges to disapply incompatible national legal norms, the Court implicitly set out such obligations. However, it should be emphasized that the responsibility to implement the 'implicit' obligations envisioned by the Court rested with the national legislature. As Schiek noted, the judge was not instructed to take on the mantle of the legislature.[441] In fact, the obligation placed on national judges to disapply the relevant national legal provision led to a legal vacuum. There was little in terms of positive procedural obligation instructing national judges to fill that gap.

Of course, it is not entirely implausible that national judges could fill that gap by virtue of national law. The key point is that this prerogative did not stem from EU law alone, but rather from national law. This is where the discussion about national limitations on the judicial enforceability of equality rights, and the limited powers vested in national judges in fundamental rights matters, comes back to the fore. As established above, the national legal traditions of most Member States are averse to the idea that fundamental rights can create self-standing subjective rights and obligations in the context of disputes between private parties.[442] The controversy in *Dansk Industri* is perhaps the most blatant illustration of the Member States' reluctance to embrace the doctrine of horizontality of fundamental rights.[443] Beyond this, it is also fair to

[440] De Witte, 'The Strange Absence of a Doctrine of Positive Obligations under the EU Charter of Rights' (2020) n°4 Quaderni costituzionali 854; De Witte, 'Unseen Positive Obligations for the Member States: From Free Movement to the Charter of Rights' in Melin, Schoenmaekers, Carrera and Michielsen (eds), *The Art of Moving Borders: Liber Amicorum Hildegard Schneider* (Eleven International Publishing, 2022).

[441] Schiek, 'The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation' (2006) 35 Industrial Law Journal 329, 338.

[442] On national traditions on horizontality, see the national reports collected within the purview of the FIDE Congress held in The Hague in 2020 (*National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order* (Eleven International Publishing, 2020)).

[443] Case C-441/14, *Dansk Industri (DI)*, EU:C:2016:278. On that controversy, see Šadl and Mair, 'Mutual Disempowerment: Case C-441/14 *Dansk Industri, acting on behalf of Ajos A/S v Estate of*

acknowledge that the doctrine of horizontality – especially its most far-reaching forms of expression, such as 'direct horizontal effect' – has thus far failed to penetrate the national legal culture of a significant number of Member States.[444] One can therefore easily understand Eleni Frantziou, when she warns that:

> 'ascribing wide-ranging horizontal effect to fundamental rights through the Charter risks significantly upsetting domestic constitutional choices. It is likely to be a particularly divisive issue for those Member States that have limited or very deeply rooted horizontal effect regimes, to the extent that it involves potential constitutional changes, at least in respect of the situations that come within the scope of EU law'.[445]

Karsten Eigil Rasmussen'*Rasmussen* and Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A*' (2017) 13 European Constitutional Law Review 347; Madsen, Olsen and Šadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the *Ajos* case and the National Limits of Judicial Cooperation' (2017) 23 European Law Journal 140; Holdgaard, Elkan and Krohn Schaldemose, 'From Cooperation to Collision: The ECJ's *AJOS* Ruling and the Danish Supreme Court's Refusal to Comply' (2018) 55 Common Market Law Review 17, esp. 46. The controversy was fuelled by different conceptions of the respective roles of the judiciary and the legislature with respect to the protection of fundamental rights. The argument developed by the Danish Supreme Court reflected the Danish conception of democracy: it evinced a conception according to which the ultimate source of democratic will lies with the Danish people. This also means that it is not for the judiciary to challenge the choices expressed by the democratically elected parliament. That conception was reflected in the Supreme Court's emphasis on textual interpretation and judicial self-restraint. More specifically, the Supreme Court was keen to emphasise the limits of its judicial mandate. Disapplying the impugned national norm for its alleged incompatibility with an unwritten norm plucked out of the air by the Court of Justice would allegedly overstep these limits. Viewed from that perspective, this controversy illustrates perfectly well how the Danish legal culture clashes with the teleological mode of reasoning generally employed by the Court of Justice.

[444] To name but one example, the *Drittwirkung*, as it is conceived in Germany, falls short of recognising that fundamental rights may produce subjective rights and duties invocable as such in horizontal situations. The position was established in *Lüth*, where the German Federal Constitutional Court opted in favour of *indirect* horizontal effect. BVerfG 15 January, BVerfGE 7, 198. On this issue, see Brüggemeier and Ciacchi, 'Introduction' in Brüggemeier, Ciacchi and Comande (eds), *Fundamental Rights and Private Law in the European Union, Volume 2: Comparative analysis of Selected Case Patterns* (Cambridge University Press, 2010), pp. 5 et seq.; Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights', supra note 393, esp. 302 et seq.

[445] Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU', supra note 430, 671.

3. *Bauer* and *Max-Planck*: A decisive step towards fully-fledged direct horizontal effect?

Over the past few years, the European Court of Justice has progressively expanded the scope of the doctrine of horizontality beyond the confines of the principle of equal treatment on the grounds of age. The Court has acknowledged that the doctrine of horizontality could also be applied to other, labour-related equality rights enshrined in the Charter, such as the right to equal treatment on the grounds of religion and the right to paid annual leave.[446] In parallel, the Court has adopted a more positive conception of the role of national judges in this context. On several instances, the Court has ruled that these rights could produce positive implications in horizontal judicial proceedings, going beyond the mere disapplication of incompatible national laws.[447] One commentator described this development as the 'victory of direct horizontal effect in fields covered by EU law'.[448]

The positive understanding of horizontality in recent judgments has sparked renewed doctrinal discussions on how the case law aligns or contrasts with national legal traditions regarding the role of national judges in fundamental rights matters. As Bobek observed,

> 'the majority of the Member States' legal orders refuse the possibility that human rights would be of horizontal direct applicability, i.e. as being in and of themselves the very source of rights and obligations afforded to private parties'.[449]

The judgments delivered by the Grand Chamber in *Max-Planck* and *Bauer* provide a useful starting point for this discussion. These cases reflect a discernible trend towards a more positive conception of the role of equality rights in horizontal proceedings. These rights are no longer simply viewed as legal benchmarks for assessing the legality of national law; crucially, they are also regarded as a source of self-standing subjective rights and obligations, directly enforceable in horizontal judicial proceedings between private parties. In this context, the role of national judges is no longer limited to simply set aside or disapplying conflicting national provisions; they must now also ensure the judicial protection of subjective rights and obligations stemming from EU fundamental equality rights. *Bauer* and *Max-Planck* reflect a conception of justice focused on the

[446] Case C-404/16, *Egenberger*, EU:C:2018:257; Case C-68/17, *IR*, EU:C:2018:696; Case C-193/17, *Cresco Investigation*, EU:C:2019:43.
[447] Case C-193/17, *Cresco Investigation*, EU:C:2019:43.
[448] Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights', supra note 393, 304.
[449] Bobek, 'Institutional Report: National Courts and the Enforcement of EU Law' in op. cit. supra note 392, p. 67.

enforcement of subjective rights and obligations in court proceedings involving private parties (section 3.1).

The development of a positive conception of the role of national judges involved in inter-personal litigation over (fundamental) equality rights appears difficult to reconcile with national legal traditions regarding the role of judges in fundamental rights matters. As noted earlier, many Member States remain reluctant to fully embrace the idea that fundamental rights can have direct horizontal effect. The development of a positive understanding of horizontality invites renewed scrutiny of how the Court's approach squares with national legal traditions concerning the role of national judges involved in fundamental rights litigation.

This section takes up that challenge. It explains that the Court has demonstrated sensitivity to national legal traditions regarding the judicial enforcement of equality rights, first and foremost by establishing a distinction between rights-conferring and non-rights-conferring provisions. However, this binary distinction obfuscates to some extent the debate on the appropriate remedy for the horizontal enforcement of non-rights-conferring provisions (section 3.2). Moreover, this section highlights that the Court has embraced a more comprehensive understanding of horizontality, in a pledge to allow the Member States to accommodate their preferred conception of horizontality (section 3.3). Finally, this section discusses how the procedural rights and remedies developed by the Court align with recent legislative initiatives on the creation of information rights. By carving out information rights for workers, the Court also seems sensitive to the normative concerns intrinsic to equality law (section 3.4).

3.1. Article 31(2) of the Charter as a source of directly enforceable subjective rights in horizontal proceedings

Before analysing *Bauer* and *Max-Planck*, it is necessary, from the outset, to provide some context regarding the circumstances at issue in each of these cases. The proceedings in *Max-Planck* concerned national legislation providing that individual workers lose their right to paid annual leave (and the corresponding allowance *in lieu*) if an application for this right was not submitted before the end of the employment relationship. In *Bauer*, the proceedings involved national legislation under which the right to paid annual leave ceased to exist and could not be transmitted to the worker's legal heirs if the employment relationship ended due to the worker's death. In both cases, the Court was called upon to answer the following question: can Article 31(2) of the Charter be invoked in private law proceedings to set aside a national provision conflicting with this right?

In the wake of *Dominguez*,[450] it remained unclear whether the right to paid annual leave under Article 31(2) of the Charter could produce such indirect horizontal effect. While the opinion of Advocate General Trstenjak in the *Dominguez* case offered three possible pathways for granting horizontal effects to that right,[451] the Court remained somewhat oblivious to the issue.[452] *Dominguez* was thus seen as a 'first step in the direction of a restrictive interpretation of *Mangold* and *Kücükdeveci*'.[453] The reason for this was simple: the Court's assessment was based solely on the Working Time Directive, with no mention of the Charter. Consequently, most legal commentators disapproved:

> 'the Court's reluctance to engage with the issue of the constitutional status of the Charter and the distinction between rights and principles enshrined therein'.[454]

Although the Court affirmed that the 'entitlement of every worker to paid annual leave' constituted a 'particularly important principle of European social law',[455] this statement raised salient questions about the nature of that entitlement. Topical questions remained, particularly whether this entitlement was a fundamental right or a principle under Article 52(5) of the Charter,[456] and whether it could be invoked directly in legal disputes between private parties – and, if so, to what extent.[457] The implications of the distinction set out in Article 52(5) will be addressed in Section 3.2. At this point, it is sufficient to note that this distinction has obvious implications for the judicial enforceability of Charter provisions. On the one hand, principles may be used as a standard of review for assessing the legality of national law, and cannot give rise to subjective rights enforceable by individuals affected by breaches of these principles. This reflects an objective conception of judicial protection. On the other hand, rights express a subjective conception of justice, enabling individuals to assert their rights in national judicial proceedings.

In *Bauer* and *Max-Planck*, the Grand Chamber of the Court clarified that the right to paid annual leave under Article 31(2) of the Charter could indeed be invoked directly

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[450] Case C-182/10, *Dominguez*, EU:C:2012:33.
[451] Opinion of AG Trstenjak in Case C-182/10, *Dominguez*, EU:C:2011:559.
[452] On that judgment, see De Mol, '*Dominguez*: A Deafening Silence', supra note 430; Pech, 'Between Judicial Minimalism and Avoidance', supra note 427, 1841.
[453] De Mol, '*Dominguez*: A Deafening Silence', supra note 430, 302.
[454] Panasci, 'The Right to Paid Annual Leave as an EU Fundamental Social Right. Comment on *Bauer et al.*' (2019) 26 Maastricht Journal of European and Comparative Law 441, 446.
[455] Case C-182/10, *Dominguez*, para 16.
[456] Article 52(5) of the Charter states that: '[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by the institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'.
[457] Nogueira-Guastavino, 'A Principle Vanishes and a Right Arises: Paid Annual Leave as a Fundamental Right and its Impact on Liability for Breach of EU Law' in Izquierdo-Sans, Martinez-Capdevila and Nogueira-Guastavino (eds), *Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of Appreciation* (Springer, 2021), p. 41.

in private law proceedings. The Court also suggested, somewhat explicitly, that this provision could give rise to subjective rights and obligations, directly enforceable in private law proceedings. Admittedly, *Bauer* and *Max-Planck* 'concern[ed] the behaviour of the national legislatures and not the behaviour of private parties'.[458] The core issue in both cases revolved around the compatibility of national law with the right to paid annual leave set out in Article 31(2) of the Charter. Viewed from this perspective, these judgments did not represent a radical departure from the case law discussed earlier. Much like the early judgments on horizontality, they focused on an objective assessment of whether national law was compatible with the fundamental right to paid annual leave. The remedy proposed by the Court in this context was not without precedent; the national referring court was invited to disapply the conflicting national provisions. Therefore, it could be suggested that these judgments reflected an instance of indirect horizontal effect, similar to the approach taken in *Mangold* and *Kücükdeveci*.

However, the language employed in *Bauer* and *Max-Planck* left little room for debate: these judgments reflected a subjective conception of access to justice in equality matters, meaning that fundamental equality rights operate as a source of subjective rights and obligations directly enforceable in horizontal proceedings. In other words, they gave expression to direct horizontal effect.[459] The statement formulated by the Court in para 81 of *Max-Planck* is particularly instructive. The Court stated that the national referring court had to:

> 'disapply the national legislation and ensure that, should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly, and in the event of termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid, in that case, directly by the employer concerned'.[460]

In other words, the national referring court was not merely instructed to set aside, or strike down, national legal requirements deemed incompatible with Article 31(2) of the Charter. Rather, the national referring court was also required to enforce the subjective rights and obligations arising from the right to paid annual leave. The task of national courts was thus re-evaluated: they were required to ensure the judicial protection of workers' subjective rights under Article 31(2) of the Charter.

[458] Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: *Bauer and Wilmeroth, MPG'* (2021) 58 Common Market Law Review 1173, 1193-1194.
[459] Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights', 1194-5.
[460] Case C-648/16, *Max-Planck*, para 81.

The reasoning in support of *Bauer* and *Max-Planck* was grounded in the right-conferring nature of this provision. As the Court stated, the right to paid annual leave enshrined in Article 31(2) was deemed:

> 'sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter'.[461]

The Court also emphasised that:

> 'the right of every worker to paid annual leave entails, by its very nature, a corresponding obligation on the employer, which is to grant such periods of paid leave or an allowance in lieu of paid annual leave not taken upon termination of the employment relationship'.[462]

In essence, the crux of the matter can be summarised as follows: for EU fundamental rights to operate as a source of rights and duties in the context of horizontal proceedings, they must be capable of producing a subjective right for the worker and a correlative obligation for the employer.[463] To put it differently, the Court's approach was based on the rights-conferring nature of the fundamental right to paid annual leave enshrined in Article 31(2) of the Charter. This has led Sacha Prechal to observe:

> '[w]hat is different from standard case law on direct effect is the fact that the provision of the Charter must confer a right'.[464]

Other legal commentators echo this view. Former-AG Bobek similarly suggested (in an extra-judicial context) that the conception of direct effect in the case law on horizontality of fundamental equality rights could be 'something else' compared to other types of EU law provisions.[465]

In some respects, the concept of direct effect at play in the case law on horizontality departs from the traditional approach that has dominated the Court's case law until now. As demonstrated in Chapter 2,[466] the Court has acknowledged that direct effect extends to provisions that do not necessarily confer subjective rights. In the field of environmental law, for instance, direct effect has served primarily to underpin an objective conception of legality review, aimed at ensuring that national public

[461] Ibid, para 74.
[462] Ibid, para 79.
[463] Bailleux, 'L'Effet Direct Horizontal des Droits Fondamentaux. Le Critère du Pouvoir-Savoir, Ligne Claire de la Jurisprudence?', supra note 387, 332 ; Frantziou, 'Case C-176/12 *Association de Médiation Sociale*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' (2014) 10 European Constitutional Law Review 332, 344.
[464] Prechal, 'Horizontal Direct Effect of the EU Charter of Fundamental Rights of the EU', supra note 433, 420.
[465] Bobek, 'Institutional Report: National Courts and the Enforcement of EU Law' in op. cit. supra note 392, p. 66.
[466] Chapter 2, Section 2.

authorities properly implement environmental obligations. By contrast, the conception prevailing in the case law on the horizontality of equality rights is grounded in the capacity of individual workers to enforce their subjective rights in private law disputes against other individuals.

Viewed from this perspective, the enquiry into the intended effects of EU law within the national legal orders of the Member States appears to revolve less around whether a provision is capable of producing direct effect, and more around the nature of the provision at stake and the type of proceedings in which it is invoked. In other words, the onus of the enquiry seems to have shifted – from a binary assessment of whether EU law has direct effect, to a more intricate assessment of how, and in what context, a provision is enforced. In the area of equality law, the private law nature of equality rights calls for a subjective conception of justice, that enables individual workers to enforce their rights in private law disputes against other individuals. The relevant Charter provision must be sufficient 'in itself' to confer on individual workers a subjective right that they may enforce in the context of horizontal proceedings. In doing so, the Court articulated a subjective and concrete conception of legality review, grounded in the conferral of subjective rights directly enforceable in judicial proceedings between private parties.[467] As we shall see, this approach also raises difficult challenges regarding the (lack of) justiciability of non-rights conferring Charter provisions.

In *Bauer* and *Max-Planck*, the right to paid annual leave was deemed self-sufficient to be invoked directly in horizontal proceedings. In support of that conclusion, the Court placed significant emphasis on the wording of Article 31(2) of the Charter. Unlike other Charter provisions – such as Article 27 of the Charter, discussed below, Article 31(2) did not make reference to the 'cases' and 'conditions provided for by Union law and national laws and practices'.[468] According to the Court, this implied that the right to paid annual leave did not need to be:

> 'given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right'.[469]

By the same token, the Court established that the right to paid annual leave was not merely a guiding principle; it was elevated to the status of a fundamental right capable of being applied directly in legal relationships between private parties.[470] This meant, in other words, that it could serve to support the disapplication of national norms

[467] Bailleux, 'L'Effet Direct Horizontal des Droits Fondamentaux. Le Critère du Pouvoir-Savoir, Ligne Claire de la Jurisprudence?', supra note 387, 332.
[468] Case C-648/16, *Max-Planck*, para 73.
[469] Ibid, para 74; Joined Cases C-569/16 and C-570/16, *Bauer*, para 85.
[470] Panasci, 'The Right to Paid Annual Leave as an EU Fundamental Social Right', supra note 454, 447; Fenoglio, 'Le Ferie: Il Dialogo fra le Corti si fa Intenso' (2021) 7 Labour & Law Issues 83, 84.

deemed incompatible with Article 31(2) of the Charter (even in the context of legal disputes between individuals). Crucially, it also supported the creation of subjective rights and obligations, which it was the responsibility of the national judiciary to protect in legal disputes between individuals.

In spite of this, the requisite conditions for a Charter provision to have direct horizontal effect have resisted clear-cut systematisation in the Court's case law.[471] To assess whether that is the case, it seems necessary to determine whether a given Charter provision is both mandatory and unconditional. However, based on the relevant case law, it is difficult, if not impossible, to strike a neat distinction between these requirements. *Max-Planck* serves as a case in point to illustrate this tension. The Court initially stated that the right to paid annual leave was 'as an essential principle of EU social law, mandatory in nature'.[472] This seemed to suggest that the mandatory nature of the relevant Charter provision stemmed from its belonging to the category of 'essential principles of EU social law'. But the Court also ascribed the mandatory nature of this provision to the wording of Article 31(2) of the Charter. According to the Court,

> '[by] providing, in mandatory terms, that 'every worker' has the 'right' 'to an annual period of paid leave' without referring […] to the 'cases' and 'conditions provided for by Union law and national laws and practices', Article 31(2) of the Charter, reflects the essential principle of EU social law from which there can be no derogations only in compliance with the strict conditions laid down in Article 52(1) of the Charter and, in particular, the fundamental right to paid annual leave'.[473]

To complicate matters even further, the absence of reference to the adoption of additional implementing legislation, whether at the EU or domestic level, also constitutes a relevant parameter for assessing whether a given provision is unconditional, in the sense attributed to that term by the Court. One can easily understand why Panasi observed that 'it is unclear how the mandatory nature of a Charter provision can be ascertained'.[474]

This state of uncertainty has led legal scholars to attempt to identify the requisite criteria governing the operation of the EU doctrine of horizontality. According to Sacha Prechal, two conditions must be satisfied.[475] The first condition concerns the nature of the right at stake, which must be:

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[471] Frantziou, 'Case C-176/12 *Association de Médiation Sociale*', supra note 463, 345.
[472] Case C-648/16, *Max-Planck*, para 72.
[473] Ibid, para 73.
[474] Panasci, 'The Right to Paid Annual Leave as an EU Fundamental Social Right', supra note 454, 448.
[475] It is interesting to note that Prechal dispelled the possibility that the fundamental right under consideration must necessarily form part of general principles of (EU) law to be capable of producing direct horizontal effect.

> 'capable, as far as its content is concerned, of playing a role in relationships between private individuals'.[476]

This condition finds echo in *Max-Planck* and *Bauer*. In both judgments, the Court was clear that the right to paid annual leave could indeed give rise to subjective rights in favour of workers, while imposing corresponding duties on their employers.[477] The second condition requires that the fundamental right at stake must be 'sufficient in itself to confer a right'.[478] According to Lazzerini, this condition entails that the fundamental right must be 'legally perfect' to be applied in national court proceedings.[479] In Prechal's view, this requirement will be deemed satisfied if a given Charter provision is both mandatory and unconditional. The mandatory nature of a right allegedly derives from the fact that that right concerned does not allow for derogation. The requirement of unconditionality is understood to mean that the right is not subject to the adoption of additional EU or national legislation meant to define its material content. However, other commentators have treated the requirement of mandatory nature of the relevant right as a distinct, self-standing requirement separate from the condition of (normative) self-sufficiency.[480]

In view of the foregoing, it may be suggested that the doctrine of horizontality of Charter provisions boils down to an assessment of normative self-sufficiency – i.e., whether the relevant provision is sufficiently clear and unconditional to give rise to subjective rights and obligations that individuals can invoke in national judicial proceedings. The condition relating to the absence of additional implementing measures is key here: if a provision requires additional measures, it cannot be considered self-sufficient to give rise to subjective rights in national judicial proceedings. Furthermore, the nature of the provision helps determine whether it is intended to govern relationships between private individuals or entities, or whether it primarily addresses state obligations – which is essential in assessing whether it may be invoked in private law disputes. Specifically, the private law dimension of equality

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[476] Prechal, 'Horizontal Direct Effect of EU Charter of Fundamental Rights of the EU', supra note 433, 419.
[477] See, e.g., Case C-648/16, *Max-Planck*, paras 78-79.
[478] Prechal, 'Horizontal Direct Effect of EU Charter of Fundamental Rights of the EU', supra note 433, 420.
[479] Lazzerini, '(Some of) the Fundamental Rights Granted by the Charter May Be a Source of Obligations for Private Parties: *AMS*' (2014) 51 Common Market Law Review 907, 925.
[480] Muir, 'The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from *Mangold* to *Bauer*', supra note 386, 201. Lucia Serena Rossi similarly suggested that the mandatory nature of the relevant Charter provision referred to the 'absolute nature of the right at issue, from which there can be no derogation, but also to […] the traditional criteria of clarity and precision required for having direct effects'. She suggested that the condition of unconditionality turns on the normative self-sufficiency of the relevant provision, that does not need to be given concrete expression by the provisions of EU or national law (Rossi, 'The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations' (25 February 2019) EU Law Analysis <http://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html> (last accessed, 16 August 2022).

rights plays a crucial role in shaping a subjective conception of justice, empowering individual workers to assert and enforce their rights in disputes with other private actors.

3.2. The distinction between rights-conferring and non-rights-conferring Charter provisions: A new legal test eclipsing the remedies debate?

The requirement that fundamental equality rights must generate subjective rights to produce horizontal effects raises difficult challenges regarding the justiciability of non-rights-conferring Charter provisions. In the light of *AMS*, there appears to be little in terms of what EU law prescribes concerning remedies available to individuals affected by breaches of such provisions. This section explains that the case law has been criticised for failing to secure judicial protection for individuals affected by such breaches. It also suggests an alternative reading of *AMS*, which may open space for a more nuanced discussion about the type of horizontal effects produced by non-rights-conferring Charter provisions (or, at the very least, the workers' right to information and consultation set out in Article 27 of the Charter).

The circumstances leading to *AMS* may be summarised as follows. The core issue revolved around the obligation, set out in Directive 2002/14,[481] to establish bodies for the representation of employees. Under Article 3(1) of the Directive, this obligation was conditional upon reaching specific thresholds based on the number of employees. According to French law, a specific category of employees benefitting from assisted contracts was excluded from the calculation of this threshold. The main proceedings concerned the compatibility of this exclusion with Directive 2002/114. This issue did not require in-depth explanation and followed from past case-law: the Member States were not authorised to exclude specific categories of workers from the calculation of staff members under Directive 2002/114.[482]

A more problematic issue was also referred to the Court: can Article 27 of the Charter, either alone or in conjunction with Directive 2002/14, be relied upon to set aside a national norm incompatible with that Directive in judicial proceedings between private parties? The Court's answer was negative. After recalling its well-established case law on the absence of horizontal direct effect of directives, the Court insisted that the right of workers to information and consultation, as laid down in Article 27 of the Charter, was also deprived of horizontal direct effect. The novelty of the judgment

[481] Directive 2002/114/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, [2002] OJ L 80/29.
[482] Case C-176/12, *AMS*, para 29.

stemmed from its understanding of the relationship between Article 27 of the Charter and Directive 2002/114. The bottom line was established as follows: a Charter provision must be self-sufficient to confer on individuals a subjective right that can be invoked in national legal proceedings.[483] It followed that:

> 'it is only the provision of primary law which can, where appropriate, be relied on in a dispute between individuals'.[484]

In doing so, the Court reaffirmed its earlier findings in *Kücükdeveci*: the possibility of relying on a given Charter provision in horizontal settings does not depend on a combination of norms, but rather on an assessment of the intrinsic qualities of the Charter provision itself. The Charter provision in question must be self-sufficient for that purpose. However, the right enshrined in Article 27 of the Charter did not meet that requirement. Consequently, it could not produce horizontal effects. More importantly, this effect could not be derived from a combination of Article 27 of the Charter and Directive 2002/114.[485]

The interpretative approach supporting this conclusion placed significant emphasis on the wording of Article 27 of the Charter. The Court focused on the textual limitations set out in that provision, particularly its guarantee of information and consultation to workers:

> 'in the cases and under the conditions provided for by Union law and national laws and practices'.[486]

As a result, it followed that Article 27 of the Charter needed to be given 'more specific expression' through EU or national provisions in order to be 'fully effective'.[487] This judgment was understood to mean that a mere reference in the relevant Charter provision to the adoption of implementing measures, whether at the EU or national level, sufficed to rule out the possibility that such a provision could produce horizontal direct effect.[488]

The Court's insistence on the reference, set out in Article 27 of the Charter, to the adoption of concretising legislation appeared to imply that the right concerned could only become fully effective in the presence of such legislation.[489] Conversely, the absence of such concretising legislation would constitute an absolute bar to the justiciability of these Charter provisions. Therefore, the justiciability of Charter

[483] Ibid, para 49.
[484] Opinion of AG Bot in Joined Cases C-569/16 & C-570/16, *Bauer*, EU:C:2018:337, para 75.
[485] Case C-176/12, *AMS*, para 49.
[486] Ibid, para 44.
[487] Ibid, para 45.
[488] Frantziou, 'Case C-176/12 *Association de Médiation Sociale*', supra note 463, 345-6. For a similar view, see AG Cruz Villalon in Case C-176/12, *AMS*, EU:C:2013:491, paras 55 et seq.
[489] Frantziou, 'Case C-176/12 *Association de Médiation Sociale*', 340-341.

provisions in horizontal proceedings was ruled out in relation to provisions that explicitly reference the adoption of additional concretising measures, whether at the national or EU level. It is fair to acknowledge that this limitation is likely to play out primarily (or predominantly) in relation to the social provisions featured in the Charter, as many of these provisions refer to the adoption of additional concretizing measures.[490]

Viewed from this perspective, the Court's approach seems to reflect distinctive national traditions concerning the (limited) justiciability of social rights. As former Advocate General Bot rightly observed, the reference to additional concretizing measures was deemed to reveal the intention of the founding fathers of the Charter to:

> 'entrust the EU legislature and/or the national legislatures with the task of specifying the content of the fundamental rights recognised therein and the conditions for their implementation'.[491]

It is surprising, in this context, that the Court did not elaborate further on the distinction between rights and principles outlined in Article 52(5) of the Charter. For clarity, it is useful to recall that this distinction was introduced at the instigation of a group of Member States concerned about the inclusion of fundamental social rights in the Charter. It reflects national traditions regarding the limited enforceability of fundamental rights, particularly social rights. To some extent, this distinction mirrors the respective roles attributed to the judiciary and political institutions concerning the definition and implementation of fundamental social rights.

On the one hand, the definition of the principles laid down in the Charter is reserved for political institutions, whether at the Member State or Union level. As a result, the justiciability of these principles is limited. They may, first, be employed in the interpretation of 'implementing' acts – those acts that provide more detailed content to these abstract principles. Second, they may also serve as standards of review in assessing the legality of these acts. However, they may not serve as a source of directly enforceable subjective rights.

On the other hand, the Charter also contains rights that must be 'respected' by Union institutions and Member States (when they operate within the scope of Union law). According to the Charter's explanations, these rights may give rise to a 'direct claim for positive actions' by EU or Member State institutions. Therefore, they may be invoked directly as a source of subjective rights and obligations in legal proceedings before national courts and tribunals.[492]

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[490] Frantziou, '(Most of) the Charter of Fundamental Rights is Horizontally Applicable' (2019) 15 European Constitutional Law Review 306, 320.
[491] Opinion of AG Bot in Joined Cases C-569/16 and C-570/16, *Bauer*, para 92.
[492] European Union Agency for Fundamental Rights, *Applying the Charter of Fundamental Rights of the European Union in Law and Policymaking at National Level* (Publications Office of the European Union, 2020), p. 20.

The distinction set out in Article 52(5) of the Charter is a grey area of European Union law. Legal scholars have grappled for years with the criteria that enable to categorise a relevant Charter provision as a right or a principle, as well as their justiciability in national legal proceedings.[493] As mentioned above, the legal implications stemming from this distinction are spelled out in Article 52(5). Nevertheless, open questions remain about whether EU principles may come into play only in relation to acts giving specific expression to these principles, or more generally in relation to any act adopted by Union institutions (or by the Member States when they operate as agents of EU law).[494]

The Charter also remains surprisingly evasive regarding the classification of a given Charter provision as a right or a principle. The explanations relating to the Charter offer a list of examples of principles, but this list is non-exhaustive. To add insult to injury, the explanations also specify that some provisions may contain 'both elements of a right and of a principle'. In practice, it would seem that most principles are found in provisions listed in Chapter IV of the Charter (on solidarity).[495] However, this does not mean that all social provisions can be categorised as principles.

As for the Court, it does not seem overly willing to shed light on this grey area. This distinction was even deemed 'redundant' by none other than Sacha Prechal.[496] The issue is barely discussed in recent judgments,[497] and the Court appears more comfortable discussing the (extent of the) justiciability of Charter rights through the lens of the distinct – though partially overlapping – debate on direct effect.[498]

The judgments delivered in *AMS*, *Bauer*, and *Max-Planck* seem to reflect the Court's reluctance to clarify the distinction between rights and principles.[499] Instead, the Court seems to introduce:

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[493] On that topic, see Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11 European Constitutional Law Review 321; Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56 Common Market Law Review 1201.

[494] For further details, see Opinion of AG Cruz-Villalon in Case C-176/12, *AMS*, paras 60 et seq.

[495] AG Cruz-Villalon similarly opined that '[t]he group of rights included under the title 'Solidarity' incorporates mainly rights regarded as *social* rights with respect to their substance, for the content of which a form of wording such as that in Article 27 is preferred. That means that there is a strong presumption that the fundamental rights set out in that title belong to the category of "principles"' (AG Cruz-Villalon in Case C-176/12, *AMS*, para 55).

[496] Peers and Prechal, 'Article 52' in Peers, Hervey, Kenner and Ward (eds), *The EU Charter of Fundamental Rights - A Commentary* (1st edn, Hart Publishing, 2014), para 52.190.

[497] However, see Case C-356/12, *Glatzel*, EU:C:2014:350. Although the Court did not mention the distinction rights vs principles in *AMS*, that judgment has also been interpreted as meaning that Article 27 of the Charter qualifies as a principle for the purposes of Article 52(5) of the Charter (e.g., Opinion of AG Bot in Joined Cases C-569/16 and C-570/16, *Bauer*, para 70).

[498] Krommendijk, 'Principled Silence or Mere Silence on Principles?', supra note 493.

[499] However, see Sarmiento, 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on *Bauer*' Despite Our Differences (8 November 2018), available at <Sharpening the Teeth of EU Social

> 'a new test regarding the enforceability of Charter provisions: that of whether a provision is rights-conferring or not. This appears to create a hierarchy of provisions within the Charter based on their 'rights-conferring' nature and is additional – or perhaps even alternative – to the distinction between rights and principles made in the Charter itself'.[500]

Manfredi similarly opined that:

> '[t]he case law on paid annual leave hints that the distinction between rights and principles is no longer determinative, since the decisive question under EU law is not whether a provision confers a right on an individual, but whether it has a direct effect'.[501]

This is regrettable. The distinction between rights-conferring and non-rights-conferring provisions seems to substitute a binary perspective to the more nuanced distinction between rights and principles established by the Charter. It must be stressed that the latter distinction allows principles to produce various effects in domestic judicial proceedings. As De Mol pointed out,

> 'Article 52(5) does not seem to exclude the kind of direct effect at stake in *Dominguez*. The provision clearly states that Charter 'principles' can serve as autonomous grounds for legality review'.[502]

Therefore, there seems to be nothing to exclude the idea that principles could operate as legal standards for assessing the legality of national or EU law, or for the interpretation of national implementing acts in the context of horizontal proceedings. By relying on this distinction, the Court could have set out a more nuanced picture of the effects or remedies produced by equality provisions in disputes between individuals. It could therefore be suggested that the Court ruled out the possibility that Article 27 of the Charter – or any Charter provision referring to additional concretising measure – could produce any type of effect or remedy in horizontal settings.[503]

Fundamental Rights: A Comment on Bauer | Despite our Differences (wordpress.com)> (last accessed, 6 May 2025): '[t]he Court seemed to agree with the Advocate General by hinting that Article 27 is a "principle" and not a "right" in the sense of Article 51(2) of the Charter. But that was not explicitly nor clearly stated in the judgment'.

[500] Frantziou, 'Case C-176/12 *Association de Médiation Sociale*', supra note 563, 344.

[501] Manfredi, 'Enhancing Economic and Social Rights Within the Internal Market Through Recognition of the Horizontal Effect of the European Charter of Fundamental Rights' (2021) 6 European Papers 293, 308.

[502] De Mol, '*Dominguez*: A Deafening Silence', supra note 430, 299.

[503] For a similar argument, see Case C-196/23, *Plamaro*, EU:C:2024:596, esp. para 51, in which the Court ruled out the prospect that Article 27 of the Charter may be employed for the purposes of excluding national legal norms. This finding limits the potential avenues available to individuals to vindicate the enforcement of their rights in domestic legal proceedings. Admittedly, there is nothing to rule out the prospect that individuals may be entitled to compensation as a matter of state liability.

The problem with the approach discernible in *AMS* can be framed as follows: the Court's current approach suggests that several EU equality rights are simply devoid of relevance in domestic judicial proceedings involving private parties. In other words, individuals may be left empty-handed if they are affected by a breach of their (non-directly effective) equality rights. The distinction between rights and principles would allow the Court to spell out a more robust (objective) conception of judicial protection. The bottom-line may be summarised as follows: regardless of whether a given Charter provision belongs to the category of rights and/or principles, it should at least be capable of operating as a standard of review in the appraisal of the legality of national law.[504] In other words, the Court's exclusive focus on the discussion about direct horizontal effect seemingly obscures the relevance of the distinction between rights and principles in the debate about the remedies available for breaches of EU equality rights.

Most commentators have therefore lamented the negative implications stemming from the Court's pronouncements regarding the judicial protection of individuals affected by the incompatibility of national law with (some of) the social provisions of the Charter.[505] As Eleni Frantziou put it,

> 'by confining its assessment to an exclusion of the direct effect of Article 27, the Court does not discuss other means of enforcing the Charter provision (indirect effect, etc)'.[506]

The approach taken by the Court has been most notably criticised for failing to isolate the minimum, or core, normative content of Article 27 of the Charter.[507] According to Frantziou, Article 27 of the Charter contains two distinct elements. The first element derives from the requirement that workers must be given a right to information and consultation. The second element stems from the textual limitation described above. By placing exclusive emphasis on this textual limitation, the Court failed – so it is suggested – to ascribe a minimum normative content to the requirement that workers be given a right to information and consultation. Frantziou forcefully advocated for a

[504] For a similar view, see Tinière, 'L'Invocabilité des Principes de la Charte des Droits Fondamentaux dans les Litiges Horizontaux', supra note 424; De Mol, '*Dominguez*: A Deafening Silence', supra note 430, 298-9.
[505] Sarmiento, 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on *Bauer*', supra note 499. Similarly, Romain Tinière suggested that *AMS* implied that Charter principles could not play out as yardsticks for assessing the legality of national implementing acts (Tinière, 'L'Invocabilité des Principes de la Charte des Droits Fondamentaux dans les Litiges Horizontaux', supra note 424, 14). That statement is perhaps exaggerated. Admittedly, the reference to the adoption of additional concretizing measures would seem to imply that the political institutions enjoy a wide margin of appreciation with respect to the definition of the content of these principles. That does not mean, however, that the exercise of that margin for appreciation cannot be subject to some sort of control by the judiciary (albeit that control should presumably be rather limited).
[506] Frantziou, 'Case C-176/12 *Association de Médiation Sociale*', supra note 563, 342.
[507] Lazzerini, '(Some) of the Fundamental Rights Granted by the Charter May be a Source of Obligations for Private Parties: *AMS*', supra note 479, 927.

renewed emphasis on the remedies available to individuals in circumstances involving a breach of the right mentioned in Article 27 of the Charter. According to her,

> 'the limitations otherwise built into the content of certain rights, such as conditionality upon national laws and practices or the restrictions on the justiciability of unimplemented principles set out in Article 52(5) of the Charter might shift the meaning of remedial effectiveness for these provisions, but do not wholly pre-empt the possibility of effective judicial protection'.[508]

There is room for a more nuanced assessment of *AMS*. Upon closer analysis, the Court did attempt to isolate the normative content of Article 27 of the Charter. Crucially, this analysis was carried out autonomously, that is, independently from the requirements arising from secondary law.[509] Once again, the Court placed significant emphasis on the wording of Article 27 of the Charter. In para 46, the Court considered that:

> '[i]t [was] not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, [laid] down and addresse[d] to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation'.

The French version is more explicit. In essence, it states that the rule set out in Article 3 of the Directive could not be inferred from the wording and the explanations relating to Article 27 of the Charter.[510] In doing so, the Court drew a distinction between, on the one hand, the right originating from primary law and, on the other hand, the guarantees offered by virtue of secondary law. That judgment clarified that, to identify the content of a given Charter provision, regard must be had to the wording and explanations relating to the relevant provision. What matters most here is that the normative content of a given Charter provision must be 'inferable' or, to put it differently, ascertainable in the light of the wording and explanations relating to that Charter provision.

It is regrettable that the Court did not specify in a positive manner what the normative content of Article 27 entails.[511] Instead, it stated that the rule deriving from Article 3 of the Directive could not be inferred from Article 27. The Court's cautious approach may be better understood when viewed in relation to the issue raised in the main proceedings. However disappointing this approach may seem, it is worth remembering that the Court was asked to provide guidance on a specific issue: can

[508] Frantziou, 'The Horizontal Effect of the Charter', supra note 430, 224.
[509] Frantziou, 'Case C-176/12 *Association de Médiation Sociale*', supra note 563, 341-2.
[510] Lazzerini, 'The Horizontal Application of the General Principles of EU Law' in op. cit. supra note 429, p. 180.
[511] Frantziou, 'Case C-176/12 *Association de Médiation Sociale*', supra note 463, 344-5.

Article 27 of the Charter be relied upon to set aside the national norm at stake? As pointed out by Lenaerts, the answer given by the Court in the context of preliminary ruling proceedings must:

> 'constitute, first and foremost, a real contribution to the solution of the case pending before the referring court'.[512]

Viewed from this perspective, it can be safely assumed that the Court discharged its duties by providing an answer to the question asked by the referring court.[513]

The comments expressed in the previous paragraphs suggest that Article 27 of the Charter may hold untapped potential as a benchmark for assessing the legality of Member State actions. However, in the light of *AMS*, it is undeniable that the role of Article 27 of the Charter is bound to remain limited. By adopting a strict textual understanding of the content of this right, the Court appears to have ruled out the possibility that it may serve as a self-standing source of rights and obligations in private law proceedings. That said, a reasonable argument can be made that Article 27, or some of its core components, could produce horizontal effects in other settings. The limited normative content attributed to this right in *AMS* suggests that it is particularly well-suited to operate as a standard for assessing the compatibility of national norms, even within the realm of private law. In this context, Article 27 of the Charter could be invoked in its 'bare form' to ensure that workers are not deprived of fundamental guarantees of information and consultation.

Even considering the limited justiciability of Article 27 of the Charter when read in isolation, the possibility of it gaining justiciability in conjunction with other Charter provisions cannot be ruled out. This view finds support in the observations of Guy Braibant, one of the Charter's most prominent drafters.[514] During the drafting process, Braibant suggested that the reference to implementing measures in certain provisions of the Charter did not imply that they should be deprived of any legal effect whatsoever. Instead, he proposed that these provisions could be invoked in conjunction with other Charter provisions in judicial proceedings. If this suggestion were indeed taken up, the normative effect of Article 27 of the Charter could be significantly enhanced by its combination with another Charter provision – rather than secondary law, which the Court has clearly ruled out.

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[512] Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Adams, De Waele, Meeusen and Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, 2015), p. 59.
[513] Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar Publishing, 2018), p. 109.
[514] Coghlan and Steiert (eds), *The Charter of Fundamental Rights of the European Union: The Travaux Préparatoires and Selected Documents* (European University Institute, 2020), p. 1626.

Furthermore, it cannot be ruled out that additional remedies under EU law, such as state liability, may provide alternative avenues for individuals seeking to enforce their non-directly effective equality rights.[515] State liability, as a remedy conceptually distinct from direct (horizontal) effect or the Charter's distinction between rights and principles, could offer an alternative route.[516] The Court may be expected to clarify whether a Charter provision that lacks the requirements for direct horizontal effect, but qualifies as a principle under the Charter, might still confer rights for the purpose of state liability. Perhaps surprisingly, the Court has yet to address this issue, thereby reinforcing the (uncomfortable) impression that individuals may be left with limited procedural device to address the violation of their non-directly effective equality rights are disrespected.

3.3. Primacy, direct effect, and consistent interpretation: What's the difference, after all?

Another noteworthy aspect of the *Bauer* and *Max-Planck* judgments lies in the Court's conception of horizontality. Specifically, the Court appears to have adopted a more comprehensive understanding of the type of effects or remedies available to individuals when fundamental equality rights are breached in disputes between private parties. This shift is evidenced by the emphasis placed on the implications of a finding of incompatibility between national law and Article 31(2) of the Charter. In these judgments, the Court's approach extended beyond the traditional remedy of setting aside conflicting national provisions. It also underscored the national courts' obligation to ensure judicial protection of the subjective rights and remedies arising from Article 31(2). Furthermore, the Court of Justice emphasised less intrusive remedies, such as the possibility of interpreting national law in conformity with the fundamental right to paid annual leave. Considerable attention was devoted to explaining the practical implications of the duty of conform interpretation.

Viewed from this perspective, the duty to set aside national legislation was portrayed as one remedy among several horizontal effects or remedies available to national courts for enforcing fundamental social rights. The Court insisted that disapplying the impugned national norm should occur only 'if need be', meaning if the same outcome could not be achieved through conform interpretation. Frantziou considered, in this respect, that these judgments:

[515] For a similar view, see Frantziou, 'The Horizontal Effect of the Charter', supra note 430, 225.
[516] Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?' (2006) 17 European Business Law Review 299.

> ‘confirm a trend traceable to *Dansk Industri* but, as noted in the judgment, more explicitly assumed in *Egenberger*, i.e. to refrain from harmonising the remedial stage of the process by stipulating the direct use of a fundamental right in a private relationship (note the absence of a reference to *Mangold* and *Kücükdeveci*). Rather, the Court appears to be prepared to allow national courts to guarantee the full effectiveness of the right by any appropriate means including, but perhaps not limited to, its disapplication’.[517]

This approach reflects the Court’s willingness to embrace a more comprehensive understanding of horizontality, in a pledge to allow the Member States to integrate their preferred conception of this principle. In other words,

> ‘*Bauer* now suggests that, as long as the means used are outcome-neutral, i.e. do not place the aggrieved party at a disadvantage or leave them without redress simply due to the structures of national law, more space can be carved out for the constitutional complexity of horizontality to be accommodated within EU discourse’.[518]

Cecchetti similarly noted that the Court:

> ‘confirm[ed] the “subsidiary nature” of the horizontal direct effect of EU fundamental rights: the more flexible and less intrusive duty of “consistent interpretation” (aka indirect effect) takes precedence over the disapplication of incompatible national norm’.[519]

This approach suggests more than meets the eye. On the face of it, the EU doctrine of consistent – or conform – interpretation reflects a different conception of the respective roles attributed to the judiciary and the legislature in enforcing EU fundamental rights. More specifically, it displays greater deference towards national legislatures in implementing non-directly effective obligations under EU law.

The Court of Justice has consistently held that the obligation to interpret national law in conformity with non-directly effective EU provision extends only as far as national law permits. National courts are not required to adopt an interpretation of national law that ‘it cannot bear’.[520] This principle, commonly known as the *contra legem* rule, entails that national courts are not required to interpret domestic provisions in a way that contradicts their wording.[521] The starting point is therefore one of

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[517] Frantziou, ‘(Most of) the Charter of Fundamental Rights is Horizontally Applicable’ (2019) 15 European Constitutional Law Review 306, 314.
[518] Frantziou, ‘(Most of) the Charter of Fundamental Rights is Horizontally Applicable’, 318.
[519] Cecchetti, ‘Something New Under the Sun: The Direct Effect of Directives plus Article 47 of the Charter in Horizontal Situations in the K.L. Judgment’ (2024) Quaderni AISDUE n°1/24, 5.
[520] Craig and De Búrca, op. cit. supra note 399, p. 203.
[521] On that topic, see Mollers, ‘The Principle of Directive-Compliant Development of the Law and the Contra Legem Limit’ (2020) 16 European Review of Contract Law 465; Arnull, ‘European Union Law

deference to the mandate conferred on national judges under domestic law. The ability of national courts to meet the normative demands of EU law depends on the scope and limits of their mandate as defined by national law.

At the same time, it is fair to acknowledge that the interpretative obligation laid out by the Court of Justice may be particularly far-reaching. Specifically, national courts are required to:

> 'do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the [provision] in question is fully effective and to achieving an outcome consistent with the objective pursued by it'.[522]

This obligation also entails that the competent judge should modify established case-law when it conflicts with obligations arising under EU law.[523] As the Court explained in *Poplawski II*,

> 'the obligation to interpret domestic law in conformity with EU law requires national courts to change established case-law, where necessary, if it is based on an interpretation of domestic law that is incompatible with the objectives of a framework decision and to disapply, on their own authority, the interpretation adopted by a higher court which it must follow in accordance with its national law, if that interpretation is not compatible with the framework decision concerned'.[524]

The interpretative obligations placed on national courts in enforcing (non-directly effective) EU law are, therefore, particularly far-reaching. This has sparked long-standing debates about the scope of these duties and the implications for national judges entrusted with the task of patrolling the effective enforcement of EU law through consistent interpretation.

It is worth questioning whether the duty of consistent interpretation is genuinely more respectful of the procedural autonomy retained by the Member States compared to other remedies, such as direct effect (whether through exclusion or substitution).[525]

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and the Contra Legem Principle' (2022) 47 European Law Review 291; Pirker and Smolka, 'Linguistics and the Contra Legem Principle – A Response to Anthony Arnull' (2023) 48 European Law Review 117.

[522] Joined Cases C-569/16 and C-570/16, *Bauer*, EU:C:2018:871, para 67; Case C-573/17, *Poplawski II*, EU:C:2019:530, paras 74-77.

[523] That obligation cannot however be taken to mean that the national judge ought to disregard 'the only interpretation of [a provision of national law] which seems to it to accord with the national constitution *if, in so doing, it infringes another fundamental right guaranteed by EU law*' (emphasis added, see Case C-752/18, *Deutsche Umwelthilfe*, para 43).

[524] Case C-573/17, *Poplawski II*, para 78.

[525] Drake, 'Twenty Years after Von Colson: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' (2005) 30 European Law Review 329; Franklin, 'Limit to the Limits

Oftentimes, the interpretative duties imposed on national courts are very far-reaching. In particular, the Court does not seem overly concerned with dictating the outcome of the interpretative exercise undertaken by national judges, and it does not seem to matter that much whether the resulting interpretation aligns with the national judiciary's own understanding of the meaning of national law.[526] In those circumstances, the distinction between direct effect – and its associated obligation to disapply conflicting national legislation – and consistent interpretation has become increasingly blurred. Indeed, the doctrine of consistent interpretation often compels national judges to step outside the traditional bounds of their judicial mandate under national law, to guarantee that national law effectively lives up to the expectations emanating from EU law.

The Court of Justice also appears to operate with few constraints in interpreting secondary legislation in conformity with the Charter. Put differently, the Court's reliance on the 'rhetoric of human rights' may simultaneously conceal and support the judicial creation of new rights and obligations that go beyond those explicitly established by secondary legislation.[527] Consider, for instance, the judgment in *CCOO*.[528] In this case, the Grand Chamber concluded that the Member States must establish a system to measure the duration of time worked each day by each worker. This conclusion was reached through the conform interpretation of secondary legislation, specifically the Working Time Directive, in the light of the fundamental rights enshrined in Article 31(2) of the Charter, which guarantees the 'limitation of maximum working hours' and the right to 'daily and weekly rest periods'.[529] Crucially, this obligation did not feature explicitly in the Working Time Directive. The Directive, on its own terms, does not establish such a requirement. The Court acknowledged that the Member States retain discretion in determining the practical arrangements necessary to ensure compliance with the rights set out in the Directive. It recognized that:

> 'Articles 3, 5 and 6(b) of Directive 2003/88 do not establish the specific arrangements by which the Member States must ensure the implementation of

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of the Principle of Consistent Interpretation? Commentary on the Court's Decision in *Spedition Welter*' (2015) 40 European Law Review 910; Wildemeersch, 'Primauté, vous avez dit Primauté? Sur l'Invocabilité des Directives dans les Litiges entre Particuliers' (2018) Revue des Affaires Européennes 541, 544 et seq. ; Niglia, 'Conforming Interpretation' (2022) 30 European Review of Private Law 635.

[526] Laurent Coutron similarly observed that despite the prohibition of horizontal direct effect of directives, the obligation to interpret national law to conform with directives often gives rise to new obligations for individuals (Coutron, 'Invocabilité du Droit de l'Union Européenne: Une Doctrine enfin Assumée par la Cour de Justice dans l'Arrêt *Poplawski*' (2020) Revue Trimestrielle de Droit Européen 274, 276 et seq.).

[527] On the 'rhetoric of human rights', see Von Arnauld and Theilen, 'Rhetoric of Rights: A Topical Perspective on the Functions of Claiming a "Human Right to…"' in Von Arnauld, Von Der Decken and Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press, 2020), p. 34.

[528] Case C-55/18, *CCOO*, EU:C:2019:402. See also Case C-531/23, *Loredas*, EU:C:2024:1050.

[529] On that topic, see Leccese, 'Monitoring Working Time and Working Time Directive 2003/88/EC: A Purposive Approach' (2023) 14 European Labour Law Journal 21.

> the rights that they lay down. As is clear from their wording, those provisions leave the Member States to adopt those arrangements, by taking the 'measures necessary' to that effect'.[530]

However, the Court emphasized that this regulatory autonomy could not:

> 'render the rights enshrined in Article 31(2) of the Charter and Articles 3, 5 and 6(b) of that Directive meaningless'.[531]

The Court was adamant that it would be impossible to guarantee 'effective compliance' with these rights in the absence of a monitoring system enabling the duration of daily working time to be recorded.[532] The Court's reasoning drew heavily on the normative objective of employment protection, which aims to address the inherent power asymmetry between employers and employees. As the weaker party in the employment relationship, workers must be able to claim and enforce their rights against employers, if necessary, in judicial proceedings. The existence of a monitoring system enabling the amount of working hours to be recorded was deemed necessary to make these entitlements effective. Such a system would enable the objective and accurate determination of the number of hours worked each day by each worker. It would also allow both employers and employees to verify compliance with the rights to the limitation of working time and rest periods.[533] Moreover, it would provide a reliable and objective source of evidence in judicial proceedings regarding (non-)compliance with these fundamental rights.[534]

3.4. The rise of information rights: A pre-requisite for ensuring access to justice in employment disputes?

The judgments in *Bauer* and *Max-Planck* have been criticized for developing subjective rights and obligations beyond those explicitly provided in the Working Time Directive. In these cases, the fundamental right to paid annual leave, enshrined in Article 31(2) of the Charter, was interpreted to include a significant duty for employers to inform workers about the modalities governing the taking and enjoyment of leave days. By doing so, the Court broadened the scope of this right beyond the guarantees established in secondary law. It is, therefore, unsurprising that the Court's approach has been criticized as going 'too far'.[535] Upon first glance, this expansive interpretation

[530] Case C-55/18, *CCOO*, para 41.
[531] Ibid, para 43.
[532] Ibid, para 46.
[533] Ibid, para 50.
[534] Ibid, paras 53-54.
[535] Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: *Bauer and Wilmeroth*, *MPG*', supra note 458, 1203.

seems difficult to reconcile with the traditional approach that previously characterised the case law on the horizontality of fundamental equality rights. In *Mangold* and *Kücükdeveci*, for instance, the substantive content of the general principle of equal treatment on the grounds of age was derived primarily from secondary legislation, specifically the Equal Treatment Directive, which served as a *de facto* benchmark for assessing the legality of national law. Viewed from that perspective, *Bauer* and *Max-Planck* mark a significant departure by progressively decoupling the interpretation of EU primary rights from secondary legislation. Similar critiques of judicial overreach have been levelled against other judgments in EU social law, including *CCOO* and, more recently, *K.L.*[536]

Against this backdrop, it is essential to understand the nature of the rights and obligations developed by the Court in these judgments. This section explains that these rights boast a distinct procedural dimension. The Court's current emphasis on information rights and duties in its jurisprudence on fundamental equality rights is meant to empower individual workers to enforce their rights, if need be, by bringing legal proceedings before national courts. This development aligns with past and ongoing legislative initiatives aimed at enhancing information rights and duties to protect individual and collective employment interests. Viewed in this context, the Court's approach underscores the importance of the regulatory environment in shaping the procedural rights and remedies constructed within the framework of EU equality law.

4.4.1. The development of information rights and obligations in EU (secondary) law

The field of equality law has traditionally exhibited a limited degree of procedural harmonisation. Article 153 TFEU reflects the treaty drafters' primary emphasis on establishing minimum substantive standards in this area. Over time, the degree of procedural harmonisation has nevertheless increased significantly. This section examines the progressive development of procedural rights and remedies in the field of equality law, with a focus on the legislative framework's emphasis on information rights to empower individual workers to enforce their rights, if need be, by bringing legal proceedings. This historical overview serves as a background for analysing recent judgments on the interpretation of fundamental equality rights.

The adoption of legislative provisions specifically intended to govern the procedural rules and remedies prevailing in the field of equal treatment kickstarted a trend towards greater proceduralisation in social policy. The Equal Treatment Directive, which was

[536] Case C-715/20, *K.L.*, EU:C:2024:139.

precisely at stake in *Mangold* and *Kücükdeveci*, constitutes an early, yet paradigmatic illustration of that trend. The Directive includes provisions on access to remedies (regardless of their administrative or judicial nature),[537] standing for associations involved in defending the interests of workers,[538] and rules on the reversal of the burden of proof when *prima facie* evidence of discrimination is adduced by a claimant.[539]

This procedural trend has intensified over time. With Koukiadaki, it is possible to affirm that the proceduralisation discernible in the field of equality law:

> 'falls short of a comprehensive sectoral approach towards a remedial framework regarding EU labour rights (as is the case, for instance, in consumer law)'.[540]

There is little denying, however, that EU law has placed significant emphasis on providing information to individual workers. The procedural dimension of these information rights is clear to see; these rights are considered as a necessary pre-requisite for exercising equality rights. The emphasis on information is evident in secondary legislation, such as the Written Statement Directive,[541], the Directive on the rights of employees in the event of transfers of undertakings,[542] and the Directive on collective redundancy.[543] It also extends to EU primary law. One needs hardly mention the workers' right to information and consultation set out in Article 27 of the Charter. The Revised European Social Charter also deserves mention here. Its provisions have served as a source of inspiration for identifying and defining the fundamental rights featured in the Charter. It is worth highlighting, in this respect, that the Revised Social Charter displays an explicit emphasis on the information rights. This approach is reflected in Article 2(6), which states that:

> 'workers are informed in written form, as soon as possible, and in any event not later than two months after the date of commencing their employment, of the essential aspects of the contract or employment relationship'.

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[537] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16, Art. 9.
[538] Directive 2000/78, Art. 10.
[539] Directive 2000/78, Art. 11.
[540] Koukiadaki, 'Remedies and Sanctions in EU Labour Law' in op. cit. supra note 380, p. 48.
[541] Council Directive of 14 October on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (91/553/EEC), [1991] OJ L 288/32.
[542] Council Directive 2001/21/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of undertakings or businesses, [2001] OJ L 82/16.
[543] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, [1998] OJ L 225/16. Admittedly, the information duties laid down in that Directive are primarily meant to allow workers' representatives to engage in a fruitful and informed dialogue with employees wishing to carry out a collective redundancy. Viewed from that perspective, these information duties display a predominant collective dimension. It is interesting to note, however, that the Directive also sets out a right to seek (administrative and/or judicial) redress against an infringement of that Directive, which accrues to workers' representatives as well as individual workers.

In recent years, the European Pillar of Social Rights ('EPSR') has further amplified the focus on information rights. Admittedly, the EPSR does not add much to the existing acquis on information rights. Principle 7 of the Pillar proclaims that:

> 'workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship, including on probation period'.

This provision does not fundamentally depart from the approach prevailing in the Revised Social Charter. The EPSR has nevertheless spurred significant legislative activity. It has led to the adoption of new legislative measures, such as Directive on pay transparency,[544] two Directives setting out standards for equality bodies,[545] the Directive on work-life balance,[546] and the Directive on transparent and predictable working conditions.[547]

The Directive on transparent and predictable working conditions exemplifies this trend. It provides for redress mechanisms[548] and shifts the burden of proof in cases where a worker adduces *prima facie* evidence that he or she was dismissed because he exercised one of the rights listed in the Directive.[549] For present purposes, it must be stressed that its main focus lies with the provision of detailed information on employment conditions, including the date of commencement and, in the event of a fixed-term contract, of end of the employment relationship; the modalities governing the enjoyment of paid leave; the remuneration; the modalities regarding termination of

[544] Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, [2023] OJ L 132/21. It is striking to note that this Directive was adopted specifically to guarantee that individual workers would be afforded reliable and up-to-date information on pay levels (read, gaps), so as to encourage them to exercise their right of equal treatment, if need be by having recourse to legal proceedings. This is perfectly encapsulated in the preamble of that Directive, which states, at recital 32, that '[t]he lack of information on the envisaged pay range of a position creates an information asymmetry which limits the bargaining power of applicants for employment'; and, at recital 51, that its aim is 'to provide information and raise workers' awareness of the right to equal pay'.

[545] Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC, [2024] OJ L 2024/1499; Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU, [2024] OJ L 2024/1500.

[546] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, [2019] OJ L 188/79.

[547] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, [2019] OJ L 186/105.

[548] Directive 2019/1152, Art. 16.

[549] Directive 2019/1152, Art. 18.

work, etc. In other words, this Directive fits within a broader legislative trend aimed explicitly at strengthening workers' information guarantees.

4.4.2. The development of information rights and obligations in ECJ case-law

The depiction above situates the *Bauer* and *Max-Planck* judgments within the broader regulatory framework of EU equality policy. These judgments illustrate how the rights and obligations articulated by the Court fits within the field of equality law, particularly its emphasis on procedural mechanisms like information rights. The Court's emphasis on the creation of such rights reflects a broader legislative and normative concern with addressing the power asymmetries inherent in employment relationships – a cornerstone of social policy since its inception. By granting workers these rights, the Court aims to encourage individual workers to assert their social rights, including through legal proceedings when necessary.

The *Max-Planck* and *Bauer* judgments serve as illustrative examples. In these cases, the Court crafted an obligation for employers to inform their employees about the modalities governing the fundamental right to paid annual leave. The creation of information rights was motivated by underlying concerns relating to the asymmetries intrinsic to the employment relationship. The Court acknowledged that:

> '[t]he worker must be regarded as the weaker party in the employment relationship, and it is therefore necessary to prevent the employer from being in a position to impose upon him a restriction of his rights. On account of that position of weakness, such a worker may be dissuaded from explicitly claiming his rights vis-à-vis his employer where, in particular, doing so may expose him to measures taken by the employer likely to affect the employment relationship in a manner detrimental to that worker'.[550]

To address this imbalance, the Court developed information duties incumbent upon employers, requiring them to 'ensure that workers are in a position to exercise' their rights.[551] This includes providing to the worker:

> 'sufficient information – the days of paid annual leave acquired under those provisions in respect of that period, and, accordingly, his right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated'.[552]

[550] Case C-684/16, *Max-Planck*, para 41.
[551] Ibid, para 44.
[552] Ibid, para 61.

The Court emphasised that employers are required to inform employees 'accurately and in good time' about the possibility of taking leave days. The Court was also adamant that, in cases of legal proceedings assessing compliance with that obligation, the burden of proof rests with the employer to demonstrate that all due diligence has been undertaken to provide the worker with an effective possibility to exercise their rights.

The current emphasis on information rights and duties in the jurisprudence on fundamental social rights aims to enable individual workers to vindicate their rights, including through legal proceedings in national courts. This approach reflects a consistent line of judgments focused on the creation of information mechanisms, such as information rights, to strengthen employment protection. The *CCOO* judgment is a notable example. This case underscores the Court's focus on ensuring that workers – and, where necessary, courts – have access to the information needed to address alleged breaches of EU equality rights. Lörcher observed, in this context, that:

> 'the *CCOO* judgment offers a good example of the creation of specific means (the obligation of employers to measure all working hours) available for workers aimed at facilitating the acquisition of proof that an employer has violated (working time) provisions'.[553]

The Grand Chamber's, recent judgment in *K.L.* also illustrates this trend. The case focused on national legislation introducing a difference of treatment between fixed-term employment contracts and contracts for an indefinite duration regarding the employer's obligation to provide reason for dismissal. While Polish law required an explanation for dismissals in the latter category, no such obligation applied to fixed-term contracts. The national referring court asked whether the national legislation violated the fundamental right of equal treatment expressed in clause 4 of the Framework Agreement on fixed term contracts,[554] as well as Article 21 of the Charter.

The national referring court was instructed to disapply the impugned national norm. Surprisingly, the outcome was not based on the principle of equal treatment; instead, it rested on the right to an effective judicial remedy enshrined in Article 47 of the Charter. The Court did not address whether the principle of non-discrimination set out in the Framework Agreement could be viewed as a specific manifestation of the general principle of equal treatment in Article 21 of the Charter. As a result, this judgment was criticised for expanding the doctrine of horizontality beyond situations where an intrinsic link exists between an EU fundamental right and a secondary law instrument

[553] Lörcher, 'Access to Justice' in op. cit. supra note 375, p. 73.
[554] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, [1999] OJ L 175/43.

giving expression to that right.[555] By 'decoupling' the Directive's right from the EU fundamental right, the Court fuelled concerns about 'the "creativeness" and "unpredictability" of the' doctrine of horizontality of EU fundamental rights.[556] This line of case law raised concerns that the Court could be tempted to expand horizontality to any situation involving a breach of a fundamental right enshrined in secondary law. As Cecchetti puts it,

> '[i]f taken to its extreme consequences, moreover, the "reaction products" of this ruling would probably entail that any (unconditional and sufficiently precise) right enshrined in a not-correctly-implemented directive could be relied upon by an individual against another individual in combination with Article 47 of the Charter, should a national rule discourage "directly or indirectly, actually or potentially" – so to speak – his or her decision to bring proceedings before a court'.[557]

In my view, however, this judgment reflects the Court's overarching concern with information rights in the field of EU equality law. The Court's approach is consistent with past and current legislative efforts to bolster employment protection through the creation of information rights.

This militates for a more explicit engagement with the existing acquis on workers' information rights. It is regrettable, in that respect, that the Court did not engage explicitly with the broader regulatory framework intrinsic to the field of equality law. Viewed from this perspective, the foregoing considerations constitutes a powerful reminder of the line of criticism levelled against the Court by EU legal scholarship: its inadequate, or terse reasoning. Ultimately, the Court seems to rely on a pragmatic approach, that is not overly concerned with addressing the doctrinal – one might say overly theoretical – concerns voiced by legal scholarship.

4. Conclusion

The field of equality law has been characterised by the adoption of legislative provisions designed to confer subjective equality rights on individual workers. However, the absence of explicit provisions addressing the procedural and remedial safeguards necessary to enable workers to vindicate these rights in national court proceedings has cast a long shadow on the prospect of enforcing these rights at the

[555] For a similar view, see Van Reempts, 'The Court of Justice of the EU and the Philosopher's Stone: The Independent Horizontal Direct Effect of Article 47 of the Charter in *K.L. v X*' (2024) 20 European Constitutional Law Review 482.
[556] Cecchetti, 'Something New Under the Sun', supra note 519, 6.
[557] Ibid, 7.

domestic level. There is no better example than the so-called 'no-horizontal-direct-effect' rule to illustrate the challenges encountered by workers on the ground. By precluding workers from directly invoking rights derived from EU directives in horizontal proceedings, this rule forecloses access to justice in a substantial number of disputes emerging on the workplace. Notably, the only exceptions involve labour relationships with public employers.

Against this background, this chapter has addressed the following research sub-question: how has the recognition of equal treatment guarantees, especially in the employment sphere, shaped the development of obligation of judicial protection beyond the core guarantees of effective judicial protection under EU primary law? To do so, it has explored how the Court has navigated the absence of horizontal direct effect of directives to strengthen judicial protection in the employment context. It highlighted the Court's role in gradually reducing the gaps left by the limited procedural harmonisation in this field. By drawing on the EU Charter alongside secondary law provisions, the Court has established obligations of judicial protection that enable individual workers to assert their equality rights in disputes against other private parties, especially their employers. This chapter described how this evolution reflects a shift in the Court's understanding of the role of national courts in enforcing EU equality law – from a negative conception, which required national judges to disapply national provisions, to a more positive approach. The latter emphasises the national judiciary's role in upholding subjective rights and obligations that are directly enforceable in private law disputes, reinforcing the effectiveness of EU equality law in domestic legal systems.

Overall, the Court's approach reflects a subjective conception of justice, one that is oriented towards enabling individual workers to assert their rights in legal disputes with private employers. This conception explains the limited relevance of the core of the right to effective judicial protection – understood, as outlined in the previous chapter, as requiring judicial oversight of administrative action – in the context of equality law. In the private law setting of equality law, the Court has turned to traditional doctrines such as direct effect to shape remedies appropriate to the nature of the rights at stake and the procedural framework in which they are enforced. Viewed from this perspective, the regulatory context inherent in EU equality law has played a pivotal role in shaping this development. Specifically, this framework has contributed to the emergence of positive obligations of judicial protection. The normative emphasis on protecting workers has led to a subjective conception of justice centred on the enforcement of subjective rights in private disputes. Although the Court has yet to explicitly articulate how the goals of EU equality law influence the remedies it has developed, recent judgments indicate a growing recognition of the need to address workers' vulnerability through procedural tools – particularly information rights –

which enable them to enforce their rights before national courts.[558] This approach aligns with recent legislative efforts to strengthen workers' information guarantees.

[558] On the distinction between information rights as substantive rights and enabling rights, see Rainone, 'Enforcing EU Information and Consultation Rights' in Rasnaca, Koukiadaki, Bruun and Lörcher (eds), *Effective Enforcement of EU Labour Law* (Hart Publishing, 2022), p. 243.

Chapter 4: The principle of effective judicial protection: A catalyst for institutional change? An inquiry into judicial empowerment in asylum matters

1. Introduction

This chapter addresses the following research sub-question: how has the harmonisation of administrative and judicial procedural rules in asylum law contributed to the development of obligations of judicial protection beyond the core guarantees of effective judicial protection under EU primary law? In answering this question, it demonstrates that the development of positive obligations of judicial protection, driven by the growing scope of harmonised procedural standards in asylum matters, has bolstered the influence of judges over decision-making in this area. This phenomenon represents a stark contrast to the situation that traditionally prevailed across the EU Member States. Historically, immigration matters have been viewed as a key tenet of national sovereignty.[559] For the most part, immigration policy was thus 'highly politicised'.[560] To put it simply, the executive branch of government assumed control over the entry of aliens into state territory, while judges were barely involved in this process. The institutional configuration at the Member State level reflected the limited involvement of state judiciaries in immigration matters. Admittedly, there was (and still is) a wide diversity in how the Member States articulated the role of the judiciary.[561] The coexistence of diverse institutional settings reflected distinctive national traditions about the separation of powers between the executive and the judiciary. Be that as it may, it seems uncontroversial to say that most Member States have historically been reluctant to embrace comprehensive judicial review of administrative action in immigration. It was common for the Member States to delegate appeal competence to administrative or quasi-judicial bodies intricately linked to the executive and/or administrative body competent at first instance to decide on individual requests to enter state territory. More generally, this reluctance was evident in rules that set out minimal standards of judicial review, excessively brief time limits for handling

[559] Kamouna, 'La Politique Migratoire de l'Union Européenne à l'Epreuve des Droits Fondamentaux' (DPhil thesis, Université Bourgogne Franche-Comté, 2021), pp. 29 et seq.
[560] Reneman, 'No Turning Back? The Empowerment of National Asylum and Migration Courts under Article 47 of the Charter' in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022), p. 157.
[561] On that topic, see Chlebny, 'Public Order, National Security and the Rights of Third-Country Nationals in Immigration Cases' (2018) 20 European Journal of Migration and Law 115, esp. pp. 117 et seq.

appeals, limited investigative powers, and weak and/or laconic provisions on judicial remedies.[562]

The introduction of common procedural standards for decision-making in immigration at the EU level allowed judges to exert growing influence over traditional channels of decision-making. That was especially the case in the field of asylum. The Lisbon Treaty mandated the establishment of harmonised procedural standards on the treatment of individual requests for international protection. Beyond the harmonisation of substantive standards for deciding on such requests, the field of asylum is therefore characterised by a high degree of procedural harmonisation. To a considerable extent, the legislative instruments adopted in that field reflect the difficulty to reach a compromise on common procedural standards amongst countries belonging to diverse administrative and judicial traditions. More specifically, the various iterations of the Asylum Procedures Directive (hereafter respectively, 'the Asylum Procedures Directive'[563] and 'the Recast Procedures Directive'[564]) provided for weak remedies, and left considerable discretion to the Member States in the implementation of these remedies.[565]

Against this background, the principle of effective judicial protection set out in Article 46 of the Recast Procedures Directive and Article 47 of the Charter has been deployed to secure judicial oversight of administrative decisions in asylum matters. In some ways, it served to liberate national judges from the constraints and limitations placed on their powers by national law.[566] The empowerment of national judges was facilitated by the establishment of positive standards of judicial protection, grounded in the principle of effective judicial protection.[567] In fact, the creation of positive standards militated in favour of a greater involvement of national judges in asylum matters. The latter were invited to abandon their (traditional) passive role, and take up an active role as gatekeepers for the protection of asylum seekers' fundamental rights. This development has brought into sharp focus topical issues about the interaction between the principle of effective judicial protection and national procedural

[562] On that matter, see Tsourdi, 'Of Legislative Waves and Case Law: Effective Judicial Protection, Right to an Effective Remedy and Proceduralisation in the EU Asylum Policy' (2019) 12 Review of European Administrative Law 143, 145 et seq.
[563] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326/13.
[564] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60.
[565] Tsourdi, 'Of Legislative Waves and Case Law', supra note 562, 154.
[566] See, e.g., Joined Cases C-924 PPU and C-925/19 PPU, *FMS*, EU:C:2020:294; Case C-556/17, *Torubarov*, EU:C:2019:339, Joined Cases C-704/20 and C-39/21, *Staatssecretatis van Justitie en Veiligheid (Examen d'office de la retention)*, EU:C:2022:858.
[567] Slowik, 'Creating Procedural Obligations under EU Law: A Way Forward to Enhanced Protection of Fundamental Rights in the Field of Migration' EU Law Analysis (1 August 2022), available at < EU Law Analysis: Creating procedural obligations under EU law: a way forward to enhanced protection of fundamental rights in the field of migration?> (last accessed, 6 May 2025).

autonomy, especially considering the continued prevalence of the traditional 'no-new-remedy' rule.

This chapter reflects on the development of positive obligations of judicial protection in asylum law. Overall, the picture that emerges from the analysis depicts a process whereby the mandate of national courts was progressively fleshed out, and strengthened by reference to the requirements of judicial protection laid down in EU secondary law, and further delineated by reference to primary law. The role of legislative provisions on the scope and treatment of judicial appeals can hardly be overstated. The Court was mindful of the legislative compromise struck by means of secondary law. This is not to say, of course, that the principle of effective judicial protection played no role in the interpretation of relevant provisions on judicial remedies. There is little denying that the interpretation of weak and/or laconic provisions on remedies necessarily involves some degree of creativity to fill in the legislative blanks. In that context, the principle of effective judicial protection offered interpretative guidance to support the development of appropriate procedural tools and remedies in the field of asylum. Based on Article 46(3) of the Recast Procedures Directive, interpreted in the light of Article 47 of the Charter, the Court was indeed able to form a particularly strong view about the powers conferred on national judges in that area, especially regarding their scope of review. It was also keen to insist that the room for manoeuvre left to the Member States in the implementation of these provisions is limited and cannot allow the Member States to call into question the very essence of the principle of effective judicial protection. This chapter attests to the institutional implications of the requirements of effective judicial protection emanating from EU law. It shows that these requirements served to rekindle the traditional distribution of powers and competences vested in the judiciary and the administration in favour of a greater involvement of the former in asylum matters.

The development of a robust conception of the powers available to national judges in their endeavour to patrol administrative action was fuelled by underlying fundamental rights concerns intrinsic to the field of EU asylum law. Administrative decisions on asylum may entail far-reaching repercussions with respect to the fundamental rights of asylum seekers. A negative decision on asylum may indeed lead to the removal of the individual applicant from the territory of the Member States responsible for processing that request, and his or her transfer to a third-country in which he or she may be subject to inhumane or degrading treatment. It follows that such a decision involves obvious risks of *refoulement* of the individual concerned. As we shall see, the principle of *non-refoulement* – originally enshrined in Article 33 of the Refugee Convention[568] and now explicitly spelled out in Articles 4 and 19(2) of the Charter – has inspired the establishment of robust judicial oversight in asylum law.

[568] 1951 Convention relating to the status of refugees ('Refugee Convention').

Viewed from this perspective, the story depicted in this chapter aligns with the Court's approach in environmental and equality law. More specifically, this chapter demonstrates that the normative aspirations underlying the adoption of rules of secondary legislation on asylum matters constitute the main relevant legal parameter shaping the requirements of judicial protection prevailing in that area.

To explore these developments, this chapter proceeds as follows. Section 2 begins by exploring how the original Asylum Procedures Directive – namely, Directive 2005/85 – reflected the Member States' reluctance to relinquish control over administrative and judicial decision-making in asylum matters. It explains that the Directive conferred considerable discretion on administrative authorities in processing asylum requests, reflecting the Member States' reluctance to embrace robust judicial oversight in this area. Section 3 then explores how the Court, drawing on Article 47 of the Charter, has integrated international human rights standards to fill legislative gaps and strengthen the role of national courts in reviewing administrative decisions. Section 4 reflects on the implications of the recast Asylum Procedures Directive – namely, Directive 2013/32. It explores how the Court, by interpreting this Directive in the light of Article 47 of the Charter, has articulated positive obligations of judicial protection that have strengthened the institutional position of national courts in asylum matters, particularly regarding their scope of review and the execution of their decisions. Section 5 then examines how the Court has developed positive obligations of judicial protection beyond the confines of asylum law. Through an analysis of key judgments such as *FMS* and *Staatsecretaris van Justitie en Veiligheid*, it shows how the principle of effective judicial protection has been deployed to expand the remedial powers of national judges, especially in contexts involving detention or removal, where fundamental rights concerns are particularly acute.

2. 'Tra il dire e il fare, c'è di mezzo il mare': Directive 2005/85 and the elusive goal of common asylum procedures

This section reflects on how national traditions of administrative and judicial decision-making in asylum matters decisively shaped the legislative compromise in the Asylum Procedures Directive. That is achieved through an overview of the process leading to the adoption of the Directive. To that end, this section briefly outlines the broader Treaty framework that underpins the establishment of minimum procedural standards in asylum matters by secondary law. It explains how the law-making features of inter-governmental cooperation allowed the Member States to exert decisive influence over the design of harmonised judicial procedures and remedies. Although the Treaty established a clear mandate for common minimum procedural standards in asylum, the inter-governmental legislative decision-making rules enabled the Member States to

embed their diverse and sometimes conflicting national traditions into the Procedures Directive. This section concludes that the legislative compromise adopted by the Council reflects diverse national conceptions of the institutional architecture for decision-making in asylum and immigration matters. The following paragraphs highlight the exceptionalism of asylum procedures, where the Member States can turn procedural rules and principles into hollow promises in numerous cases deemed exceptionals. It also describes how the Commission's proposal was trimmed to accommodate the Member States' desire to retain control over the institutional set up of asylum decision-making.

To do so, this section begins by outlining how the Treaty rules on legislative decision-making in asylum matters gave the Member States major influence over the negotiations on the directive, resulting in a legislative instrument that reflects their reluctance to establish common asylum procedures (section 2.1). It then explains that the Directive grants national administrative authorities considerable leeway to depart from the basic procedural standards it enshrines (section 2.2). The analysis proceeds to examine how the Commission's original proposal was scaled back to accommodate the Member States' desire to retain control over the institutional design of decision-making in asylum matters (section 2.3). Finally, it concludes that the Directive reflects the Member States's unwillingness to establish judicial review of administrative action in asylum and immigration matters (section 2.4).

2.1. The inter-governmental model of lawmaking: An obstacle to the harmonisation of asylum procedures?

Following the adoption of the Schengen Convention in 1990, the Member States realised that the removal of internal border checks would need to be complemented by common rules for the integrated management of migratory flows at the Union's external borders. In other words, the need to develop common immigration and asylum policies arose as a by-product of the abolition of checks on persons crossing internal borders between the Member States.[569] In this context, the conclusions reached during the European Council meeting Tampere in 1999 reflected a political compromise on developing 'common policies on asylum and immigration'. The European Council invited the main political institutions of the Union to 'work towards establishing a

[569] The Court provided a powerful reminder of the intrinsic relationship between the eradication of internal borders and the creation of a common policy on the management of external borders in *Wijsembeek*. In that judgment, it considered that the Member States maintained the right to 'carry out identity checks at the international frontiers of the Community' as long as 'Community provisions on controls at the external borders… have not been adopted' (Case C-378/97, *Wijsenbeek*, EU:C:1999:439, paras 42-43, see also Case C-35/20, *A (Franchissement de frontières en navire de plaisance)*, EU:C:2021:813).

Common European Asylum System' ('the CEAS'). The CEAS envisaged by the European Council would notably include 'common standards for a fair and efficient asylum procedure'. To that end, the Tampere conclusions entrusted the Commission with the task of tabling a proposal for common procedures governing the domestic treatment of asylum requests.

The long-term objective behind the adoption of these rules was clear. The European Council was adamant, in particular, that:

> '[i]n the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union'.

The Amsterdam Treaty reflected the European Council's ambition. It explicitly called on Union institutions to adopt 'minimum standards' on procedures for granting or withdrawing refugee status.[570] Viewed from this perspective, the Amsterdam Treaty distinguished asylum policy from virtually every other policy area in the Treaty.[571] It spelled out a legislative mandate to devise minimum common standards of procedure for the domestic treatment of requests for international protection. As Lilian Tsourdi put it,

> 'proceduralisation in the EU asylum policy was not "incidental", but rather an explicit goal of the EU asylum policy under the EU Treaties since its inception'.[572]

The mandate set out by the Treaties was taken up by the European Commission, which kickstarted negotiations involving other institutional actors in the early years following the turn of the millennium. The Commission initially tabled a proposal for the adoption of a directive on asylum procedures in late 2000.[573] Its aim was to set out 'in the short term a minimum level of harmonisation' of procedures, without requiring 'uniform procedures'. The ambition expressed by the guardian of the treaties was therefore fully

[570] As we shall see, the Treaty of Lisbon now states that the Union should establish 'common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status' (Art. 78(2)(d) TFEU).

[571] In (most) other policy areas, a certain degree of procedural harmonisation was generally achieved in the absence of a specific Treaty mandate. Instead, procedural harmonisation arose incidentally, as a by-product of the harmonisation of substantive rules. The concept of 'incidental', or 'functional proceduralisation' was employed to describe the development of harmonised procedural standards in that context. On that topic, see Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12 Review of European Administrative Law 5.

[572] Tsourdi, 'Of Legislative Waves and Case Law', supra note 562, 146.

[573] This proposal was submitted following discussions involving the Council and the European Parliament that were initiated after the publication of a working document by the Commission in early 1999. European Commission, 'Towards Common Standards on Asylum Procedures' SEC(1999) 271 final.

in line with the mandate established by the Amsterdam Treaty. The Commission was keen to emphasise, in that context, that the Member States would:

> 'retain their national systems subject to respect for certain norms and conditions regarding competent authorities and the applicable procedures'.[574]

Nevertheless, the proposal released by the Commission included ambitious provisions concerning the judicial treatment of appeals against negative decisions on the granting or withdrawing of refugee status.[575] These provisions covered the right to appeal such decisions, the scope of review of administrative decisions on asylum, the suspensive effect of appeals, and 'reasonable' time-limits.[576] Unfortunately, the proposal introduced by the Commission failed to gather support in the Council. As a result, most of the provisions on judicial protection of asylum seekers were watered down during the negotiations leading up to the adoption of the Asylum Procedures Directive, in its first iteration.

The following paragraphs reflect on the changes brought about in relation to the initial proposal. The picture painted in this context depicts a legislative process dominated by state-minded interests. It would be impossible to overlook the fact that, at the time, the field of asylum fell within the realm of third-pillar politics. The rules governing decision-making in this field were therefore based on the model of inter-governmental cooperation. The enactment of the Procedures Directive mirrored the nature of decision-making in this area; the Directive was adopted by unanimity in the Council, with only limited involvement of the European Parliament (whose opinion was, however, sought prior to the adoption of the Directive). Undoubtedly, the inter-governmental features intrinsic to the decision-making procedure in this field played a decisive role in the negotiations leading to the adoption of the Directive. The requirement of unanimity bolstered the bargaining position of the Member States. It allowed them to shape the outcome of the negotiation process in a way that aligned with their own national political and legal traditions regarding the institutional framework for asylum decision-making.

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[574] European Commission, 'Towards a Common Asylum Procedure and a Uniform Status, Valid Throughout the Union, for Persons Granted Asylum' COM(2000) 755 final, 8. The Commission envisaged a sequential, or incremental, approach to the fulfilment of the mandate initially expressed by the Tampere European Council to strive for the adoption of 'common' procedural standards. In effect, the Commission added that, at a later stage, it would be necessary to 'restrict the scope for flexibility given to the Member States as regards powers at first instance and on appeal (common concept of independence from political authorities, for example), procedures governing admissibility, expedited procedures and procedures at borders' in order to make good on the promise expressed by the Tampere conclusions to strive for the establishment of 'common procedures' on asylum.

[575] The Procedures Directive, as it would later be adopted, was intended to apply primarily to procedures for the determination of refugee status, but it also allowed the Member States to apply its rules and procedures in relation to procedures governing the determination of subsidiary protection (see Art. 3(3)).

[576] European Commission, 'Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', COM/2000/0578 final – CNS 2000/0238, [2001] OJ L 62/231.

The following sections explore how these national legal traditions have decisively shaped the relevant provisions on the judicial protection of asylum seekers in the Directive. In summary, the bottom-line can be summarised as follows: the Procedures Directive is a far cry from the initial proposal tabled by the Commission. If the goal were to strive for, or at least make decisive strides towards, the establishment of 'common procedures' in asylum matters, the Procedures Directive missed the mark by a mile. The legislative compromise adopted by the Council reflects traditional conceptions of administrative justice in asylum and immigration matters. On the one hand, the administration is afforded significant discretion in ruling on requests for international protection and may deviate from the procedural entitlements established by the Directive. On the other hand, national judges have only a marginal say in those matters.

2.2. Procedural rights as exceptions? The exceptionalism of asylum procedures and the contingent nature of asylum seekers' rights

From the outset, it is fair to acknowledge that the Asylum Procedures Directive constitutes a positive first step towards recognising that asylum seekers are in a particularly vulnerable position, and should accordingly be afforded special procedural guarantees regarding the treatment of their requests. The vulnerability of asylum seekers was initially reflected in international human rights law, most notably in the United Nations Convention relating to the Status of Refugees, adopted in Geneva in 1951 ('the Refugee Convention'). The Convention sets out basic minimum rights and guarantees for refugees (such as the right to primary education, the right to work, and the right to non-discrimination). At the same time, the procedural treatment of requests for refugee status was addressed, or merely touched upon, in an incidental manner by the Convention. Article 16 of the Convention merely states that refugees must have 'free access to the courts of law on the territory of all contracting parties'. However, it does not:

> 'indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure'.[577]

Viewed from this perspective, the Procedures Directive is in a class of its own. This piece of legislation is different from previous attempts to codify the rights of refugees

[577] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', HCR/1P/4/ENG/REV.4 (Geneva, 2019), 42.

because its primary emphasis is on the procedural guarantees governing the handling of requests for refugee status. The necessity for a specific legislative instrument on such matters arose as a by-product of the:

> 'importance of an approach focusing on criteria for fairness and efficiency… Guarantees must be in place to ensure that persons in need of protection under the 1951 Geneva Convention relating to the status of refugees have access to asylum procedures and that all the circumstances of their claims are examined on an individual basis'.[578]

To that end, the Directive set out basic minimum procedural rights and guarantees. Asylum seekers were afforded the right to remain within the territory of the Member States pending examination of the request (Art. 7), the right to be informed about the procedure for requesting refugee status, including about their rights and responsibilities (Art. 10(1)(a)); the right to an interpreter (Art. 10(1)(b); the right to be informed in 'reasonable time' about the decision (Art. 10(1)(d)), in a language that they may reasonably be supposed to understand (Art. 10(1)(e)), as well as the right to a personal interview (Art. 12), and the right to legal assistance and representation (Art. 15). Beyond these guarantees, which primarily concerned first instance decisions on asylum, the Directive also laid down provisions for appeals against negative administrative decisions on asylum. Chief among them was Article 39, which stated that asylum seekers have the right to 'an effective remedy before a court or tribunal'. Article 18 of the Directive similarly required that, where an applicant for asylum is detained, the Member States must establish a 'speedy judicial review' to assess the legality of detention.

The foregoing considerations do not fundamentally depart from the uncomfortable truth about the Procedures Directive. The Directive could be labelled as a timid first step towards conferring fully-fledged fundamental rights upon asylum seekers. The reason for this is simple: in many cases, the Directive afforded national public authorities extensive discretion to deviate from the procedural standards set out therein. Tsourdi opined that the Directive established a series of exceptional procedures, allowing for 'divergences from the basic principles and guarantees'.[579] Costello explained that, in this respect, 'exceptional procedures bec[a]me the norm'.[580] Byrne also showed that the 'defining feature' of the Directive was its reliance on a system for classifying claims.[581] This system allowed the Member States to deviate from the

[578] European Commission, 'Towards Common Standards on Asylum Procedures' SEC(1999) 271 final, 3.
[579] Tsourdi, 'Of Legislative Waves and Case Law', supra note 562, 149.
[580] Costello, 'The European Asylum Procedures Directive in Legal Context' (2006) UNHCR New Issues in Refugee Research, Research Paper No. 134, 8 available at <Microsoft Word - CostellofinalRev1nov2.doc (refworld.org)> (last accessed, 6 May 2025).
[581] Byrne, 'Remedies of Limited Effect: Appeals under the Forthcoming Directive on EU Minimum Standards on Procedures' (2005) 7 European Journal of Migration and Law 71, 72-3.

procedural safeguards established by the Directive in relation to certain categories of requests for international protection (such as 'manifestly unfounded' claims or requests made by applicants from 'safe third countries').

Take, for example, the right to a personal interview set out in Article 12 of the Directive. The Directive specified several instances in which the competent determining authority could waive this requirement. In practice, the personal interview could be 'omitted' when the claim was deemed unfounded because the applicant originated from a 'safe country of origin' or a 'safe third country', or when he submitted a 'subsequent application' that did not add much to the prospect that his or her claim would be granted (Art. 12 (2)(c)).

The right to legal assistance and representation laid down in Article 15 of the Directive also illustrates this approach. Upon closer inspection, this right appeared weak. Regarding the right to consult with a legal adviser to prepare an application for refugee status, the Directive explicitly stated that the applicant must bear the costs. Admittedly, the guarantees outlined by the Directive were strengthened in the event of an appeal against a negative first-instance decision. In such cases, the Directive required that the Member States ensure '*free* legal assistance and/or representation be granted on request'. However, this requirement was subject to the caveat that free legal assistance could be denied in several cases. A request for free legal assistance could be rejected if a further appeal was brought (beyond the one-tier appeal system established by the Directive); if the applicant had sufficient resources to cover the costs; or if the appeal or review was deemed unlikely to succeed (Art. 15(3)(a)-(b)-(d)). The latter requirement amounted to rejecting free legal assistance based on a 'test on the merits' of the applicant's claim.[582]

2.3. What might have been: Political aspirations and Member State resistance to institutional reform in EU asylum policy

Much ink has been spilled, in the previous sub-section, regarding how the Procedures Directive allowed national administrative authorities to turn the procedural rights and entitlements it established into little more than empty promises. The Procedures Directive also faced criticism on another front. Following its adoption, much of the doctrinal discussion focused on what was excluded from the final legislative compromise adopted by the Council. Several doctrinal accounts described in detail how the original proposal tabled by the Commission was stripped of its most progressive – and ultimately, from the perspective of the Member States, unacceptable – provisions

[582] Ackers, 'The Negotiations on the Asylum Procedures Directive' (2005) 7 European Journal of Migration and Law 1, 10.

on judicial remedies.[583] The crux of the argument can be aptly summarized as follows: ultimately, the Procedures Directive reflected complex and, at times, diverging national administrative and judicial traditions. In other words, the Directive afforded significant leeway to the Member States in determining the institutional set-up of administrative and judicial decision-making in asylum and immigration matters.

This section reflects on how national traditions regarding the institutional set-up of decision-making in asylum matters shaped decisively the outcome of the negotiations on the Asylum Procedures Directive. To that end, it briefly describes the institutional diversity at national level concerning the organisation of appeals in asylum matters. This diversity reflects distinct national traditions about the respective roles of the administration and the judiciary in this policy area. The section then explores how the 'institutional heteronomy' of appeals systems was reflected in the Asylum Procedures Directive. It demonstrates that the original proposal released by the Commission was stripped of its most progressive provisions to accommodate the Member States' desire to remain competent over the institutional design of appeals. Broadly speaking, this section reflects on the Member States' reluctance to fully embrace comprehensive judicial review of administrative action in the field of asylum and immigration.

2.3.1. Institutional diversity in asylum decision-making across the European Union

It would be impossible to describe in detail the full spectrum of institutional configurations prevailing at the national level. The respective roles and responsibilities attributed to national judges and administrative authorities in asylum matters can vary across the EU Member States.[584] These institutional arrangements reflect distinctive national administrative and constitutional traditions.[585] Therefore, it is important to avoid falling into the trap of over-generalisation. It seems uncontroversial to state that most Member States have historically endowed the judiciary with limited prerogatives and responsibilities in asylum and immigration matters.[586]

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[583] For instance, see Ackers, 'The Negotiations on the Asylum Procedures Directive'; Byrne, 'Remedies of Limited Effect', supra note 581, 71.

[584] Costello, 'The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles' in Baldaccini, Guild and Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing, 2007), pp. 157-8.

[585] Ackers, 'The Negotiations on the Asylum Procedures Directive', supra note 582, 2; Blisa and Kosar, 'Scope and Intensity of Judicial Review: Which Power for Judges within the Control of Immigration Detention?' in Moraru, Cornelisse and De Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing, 2020), pp. 191 et seq.

[586] Consider, by way of exception, the examples of Germany and Austria. Ackers explains that these two countries were keen on keeping the relevant provisions on the scope of judicial review within the Asylum Procedures Directive. They were also concerned about circumscribing the scope of potential exceptions

By way of illustration, consider the example of the Netherlands. The Dutch system of general administrative law embodies a deferential approach to judicial review of administrative action.[587] This approach is intrinsically rooted in the Dutch conception of the separation of powers between the administration and the judiciary. More specifically, the administration is considered to possess greater expertise in dealing with immigration matters.[588] Dutch judges are therefore expected to conduct marginal scrutiny, limited to an assessment of the reasonableness of administrative decisions.[589] It has been questioned whether this approach is compatible with the 'thorough and detailed review' required by the European Court of Human Rights. Additionally, Dutch courts cannot 'take the role of the administration'.[590] This means that they cannot change the decision taken by the administration or substitute their assessment for that of the administration. Their mandate is limited to quashing the decision taken at first instance and referring the case back for re-examination by the administrative authorities.[591]

Beyond the Dutch example, a broader historical trend can be discerned, marked by the limited involvement of national judges in asylum matters. In some Member States,

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to the principle of suspensive effects. For further details, see Ackers 'The Negotiations on the Asylum Procedures Directive', supra note 582, 8; Duchrow, 'The Implementation of the Asylum Procedures Directive in Germany' in Zwaan (ed), *The Procedures Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (Wolf Legal Publishers, 2008), pp. 153-155.

[587] Costello, 'The Asylum Procedures Directive in Legal Context', in op. cit. supra note 584, pp. 157-158.

[588] Reneman, 'Asylum and Article 47 of the Charter: Scope and Intensity of Judicial Review' in Crescenzi, Forasterio and Palmisano (eds), *Asylum and the EU Charter of Fundamental Rights* (Editoriale Scientifica Napoli, 2018), pp. 67-68.

[589] Reneman, 'Implementation of the Procedures Directive in the Netherlands' in Zwaan (ed), *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, 2008), pp. 141-144. On that topic, see also Reneman, 'Asylum and Article 47 of the Charter' in op. cit. supra note 588.

[590] Reneman, 'Asylum and Article 47 of the Charter' in op. cit. supra note 588, p. 67. Similar issues also arise in Poland. The first level of appeal involves a full and *ex nunc* examination of both facts and points of law by an administrative body. Conversely, the second level of appeal involves the judiciary (i.e., the administrative court), but the assessment conducted in that context is limited to an *ex tunc* examination of points of law (Bialas and Jaźwińska, 'Preliminary Questions in Asylum Cases Lodged by the Courts from Central and Eastern Europe: A Pragmatic Study' in Crescenzi, Forasterio and Palmisano (eds), *Asylum and the EU Charter of Fundamental Rights* (Editoriale Scientifica Napoli, 2018), pp. 175 et seq). The United Kingdom also deserves to be mentioned here, because the scope of review conducted by national judges is circumscribed to a reasonableness test (see further Costello, 'Implementation of the Procedures Directive (2005/85) in the United Kingdom' in Zwaan (ed), *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, 2008), pp. 131-132).

[591] In other Member States, national judges are equally incompetent to vary the administrative decision taken at first instance. The cassation model prevails most notably in countries such as Hungary, Slovakia, Bulgaria and Poland. For further details, see Bialas and Jaźwińska, 'Preliminary Questions in Asylum Cases Lodged by the Courts from Central and Eastern Europe' in ibid, pp. 175 et seq; Bekisz, 'Procedural Conservatism of National Courts in Asylum Adjudication' (2023) MOBILE Working Paper Series no. 30; Bulandra and Przybyslawska, 'Selected Aspects of Implementation of the Procedures Directive in Poland in the Larger Context of the EU Asylum Policy' in Zwaan (ed), *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, 2008), esp. pp. 108-109.

the competence to review challenges against first-instance decisions was initially conferred exclusively upon administrative authorities. In such systems, there was no role for judges in the institutional architecture of decision-making in asylum matters. The case of Italy is particularly illustrative.[592] Initially, the institutional architecture governing decision-making in asylum matters was based on administrative authorities, specifically the so-called territorial commissions ('*commissioni territoriali per il riconoscimento della protezione internationale*'). These commissions wore a double hat: they were responsible not only for adopting first-instance decisions on asylum but also for hearing appeals against these decisions. This mechanism was commonly referred to as 'supplication' to emphasise its 'lack of remedial nature'.[593] The possibility of appealing to ordinary judges was introduced after the adoption of a legislative decree ('*decreto legislativo*') intended to implement the Procedures Directive (Article 35 of Legislative Decree no. 25/2008).

In other Member States, the task of scrutinising first-instance administrative decisions on asylum was entrusted to quasi-judicial authorities. In Denmark, for instance, an appeal could be brought before a Refugee Board. The Refugee Board did not formally belong to the judiciary; it was a quasi-judicial body comprising a judge, two members appointed by administrative authorities, two members appointed by a Danish NGO involved in refugee activities, and one member appointed by the Danish bar. A similar appeals system prevailed in Austria, where appeals could be introduced before the Independent Federal Asylum System. This body was composed of civilians with a legal background whose status was assimilated to that of government officials. The example of Sweden is also particularly instructive. In Sweden, the competence to adjudicate appeals was conferred upon the Aliens Appeals Board. The asylum appeals systems were the subject of parliamentary debates around the early 2000s. It was suggested at the time that the Aliens Appeals Board could be replaced by regular courts of law, but this suggestion failed to gain sufficient support.

Even in cases where the option to introduce judicial appeals was picked up, the structure of the appeals system diverged among Member States. Broadly speaking, the key differences revolved around matters such as the nature of the remedy (administrative or judicial), the number of judicial layers (one or multiple layers of judicial appeals), the scope of review (*ex nunc* or *ex tunc*; assessment of facts and/or points of law), the suspensive effect of appeals (automatic or upon request; concerning one or two layers of appeals), and the powers of judges in the event the decision was found to be illegal (power of cassation or power of reformation).

[592] Olivetti, 'Implementation of the Procedures Directive (2005/85) in Italy' in Zwaan (ed), *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, 2008), esp. pp. 180-182.
[593] Ibid, p. 180.

2.3.2. Obstacles to harmonising procedural standards in the European Union's diverse institutional landscape

In view of the institutional diversity prevailing across the EU, it should come as no surprise that a proposal to harmonise asylum procedures and remedies faced significant backlash within the Council. This also explains why some issues were deemed too sensitive and were accordingly discarded from the outset by the Commission. This was the case, for instance, with rules on evidence, which presumably involved 'difficult issues related to Member States' individual legal systems'.[594] Beyond this, the proposal drafted by the Commission failed to gather support because it was too difficult to square with distinctive and sometimes conflicting national legal and political traditions regarding the role of the judiciary in asylum matters. Ackers explained that:

> '[m]any Member States expressed concerns about the implications of the appeals chapter for their national judicial system and suggested that they could generally not accept standards (potentially) superseding national rules on court proceedings'.[595]

That is especially evident in relation to the appeals system devised in accordance with Article 39 of the Directive. The Commission originally suggested the introduction of a two-layer system of appeals against negative asylum decisions.[596] Based on Article 38 of the proposal released by the Commission, the Member States were invited to introduce or maintain a 'right to a further appeal to the Appellate Court'.[597] The proposal admittedly left some scope for national administrative and judicial autonomy. More specifically, the Member States remained competent to determine the specific institutional arrangements of the multi-layered system of appeals foreseen by the

[594] Commission, 'Towards Common Standards on Asylum Procedures' SEC(1999) 271 final, pp. 11-12.
[595] Ackers, 'The Negotiations on the Asylum Procedures Directive', supra note 582, 6.
[596] The Commission initially ruled out the option to introduce a multi-layer appeals mechanism. As a matter of fact, the Commission Working Document published to initiate discussions on asylum procedures stated explicitly that '[t]he Community legal instrument would not, for instance, require Member States to introduce or maintain multi-tiered appeal systems… a single appeal or review of the substance of the decision will normally be sufficient (without prejudice to the power of higher courts to rule on points of law)' (European Commission, 'Towards Common Standards on Asylum Procedures', SEC(1999) 271 final, 10).
[597] It is rather surprising that Ackers considered that the proposal set forth a 'three tier system' involving two levels of judicial appeals (Ackers, 'The Negotiation Process of the Asylum Procedures Directive', supra note 582, 4). In fact, the intention of the Commission has always been to introduce a single judicial appeal. The Commission was keen to emphasise from the outset that the proposal would not 'require Member States to introduce or maintain multi-layered appeal systems' (European Commission, 'Towards Common Standards on Asylum Procedures', SEC(1999) 271 final, 10). The proposal admittedly referred to the possibility that the Member States could establish an additional layer of judicial appeal involving the power to examine decision on points of law, but this was by no means intended to constitute an obligation. The Commission was primarily concerned about securing judicial review of both facts and points of law in first instance, whilst allowing the Member States to introduce a right to a further judicial appeal involving an assessment of the legality of decisions on asylum.

Directive. They could decide to entrust the responsibility for conducting first-instance review of administrative decisions on asylum either to an 'administrative or quasi-judicial body', or to a 'judicial body'. In other words, the proposal tabled by the Commission applied without prejudice to the competence of the Member States to opt for either one of these institutional configurations.

What the proposal made clear, however, was that a court of law had to be competent 'at least once' to review a decision on asylum.[598] It also clarified that the scope of judicial review conducted by the 'Appellate Court' had to include 'both facts and points of law'. Article 38(2) of the Proposal prescribed that:

> '[i]f the reviewing body [was] an administrative or quasi-judicial body, Member States [had to] ensure that the Appellate Court [would have] the power to examine decisions on both facts and points of law. If the reviewing body [was] a judicial body, Member States [could] decide that the Appellate Court [would have] to limit its examination of decisions to points of law'.

If the proposal had passed into law, there is little denying that it would have entailed a significant recalibration of institutional autonomy in the field of asylum matters. The establishment of a two-layer review system, together with detailed requirements on the scope of judicial review, would have introduced far-reaching constraints on the Member States' autonomy to structure decision-making in asylum matters according to their own legal and political traditions. It would have gone a long way towards reshaping the institutional architecture governing the treatment of requests for international protection traditionally deployed at the domestic level in the field of asylum (and, more generally, immigration) matters.

However, the ambition formulated by the Commission was short-lived. It should come as no surprise that the text of the proposal was substantially amended during negotiations within the Council. The provisions on access to judicial review proved to be 'one of the last unresolved stumbling blocks at the negotiating table'.[599] These provisions were modified to reflect the Member States' own administrative and judicial traditions. Viewed from this perspective, the negotiation process of the Directive attests to the difficulty of reaching a legislative compromise on common procedures, especially considering the 'institutional heterogeneity' characterising national decision-making processes in asylum and immigration matters.[600]

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[598] European Commission, 'Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', COM(2002) 326 final, p. 3.
[599] Byrne, 'Remedies of Limited Effect', supra note 581, 71.
[600] Cornelisse and Moraru, 'Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance' (2022) 7 European Papers 127, 141; Blisa and Kosar, 'Scope and Intensity of Judicial Review: Which Power for Judges within the Control of Immigration Detention?' in Moraru, Cornelisse and De Bruycker (eds), *Law and Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing, 2020), p. 191.

The Commission initially acknowledged the difficulty of reaching a compromise on the institutional setup of appeals procedures. The relevant provision on access to justice was accordingly 'stripped to its bare essentials'.[601] The 'institutional' approach, which involved setting out a two-layer institutional configuration of review with at least one appeal before a court or tribunal, was abandoned. Instead, the amended proposal merely referenced the right to an effective remedy set out in Article 47 of the Charter, without detailing how the Member States had to organise their national judicial systems in asylum matters. In other words, the Member States remained fully competent to determine the institutional arrangements for review or appeal.[602]

Be that as it may, the Commission was adamant that the right to an effective judicial remedy would further circumscribe the exercise of national discretion in this regard. It stressed that the Member States could not simply provide for an *administrative* appeal before a 'quasi-judicial body'. They had to establish at least one *judicial* appeal before a court or tribunal meeting the demands of independence and impartiality stemming from Article 47 of the Charter. In other words,

> 'an effective remedy might entail either an appeal before a court or a review by an administrative body followed by an appeal before a court'.[603]

The Commission was also keen to insist that the judicial remedy had to involve an examination of both facts and points of law. Though, the Member States did not rally behind the Commission's proposal. The legislative text maintained a reference to the right to an effective judicial review but remained silent on the scope of such review. That issue was left to be regulated at the Member State level. Instead, a recital was inserted into the preamble of the Directive, which stated:

> '[t]he effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial systems of each Member State seen as a whole'.[604]

By deleting any reference to the standard of review exerted by national judges, the Council preserved the discretion of the Member States to decide that:

> 'if the relevant facts have been the subject of an independent review by an administrative body, they may provide that the examination of facts by a court or tribunal may be limited to at least an examination of the reasonableness of the

[601] European Commission, 'Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', COM(2002) 326 final, p. 17.
[602] Ibid, p. 3.
[603] Ibid, pp. 16-17.
[604] Recital 27 in the preamble of the Asylum Procedures Directive.

decision under review, ensuring that it does not proceed from a manifest error of appraisal of facts'.[605]

A similar story also unfolded with respect to the suspensive effect of appeals – or lack thereof. The Commission initially proposed that first-instance appeals should have suspensive effect as a matter of principle, with derogations allowed only under specific and carefully crafted circumstances. An additional safety valve was even introduced in these circumstances, whereby the applicant could in any event apply for leave to remain on the territory of the Member States pending appeal. The same possibility also applied to the second layer of appeals initially prescribed by the proposal. Ultimately, though, the proposal submitted by the Commission encountered resistance within the Council. It could not be reconciled with Spanish legal traditions on suspensive effect.[606] In Spanish administrative law, the power to suspend the execution of an administrative decision lay with the judiciary. This meant, in particular, that the suspensive effect of appeal could not be determined by operation of law, but could only be determined by the judiciary on a case-by-case basis upon request by the applicant.[607] Spain threatened to withdraw from negotiations if the Commission's proposal were adopted. Similar concerns were voiced by the German and Austrian governments.[608]

The opposition expressed by these countries proved to be an insurmountable hurdle in the path to the eventual adoption of the Directive. The provisions on suspensive effect were progressively scaled down over the course of successive Council presidencies. The contrast between the original proposal and the wording of Article 39 of the eventual Procedures Directive is striking. Based on the third paragraph of this provision, it falls exclusively on the Member States to set out 'where appropriate' rules on the suspensive effects of appeals. The only requirement stemming from the Directive was expressed in the form of a gentle reminder that the Member States must comply with their international obligations on such matters. As we shall see, this laconic reference to international human rights law is not devoid of interest,[609] though it is surprising that the Directive did not engage further with the acquis emanating from international law on that issue. By the time the Directive was adopted, it had already become clear that appeals had to produce automatic suspensive effect to comply with

[605] Ackers, 'The Negotiation Process on the Asylum Procedures Directive', supra note 582, 22-23.
[606] Ibid, 6.
[607] Arenas, 'The Southern Border of Europe: "Right to Asylum between Seas and Fences". The Spanish Position relating to the Transposition of the Procedures Directive' in Zwaan (ed), *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, 2008), pp. 80-81.
[608] For further details, see Ackers, 'The Negotiation Process on the Asylum Procedures Directive', supra note 582, 23-24.
[609] Brouwer, 'Effective Remedies in Immigration and Asylum Law Procedures: A Matter of General Principles of EU Law' in Baldaccini, Guild and Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing, 2007), pp. 65-66.

the prohibition of *refoulement* originating from the European Convention of Human Rights.[610]

2.4. Interim conclusion: The marginalisation of national judiciaries in asylum and immigration governance

Overall, the developments described in this section are indicative of the reluctance exhibited by the Member States to relinquish control over procedural and remedial matters in the field of asylum and immigration policy. By failing to address salient issues such as the standard of judicial review, the suspensive effect of appeals, time limits, and judicial powers on appeal, the Procedures Directive reflected the national administrative traditions prevailing in the EU Member States.[611] In a similar vein, Cathryn Costello took the view that the Directive:

> 'apparently accord[ed] national administrations discretion that they had in some measure lost due to domestic and ECtHR rulings'.[612]

She considered that:

> 'the Asylum Procedures Directive amplifie[d] current trends towards restricting appeals and allowing deportation while appeals are pending'.[613]

Interestingly, the story depicted in the previous paragraphs aligns with a more general trend in which the Member States appeared reluctant to embrace proposals for a greater involvement of national judges in immigration and asylum matters. Similar developments have indeed occurred across the field of asylum and immigration policy. In summary, the Member States have expressed strong reluctance to accept Commission proposals suggesting detailed institutional requirements for the make-up of appeals against administrative decisions. More specifically, the Member States have repeatedly attempted to 'keep national courts away' from exerting any decisive influence on decision-making in this policy field.[614] Baldinger demonstrated how the Member States, acting within the Council, have managed to strip most provisions on

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[610] Byrne, 'Remedies of Limited Effect', supra note 581, 80: '[d]uring the period of negotiation and reformulation of the draft directive… the regional human rights court has moved conclusively towards a more robust understanding of the scope of an effective remedy in relationship to expulsion… the right to an effective remedy for all asylum claims that concern a potential Article 3 violation requires suspensive effect for a minimum amount of time'.

[611] Tsourdi, 'Of Legislative Waves and Case Law', supra note 562, 146.

[612] Costello, 'The Asylum Procedures Directive in Context' in op. cit. supra note 584, pp. 157-158.

[613] Ibid, p. 184.

[614] Baldinger, *Vertical Judicial Dialogue in Asylum Cases: Standards on Judicial Scrutiny and Evidence in International and European Asylum Law* (Brill, 2015), p. 412. On that topic, see also Brouwer, 'Effective Remedies in Immigration and Asylum Law Procedures' in op. cit. supra note 609, pp. 63 et seq.

appeals of any reference to national courts or tribunals. This played out in relation to Article 29 of Directive 2001/55 ('right to mount a legal challenge'),[615] Article 18 of Directive 2003/86 ('right to mount a legal challenge'),[616] Article 19(2) of the former Dublin Regulation ('appeal or review'),[617] Article 32(3) of the Visa Code ('right to appeal'),[618] and Article 13(2) of the former Schengen Border Code ('right to appeal').[619]

Additional provisions on the scope of judicial review or automatic suspensive effect of appeals were either weakened or removed altogether during the negotiations over some of these pieces of legislation. In most instances, the relevant amendments were introduced by the Council with little explanation. There is little doubt, however, that these amendments were intended to accommodate national traditions regarding the institutional design of appeals in immigration matters.[620] This was achieved by removing any direct reference to national judges in the relevant provisions on remedies. By doing so, the Council was able to preserve the Member States' competence to determine the rules on procedures and competences according to which such remedies should be organised. Ultimately, the Member States remained competent to entrust appeals to administrative bodies, while excluding national judges from intruding too far – or even at all – into asylum and immigration matters.

In the light of the foregoing, the importance of the general principle of effective judicial protection cannot be overstated. This is especially true with respect to the Asylum Procedures Directive. In the wake of the adoption of the Directive, much attention was given to the (in)compatibility of its provisions with international human

[615] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, [2001] OJ L 212/12.
[616] Council Directive 2003/86/EC of 22 December 2003 on the right to family reunification, [2003] OJ L 251/12.
[617] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 50/1. In its current iteration, the Dublin Regulation nevertheless sets out a 'right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal' (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L 180/31, Art. 27.
[618] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), [2009] OJ L 243/1. On that issue, see Case C-403/16, *El Hassani*, EU:C:2017:960.
[619] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2006] OJ L 105/1. See also Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016] OJ L 77/1, Art. 14(2).
[620] Baldinger, *Vertical Judicial Dialogue in Asylum Cases*, op. cit. supra note 614, pp. 412 et seq.

rights law and the principles of the Refugee Convention.[621] Much of the debate focused on critical matters such as the suspensive effect of appeals, the right to be heard, and the scope of judicial review. The general expectation was that the principle of effective judicial protection could 'prompt streamlining and convergence' of national procedural standards,[622] aligning the provisions on remedies with international human rights law. The next section reflects on how this principle was employed to carve out detailed requirements for judicial control of administrative decision-making in asylum and immigration matters.

3. Readjusting the role of national judges: Reconciling the Asylum Procedures Directive with international human rights standards

This section discusses how the EU general principle of effective judicial protection was deployed to recalibrate, or readjust, the institutional architecture of decision-making in favour of greater involvement of national judges in asylum matters. It demonstrates that the adoption and subsequent implementation of the Asylum Procedures Directive at the Member State level sparked a process of 'judicial interactions' that reshaped the system of judicial protection established by the Directive.[623]

To begin with, this section outlines how the Asylum Procedural Directive failed to live up to the lofty expectations set by international human rights law. Given the absence of provisions regarding the suspensive effect and the scope of appeals, it was widely believed that the Directive fell short of fulfilling these expectations. However, this section explains that the principle of effective judicial protection, now enshrined in Article 47 of the Charter, was relied upon by the Court to integrate the requirements of international human rights law into EU law. By the same token, this principle empowered national judges to 'reassert national administrations' legal accountability'.[624]

To explore those developments, this section first explains how the Asylum Procedures Directive fails to meet the requirements of judicial protection under international human rights law, particularly the ECHR (section 3.1). It then examines

[621] Byrne, 'Remedies of Limited Effect', supra note 581; Ackers, 'The Negotiations on the Asylum Procedures Directive', supra note 582, esp. 32; Peers and Rogers, *EU Immigration and Asylum Law: Text and Commentary*, ch 14 (Brill, 2006), esp. pp. 380 et seq.
[622] Costello, 'The Asylum Procedures Directive in Context', supra note 584, p. 189.
[623] On 'judicial interaction' in relation to the implementation of the Return Directive, see Cornelisse and Moraru, 'Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance' in Tsourdi, Ott and Vankova (eds), *The EU's Shifting Borders Reconsidered: Externalisation, Constitutionalisation and Administrative Integration*, (2022) 7 European Papers 127.
[624] Costello, 'The Asylum Procedures Directive in Context' in op. cit. supra note 584, p. 193.

how the Court, relying on the general principle of effective judicial protection, addressed these shortcomings to align the Directive with the standards established by international human rights law (section 3.2). Building on an analysis of *Samba Diouf*,[625] it considers the influence of the ECHR in shaping obligations of judicial protection in asylum matters, especially regarding the scope of judicial review and the suspensive effect of appeals (section 3.3). Finally, it explains how the general principle of effective judicial protection, now codified in Article 47 of the Charter, was invoked in that judgment to reinforce the mandate of national judges in safeguarding the fundamental rights of asylum seekers (section 3.4).

3.1. Mind the gap between the Asylum Procedures Directive and international human rights law

As mentioned in the previous section, the Asylum Procedures Directive explicitly stated that the Member States must implement Article 39 'in accordance with their international obligations' (Art. 39(3)). Similarly, the preamble of the Directive clarified that its provisions must be interpreted in line with the fundamental right to an effective judicial remedy. This was especially relevant for remedial issues that the Directive left unaddressed. Specifically, the Directive remained silent on issues such as the suspensive effect of appeals and the scope of judicial review. By doing so, it contributed to the proliferation of divergent national procedural standards,[626] and reflected controversial practices from the perspective of fundamental rights protection. The absence of provisions on suspensive effect and the scope of appeals 'amplifie[d] current trends towards restricting appeals and allowing deportation while appeals are pending'.[627]

Much of the doctrinal discussion, therefore, focused on analysing the (in)compatibility of the Directive with the international human rights acquis,[628] as well

[625] Case C-69/10, *Samba Diouf*, EU:C:2011:524.
[626] Thym and Hailbronner, *EU Immigration and Asylum Law*, ch 21 (Hart Publishing, 2021), p. 1431. On that topic, see Commission, 'Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status', COM(2010) 465 final, esp. pp. 14-15: this report contains insights about divergences of national standards on appeals procedures, especially with respect to the suspensive effect of appeals, or the scope of judicial review applicable in that context.
[627] Costello, 'The Asylum Procedures Directive in Context' in op. cit. supra note 584, p. 184.
[628] In parallel, the Commission was also concerned about defending the compatibility of the Directive with respect to international human rights law. It was keen to insist, in particular, that the lack of treatment of these issues was not as such constitutive of a breach of international law (SPEECH/04/226: Statement on the European asylum policy, 5 May 2004). As Ackers duly noted, the position of the Commission hinged to a certain extent on the fact that the responsibility to comply with international

as efforts to reconcile the Directive with this acquis. To take just one example, Peers and Rogers argued that the absence of provisions on the suspensive effect of appeals was difficult to reconcile with the prohibition of *refoulement* under international human rights law.[629] During the negotiation process on the Asylum Procedures Directive, the ECtHR moved decisively towards a robust conception of procedural guarantees for asylum seekers regarding the treatment of their requests for international protection. The tone and language of judgments such as *Jabari v Turkey*[630] and *Conka v Belgium*[631] left little room for doubt. These judgments dictated that any asylum decision whose effects could lead to an irreversible violation of the prohibition of *refoulement* must include the possibility of an appeal with suspensive effect.[632] In *Conka*, the right to suspensive effect was depicted as an absolute safeguard, given the potential consequences of unlawful deportation under Article 3 of the Convention.[633] In *Jabari*, the ECtHR emphasised that the scope of review must include 'independent and rigorous scrutiny' of the substance of the asylum claim.[634]

Seen in this light, the jurisprudence of the European Court of Human Rights cast critical eye on the glaring holes of the Asylum Procedures Directive. More specifically, these judgments reflect a stronger conception of the right to an effective remedy compared to the conception prevailing in the Directive and at the Member State level. Most doctrinal accounts converge around the view that the general principle of effective judicial protection set out in Article 47 of the Charter could serve to integrate the requirements arising from the Convention into the realm of EU law.[635] After all, Article 52(3) of the Charter establishes that the level of protection afforded by the Convention serves as a baseline, or floor of protection, which the Charter cannot deviate from. This provision supports an interpretation of Article 47 of the Charter that is enriched, or further defined, by reference to the fundamental rights stemming from the Convention.

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human rights law ultimately lied with the Member States themselves (Ackers, 'The Negotiations on the Asylum Procedures Directive', supra note 582, 32). On that topic, see Thielemann and El-Enany, 'The Myth of "Fortress Europe": The (True) Impact of European Integration on Refugee Protection' (2008), available at <(PDF) The Myth of 'Fortress Europe': The (true) impact of European integration on refugee protection (researchgate.net)> (last accessed, 6 May 2025).

[629] Peers and Rogers, *EU Immigration and Asylum Law: Text and Commentary*, op. cit. supra note 621, p. 408.

[630] *Jabari v Turkey*, 11 July 2000, Application no. 40035/98.

[631] *Conka v Belgium*, 5 February 2002, Application no. 51564/99.

[632] Ibid, paras 79 and 83.

[633] Byrne, 'Remedies of Limited Effect', supra note 581, 80: 'in *Conka*, the Court extends this to duty to provide the "necessity" of a remedy having suspensive effect for a "minimum reasonable period"'.

[634] *Jabari v Turkey*, 11 July 2000, Application no. 40035/98, para 50.

[635] See, e.g., Costello, 'The Asylum Procedures Directive in Context' in op. cit. supra note 584, pp. 184 et seq.; Brouwer, 'Effective Remedies in Immigration and Asylum Law Procedures' in op. cit. supra note 609, pp. 63 et seq.; Baldinger, *Vertical Judicial Dialogue in Asylum Cases*, op. cit. supra note 614, pp. 415-416. The latter observed that the Member States' attempt to keep national courts at bay in asylum and immigration matters was bound to fail because, in any event, the principle of effective judicial protection required intense judicial control in cases where fundamental rights are at stake.

The next subsections examine how the principle of effective judicial protection has been employed to 'frame' the national autonomy retained by the Member States in implementing the minimum procedural standards established by the Directive.[636] The judgment delivered by the Court in *Samba Diouf* is used as a case study to kickstart a discussion about the potential of the principle of effective judicial protection to shape national procedural law in a manner consistent with the international human rights acquis. Two issues will be discussed. First, this section explores the extent to which the Court has relied on the relevant case law of the European Court of Human Rights as an authoritative source of interpretation. It explains that the material content of the principle of effective judicial protection was aligned with the normative expectations developed by the ECtHR. At the same time, the Court appears willing to establish this principle as an independent source of procedural rights and obligations. Second, this section discusses how *Samba Diouf* signals a trend towards the creation of positive standards of judicial protection in the field of asylum. The argument developed in that context can be summarised as follows: the mandate of national courts was readjusted upwards to reflect their primary responsibility to safeguard the fundamental rights of asylum seekers.

3.2. *Samba Diouf:* A test-case for aligning Article 39 of the Asylum Procedures Directive with international human rights law?

The situation at issue in *Samba Diouf* illustrates the types of restrictions on judicial remedies introduced by the Member States in the field of asylum.[637] Under Luxembourgish law, the Minister for Labour, Employment and Immigration was entitled to examine asylum requests through an accelerated procedure in a number of specified cases, including instances where the applicant 'clearly' did not qualify for international protection. The decision to apply an accelerated procedure had significant repercussions for the procedural rights and remedies available to the claimant. Under this procedure, the time limits for filing appeals were shortened, the number of levels of judicial appeals was reduced, and there was no possibility of appealing the very decision to apply the accelerated procedure. Against that background, the Court was asked whether the limitations on judicial control that applied when an accelerated procedures complied was used complied with the right to an effective judicial remedy under Article 39 of the Directive.

Seized of that matter, the Court of Justice emphasised that the Directive itself did not require the decision to use an accelerated procedure to be subject to judicial review.

[636] Tsourdi, 'Of Legislative Waves and Case Law', supra note 562, 162.
[637] Case C-69/10, *Samba Diouf*, EU:C:2011:524.

Rather, it merely prescribed that judicial control was required for final decisions that rejected requests for refugee status on their merits.[638] In contrast, preparatory decisions, such as those regarding the use of an accelerated procedures, escaped from the reach of judicial control under the Directive.[639] However, the Court then considered whether the right to an effective judicial remedy enshrined in Article 47 of the Charter imposed additional constraints on the autonomy of Member States regarding judicial review of preparatory decisions in asylum cases. The Court stressed that:

> '[w]hat is important … is that the reasons justifying the use of an accelerated procedure be effectively challenged at a later stage before the national court and reviewed by it within the framework of an action that [could] be brought against the final decision closing the procedure relating to the application for asylum'.[640]

In other words, the Court did not focus on whether there was a separate and independent national remedy specifically for challenging the decision to apply an accelerated procedure. The Member States retained the competence to organise their system of appeals, but this competence was constrained by the principle of effective judicial protection. What mattered most was that the reasons justifying the use of such procedures could be subject to 'thorough review' by the national court in the context of its assessment of the legality of the final decision on the asylum request.[641] Ultimately, the Court seemed primarily concerned with preserving the role of national judges in conducting a comprehensive assessment the legality of the decision, covering 'both the facts and the law'.[642]

The Court's assessment of time limits for bringing judicial proceedings followed a similar path. It initially acknowledged that the differences between the time limits applicable to ordinary and accelerated procedures were justified by 'the nature of the procedure in place'.[643] There is indeed a fundamental distinction between these two types of procedure. Accelerated procedures typically involve applications with a lower prospect of success compared to ordinary procedures, which often contain stronger grounds for obtaining refugee status. A great deal was also made about the overall efficiency of asylum procedures. In fact, the shortened time limits applicable to accelerated procedures were deemed justified to ensure that applications processed under the ordinary procedure would be 'processed more efficiently'.[644] At the same time, the Court was adamant that:

[638] Ibid, para 41.
[639] Ibid, para 43.
[640] Ibid, para 58.
[641] Ibid, para 56.
[642] Ibid, para 57.
[643] Ibid, para 65.
[644] Ibid, para 65.

'the important point … is that the period prescribed must be sufficient in practical terms to enable the applicant to prepare and bring an effective action'.[645]

3.3. The European Convention on Human Rights: An authoritative baseline for shaping judicial protection in EU asylum law?

The judgment delivered by the Court in *Samba Diouf* invites further scrutiny of the interaction between the two European human rights courts. More specifically, the judgment brings into sharp focus topical issues regarding the normative significance of the acquis emanating from the European Convention on Human Rights in relation to the interpretation of the principle of effective judicial protection. A mixed picture emerges from the analysis. This section demonstrates that the principle of effective judicial protection was relied upon to incorporate the Convention acquis. At the same time, this judgment reflects the Court's reluctance to explicitly draw from the case law of the European Court of Human Rights. Substantively, the content of the principle of effective judicial protection was aligned with the guarantees deriving from the Convention, but this was done without explicitly acknowledging the Convention. This approach reflects the Court's willingness to set the principle of effective judicial protection apart as a self-standing source of procedural rights and obligations.

To begin with, it is fair to acknowledge that the solution developed in *Samba Diouf* aligns with the acquis originating from the Convention.[646] This is true, first and foremost, with respect to the contextual approach adopted by the Court. It is worth remembering that the contextual approach has long been a staple of the interpretation of the right to an effective remedy set out in Article 13 ECHR. This approach entails that the effectiveness of a remedy must be assessed in the light of elements such as the nature of the fundamental rights involved, the intensity of the breach, and the procedure as a whole.[647] Similarly, the Court approached the national procedural rules under consideration in *Samba Diouf* from a holistic and contextual perspective: it assessed the procedure as a whole to determine whether the decision to use an accelerated procedure could be examined at a later stage – or, one might be tempted to add, at any

[645] Ibid, para 66.
[646] For a similar view, see Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 571, 23-24.
[647] In *Conka*, the ECtHR was keen to emphasize, for instance, that 'even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so' (*Conka v Belgium*, 5 February 2002, Application no. 51564/99, para 75).

stage – of the procedure.[648] Likewise, the decision to apply shortened time limits was assessed with regard to the nature of the procedure involved.

On a more substantive level, it is also interesting to observe that the standard of scrutiny formulated in *Samba Diouf* seems fairly similar to the Convention requirement of 'full jurisdiction', which includes both points of law and the merits. What is somewhat surprising, in this context, is the absence of any reference to the ECtHR jurisprudence.[649] After all, Article 52(3) of the Charter prescribes that the level of protection afforded by the Convention constitutes a baseline, or floor of protection, from which the Charter cannot depart. This provision supports an interpretation of Charter rights that is grounded in, or fleshed out by reference to, the fundamental rights deriving from the Convention. The question put to the Court also reflected that imperative. It made clear that the national procedural rules at issue had to be tested by reference to the general principle of effective judicial protection, 'prompted by Articles 6 and 13' of the Convention.[650]

Against this background, the judgment in *Samba Diouf* seemed to reflect a conscious choice to move beyond the acquis resulting from the Convention and construe the material content of EU fundamental rights in its own terms.[651] Although the Court did

[648] In doing so, the Court admittedly espoused the standard approach prevailing in the context of an assessment of the effectiveness of national procedural rules. On that topic, see Reneman, 'Asylum and Article 47 of the Charter' in op. cit. supra note 588, p. 62. She observed that the judgment delivered in *H.I.D.* was similarly grounded on a contextual approach. The Irish Refugee Appeals Tribunal boasted functional links with the executive, as well as the administrative authority competent at first instance, In spite of this, the Court considered that the possibility to appeal decisions adopted by the Tribunal in front of higher courts or tribunals was 'capable of protecting [that tribunal] against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members' (Case C-175/11, *H.I.D. and B.A.*, EU:C:2013:45, para 103). With the benefit of hindsight, the reasoning offered in support of that conclusion is rather surprising. This is especially true considering the fact that the courts competent on appeal (i.e., the High Court or the Supreme Court) could not conduct an appraisal of the facts. This sits at odds with the requirement of 'full and *ex nunc*' examination of both elements of facts and law elaborated by the Court on the basis of Article 46(3) of the Recast Directive. In the wake of recent judgments on the criterion of independence of courts or tribunals (such as *FMS*), there is a reasonable argument to be made that this judgment no longer reflects the current stance of the Court on that matter. In FMS, for instance, the Court was keen to insist that the judiciary must 'exercise its functions wholly autonomously', which entails that 'the independence of the judiciary must be ensured in relation to the legislature and the executive' (Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*, paras 135-136). The solution developed in *H.I.D. and B.A.* seems difficult to square with that stance. Admittedly, the Court has never overruled explicitly the solution developed in this judgment (perhaps because it was never requested to do so). The requirement of independence nevertheless constitutes a requirement intrinsic to the essence of the right to an effective judicial remedy. As such, it applies across the board and should bind the Member States in the exercise of their competence to define the institutional set-up of decision-making in asylum matters.

[649] By the same token, the Court also remained somewhat oblivious to the fundamental rights saliency of the field of asylum law. As the ECtHR duly established, any decision on asylum involves fundamental rights considerations relating to the principle of *non-refoulement*.

[650] Case C-69/10, *Samba Diouf*, para 27.

[651] Kosta and De Witte, 'Human Rights Norms in the Court of Justice of the European Union', in Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (Cambridge University Press, 2019), p. 276. Similarly, the relevant case law on the right to be heard also illustrates the Court's growing

not expound explicitly on that matter, the opinion drafted by Advocate General Cruz-Villalon offered some interesting insights into the potential reasons underlying that choice. The AG opined, particularly that following the entry into force of the Charter, the principle of effective judicial protection had 'acquired a separate identity and substance'. In other words, this principle had transitioned into a self-standing or autonomous right with a 'content of its own'. The consequences of this approach were readily apparent: to determine the material content of that principle, it was no longer necessary to seek inspiration from the content attributed to equivalent rights and principles in the Convention system.[652]

Instead of explicitly referencing the jurisprudence of the ECtHR on the requirement of 'full jurisdiction', the Court looked inward, drawing inspiration from the standard of judicial scrutiny applicable in free movement case law. In this context, the Court seemed to establish a parallel between fundamental freedoms and fundamental rights with respect to the relevant standard of scrutiny. More specifically, the judgment referenced in *Samba Diouf* concerned judicial review of a Member State's decision refusing the registration of a lawyer wishing to establish themselves in another Member State. Directive 98/5 did set out a right to institute judicial proceedings in relation to that decision, but remained silent on the scope of review in that context.[653] In that judgment, the Court was adamant that the reviewing body had to possess 'full jurisdiction' with respect to both law and facts.[654] By relying on that judgment in *Samba Diouf*, the Court seemed to suggest that the requirement of 'full jurisdiction' should apply in relation to any decision involving fundamental rights (of which fundamental freedoms form an intrinsic component).[655] Tsourdi opined that these requirements essentially coincided with the standards established by previous case law on the principle of effective judicial protection. As an integral component of primary law, that principle applies 'even in the absence of explicit procedural norms under secondary

awareness about the potential of the Charter to support a self-standing interpretation of EU fundamental rights. It is also useful to observe that these judgments establish the right to be heard as a safeguard inherent in the fundamental principle of effective judicial protection that is intended to apply across the board, i.e., in respect of any decision that is susceptible to affect the interests of individuals (See, e.g., Case C-277/11, *M.M.*, EU:C:2012:744, esp. paras 81-86; Case C-348/16, *Sackho*, EU:C:2017:591, esp. paras 36 et seq.; Case C-560/14, M, EU:C:2017:101.

[652] Opinion of AG Cruz-Villalon in Case C-69/10, *Samba Diouf*, EU:C:2011:102, para 39.

[653] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, [1998] OJ L 77/36, Art. 10

[654] Case C-506/04, *Wilson*, EU:C:2006:587, paras 61-62.

[655] For a similar view, see Baldinger, *Vertical Judicial Dialogue in Asylum Cases*, op. cit. supra note 614, pp. 408-409. AG Cruz-Villalon also suggested that, as a general principle belonging to the realm of primary law, the scope and content of the principle of effective judicial protection remained immutable irrespective of the policy area concerned (Opinion of AG Cruz-Villalon in Case C-69/10, *Samba Diouf*, para 32).

law'.[656] In other words, the judgment reflects the transversal nature of the principle of effective judicial protection, transcending the intricacies of the field of asylum.[657]

Be that as it may, the case law on the suspensive effect of appeals in asylum matters demonstrates that the acquis resulting from the Convention is not entirely devoid of relevance for the interpretation of the principle of effective judicial protection.[658] The judgment delivered in *Tall* deserves mention here.[659] The applicant in the main proceedings, Mr Tall, submitted a subsequent application for asylum, but that request was rejected by the competent determining authority. Mr Tall was then served with an order to leave the territory following the rejection of his application. An appeal was brought against the rejection of the application. Under Belgian law, the appeal introduced by the applicant in respect of the decision not to further examine his application was devoid of suspensive effect. Against this backdrop, the question referred to the Court thus boiled down to the following: does the exclusion of suspensory effect comply with the requirements set out in Article 47 of the Charter and Article 39 of the Asylum Procedures Directive?

The Court initially concluded that the Asylum Procedures Directive as such authorised the Member States to:

> 'provide that an appeal against a decision refusing to take a subsequent application for asylum into consideration, such as the one at issue in the main proceedings, [was] devoid of suspensory effect'.[660]

At the same time, the characteristics of the remedy had to be 'determined in a manner that [was] consistent with Article 47 of the Charter'.[661] This was assessed by reference to the relevant jurisprudence of the ECtHR. Based on Article 52(3) of the Charter, the guarantees of effective judicial protection deriving from Articles 19(2) and 47 of the

[656] Tsourdi, 'Of Legislative Waves and Case Law', supra note 562, 162.
[657] A similar requirement of 'full jurisdiction' was also expressed in recent judgments on the basis of the principle of effective judicial protection. See, e.g., Case C-403/16, *El Hassani*, EU:C:2017:960, para 39; Case C-682/15, *Berlioz*, EU:2017:373, para 55 ('jurisdiction to consider all the relevant issues'). In the former judgment, the Court remained oblivious to the suggestion expressed by AG Bobek to establish a 'lighter standard' for judicial review in the light of the 'wide discretion' enjoyed by the Member States when examining visa applications (Opinion of AG Bobek in Case C-403/16, *El Hassani*, EU:C:2017:659, para 109). Widdershoven similarly suggested that the level of intensity of judicial scrutiny hinged on the degree of harmonisation achieved by virtue of EU secondary law (Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 571, 24 et seq.).
[658] On that topic, see Kosta and De Witte, 'Human Rights Norms in the Court of Justice of the European Union' in op. cit. supra note 651.
[659] Case C-239/14, *Tall*, EU:C:2015:824. See also Case C-562/13, *Abdida*, EU:C:2014:2453.
[660] Case C-239/14, *Tall*, para 49.
[661] Ibid, para 51.

Charter were further elaborated by reference to ECtHR case law on the suspensive effect of appeals in asylum matters.[662]

The guarantee of automatic suspensive effect that had emerged from the case law of the ECtHR was thus integrated into the fabric of EU law.[663] Ultimately, the Court was firm that the requirement of automatic suspensive effect must be applied in relation to measures likely to expose migrants to a risk of *refoulement*. However, the Court also stressed that the decision at issue did not involve such a risk. In fact, negative asylum decisions did not lead to the removal of the applicant.[664] In other words, these decisions were one step removed from the actual decision to return the applicant to the country which they had fled. To comply with the principle of effective judicial protection, therefore, it would suffice to establish suspensive effect of appeals brought against the actual return decision. In some respects, the Court used the procedures established by the Returns Directive (i.e., Directive 2008/115)[665] as a 'safety net' to integrate the requirements arising from ECtHR case law.[666]

The judgment delivered in *Tall* is instructive for two reasons. First, the judgment reflected a contextual approach to the interpretation of the principle of effective judicial protection. More specifically, the Court's conclusion was grounded in the nature of the rights involved and the procedure as a whole. The principle of *non-refoulement*, expressed in Article 19(2) of the Charter, was considered a key element in strengthening the conception of judicial protection, especially regarding the automatic suspensive effect of appeals. Similar to *Samba Diouf*, the solution formulated by the Court involved an assessment of the procedure in its entirety. Ultimately, the Court was concerned with ensuring automatic suspensive effect for the actual return decision. The initial appeal against the rejection of the asylum request was less relevant, as long as the appeal against the return decision was automatically suspensive. Second, the judgment of *Tall* revealed that the case law of the European Court of Human Rights continued to have a decisive influence on the interpretation of the principle of effective judicial protection. The Court of Justice in *Tall* drew from the right to an effective

[662] Article 19(2) of the Charter states that: '[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. It integrates the principle of *non-refoulement* into EU (primary) law. Although that principle does not seem directly relevant to the issue of judicial protection of asylum seekers, the European Court of Human Rights has relied upon that principle to carve out detailed remedies available to asylum seekers.
[663] *Gebremedhin v France*, 26 April 2007, Application no. 25389/05, para 66; *Hirsi Jamaa and Others v Italy*, 23 February 2012, Application no. 27765/09, para 200.
[664] Case C-239/14, *Tall*, para 56.
[665] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98.
[666] Carlier and Leboeuf, 'Droit Européen des Migrations' (2016) 227 Journal de Droit Européen, 109. By doing so, the Court also refrained from impinging upon the intention of the EU legislature to exclude suspensive effect of appeals in respect of negative decisions on appeal.

remedy, as set out in Article 13 of the Convention, allowing the Court to integrate the requirement of automatic suspensive effect into EU law.

One may wonder about the reasons behind the Court's inconsistent reliance on the Convention as a source of interpretation for the purposes of the Charter. It might be tempting to discern a tendency to draw from internal sources when a clear norm of judicial protection is already available within EU law. *Samba Diouf* is a case in point, where the Court could draw inspiration from the standard of review already established under the principle of effective judicial protection, including a parallel with the standard of review applicable in free movement. This may explain why the Court refrained from explicitly relying on the ECtHR's standards in that case.

Conversely, the Court did not seem reluctant to draw from external sources in *Tall*. This is easily explained: in that case, there was no alternative standard of judicial protection available within EU law. The Court thus had to venture into uncharted territory to integrate the requirement of automatic suspensive effect into the realm of EU law. This requirement did not form part of the EU's body of rights and principles under the principle of effective judicial protection. The need for such a guarantee makes sense when considering the unique implications of negative asylum decisions, which expose asylum seekers to the risk of being returned to a place where they may face torture or degrading treatment. Viewed from this perspective, the field of asylum is distinct, with features that few other policy areas possess. As such, the principle of effective judicial protection had to be reinforced to address the complex fundamental rights implications of negative decisions on asylum. In the absence of an internal EU source of inspiration, the Court demonstrated its willingness to rely on external sources to define the EU standard of judicial protection.

3.4. The principle of effective judicial protection: A building block for strengthening the mandate of asylum judges?

Samba Diouf also seemed to usher in a renewed conception of the role and responsibilities of national judges in the field of asylum. It is useful to remember that, for a long time, the enforcement of EU law rested on the procedures and remedies available at the national level. The toolbox of EU rights and remedies available to national judges tasked with ensuring the judicial protection of individuals was limited.[667] They were, in particular, entitled to disapply national procedural rules that

[667] It is perhaps necessary to remember that the traditional narrative depicts a three-stage process characterising the development of obligations in respect of national procedural law. The first stage was characterised by the Court's deference towards national procedural law (under what came to be known

made the enforcement of EU law impossible or excessively difficult. However, the Court of Justice appeared hesitant to make further inroads into national procedural autonomy. There was relatively little in terms of what EU law provided by way of positive remedies beyond the mere disapplication of incompatible national procedural norms. This reluctance became known as the 'no-new-remedy rule', which meant that national courts would only be invited to create new remedies beyond those explicitly spelled out by national law in extremely limited and exceptional circumstances.

Following the entry into force of the Lisbon Treaty, much attention was given to the potential of the new framework governing judicial protection to support the development of positive obligations of judicial protection. The obligation on national courts to secure judicial protection for individuals under Articles 47 of the Charter and 19 TEU underscored the need for an increased emphasis on the remedies available at the domestic level. *Samba Diouf* appeared to reflect the Court's emerging tendency to empower national judges to ensure compliance with the fundamental rights of asylum seekers. This judgment speaks to the growing influence of fundamental rights on national procedural rules. In a similar vein, Van Cleynenbreugel viewed this as a shift towards a fundamental rights approach to national procedural provisions.[668] In essence, the principle of effective judicial protection was used as a legal benchmark to assess the suitability of national procedural rules. It supported the formulation of positive recommendations about the manner in which the national procedural framework should be readjusted to comply with the Charter.

The implications of this approach for national procedural autonomy were particularly significant regarding the standard of 'full jurisdiction'. Based on the fundamental right to an effective judicial remedy, the Court established a specific standard of review applicable in asylum cases. It strikes me that the relevant standard closely resembled the type of standard that the drafters of the Asylum Procedures Directive consciously discarded. By requiring that national judges to assess both facts and points of law, the Court formulated recommendations that went beyond the legislative compromise achieved through secondary law. In fact, the principle of effective judicial protection was used to frame the procedural autonomy retained by the Member States when implementing the minimum procedural safeguards established by

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as the 'principle of procedural autonomy). The second stage was marked by the development of EU-wide remedies. Beyond the right to invoke EU law (and the duty to disapply conflicting national provisions), the Court developed positive remedies such as the action for state liability or the right to judicial control. The third stage reflected a significant recalibration of the interaction between EU law and national procedural law. The 'procedural rule of reason' was devised in this context to reflect a greater emphasis on national procedural autonomy (to the detriment of the requirements of effectiveness of EU law) (Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 571).

[668] Van Cleynenbreugel, 'Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration* Judgment of the Court of Justice (Second Chamber) of 28 July 2011' (2012) 49 Common Market Law Review 327, 347.

the Procedures Directive. It is important to recall that the absence of provisions on the scope of judicial review had led to a proliferation of divergent standards of review. In some Member States, the national judge was not entitled to delve into the merits of the decision, while in others, such as the Netherlands and the UK, judicial review focused on a rather limited appraisal of facts.[669] *Samba Diouf* thus marked a significant departure from the procedural autonomy retained by the Member States regarding the scope of judicial review. More specifically, the judgment in *Samba Diouf* strengthened the powers granted to national judges in reviewing negative decisions on asylum.

Viewed from this perspective, *Samba Diouf* seemed to make decisive strides towards a significant recalibration of the mandate attributed to national judges. This development reflected their responsibility as guardians of the fundamental rights granted to asylum seekers. The language employed in that judgment also signalled the Court's willingness to further intervene in national procedural autonomy by establishing positive standards of judicial protection. It must be stressed, in particular, that the Court did not shy away from expressly guiding the outcome of the interpretative endeavour of the national referring court. Of course, the latter remained ultimately competent to determine whether national procedural law complied with the constraints stemming from Article 39 of the Asylum Procedures Directive, interpreted in the light of Article 47 of the Charter. It fell upon the national judge to assess, in particular, whether national law permitted an assessment of both the facts and the points of law, including the reasons underlying the use of an accelerated procedure. Ultimately, the national referring court remained competent to interpret national law in conformity with EU law.[670] Similarly, the Court deferred to the national referring court's assessment of whether the time limits established by national law would allow the claimant to 'prepare and bring an effective action'.[671]

The bottom-line could nevertheless be conceptualised in the following manner: if the national court found that national procedural law failed to satisfy the directly effective EU standard of judicial protection, the scope of discretion available to the national court to modulate national procedural law was quite limited. In fact, the Court suggested that the national referring court might have to disregard the impugned national provisions and instead apply the standard of protection deriving from EU law. Regarding the scope of review, the Court emphasised that:

> '[t]he right to an effective remedy is a fundamental principle of EU law. In order for that right to be exercised effectively, the national court *must be able* to review the merits of the reasons which led the competent administrative authority to hold

[669] Commission, 'Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status', COM(2010) 465 final, p. 15.
[670] Case C-69/10, *Samba Diouf*, paras 59-60.
[671] Ibid, para 66.

> the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons'.[672]

Admittedly, this statement did not *explicitly* require national judges to disapply national legislation precluding them from assessing the reasons justifying the use of an accelerated procedure and to apply the standard of review formulated in that case. In other words, the Court seemed somewhat hesitant to expressly declare that the national judge had to create a new remedy beyond those provided by national law. Ultimately, the responsibility to adapt national law in a way that aligns with the EU standard of judicial protection primarily fell on the national legislature. Be that as it may, the language employed in that excerpt, specifically the expression 'must be able', seemed to invite national judges to take the bull by the horns and review the reasons underlying the decision to apply an accelerated procedure, even if national provision did not explicitly authorise them to do so.

A similar story unfolded regarding the requirements governing time limits. More specifically, the Court formulated detailed recommendations about how the national referring court could adjust national law to reflect the requirement that time limits should enable the applicant to 'prepare and bring an effective action'. Once again, the national referring court was left with some discretion to interpret national procedural law in a way that accommodated the demands imposed by the principle of effective judicial protection.[673] More specifically, it was up to the national referring judge to determine if, given the circumstances of the case, the time limit was sufficient to 'enable the applicant to prepare and bring an effective action'. At the same time, though, the Court also hinted that if the outcome of that assessment showed that the time limits were insufficient for that purpose, the judge would have to order the application to be examined under the ordinary procedure.[674] It suggested, in particular, that the national judge could:

> 'uphold […] the action brought indirectly against the decision to examine the application for asylum under an accelerated procedure, so that, in upholding the action, the national court would order the application [to] be examined under the ordinary procedure '.[675]

[672] Ibid, para 61 (emphasis added).
[673] The same approach also seems to prevail in relation to the institutional make-up of appeals, whereby the accelerated procedure only involves one level of appeal (in comparison with the two levels of appeals traditionally applicable in ordinary procedures). In that context, the Court was satisfied that the Asylum Procedures Directive merely required that 'there should be a remedy before a judicial body' (Ibid, para 69).
[674] Ibid, para 68.
[675] Ibid, para 68.

In other words, the national referring court was directly instructed to nullify the effects of the accelerated procedure, if necessary, by substituting (the time limits inherent in) the ordinary procedure.

In the light of the foregoing, *Samba Diouf* seemed to usher in a new narrative about the role and responsibilities of national judges. In particular, it reflected a new trend whereby the Court of Justice appeared less concerned, or hesitant, about entrusting national courts with more assertive remedial powers beyond those explicitly set out in national law (or even secondary law, for that matter). The Court presumably felt emboldened by the integration of a new standard of effective judicial protection into the Charter, and suggested the creation of positive obligations of judicial protection beyond the mere disapplication of national procedural law. To be sure, the language and tone of that judgment remained, at this stage, rather cautious. But the bottom line is that the national referring court was invited, or encouraged, to step outside the bounds of its national mandate to accommodate the requirements emanating from the EU standard of judicial protection.

4. Another brick in the wall: The development of positive standards of judicial protection in EU asylum law

This section examines how the Recast Procedures Directive, when read in the light of Article 47 of the Charter, reshaped the mandate given to national judges in the field of asylum. The bottom-line can be summarised as follows: the new legal framework on judicial protection strongly militated for greater involvement of national judges in asylum matters. In some ways, the story outlined in the following paragraphs aligns with previous developments in the *Samba Diouf* case. This is particularly true considering the fact that the new conception established by that judgment was, to some extent, grounded in the Charter. However, this section takes that approach a step further. It aims to assess the impact of the adoption of the Recast Directive on asylum procedures.

The starting point of the discussion is the Directive. This section explains that the Recast Directive simply codified what had already been prescribed by the case law of the ECtHR and the Court of Justice. Together, the Recast Directive and Article 47 of the Charter nevertheless encouraged national judges to assume a more prominent role as watchdogs for the fundamental rights of asylum seekers. On the basis of these provisions, the Court developed positive standards of judicial protection. This development invites a renewed doctrinal focus on the interaction between national procedural autonomy and the requirements of the principle of effective judicial

protection. This section addresses that challenge by demonstrating that the jurisprudence now reflects a new conception of judicial protection.

The novelty lies in the recognition that the principle of effective judicial protection now operates as a self-standing source of obligations of judicial protection. This development took pace against the backdrop of a recalibration of the relationship between direct effect and primacy. In short, the principle of primacy is no longer solely concerned with removing inconsistent national procedural provisions. The principle of effective judicial protection now also imposes positive obligations, extending beyond the mere disapplication of incompatible national provisions. Furthermore, this section explains that, in its endeavour to establish positive standards of judicial protection, the Court appears mindful of the legislative compromise reached by the EU legislature. By interpreting the Recast Procedures Directive, the Court seeks to reconstruct the mandate conferred upon national courts in asylum matters. In this sense, the Directive serves as the primary frame of reference for outlining the detailed requirements of judicial protection in this area. At the same time, the Court is engaged in a delicate balancing act, refining the mandate of national judges and ultimately strengthening it by reference to the primary law guarantees enshrined in Article 47 of the Charter.

To explore these developments, this section begins by briefly describing the key features of the Recast Procedures Directive. It concludes that the Directive codifies the acquis derived from the Court's case law, as outlined in the previous section (section 4.1). It then explains how the Court, by interpreting the Directive in the light of Article 47 of the Charter, developed robust obligations of judicial protection in asylum law (section 4.2). Through an analysis of recent judgments such as *Torubarov*,[676] it demonstrates how the Court strengthened the role of national courts, especially in relation to their scope of review and the execution of final judgments (section 4.3). Finally, this section unpacks the complex interplay between the core features of effective judicial protection under Article 47 of the Charter and the requirements derived from the Directive (section 4.4).

4.1. The Recast Procedures Directive: A mere codification of jurisprudential acquis?

The Lisbon Treaty brought about far-reaching changes to the objectives, rules, and procedures governing lawmaking in asylum matters. Undoubtedly, the most profound change was the 'de-pillarisation' of decision-making in the area of freedom, security and justice ('AFSJ'). The abolition of the third pillar meant, by extension, that the inter-governmental rules on law-making were replaced by the Community method. Gone

[676] Case C-556/17, *Torubarov*, EU:C:2019:626.

were the days when any individual Member State could simply oppose the adoption of legislative instruments in this area. Instead, the adoption of legislative instruments would follow the rules of the ordinary legislative procedure set out in Article 294 TFEU. This marked the shift to co-decision. The European Parliament, once on the periphery of decision-making in asylum matters, was given a seat (and a resounding voice) at the negotiating table.

The Lisbon Treaty reflected a growing sense of optimism about the capacity of this new institutional configuration to fulfil the promises outlined in the Tampere Conclusions. The mandate set out by Article 78(2)(d) TFEU invited the EU's legislative institutions to work towards the adoption of 'common procedures for the granting and withdrawing of uniform asylum or subsidiary status'. The Commission presumably felt emboldened by the new legislative mandate provided by the Lisbon Treaty. It proposed establishing a:

> 'single, common asylum procedure leaving no space for the proliferation of disparate procedural arrangements in Member States'.[677]

The ambition was clear: the Commission sought to strengthen the procedural guarantees established by the first iteration of the Asylum Procedures Directive. However, the implementation of that Directive had led to a proliferation of divergent national procedural practices. The chief culprit was identified as the existence of numerous provisions granting Member States considerable discretion to deviate from the procedural standards set out by the Directive. The explicit aim of the proposal for a recast Directive on asylum procedures, therefore, was to advance towards a 'common asylum procedure and a uniform status';[678] in other words, the second phase of the CEAS was in full swing – or so it seemed.

To achieve greater harmonisation in procedural matters, the requirements of EU and international human rights law were intended to serve as a useful source of inspiration.[679] More specifically, the Commission's proposal was originally devised to be compatible with the existing acquis regarding these rights.[680] Ultimately, however, the Recast Directive failed to build upon the jurisprudential acquis. Much like the first iteration of the Asylum Procedures Directive, the Recast Directive afforded significant

[677] Commission, 'Policy plan on asylum – An integrated approach to protection across the EU', COM(2008) 360 final, p. 5.
[678] Commission, 'Proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)', COM(2009) 554 final, p. 3.
[679] Commission, 'Policy plan on asylum – An integrated approach to protection across the EU', p. 3.
[680] Commission, 'Proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)', p. 9.

discretion to national administrative authorities regarding the treatment of requests for international protection.[681]

On the bright side, the Directive included some minor improvements, such as an extension of its scope to include applications for subsidiary protection (Art. 3), new rules on the nature of the first instance determining authority, and requirements for training obligations (Art.4), strengthened guarantees on access to legal assistance and information (Art. 12(1)), and time limits for deciding on asylum applications (Art. 31(2)-(3)), among others. However, the downside was that the Recast Directive maintained the traditional approach, whereby national administrative authorities retained discretion to deviate from procedural standards under 'exceptional procedures' - which, in practice, had often become the norm.[682] Furthermore, it restricted access to legal aid in appeals procedures even further by adding an additional ground for derogation in cases of repeated applications (Art. 21(2)).

The Recast Procedures Directive also introduced additional provisions on judicial remedies. Most of the improvements regarding access to effective remedies were designed to incorporate the jurisprudential acquis deriving from the case law of the European Court of Human Rights and the European Court of Justice. It provided specific rules on the standard of review, which included a:

> 'full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs'.[683]

This provision integrated the requirement of 'full and thorough' scrutiny into the realm of EU secondary law. Similarly, the legal standard of 'reasonable time limits' reflected the case law of the ECtHR and the Court of Justice.[684] The Directive also introduced a guarantee of automatic suspensive effect in the event of appeals. However, this requirement was subject to exceptions in 'exceptional cases' (Art. 46(6)(a)-(b)-(c)-(d)). In these cases, the requirement for suspensive effect became facultative: the competent national judge could decide, either *ex officio* or upon request, whether to grant suspensive effect. Pending examination of the request, the applicant enjoyed a right to remain on the territory of the Member States (Art. 46(8)). It is also worth noting that the requirement of (automatic) suspensive effect applied only to judicial appeals at first

[681] On that topic, see Peers, 'The Second Phase of the Common European Asylum System: A Brave New World – Or Lipstick on a Pig?' Statewatch (8 April 2013), available at <The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig? (statewatch.org)> (last accessed, 6 May 2025).
[682] Similarly, the list of inadmissible cases is now explicitly non-exhaustive (Art. 33), and although the list of grounds for accelerating procedures has been reduced, it remains unclear whether that list is exhaustive.
[683] Art. 46(3) of the Recast Directive.
[684] Art. 46(4) of the Recast Directive.

instance. This meant that the Member States retained the competence to decide that a potential second-level appeal would not automatically grant suspensive effect.[685]

All in all, the Recast Directive merely codified the existing rules and principles derived from case law, without introducing new elements in terms of judicial protection for applicants for international protection. In other words, it did not contribute to a more robust conception of the principle of effective judicial protection beyond what was already prescribed by the jurisprudential acquis. For instance, the Directive remained silent on the powers granted to national judges when a negative asylum decision was found to be illegal. Viewed from this perspective, the competence of the Member States to opt for either a cassation or reformation model was fully preserved. In sum, the Recast Directive brought about:

> 'modest improvements in terms of harmonisation, including in what concerns the right to an effective remedy, its scope, and the suspensive effect of appeals'.[686]

Once again, the expectations set out by the Treaty failed to fully materialise in practice. Instead of establishing a common asylum procedure, the Recast Directive allowed for the continued proliferation of disparate standards of judicial protection.

The European Court of Justice was therefore called upon to fine-tune the contours of the right to an effective remedy featuring in Article 46 of the Directive. Taken together, this provision and Article 47 of the Charter served to strengthen the mandate attributed to national judges in asylum matters. This development invites renewed doctrinal discussion on the interaction between national procedural autonomy and the principle of effective judicial protection. The starting point of the discussion revolves around a reflection on the evolution of traditional doctrines concerning the decentralised enforcement of EU law. As mentioned in Chapter 1,[687] the principle of effective judicial protection has come to embrace a more positive dimension, focusing on the creation of positive obligations of judicial protection. This section explains how this approach resonates in the field of asylum and, more generally, immigration matters.

[685] Thym and Hailbronner, *EU Immigration and Asylum Law*, ch 21, op. cit. supra note 626, pp. 1535-1536.
[686] Tsourdi, 'Of Legislative Waves and Case Law', supra note 562, 163.
[687] Chapter 1, Section 3.1.

4.2. Beyond disapplication: The path to positive obligations of judicial protection grounded in Article 47 of the EU Charter

The field of asylum and immigration has been depicted as a fertile ground for the development of common obligations of judicial protection.[688] As we shall see in the following subsections, the relevant case law reflects a discernible trend towards the creation of positive procedural rights and obligations. This development ties into both past and current debates about the traditional doctrines governing the enforcement of EU law at the national level. For clarity, it may be useful to restate here what was outlined above in the introductory chapter. Historically, the procedural and remedial requirements stemming from the twin principles of effectiveness of equivalence were fairly limited. In cases where a national procedural rule was found to be incompatible with these principles, the doctrine of primacy dictated that the relevant procedural rule had to be disapplied, without adding much in terms of positive rights and remedies. The principle of minimum effectiveness, in particular, was not conducive to the development of a positive conception of procedures and remedies.[689] The 'no-new-remedy' rule similarly reflected the Court's concern with preserving the Member States' competence in procedural matters. It held that the competence to establish adequate procedures and remedies for applying and enforcing EU material provisions rested primarily with national legislative bodies.

In contrast, the case law analysed in this section supports the creation of positive standards of judicial protection by national courts and tribunals. The novelty lies in how the principle of effective judicial protection has been conceptualised as a directly effective source of positive obligations of judicial protection. As a result, this principle can serve as a legal basis for establishing positive procedural rights and remedies, even in the absence of secondary legislation on such matters.[690] In short, national judges are instructed to adjust national procedural rules to accommodate the positive standards of judicial protection embedded in Article 47 of the Charter.[691] The case law on environmental protection, mentioned above in Chapter 2, is a case in point.[692]

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[688] Slowik, 'Multiple Sources of Right to an Effective Remedy in EU Migration and Asylum Law: Towards Common Standards on Judicial Protection?' (2024) 31 Maastricht Journal of European and Comparative Law 27.

[689] Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 501, 533.

[690] It is perhaps necessary to clarify that secondary legislative provisions on procedural matters can also produce direct effect.

[691] For a similar view, see Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU: Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States' in Mak and Kas (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing, 2023), p. 144.

[692] On that topic, see Tecqmenne, 'Turning "Public Interest Litigation into a Positive Obligation Deriving from Article 47 of the Charter: *Deutsche Umwelthilfe*' (2023) 60 Common Market Law Review 1745.

Similarly, the field of asylum has also witnessed the creation of positive obligations under the aegis of the principle of effective judicial protection and relevant secondary provisions on such matters. In some ways, the development of positive obligations of judicial protection has therefore been grounded in secondary law.[693] It is important to note that the field of asylum boasts an unparalleled degree of procedural harmonisation. Provided that the procedural norms established by the Recast Procedures Directive enjoy direct effect, the principles of primacy and direct effect may be employed to enforce these provisions. Any conflicting national norms must accordingly be disapplied in order to make room for the application of the alternative standard of judicial protection stemming from the Directive. At the same time, the Court is also involved in creating additional procedural obligations beyond those explicitly prescribed by the Recast Directive. In doing so, the Court essentially delineates the scope of the different layers of judicial protection emanating from the Recast Procedures Directive and the Charter.

The next section discusses the Court's case law regarding the creation of positive obligations of judicial protection in asylum matters. It explains how the legal framework on judicial protection has served to strengthen the powers and competences attributed to national judges in asylum matters. In its endeavour to carve out positive standards of judicial protection, the Court appears mindful of the legislative compromise adopted by the EU legislature. Based on its interpretation of the Recast Procedures Directive, the Court seeks to reconstruct the mandate conferred upon national courts in asylum matters. At the same time, the Court is engaged in a delicate exercise whereby the mandate of national judges is further delineated and ultimately strengthened by reference to primary law guarantees emanating from Article 47 of the Charter. This brings into sharp focus puzzling questions about the remedies that should be made available at the national level. This is especially true given the Court's traditional reluctance to interfere in the realm of national remedies (under the so-called 'no new remedy' rule).

4.3. *Torubarov*: a stepping stone towards strengthened remedial powers in asylum, or a far-reaching solution dictated by exceptional circumstances?

Torubarov is an interesting case-study for reflecting on the interaction between national procedural autonomy and effective judicial protection in the field of asylum. This judgment illustrates the positive undercurrents of the jurisprudence on effective judicial

[693] Similar developments also unfolded in the area of judicial cooperation in criminal matters, see, e.g., Case C-569/20, *Spetsializirana prokuratura (Procès d'un accusé en fuite)*, EU:C:2022:401, esp. para 28.

protection following the entry into force of the Charter.[694] Based on Article 47 of the Charter, the national referring court was invited to create a new remedy beyond those prescribed by national procedural law (or EU secondary law, for that matter). More specifically, the national court was empowered to substitute its own decision for the initial decision on asylum, even though this solution had been explicitly ruled out by the national legislature. The judgment has been interpreted as reflecting a broader stance on the potential of Article 47 of the Charter to support the creation of new remedies concerning the enforcement of EU asylum law.

Against this background, this section offers a more nuanced and balanced understanding of the implications of this judgment for the creation of new remedies. It shows that the Court's approach was shaped by specific concerns regarding the preservation of basic safeguards intrinsic to the right to an effective judicial review. On the basis of Article 46 of this Directive, interpreted in the light of Article 47 of the Charter, the Court was able to assess the powers attributed to national judges in asylum matters. The Court also emphasised that the discretion left to the Member States in implementing these provisions was limited and could not, in particular, allow the Member States to undermine the very essence of the right to an effective judicial remedy.

The complexity and specificity of the situation at issue in *Torubarov* cannot be overstated. The request for a preliminary ruling arose in the context of a 'procedural ping-pong' between the administration and the judiciary,[695] underpinned by fundamental concerns over the rule of law crisis in Hungary. Under Hungarian law, national judges competent to hear appeals against first-instance administrative decisions on asylum were not entitled to vary such decisions. In fact, the Hungarian legislature had recently adopted the cassation model. In the event of infringement of the rules governing the treatment of requests for international protection, national judges could only annul the relevant decision and refer the case back to the administration for a fresh assessment of the applicant's international protection needs. In theory, the administration was bound to comply with the operative part and justification set out in such judicial decision. Despite this, the administration repeatedly failed to abide by the judicial decision at issue in the main proceedings. On three occasions, the Hungarian Immigration Office rejected the request for international protection submitted by the applicant. On two of these occasions, the administrative decision was annulled by the judiciary, and the administration was instructed to make a new decision on the request. In the third instance, the administration seemingly disregarded the judgment delivered on appeal.[696]

[694] Case C-555/17, *Torubarov*.
[695] Opinion of AG Bobek in Case C-555/17, *Torubarov*, EU:C:2019:339, paras 1-6.
[696] Opinion of AG Bobek in Case C-556:17, *Torubarov*, para 5.

At the third time of asking, the applicant seized the competent national judge with a request to vary the administrative decision in question and to rule on the merits of the request for international protection. The referring court was keen to emphasise that, if left to its own devices, there would be little it could do to respond favourably to the applicant's request. It enquired whether the right to effective judicial protection, as set out in Articles 46 of the Recast Procedures Directive and 47 of the Charter, could support a different outcome. In other words, the Court of Justice was asked to determine whether these provisions empowered national judges to vary first-instance administrative decisions on asylum and substitute their own assessment of the international protection needs of the applicant.

Viewed from this perspective, the Grand Chamber of the Court was called upon to revisit its past case law regarding the powers and competences attributed to national courts and tribunals in asylum matters. It is therefore useful to reflect briefly on the main findings of *Alheto*.[697] I do not intend to delve into an assessment of the factual background of the case. It suffices to say, for present purposes, that the national referring court sought guidance on the scope of powers accruing to the judge competent to review a first-instance decision on asylum. As a reminder, Article 46(3) states that the scope of (first-instance) review must include a 'full and *ex nunc*' appraisal of 'both facts and points of law'. It further states that this assessment may include an evaluation of the international protection needs of the applicant 'where applicable'. The Court of Justice was asked to clarify whether the 'full and *ex nunc*' requirement encompassed matters of fact or law that were not examined by the administrative authority at first instance. The answer was positive.[698] The national referring court was entitled to consider new evidence that came to light after the adoption of the administrative decision subject to appeal.[699] The judgment also clarified that the national judge could supplement the factual and legal elements considered by the administration, using elements that already existed before the adoption of the first-instance decision and that could have been considered in that context.[700] That conclusion was firmly grounded in Article 46(3) of the Recast Directive, which was understood as reflecting the legislature's intention to enable national judges to conduct a novel and comprehensive assessment of the international protection needs of the applicant, without being bound by the assessment made by the administrative authority at first instance.[701] The bottom-line seemed clear: the competent national judge could examine:

[697] Case C-585/16, *Alheto*, EU:C:2018:584.
[698] See also Case C-652/16, *Ahmedbekova*, EU:C:2018:801, esp. paras 91 et seq.
[699] Case C-585/16, *Alheto*, para 113. See also Case C-652/16, *Ahmedbekova*, esp. paras 91 et seq.
[700] Case C-585/16, *Alheto*, para 118.
[701] Michel, 'Directive Procédure et Pouvoirs du Juge' (2018) Europe 29, 30. See also Case C-555/17, *Torubarov*, para 65.

> ‘all the facts and elements necessary in order to make an up-to-date assessment of the case at hand’.[702]

Perhaps somewhat surprisingly, the Court also suggested that the powers of national courts could extend beyond merely annulling a decision on asylum following such an assessment. It stated that the ‘full and *ex nunc*’ appraisal of ‘both facts and points of law’ set out by the Directive:

> ‘makes it possible to deal with the application for international protection exhaustively without there being any need to refer the case back to the determining authority’.[703]

Taken at face value, this statement seemed to support conferring increased powers on national judges following a finding of illegality in a given decision on asylum. However, it remained somewhat unclear whether national judges would be empowered to substitute their own assessment for that of the original decision-maker as a matter of EU law.

On one end of the spectrum, AG Bobek opined that the national judge should be entitled to rule independently on the request for asylum.[704] Carlier and Leboeuf similarly observed that this approach would presumably serve the objective of celerity in handling the request.[705] On the other end of the spectrum, it could be suggested that this issue should fall within the scope of the Member States' national procedural autonomy.[706]

In *Torubarov*, the Court was asked to offer much-needed guidance on this matter. One of the most interesting aspects of that judgment is the way in which the Court reconstructed the mandate attributed to national judges based on Article 46(3) of the Recast Procedures Directive. At this stage, the Court clarified that the national judge was entitled to decide, in a binding manner, whether the applicant qualified for international protection in accordance with the Qualifications Directive.[707] This provision reflected the EU legislature's intention to empower national judges to give a ‘binding ruling’ on whether an applicant qualifies for international protection if they consider that they possess ‘all the elements of fact and law necessary in that regard’.[708]

If the national judge is indeed capable, based on the evidence presented, of forming a view about whether the applicant qualifies for international protection, the competent determining authority must defer to the judge’s assessment. In other words, the

[702] Case C-585/16, *Alheto*, para 110.
[703] Ibid, para 112.
[704] Opinion of AG Bobek in Case C-556/17, *Torubarov*.
[705] Carlier and Leboeuf, ‘Droit Européen des Migrations’ (2019) Journal de Droit Européen 114, 123.
[706] Michel, ‘Directive Procédure et Pouvoirs du Juge’, supra note 701, 31.
[707] Case C-555/17, *Torubarov*, para 53.
[708] Ibid, para 62.

determining authority is bound to comply with the judge's ruling, subject to new matters of fact or law arising that objectively require an updated assessment.[709] As the Court put it, the competent determining authority:

> 'no longer has a discretionary power as to the decision to grant or refuse the protection sought'.[710]

Ultimately, the Court concluded that the Member States were by no means obliged to authorise national judges to substitute their decision for the original decision on asylum solely on the basis of Article 46(3) of the Directive. In other words, that provision did not address the consequences arising from a judicial finding of incompatibility of a decision on asylum. The Member States retained the discretion to decide whether the case should be referred back to the administration for re-examination (under the so-called cassation model), or whether the judge could substitute their own decision for the administrative decision taken at first instance (under the reformation model).

In some respects, this judgment aligns closely with *Alheto*. The novelty of *Torubarov*, however, lies in how the principle of effective judicial protection enshrined in Article 47 of the Charter strengthened the mandate of national judges in asylum matters. The solution articulated by the Court was particularly far-reaching. In essence, the national referring court was instructed to substitute its own assessment for the decision made by the administration on the applicant's request for international protection. The reasoning behind this solution was firmly rooted in the exceptional circumstances of the case under consideration. More specifically, the situation involved a profound departure from the principle of effective judicial protection, characterised by the complete absence of 'any remedy' through which the competent judge could ensure compliance with its judgment.[711]

After all, the competent administrative authority had repeatedly failed to comply with the judgment of the national court hearing the appeal.[712] In these circumstances, the competent judge was only entitled to annul the decision on appeal and to refer the case back to the competent authority for re-examination. In fact, the national judge was prohibited from overturning the contested decision and substituting its own ruling on the asylum request. The judge was left without any realistic means of securing compliance with its judgment. Without such a remedy, the judgment would simply have remained inoperative.

[709] Ibid, para 62.
[710] Ibid, para 66.
[711] Ibid, para 72.
[712] Ibid, para 76.

This situation was untenable. According to the Court, it amounted to a failure to comply with the 'essential content' of the right to an effective judicial remedy.[713] It emphasised that such a right:

> 'would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party'.[714]

In these circumstances, the national court was instructed to set aside any national provision that would prevent the application of the positive standard of judicial protection deriving from Article 47 of the Charter.[715] As a directly effective provision, Article 47 of the Charter could justify setting aside conflicting national provision. In particular, it required the national referring court to vary the administrative decision on appeal and substitute its own assessment of the international protection needs of the applicant.[716]

A great deal has been made of the implications of *Torubarov*. One view is that the solution developed in that judgment should be confined to the exceptional set of circumstances presented in the case. After all, a reasonable argument can be made that the intricacies of *Torubarov* reveal more about the state of the rule of law in Hungary than about the broader significance of the principle of effective judicial protection with respect to the procedural autonomy of the Member States. On another view, the implications of *Torubarov* extend beyond the specifics of judicial protection in asylum matters. The approach exhibited in this judgment reflects a deeper concern for enabling national judges to do whatever is necessary to secure compliance with their judgments and, ultimately, with substantive EU law. For instance, Caiola opined that this judgment supported a strengthened conception of the remedial powers granted to national judges. The emphasis was placed on the Court's assertion that a national provision depriving the competent judge of any remedy to ensure compliance with its judgment would fail to comply with the essential content of Article 47 of the Charter.[717] Viewed from this standpoint, the judicial power to reform administrative decisions becomes a key tenet of the rule of law. An additional argument for a more robust conception of judicial powers is found in the obligation placed on national judges to ensure effective judicial protection of EU law rights under Article 19 TEU.

In my view, there is one element that is sometimes overlooked in legal scholarship. The Court was keen to emphasize that the assessment of compliance with the fundamental right to an effective judicial review must involve an appraisal of the

[713] Ibid, para 72.
[714] Ibid, para 57.
[715] Ibid, para 73.
[716] Ibid, para 74.
[717] Caiola, 'Contre le Ping-Pong Procédural: Un Arrêt sur la Logique du Droit à un Recours Effectif' (2019) Revue des Affaires Européennes 627, 628-629.

'specific circumstances of each case'.[718] This statement, in my opinion, calls for a more cautious interpretation of the judgment's implications. The contextual approach is a staple of the fundamental rights analysis of national procedural law unveiled in *Torubarov*. It suggests that the national procedural framework should be evaluated for compliance with the right to an effective judicial review, considering factors such as the nature of the right(s) involved, the extent of the breach, and the procedure as a whole.[719] This approach essentially means that the remedial obligations stemming from the principle of effective judicial protection depend on the factual matrix presented to the Court.

It must be stressed that the situation under consideration involved a particularly serious infringement of the right to an effective judicial review. The Court acknowledged the exceptional character of the case on more than one occasion. Perhaps the clearest indication of its awareness of the case's specificities was the legal characterisation of the breach as a failure to comply with the essence of the right to an effective judicial remedy. Although the Court does not state this explicitly, it also seems to suggest that the execution of a judgment forms an integral part of the essence of that right.[720] It is worth mentioning that Gulia Gentile has argued that the concept of essence serves a 'signalling function', enabling the Court to assess the gravity of the violation of EU law in question.[721] Taken together, these elements contributed to a strengthened conception of judicial protection. Viewed from that perspective, the remedial obligation imposed on the national referring court was commensurate with the nature and extent of the breach in question. Madalina Moraru seemed to concur with this assessment when she stated that:

[718] Case C-555/17, *Torubarov*, para 70.

[719] Reneman, 'Asylum and Article 47 of the Charter' in op. cit. supra note 588, p. 60. According to her, the contextual approach adopted by the Court also means that the principle of effective judicial protection defies cross-sectoral, or transversal, systematisation. She contends that the procedural rules and principles developed under that principle are firmly rooted in a contextual assessment based on the three factors set out above, and hence, remain intrinsically bound to the specific rules, interests, and objectives prevailing in each policy sector.

[720] See also Case C-752/18, *Deutsche Umwelthilfe*, EU:C:2019:1114, para 35. For a similar view, see Opinion of AG Bobek in Case C-556/17, *Torubarov*, para 58 ; Caiola, 'Contre le Ping-Pong Procédural: Un Arrêt sur la Logique du Droit à un Recours Effectif', supra note 717, 636.

[721] Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU' in op. cit. supra note 691, p. 156. Spitaleri similarly opined that: 'laddove la normativa dello Stato membro considerate comprimo il contenuto essenziale del diritto a una tutela giurisdizionale effetiva, l'art. 47 della Carta attribuisce al Giudice nazionale nuove prerogative di intervento, che possono modificare l'equilibrio dei poteri, definito a livello statale, tra legislatore, magistrature e pubblica amministrazione' (Spitaleri, 'La Tutela Giurisdizionale Effettiva dei Singoli nei Settori dell'Immigrazione e dell'Asilo' 1/2024 Quaderni AISDUE – Atti del V Convegno Nazionale AISDUE Padova 2/3 novembre 2023, p. 15).

'[t]he lower the executive accountability guarantees, the more intrusive is the CJEU's re-design of the national system of remedies'.[722]

If this is indeed true, there is a reasonable argument to be made in favour of moderating expectations regarding the implications of *Torubarov*. In my view, this judgment should be understood for what it is: a particularly extreme and specific solution dictated by the (equally extreme and specific) circumstances of the case under consideration.

This point was confirmed in *Bundesrepublik Deutschland (Recevabilité d'une demande ultérieure)*.[723] In essence, the Court was asked to expound on the implications of *Torubarov* concerning the power to reform a first instance decision. The crux of the matter boiled down to the following question: can a national court rule on the merits of an application in the context of an appeal against a decision not to examine a subsequent application, without having to send the case back for re-examination at the administrative level?

The novelty of that judgment lies in the Court's conclusion that the national referring court is entitled to assess the merits of a 'subsequent request' for asylum, even if it was ruled inadmissible by the administrative authority. The German legislation at issue in the main proceedings limited the scope of review for national judges in such cases. As a matter of law, national judges were not authorised to assess the substance of a subsequent asylum claim declared inadmissible by the competent authority. They were only authorised to assess whether the subsequent request contained 'new elements' that could enhance the likelihood of the claim being accepted. If this were the case, the case would be sent back to the administration for a novel assessment of the international protection needs of the applicant.

Seized of this matter, the Court emphasised that the national referring court could, in fact, assess the merits even if the administrative authority had ruled it inadmissible. In some ways, this judgment follows closely in the footsteps of *Alheto* and *Torubarov*, reaffirming that national judges competent on appeal are not bound by the assessment of the administration. Consequently, the national referring court could delve into the merits of a subsequent asylum request, even if it had been ruled inadmissible by the administration.

However, the judgment does not go as far as requiring that the competent national judge must be granted additional remedies beyond the annulment of the impugned decision. More specifically, the Court reiterated that the Recast Directive is silent on the consequences of a finding of illegality. In the absence of secondary legislation on

[722] Moraru, 'The European Court of Justice Shaping the Right to Be Heard for Asylum Seekers, Returnees, and Visa Applicants: An Exercise in Judicial Diplomacy' (2022) European Journal of Legal Studies, Special Issue: Adjudicating Migrants' Rights: What Are European Courts Saying? 21, 53.
[723] Case C-216/22, *Bundesrepublik Deutschland (Recevabilité d'une demande ultérieure)*, EU:C:2024:122.

this matter, the Member States retain discretion to determine whether national judges should be empowered to rule on the merits of the application, or whether the case should instead be referred back to the national determining authority for re-examination.[724]

The key takeaway here is that the Court implicitly rejects the proposal to empower national courts to reform asylum decisions in normal circumstances, not involving a fundamental challenge to the essence of the right to effective judicial review. In this sense, the judgment aligns with the traditional, more moderate approach to the creation of new remedies. It reinforces the idea that the creation of new remedies remains a specific solution dictated by exceptional circumstances in which the administration fails to comply with the judgment rendered by the national court.[725]

4.4. Interim conclusion: The added normative value of effective judicial protection at the crossroads of primary and secondary law

Overall, this section highlighted the decisive and growing influence of the principle of effective judicial protection concerning national procedural and remedial matters. This principle has provided the legal building block for reshaping the traditional institutional configuration of decision-making in asylum matters. The message from the Court is crystal clear: the competent national judge cannot merely rubber-stamp first-instance administrative decisions on asylum; instead, the judge is invited to take on a more proactive role as a guardian of asylum seekers' rights.

Based on Article 46 of the Recast Directive, interpreted in the light of Article 47 of the Charter, the Court has clarified the scope of review that national judges can exercise in asylum matters. Ultimately, the Court of Justice appears primarily concerned with enabling national judges to rule on the merits of asylum applications. In this context, it is somewhat irrelevant whether the competent determining authority itself has ruled out the application following a full examination of its merits, or whether it dismissed the request during a preliminary assessment of its (in)admissibility. What matters is that the requirement of 'full and *ex nunc*' assessment of 'both facts and points of law' reflects the legislature's intention to empower national judges to decide on the merits of asylum applications when all necessary elements are available for such an assessment.

[724] Ibid, para 60.
[725] See also Case C-406/18, *PG*, EU:C:2020:216, paras 21-22.

The principle of effective judicial protection has been relied upon by the Court to equip national judges with the procedural tools required to discharge the duties outlined in Article 46 of the Recast Directive. In the words of Reneman,

> '[t]he CJUE has made clear in its case law that Article 47 of the Charter requires national law to grant the courts the tools and practical opportunity to conduct a full and *ex nunc* examination'.[726]

In other words, the principle of effective judicial protection has been used to strengthen the mandate given to national judges, ensuring that they can safeguard the judicial protection of asylum seekers. To reconnect the dots and rule on the request, the competent judge is empowered to use additional procedural tools, such as the ability to hear applicants or to order further investigative measures if deemed necessary, in order to fulfil the duties assigned by Article 46(3) of the Recast Directive.[727]

If the national judge is capable, on the basis of the elements presented to it, of forming a view on the merits of the request, the discretion of the competent administrative authorities becomes virtually non-existent. Of course, the Member States still retain some discretion regarding the system of judicial appeals prescribed by Article 46 of the Recast Directive. Viewed from this perspective, the Court appears primarily mindful of the legislative compromise embedded in Directive 2013/32.[728] It stresses that the Member States have room for manoeuvre in the follow-up to the annulment of an asylum decision. However, this room for manoeuvre is limited and cannot be used to undermine the essence of the principle of effective judicial protection. The administration, which once seemed omnipotent in immigration matters, must now bow to the judicial decision.

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[726] Reneman, 'No Turning Back?' in op. cit. supra note 560, p. 151.

[727] Case C-348/16, *Sacko*, EU:C:2017:591, esp. para 48 ; Case C-406/18, *PG*, paras 30-32.

[728] Recent judgments on the suspensive effect of appeal similarly feed into the Court's tendency to express deference towards the compromise reflected in secondary law on such matters. As a reminder, it is perhaps useful to remember that the option to introduce a two-layer system of judicial review producing suspensive effect was explicitly ruled out during the negotiations leading up to the adoption of the Procedures Directive. In its case law on suspensive effect, the Court was mindful of maintaining the degree of procedural discretion retained by the Member States in that respect. It insisted that the Member States were by no means obliged to introduce a two-layer system of judicial protection, let alone provide that the second layer of appeal ought to produce automatic suspensive effect. The Court appeared primarily concerned about securing at least one level of judicial appeal producing automatic suspensive effect. The relevant case law illustrates the manner in which the fundamental rights saliency of asylum matters (in this case, under the guise of the prohibition of *refoulement* established by Article 18 of the Charter) plays out in the assessment of national procedural rules and orients or directs that assessment. The risks of *refoulement* stemming from the adoption of negative decisions on asylum led to a strengthened conception of judicial protection. In some ways, the Court seems to delineate the essence of the right enshrined in Article 47 of the Charter by reference to the prohibition of *refoulement*. See, e.g., Case C-180/17, *Staatssecretatis van Veiligheid en Justitie (suspensory effect of the appeal)*, EU:C:2018:775, esp. paras 23-30; Case C-175/17, *Belastingdienst v Toeslagen (suspensory effect of appeal)*, EU:C:2018:776, esp. para 34; C-422/18 PPU, *FR*, EU:C:2018:784. On that topic, see Reneman, 'Asylum and Article 47 of the Charter' in op. cit. supra note 588, p. 62.

The judgments analysed in this section suggest that the concept of the 'essence' of the fundamental right to an effective judicial remedy plays a decisive role in defining the scope of national procedural autonomy retained by the Member States.[729] In these judgments, the Court appears primarily concerned with ensuring that the Member States respect the essential content of that right. Any national provision that calls into question the 'essential content' of the right to effective judicial protection must be set aside, thus triggering the positive obligations of judicial protection derived from Article 47 of the Charter. This also means that, beyond safeguarding the essence of that right, the Member States presumably retain a wider margin of discretion to tailor national procedural and remedial rules as they see fit.

Interestingly, these judgments reveal the Court's willingness to draw from secondary law to delineate the essential content of the right to effective judicial review. In essence, what is deemed essential is that national courts or tribunals must be able to carry out the mandate entrusted to them by Article 46 of the Directive.[730] The principle of effective judicial protection, in turn, serves to empower national courts to carry out that endeavour. To illustrate this, consider the relevant judgments concerning the right to be heard in appeals proceedings.[731] In these judgments, the right to be heard was portrayed as an integral component of the principle of effective judicial protection. Although the Recast Directive does not itself require a hearing at the appeals stage, the discretion retained by the Member States is circumscribed by the principle of effective judicial protection.

At the same time, the Court acknowledged that whether this principle has been infringed must be assessed having regard to the:

> 'specific circumstances of each case, including the nature of the act at issue, the context in which it was adopted and the legal rules governing the matter'.[732]

Thus, the Court employed the general framework for assessing breaches of fundamental rights to evaluate the obligations imposed on the Member States with respect to the hearing of the applicant. While it acknowledged that the national referring court was not necessarily obliged to conduct such a hearing (especially when a hearing had already been conducted during the administrative phase), the Court emphasised that the right to be heard constituted an 'essential procedural requirement, which cannot

[729] For a similar view, see Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU' in op. cit. supra note 691, p. 158; Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 German Law Journal 779.
[730] An interesting parallel may be drawn with the relevant case law on legal standing of NGOs in environmental matters. The Court similarly hinted that the essential content of the right to an effective judicial remedy had to be reconstructed based on an analysis of the relevant provisions on access to environmental justice established by the Aarhus Convention.
[731] Case C-348/16, *Sacko*.
[732] Ibid, para 41.

be dispensed with on the grounds of speed',[733] if that hearing proved necessary for the national judge to carry out the full and *ex nunc* examination prescribed by the Recast Directive.

If that were indeed the case, the national referring court was implicitly encouraged to disapply any national provisions that would prohibit it from conducting an oral hearing with the applicant. To be sure, the Court's primary concern appeared to be enabling national judges to discharge the duties assigned to them by the Recast Directive.[734] In other words, the Court's approach reflects its commitment to ensuring that national judges have the tools to perform the independent and comprehensive review of administrative action envisaged by Article 46(3) of the Recast Directive.[735]

5. The creation of new remedies beyond the Recast Procedures Directive

A great deal has been made thus far about the creation of positive obligations of judicial protection through new remedies in relation to the judicial treatment of requests for international protection. This chapter sheds light on how the mandate of national judges has been strengthened to reflect their primary responsibility as watchdogs for the protection of the fundamental rights of asylum seekers. This section takes a step back to reflect on the implications of the approach exhibited in these judgments beyond the Recast Procedures Directive. In other words, it zooms out from the intricate set of procedural rules and principles established by the Recast Directive, situating the judgments analysed in the previous section within a broader doctrinal discussion about the rights and remedies accruing to asylum seekers. By the same token, it provides a

[733] Ibid, para 45.
[734] Ibid, para 48.
[735] A similar story unfolded in relation to the relevant case law on time limits. To put it briefly, the Court showed deference to the assessment of compatibility, which ultimately fell to be determined by the national referring court seized of the matter. However, it did provide guidance on the relevant parameters for interpretation and dictated the outcome in cases of non-compliance or incompatibility: the national judge was invited to set aside the impugned time limits and deliver a decision within an extended period (albeit in an expeditious manner). The core issue was whether the time limits set by national law would be sufficient to allow national judges to fulfil their obligation to conduct a 'full and *ex nunc*' examination according to Article 46(3) of the Directive. Additionally, the national competent judge was invited to take due account of the fundamental rights of defence of the applicants. As a result, the national judge was granted greater discretion to strike a balance between the fundamental rights of applicants and the interests served by national procedural rules (Case C-564/18, *LH*, EU:C:2020:218, esp. paras 73-76). Another notable feature of these judgments is that the Court relied on the twin-principles of effectiveness and equivalence in relation to these matters, perhaps because they were considered incidental – extraneous to the essence of effective judicial protection. Nevertheless, the Court also indicated that if the time limits were insufficient to allow the national judge to fulfil their mandate, those time limits would have to be set aside. This suggests that the scope of national procedural autonomy ultimately depends on whether national procedural law enables national judges to actually perform the type of control prescribed by Article 46(3) of the Recast Directive.

more comprehensive picture of the role and responsibilities attributed to national judges in the field of asylum.

This is achieved through an analysis of two recent judgments delivered by the Grand Chamber of the Court (i.e., *FMS*[736] and *Staatssecretaris van Justitie en Veiligheid (Examen d'office de la retention)*[737]). Taken together, these judgments support the creation of new powers for national judges anchored in the principle of effective judicial protection. This section explains that the Court's approach does not fundamentally depart from the developments described in the previous section. The Court remains primarily concerned with reconstructing the mandate of national judges based on a close reading of the relevant provisions of secondary law. At the same time, these judgments highlight the growing influence of the principle of effective judicial protection as a benchmark for assessing the suitability of national procedural law in protecting the fundamental rights of asylum seekers. More specifically, the exercise of procedural discretion enjoyed by the Member States is clearly circumscribed by the requirements of the right to an effective judicial remedy set out in Article 47 of the Charter.

There is, or so it seems, a recurring theme whereby the Court reconstructs the mandate of national judges based on a literal reading of relevant secondary legislation and then equips national courts with the necessary procedural tools to fulfil that mandate. In these circumstances, the principle of effective judicial protection invites national judges to move beyond the passive role traditionally assigned to them by national law. To put it bluntly, national judges are encouraged to take on a more proactive role as gatekeepers for the protection of asylum seekers' rights, even if this means disregarding potential barriers to the fulfilment of that mandate posed by national procedural law. *FMS* demonstrates that the creation of new remedies can only be justified in exceptional circumstances, involving a fundamental challenge to the very essence of that principle. *Staatssecretaris van Justitie en Veiligheid (Examen d'office de la retention)* shows how the fundamental rights analysis of national procedural law can generate a more robust conception of judicial protection in cases involving a particularly far-reaching departure from the fundamental right to liberty as enshrined in Article 6 of the Charter.

To address these developments, this section first demonstrates how these judgments are relevant to the present discussion on the role of national courts in safeguarding asylum seekers' fundamental rights (section 5.1). Building on an analysis of *FMS*, it then explores how the Member States must organise their judicial systems to safeguard the essence of the right to effective judicial protection under Article 47 of the Charter

[736] Joined Cases C-924/19 PPU and C-925/19 PPU, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság ('FMS')*, EU:C:2020:367.
[737] Joined Cases C-704/20 and C-39/21, *Staatssecretaris van Justitie en Veiligheid (Examen d'office de la rétention)*, EU:C:2022:858.

(section 5.2). This section then goes on to address *Staatssecretaris van Justitie en Veiligheid (Examen d'office de la retention)*, explaining how this judgment reflects the Court's effort to shape obligations of judicial protection tailored to the regulatory context of detention in asylum matters, particularly with respect to the fundamental rights implications of such measures (section 5.3).

5.1. Looking for a common thread: Strong rights, weak remedies

Before conducting an in-depth analysis of both judgments, I would like to briefly reflect on the specific regulatory context underpinning each case. This preliminary step aims to illustrate how each of these judgments resonates with the ongoing discussion about the rights and remedies accruing to asylum seekers. In other words, the objective is to provide context for why and how these judgments are relevant to describing the role and responsibilities of national judges in asylum matters. Of course, there is little denying that the context leading up to each of these judgments differs considerably. However, in my view, there is one common thread running through both cases. In essence, the gist of the matter revolves around the powers and competences of national judges in the context of appeals against decisions susceptible to affect the rights and interests of asylum seekers.

More specifically, these cases concern two distinct elements intrinsic to the judicial protection of asylum seekers. The first issue relates to the possibility of bringing a judicial appeal against return decisions. At first glance, this issue may seem unrelated to the rights and remedies available to asylum seekers. After all, the Return Directive applies to individuals who no longer qualify as applicants for international protection but as illegally staying third-country-nationals.[738] However, the adoption of a return decision still involves obvious risks of *refoulement*, particularly when such a decision is based on an unlawful rejection of an asylum application. These risks are even more pronounced when both decisions are adopted simultaneously (as was the case in *FMS*). Article 13 of Directive 2008/115 ('the Return Directive') introduces a right to challenge returns decisions. It provides that individuals must have:

> 'an effective remedy to appeal against or seek review of decisions related to return … before a competent judicial or administrative authority or a competent

[738] On the concept of 'illegal stay', see Case C-181/16, *Gnandi*, EU:C:2018:465, paras 37 et seq.; Case C-534/11, *Arslan*, EU:C:2013:343, paras 43 et seq. ; Case C-257/22, *Odbor azylové a migrační politiky MV (Scope of the Return Directive)*, EU:C:2923:852, paras 36 et seq.

body composed of members who are impartial and who enjoy safeguards of independence'.[739]

This provision indicates that the Member States are not required to set up a judicial remedy for return decisions. In other words, they can choose to allocate the competence to hear appeals to national administrative bodies, excluding the judiciary from reviewing the legality of return decisions. In some ways, this provision reflects the Member States' reluctance to involve judges in a field traditionally dominated by administrative discretion. Viewed from this perspective, it is worth recalling the developments described above.[740] In a pledge to maintain control over the institutional framework for appeals in immigration matters, the Member States stripped most proposals concerning appeals of any reference to judicial remedies.

In *FMS*, the national referring court asked the Court of Justice to reflect on the normative significance of the principle of effective judicial protection in this context. One of the questions presented to the Court essentially boiled down to the following queries: are the Member States required to introduce a judicial appeal mechanism against return decisions, beyond a pre-existing right to seek administrative review? And, in particular, can a national judge who is seized of the matter assume competence to assess the legality of a return decision, even in the absence of national provisions providing for judicial remedies in such cases?

The second issue concerns another related topic: the judicial review of the detention of asylum seekers. In contrast to the issue of appeals against return decisions, the legal framework governing the judicial review of detention of aliens is relatively detailed, though, unfortunately, it is also fragmented - to say the least. The fragmented regulatory landscape reflects the widespread and varied practices of detaining third-country nationals at the Member State level. Asylum seekers, in fact, may be detained in a variety of circumstances, including, but not limited to, the processing of their request for asylum protection or the procedure leading up to their removal following the adoption of a return decision.

The Recast Procedures Directive is not entirely devoid of relevance in this regard. It states that:

'[w]here an applicant is held in detention, Member States shall ensure that there is a possibility of speedy judicial review in accordance with Article 2013/33/EU'.[741]

[739] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98, Art. 13.
[740] Section 2.3.3.
[741] Art. 26(2) of the Recast Procedures Directive.

In turn, Directive 2013/33 ('the Reception Conditions Directive') establishes detailed requirements governing the mandate of national judges in this context.[742] According to Article 9(3) of the Directive, this includes the possibility of obtaining a 'speedy judicial review', either *ex officio* (that is, at the instigation of the competent national judge) and/or upon the request of the applicant. Article 9(5) of the Directive further prescribes that there must be an opportunity for judicial review of prolonged detention 'at reasonable intervals of time', either *ex officio* or upon the request of the applicant.

In addition, the Directive also circumscribes the margin of discretion available to national competent authorities when deciding to detain asylum seekers in the first place. Detention is described as a measure of last resort, and the competent authority is therefore required to consider other, less intrusive measures before resorting to detention. The Reception Conditions Directive specifies that the decision to detain individuals must be made in writing and must state the grounds justifying the adoption of that decision, particularly with regard to the reasons why other less intrusive measures were ultimately ruled out. Similar requirements are also outlined in Article 15 of the Return Directive concerning detention measures imposed on third-country nationals subject to a return decision.[743]

In both cases, the European Court of Justice was invited to delineate the mandate conferred upon national judges with regard to the review of the legality of detention orders. In *FMS*, the Court was asked to determine whether a national judge could assume competence to assess the legality of detention in the absence of any national provision on judicial review of detention measures. It was also asked to define the scope of the remedial powers vested in national judges in this context. In particular, the referring court sought to know whether a competent judge could require the competent national authority to provide accommodation to an illegally detained individual by way of interim relief. Similarly, the question raised in *Staatssecretaris van Justitie en Veiligheid (Examen d'office de la retention)* concerned whether a national judge could raise issues of EU law of its own initiative when assessing the legality of the detention of an asylum seeker.

5.2. The essence of the fundamental right to an effective remedy as a catalyst for articulating institutional demands arising from the rule of law: FMS

It would be impossible to discuss *FMS* without acknowledging that the case presents a particularly resounding example of the challenges faced by asylum seekers attempting

[742] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), [2013] OJ L 180/96.
[743] See, e.g., Art. 15 of the Return Directive.

to enter the territory of the European Union. There is no way to view the case as aligning with the most basic ideals of justice. But then again, one should hardly be surprised. The Hungarian Röszke transit zone has been portrayed as a site where malpractices are perpetuated, with far-reaching restrictions on asylum seekers' fundamental rights - most notably, prolonged detention and a lack of adequate procedural safeguards.[744] It was only a matter of time before Hungary was brought to court before one of the two European human rights courts.[745] In fact, both the European Court of Human Rights and the European Court of Justice were seized of legal actions alleging violations of asylum seekers' fundamental rights in the Röszke transit zone.[746]

The coexistence of parallel proceedings involving similar issues casts new light on the interaction between the European Convention of Human Rights and the EU Charter, particularly regarding key concepts such as 'detention' (or, for the purposes of the Convention, 'deprivation of liberty').[747] Moreover, the judgment delivered by the Grand Chamber in *FMS* aligns with the approach taken in *Torubarov* concerning the creation of new judicial remedies.[748] In a context that presents fundamental challenges to the rule of law, the Court seems primarily concerned with empowering national judges to ensure the correct application of EU law by national authorities.[749] Seen in that light, *FMS* suggests that the creation of new remedies can only be dictated by the principle of effective judicial protection, and only in exceptional circumstances where there is a fundamental challenge to the very essence of that right.

To provide context, it may be useful to briefly explain the circumstances of these joined cases. Upon their arrival in Hungarian territory, the applicants were placed in

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[744] Amnesty, 'Fenced Out: Hungary's Violations of the Rights of Refugees and Migrants' Amnesty International Publications (7 October 2015), available at <Hungary; Fenced Out: Hungary's violations of the rights of refugees and migrants - Amnesty International> (last accessed, 6 May 2025); Global Detention Project, 'Immigration Detention in Hungary: Transit Zone or Twilight Zone?' June 2020, available at <Microsoft Word - Design Doc - Immigration Detention in Hungary - 2020.docx (globaldetentionproject.org)> (last accessed, 6 May 2025); Council of Europe, 'Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 26 October 2017', CPT/Inf (2018) 42.

[745] On the role of the European Court of Justice as a 'human rights adjudicator', see De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168; Frantziou, 'Human Rights as an Example of Cooperative Federalism? A Chronology of the Use of the Preliminary Reference Procedure in Human Rights Cases between 1957 and 2023' (2023) European Journal of Legal Studies, CJEU Special Issue 189.

[746] Before the ECtHR, see *Ilias and Adhmed v Hungary*,14 March 2017, Application no. 47287/15; *R.R. and Others v Hungary*, 2 March 2021, Application no. 36037/17. Before the ECJ, see Joined Cases C-924/19 PPU and C-925/19 PPU, FMS; C-808/18, *Commission v Hungary (Accueil des demandeurs de protection internationale)*, EU:C:2020:1029.

[747] On that issue, see Dumas, 'L'Arrêt *FMS, FNZ, SA, SA Junior*: L'Harmonisation à la Hausse du Standard de Protection des Droits Fondamentaux et le Renforcement du Contrôle Juridictionnel en Matière d'Asile et d'Immigration' (2020) Revue des Affaires Européennes 499, 507 et seq. ; Callewaert, 'Interactions Migratoires entre Strasbourg et Luxembourg' (2020) Journal de Droit Européen 310.

[748] Dumas, 'L'Arrêt *FMS, FNZ, SA, SA Junior*', 503.

[749] Carlier and Leboeuf, 'Droit Européen des Migrations' (2021) Journal de Droit Européen 140, 146.

the Röszke transit zone. After their request for asylum was rejected, they were served with an order to leave the country. At the same time, they were ordered to remain in the Rözske transit zone pending their removal. They were initially supposed to be transferred to Serbia, but the Serbian authorities refused to readmit them into their territory. The Hungarian authorities subsequently modified the country of destination mentioned in the relevant return decisions. Crucially, this decision could not be challenged before a judge.

The crux of the matter was whether this decision constituted a new return decision for the purposes of the Return Directive and, if so, whether that decision was subject to judicial appeal. Similarly, the decision requiring the applicants to remain in the transit zone pending removal was not subject to judicial review. The Court was asked to determine whether the obligation to stay in the transit zone amounted to detention and, if so, whether the referring court could review the legality of that detention in the absence of a specific provision allowing such a decision to be scrutinised by a national judge. In essence, both questions involved fundamental concerns about the lack of judicial remedy for decisions that could negatively affect the rights and interests of asylum seekers. In the main proceedings, the applicants were kept in a state of legal limbo, with no real prospect of obtaining judicial redress for their prolonged stay in the Röszke transit zone.

In this context, the Grand Chamber forcefully advocated for the creation of new remedies to allow the applicants to assert their rights before a judge. This was particularly true with respect to the decision to amend the removal order. After concluding that this decision qualified as a return decision,[750] the Court emphasised that the adoption of such decisions should be subject to a right of judicial review. Viewed from this perspective, this judgment serves as a powerful reminder that the competence of the Member States to determine which national bodies are responsible for implementing EU law is limited by the principle of effective judicial protection. While the Returns Directive mentions the existence of a right to appeal return decisions, it does not specify the nature of that remedy. Nevertheless, the Court was adamant that the Member States must establish at least one level of judicial appeal during the proceedings.

It is worth remembering that the ‘right to an independent and impartial judge’ is an essential requirement, forming an integral part of the essence of the right to an effective judicial remedy as set out in Article 47 of the Charter. In recent years, the Court has not shied away from imposing similar obligations to establish judicial review in areas traditionally dominated by administrative discretion, with *El Hassani* serving as a

[750] Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*, para 123.

notable example.[751] It is unsurprising that the Court explicitly cited this case in support of the solution developed in *FMS*. In many respects, the issues brought to the fore in *El Hassani* and *FMS* were quite similar. The absence of specific provisions on judicial appeals in the Visa Code reflected the Member States' reluctance to embrace judicial review in immigration and asylum matters. Nevertheless, the Court insisted that the Member States must establish at least one level of judicial appeal concerning visa decisions.[752]

There is little doubt that the Court's findings were intended to extend beyond the intricacies of the field of immigration and asylum law.[753] As the Court itself noted, the obligation to provide for a judicial appeal before a 'court or tribunal' that meets the requirements of independence is intrinsic to the 'essential content of the right provided in Article 47 of the Charter'.[754] In other words, the principle of effective judicial protection reflects a fundamental and overarching concern for ensuring independent judicial control over administrative decisions relating to the application and enforcement of Union law.

The situation at issue in the main proceedings did not satisfy the requirements of Article 47 of the Charter. More specifically, the Court emphasised that the Hungarian administrative responsible for the first-instance decision lacked the necessary attributes of independence, as it was formally under the control of the Ministry. Moreover, the Hungarian legal system as a whole failed to meet the requirements of independent judicial control outlined in Article 47(2) of the Charter. There was simply no way for the applicants to have their case heard and reviewed by a judge. In these circumstances, the Grand Chamber empowered the national referring court – and, more generally, national courts – to assume jurisdiction over the legality of return decisions. The national referring court was not only instructed to disapply any national provisions contrary to EU law,[755] but the principle of effective judicial protection also required it to assume competence in situations where no other remedy would allow the applicants to seek judicial redress for the relevant return decision.[756]

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[751] Case C-403/16, *El Hassani*, EU:C:2017:960. In that case, the Court was called upon to determine whether the Member States were obliged to institute a right to bring judicial proceedings in respect of negative decisions on visa applications. On the basis of the relevant legal provision, which merely mentioned a 'right to appeal', it remained somewhat unclear whether an administrative appeal could suffice, or whether EU law also prescribed a judicial appeal.

[752] Ibid, para 41.

[753] The Court has also imposed similar requirements in the field of tax cooperation (see Case C-682/15, *Berlioz Investment Fund*, EU:C:2017:373) and environmental protection (see Case C-243/15, *Lesoochranarske zoskupenie VLK*, EU:C:2016:838; Case C-644/15, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation*, EU:C:2017:987, paras 44 et seq.).

[754] Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*, para 137.

[755] Ibid, para 139.

[756] Ibid, para 146.

In line with the well-established prohibition of new remedies, the creation of a new cause of action was limited to cases where:

> 'it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law, or again if the sole means whereby individuals can obtain access to a court is by breaking the law'.[757]

In these circumstances, the principle of effective judicial protection, as enshrined in Article 47 of the Charter, was deemed sufficient in itself to provide a 'directly applicable basis for jurisdiction'.[758]

The scope of review available to the national judge competent in this context is particularly far-reaching. More specifically, the Court emphasised that the national judge could conduct an ancillary assessment of the legality of the initial rejection of the asylum request, even if that decision had been confirmed by a final judicial ruling. The national judge was called upon to assess whether the decision on asylum was compatible with EU law. The Court held, in particular, that:

> 'in the judicial review of the lawfulness of the return decision, which was adopted after the rejection of an application for international protection which was confirmed by a judicial decision which has become final, the national court hearing an action against the return decision may examine, by virtue of EU law and without the authority which the judicial decision confirming the rejection has acquired precluding it from examining, as an ancillary matter, the validity of such a rejection when it is based on a ground that is contrary to EU law'.[759]

This development represents a significant challenge to the sacrosanct principle of *res judicata* attached to final administrative decisions confirmed by a final judgment.[760] Admittedly, this solution does not directly call into question the finality of the judicial decision confirming the legality of the asylum decision.[761] However, the effects of such a decision are effectively attenuated. If the national judge finds that such a decision was vitiated by illegality, they are entitled to adjust the effects of the subsequent return decision. In particular, the national judge should postpone the removal of the asylum seekers 'where that removal is decided … in breach of the principle of non-refoulement'.[762]

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[757] Ibid, para 143.
[758] Ibid, para 145. Admittedly, the Court also hinted that the relevant secondary legislative provision could form such a basis for jurisdiction.
[759] Ibid, para 199.
[760] Dumas, 'L'Arrêt *FMS, FNZ, SA, SA Junior*', supra note 747, 505.
[761] Turmo, 'National Res Judicata in the European Union: Revisiting the Tension Between the Temptation of Effectiveness and the Acknowledgment of Domestic Procedural Law' (2021) 58 Common Market Law Review 361, 388.
[762] Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*, para 201.

Ultimately, the Court invites national judges to assess the international protection needs of the applicants to determine whether the removal would be compatible with the principle of *non-refoulement*. As we will see, the national judge is also required to ensure, if necessary *ex officio*, compliance with the principle of *non-refoulement* in any judicial proceedings concerning the regularity of the stay of third-country nationals.[763] Viewed from this perspective, the principle of *non-refoulement* contributes to a strengthened conception of judicial protection for asylum seekers' rights. It justifies a departure from, or at the very least an adjustment to, the principle of *res judicata* concerning the effects of administrative decisions on asylum.[764]

The Court also advocated for the creation of a new remedy in the context of assessing the legality of the applicants' detention. The reasoning supporting this outcome was grounded in the approach to the creation of remedies outlined in *Torubarov*. More specifically, the Court identified a particularly significant breach of the right to an effective judicial remedy. According to the Court,

> 'a national legislation which does not guarantee any judicial review of the lawfulness of an administrative decision ordering the detention of an applicant for international protection or an illegally staying third-country national … undermines the essential content of the right to effective judicial protection guaranteed by Article 47 of the Charter, in that it absolutely prevents a court from ruling on respect for the rights and freedoms guaranteed by EU law to the third-country national placed in detention'.[765]

In these circumstances, the standard of judicial protection deriving from Article 47 of the Charter formed the basis for the competence of the referring court. After all, the right to an effective judicial remedy has direct effect, meaning that it can 'confer on individuals a right which they can rely as such' - independently of national implementing legislation (or even secondary law, for that matter).[766] Consequently, the referring court could assume jurisdiction to examine the lawfulness of detention on the basis of this provision, even if such a judicial remedy was not explicitly foreseen by national law. The principle of primacy further dictated that any national provision precluding the national judge from proceeding in this manner could be disapplied.[767]

The Court also elaborated on the remedies that could be available to the claimants in the event that their detention was found to be unlawful. In this context, the Court essentially reconstructed the mandate of national courts based on the relevant provisions in secondary law. More specifically, the provisions on judicial review of detention clarified that a person must be released immediately if detention is found to

[763] Case C-156/23, *Ararat*, EU:C:2024:892, esp. para 51. On that topic, see Section 5.3.
[764] Dumas, 'L'Arrêt *FMS*, *FNZ*, *SA*, *SA Junior*', supra note 747, 507.
[765] Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*, para 290.
[766] Ibid, para 289.
[767] Ibid, para 291.

be unlawful. Thus, the national court was required to substitute its own decision for that of the administration, either by ordering an alternative, less intrusive measure (where the grounds for detention remained valid but the measure was disproportionate) or by ordering the applicant's release if the detention was unlawful.

In addition, the court was empowered to hear appeals concerning the housing conditions of asylum seekers. This was due to Article 26 of the Reception Conditions Directive, which provided for a judicial appeal to ensure respect for the right to housing. If no such remedy existed under national law, the principle of effective judicial protection enshrined in Article 47 of the Charter required that the national referring court could assume jurisdiction over such claims.[768] To ensure judicial protection of the applicant's rights in this context, the national court could rely on the full range of EU-wide remedies, including the possibility of ordering, as interim relief, that the competent administrative authority comply with the applicant's right to housing.[769]

5.3. The right to liberty: A key legal parameter for strengthening judicial protection in detention matters – C-704/20 *Staatssecretaris van Justitie en Veiligheid (Examen d'office de la rétention)*

In *Staatssecretatis van Justitie en Veiligheid (Examen d'office de la rétention)*, the Grand Chamber of the Court was called upon to offer additional guidance on the intensity of the review conferred upon national judges in assessing the legality of detention. The issue in these joined cases essentially boiled down to the following query: can a national judge examine on their own initiative, whether the detention satisfies conditions of lawfulness that were not raised by the individual concerned? The solution devised by the Court illustrates how a fundamental rights analysis of national procedural law can generate a more robust conception of judicial protection, particularly in circumstances involving a significant departure from the fundamental right to liberty set out in Article 6 of the Charter. It also highlights the context-sensitivity of the principle of effective judicial protection, which reflects transversal concerns for judicial protection of individuals while embodying specific procedural rules and principles based on the particular features of sectoral rules. Ultimately, the scope of national procedural autonomy depends on a contextual assessment that considers the nature of the right concerned, the extent of the breach, and the requirements for a high level of judicial protection as articulated by the relevant secondary legislation.

[768] Ibid, para 299.
[769] Ibid, paras 297-298.

The issue of *ex officio* review of detention was at the heart of a judicial *passe d'armes* between different members of the Dutch judiciary. On the one hand, a lower-ranking judge from the District Court of The Hague maintained that the competent judge could assess the legality of detention on their own initiative. In other words, this judge seemed to consider that the scope of judicial review could not be limited to the grounds explicitly raised by the individual concerned in their request for judicial review of detention. On the other hand, the Dutch Council of State (*Raad van State*) has traditionally taken a more restrictive stance regarding the powers of national judges in this context. In essence, the Council has held that Dutch judges are only allowed to expand the scope of the dispute beyond the parties' pleas in cases involving public policy rules, such as those relating to jurisdiction and access to justice. This passive role attributed to judges reflects a more general concern for party autonomy, which is intrinsic to the adversarial nature of Dutch administrative proceedings. Thus, if a national judge is called upon to assess the legality of detention, he or she is not permitted to raise matters of facts or law that were not brought before the court by the parties involved.

In the main proceedings, the District Court of The Hague openly challenged the strict stance of the Council of State.[770] It issued several decisions in which detention measures were found to be illegal on grounds that had not been pleaded by the individuals concerned. Seized of the matter on appeal, the Dutch Council of State stayed the proceedings and referred the case to the Court of Justice. The Court was essentially invited to revisit its past case law regarding the duty of national courts to raise matters of EU law *ex officio*.

It is worth remembering that, as a matter of principle, national courts are not generally required to review compliance with EU rules on their own motion when assessing the legality of administrative measures. The traditional stance adopted by the Court of Justice has been, at any rate, to assess national procedural rules through a contextual balancing exercise of the various interests at stake under the so-called 'procedural rule of reason'.[771] This case law reflects the Court's reluctance to interfere:

> 'too much in relation to remedies and procedures, trying only to set a reasonable minimum level'.[772]

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[770] However, Krommendijk and Hendrikx explained that the behaviour of the District Court should not be described as 'activist'. Ultimately, it appears to reflect the District Court's desire to arrive at a correct interpretation of EU law (Krommendijk and Hendrikx, 'Picking Primacy over Procedural Autonomy' Verfassungsblog (17 November 2022), available at <Picking Primacy over Procedural Autonomy – Verfassungsblog> (last accessed, 6 May 2025).

[771] See, e.g., Joined Cases C-430/93 and C-431/93, *Van Schijndel*, EU:C:1995:441; Joined Cases C-220/05 to 225/05, *Van der Weerd*, EU:C:2007:318.

[772] Engström, 'National Courts' Obligation to Apply Community Law Ex Officio – The Court Showing New Respect for Party Autonomy and National Procedural Autonomy?' (2008) 1 Review of European Administrative Law 67, 88.

Of course, the principle of non-interference in such matters has some exceptions, but these exceptions have been carefully-crafted and limited to specific matters involving European public interests, such as competition law or consumer protection.[773] The Dutch Council of State argued, in this respect, that the conditions relating to detention did not qualify as national rules of public policy. Therefore, it contended, the principles of effectiveness and equivalence did not justify an *ex officio* examination of the lawfulness of detention on the basis of EU law, when such matters were not raised by the individuals concerned.[774]

The District Court of The Hague was not satisfied with the manner in which the request for a preliminary ruling was formulated by the Council of State in the first case referred to the Court. It decided to take matters into its own hands and submitted a request of its own in subsequent proceedings concerning the legality of detention measures. This new request was joined to the one referred earlier by the Dutch Council of State. It was essentially intended to 'elucidate' the complete picture.[775] The request presented by the District Court was framed more explicitly around the fundamental rights implications of the detention of third-country nationals, particularly asylum seekers.

In essence, the Court of Justice was asked to provide guidance on whether the principle of effective judicial protection set out in Article 47 of the Charter could empower national courts to disregard the limits on the scope of review prescribed by national law. Viewed from this perspective, this case illustrates the growing awareness among national courts of the potential of Article 47 of the Charter to challenge limitations imposed by national law. More specifically, the District Court seemed primarily concerned with ensuring judicial protection of the fundamental right to liberty of detained individuals, as set forth in Article 6 of the Charter.[776] The Court of Justice was therefore asked to determine whether the fundamental rights implications

[773] In the field of competition law, see Case C-126/97, *Eco Swiss*, EU:C:199:269 ; Joined Cases C-295/04 to C-298/04, *Manfredi*, EU:C:2006:461; in the field of consumer protection, see Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, EU:C:2000:346; Case C-168/05, *Mostaza Claro*, EU:C:2006:675. Engström hinted that 'other interests, not necessarily fundamental to society but still important, such as environmental policy, should considered as "European public policy" and be protected through *ex officio* action' (Engström, 'National Courts' Obligation to Apply Community Law Ex Officio', 80).

[774] It is interesting to observe that Widdershoven similarly suggested that national rules on the *ex officio* application of EU law would continue to be tested within the traditional framework formed by the procedural rule of reason despite the increasing prominence of the principle of effective judicial protection. He suggested that this issue would fall outside the scope of that principle because *ex officio* application is essentially meant to secure the effective application of EU law, rather than the judicial protection of individual rights (Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 571, 29).

[775] Krommendijk and Hendrikx, 'Picking Primacy over Procedural Autonomy', supra note 770.

[776] Joined Cases C-704/20 and C-39/21, *Staatssecretaris van Justitie en Veiligheid (Examen d'office de la rétention)*, para 48.

of detention measures justified a departure from the principle of national procedural autonomy.

The answer provided by the Grand Chamber of the Court was rather straightforward. The national referring court was instructed to apply the positive standard of judicial protection deriving from EU law: it had to review the legality of detention measures *ex officio*. This judgment reflects the positive framing of national procedural law in the light of fundamental rights. In particular, the fundamental rights enshrined in Articles 6 and 47 of the Charter were employed to assess the suitability of national procedural law and, ultimately, to reshape the mandate of national judges in a Charter-compliant manner.[777] Slowik similarly opined that the fundamental rights-based analysis adopted by the Court in this judgment 'trump[ed]' the traditional deference owed to national procedural autonomy in this area.[778]

In the wake of this judgment, the gist of the academic debate shifted to whether this approach could be expanded to other policy areas. Most commentators agree that the solution developed in the judgment was justified by the specific features underlying the adoption of detention measures. For this reason, it is generally assumed that the solution should be circumscribed to the field of immigration.[779] A great deal was indeed made, in the Court's judgment, of the specific and far-reaching fundamental rights implications resulting from the detention of third-country nationals. From the outset, the Court was keen to stress that:

> 'any detention of a third-country national … constitutes a serious interference with the right to liberty enshrined in Article 6 of the Charter'.[780]

More specifically, the Court explained that the gravity of detention in immigration matters was greater compared to other types of detention measures adopted in the context of criminal prosecution.[781] The fundamental rights significance of detention measures was reflected in the legal framework governing their adoption. The Court provided a useful reminder of the strict safeguards circumscribing the adoption of such measures. As the Court put it,

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[777] Barbou des Places, 'Quand la Cour de Justice décrit au Juge des Etrangers son Office de Juge des Droits de l'Homme' (2023) Revue Trimestrielle de Droit Européen 127.
[778] Slowik, 'Creating Procedural Obligations under EU Law: A Way Forward to Enhanced Protection of Fundamental Rights in the Field of Migration?', supra note 567.
[779] Eliantonio, '"A Spectre is Haunting Kirchberg" – The Spectre of Article 47: The CJEU Case Law on the Finality of Judicial Decisions and on the Ex Officio Application of EU Law' REALaw.blog (31 January 2023), available at <'A spectre is haunting Kirchberg' – the Spectre of Article 47: the CJEU Case Law on the Finality of Judicial Decisions and on the Ex Officio Application of EU law, by Mariolina Eliantonio – (realaw.blog)> (last accessed, 6 May 2025); Krommendijk and Hendrikx, 'Picking Primacy over Procedural Autonomy', supra note 770.
[780] Joined Cases C-704/20 and C-39/21, *Staatssecretaris van Justitie en Veiligheid (Examen d'office de la rétention)*, para 72.
[781] Ibid, paras 74-89. See also Case C-519/20, *Landkreis Gighorn*, EU:C:2022:178, esp. para 91.

> ‘[i]n view of the gravity of that interference with the right to liberty enshrined in Article 6 of the Charter and of the importance of that right, the power of the competent national authorities to detain third-country nationals is strictly circumscribed’.[782]

Likewise, the relevant rules on the judicial review of the legality of detention, as set out by the Return Directive and the Reception Conditions Directive, also reflected underlying concerns for ensuring a ‘high level of judicial protection’ for the fundamental rights of third-country nationals.[783] In other words, the fundamental rights specificity of detention measures in immigration matters was mirrored in the relevant secondary rules on judicial review of detention. Based on these provisions, the Court reconstructed the mandate of national judges. It considered that these rules reflected the legislature's intent to ensure that:

> ‘there is a system which enables the competent judicial authority to release the person concerned, where appropriate after an examination of its own motion, as soon as it is apparent that his or her detention is not, or is no longer, lawful’.[784]

The requisite scope of review was construed to enable national judges to discharge the duties imposed upon them by the legislature. It included all matters of fact and law relevant to the assessment of the lawfulness of detention. This did not merely cover the elements adduced by the competent authority or even those raised by the person concerned.[785] In addition, the competent judge was also entitled to:

> ‘take into consideration all the elements, in particular the facts, brought to its knowledge, as supplemented or clarified in the context of procedural measures which it deems necessary to adopt on the basis of its national law, and, on the basis of these elements, raise, where appropriate, the failure to comply with a condition governing lawfulness arising from EU law, even if that failure has not been raised by the person concerned’.[786]

This judgment illustrates how the fundamental rights set out in the Charter can generate a strengthened conception of judicial protection in immigration matters. The Court factored in the nature of the right to liberty, the degree of interference with that right, and the requirements for a high level of judicial protection in its assessment of the procedural obligations imposed on the Member States with regard to the judicial review of detention.

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[782] Ibid, para 75.
[783] Ibid, para 89.
[784] Ibid, para 86.
[785] Ibid, para 87.
[786] Ibid, para 89.

The Court followed a similar pattern of reasoning in the *Ararat* judgment.[787] The question referred to the Court concerned whether the national judiciary was entitled to raise of its own motion an instance of non-compliance with the principle of *non-refoulement* in the context of judicial review of an administrative decision regarding the irregular stay of third-country nationals. In the main proceedings, the national judiciary was called upon to examine the legality of an administrative decision rejecting an application for a residence permit submitted by third-country nationals. The powers vested in national judges under Dutch law did not include the possibility of assessing *ex officio* whether that administrative decision complied with the prohibition of *refoulement*. In these circumstances, the Court concluded that:

> '[t]he existence of that obligation on the national court to ensure, where necessary of its own motion, compliance with the principle of *non-refoulement* applies in the same way in a procedure for international protection and in a procedure, such as that in the main proceedings, which has been initiated by an application for a residence permit provided for by national law.'[788]

The reasoning spelled out by the Court in support of that conclusion was grounded in the fundamental rights saliency of administrative decisions concerning the (il)legality of stay for third-country nationals. Such decisions may indeed lead to the removal of third-country nationals from the territory of the host states and their transfer to a third-country in which they might be subjected to inhumane or degrading treatment. It follows that these decisions may entail significant risks of *refoulement* for third-country nationals found to be staying illegally in the territory of the host Member State.

This is why Article 5 of the Return Directive sets out an obligation for competent national authorities to ensure compliance with the principle of *non-refoulement* when assessing the legality of the stay of third-country nationals.[789] Similarly, the obligation under Article 13(1) and (2) of the Return Directive for the Member States to establish effective remedies against such decisions is intended to:

> 'ensure that a third-country national against whom a return decision has been adopted is not removed under conditions contrary to Article 5 of that Directive.

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[787] Case C-156/23, *Ararat*, EU:C:2024:892. On this judgment, see Pahladsingh, 'Obligation for National Courts to Review Ex Officio Whether the Non-Refoulement Principle is Violated in Situations where the Member State has issued a Return Decision against a Third-Country National (C-156/23, *Ararat*)' EU Law Live (19 November 2024), available at <Op-Ed: "Obligation for national Courts to review ex officio whether the Non-Refoulement Principle is violated in Situations where the Member State has issued a Return Decision against a third-country National (C-156/23, Ararat)" - EU Law Live/> (last accessed, 6 May 2025).

[788] Ibid, para 51.

[789] Article 5 of Directive 2008/115 states that: '[w]hen implementing this Directive, the Member States shall… respect the principle of non-refoulement'.

> Those rules are thus intended to ensure respect for the principle of *non-refoulement*, which … is of an absolute nature'.[790]

This is the reason why the Court took the view that:

> 'the judicial protection guaranteed by [those provisions] would be neither effective nor complete if the national court were not required to raise *ex officio* the failure to comply with the principle of *non-refoulement* when the material in the file brought to its attention, as supplemented or clarified during the adversarial proceedings before it, tends to demonstrate that the return is based on an obsolete assessment of the risks of [*refoulement*]… A limitation of the role of the national court could result in such a decision being enforced, even though such material indicates that the person concerned might be subjected, in that third country, to such treatment, which is prohibited in absolute terms by Article 4 of the Charter'.[791]

In other words, the principle of *non-refoulement* laid down in Articles 4 and 19(2) of the Charter was relied upon by the Court to enhance judicial protection in relation to the judicial review of administrative decisions concerning the (il)legality of stay of third-country nationals. More generally, the obligation to raise such matters *ex officio* prevails in any judicial proceedings concerning the legality of an administrative decision that could give rise to the enforcement of a return decision. Viewed from this perspective, the Court's reasoning rests firmly on the absolute nature of the fundamental rights enshrined in those Charter provisions, and given specific expression in the procedural safeguards set out in the Return Directive.

Taken together, these two judgments reflect the context-sensitive nature of the principle of effective judicial protection, which allows for differentiation based on the peculiar features of specific sectoral rules. Ultimately, the solutions devised in these judgments was grounded in a contextual assessment of the specific fundamental rights nexus surrounding administrative decisions on the detention and/or legality of stay of asylum seekers (and, more generally, third-country nationals). For that reason, it is unlikely that the reasoning will transcend the boundaries of migration law.[792]

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[790] Case C-156/23, *Ararat*, para 49 (emphasis added).
[791] Ibid, para 50 (emphasis added).
[792] The Court itself differentiated the situation at stake from other administrative proceedings where the 'initiative and delimitation of the dispute lies with the parties' (see ibid, para 92). In subsequent judgments, it was also careful to circumscribe this solution to the intricacies of detention in immigration matters. In the field of environmental law, the Court reverted to the traditional 'procedural autonomy approach', concluding that the duty to raise points of EU law *ex officio* in the field of consumer protection was 'the consequence of the specific characteristics of those areas and of the EU law provisions concerned, such as the necessity of compensating for the imbalance which exists between the consumer and the seller'. Similar concerns did not arise in relation to the environmental rules at issue, and therefore, the national court was not compelled to raise a breach of these rules *ex officio*. AG Kokott similarly

At the same time, these judgments align squarely with recent case law regarding the creation of positive obligations of judicial protection in the field of asylum and immigration matters. Ultimately, the Court appears primarily concerned with securing independent and impartial judicial control over negative administrative decisions in this area. In other words, the national judge is asked to do more than follow blindly in the footsteps of the administration. Instead, the national judge is invited to conduct a thorough and updated assessment of the legality of such decisions, and the Court signals its willingness to equip national judges with the necessary powers and competences to carry out this endeavour. The scope of remedial powers available to national judges depends on a contextual assessment of whether the national procedural framework effectively protects the fundamental rights of asylum seekers. At the end of the day, there seems to be little the administration can do that the judge cannot also do.

6. Conclusion

Over the past few years, there has been a discernible jurisprudential trend towards the establishment of positive obligations of judicial protection under the principle of effective judicial protection, alongside relevant secondary law provisions on procedural rules and judicial remedies. This development is by no means limited to the field of asylum law but reflects a broader trend discernible across various policy areas. However, the field of asylum boasts unique attributes that make it particularly suitable for assessing the positive demands of judicial protection. Unlike most other policy fields, the Lisbon Treaty spells out a legislative mandate for the establishment of common procedural standards in asylum matters. As a result, asylum law is characterised by a relatively high degree of procedural harmonisation. At the same time, the procedural rules in this area reflect the Member States' desire to maintain control over the institutional set up of decision-making in asylum matters. The various iterations of the Asylum Procedures Directive can be viewed as (failed) attempts to keep national judges at bay, while granting significant leeway to administrative authorities in handling requests for international protection.

distinguished the rules at issue from those discussed in this section. She noted, in particular, that the enforcement of environmental law rules generally involves 'no similarly serious interferences with the rights of individuals' (AG Kokott in Case C-721/21, *Eco Advocacy*, EU:C:2023:39, para 47). In another judgment, the Court concluded that the principle of effective judicial protection does not require a trial court in a criminal case to raise *ex officio* a breach of the obligation imposed on competent authorities to inform suspects of their right to remain silent with a view to annulling the procedure. This conclusion was reached because the relevant directive (Directive 2012/13) included additional safeguards that enable the suspect or accused person to raise that illegality during the criminal procedure (Case C-660/21, *K.B. and F.S. (Raising ex officio of an infringement in criminal proceedings*, EU:C:2023:498, paras 32 et seq.)

Against this background, this chapter has addressed the following research question: how has the harmonisation of administrative and judicial procedural rules in asylum law contributed to the development of obligations of judicial protection beyond the core guarantees of effective judicial protection under EU primary law? In answering this question, it has explored how the principle of effective judicial protection has been deployed to rekindle the institutional set up of decision-making in asylum matters. The development of positive standards of judicial protection has led to a greater involvement of national judges in asylum matters. National judges have been urged to abandon their traditional passive role and take on an active role as gatekeepers for the protection of asylum seekers' fundamental rights. The bottom line is that national judges cannot simply rubber-stamp first-instance administrative decisions on asylum; instead, they are encouraged to act as watchdogs ensuring the judicial protection of asylum seekers' rights. Viewed from this perspective, the development of positive standards of judicial protection in asylum law reflects the growing prevalence of fundamental rights in shaping the procedural rights and obligations of individuals within the EU.

In the field of asylum, the starting point of the Court's approach has been to reconstruct the mandate granted to national judges by virtue of the relevant secondary legislative provisions. For the most part, the fundamental rights saliency of asylum matters has been filtered through the interpretation of secondary law. The Court has been primarily concerned with enabling national courts or tribunals to conduct an independent and comprehensive appraisal of the legality of administrative decisions susceptible to negatively affect the interests and rights of asylum seekers.

At the same time, the Court has engaged in a delicate exercise of identification of the essence of the principle of effective judicial protection enshrined in Article 47 of the Charter. However dubious the analytical value of the concept of the essence of fundamental rights may be, that criterion has played a prominent role in the debate on procedural autonomy. The Court is eager to preserve the sacrosanct principle of procedural autonomy, but this autonomy is increasingly qualified by reference to the essence of effective judicial protection. The judgments analysed here reflect the Court's willingness to draw from secondary law to isolate the essential content of the principle of effective judicial protection. What is considered essential is that national courts or tribunals must be able to perform the mandate entrusted to them by secondary law. In turn, the principle of effective judicial protection empowers national courts to carry out this task. The fundamental rights nexus intrinsic to asylum matters is also taken into account to create a more robust conception of judicial protection, going beyond the requirements prevailing in other policy areas.

The added normative value of the principle of effective judicial stems from its primary emphasis on the remedies and procedures available to enable national judges

to exercise the type of control envisioned by secondary law. Ultimately, there is relatively little the administration can do that the judge cannot also do. Given the wide scope of powers and responsibilities vested in national judges, there is a reasonable argument for imposing additional constraints on the organisational structure of national judiciaries. In this context, it is worth noting that the Recast Procedures Directive imposes detailed requirements regarding the training of staff at national determining authorities.[793] The Member States are required to provide specialised training on asylum matters, including, for example, training sessions on asylum law and specific issues relating to handling asylum requests. If national judges are expected to conduct a novel and comprehensive assessment of applicants' international protection needs – using, if necessary, procedural and investigative tools typically available to the administration[794] – then there is a compelling argument that they should be subject to similar constraints. This suggests a need for greater specialisation among national judges involved in asylum matters, beyond what is currently the case at the national level.

Furthermore, the insights presented in this chapter are particularly relevant in the aftermath of the New Pact on Migration and Asylum. The adoption of the New Pact has been characterised by most as a step back for the judicial protection of asylum seekers' rights. While space constraints do not allow me to do justice to the breadth of literature devoted to that subject, it is worth noting that the pact introduces, or formalises,[795] exceptional procedures that effectively deprive asylum seekers of a genuine opportunity to access justice and enforce their rights before domestic courts. Viewed from this perspective, the New Pact reflects the Member States' desire to implement exceptional procedures involving lessened (or fictitious) procedural safeguards, including expedited and cursory treatment of asylum requests, excessively short time-limits, and so on. A paradigmatic example of this approach is the fiction of

[793] Art. 4(3)-(4) of the Recast Directive.

[794] As a reminder, this includes, for instance, the possibility to conduct a personal interview of the applicant. It follows from recent case law that national judges are also invited to adopt additional 'procedural measures which it deems necessary to adopt on the basis of national law' in order to be able discharge the duties laid upon them by secondary law (Joined Cases C-704/20 and C-39/21, *Staatssecretatis van Justitie en Veiligheid (Examen d'office de la rétention)*, para 88).

[795] Legal scholars have questioned the newness of this pact on the ground that it merely formalises, or legalises, existing national practices. See, e.g., Jakulevičienė, 'Re-decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders' EU Immigration and Asylum Law and Policy (27 October, 2020), available at <Re-decoration of existing practices? Proposed screening procedures at the EU external borders – EU Immigration and Asylum Law and Policy (eumigrationlawblog.eu)> (last accessed, 6 May 2025); Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the "New" Pact on Migration and Asylum' EU Immigration and Asylum Law and Policy (28 September 2020), available at <European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum – EU Immigration and Asylum Law and Policy (eumigrationlawblog.eu)> (last accessed, 6 May 2025).

non-entry,[796] which allows the Member States to treat asylum seekers intercepted while crossing the border illegally as if they remained outside Union territory pending a preliminary examination of their asylum request. This presumably allows the Member States to maintain asylum seekers in a state of legal limbo for an extended period of time, without real prospect of obtaining access to justice.

It should come as no surprise, in this context, that the adoption of the New Pact on Migration and Asylum has generated renewed emphasis in academic literature on the role of the Court of Justice as a watchdog for the judicial protection of asylum seekers. Much attention has, in particular, been given to the interaction between primary and secondary law in this area. In the words of Slowik,

> '[t]he characterization of the role of Article 47 of the Charter in the development of procedural guarantees presents a vital interest in light of the incoming reforms foreseen in the New Pact of Migration and Asylum'.[797]

The gist of the matter can be summarised in the following questions: to what extent can the EU legislature restrict existing procedural guarantees? And what can the EU judiciary do to mitigate the restrictive stance taken by the legislature under Article 47 of the Charter? Or, to put it differently, to what extent can EU general principles be used to frame the interpretation of restrictive provisions on procedural matters and/or mount a successful challenge against the legality of such provisions?

In some ways, the crux of the academic debate is grounded in the procedural framework that has been developed over time in the field of asylum law. In other words, the Court is not called upon to spearhead the development of new procedural tools aimed at strengthening the judicial protection of asylum seekers' rights. Rather, it is called upon to ensure respect for the core constitutional features derived from the principle of effective judicial protection enshrined in Article 47 of the Charter. In this context, the Court must, at the very least, ensure that the legislative compromise established by secondary law complies with the essential requirements of the principle of effective judicial protection, as identified above. Asylum seekers must therefore be able to seek access to an independent and impartial court or tribunal that is competent to conduct a comprehensive appraisal of all relevant issues, including both elements of

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[796] Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, [2024] OJ L 1/76, Arts. 43 et seq. For further details, see Apatzidou, 'The Normalization of Denial of Legal Safeguards in the Proposed Asylum and Migration Legislation' EU Immigration and Asylum Law and Policy (2 March 2023) European Law Blog, available at <The Normalization of Denial of Legal Safeguards in the proposed Asylum and Migration Legislation · European Law Blog> (last accessed, 6 May 2025); Gerbaudo, 'The European Commission's Instrumentalization Strategy: Normalising Border Procedures and De Facto Detention' (2022) 7 European Papers 615; Mouzourakis, 'More Laws, Less Law: The European Union's New Pact on Migration and Asylum and the Fragmentation of "Asylum Seeker" Status' (2021) 26 European Law Journal 171.

[797] Slowik, 'Multiple Sources of Right to an Effective Remedy in EU Migration and Asylum Law: Towards Common Standards on Judicial Protection?', supra note 688, 29.

fact and law, regarding the lawfulness of the administrative decision on their request for international protection.[798] If they are detained pending examination of their request, the legality of that detention must similarly be subject to thorough judicial scrutiny. Additionally, the essence of the principle of effective judicial protection also requires national administrative authorities to comply with final judicial decisions relating to EU law. Accordingly, where a national court has had the opportunity to rule on the legality of detention or on the international protection status of an asylum seeker, the administrative authority to which the matter is referred must comply with that judicial assessment. Should the procedural requirements embedded in the New Pact on Migration and Asylum prevent national courts from living up to this standard, they will presumably fail to withstand scrutiny by the Court.

[798] For a similar argument, in relation to the scope of judicial review exerted by domestic courts, see Reneman, 'No Turning Back?' in op. cit. supra note 560, p. 157.

Chapter 5: Upholding the essence of judicial protection through sectoral procedural rules in EU environmental, equality, and asylum law

1. Introduction

The classical narrative on national procedural autonomy has traditionally examined the interaction between EU law and national procedural autonomy through the prism of the principles of effectiveness and equivalence, as well as the general principle of effective judicial protection.[799] Much has been written about how the Court, drawing on these 'EU core principles', has shaped national procedural autonomy with regard to the judicial enforcement of EU law. However, over the past few decades, a discernible evolution has occurred, reflecting the expansion of both the scope and the level of detail of common procedural rules and remedies established through secondary law. This expansion of common procedural rules seems to challenge the analytical framework used by the classical narrative to study the interaction between national procedural traditions and the procedural expectations arising from EU law. More specifically, that development prompts renewed doctrinal scrutiny on challenging questions about the continued relevance of the principles of effectiveness, equivalence and effective judicial protection in the debate on national procedural autonomy.

Against this background, this thesis has sought to offer a more nuanced account of the classical narrative surrounding national procedural autonomy – endorsed by the majority of legal scholars – by broadening the analytical framework beyond the dominant emphasis on 'EU core principles'.[800] This was achieved through a cross-sectoral doctrinal inquiry into the obligations of judicial protection developed by the Court in the policy areas of environmental, equality, and asylum law. In addition to EU principles, the analysis incorporated relevant common procedural rules established by secondary law. This approach allowed to formulate a more accurate and comprehensive account of the obligations of judicial protection prevailing in these three policy fields.

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[799] A great deal has admittedly been made over the past few years of the added normative value of the principle of effective judicial protection, and, more specifically, whether the formal constitutionalisation of this principle by virtue of Article 47 of the Charter ushered in a new stage in relation to the interaction between EU law and national procedural autonomy. On that topic, see Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022). However, see Bobek and Adams-Prassl, 'Conclusion' in Bobek and Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing, 2020), esp. pp. 572-573. For the reasons spelled out at length in Chapter 1, Section 3.2., this thesis does not consider that the development of positive standards of judicial protection discernible in recent judgments emerged as a necessary by-product of the formal integration of that principle within the realm of written primary law.

[800] Bonelli, 'Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature' (2019) 12 Review of European Administrative Law 35, 36.

Specifically, the comparative analysis of these policy areas also helps to distinguish between: (i) cross-cutting obligations of judicial protection that bind the Member States in the implementation of EU law, irrespective of the regulatory framework specific to each policy area; and (ii) sector-specific obligations, shaped by the regulatory framework of each area.

Building upon the sector-specific case studies presented in previous chapters, this chapter explores the following research question: how do the case studies in the area of environmental, equality, and asylum law help distinguish between the core and the periphery of the fundamental right to an effective judicial remedy, and what are the implications of this distinction for the Member States' competences to organise their judicial systems in less harmonised areas? To answer this sub-question, which forms the cornerstone of the overarching research question guiding this thesis, this chapter first outlines the sector-specific obligations of judicial protection prevailing in these three policy areas. It shows that the Court has drawn on the regulatory framework of each policy area – including sectoral procedural rules and the nature of the underlying rights and interests – to craft detailed standards of judicial protection tailored to the specific normative aspirations underlying these areas (section 2). It then argues that this approach calls for a more nuanced understanding of the traditional narrative, which has primarily focused on the obligations developed under EU primary law. In particular, it shows that the emergence of positive obligations of judicial protection in these areas has largely been driven by the expansion in both the scope and specificity of harmonised procedural requirements established through secondary law (section 3). This chapter then identifies core, transversal components of effective judicial protection grounded in Article 47 of the Charter, showing how these components have supported more or less detailed recommendations regarding the organisation of national judicial systems – especially in relation to the scope of review and the remedial powers of national courts (section 4). Finally, it examines how the Court articulated the essence of judicial protection across the three policy areas examined in this thesis (section 5).

Overall, this chapter demonstrates that the emergence of obligations of judicial protection – spanning procedural, remedial, and institutional matters – established by EU law has been driven by the expanding scope of harmonised procedural requirements established through sectoral rules. This chapter explains that this approach has allowed the Court, through its case law, to formulate both explicit and implicit recommendations on how the Member States must organise their domestic judicial systems. In doing so, the Court contributes to the establishment of an EU-wide procedural framework, without becoming insensitive to the distinctive national

procedural traditions prevailing at the Member State level.[801] Moreover, this approach has allowed the Court to develop specific procedural requirements that are tailored to the unique characteristics of the three policy sectors analysed in this thesis.

2. The polymorphism of judicial protection:[802] The role of regulatory context in shaping judicial protection across EU environmental, equality and asylum law

This section revisits the sector-specific obligations of judicial protection developed by the Court in the three policy areas analysed in this thesis. Overall, the case-studies undertaken in this thesis demonstrate that the Court's approach is directly shaped by the regulatory context of each policy area, which includes relevant procedural rules, and the nature of rights and interests underlying these rules.[803] By drawing inspiration from the regulatory framework of each area, the Court has been able to articulate detailed obligations of judicial protection tailored to the normative needs of each area.

This section shows, in particular, that in the area of environmental law, the Court has relied on the Aarhus Convention alongside secondary law to develop standing rights that empower individuals and environmental NGOs to initiate judicial proceedings against national authorities for failing to fulfil their obligations under EU environmental law. The relevant case law embodies an objective conception of justice, aimed at upholding the rule of (environmental) law (section 2.1). By contrast, in the area of equality law, the Court has embraced a more subjective conception of justice, focused on enabling individual workers to assert their rights in horizontal proceedings. Building on a statutory interpretation of Charter provisions, the Court has strengthened the judicial enforceability of equality rights derived from secondary legislation (section 2.2). Finally, in the field of asylum law, the Court has interpreted Directive 2013/32

[801] This finding aligns with the tendencies identified in the context of EU-imposed administrative obligations. It does appear, however, that in the latter contexts, the EU legislature itself contributes more directly to the establishment of an EU-streamlined administrative framework that is less sensitive to distinct national administrative law traditions. On this matter, see Bois, 'The Most Dangerous Branch? The EU-led Constitutionalisation of Independent Public Authorities and the Reshuffling of the Balance of Powers in the Member States' EUDAIMONIA Working Paper 2025/2, available at <www.eulegalstudies.uliege.be> (last accessed, 6 May 2025).

[802] Note that Giulia Gentile similarly alluded to the polymorphism of Article 47 of the Charter. What she has in mind, however, concerns the coexistence of the right to a fair trial and the right to an effective judicial remedy under that provision. For further details, see Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU: Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States' in Mak and Kas (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing, 2023), pp. 152 et seq.

[803] Reneman, 'Asylum and Article 47 of the Charter: Scope and Intensity of Judicial Review' in Crescenzi, Forastiero and Palmisano, *Asylum and the EU Charter of Fundamental Rights* (Editoriale Scientifica Napoli, 2018), p. 61.

('the Asylum Procedures Directive')[804] in the light of Article 47 of the Charter to require robust judicial oversight of administrative decisions. This has led to the development of strong obligations of judicial protection – particularly concerning the scope of judicial review and the execution of final judicial decisions – which reflect the fundamental rights dimension of administrative action in asylum matters (section 2.3).

2.1. The creation of objective environmental rights under the influence of the Aarhus Convention

The case law on environmental protection serves as a case in point to illustrate the positive dimension of the principle of effective judicial protection.[805] Over the past few years, the Court has transformed 'public interest litigation' into a positive obligation of judicial protection grounded in Article 47 of the Charter. It follows from the Court's case law that the Member States are required to grant standing to environmental NGOs wishing to enforce EU environmental law in national judicial review proceedings. Consequently, national barriers to standing for legal and natural persons in the field of environmental law had to be re-evaluated. The *Schutznorm* doctrine prevailing in several Member States has been a clear target of this case law. That doctrine prevents individuals and NGOs from seeking access to environmental justice. Building on the general principle of effective judicial protection, the CJEU has instructed national judges to do more than simply set aside conflicting procedural norms. More specifically, national judges were required to grant standing to individuals and environmental NGOs in relation to the judicial enforcement of environmental law provisions.[806] The consequences of this line of case law for national remedial autonomy cannot be overlooked: to comply with the right to effective judicial protection, national courts had to make available a new cause of action beyond the remedies already prescribed at the national level.

It is worth reflecting on the normative relevance of the regulatory context within which the Court was called upon to intervene. In interpreting Article 47 of the Charter, the Court explicitly and directly relied on the standing requirements established by the

[804] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60.
[805] On that topic, see Tecqmenne, 'Turning "Public Interest Litigation into a Positive Obligation Deriving from Article 47 of the Charter: *Deutsche Umwelthilfe*' (2023) 60 Common Market Law Review 1745.
[806] On individual standing, see C-237/07, *Janecek*, EU:C:2008:447; Case C-197/18, *Wasserleitungsverband Nördliches Burgenland and Others*, EU:C:2019:824; Case C-535/18, *Land Nordrhein-Westfalen*, EU:C:2020:391; on NGO standing: Case C-240/09, *Lesoochranárske zoskupenie ('Brown Bears I')*, EU:C:2011:125; Case C-243/15, *Lesoochranárske zoskupenie VLK ('Brown Bears II')*, EU:C:2016:838; Case C-664/15, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation ('Protect')*, EU:C:2017:987; Case C-873/19, *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, EU:C:2022:857.

Aarhus Convention.[807] For clarity, it is useful to remember that Article 9(1)-(3) of the Convention sets out the right for concerned individuals and NGOs to bring judicial review proceedings in environmental matters. The EU legislature has repeatedly been criticised for failing to implement the Convention in a comprehensive and consistent manner. In the absence of cross-cutting harmonisation on such matters, the Court has relied on Article 47 of the Charter, interpreted in the light of Article 9 of the Convention, to establish a directly effective procedural obligation, turning public interest litigation into a reality. By relying on the Aarhus Convention, which prescribes that NGOs should be granted access to environmental justice, the Court was able to fine-tune the material content of Article 47 in a positive manner. The national judge was instructed to directly apply the EU standard of judicial protection derived from the latter provision, interpreted in the light of the Aarhus Convention.

More generally, the remedies developed over time through case law have been influenced by the Aarhus Convention and reflect the normative concerns underpinning most environmental legislation. It should be clear that the area of environmental law has historically been insulated from the influence of the narrative of rights. De Búrca explained that the 'language of rights' initially failed to penetrate the realm of environmental law.[808] Speaking of individual rights in this context was even described as an instance of 'conceptual pollution' by Prechal and Hancher.[809] The reason for this is relatively straightforward: the objective behind most (if not all) environmental legislation has never been to protect individual rights or interests. Rather, most legislative instruments in this area are aimed at safeguarding collective interests inherent in environmental preservation. The Charter similarly evinces a certain reluctance to embrace a regulatory approach explicitly centred around (environmental) fundamental subjective rights. It articulates a principle encouraging public authorities to strive for a 'high level of environmental protection', rather than providing individuals with a subjective entitlement to remedies for environmental harm.[810] The drafters of the Charter presumably deferred to the assessment of the EU legislature

[807] United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.
[808] De Búrca, 'The Language of Rights and European Integration' in More and Shaw (eds), *New Legal Dynamics of the European Union* (Oxford University Press, 1995). For a similar view, see Hilson, 'The Visibility of Environmental Rights in the EU Legal Order: Eurolegalism in Action?' (2018) 25 Journal of European Public Policy 1589.
[809] Prechal and Hancher, 'Individual Environmental Rights: Conceptual Pollution in EU Environmental Law' in Somsen (ed), *Yearbook of European Environmental Law* (Oxford University Press, 2002). See more recently Reid, 'Pitfalls in Promoting Environmental Rights' and Gill-Pedro, 'EU Environmental Rights as Human Rights: Some Methodological Difficulties Facing European Courts', both contributions can be found in Bogojević and Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing, 2018)
[810] On the potential of Article 37 of the Charter to support a fundamental rights approach to environmental protection, see Bogojević, 'EU Human Rights Law and Environmental Protection: The Beginning of a Beautiful Relationship?' in Douglas-Scott and Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing, 2019).

regarding the regulatory approach in EU environmental law. If the Court were to rely on other relevant Charter provisions to develop subjective environmental rights, this would sidestep the express choice made by the drafters of the Charter to leave such issues to the discretion of EU political institutions.[811]

The procedural rights and remedies developed by the Court reflect the normative aspirations pursued by most legislative instruments in that area. The Aarhus Convention has served as a crucial reference point in shaping objective procedural rights and remedies facilitating access to justice in this area. Over the past few years, the Court has indeed crafted specific remedies that facilitate the judicial protection of the collective interests underlying EU secondary law on environmental matters.[812] The relevant case law builds upon – and in fact, falls squarely in line with – existing procedural requirements established by secondary and/or international law. More specifically, the Aarhus Convention has been relied upon as a source of guidance for developing objective rights, allowing individuals and NGOs to act on behalf of the environment.[813] This includes, of course, the right to initiate judicial review proceedings for the protection of the environmental, which was precisely at stake in the judgments mentioned above.[814] Beyond this, the Court has also established a right to invoke environmental provisions in national judicial proceedings, as well as a right to seek an injunction compelling national public authorities to comply with EU environmental law. Conversely, the Court appears reluctant to expand the requirements of effective judicial protection beyond the current emphasis on collective interests. Notably, the Court has ruled out the possibility that individuals could derive a subjective right to obtain damages for state liability due to infringements of EU environmental law.[815] In other words, the case law falls short of recognising a genuine subjective right to a healthy environment deserving of monetary compensation. Ultimately, the Court seems primarily focused on upholding the rule of (environmental)

[811] De Sadeleer, 'Droits Fondamentaux et Protection de l'Environnement dans l'Ordre Juridique de l'UE et dans la CEDH' (2011) European Journal of Consumer Law 25, 30, who similarly opined that the obligation set out in Article 37 of the Charter is addressed to the EU political institutions, and does not give rise to subjective rights for the sake of individuals affected by an infringement of EU environmental law. In his view, '[d]es droits subjectifs ne [peuvent] émerger que par l'entremise du droit dérivé (Article 52, § 5, de la Charte)'.

[812] For a similar view, see Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU: Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States' in op. cit. supra note 802, p. 158.

[813] Case C-535/18, *Land Nordrhein-Westfalen*, para 45; Case C-197/18, *Wasserleitungsverband Nördliches Burgenland and Others*, paras 33-34.

[814] See further, e.g., Case C-243/15, *Brown Bears II*; Case C-664/15, *Protect*; C-197/18, *Wasserleitungsverband Nördliches Burgenland and Others*, EU:C:2019:824.

[815] Case C-61/21, *Ministre de la Transition écologique et Premier Ministre (Responsabilité de l'Etat pour la pollution de l'air)*, EU:C:2022:1015.

law, thus ensuring judicial protection of the collective interests embedded in the very fabric of EU environmental law.[816]

2.2. Empowering employees through subjective equality rights

A similar story plays out in the field of equality law, but here the regulatory framework shaping the Court's approach to sectoral procedural rules and remedies is different. The type of remedies developed in this context is more explicitly rooted in the normative concerns that have underpinned equality law ever since its inception. The employment relationship has traditionally been viewed as a site of power asymmetry between employers and employees. The field of employment law emerged to (re)instil some sense of fairness or balance in the respective rights and obligations of both parties. The current stance of Union legislative institutions in addressing the power asymmetry inherent in most employment relationships primarily rests on the creation of information duties for employers. The European Pillar of Social Rights advocates for providing relevant information to employees about their working conditions. It sets out information rights regarding wages,[817] employees' rights and obligations within the employment relationship,[818] and the reasons for dismissal.[819] Recent legislative initiatives reflect this concern.[820] The La Hulpe Declaration, for example, pledges to enhancing employees' and their representatives' right to information.[821] The aim behind these political initiatives is straightforward: by offering workers relevant information about their rights and duties, the EU seeks to encourage them to exercise their rights, including, if necessary, by pursuing legal proceedings. As the European Commission puts it,

[816] For a similar argument, see Stagstrup, 'State Liability in EU Environmental Law: *Francovich* is Dead, Long Live Compensation?' (2024) 36 Journal of Environmental Law 343. On that topic, see also Tecqmenne, 'A Subjective Right to Breathe Clean Air, At Last? The Promises and Perils of the Right of Compensation' in Eliantonio, Kulovesi, Peeters and Savaresi (eds), *Greening Europe and the Rule of Law: Opportunities for and Limits to EU's Legal Power* (Edward Elgar Publishing, forthcoming).
[817] Interinstitutional Proclamation on the European Pillar of Social Rights, [2017] OJ C 428/10, Art. 6(c).
[818] Art. 7(a) of the European Pillar of Social Rights.
[819] Art. 7(b) of the European Pillar of Social Rights.
[820] See, e.g., Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, [2019] OJ L 186/105; Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, [2023] OJ L 132/32.
[821] La Hulpe Declaration on the Future of the European Pillar of Social Rights, 16 April 2024, paras 20-22.

> 'having information about his/her own rights is a pre-requisite for an employee to be able to enforce them'.[822]

This normative stance by EU political institutions serves as a crucial legal parameter for understanding the types of rights and remedies available to individuals in the field of equality law. The relevant case law mirrors the normative concerns expressed by the Union's political institutions. Over the years, the Court has made significant strides in ensuring the judicial protection of subjective equality rights in private law disputes between parties in the employment relationship. Initially, the case law focused on whether individual workers affected by violations of their rights could invoke such violations in horizontal judicial proceedings. The Court articulated negative procedural obligations, specifically the obligation of national courts to set aside national legislative provisions deemed incompatible with EU fundamental rights, such as the prohibition of discrimination. In this regard, cases like *Mangold* and *Kücükdeveci* are particularly noticeable.[823] Beyond the right to rely upon these rights, there was little in terms of positive rights and remedies provided by EU law.

Over time, however, several fundamental equality rights enshrined in the Charter began to take on a more positive and prescriptive role, becoming the source of self-standing rights and remedies. The *Bauer* and *Max-Planck* judgments reflect a clear trend toward the direct horizontal effect of fundamental rights.[824] This means that these rights latter are no longer just legal benchmarks for assessing the legality of national law; crucially, they now serve as sources of subjective rights and obligations that can be directly invoked in horizontal proceedings involving private parties. Viewed from that perspective, these judgments evince a conception of justice revolving around the ability to enforce subjective equality rights and obligations in court proceedings between private parties. Although the Court has yet to explicitly clarify the substantive reasons underlying for using horizontality,[825] it seems that the normative concerns underlying equality law inspired the approach taken by the Court in this context.[826]

Beyond this, the additional remedies developed in this context are deeply rooted in the normative concerns underpinning the field of equality law. More specifically, national courts have been called upon to create detailed information rights and obligations aimed at encouraging workers to exercise their rights, including, if

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[822] Commission, 'REFIT Evaluation of the "Written Statement Directive" (Directive 91/533/EC)', SWD(2017) 205 final, p. 3.
[823] Case C-144/04, *Mangold*, EU:C:2005:709; Case C-555/07, *Kücükdeveci*, EU:C:2010:21.
[824] Case C-684/16, *Max-Planck*, EU:C:2018:874; Joined Cases C-569/16 and C-570/16, *Bauer*, EU:C:2018:871.
[825] Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford University Press, 2019), p. 58: 'this line of case law … has remained rooted in formalistic, ad hoc distinctions between different sources of EU law, which have substantively revealed little in terms of the role of private responsibility for violations of fundamental constitutional rights'.
[826] For a similar argument, see Bailleux, 'L'Effet Direct Horizontal des Droits Fondamentaux. Le Critère du Pouvoir-Savoir, Ligne Claire de la Jurisprudence?' (2019) Revue des Affaires Européennes 329.

necessary, by initiating judicial proceedings. The judgment delivered in *Max-Planck* is particularly instructive in this respect.[827] It advocates for the creation of robust individual entitlements to receive information about the modalities and exercise of the right to paid annual leave conferred upon workers under Article 31(2) of the Charter. What is striking here, however, is that this judgment does not mention Article 47 of the Charter. The rights and remedies identified by the Court were considered an integral part of the right to paid annual leave outlined in Article 31(2) of the Charter. The bottom-line, however, can be summarised as follows: individuals concerned must be in a position to effectively exercise these rights, which may, if necessary, involve bringing claims before national judges to vindicate these rights.[828] It follows that the rights and remedies identified in this judgment reflect the normative concerns that underpin most secondary legislation adopted in the field of equality law.

2.3. The principle of *non-refoulement*: A key building block for strengthening judicial oversight in asylum law

The field of asylum law also follows a similar pattern, albeit with distinct normative concerns. Asylum law is inherently framed by fundamental rights considerations, particularly because individual decisions on asylum have profound implications for the fundamental rights of asylum seekers. The principle of *non-refoulement*, enshrined in in Articles 4 and 19(2) of the Charter, exemplifies the type of rights at skate in the administrative processing of individual requests for international protection. This principle, central to asylum law, underpins the demand for robust judicial protection, ensuring that individuals are not forcibly returned to situations where they face risk of harm.

The field of asylum has witnessed the establishment of significant positive procedural obligations under the general principle of effective judicial protection. This principle has been pivotal in reintroducing adequate judicial safeguards in a field traditionally dominated by executive discretion.[829] Seen in that light, asylum law serves as a relevant case study for understanding the cross-cutting demands of judicial

[827] Case C-684/16, *Max-Planck*, para 45: 'the employer is in particular required, in view of the mandatory nature of the entitlement to paid annual leave and in order to ensure the effectiveness of Article 7 of Directive 2003/88, to ensure, specifically and transparently, that the worker is actually in a position to take the paid annual leave to which he is entitled, by encouraging him, formally if need be, to do so, while informing him, accurately and in good time so as to ensure that that leave is still capable of ensuring for the person concerned the rest and relaxation to which it is supposed to contribute, that, if he does not take it, it will be lost at the end of the reference period or authorised carry-over period'.

[828] See similarly Case C-55/18, *CCOO*, EU:C:2019:402; Case C-715/20, *X (Absence de motifs de résiliation)*, EU:C:2024:139.

[829] Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*, EU:C:2020:367; Case C-556/17, *Torubarov*, EU:C:2019:626.

protection, which require judicial review to safeguard fundamental rights.[830] In this context, the Court was able to instruct the Member States to establish independent and impartial judicial control over the legality of individual administrative decisions that might involve a breach of the principle of *non-refoulement*.[831]

Moreover, the mandate of national judges was strengthened to reflect their primary responsibility as gatekeepers for the protection of asylum seekers' fundamental rights. The procedural obligations developed in this context reflect the fundamental rights saliency of asylum matters. It is useful to remember that the field of asylum boasts an unparalleled degree of procedural harmonisation. The relatively high degree of procedural harmonisation achieved through the Asylum Procedures Directive constitutes a relevant legal parameter for assessing the normative demands formulated by the case law. Reneman explains, in this respect, that:

> 'the required role of the national court depends in particular on the applicable secondary legislation, which reflects the nature of the (fundamental) right at issue'.[832]

For the most part, the specificity of the fundamental rights at stake in asylum matters has been filtered through an interpretation of the Asylum Procedures Directive. The development of positive procedural obligations has been grounded in the secondary law provisions on procedural matters. Viewed from this perspective, the relevant case law conveys an element of judicial self-restraint, or 'judicial passivism', as Goldner-Lang frames it.[833] Insights collected throughout this research project reveal that the case law is primarily driven or framed by reference to existing procedural requirements established by the Asylum Procedures Directive. This shows how the rise in procedural harmonisation discernible in asylum matters has contributed to the creation of detailed, tailor-made procedures and remedies designed to meet the normative objectives underlying this area.

The relevant secondary provisions enabled the Court to carve out a particularly far-reaching standard of judicial review under Article 46(3) of Directive 2013/32. In

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[830] For further details, see Section 4.2.

[831] Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*, EU:C:2020:367, esp. paras 127 et seq.

[832] Reneman, 'No Turning Back? The Empowerment of National Asylum and Migration Courts under Article 47 of the Charter' in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022), p. 147.

[833] Goldner-Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' in Capeta, Goldner-Land and Perisin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing, 2022). The updated version also deserves mention: Goldner-Lang, '"Judicial Passivism" in EU Migration and Asylum Law Revisited' in Dawson, De Witte and Muir (eds), *Revisiting Judicial Politics in the European Union* (Edward Elgar Publishing, 2024). For a similar view, see Thym, 'A Bird's Eye View on ECJ Judgments on Immigration, Asylum and Border Control Cases' (2019) 21 European Journal of Migration and Law 166, esp. 193, who warned that 'statutory interpretation should not be confused with static conservatism'.

particular, the Court has repeatedly stated that national courts must be put in a position to provide binding rulings on the international protection needs of asylum seekers.[834] The far-reaching standard of review granted to national judges in this context is driven by concerns regarding the well-founded risks of *refoulement* for asylum seekers.[835] National judges were also equipped with additional procedural tools, such as the ability to interview applicants for international protection. This procedural tool is intended to enable national judges to carry out the type of review prescribed by Article 46(3) of the Asylum Procedures Directive.[836] The relevant secondary legislative provisions on asylum procedures have incorporated some of the procedural rights and remedies formulated by previous case law. This is particularly true for the principle of suspensive effect of appeals against negative asylum decisions.[837] It is worth emphasizing that this procedural device was initially developed by case law in order to mitigate the risk that an asylum seeker could be returned to a situation in which they might face inhumane or degrading treatment due to an unlawful first-instance administrative decision on asylum.[838] In other words, it is fundamentally motivated by concerns related to the principle of *non-refoulement*. This principle was also relied upon to establish an obligation to raise *ex officio* any failure to comply with it in the judicial review of administrative decisions regarding the (il)legality of stay third-country nationals.[839] Once again, this highlights how the procedural rights and obligations developed by case law are tailored to the normative specificity underlying the policy field in which judicial protection operates.

[834] Case C-556/17, *Torubarov*, para 65; Case C-216/22, *Bundesrepublik Deutschland (Recevabilité d'une demande ultérieure)*, EU:C:2024:122, para 62.
[835] Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*, para 201.
[836] In a judgment concerning judicial review of detention of asylum seekers, the Court even considered that the competent judge should take 'procedural measures which it deems necessary to adopt on the basis of its national law' to be able to form a view about the legality of detention (Joined Cases C-702/20 and C-39/21, *Staatssecretaris van Justitie en Veiligheid (Examen d'office de la retention)*, EU:C:2022:858, para 88).
[837] Article 46(5) of Directive 2013/32: '[w]ithout prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy'.
[838] Case C-180/17, *Staatssecretatis van Veiligheid en Justitie (suspensory effect of the appeal)*, EU:C:2018:775, esp. paras 23-30; Case C-175/17, *Belastingdienst v Toeslagen (suspensory effect of appeal)*, EU:C:2018:776, esp. para 34; Case C-422/18 PPU, *FR*, EU:C:2018:784.
[839] Case C-156/23, *Ararat*, EU:C:2024:892.

3. National procedural autonomy: A relic of a bygone era?

The mapping exercise conducted in the previous section prompts renewed scrutiny of the debate surrounding national procedural autonomy. In essence, the story outlined in this section portrays a landscape increasingly occupied by common procedural rules. It highlights the predominant role of sectoral procedural rules in defining the procedural demands stemming from EU law and, consequently, the scope of national procedural autonomy retained by the Member States. This observation raises the question of the continued relevance of the principles of effectiveness, equivalence and effective judicial protection in the context of the interaction between national procedural autonomy and EU law. After all, the traditional mantra on national procedural autonomy entails that these principles are used to delineate the scope of national procedural autonomy in the absence of common procedural rules on the matter in question. In the words of Muir and Eliantonio,

> 'the principle of procedural autonomy is used to regulate the void left after (legitimate) EU intervention'.[840]

There remains some uncertainty about the relevance of these 'EU core principles' and, more generally, the concept of national procedural autonomy in a context increasingly characterised by harmonised procedural rules.[841] This section, therefore, questions the remaining role, if any, for national procedural autonomy against the background of increasingly detailed common procedural rules.[842]

Based on the three sectoral case studies conducted within the framework of this thesis, it can be inferred that, today, the development of procedural rules and remedies primarily occurs through the interpretation of existing sectoral rules that reflect distinctive national procedural traditions. To clarify this point, this section is structured as follows. This section explains that the interaction between EU law and national

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[840] Muir and Eliantonio, 'Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law' (2015) 8 Review of European Administrative Law 177, 181.

[841] Bonelli, 'Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature', supra note 800, 36. On that topic, see also the sectoral analyses featuring in the same issue of the Review of European Administrative Law, Caranta, 'The Interplay between EU Legislation and Effectiveness, Effective Judicial Protection and the Right to an Effective Remedy in EU Public Procurement Law', 63; 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"', 95; Mitsilegas, 'The Impact of Legislative Harmonisation on Effective Judicial Protection in Europe' Area of Criminal Justice', 117; Tsourdi, 'Of Legislative Waves and Case Law: Effective Judicial Protection, Right to an Effective Remedy and Proceduralisation in EU Asylum Policy', 143.

[842] This question has attracted (and continues to garner) a great deal of interest in academic literature, see, e.g., Prechal and Widdershoven, 'Redefining the Relationship between "*Rewe*-Effectiveness" and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 31; Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12 Review of European Administrative Law 5.

procedural autonomy has traditionally been analysed through the lens of primary law. For the most part, the onus has been on the role of the Court in shaping common procedural rules and remedies under EU primary law – especially the principles of effectiveness and equivalence, and the general principle of effective judicial protection (section 3.1). However, the second sub-section also demonstrates that this approach no longer provides a comprehensive and accurate account of the relevant case law. In particular, the three sectoral analyses conducted within the framework of this thesis show that the Court has increasingly drawn on procedural rules established by secondary law to reconstruct the requirements of judicial protection stemming from EU law in these three policy fields (section 3.2). Consequently, the debate about (the scope of) national procedural autonomy is now largely subsumed within the framework of existing sectoral procedural rules (section 3.3).

3.1. The classical narrative on national procedural autonomy: Judicial development of obligations of judicial protection grounded in EU primary law

The 'core', or classical, narrative has mostly, if not exclusively, revolved around an assessment of the normative expectations developed by the Court of Justice based on the principles of effectiveness and equivalence, as well as the effective judicial protection (which are commonly referred to as 'the principles', or 'the EU core principles').[843] This is hardly surprising. After all, the concept of national procedural autonomy was originally built on the premise that there were no common procedural rules to govern the domestic enforcement of the matter under consideration. The traditional mantra can, therefore, be summarised as follows: in the absence of common procedural rules, the Member States presumably retained competent to define the appropriate rules governing the domestic enforcement of EU law, but the exercise of procedural competence was circumscribed by reference to the principles of effectiveness and equivalence established in *Rewe*,[844] and later the general principle of effective judicial protection, as established in *Johnston*.[845] The predominant role accorded to these principles in the early case law on national procedural autonomy has

[843] On this topic, see Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press, 2006), esp. pp. 420-422; Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36 European Law Review 51; Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before National Courts' in Craig and De Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press, 2011); Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 Irish Jurist 13.

[844] See, e.g., Case C-33/76, *Rewe-Zentral*, EU:C:1976:188, para 5; Case C-312/93, *Peterbroeck, Van Campenhout & Cie v Belgian State*, EU:C:1995:437, para 12; Joined Cases C-317/08 to C-320/08, *Alassini and Others*, EU:C:2010:146, paras 47-49.

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

framed much of the doctrinal debate about national procedural autonomy. A great deal has, accordingly, been made of the role of the Court of Justice in developing procedural rules and remedies based on these principles. The following paragraphs offer a (brief) descriptive account of the classical narrative on the interaction between national procedural autonomy and the procedural rules developed in this context.

As described in the introduction,[846] the classical narrative identifies three stages in the relevant case law on national procedural autonomy. The variations in the case law are framed through the prism of the distinct, and at times conflicting or overlapping,[847] standards of review that the Court applied under the EU foundational principles, described above. In the first stage, the Court's approach appeared to be guided by caution and respect for national procedural autonomy.[848] The principle of (minimum) effectiveness reflected a presumption in favour of procedural autonomy, granting the Member States considerable discretion in procedural matters.

The second stage marked a shift towards a more demanding conception focused on ensuring full protection of EU law rights. In this period, the Court was bold enough to dictate the creation of new remedies. To this end, it sought support from various sources, drawing inspiration from the constitutional traditions common to (some of) the Member States, as well as the case law of the European Court of Human Rights. This approach allowed the Court to reconstruct the common requirements of judicial protection emanating from EU law. The 'evaluative approach'[849] followed by the Court enabled it to 'pick and choose'[850] constitutional traditions that it deemed best suited to the specific contours or needs of the EU legal order. This in turn enabled the Court to carve out EU-wide remedies such as state liability,[851] the right to bring judicial proceedings in relation to alleged infringements of EU law,[852] or the right to seek interim relief.[853] In short, the core principles framing national procedural autonomy were used to incorporate the procedural guarantees stemming from the constitutional

[846] Chapter 1, Section 2.
[847] For further details, see Craufurd Smith, 'Remedies for Breaches of EU Law in National Courts: Legal Variations and Selection' in Craig and De Búrca (eds), *The Evolution of EU Law* (1st edn, Oxford University Press, 1999), pp. 293 et seq.
[848] Episcopo, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before National Courts' in Craig and De Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press, 2021), p. 279.
[849] On the evaluative approach followed by the Court, see Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 Common Market Law Review 1629.
[850] Mayer, 'Constitutional Comparativism in Action. The Example of General Principles of EU Law and How They are Made – A German Perspective' (2013) 11 ICON 1003, 1007.
[851] Case C-6/90, *Francovich and Bonifaci v Italy*, EU:C:1991:428; Case C-46/93, *Brasserie du Pêcheur*, EU:C:1996:79.
[852] Case C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:1986:206, para 18.
[853] Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others (Factortame I)*, EU:C:1990:257.

traditions common to the Member States into the realm of EU law.[854] Lenaerts and Gutiérrez-Fons opined, in this context, that:

> 'the true function of general principles must be assessed in the light of "mutual cross-fertilization" which creates a continuous flux of ideas and exchange of opinion between the ECJ and its national counterparts. This gives rise to a "common constitutional space" defined by a dynamic dialogue'.[855]

In some ways, the development of common remedies grounded in these principles reflected a process of reflexive interaction between EU law and national procedural traditions, involving both the Court of Justice and its national counterparts.[856] They were deployed to reflect – or at least accommodate – distinctive national procedural traditions within the overarching framework established by EU law.

In the third stage, the Court displayed greater caution. The 'procedural rule of reason',[857] or 'balancing' test,[858] crafted in *Van Schijndel* and *Peterbroek* under the principle of effectiveness was designed to reconcile the demands of national procedural law with the sacrosanct effectiveness of EU law. Rather than dictating a specific outcome to the detriment of national procedural autonomy, the procedural rule of reason offered considerable scope for expressing national procedural diversity. National courts were called upon to consider:

> 'whether a national procedural provision renders application of Community law impossible or excessively difficult […] by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the

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[854] Craufurd Smith observed in this context that the Court has also drawn 'analogies with its own procedures in order to extend its control over domestic remedies' (Craufurd Smith, 'Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection' in op. cit. supra note 847, p. 301). It is arguable that this approach allowed the Court to identify the remedies and procedures belonging to the common constitutional traditions of the Member States.

[855] Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', supra note 849, 1630.

[856] Viewed from that perspective, the story depicted here falls squarely in line with the dominant narrative according to which the process of European integration has mostly been driven by the 'collaborative effort of national and European judges'. On that topic, see Pavone, 'Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance' (2018) 6 Journal of Law and Courts 303. See also Lenaerts, Maselis and Gutman, *EU Procedural Law* (1st edn, Oxford University Press, 2014), p. 3; Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Adams, De Waele, Meeusen and Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, 2015), pp. 40 et seq.

[857] The Court never explicitly used the expression 'procedural rule of reason'. It is a concept coined by several legal scholars, including Widdershoven ('National Procedural Autonomy and General EU Law Limits', op. cit. supra note 842, 10).

[858] Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States' in De Witte and Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012), p. 312.

principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration'.[859]

In essence, the procedural rule of reason expressed deference toward national judges. It allowed them to establish adequate procedural outcomes to ensure the correct application of EU law, while remaining sensitive to the idiosyncrasies of national procedural law. The procedural rule of reason was accordingly seen as a symbol of the cautious or moderate attitude displayed by the Court in procedural matters.[860] The 'no new remedy' rule similarly reflected a certain reluctance to encroach unduly upon the competence of the Member States in procedural matters.[861]

Leaving aside the ebbs and flows of the case law, one common thread runs through the classical narrative on national procedural autonomy: its primary emphasis on the principles of effectiveness and equivalence. Similarly, the 'positivisation' of case law, as described in Chapter 1,[862] has been conceptualised as a by-product of the emergence of the general principle of effective judicial protection and its integration into the Treaties by the Lisbon Treaty. In short, the classical narrative has mostly revolved around assessing the development of judge-made procedural rules based on these EU principles. To be sure, there was a time when this conception could offer a comprehensive and accurate picture of the case law on procedural matters. After all, the early case law on national procedural autonomy emerged in a regulatory context largely devoid of common procedural rules established by secondary law.[863] In those circumstances, the principles of effectiveness, equivalence, and effective judicial protection were deployed to fill in the gaps and support the development of minimum requirements of judicial protection.

However, the scope and detail of common procedural rules have intensified over time in the majority of policy areas covered by EU law. This invites further scrutiny into how these procedural rules drive or frame the Court's assessment in the area of procedures and remedies, as well as the continued relevance of EU core principles in a context characterised by expanding procedural harmonisation. Perhaps somewhat surprisingly, though, these principles continue to dominate contemporary doctrinal attempts to decipher and systematise recent jurisprudential developments in procedural matters.

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[859] Case C-312/93, *Peterbroek, Van Campenhout & Cie v Belgian State*, EU:C:1995:437, para 14.
[860] Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 501, 533.
[861] See, e.g., Case C-158/80, *Rewe v Hauptzollamt Kiel (Butter-buying cruises)*, EU:C:1981:163, para 44; Case C-432/05, *Unibet*, EU:C:2007:163, paras 40-41.
[862] Chapter 1, Section 3.1.
[863] On the genesis and distinctive features of the phenomenon of proceduralisation of EU law, see Dubos, 'The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism' (2015) Review of European Administrative Law 7.

Over the past few years, the case law has seemingly moved into a new stage, more explicitly geared towards the creation of positive procedural rules and remedies.[864] For better or worse, this development is often analysed through the prism of the evolving Treaty landscape on judicial protection.[865] The predominant role attributed to the general principle of effective judicial protection, now enshrined in Article 47 of the Charter, has prompted renewed doctrinal emphasis on the continued relevance of the twin-principles of effectiveness and equivalence,[866] and the added normative value of the general principle of effective judicial protection.[867]

In some ways, contemporary doctrinal accounts therefore remain squarely aligned with the approach prevailing in the core narrative.[868] They continue to revolve around an assessment of the normative expectations developed by the Court of Justice based on EU principles – particularly the general principle of effective judicial protection, as expressed in Article 47 of the Charter.[869] The next section examines the continued

[864] On the positivisation of case law, see Chapter 1, Section 3.1.

[865] See, e.g., Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in Paulussen, Takacs, Lazic and Van Rompuy (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (Springer, 2016); Bonelli, 'Effective Judicial Protection in EU Law', supra note 800, 35.

[866] Eliantonio and Muir, 'The Principle of Effectiveness: Under Strain?' (2019) 12 Review of European Administrative Law 255; Wildemeersch, 'L'Avènement de l'Article 47 de la Charte des Droits Fondamentaux et de l'Article 19, Paragraphe 1, Second Alinéa, TEU' (2021) Cahiers de Droit Européen 867 ; Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 842; Prechal and Widdershoven, 'Redefining the Relationship between "*Rewe*-effectiveness" and Effective Judicial Protection', supra note 842, 31.

[867] Roeben, 'Judicial Protection as the Meta-norm in the EU Judicial Architecture' (2020) 12 The Hague Journal on the Rule of Law 29; Pastor-Merchante, 'The Overlap Between the Principles of Effectiveness and Effective Judicial Protection in EU Law' in Izquierdo-Sans, Martínez-Capdevila and Nogueira-Guastavino (eds), *Fundamental Rights Challenges - Horizontal Effectiveness, Rule of Law and Margin of National Appreciation* (Springer, 2021).

[868] It is perhaps fair to acknowledge, however, that recent doctrinal accounts exhibit a more explicit emphasis on other relevant legal sources of judicial protection (emanating mostly from secondary legislations dealing with procedural matters). For instance, see Caranta, 'The Interplay between EU Legislation and Effectiveness, Effective Judicial Protection and the Right to an Effective Remedy in EU Public Procurement Law', supra note 841; Eliantonio, 'The Relationship between EU Secondary Rules and the Principles of Effectiveness and Effective Judicial Protection in Environmental Matters', supra note 841; Mitsilegas, 'The Impact of Legislative Harmonisation on Effective Judicial Protection in Europe's Area of Criminal Justice', supra note 841, 119; Tsourdi, 'Of Legislative Waves and Case Law', supra note 841, 143.

[869] For the purposes of this discussion, the fundamental right to an effective judicial remedy, as established by Article 47 of the Charter, is considered to correspond to the pre-existing general principle of effective judicial protection. This aligns with the view formulated by the Court in *ASJP*, which entails that '[t]he principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and *which is now reaffirmed by Article 47 of the Charter*' (Case C-64/16, *Associação Sindical dos Juízes Portugueses ('ASJP')*, EU:C:2018:117, para 35 (emphasis added)). This also echoes one of the stated goals of the Charter, which, according to its preamble, is to reaffirm the rights recognised by the case law of the Court of Justice. Given the Charter's aim to reaffirm pre-existing rights, the meaning attached to the right enshrined in Article 47 of the Charter should be consistent with

relevance of these principles in the debate about the interaction between national procedural autonomy and the procedural demands emanating from EU law. This analysis offers an opportunity to reframe the classical narrative on national procedural autonomy within a broader perspective, characterised by the expanding scope of harmonised procedural requirements.

3.2. Reframing national procedural autonomy: The role of sectoral procedural rules in shaping EU judicial protection

The three case studies undertaken as part of this thesis show a field increasingly dominated by the statutory interpretation of sectoral procedural rules. This development is evident across the three policy areas examined in this context. For clarity, it is useful to briefly expound on the distinctive relevance of sectoral procedural rules in these areas.

In environmental law, the Aarhus Convention has been the main driving force behind the creation of detailed guarantees of access to justice. This project also demonstrated that the Recast Asylum Procedures Directive has become the key parameter for identifying the procedural expectations weighing on the Member States in the field of asylum law. A similar story unfolds in the area of equality law, where the development of procedural rights has been inspired by the procedural framework set out in the Charter, as well as current legislative provisions on access to labour-related information rights. In these three policy areas, the Court has grown accustomed to relying on existing sectoral procedural rules to delineate the normative expectations arising from EU law in procedural matters.

This is not to say, of course, that these rules pre-empt the field exhaustively, in the sense that they leave no room for the expression of national procedural autonomy. A notable example is the relevant case law on access to environmental justice. The chapter on environmental law explains that the Aarhus Convention has been a driving force behind the creation of objective environmental rights in this area. The Convention has served as a valuable source of authoritative guidance for developing standing requirements, especially in the absence of common rules on this matter. In practice, the framework established by the Aarhus Convention has been used by the Court to delineate the procedural demands arising from EU law, while also allowing the Court able to develop a streamlined conception of judicial protection that reflects distinctive

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its earlier formulation as the (judge-made) general principle of effective judicial protection. On that topic, see Wildemeersch, 'L'Avènement de l'Article 47 de la Charte des Droits Fondamentaux et de l'Article 19, Paragraphe 1, Second Alinéa, TUE', supra note 866, 875-876; Rauchegger, 'Article 47' in Peers, Hervey, Kenner and Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Nomos, 2022), p. 1256.

national procedural traditions in environmental justice. However, beyond this, the Member States retain discretion on how to articulate national standing rules. The Court's approach does not extend to requiring the establishment of *actio popularis* in environmental matters.

The relevant case law on the power of national judges to reform unlawful administrative decisions in asylum law also provides an interesting case study of the Court's approach. A great deal has been made in the Court's case law regarding Article 46(3) of the Recast Asylum Procedures Directive. That provision has been interpreted as a token of the legislature's intention not to regulate the powers of national judges following the annulment of a negative administrative asylum decision. As a matter of principle, the Member States therefore remain competent to decide whether the case should be sent back to the administration for re-examination (under the so-called cassation model) or whether the judge could substitute its own decision for the administrative decision taken at first instance (according to the reformation model). The only caveat is that the administration is bound by the relevant judicial decision. Consequently, the competent administrative authority must comply with that decision if the case is returned to the administration for re-assessment.

Another example of this tendency can be found in the doctrine of horizontality. An analysis of recent judgments demonstrates that the approach taken by the Court was grounded in a literal interpretation of the relevant Charter provisions. In *AMS*,[870] for instance, the Court relied on the wording of Article 27 of the Charter – specifically the reference to the adoption of additional implementing measures – to rule out the possibility of direct horizontal effect. By focusing on the wording of each individual Charter provision, the Court seems to overlook the substantive reasons that might justify attributing horizontal effects to such provisions.[871] However, it should be emphasized that the wording of each individual Charter provision reflects the distinctive national traditions concerning the role of national judges in the judicial enforcement of labour provisions.[872] More specifically, Advocate General Bot explained that the reference to additional concretizing measures in some Charter provisions could be seen as indicative of the intention of the Member States's representatives to:

[870] Case C-176/12, *Association de Médiation Sociale*, EU:C:2014:2.
[871] Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis*, op. cit. supra note 825, p. 83, where she criticises the: 'lack of an articulate and rationally justified assessment of the merits of horizontality in the field of fundamental rights protection'.
[872] On that issue, see Tecqmenne, 'The European Court of Justice, the EU Charter and the Interpretation of Fundamental Social Rights: Judicial Law-making in Disguise?' (2024) 31 Maastricht Journal of European and Comparative Law 254; Tecqmenne, 'Les Limites de l'Office du Juge Mises à l'Epreuve de l'Evolution des Standards de Droits Fondamentaux: Vers une Conception Renouvelée du Droit à (Ré)concilier Vie Familiale et Professionnelle ?' (2023) Revue de la Faculté de Droit de l'Université de Liège 267.

> 'entrust the EU legislature and/or the national legislatures with the task of specifying the content of the fundamental rights recognised therein and the conditions for their implementation'.[873]

Viewed from this perspective, the Court's rather technical approach to the debate about horizontality ultimately reflects distinctive national traditions regarding the enforceability of equality rights in the context of private law disputes. By taking a literal interpretation of the relevant Charter provision, the Court was able to delineate the scope of the procedural demands emanating from EU law in a way that seemingly accommodated, or reflected, the distinctive procedural traditions embedded in the Charter.

In the three cases mentioned above, the Court employed the relevant sectoral procedural provisions to delineate the scope of the remedial demands emanating from EU law. This endeavour was made possible because these rules ultimately reflect distinctive national procedural traditions. Their interpretation allowed the Court to delineate the respective spheres of EU law and national procedural autonomy. In some ways, the debate about (the scope of) national procedural autonomy plays out, or is subsumed, within the process of statutory interpretation of existing sectoral procedural rules. This also means that the development of procedural rules and remedies owes a great deal to the interpretation of these sectoral rules.

To be sure, there is nothing to suggest that the core principles on national procedural autonomy, as described above, are completely devoid of relevance in this context. However, their importance should not be overstated. It should be stressed, in particular, that the relevance of the principles of effectiveness and equivalence has decreased significantly over time. There is nothing new or revolutionary about this finding; in fact, it aligns with the, indeed rather dominant, narrative prevailing in academic literature.[874] An analysis of recent judgments leads to the conclusion that these principles were scarcely mentioned in support of the developments discussed in this thesis. When they were indeed mentioned, it was usually in relation to peripheral procedural issues (such as time limits).[875] By referring to these principles, the Court

[873] Opinion of AG Bot in Joined Cases C-569/16 and C-570/16, *Bauer*, EU:C:2018:337, para 92.
[874] See, e.g., Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 842; Bonelli, 'Effective Judicial Protection in EU Law', supra note 800; Eliantonio and Muir, 'The Principle of Effectiveness: Under Strain?', supra note 866; Episcopo, 'The Vicissitudes of Life at the Coalface' in op. cit. supra note 848, p. 301.
[875] See, e.g., Case C-564/18, *LH*, EU:C:2020:218, esp. paras 73-76. The Court's approach is not necessarily consistent, however, as the issue of time limits has sometimes been addressed through the prism of the principle of effective judicial protection, rather than the principle of effectiveness (see, e.g., Case C-664/15, *Protect*, paras 88 et seq.). Eliantonio and Muir highlighted the 'strikingly limited process of proceduralisation' in relation to time limits (Eliantonio and Muir, 'Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law' (2015) Review of European Administrative Law 177, 191). This may presumably explain the deferential stance adopted by the Court in this context. It should be stressed, in particular, that the Recast Asylum Procedures Directive leaves

was able to defer to the assessment of the national judiciary while setting out relevant parameters to frame that assessment.

Perhaps somewhat surprisingly, the general principle of effective judicial protection did not occupy a predominant role in the developments analysed across the three fields covered by this thesis. This finding is surprising because EU law orthodoxy professes that the twin-principles of effectiveness and equivalence have been superseded by the predominant role accorded to that general principle in the relevant case-law on procedural matters.[876] Many commentators have indeed acknowledged that the general principle of effective judicial protection is gaining momentum as the 'main test' for assessing national procedural rules (at least with respect to judicial procedures).[877] This led Anthony Arnull to suggest that:

> 'it seems only a matter of time before the principle of effectiveness becomes redundant: it is almost a tautology to say that the principle of effective judicial protection is infringed where national law makes it excessively difficult to pursue a claim'.[878]

Based on the three case studies conducted within this thesis, however, it can be inferred that the general principle of effective judicial protection has played a relatively marginal role in developing common procedural rules and remedies. As noted earlier, the classical narrative's primary emphasis on that principle seems to obscure the role of other legal provisions in the jurisprudential development of common procedural rules and remedies. In the case studies, the requirements of judicial protection were primarily fine-tuned by reference to existing common procedural rules, particularly the Aarhus Convention, the Asylum Procedures Directive, and the EU Charter. The principle of effective judicial protection was used to fill in gaps. In this context, the

considerable leeway to the Member States in respect of time limits, by stating that the latter must set out 'reasonable' time-limits which cannot render the exercise of the rights set out by the Directive 'impossible or excessively difficult' (Art. 46(4) of the Directive). In fact, that provision does no more than codifying past judgments setting out relevant parameters circumscribing the Member States' competence in respect of time limits by virtue of the principle of effectiveness (in a way that is seemingly inspired by the requirements emanating from the case law of the ECtHR on Article 6 of the Convention).

[876] On the role of that principle in the Court's case law, see Wildemeersch, 'L'Avènement de l'Article 47 de la Charte des Droits Fondamentaux et de l'Article 19, Paragraphe 1, Second Alinéa, TEU', supra note 866, 867; Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 842; Bonelli, 'Effective Judicial Protection in EU Law', supra note 800.

[877] See, amongst others, Bonelli, 'Effective Judicial Protection in EU Law', supra note 800, 51 et seq.; Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 842; Eliantonio and Muir, 'The Principle of Effectiveness: Under Strain?', supra note 866, 264; Wildemeersch, 'L'Avènement de l'Article 47 de la Charte des Droits Fondamentaux et de l'Article 19, Paragraphe 1, Second Alinéa, TEU', supra note 866, 867.

[878] Arnull, 'Remedies before National Courts' in Schütze and Tridimas (eds), *Oxford Principle of European Union Law, Volume 1: The European Union Legal Order* (Oxford University Press, 2018), p. 1026.

Court relied on existing sectoral procedural rules to flesh out the essence of the principle of effective judicial protection.

The example of environmental law is instructive. The chapter on environmental law explained that the Aarhus Convention has served as a valuable source of authoritative guidance for developing standing requirements, especially in the absence of common EU rules on this matter. In practice, the procedural framework established by the Aarhus Convention was used by the Court to define the procedural obligations arising from EU law. At the same time, the general principle of effective judicial protection remained relevant in discussions about procedural autonomy in environmental matters. The implementation of the Aarhus Convention by the EU legislature was notably fragmented, and in this context, the principle of effective judicial protection helped fill the regulatory gaps. It was deployed to make 'public interest litigation' a legal reality across the EU Member States.[879] The obligation to grant access to justice to environmental NGOs, as set out in Articles 2(5) and 9(2) of the Convention, became an integral part of the right enshrined in Article 47 of the Charter. In other words, the material content of this right was defined by reference to the standards formulated by the Convention.

The field of asylum law also shows how the material content of the principle of effective judicial protection was defined by reference to Article 46(3) of the Recast Procedures Directive. The right to be heard in appeals proceedings is a case in point.[880] From the outset, it should be stressed that the right to a hearing reflects a transversal requirement that applies to any administrative decision potentially affecting the rights conferred upon individuals by EU law. However, the position formulated by the Court in *Sacko* was seemingly motivated by underlying (sectoral) concerns to allow national judges to discharge the mandate conferred upon them by secondary law. The Court emphasized, in particular, that the right to be heard constituted an 'essential procedural requirement, which cannot be dispensed with on the grounds of speed',[881] if that hearing proved necessary for the national judge to carry out the full and *ex nunc* examination prescribed by the Recast Directive.

The normative expectations emanating from the principle of effective judicial protection were identified in *Sacko* by reference to the procedural framework established by the Directive. To put it bluntly, the discretion retained by the competent national judge hinged on whether they could discharge the mandate laid upon them without hearing the applicant. If a hearing was necessary to conduct the endeavour envisioned by that provision, the national judiciary had no choice but to carry out that hearing. By contrast, the national judge enjoyed greater discretion when that hearing

[879] Case C-240/09, *Brown Bears I*; Case C-243/15, *Brown Bears II*; Case C-664/15, *Protect*: Case C-873/19, *Deutsche Umwelthilfe (Réception de véhicules à moteur)*.
[880] Case C-348/16, *Sacko*.
[881] Ibid, para 45.

did not appear necessary for that purpose. Ultimately, the Court's approach reflects a concern for enabling national judges to perform the type of independent and comprehensive control of administrative action envisioned by Article 46(3) of the Recast Directive.

The influence of the general principle of effective judicial protection in the field of equality law is difficult to identify. The Court has so far failed to explicitly mention that principle or, for that matter, the relevant Treaty provisions on judicial protection. In other words, the case law on horizontality has not established an explicit connection with the principle of effective judicial protection set out in Article 47 of the Charter.[882] At the same time, it is rather obvious that the debate about the horizontal effects attributed to fundamental rights reflects underlying concerns about the type of remedies available to individuals affected by a breach of their rights. Most judgments on horizontality make it plain that this doctrine emerged as a by-product of the need to secure the 'legal',[883] or 'judicial protection' of individuals whose equality rights were breached.[884] It is worth highlighting, in this respect, that the requirements of judicial protection weighing on national courts in this context were fine-tuned by reference to the procedural framework set out by the Charter.

Taken together, these examples reflect the Court's willingness to draw inspiration from existing sectoral procedural rules to flesh out the contours of the general principle of effective judicial protection, as expressed in Article 47 of the Charter. This means, in other words, that these rules drive or frame the jurisprudential development of procedural rules and remedies under that principle. As the scope of procedural harmonisation progressively expands, the interpretative efforts of the Court are increasingly framed by these procedural requirements. However, one should not overlook the relevance of other sources of common procedural standards in the Court's assessment. In particular, the example of environmental law teaches us that the procedural requirements emanating from international legal instruments, within the realm of EU law, also frame the Court's interpretative efforts under the general principle of effective judicial protection, as expressed in Article 47 of the Charter. Similarly, the field of equality law illustrates the relevance of the Charter in delineating the procedural obligations weighing upon the national judiciary in this policy area.

This finding allows for two additional observations on the role and distinctive impact of the general principle of effective judicial protection across policy sectors. First, the approach taken by the Court implies that this principle displays a distinct

[882] It should be stressed, however, that recent judgments display a more explicit emphasis on that principle. See, e.g., Case C-414/16, *Egenberger*, EU:C:2018:257, para 79.
[883] Case C-144/04, *Mangold*, EU:C:2005:709, para 77; Case C-555/07, *Kücükdeveci*, EU:C:2010:21, para 51.
[884] See, e.g., Case C-414/16, *Egenberger*, para 79; Joined Cases C-569/16 and C-570/16, *Bauer and Wilmeroth*, para 91.

sectoral flavour. To be sure, the principle does indeed embody transversal procedural requirements that apply across the board, that is, irrespective of the specificities of sectoral rules. We shall see in the next section that the essence of this principle reflects fundamental requirements associated with the rule of law, as outlined in Article 2 TEU. In addition, the principle also includes other procedural tools and/or remedies, such as state liability (which, however, allows for cross-sectoral variations based on the 'intention to confer rights' criterion), and the possibility of seeking interim relief. Beyond these transversal procedural tools, the insights mentioned above clarify that the principle of effective judicial protection is further fleshed out by reference to common sectoral procedural rules. This allows for the fine-tuning of procedural rules and remedies in a way that reflects the normative concerns intrinsic to the three policy areas analysed in this thesis.

Second, the approach adopted by the Court also challenges a traditional understanding of the EU hierarchy of norms. It should be stressed, in this respect, that some commentators have ruled out the possibility that the requirements emanating from this principle can be identified by reference to sectoral procedural rules established through secondary and/or primary law. As Advocate General Cruz-Villalon put it,

> '[i]t seems clear in that regard that the content and scope of the right to an effective judicial remedy recognised by European Union law does not vary depending on the Community rule or principle enshrining that right in each case'.[885]

The argument put forward by AG Cruz-Villalon can be summarised in a few words: because the principle of effective judicial protection belongs to the realm of primary law, the scope of that principle cannot be defined by reference to lower-ranking procedural norms – which, in that case, consisted of secondary law provisions on remedies. In contrast, the findings expressed above suggest that the scope and meaning attributed to the principle of effective judicial protection are delineated by reference to sectoral procedural rules established through lower-ranking legal norms.

3.3. Interim conclusion: The role of sectoral rules in balancing national procedural traditions with EU judicial protection

Overall, this section attested to the predominant role attributed to sectoral rules in the process of identifying the procedural expectations emanating from EU law. The approach adopted by the Court represents a significant departure from the analytical

[885] Opinion of AG Cruz-Villalon in Case C-69/10, *Samba Diouf*, EU:C:2011:102, para 32.

framework used by the classical or core narrative on the interaction between EU law and national procedural autonomy. After all, the classical narrative places primary emphasis on the creation of common procedural rules and remedies based on EU principles, particularly the principles of effectiveness and equivalence, as well as the general principle of effective judicial protection. However, this section has explained that the classical narrative no longer offers a comprehensive and accurate account of the relevant case law on procedural matters. Beyond EU principles, the Court's interpretative exercise also owes much to the interpretation of sectoral procedural rules. In other words, the assessment conducted by the Court is framed, or driven, by reference to existing common procedural rules established through sectoral rules.

Viewed from this perspective, the relevant case law appears inspired by a desire to avoid unduly encroaching upon the realm of national procedural autonomy. The development of procedural rules and remedies through sectoral procedural rules presumably reflects distinctive national legal traditions concerning procedural matters. To be sure, it should be clear that the early judgments establishing EU-wide remedies were similarly motivated by caution and respect for national procedural autonomy. Historically, the Court's approach has been to draw inspiration from the constitutional traditions common to (some of) the Member States, as well as relevant international legal instruments.[886] Of course, developing concrete remedies and procedural rules from disparate legal traditions inevitably involves some degree of judicial creativity.[887] However, the 'bottom-up' development of procedural rules and remedies has allowed the Court to maintain a sense of balance with respect to the vertical allocation of powers between the EU and its Member States.[888] It enabled the development of EU-wide remedies in a way that reflected, or accommodated, distinctive national procedural traditions.

In some ways, the Court's current stance aligns squarely with the approach that has dominated the early case law on this matter. More specifically, the Court's reliance on existing procedural frameworks established through secondary and/or international law reflects concerns for maintaining the vertical allocation of powers between the EU and its Member States. It presumably helps mediate the tension between the uniformising tendencies of the requirements of effective judicial protection and the competence of the Member States in procedural matters. Ultimately, common procedural rules reflect distinct and diverse national traditions on procedural matters. By relying on these rules, the Court can flesh out the requirements of effective judicial protection in a way that

[886] The standard formula was taken up by the Treaties. It is reaffirmed by Art. 6(3), TEU, as well as the preamble leading up to the Charter.
[887] Mazak and Moser, 'Adjudication by Reference to General Principles of EU Law: A Second Look at the *Mangold* Case Law' in Adam, de Waele, Meeusen, and Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, 2015), p. 69.
[888] Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', supra note 849, 1630.

accommodates distinctive national legal traditions within an overarching EU-wide procedural framework.

4. The essence of the principle of effective judicial protection: A catalyst for institutional change?

In a context characterised by the expanding scope of harmonised procedural rules, the added normative value of the general principle of effective judicial protection presumably derives from its emphasis on the essential features governing the institutional architecture of judicial review of administrative action falling within the scope of EU law. Over the past few years, the 'essence' of that principle has anchored the creation of detailed institutional safeguards governing the judicial enforcement of EU law.[889] This chapter expands on the notion of the essence of judicial protection by focusing on its institutional dimension,[890] which encompasses aspects such as the

[889] The relevant case law thus concerns situations in which domestic authorities are called upon to implement and/or apply EU material provisions. In other words, it is distinct (albeit related) from the 'rule-of-law' case law, in which the Court formulated institutional recommendations on the basis of Article 19 TEU in situations that do not involve the domestic implementation and/or application of EU material provisions. On that topic, see Bonelli and Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14 European Constitutional Law Review 622, 642, suggesting that the Court 'introduced a new sphere of EU law, positing that Article 19 TEU imposes an obligation on the Member States to ensure that all courts and tribunals that may potentially be called on to apply and interpret EU law offer effective judicial protection'. However, see O'Neill, 'Effet Utile and the (Re)organisation of National Judiciaries: A not so Unique Institutional Response to a Uniquely Important Challenge' (2021) 27 European Law Journal 240, 243: 'the principle of national procedural autonomy to organise national judicial systems, enshrined in Article 19(1) TEU, finds its counter limit in the principle of effective judicial protection... [R]espect for judicial independence, as part of the essence of the principle of effective judicial protection, necessarily takes precedence over national procedural autonomy. In this sense, Article 19(1) TEU is an entirely valid trigger of the CJEU's jurisdiction'; Menzione, 'Anything New under the Sun? An Exercise in Defence of the Reasoning of the CJEU in the *ASJP* Case' (2019) 12 Review of European Administrative Law 219: '[i]n this judgment, the CJEU has strongly restated its role as a guardian of the interpretation and effective application of EU law in the EU system as based on the founding value of the rule of law, as it has done since 1986'; Prechal, 'Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection' in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022), p. 24: '[t]he rationale behind the exceptionally wide scope of application of Article 19 … is the indivisible nature of the guarantees of access to an independent and impartial court previously established by law'.

[890] Although the distinction between procedural, remedial, and institutional matters is difficult to pinpoint, it is useful to clarify that the category of procedural rules includes the rules governing the conditions and limits under which individuals may bring legal actions in cases of EU law infringements. These rules may address time limits, costs of proceedings, etc. The category of remedial provisions defines the type of actions that individuals can bring for the enforcement of EU law, as well as the powers vested in national judges responsible for ensuring the enforcement of EU law at the domestic level. This includes rules on the type of remedies available to the judiciary. Finally, institutional provisions concern the organisational features of national bodies competent to adjudicate claims brought by individuals affected by breaches of EU law. This category encompasses rules on the nature (i.e., judicial or quasi-judicial) and composition of such bodies (including rules on the appointment and dismissal of its members).

nature and scope of national reviewing bodies, as well as the number of appeals that the Member States are required to establish. While much legislative attention has focused on procedural and remedial obligations, comparatively little attention has been given to the institutional features underpinning the fundamental right to effective judicial protection. Where EU secondary law addresses such institutional matters, it often does so in a fragmented manner, without laying down transversal requirements applicable across all areas governed by EU law. This has prompted the Court to place increasing reliance on EU primary law – particularly Article 47 of the Charter and 19 TEU – to articulate the institutional requirements that the Member States must meet in organising their judicial systems.

This section explores how the relevant case law aligns with national procedural autonomy. After all, the traditional stance used to be that:

> 'it [was] for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from [EU] law'.[891]

In other words, the EU used to '"take" national courts as it "f[ound]" them'.[892] By contrast, the relevant case law on the essence of the general principle of effective judicial protection directly addresses the organisational links between the administration and the judiciary. It presumably militates in favour of greater involvement by the national judiciary in the enforcement of EU law at the domestic level. Viewed from this perspective, the relevant case law may reshuffle the respective powers and competences attributed to the administration and the judiciary in that context.

This led Bonelli to suggest that the very 'starting point' of national procedural autonomy was negated, or at the very least challenged, by recent judgments on the essence of the principle of effective judicial protection.[893] In stark contrast to the logic underlying much of the early judgments on national procedural autonomy, that case law presupposes that it is no longer up to the Member States to identify:

> 'which specific national bodies should be competent ... as well as how these bodies should be entrusted with the powers to implement Union law requirement'.[894]

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[891] Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 Common Market Law Review 1625, 1645.
[892] Schütze, 'Conclusion: Article 267 TFEU and EU Federalism' (2023) 15 European Journal of Legal Studies 221, 223.
[893] For a similar view, see Bonelli and Claes, 'Judicial Serendipity', supra note 889, 643.
[894] Bonelli, 'Effective Judicial protection in EU Law', supra note 800, 56.

At first glance, this development appears difficult to reconcile with distinctive domestic legal traditions regarding the organisation of the judiciary. According to Krajewski,

> 'there is also a concern about the long-term consequences of a possible CJEU-led harmonisation of domestic judicial organization with the ensuing risk of interference with constitutional traditions'.[895]

Against this background, this section reflects on the growing prevalence of the 'essence' of the right to an effective judicial remedy in recent judgments on national procedural autonomy. It explains that the Court treads warily in that context. Ultimately, the Member States remain competent to organise their judiciary in accordance with their own domestic traditions, but they cannot exercise that competence in a way that negates the core of the principle of effective judicial protection.[896] In circumstances where the essential content of that principle is compromised, EU law steps in and fills the void by reference to the positive standard of judicial protection emanating from the general principle of effective judicial protection, as expressed in Article 47 of the Charter. This holds true especially in policy fields characterised by the existence of detailed common procedural rules. In particular, this section demonstrates that the scope of organisational requirements crafted by the Court in relation to the review of administrative action hinges on the degree of harmonisation of the remedial stage of proceedings achieved by means of secondary law.[897]

To this end, this section is divided into three parts. It begins by exploring the conceptual foundations and evolution of the 'essence' of Article 47 of the Charter, examining how the Court of Justice has used this notion to uphold the rule of law. However, it concludes that the Court has yet to clearly define the core requirements of this right (section 4.1). The analysis conducted in this thesis allows for the identification of two essential components of this right: first, the requirement of judicial control over administrative action; and second, the requirement of administrative compliance with final judicial decisions. This section then turns to the first of these components – the

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[895] Krajewski, 'The EU Right to an Independent Judge: How Much Consensus Across the EU?' in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022), p. 79; Lenaerts, 'New Horizons for the Rule of Law Within the EU' (2020) 21 German Law Journal 29, 33.

[896] For a similar view, see Bonelli and Claes, 'Judicial Serendipity', supra note 889, 643; Opinion of AG Bobek in Joined Cases C-83/19, C-127/19 and C-195/19, Case C-291/19 and Case C-355/19, *Asociata 'Forumul Judecatorilor Din Romania' and Others*, EU:C:2020:746, para 230: '[t]he principle of judicial independence does not require Member States to adopt any particular constitutional model governing the relationship and interaction between the various branches of the State, provided of course that some basic separation of powers characteristic of the rule of law is maintained'.

[897] In a similar fashion, Giulia Gentile opined that 'the scope of application of Article 47 of the Charter and the consequent margin of discretion of national courts in the enforcement of EU law impact the division of judicial competences in the EU' (Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU: Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States' in op. cit. supra note 802, p. 144).

requirement of independent and impartial judicial review – analysing how the Court has drawn on the right to effective judicial protection to shape the institutional design of national judicial systems, particularly in areas such as tax and immigration law where procedural harmonisation is limited (section 4.2). Finally, it considers the second component – the requirement of administrative compliance with final judgments – focusing on how this has been used to strengthen the powers conferred on national courts when administrative authorities disregard judicial decisions in areas governed by EU law (section 4.3).

4.1. The challenge(s) of identifying the requirements intrinsic to the essence of the principle of effective judicial protection

It is worth highlighting, from the outset, that the concept of 'essence' of fundamental rights is spelled out in Article 52(1) of the Charter.[898] It entails that rights have an inviolable or 'untouchable core'[899] that can, in no event, be subject to limitations or interferences.[900] Nevertheless, there remains a great deal of uncertainty about the theoretical underpinnings of that concept, or even the methodology used to identify its components.[901] The Court of Justice has thus far failed to devise a coherent methodology to identify the essence of rights. The relevant case law seemingly proceeds on an 'ad hoc basis',[902] which seriously complicates the identification of the essence of rights. That is particularly true with respect to the right to an effective judicial remedy set out in Article 47 of the Charter. As Gentile puts it,

> '[o]verall, the depiction of the essence of Article 47 is impressionistic and fragmented. The discovery of the essence of Article 47 occurs in the form of

[898] Article 52(1) of the Charter states that: '[a]ny 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'.

[899] Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling an Onion to its Core' (2018) 14 European Constitutional Law Review 332.

[900] Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 German Law Journal 779, 781.

[901] On that topic, see Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling an Onion to its Core', supra note 899, 332; Tridimas and Gentile, 'The Essence of Rights: An Unreliable Boundary' (2019) 20 German Law Journal 794, esp. 803 et seq. It is a matter of contention whether the concept of the essence of rights may be conflated with or subsumed within an assessment of the proportionality of a breach with the relevant fundamental right. Contrast Lenaerts, 'Limits on Limitations', supra note 900, 786 et seq. with Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case Law of the Court of Justice of the European Union: The Best is Yet to Come?' (2019) 20 German Law Journal 884, 891.

[902] Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case Law of the Court of Justice of the European Union', 886.

judicial "enlightenments" and is strategically used by the CJEU to protect the rule of law in the Member States'.[903]

Over the past few years, the essence of the general principle of effective judicial protection has been employed to delineate the extent of the demands expressed by that principle regarding the creation of new remedies at the national level.[904] The rule of law crisis prevailing in some EU Member States has represented a particularly fertile ground for allowing the Court to interpret the essence of Article 47 of the Charter. Most judgments on the essence of that provision were delivered in response to blatant and far-reaching breaches of the most basic features intrinsic to a well-functioning constitutional system governed by the rule of law.[905] In this context, the essence of the principle of effective judicial protection was found to incorporate the normative demands emanating from the principle of rule of law expressed in Article 2 TEU. It was used to instate, or reinstate, institutional guarantees inherent in a constitutional system governed by the rule of law. In the words of Gentile,

'[t]his principle has thus become the vehicle for the enforcement of the rule of law at the national level'.[906]

The extent of interference with national institutional law was, in fact, commensurate with the nature of the breach involved in such cases.[907] The rule of law crisis discernible in some Member States was depicted as a far-reaching departure from the hardcore or basic features – the 'very identity' of the EU legal order.[908]

One may accordingly be tempted to depict the relevant case law as an exceptional solution motivated by equally exceptional circumstances involving blatant departures from the rule of law. It is nevertheless submitted that such a temptation should be resisted. It would indeed be overly simplistic to dismiss the relevant judgments on that matter as mere expressions of the rule of law crisis that has plagued the EU. To be sure, the requirements inherent in the essence of that principle give expression to the

[903] Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU: Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States' in op. cit. supra note 802, p. 158.
[904] Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU', pp. 157-158; Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in op. cit. supra note 799, p. 91.
[905] It should be clear, however, that the seminal *ASJP* judgment concerned a rather mundane matter relating to the reduction of remuneration of national judges, see Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.
[906] Gentile, 'Effective Judicial Protection: Enforcement, Judicial Federalism and the Politics of EU Law' (2023) 2 European Law Open 128, 130. In a similar vein, see also Lenaerts, 'New Horizons for the Rule of Law Within the EU' (2020) 21 German Law Journal, Special Issue 1: 20 Challenges in the EU in 2020 29.
[907] Gentile similarly opined that: 'the Court appear[ed] to employ the concept of essence with a signalling function, in order to highlight the importance of the violation of EU law' (Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU' in op. cit. supra note 802, p. 156).
[908] Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97, para 232.

principle of the rule of law enshrined in Article 2, TEU.[909] However, it should be stressed that the relevant case law transcends the intricacies of the rule of law crisis. It offers direct insight into key institutional and procedural requirements in relation to the judicial remedies that the Member States are expected to establish across the policy areas falling within the scope of EU law.

This led several legal scholars to grapple with the issue of defining the core components of judicial protection.[910] Sacha Prechal identified two elements forming an integral part of the core of effective judicial protection: the execution of final judicial decisions and the independence of the judiciary.[911] In addition, the right of access to a court is also considered as an integral part of the essence of judicial protection.[912] In the words of Advocate General Bobek,

> 'the duty of the Member States under the first paragraph of Article 47 of the Charter is to guarantee the very core or essence of the right enshrined therein, namely access to the courts. To preserve that core, judicial review of decisions cannot be excluded when an EU right or freedom has been infringed'.[913]

It is worth remembering, in that respect, that ever since *Les Verts* the Court has repeatedly stated that the:

> 'very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law'.[914]

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[909] Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU' in op. cit. supra note 802, p. 156.

[910] Several legal scholars reflected on the prospect of including other elements into the essence of the right to an effective judicial remedy. For instance, Gutman suggested that the right to obtain information about administrative decisions affecting the rights of individuals, or the right to seek legal representation may be considered as intrinsic elements of the essence of that right. It should be stressed, however, that those elements do not appear directly relevant to the discussion about the institutional set up of decision-making in matters involving the decentralised implementation and/or application of EU law at the domestic level. On that topic, see Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case Law of the Court of Justice of the European Union', supra note 901, esp. 902: 'the essence of the fundamental right to an effective remedy and to a fair trial within the EU system of judicial protection may be considered to act as a kind of developmental device in the Union legal order, encouraging the progressive realization of Charter rights'; Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU' in op. cit. supra note 802, esp. p. 156: 'the Court should ultimately consider the essence of Charter rights from the perspective of Article 2 TEU'.

[911] Prechal, 'Effective Judicial Protection: Some Recent Developments – Moving to the Essence' (2020) 13 Review of European Administrative Law 175, 188. See further Prechal, 'Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?' in op. cit. supra note 889.

[912] See also Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case Law of the Court of Justice of the European Union', supra note 901, 889.

[913] Opinion of AG Bobek in Case C-403/16, *El Hassani*, EU:C:2017:659, para 110. See also, e.g., Case C-362/14, *Schrems*, EU:C:2015:650, para 95; Case C-216/18 PPU, *Minister for Justice and Equality*, EU:C:2018:586, paras 51 et seq.

[914] See, e.g., Case C-294/83, *Les Verts v Parliament*, EU:C:1986:166, para 23 ; Case C-222/84, *Johnston*, EU:C:1986:206, paras 18-19 ; Case C-72/15, *Rosneft*, EU:C:2017:236, para 73.

4.2. The requirement for independent and impartial control of administrative action: A catalyst for streamlining the institutional design of appeals?

As noted above, the essence of the principle of effective judicial protection has been invoked to support more or less stringent obligations concerning the institutional design of judicial review in areas governed by EU law. This development is particularly relevant in policy areas traditionally characterised by broad administrative discretion – such as asylum and immigration law, and fiscal matters, particularly tax cooperation. In these areas, the principle of effective judicial protection has played a vital role in subjecting administrative decision-making to independent and impartial judicial oversight. In recent years, the Court has increasingly imposed detailed obligations regarding the establishment of independent and impartial judicial review mechanisms. Indirectly, the requirements emerging from the relevant case law have served as a template for how national institutions and their procedures should be structured.

This section suggests that the Court's approach is shaped by the degree of procedural harmonisation established by secondary law. Where EU secondary law lacks detailed provisions on remedies or review procedures – as in *Berlioz* – the Court derives institutional requirements directly from Article 47 of the Charter. In particular, it emphasises the need for judicial oversight by a body with full jurisdiction when the administrative authority lacks independence or impartiality. Conversely, where EU secondary law establishes a more comprehensive procedural framework, the Court adjusts the institutional and procedural demands of Article 47 of the Charter in accordance with the degree of harmonisation achieved under EU law. In particular, the intensity of these requirements appears to depend on whether the legislation lays down specific procedural guarantees concerning the institutional design of administrative bodies – especially their independence and impartiality – and the scope or levels of judicial review that the Member States are required to establish. This approach allows the Court to safeguard the core guarantees of Article 47 of the Charter, while accommodating institutional diversity among the Member States in areas where procedural harmonisation is absent.

The judgment in *Berlioz* illustrates the institutional demands emanating from the essence of the principle of effective judicial protection in the absence of common rules harmonising the remedial stage of proceedings.[915] In the main proceedings, Berlioz, a company based in Luxembourg, incurred a fine for refusing to provide information requested by the Luxembourg tax administration. This request for information was made in the context of a procedure for cross-border cooperation governed by Directive

[915] Case C-682/16, *Berlioz Investment Fund*, EU:C:2017:373.

2011/16.[916] Berlioz sought to challenge the validity of the information order, the non-compliance with which led to the fine. However, the competent judge declined to review the legality of that order. For the present discussion, it should be noted that Directive 2011/16 does not include any provisions about the remedies available to individuals wishing to challenge the legality of administrative decisions adopted under that Directive. After all, the Directive is primarily concerned with setting out a framework for cross-border administrative cooperation in the field of taxation. In these circumstances, the referring court queried whether Berlioz could rely on Article 47 of the Charter to claim a right to bring proceedings in order to challenge the validity of the information order underlying the fine.

Seized of the matter, the Grand Chamber concluded that the Charter requires the individual concerned to be entitled to bring judicial proceedings to challenge both the legality of the information order and the penalty imposed for failing to comply with it.[917] For the purposes of the present discussion, it is useful to cite one particularly significant excerpt from *Berlioz*. In paragraph 55 of that judgment, the Court held that the right to an effective judicial remedy requires that:

> 'a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider all relevant issues'.[918]

Drawing on the ECtHR's case law, Advocate General Wathelet similarly opined that a decision taken by an administrative authority that 'does not itself satisfy the conditions of [independence and impartiality]' must be subject to review by a judicial body having full jurisdiction to consider all questions of fact and law relevant to the dispute.[919] This appears to suggest that when the competent administrative authority *does* satisfy the conditions of independence and impartiality, the principle of effective judicial protection does not necessarily require the Member States to establish an appeal before

[916] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, [2011] OJ L 64/1.
[917] Case C-682/16, *Berlioz*, paras 52-56.
[918] Ibid, para 55. See also Case C-403/16, *El Hassani*, para 39. The Court took that approach one step further in *Etat Luxembourgeois v B*. In that judgment, the requirement of independent judicial control was considered to be an integral component of the essence of Article 47 of the Charter (Joined Cases C-245/19 and C-246/19, *Etat luxembourgeois (Droit de recours contre une demande d'information en matière fiscale)*, EU:C:2020:795, para 66). On that topic, see Pantazatou, 'The Evolution of the Right to an Effective Remedy and to a Fair Trial in Direct and Indirect Taxation: Are We There Yet?' in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022); Mazzotti and Eliantonio, 'Transnational Judicial Review in Horizontal Composite Procedures: *Berlioz*, *Donnellan*, and the Constitutional Law of the Union' (2020) 5 European Papers 41.
[919] Opinion of AG Wathelet in Case C-682/15, *Berlioz*, EU:C:2017:2, paras 74-75.

a court competent to consider both matters of facts and law.[920] The core of that right simply obliges them to ensure judicial review of administrative decisions falling within the scope of EU law. Within these limits, the Member States presumably retain some leeway with respect to the scope of review conferred on the competent national court.

In *Berlioz*, the administrative authority that imposed the fine did not satisfy the requirements of impartiality and independence derived from Article 47 of the Charter. Advocate General Wathelet observed that:

> '[i]t cannot be denied that [the] procedure for administrative cooperation in the field of taxation established by Directive 2011/16, transposed into Luxembourg law by the Law of 29 March 2013, and the subsequent decisions requiring information and imposing a penalty adopted on the basis of those provisions, do not provide the guarantees set out in Article 47 of the Charter. Having regard to the objective of effective collaboration between administrations that forms the basis of those decisions, it is logical that those decisions are not taken by an independent and impartial authority after the party concerned has been given a fair and public hearing'.[921]

In those circumstances, the national referring court was granted jurisdiction to consider all relevant issues. Specifically, the Court concluded that it could assume competence to examine the legality of the order underlying the fine imposed on Berlioz. According to the Court,

> 'the national court hearing an action against the pecuniary administrative penalty imposed on the relevant person for failure to comply with an information order must be able to examine the legality of that information order if it is to satisfy the requirements of Article 47 of the Charter'.[922]

The *El Hassani* judgment appears to build upon, and reinforce, the developing understanding of the core of effective judicial protection within the EU legal order.[923] In the main proceedings, an individual applicant who had been denied a visa sought to challenge that rejection before domestic courts. The national court of first instance dismissed the action on the grounds that it lacked jurisdiction to adjudicate the matter. Seized on appeal, the national referring court sought to ascertain whether Article 32(3)

[920] In essence, the solution developed by the Court aligns with the stance adopted by the relevant ECtHR case law on the right to an effective remedy. The ECtHR held on many instances that this right does not necessarily imply that the contracting parties are bound to set up a remedy of a judicial nature, as long as the competent reviewing body is independent and impartial. Although the Court did not explicitly refer to ECtHR case law, AG Wathelet drew inspiration from the requirements formulated in that context (Opinion of AG Wathelet in Case C-682/15, *Berlioz*, paras 73 et seq.).
[921] Opinion of AG Wathelet in Case C-682/15, *Berlioz*, para 78.
[922] Case C-682/15, *Berlioz*, para 56.
[923] Case C-403/16, *El Hassani*.

of the Visa Code,[924] interpreted in the light of Article 47 of the Charter, imposed an obligation to establish a judicial appeal against visa refusals, or whether an administrative appeal could satisfy the requirements set out by those provisions.

The Visa Code adopts a rather flexible approach regarding the institutional design of review procedures for assessing the legality of administrative visa decisions. By virtue of Article 32(3) of the Visa Code, '[a]pplicants who have been refused a visa shall have the right to appeal'. As Advocate General Bobek pointed out, the right of appeal set out by that provision 'is open-ended as to the nature of that right'.[925] As previously mentioned,[926] the absence of specific provisions on judicial appeals in the Visa Code reflects a broader reluctance among the Member States to involve the judiciary in a field traditionally governed by administrative discretion. In a pledge to maintain control over the institutional set-up of appeals in immigration matters, the Member States stripped most secondary provisions on appeals from any reference to 'judicial' remedies. In the absence of specific provisions on judicial review, the Member States presumably retained discretion to confer competence on appeal to national administrative bodies or quasi-judicial bodies, excluding the judiciary from reviewing the legality of administrative decisions in this area.[927]

In spite of this, the Court was adamant that the Member States must establish at least one level of judicial appeal for negative visa decisions.[928] According to the Court,

> 'Article 32(3) of the Visa Code, read in the light of Article 47 of the Charter, must be interpreted as meaning that it requires Member States to provide for an appeal procedure against decisions refusing visas, the procedural rules for which are a matter for the legal order of each Member State in accordance with the principles of equivalence and effectiveness. Those proceedings must, at a certain stage of the proceedings, guarantee a judicial appeal'.[929]

[924] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), [2009] OJ L 243/1.
[925] Opinion of AG Bobek in Case C-403/16, *El Hassani*, para 112.
[926] Chapter 4, Section 2.3.3.
[927] Opinion of AG Bobek in Case C-403/16, *El Hassani*, para 112.
[928] Case C-403/16, *El Hassani*, para 41.
[929] Case C-403/16, *El Hassani*, para 42. Contrast with Case C-682/15, *Berlioz*, para 59: 'Article 47 of the Charter must be interpreted as meaning that a relevant person on whom a pecuniary penalty has been imposed for failure to comply with an administrative decision directing that person to provide information in the context of an exchange between national tax administrations pursuant to Directive 2011/16 is entitled to challenge the legality of that decision'. It is striking that the statement quoted above does not make any explicit allusion to the right to seek judicial redress.

In doing so, the Court followed Advocate General Bobek's approach. The latter had strongly advocated for the establishment of at least one judicial appeal,[930] stating that the Member States were bound to set up:

> 'a truly independent and impartial body of a judicial nature which fulfils all the defining criteria of a court or tribunal in the sense of Article 267 TFEU. Thus, that body must be established by law; it must be permanent; its jurisdiction must be compulsory; its procedure must be *inter partes* – that is, of a contradictory judicial nature; it must apply rules of law; and it must be independent'.[931]

It is worth acknowledging that the Member States retain some leeway in how they decide to structure the institutional make-up of appeals related to visa decisions. They are free to establish remedies of another nature in addition to the judicial remedy envisioned in *El Hassani*.[932] Advocate General Bobek suggested that Article 47 of the Charter:

> 'does not question the existence itself of other means of redress, such as administrative remedies provided for in a number of Member States. Nor does it alter the content of Article 33(2) of the Visa Code. [That provision] merely adds an obligation for the Member States, there must be the possibility of bringing the matter before a court. Before that, it is for each Member State to decide to opt for a purely administrative review (before the same authority or another one); or for a review carried out by mixed tribunals composed of both judges and civil servants; or, of course, should the Member States wish to do so, also directly

[930] Opinion of AG Bobek in Case C-406/13, *El Hassani*, para 119. It should be stressed, however, that the solution spelled out by the AG differs from the Court's approach in two respects. In the first place, AG Bobek considered that the Member States were bound to set up a judicial appeal on the sole basis of Article 47 of the Charter. In other words, he opined that Article 47 of the Charter imposed an additional obligation beyond the obligation to set up an effective remedy emanating from Article 32(3) of the Visa Code. However, the Court did not specify explicitly whether the obligation to set up a judicial appeal was grounded on Article 32(3) of the Visa Code, interpreted in the light of Article 47 of the Charter, or rather on the sole basis of that provision. In the second place, the AG spelled out more explicitly than the Court what the notion of 'court or tribunal' actually entailed. In contrast, the Court simply alluded to the creation of a 'judicial appeal', without expounding on the defining feature(s) of that notion.

[931] Ibid, para 121.

[932] A similar story also plays out in relation to Directive 2008/115. Although Article 13(1) of that Directive remains oblivious as to the nature and characteristics of the remedy available to individuals wishing to challenge a return decision, the Court held in *FMS* that: 'Article 47 of the Charter requires the Member States to guarantee, at a certain stage of the proceedings, the possibility for the third-country national concerned to bring any dispute relating to a return decision adopted by an administrative authority before a court' (Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*, para 129). The reasoning spelled out by the Court follows in the footsteps of *El Hassani* (which is even mentioned explicitly as authoritative support for the solution devised in *FMS*). More specifically, the Court interpreted Article 13(1) of Directive 2008/115 in the light of Article 47 of the Charter to call upon the Member State to set up an appeal 'before at least one judicial body' at a 'certain stage of the proceedings' on the legality of return decisions.

allow for a review before a tribunal within the meaning of the first paragraph of Article 47'.[933]

In view of the foregoing considerations, the bottom-line may be summarised as follows: the essence of effective judicial protection ultimately reflects a fundamental concern with ensuring that administrative decisions relating to the application of EU law are subject to judicial oversight by a national court or tribunal. As Advocate General Bobek emphasised:

'[t]o preserve that core, judicial review of decisions cannot be excluded when an EU right of freedom has been infringed'[934].

However, the core of this principle offers relatively limited guidance on the scope of review that must be available to national courts in such cases, or on the levels of judicial review that the Member States are required to establish. In the absence of more detailed harmonised framework on the scope of review,[935] the Member States are not obliged to confer full jurisdiction on the competent national court. This is particularly the case where the decision was taken by an administrative authority that satisfies the requirements of independence and impartiality. In such circumstances, they may instead choose to assign that competence to a judicial body with limited jurisdiction – namely, to examine the lawfulness of the administrative decision.

This finding is particularly relevant in light of the expanding body of secondary legislation governing the institutional design of national administrative bodies tasked with implementing and/or enforcing EU law. Over the past few years, the EU legislature has increasingly sought to establish requirements for the creation of independent administrative authorities in various policy areas, such as data

[933] Opinion of AG Bobek in Case C-403/16, *El Hassani*, para 119.
[934] Opinion of AG Bobek in Case C-403/16, *El Hassani*, para 110.
[935] Widdershoven similarly emphasised that the Court's approach to the scope of review depends on the 'applicable EU rules in question' (Widdershoven, 'National Procedural Autonomy and General EU Law Limits', supra note 842, 24). However, he arguably does not fully explore the implications of this development for the relationship between the general principle of effective judicial protection and secondary legislation. Similarly, see Opinion of AG Campos Sánchez-Bordona in Case C-171/15, *Connexxion Taxi Services BV*, EU:C:2016:506, paras 65-66. For further discussion in the context of asylum law, see below, Section 5.3.

protection,[936] equal treatment,[937] and competition law.[938] Where such bodies have been established, the Member States appear to retain a degree of discretion in structuring judicial review – particularly with respect to its scope. They may determine that the competent national court on appeal is not entitled to review both factual and legal aspects of a case. In other words, the Member States may limit the jurisdiction of the reviewing court to questions of law when assessing decisions adopted by independent administrative authorities – unless secondary legislation expressly requires them to confer full jurisdiction on the competent court or tribunal. Similarly, they retain discretion concerning the levels of judicial review they are required to establish.

In sum, the intensity of the institutional demands imposed on the Member States when they implement EU law seems to be influenced by the scope and level of detail of procedural harmonisation under EU law. Specifically, it is influenced by whether EU secondary law lays down specific safeguards regarding the institutional structure of administrative bodies, including requirements for their independence and impartiality, as well as the level(s) and scope of judicial review that the Member States must ensure. This approach enables to protect the fundamental features of Article 47 of the Charter, while also allowing for institutional diversity among the Member States in areas where procedural harmonisation is lacking.

4.3. The requirement of administrative compliance with final judgments: A catalyst for strengthening the remedial powers of national courts?

A similar pattern emerges regarding the requirement for the administration's compliance with final judicial decisions in matters falling under the purview of EU law. In recent years, the CJEU case law has clarified the implications of judicial decisions delivered on appeal concerning the margin of discretion enjoyed by national administrative authorities to which the case is returned. This has enabled the Court to

[936] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119/1, esp. Arts. 51 et seq.

[937] Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services and amending Directives 2000/43/EC and 2004/113/EC, [2024] OJ L 1/14.

[938] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L 11/3. See also 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 (framework Directive), [2002] OJ L 108/33.

consider that the execution of a final judgment ordering a national public authority to comply with EU law constitutes another element intrinsic to the essence of the fundamental right to an effective judicial remedy.[939]

It follows from Article 47 of the Charter that once a national judge (or, more generally, a body meeting the requisite qualities of independence and impartiality) has had an opportunity to decide on the legality of an administrative decision, the administrative authority to which the case is referred must comply with the assessment conducted by that judge. The analysis below demonstrates that the essence of the principle of effective judicial protection has been relied upon by the Court to empower the judiciary vis-à-vis the administration. In cases where the national administrative authority failed to comply with a final judicial decision regarding the application of EU law, the principle of effective judicial protection has supported conferring more robust remedial powers upon the national judiciary. Nevertheless, the following paragraphs show that the extent of the institutional demands formulated in this context depends on the scope and level of detail of harmonised requirements achieved through secondary law.

The judgments delivered by the Court in *Torubarov* and *Deutsche Umwelthilfe* illustrate the potentially far-reaching implications for national procedural autonomy derived from the principle of effective judicial protection in this context.[940] Both cases involved similar issues revolving around a national administrative authority's persistent failure to comply with a final judgment ordering it to comply with EU law. As emphasized by Prechal,

> 'this new line of case law applies only in rather extreme situations where the executive has persistently refused to comply with judicial decisions'.[941]

The situations at issue in both cases were accordingly deemed to impinge upon the very essence, or substance, of the right to an effective judicial remedy. The Court considered that the 'essence' of that right dictated that the competent judicial authority must have the requisite means of enforcement to ensure compliance with a final and enforceable judicial decision ordering the competent public authority to comply with EU law.[942] It followed that the referring court was, as a matter of principle,[943] bound to disregard any

[939] Case C-556/17, *Torubarov*, para 72; Case C-752/18, *Deutsche Umwelthilfe*, EU:C:2019:1114, para 35. See further Prechal, 'Effective Judicial Protection', supra note 911, 175.
[940] Case C-752/18, *Deutsche Umwelthilfe*; Case C-556/17, *Torubarov*.
[941] Prechal, 'Effective Judicial Protection', supra note 911, 189.
[942] Case C-752/18, *Deutsche Umwelthilfe*, para 35.
[943] On the facts of the case at issue in *Deutsche Umwelthilfe*, the Court introduced a significant limitation on the duty to disapply such national conflicting legislations. It opined, in particular, that that duty would not become operative if and to the extent that this would infringe another fundamental right protected by the Charter (i.e., the right to liberty enshrined in Article 6).

national provision incompatible with the essential content of Article 47 of the Charter.[944]

The degree of procedural harmonisation established under EU secondary law mattered a great deal in this context. The judgment delivered by the Grand Chamber in *Deutsche Umwelthilfe* illustrates the rather prudent approach taken by the Court in the absence of procedural harmonisation regarding the remedial stage of proceedings. In the main proceedings, the competent German authority was ordered by a national court to take the necessary measures to comply with the limit values for nitrogen dioxide set out in the Air Quality Directive.[945] Given the authority's persistent and blatant refusal to comply with that order, Deutsche Umwelthilfe applied for the imposition of coercive detention of several members of the competent authority. Although that measure could be employed in the context of civil proceedings, it followed from the case-law of the German Federal Constitutional Court that it could not be imposed in administrative proceedings against (individual members of) public authorities.

The national referring court queried whether the principle of effective judicial protection could be relied upon to extend the scope of that remedy to national public authorities in a context characterized by their persistent failure to comply with a final judgment regarding the application of EU law. It should be stressed that the matter under consideration concerned the enforcement of secondary legislation devoid of common procedural rules. One would indeed be hard-pressed to identify specific provisions on procedures and remedies within the Air Quality Directive. In this context, the Court seemingly advocated for attributing increased remedial powers to the competent national judges. However, it expressed deference to the remedial tools and principles available under national law. The national referring court was instructed to:

> 'ascertain, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by that law, whether it can arrive at an interpretation of domestic law that would enable it to apply effective coercive measures in order to ensure that the public authorities comply with a judgment that has become final, such as, in particular, high financial penalties that are repeated after a short time and the payment of which does not ultimately benefit the budget from which they are funded'.[946]

Admittedly, the Court entertained the prospect of developing a more robust conception of judicial protection on the basis of Article 47 of the Charter. It examined whether that provision compelled the national judiciary to adopt coercive detention measures in respect of the competent administrative authorities. However, it should be stressed that

[944] Case C-752/18, *Deutsche Umwelthilfe*, paras 42-43; Case C-556/17, *Torubarov*, para 73.
[945] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, [2008] OJ L 152/1, esp. Arts. 13-23.
[946] Case C-752/18, *Deutsche Umwelthilfe*, para 42.

the Court did not envisage creating new remedies beyond those explicitly spelled out by national law. In fact, the Court was merely asked to determine whether the scope of a remedy already available under national law could be extended to cover unforeseen circumstances by virtue of the principle of effective judicial protection. In any event, the Court ruled out that possibility on the grounds that it would compromise the fundamental right to liberty enshrined in Article 6 of the Charter.[947]

In the presence of procedural harmonisation, the Court outlined more detailed recommendations regarding the powers available to the judiciary in similar circumstances. The judgment delivered by the Grand Chamber in *Torubarov* articulates a more robust conception of the remedial prerogatives attributed to national judges in such cases. For clarity, it is important to highlight that the situation in the main proceedings arose in the context of a back-and-forth between the competent administrative authority and the judiciary in the field of international protection. On several occasions, the national judiciary annulled a negative administrative asylum decision on the grounds that it failed to comply with the material standards set out in Directive 2011/95.[948] However, the competent administrative authority repeatedly failed to comply with the judicial determinations made in this context, thereby disregarding the relevant EU material provisions governing the treatment of requests for international protection.

In these circumstances, the national referring court asked the Court to determine whether the principle of effective judicial protection could empower it to substitute its own decision for the administrative decision under appeal. The Court's answer was clear. The national referring court was not only instructed to set aside any national provision that could prevent it from ensuring compliance with a final judgment on a request for international protection, but it was also instructed to apply the positive standard of judicial protection emanating from Article 46(3) of the Directive, interpreted in the light of Article 47 of the Charter. The Grand Chamber invited the national referring court to:

> 'vary a decision of the administrative or quasi-judicial body, in the present case the Immigration Office, that does not comply with its previous judgment and to substitute is own decision on the application by the person concerned for international protection by disapplying, if necessary, the national law that prohibits it from proceeding in that way'.[949]

[947] Ibid, paras 44 et seq.
[948] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9.
[949] Case C-556/17, *Torubarov*, para 74.

The institutional implications of the principle of effective judicial protection were evident. That principle required a re-adjustment of the prerogatives attributed to domestic judges by national law in cases involving a breach of its essence.[950] In the words of Bonelli,

> 'on the basis of EU law, and crucially, of Article 47 of the Charter, the national court gained power vis-à-vis the national administrative body'.[951]

It should be stressed that the Court's reasoning was grounded in the existence of a specific provision governing the review of administrative decisions on international protection. A great deal was made regarding the broad powers vested in national courts under Article 46(3) of the Asylum Procedures Directive. More specifically, the Court emphasised that:

> 'the EU legislature, through the adoption of Article 46(3) of Directive 2013/32, intended to confer on that court or tribunal, where it considers that it has available to it all the elements of fact and law necessary in that regard, the power to give a binding ruling following a full and *ex nunc* — that is to say exhaustive and up-to-date — examination of those elements, as to whether the applicant concerned satisfies the conditions laid down in Directive 2011/95 to be granted international protection'.[952]

In other words, it was precisely because national courts were entitled to conduct an in-depth appraisal of the international protection credentials of applicants that the administration was bound by the assessment made in that context. It followed that the administration could not disregard that assessment without undermining the very essence of the right to effective judicial protection enshrined in Article 47 of the Charter. The existence of detailed requirements regarding the scope of judicial review presumably prompted the Court to explicitly outline the institutional ramifications of a final judicial decision on international protection. Based on Article 46(3) of the Directive, interpreted in the light of Article 47 of the Charter, the Court was able to provide detailed positive recommendations about the powers (including substitution) vested in national courts and tribunals in such cases. Ultimately, the institutional demands derived from the essence of effective judicial protection were fine-tuned by reference to the scope and level of detail of common procedural rules established by the Asylum Procedures Directive.

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[950] Spitaleri, 'La Tutela Giurisdizionale Effettiva dei Singoli nei Settori dell'Immigrazione e dell'Asilo' 1/2024 Quaderni AISDUE – Atti del V Convegno nazionale AISDUE Padova, 2/3 novembre 2023 1, 14-15.
[951] Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in op. cit. supra note 799, p. 92.
[952] Case C-556/17, *Torubarov*, para 65.

5. Adjusting the institutional demands of judicial protection in the fields of environmental, equality and asylum law

The previous section demonstrated that the Court has fine-tuned the core requirements of effective judicial protection by reference to existing secondary law provisions that address procedural and remedial matters. The bottom-line may therefore be summarised as follows: the intensity with which the Court formulates recommendations regarding the institutional set-up of appeals against administrative action depends on the scope and level of detail of common procedural rules established by secondary law. As the scope of common procedural requirements expands, the Court presumably feels emboldened to provide more detailed instructions on how the essential requirements of effective judicial protection need to be implemented at the Member State level.

This section revisits that framework in the context of the three case studies explored in this thesis. It argues that the Court did not explicitly address the institutional implications of the principle of effective judicial protection, unless the relevant common procedural rules outlined specific obligations regarding the institutional design of national authorities involved in the implementation of EU law. In other words, the regulatory context underlying these three case studies has provided a key parameter for assessing the scope of institutional demands placed on the Member States. To clarify this point, this section begins by emphasising that the relevant case law on access to justice in environmental matters has largely overlooked the organisational design of national administrative and judicial authorities in the implementation and enforcement of EU environmental law. While the Court has developed standing rights for individuals and NGOs, it implicitly militated in favour of subjecting administrative decision-making within the scope of EU environmental law to independent and impartial judicial control (section 5.1). This section then that the field of equality law has largely been unaffected by institutional considerations regarding the set-up of review of administrative action. The private law dimension of EU equality law did not lend itself to an explicit assessment of the institutional implications arising from the essence of effective judicial protection, which, at its core, concerns the interaction between the administration and the judiciary – a matter grounded in public law (section 5.2). Finally, this section demonstrates that the existence of harmonised rules on the scope of review of administrative action in the field of asylum has allowed the Court to formulate detailed recommendations about the powers and competences conferred upon the judiciary and the administration in that field (section 5.3).

5.1. The case law on access to environmental justice: A pledge for independent and impartial judicial control over administrative action in environmental matters

In the field of environmental law, EU secondary law provides relatively little guidance on organisational matters such as the form and nature of national public authorities involved in the implementation and enforcement of EU environmental law, as well as functional matters such as their powers and competences. In other words, existing procedural requirements have paid comparatively little attention to the institutional make-up of national decision-making bodies in environmental matters. Admittedly, the Aarhus Convention and the various legislative instruments adopted in its wake seemingly militate in favour of establishing independent and impartial bodies with the competence to scrutinise the legality of administrative action in that area.[953] However, it should be stressed that there is no harmonised framework governing the institutional set-up of competent administrative and judicial authorities in the field of environmental law. As a result, the EU Member States are afforded considerable leeway in setting up and structuring the relevant public authorities. They presumably retain the discretion to decide on issues such as which bodies should be entrusted with implementing and/or enforcing EU environmental law, how these bodies should be structured (with respect to, for example, their form, composition, and nature), and their mandate (i.e., their powers and competences).[954]

In this context, the essence of the principle of effective judicial protection has acquired particular significance as a catalyst for subjecting administrative action in environmental matters to independent and impartial judicial oversight. In the absence of harmonisation on such matters, the Court has generally refrained from articulating detailed and positive instructions about the organisational set-up of national bodies tasked with overseeing the legality of administrative decision-making in the area of EU environmental law. Instead, the core of effective judicial protection has been developed with respect to who should be granted access to justice, drawing on the relevant procedural standards in the Aarhus Convention. The case law on judicial control of administrative action has mostly focused on developing detailed standing requirements for concerned individuals and collective entities active in environmental protection.

[953] Article 9 of the Aarhus Convention sets out a right to bring appeal proceedings before 'a court of law or another independent and impartial body established by law'. That formulation is taken up by relevant secondary legislative provisions implementing the Convention into the EU legal order, such as Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, [2003] OJ L 156/25.

[954] For the sake of the present discussion, it is worth pointing out that the *Schutznorm* doctrine gives expression to some of the Member States' reluctance to involve the judiciary in policy areas underpinned by collective interests (which accordingly fall primarily within the purview of administrative discretion).

The approach followed by the Court was thus grounded in the existing procedural requirements of the Convention. It is not an exaggeration to speak, in this context, of the 'Aarhus-isation' of EU environmental law.[955] The message addressed to the Member States is clear: they must allow concerned individuals and NGOs to bring national public authorities to court for failing to live up to the expectations of EU environmental law. By developing detailed access-to-justice requirements, the Court has implicitly advocated for the establishment of independent and impartial oversight of the legality of administrative action in the field of environmental law.

5.2. The (ir)relevance of the core of effective judicial protection in EU equality law

In contrast to the field of environmental law, the core of the principle of effective judicial protection has played little to no role in the relevant judgments concerning the horizontality of EU fundamental equality rights. It is worth pointing out, in particular, that the Court has not yet explicitly addressed the connection between the doctrine of horizontality and the core of the principle of effective judicial protection laid down in Article 47 of the Charter. The lack of explicit engagement with the institutional dimension of judicial protection is largely due to the specific nature of the field of equality law.

For clarity, it is perhaps necessary to briefly expound on the distinctive normative value of the principle of effective judicial protection. As mentioned above,[956] the essence of this principle is primarily concerned with the institutional architecture of judicial review of administrative decisions related to the domestic implementation of EU law. Viewed from that perspective, the core of effective judicial protection is especially relevant in policy areas traditionally dominated by administrative discretion (such as, for example, immigration or fiscal matters). In those fields, the principle has been used as a catalyst for subjecting administrative action to independent and impartial judicial scrutiny.

However, it should be clear that EU equality law exhibits a distinct private law dimension. As a consequence, the relevant judgments on the horizontality of EU equality rights did not involve the administration as a decision-making body whose independence from the reviewing body needed to be guaranteed. Rather, these judgments concerned private law disputes regarding the respective subjective rights and obligations of the parties to an employment relationship. The Court was not called upon to address questions about the interaction between national administrative and

[955] Hilson, 'Substantive Environmental Rights in the EU: Doomed to Disappoint?' in Bogojević and Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing, 2020), p. 102.
[956] Section 4.1.

judicial bodies involved in the implementation and/or enforcement of EU labour law standards. It is also important to remember that most legislative instruments in this area are focused on conferring subjective rights on individual workers. For the most part, the field of equality law is devoid of specific provisions governing remedies.[957] Consequently, the Court was not asked to determine whether the Member States were required to establish administrative and/or judicial review proceedings to comply with those secondary legislative instruments.

In the light of the foregoing, it should come as no surprise that the Court did not explicitly address the institutional core of judicial protection in the relevant case law on EU equality law. To be sure, the judgments on direct horizontal effect touched on the tasks and powers of national courts and other national bodies competent to adjudicate individual equality claims,[958] but the Court did not offer detailed guidance on the institutional structure of such bodies.[959]

[957] For the sake of clarity, it is perhaps useful to add that the directives on equal treatment typically require the establishment of remedies before judicial and/or administrative bodies. Gutman opined, in that respect, that 'it should be considered that those provisions indicate that, in the light of the principle of effective judicial protection laid down in Article 47 of the Charter, the right to an effective remedy before a court must be guaranteed' (Gutman, 'The Role of Article 47 of the EU Charter of Fundamental Rights in the Field of Non-Discrimination: Onwards and Upwards' in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022), p. 129). Beyond this, recent legislative initiatives have displayed a more explicit emphasis on the organisational make-up and powers of national bodies involved in the domestic enforcement of labour law standards. Directive 2024/1500 spells out detailed organisational requirements governing the set-up of national equality bodies established by virtue of Directive 2000/43. It states, for instance, that they should be independent. In parallel, the mandate of those bodies progressively expanded to cover a broad spectrum of sectoral legislations on equal treatment (even beyond the confines of employment law). Over the past few years, those bodies gained new competences in relation to issues such as work-life balance or pay transparency. It should be stressed, however, that those bodies are not empowered by EU law to adjudicate on claims brought forward by individual workers wishing to vindicate the enforcement of their EU labour rights (though their mandate comes dangerously close to that of an adjudicating body). As a matter of law, they are called upon to provide workers with assistance and support in their endeavour to seek redress for a violation of their labour rights by employers. To that end, they may, for instance, participate actively in court proceedings revolving around individual labour claims (which may include the possibility to initiate legal proceedings on behalf of individual workers).

[958] Gutman, 'The Role of Article 47 of the EU Charter of Fundamental Rights in the Field of Non-Discrimination: Onwards and Upwards' in ibid, p. 137.

[959] Case C-378/17, *Minister for Justice and Equality and Commissioner of the Garda Síochána*, EU:C:2018:979, esp. para 50. It follows from that judgment that the obligation to disapply a national legal provision deemed incompatible with the general principle of non-discrimination in the context of employment is incumbent upon any national body competent to apply EU law (irrespective of the judicial and/or administrative nature of such body). On that judgment, see Drake, 'The Principle of Primacy and the Duty of National Bodies Appointed to Enforce EU Law to Disapply Conflicting National Law: *An Garda Síochána*' (2020) 57 Common Market Law Review 557.

5.3. The Asylum Procedures Directive: A key harmonised framework for defining judicial oversight in asylum law

In asylum law, the core of the principle of effective judicial protection has been deployed to subject individual administrative decisions on asylum to impartial and independent judicial scrutiny. Based on the relevant provisions on procedural matters prevailing in this area, the Court of Justice has been able to formulate detailed and positive recommendations about the respective powers and competences conferred upon the judiciary and the administration in asylum matters. The Court's emphasis on these issues was predicated on the existence of secondary law provisions that spell out detailed harmonised guidelines about national decision-making processes in asylum matters. More specifically, the Asylum Procedures Directive includes a set of detailed procedural safeguards that circumscribe the discretion retained by the Member States with respect to the administrative handling of requests for international protection. As a result, the scope of review conferred upon national courts or tribunals competent to scrutinise the legality of administrative decisions on asylum is particularly far-reaching.

Article 46(3) of the Recast Asylum Procedures Directive provides that the competent 'court or tribunal' is entitled to conduct a 'full and *ex nunc* examination of both facts and points of law', which includes 'where applicable, an examination of the international protection needs' of asylum seekers. The existence of a specific provision on the scope of judicial review has enabled the Court to formulate a particularly strong view about the powers attributed to national courts or tribunals in this context. On the basis of Article 46(3) of the Directive, interpreted in the light of Article 47 of the Charter, the Court was able to offer detailed guidance about the respective powers and competences attributed to the administration and the judiciary in the field of asylum. It called upon the 'court or tribunal' competent on appeal to carry out a novel and comprehensive appraisal of the international protection needs of asylum seekers.[960] In other words, the Court instructed the Member States to establish an independent and impartial full jurisdiction (*recours de plein contentieux*) on appeal against administrative decisions on asylum. The scrutiny exerted in this context involves not only an assessment of the (objective) legality of administrative decisions on asylum, but also an appraisal of the merits of the reasons underlying such decisions.[961]

In parallel, the Court also emphasized that the administration is bound by the assessment conducted by the competent court or tribunal in this context. This means that the determining authority to which the case is returned cannot depart from the

[960] Case C-556/17, *Torubarov*, para 65; Case C-216/22, *Bundesrepublik Deutschland (Recevabilité d'une demande ultérieure)*, para 62.
[961] Widdershoven, 'General EU Law Limits', supra note 842, 24.

determinations made by the competent court or tribunal seized on appeal. As noted earlier,[962] it follows from *Torubarov* that the remedial powers vested in national courts or tribunals can even increase in circumstances involving blatant disrespect for the judicial decision delivered on appeal.

Perhaps somewhat surprisingly, the Court has, to date, devoted scant attention to the requisite organisational features of national courts and tribunals entrusted with the task of patrolling the legality of administrative decisions on asylum.[963] This is surprising, given that the Asylum Procedures Directive exhibits a more or less explicit emphasis on the institutional make-up of administrative and judicial decision-making bodies involved in the implementation and enforcement of EU asylum law. To be sure, the Directive leaves some leeway to the Member States in respect of the organisational design of competent determining authorities. By virtue of Article 2(f) of that Directive, the Member States may attribute competence to rule on requests for asylum to 'any quasi-judicial or administrative body'. However, the Directive also provides that the Member States must set up an effective remedy against first-instance decisions on asylum before a 'court or tribunal'. According to Article 46(1) of the Directive, as interpreted in *Alheto*, the Member States must establish a layer of appeal before a 'court or tribunal', regardless of whether the determining authority is an administrative or quasi-judicial body.[964]

It should be clear, in this regard, that the core requirements of judicial protection deriving from Article 47 of the Charter prescribe that the reviewing body must be independent and impartial.[965] Moreover, the existence of a specific provision governing

[962] Section 4.3.
[963] To be sure, it is worth remembering that the Court offered some guidance on the concept of 'court or tribunal' spelled out in Article 39(1) of the Asylum Procedures Directive, in its previous iteration. In Case C-175/11, *H.I.D. and B.A.* (EU:C:2013:45), the Court of Justice considered that the Irish Tribunal could be deemed as independent, in spite of the fact that it maintained organisational links with the executive, as well as the competent determining authority. It reasoned that the possibility to appeal decisions adopted by the Tribunal in front of higher courts or tribunals was: 'capable of protecting [that tribunal] against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members' (para 103). By doing so, the Court formulated rather weak recommendations regarding the system of appeals that had to be set up at the domestic level. It did not spell out positive obligations relating to the way in which the Member States must organise the bodies competent to scrutinise administrative action in asylum matters. It followed that the Member States were afforded broad leeway to structure their judicial and administrative systems in a way that accorded with their own national legal traditions. It is rather doubtful, however, whether that judgment remains good law. In the wake of recent judgments on the criterion of independence of courts or tribunals, there is a reasonable argument to be made that this judgment no longer reflects the current stance of the Court on that matter. In *FMS*, for instance, the Court was keen to insist that the judiciary must 'exercise its functions wholly autonomously', which entails that 'the independence of the judiciary must be ensured in relation to the legislature and the executive' (Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*, paras 135-136).
[964] Case C-585/16, *Alheto*, para 104.
[965] Section 4.2.

the right to bring appeals proceedings before national courts of tribunals (i.e., Article 46 of the Asylum Procedures Directive) seemingly encourages the Member States to establish a judicial body as such, rather than a quasi-judicial body.[966] This is especially true in the light of the judgment delivered in *El Hassani*.[967] As a reminder, the Grand Chamber of the Court instructed the Member States to set up at least one appeal before a judicial body for individuals wishing to challenge the legality of individual visa decisions. For the present discussion, it is worth highlighting that this outcome was reached despite the fact that the right of appeal mentioned in the Visa Code was 'open-ended as to the nature of that right'.[968] The existence of a right of appeal in front of a 'court or tribunal' under Article 46(1) of the Asylum Procedures Directive similarly supports extending the solution crafted in *El Hassani* to the field of asylum.

To date, however, the Court has failed to address salient organisational issues regarding the nature and composition of the bodies entrusted with the task of patrolling the legality of administrative action in this field. By embracing a particularly far-reaching view about the scope of review vested in national courts or tribunals, the Court has nonetheless indirectly or implicitly advocated for the creation of additional institutional constraints regarding the nature and composition of asylum courts and tribunals. In doing so, it has seemingly encouraged the EU legislature to take the bull by the horns and provide more detailed recommendations about the institutional design of those appeal bodies.

5.4. Interim conclusion

It follows from the foregoing considerations that the Court of Justice did not always explicitly address the institutional implications of the principle of effective judicial protection. In the presence of common procedural rules on these matters, however, the Court did not shy away from providing detailed instructions regarding the institutional framework governing national decision-making processes in the implementation of EU law. Overall, the story presented in this section highlights the Court's reliance on the regulatory context inherent to these three policy areas when formulating positive and detailed guidelines on how judicial oversight of administrative action should be

[966] An additional argument in that sense may be derived from a literal interpretation of the Asylum Procedures Directive. A distinction is indeed established between the competent 'determining authority', which may be an administrative or a quasi-judicial body, and the competent 'court or tribunal'. Although the Directive does not spell out detailed guidelines about the nature of national courts or tribunals, it may reasonably be suggested that they should be of a different nature than the competent determining authority.
[967] Case C-403/16, *El Hassani*. The judgment delivered in *FMS* also provides additional authoritative guidance to support that outcome.
[968] Opinion of AG Bobek in Case C-403/16, *El Hassani*, para 112.

structured at the Member State level. This approach reflects the Court's effort to avoid unduly encroaching on national procedural autonomy. At the same time, it allows the Court to issue detailed institutional recommendations that are tailored to the specific needs of each policy sector. Consequently, by focusing narrowly on the institutional implications deriving from the principle of effective judicial protection, the classical narrative may obscure the diverse ways in which institutional requirements are framed in these three policy sectors.

6. Conclusion

This chapter has addressed the overarching research question guiding this thesis: how do the case studies conducted in the areas of EU environmental, equality, and asylum law help distinguish between the core and the periphery of the fundamental right to an effective judicial remedy, and what are the implications of this distinction for the Member States' competences to organise their judicial systems? Drawing on these three case studies, it highlighted how the requirements of effective judicial protection under EU law shape national procedural autonomy in a context characterised by the expanding scope of harmonised procedural rules. If there is one key takeaway from this chapter, it is that regulatory context plays a crucial role in the endeavour to identify the outer boundaries of judicial intervention into national procedural law. Regulatory context, after all, appears to matter as much to the Court as any other factor, especially the principle of effective judicial protection. Specifically, the Court has drawn on existing sectoral procedural rules to develop specific obligations of judicial protection tailored to the normative aspirations of the three policy areas analysed in this thesis. Viewed from this perspective, the Court should be commended for attempting to craft specific obligations of judicial protection suited to the unique intricacies of these policy sectors.

By comparing the insights gleaned from these three case studies, this chapter also uncovered the core institutional features derived from the general principle of effective judicial protection, now enshrined in Article 47 of the Charter. It highlighted, in particular, two core components of this right: the requirement of judicial oversight of administrative action and the requirement of compliance with final judgments. It explored how the Court has safeguarded these core requirements by building on the regulatory framework inherent in the three policy areas analysed in this thesis. In other words, the case studies demonstrate that while the core elements of judicial protection remain consistent across sectors, the extent to which they influence national procedural law is directly shaped by the regulatory context of each policy area.

The implications of the Court's approach are quite clear. Beyond the core institutional requirements stemming from Article 47 of the Charter, it is arguably impossible to define a single, monolithic conception of judicial protection that is immune to the influence of the regulatory context underlying these three policy fields. By focusing primarily on transversal obligations of judicial protection anchored in EU primary law – especially Article 47 of the Charter – the classical narrative may, therefore, obfuscate the diversity of ways in which judicial protection manifests across these areas. The Court's approach also allows it to avoid overstepping into the realm of national procedural law. Ultimately, the intensity with which the Court formulates recommendations regarding the institutional set-up of appeals depends on the scope and level of detail of common procedural rules established by the EU political institutions. As a reminder, these rules reflect distinctive national procedural traditions, and by interpreting them, the Court is able to delineate the boundaries between EU and national law in a way that respects the diverse procedural landscapes established at the Member State level.

Nonetheless, a reasonable case can be made that the Court should adopt a more explicit stance on the distinctive role of common procedural rules in this context. Specifically, the Court should more clearly articulate the relevance of common procedural rules in its endeavour to identify the procedural, remedial and institutional requirements governing the implementation and enforcement of EU material provisions at the domestic level. This may admittedly seem difficult to reconcile with the 'cartesian' style of reasoning traditionally employed by the Court.[969] The role of Advocate Generals in this context cannot be overstated. Within the bounds of their mandate, they could adopt a more discursive approach, explicitly addressing this matter.

Furthermore, the Court may be expected to take a clearer stance, particularly when deciding matters of significant importance, justifying recourse to the Grand Chamber – as was the case in judgments such as *Torubarov* and *Deutsche Umwelthilfe* (C-752/18). Such an approach would help clarify the complex and sometimes overly convoluted relationship between, on the one hand, the core requirements of Article 47 of the Charter, and on the other hand, the peripheral matters that must be defined by the EU political institutions within the framework of the powers and competences granted to them by the Treaties. Such an approach would also provide a clearer understanding of the role of the EU legislature and other political institutions in shaping the distinctive contours of judicial protection prevailing across the wide range of policy

[969] Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in op. cit. supra note 856. Compare with Weiler, 'Epilogue: Judging the Judges - Apology and Critique' in the same book, describing the Court's approach as 'cryptic and uncommunicative' (p. 248); Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press, 2012), p. 162: 'the ECJ... often adopts a magisterial or declaratory style of judgment'.

sectors falling within the scope of EU law. In addition, it would streamline and clarify the Court's approach to the interaction between EU law and national procedural autonomy in a context characterised by the growing scope of procedural harmonisation by secondary law.

General conclusion

In recent years, there has been a sharp increase in the number of EU secondary law provisions establishing procedural rules for the administrative and judicial enforcement of EU law at the national level. Those provisions, which serve as detailed legislative concretisations of the general principle of effective judicial protection – now enshrined in Articles 19 TEU and 47 of the Charter – raise topical questions about the evolving relationship between the EU legislature, the European Court of Justice, and the Member States in shaping procedural and remedial frameworks across the EU. Yet, the academic literature has failed thus far to address the role of harmonised procedural obligations under secondary law in structuring national judicial systems. Instead, the 'core narrative' on national procedural autonomy has focused almost exclusively on the obligations of judicial protection developed by the Court under EU primary law.[970] As Dougan and Episcopo cautioned, this approach risks neglecting 'the role played by the Union legislature' in shaping national remedies and procedures, [971] thus failing to account for the significance of the regulatory context within which the Court is called upon to intervene.

Against this background, the thesis has explored the evolving landscape of judicial protection under EU law by unpacking the complex and dynamic interplay between EU primary law and secondary legislative provisions that define sector-specific obligations of judicial protection. To explore this topic, it has conducted a doctrinal analysis of the Court's case law establishing positive obligations of judicial across the policy areas of environmental, equality, and asylum law. In contrast to previous academic literature, which has focused almost exclusively on obligations derived from EU primary law, this thesis also considered obligations established by secondary law. Additionally, it has critically engaged with prior doctrinal analyses of the relevant case law. This approach has allowed for a comprehensive understanding of the obligations of judicial protection prevailing in the policy areas of environmental, equality, and asylum law.

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[970] On the 'core' narrative, see Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation*, chs 5-6 (Hart Publishing, 2004); Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press, 2006); Craig and De Búrca, *EU Law: Text, Cases and Materials* (6th edn, Oxford University Press, 2018), p. 305, 328; Steiner and Woods, *EU Law* (Oxford University Press, 2009), 8.3; Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 Irish Jurist 13, 14; Schütze, *European Union Law* (3rd edn, Oxford University Press, 2021), pp. 417 et seq.; Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in in Bonelli, Eliantonio and Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022).

[971] Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before National Courts' in Craig and De Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press, 2011); Episcopo, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before National Courts' in Craig and De Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press, 2021), p. 276.

Based on these case studies, this thesis has demonstrated that legislative procedural obligations in the areas of environmental, equality, and asylum law have been instrumental in shaping robust positive obligations of judicial protection that go beyond the constitutional elements of the right to an effective judicial remedy enshrined in EU primary law. More specifically, this thesis highlighted that the scope of these obligations hinges on the scope and level of detail of legislative procedural standards governing the administrative and judicial enforcement of EU law at the national level in these policy areas. Where secondary law establishes such detailed procedural standards, the Court of Justice has relied on them to develop positive obligations of judicial protection. This thesis emphasised that such obligations vary across policy areas, as they are shaped by the regulatory context of environmental, equality, and asylum law. By comparing and contrasting the obligations developed in each policy area, this thesis has also made it possible to distinguish between transversal obligations of judicial protection, applicable across all areas of EU law, and policy-specific obligations shaped by sectoral regulatory frameworks.

To demonstrate this, this thesis was divided into five chapters. Chapter 1 argued that the analytical framework for studying the interaction between EU law and national procedural autonomy should be revamped to provide a more accurate account of the obligations of judicial protection imposed on the Member States in organising their judicial systems. It explained that the classical or 'core narrative' on national procedural autonomy traditionally approaches this issue by analysing the procedural obligations developed by the Court under EU primary law. Chapter 1 then highlighted the limitations of this model, particularly in the light of the expanding scope of secondary law provisions establishing common procedural standards. To provide a more accurate and comprehensive account of the development of positive obligations of judicial protection – one that acknowledges the pivotal role of the EU legislature in shaping these obligations – Chapter 1 stressed the need to analyse not only those derived from EU primary law but also those established by secondary law.

This revamped analytical framework was then applied to test the following research hypothesis across the areas of environmental, equality, and asylum law: *the expansion of secondary law provisions establishing harmonised procedural standards has facilitated the development of judge-made obligations of judicial protection, extending beyond the core constitutional features of the right to an effective judicial remedy*. This research hypothesis enabled a distinction between core and 'peripheral' components of the fundamental right to an effective judicial review, which in turn made it possible to answer the key research question of this thesis: *To what extent do the legislative obligations requiring the Member States to ensure access to justice in the harmonised policy areas of environmental, equality, and asylum law help uncover the core of the fundamental right to effective judicial protection and shape the obligations of judicial protection flowing from that core?*

Chapter 2 highlighted the decisive influence of the Aarhus Convention in shaping judicial protection in the area of environmental law. It explored how the interplay between the Aarhus Convention and secondary law provisions has guided the Court in defining robust obligations of judicial protection, particularly in relation to the standing of individuals and collective entities before domestic courts. By drawing on the procedural standards established by the Convention, the Court has empowered concerned individuals and collective entities to access justice, enabling them to hold national public authorities accountable for breaches of EU environmental law. As a result, this case law reflects a commitment to an objective conception of justice that ensures the effective enforcement of environmental law at the national level.

Chapter 3 examined how the establishment of equal treatment guarantees in the employment sphere through secondary law has contributed to expanding the horizontal application of these guarantees. It explained that the Court has relied on the Charter and secondary law provisions on equal treatment to develop a conception of justice based on subjective equality rights. By interpreting the procedural framework established by the Charter – specifically its horizontal provisions – the Court has strengthened the judicial enforceability of equal treatment rights derived from secondary law. As a result, individuals were empowered to invoke these rights in private law disputes against other individuals, ensuring greater judicial protection in the employment context. Additionally, Chapter 3 explained that the adoption of legislative provisions ensuring access to labour-related information has enabled the Court to extend similar information rights to areas beyond the scope of the relevant secondary law provisions. In doing so, the Court has reinforced transparency and access to information as key components for enabling individual workers to enforce their equality rights before national courts, even in the absence of explicit secondary law provisions on that matter.

Chapter 4 explored how the Court has developed positive obligations of judicial protection in asylum matters grounded in Directive 2013/32.[972] It showed that the harmonised procedural framework established by the Directive, including obligations on the administrative and judicial enforcement of EU asylum law, has enabled the Court to shape detailed and specific obligations of judicial protection. Specifically, Chapter 4 demonstrated that the Directive has enabled the Court to develop a conception of judicial protection that is attuned to the fundamental rights specificity of asylum law, particularly the principle of *non-refoulement*, as enshrined in Article 33 of the Refugee Convention and Articles 4 and 19 of the Charter. Article 46(3) of the Directive has played a crucial role in this context, as it allowed the Court to grant

[972] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60.

extensive powers to national judges when reviewing whether the administration has complied with EU asylum law.

Across these three case studies, the Court articulated detailed, sector-specific obligations of judicial protection that extend beyond the core constitutional components of the right to an effective judicial remedy, as enshrined in Articles 19 TEU and 47 of the Charter. Chapter 5, in particular, argued that the Court's approach was shaped by the regulatory framework of each policy area, particularly the relevant procedural rules and the nature of the rights and/or interests underlying these areas. To reach this conclusion, Chapter 5 systematically compared and contrasted the findings from the three case studies. This analysis identified two categories of obligations:

(i) **Transversal obligations of judicial protection**, which apply even in the absence of specific harmonised obligations of judicial protection established by secondary law. These obligations form part of the core of effective judicial protection, though their scope is identified on a case-by-case basis.

(ii) **Sector-specific obligations of judicial protection**, shaped by sectoral procedural rules set out in secondary law.

This thesis demonstrated that the extent to which the Court formulated specific obligations of judicial protection beyond the core of effective judicial protection depends on the scope and specificity of harmonised procedural rules established by secondary law. Examining these 'peripheral' obligations is essential to understanding which requirements form an integral part of the core of effective judicial protection, particularly given that the Court of justice is not always explicit in this regard. This thesis nevertheless made clear that, in order to fully grasp the core of effective judicial protection, it is necessary to examine those 'peripheral' obligations.

Overall, the findings of this thesis underscore the increasingly prominent role of the EU legislature in shaping common procedural standards governing access to justice for the enforcement of EU law at the national level. This challenges the traditional academic literature, which has primarily focused on the Court's role in developing positive obligations of judicial protection under EU primary law, while often overlooking the impact of legislative harmonisation. By highlighting the need to consider the regulatory context in which the Court operates – particularly in the presence of legislative harmonisation – this thesis sheds light on the evolving and dynamic interaction between the EU and its Member States in the area of judicial protection. It contributes to a clearer distinction between the core and the periphery of effective judicial protection.

As the scope and level of detail of legislative procedural harmonisation continue to expand, the influence of EU law on the organisation of national judicial systems

progressively increases. The increasing proceduralisation of EU secondary law reflects a shift towards a more detailed and comprehensive common framework for judicial protection across the EU Member States. As a result, the core of effective judicial protection is strengthened through sector-specific 'peripheral' obligations derived from secondary law, as interpreted by the Court of Justice. This phenomenon is likely to generate additional tensions between harmonised procedural rules and national procedural traditions, as the Member States must incorporate these obligations into their judicial systems, sometimes replacing deeply embedded national procedural rules. Exploring how the growing proceduralisation of EU law affects national courts' mandate in enforcing EU rights would offer key insights into the shifting landscape of judicial protection and contribute to a deeper understanding of the evolving balance of competences between the EU and its Member States in this field.

Moreover, the proliferation of procedural obligations established by secondary law risks obscuring the essence of effective judicial protection. As the Member States are increasingly required to adjust national procedural law to conform with EU standards of judicial protection, there is a risk that they may shift their attention away from the core guarantees enshrined in Article 47 of the EU Charter. The consequences for access to justice and the rule of law cannot be overlooked. After all, this thesis demonstrated that the essence of judicial protection has served as a vehicle for subjecting administrative decision-making to judicial review in areas governed by EU. Viewed from this perspective, the core of the right to effective judicial protection has contributed to upholding the rule of law across the EU – particularly in areas where procedural harmonisation is lacking.

In the light of this, the analysis presented in this thesis did not seek to comprehensively map or resolve all the tensions identified but rather to contribute to the broader debate on these issues. It hopes to have clarified the distinction between core and peripheral obligations of judicial protection, while highlighting the key constitutional tensions that may arise from their coexistence in practice. These tensions are likely to intensify as the EU legislature becomes increasingly involved in establishing both administrative and access to justice obligations across diverse areas of EU law. In this increasingly complex and varied landscape, identifying the core features of effective judicial protection remains, more than ever, a pressing challenge.

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