Introduction

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The EU prides itself on having created a legal system that puts the individual at its centre. So much so that this is what the Court of Justice of the EU (CJEU) has identified as the core of what distinguishes the EU from other international organisations.[1] Yet, the 1957 Treaties of Rome, setting up the European Economic Community, a predecessor of the EU, included no general fundamental rights protection regime.[2] A community with a primarily economic scope was not considered to be in need of one.[3] However, as the EU evolved, so did the role and place of fundamental rights in its legal system. Over the course of several decades, the CJEU developed the contours of an EU-specific fundamental rights protection regime that culminated in the adoption of a legally binding Charter of Fundamental Rights of the EU (CFR, 'the Charter').[4] Initially, this fundamental rights protection regime may have emerged from a need for 'self-preservation'.[5] But over time, it has evolved to become a core aspect of the EU's identity and self-perception,

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1 Case C-26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1, 12; see also Charter of Fundamental Rights of the European Union [2016] OJ C202/389 (CFR), preamble.

2 Treaty establishing the European Economic Community (Rome, 25 March 1957) (TEEC).

3 Nanette A Neuwahl, 'The Treaty on European Union: A Step Forward in the Protection of Human Rights?' in Nanette A Neuwahl and Allan Rosas (eds), *The European Union and human rights* (Martinus Nijhoff 1995) 1–2; Sionaidh Douglas-Scott, 'The European Union and Fundamental Rights' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018) 384–385.

4 One of the first mentions of 'fundamental human rights' was made in Case C-f29/69 *Stauder v Ulm* [1969] ECLI:EU:C:1969:57. While the CFR was signed in Nice on 7 December 2000, it only became legally binding with the entry into force of the Treaty of Lisbon [2007] OJ C306/1.

5 For a concise account of the '*Solange* saga' see Neuwahl (n 3) 3–6; Douglas-Scott (n 3) 383–384.

featuring as a founding value in Article 2 of the Treaty on European Union (TEU).[6]

There is no doubt that today individuals benefit from a broad range of fundamental rights that protect them against EU power. Yet, as Cappelletti and Garth noted in their seminal work on access to justice back in 1978, 'the possession of rights is meaningless without mechanisms for their effective vindication'.[7] For that very reason, Article 47 CFR guarantees everyone whose rights have been violated the right to an effective remedy. This includes a right to access procedures before a tribunal within the context of which an individual can obtain relief for fundamental rights violations that have occurred.[8] From this perspective, the right to an effective remedy is not just any right but the prerequisite for the effective enjoyment of all other rights and 'one of the foundations of a European Union based on the values of the rule of law'.[9]

Nonetheless, the remarkable rise of fundamental rights protection in the EU has remained almost entirely limited to the substantive sphere and was not accompanied by any major procedural reform. The formal incorporation of the Charter into the EU legal system at primary law level resulted in individuals being able to make use of the generally available EU remedies system to vindicate their Charter rights, even though this possibility had in any case already existed for those rights also recognised as general principles of Union law. But this remedies system has significant limits.

At its centre is the action for annulment under Article 263 Treaty on the Functioning of the EU (TFEU), within the context of which EU legal acts can be reviewed and, if in conflict with higher-ranking law, annulled.[10] Individuals are, quite tellingly, 'non-privileged applicants'. Although they have the possibility to file actions for annulment, the standing requirements are so stringent that they are rarely met in practice.[11] Under similar conditions,

[6] Consolidated Version of the Treaty on European Union [2016] OJ C202/13 (TEU), art 2.

[7] Mauro Cappelletti and Bryant Garth, *Access to Justice: Vol. I A World Survey* (Book I, Sijthoff; Giuffrè 1978) 8.

[8] Herwig C Hofmann, 'Article 47: Specific Provisions (Meaning)' in Steve Peers and Others (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart 2021) 1285; Kathleen 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, 886–889.

[9] Opinion of AG Bot in Case C-511/13 P *Philips Lighting Poland and Philips Lighting v Council* [2015] ECLI:EU:C:2015:206, para 88. See also Case C-311/18 *Data Protection Commissioner v Facebook Ireland Ltd & Maximilian Schrems* [2020] ECLI:EU:C:2020:559, para 187.

[10] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU), art 263. Under similar conditions, individuals can make use of the action for failure to act under Article 265 TFEU.

[11] TFEU, art 263(4).

individuals can challenge inactivity of an EU body by lodging an action for failure to act, but the mechanism is geared towards making EU bodies act, rather than ensuring the action they take is lawful.[12] The only more broadly accessible procedure is the action for damages under Articles 268 and 340 TFEU in order to claim compensation for damage caused by the EU. However, the threshold for liability to arise is notoriously high, limiting chances of success.[13]

The essence of this remedies system was designed and drafted in 1957, with the creation of the European Economic Community, and has not undergone substantial reform since then.[14] While the Charter became legally binding with the Lisbon Treaty, a deliberate choice was made then not to add a dedicated fundamental rights complaints procedure, built on national examples such as the German *Verfassungsbeschwerde* or the Spanish *recurso de amparo*, to the EU remedies system.[15] Instead, some 'tweaks' were made to the standing requirements of Article 263(4) TFEU. Predominantly, this served the purpose of accounting for the very specific case of otherwise unchallengeable self-executing EU acts of general application and thus had only limited effect.[16] Other gaps in the EU's remedies system were left unaddressed. The potential of mechanisms other than the action for annulment to close these remained underexplored.

In the meantime, EU power has continued to evolve, exposing ever deeper gaps in the EU's remedies system. The EU has gained competences in more inherently fundamental rights sensitive areas, such as immigration and asylum law or crime prevention. It has expanded its activities from lawmaking to executive powers, the impact of which is more immediately felt by individuals. And it has set up large administrative agencies reaching into all corners of bureaucratic activity.

[12] TFEU, art 265. Once the EU body in question has acted, the legality of that action can be reviewed in the context of Article 263 TFEU. See Case T-282/21 *SS and ST v Frontex* [2022] ECLI:EU:T:2022:235, paras 31–33.

[13] To claim compensation from the EU, applicants *inter alia* have to show that the breach complained of is 'sufficiently serious', Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECLI:EU:C:2000:361, para 42.

[14] See TEEC, arts 173, 175, 178, 215.

[15] See the recommendations by the European Convention, which drafted the (failed) Constitutional Treaty that was later adopted with some alterations as the Lisbon Treaty: The European Convention, Final Report of Working Group II, 22 October 2002, CONV 354/02, 15.

[16] Angela Ward, 'Article 47: The Right to an Effective Remedy under the First Paragraph of Article 47 and Challenge to EU Measure' in Steve Peers and Others (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart 2021) 1329–1331.

The effect of these factors on the right to an effective remedy is most evident in relation to the EU agency Frontex.[17] Deploying the EU's first ever armed force is one of the most striking examples of how significantly the EU has evolved.[18] At the same time, it exposes how ill-equipped the remedies system seems to be to deal with this evolution: for years, the fundamental rights violations Frontex has been involved in have been well documented. Yet, the first ever case where the legality of Frontex's activities in this respect were substantively assessed by a competent court was brought in September 2021 before the CJEU under an action for damages, the only judicial action available to the applicants. It was dismissed on 6 September 2023 by the CJEU without any substantial discussion of the fundamental rights dimension of the case.[19]

This raises the question: Is a remedies system designed for an EU that adopts laws with a predominantly economic scope still capable of effectively protecting against an actor with a much more diverse mandate and toolbox? Or has the EU outgrown its own remedies system?

I.1 THE AIM OF THIS BOOK

Ever since the 1986 case of *Les Verts*, the CJEU has consistently held that the Treaties on which the EU is based (in the following, 'the Treaties') have established a 'complete system of remedies', even in the face of challenges by its own Advocates Generals.[20] This book critically examines this claim from a fundamental rights perspective, taking into account actions beyond annulment and the EU's activities outside the realm of lawmaking.

The book follows three lines of enquiry. First, how can private parties vindicate their fundamental rights within the current EU remedies system? This volume maps the existing mechanisms private parties can avail themselves of to enforce their fundamental rights against the EU and identifies

[17] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1 (EBCG Regulation).

[18] EBCG Regulation, art 82 and Annex V.

[19] Case T-600/21 *WS and Others v Frontex* [2023] ECLI:EU:T:2023:492.

[20] Case C-294/83 *Les Verts v Parliament* [1986] EU:C:1986:166, para 23; more recently Case C-72/15 *Rosneft* [2017] ECLI:EU:C:2017:236, para 66. A powerful critique was offered by AG Jacobs, who argued that the limited access of private parties to the Court to challenge the validity of Union measures 'is incompatible with the principle of effective judicial protection', Opinion of AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECLI:EU:C:2002:197, para 49.

their strengths and weaknesses, with particular regard to the requirements that follow from the right to an effective remedy. In doing so, it specifically focuses on the EU's role beyond an economically oriented lawmaker to account for the changes EU power has undergone and the challenges this raises from a remedies perspective.

Second, is there unused potential within the remedies system to enable individuals to vindicate their fundamental rights? The general wisdom is that the EU's remedies system offers only very limited possibilities for private applicants to hold the EU accountable. While this is certainly true, many of the limitations are only sketched out in very general terms in the Treaties and ultimately stem from the strict interpretation thereof by the CJEU. This means that the remedies system as we find it in the Treaties might harbour untapped potential to accommodate fundamental rights complaints. This volume explores how that potential may be exploited.

Third, should infringements of rights be treated differently from other breaches of EU law in terms of how they can be addressed from a remedies perspective? Article 47 CFR grants everyone whose rights may have been violated a right to an effective remedy, which might form a legal basis to afford individuals a more central position in the enforcement of obligations that confer rights on them. Yet, in a complex judicial system like the EU's, where alongside the CJEU national judges play a crucial role in the enforcement of EU law, it is not always self-evident how exactly the right to an effective remedy should be given concrete shape. This volume enquires whether rights generally, fundamental rights specifically, or even just some fundamental rights require a tailor-made remedies mechanism and, if so, what this could look like.

I.2 THE SCOPE OF THIS BOOK

Three notions are central to this book: the remedies system, EU authorities, and fundamental rights.

I.2.1 *The Remedies System*

The notion of 'remedies system' is understood in this book to cover every mechanism that (potentially) offers individuals the possibility to vindicate their rights against the EU. Much of the discussion to date has focused on the action for annulment as the primary means of judicial control and, to some degree, the preliminary reference procedure. However, the argument surrounding the 'completeness' of the EU's remedies system builds on the idea

of the complementarity of the mechanisms provided.[21] No mechanism is 'complete' on its own, but together they are. Thus, to assess 'completeness', it is essential to look at the remedies system as a whole. This book does so, covering in particular judicial remedies before the CJEU, national courts, and the European Court of Human Rights.

While the focus is on judicial mechanisms – ultimately being what the right to an effective remedy requires – this volume also takes into account non-judicial mechanisms. The latter have largely been neglected in legal scholarship, even though they have significant potential, especially in a system where judicial remedies may be scarce or difficult to access.[22] This book thus also explores where and how non-judicial mechanisms can complement – or even outperform – court-centred forms of dispute resolution.

I.2.2 *EU Authorities*

The notion of 'EU authorities' is understood both narrowly and broadly. It is narrow in that Member State authorities are excluded from the enquiry. From the outset, the remedies system was primarily designed with the non-compliant Member State in mind. This book changes the perspective, investigating the degree to which the remedies system can also effectively respond to fundamental rights violations committed by the EU itself.

Within this setting, the notion of 'EU authorities' is understood broadly. It covers all types of EU bodies, be they institutions, offices, or agencies, and all types of conduct these authorities may engage in. While the book covers law-making as an important way in which the Union acts, its focus is on executive and operational activities, as well as those types of conduct that are in the grey zone in between, such as soft law or support and guidance to Member State authorities. The reason is not that these activities are per se more fundamental rights sensitive but rather that the remedies system was 'not made for them'. For obvious historical reasons, the EU's own breaches of EU law were – if at all – imagined to be committed through EU legislation. In light of the evolution of the EU, this book explores how flexible the remedies system is to accommodate today's EU in all its dimensions.

It is worth noting that the enquiry is therefore not limited to a particular EU body or EU bodies in a particular policy area. Having said this, it is in fact

[21] E.g., *Rosneft* (n 20) para 66.

[22] Notable exceptions, for example: Michal Krajewski, *Relative Authority of Judicial and Extra-Judicial Review: EU Courts, Boards of Appeal, Ombudsman* (Hart 2021); Moritz Schramm, 'Emulated Guardians: Practice, Politics, and Performativity of the DSA and the Oversight Board' (PhD Thesis, HU Berlin, June 2023).

inspired by the EU's activities in the area of migration and asylum law and, more specifically, the EU agency Frontex, which illustrates the gaps in the current remedies system remarkably well. However, many of the challenges that obstruct individual access to justice are of a more general nature, which is why this book is too: the 'non-privileged' access of private parties to the remedies system, the focus in the remedies system on the EU as a lawmaker, and the lack of a common forum to lodge complaints against the EU and one or more Member States, to name but a few. To achieve a remedies system that stands the test of time, it is important to look beyond the current activities of a single agency and the problems these may raise. This book thus takes a forward-looking approach, striving to offer an analysis that is of broader relevance today and in a continuously evolving Union.

I.2.3 *Fundamental Rights*

Finally, the notion of fundamental rights. Fundamental rights as protected by the CFR form the very core of this book. The question at the heart of all chapters in this volume is how private parties, and individuals more specifically, may vindicate their fundamental rights against the EU. While this is related to the more general issue of effective enforcement of EU law, the discussion in this book is limited to only those mechanisms that in one way or another allow individuals themselves to take an active role in the enforcement of their own rights.

The reason for the focus on fundamental rights is simple: The promise of rights for individuals entails a promise that these can be enforced. Rights are – to quote Cappelleti and Garth a second time – 'meaningless if they cannot be enforced'. To put it differently, the true strength of rights protection within a legal order becomes apparent when we understand the extent of individuals' power in situations where they cannot rely on public authorities to willingly uphold their rights.

But the reasons for the focus on fundamental rights go deeper. It is remarkable that something that was not even worth mentioning back when the EU's predecessor was created is a cornerstone of its legal system today. In many ways, the rise of fundamental rights protection within the EU legal order is intimately connected with the changes in the breadth and nature of EU power, infusing it with legitimacy. Yet the substantive rise of fundamental rights protection was not accompanied by the creation of strong enforcement tools for the beneficiaries of this protection. The rights on paper thus risk raising expectations that the EU is not always able to meet, which in turn may feed into growing disillusionment with the EU but also a certain loss of credibility on the world stage.

Ultimately, this book seeks to contribute to a vision on how to 'complete' the project of bringing fundamental rights to the core of the EU's legal system, not just substantively but also through procedural mechanisms that are available and accessible to individuals, thus truly living up to the promise of the 'complete system of remedies'.

1.3 THE STRUCTURE OF THIS BOOK

The book is structured into four parts. Part I delves into judicial mechanisms before the CJEU. Its aim is to take stock of the CJEU's approach to fundamental rights complaints in direct and indirect actions and explore the room these procedures provide to accommodate these types of complaints. It starts with the two main mechanisms through which individuals may directly access the Court: Chapter 1 on the action for annulment (Giulia Gentile) and Chapter 2 on the action for damages (Melanie Fink, Clara Rauchegger, Joyce De Coninck). This is followed by a closer look at evidence rules and how they enable (or not) effective judicial protection in Chapter 3 (Ljupcho Grozdanovski). Concluding Part I is an empirical study of the role of fundamental rights complaints against the EU within the context of the preliminary reference procedure in Chapter 4 (Lucía López Zurita).

Part II investigates how remedies beyond the CJEU may accommodate fundamental rights–based complaints against the EU. It starts with an assessment of EU review bodies beyond the judiciary in Chapter 5 (Moritz Schramm). This is followed by a look at the role of national courts in Chapter 6 (Andreas Hofmann) and the European Court of Human Rights in Chapter 7 (Jasper Krommendijk) in offering remedies to individuals whose rights may have been violated by an EU body.

Part III explores ways to push the boundaries of the EU's remedies system. Chapter 8 (Kris van der Pas) takes a look at the existing mechanisms through the lens of strategic litigation, enquiring what room there might be to exploit their full potential. The two remaining chapters in this part step outside the current form the remedies system takes. Chapters 9 and 10 explore the benefits that fundamental rights–specific alternative dispute resolution (Veronika Yefremova) or online dispute resolution (Maria José Schmidt-Kessen) might yield, respectively.

Part IV delves deeper into the limits and potential of the remedies system. Each chapter takes as a starting point a type of activity that the remedies system prima facie struggles to accommodate. The chapters in this part are organised according to the degree to which the activity in question entails direct contact with the private party potentially harmed. In this vein, it starts with a discussion

of the remedies individuals have against EU law enforcement in Chapter 11 (Koen Bovend'Eerdt, Argyro Karagianni, Miroslava Scholten) and more generally factual conduct by an EU body in Chapter 12 (Florin Coman-Kund), both of which are likely to entail some form of direct interaction between the EU body and a private party. Both types of conduct challenge the remedies system because they were simply less common in the EU's early days, which is why devising remedies against them may not have seemed a priority.

Chapter 13 then takes a closer look at so-called composite procedures (Mariolina Eliantonio), understood as administrative procedures where both an EU body and a Member State authority formally cooperate in reaching a decision. The specific complexity here is that the many actors involved may blur not only the lines of substantive responsibility but also the lines of competence of national courts on the one hand and the CJEU on the other. In Chapter 14, the book zooms in on soft law (Merijn Chamon) with which the EU shapes outcomes in a way that may be hard to grasp within a remedies system that is focused on ensuring the legality of legally binding acts. Finally, Chapter 15 considers the newly emerging reliance by the EU on artificial intelligence (Simona Demková) and the suitability of the remedies system to accommodate this type of activity when it impacts the fundamental rights of individuals.

In Part IV, the fundamental rights perspective runs as a common thread through all the chapters at three levels. As a preliminary question, the chapters discuss how each type of activity may interfere with fundamental rights. The main question then is how infringements of fundamental rights through these types of conduct can be challenged by private parties. Finally, each chapter assesses how this relates to the promise of an effective remedy or access to justice more broadly, formulating recommendations on that basis.