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CORE ANALYSIS

Effective judicial protection: enforcement, judicial federalism and the politics of EU law

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Abstract

The general principle of effective judicial protection grants the right to obtain a remedy in the fields covered by EU law and is an essential component of the EU enforcement toolkit. Recent jurisprudential developments have complexified the role of this principle, by transforming it into a vehicle for the enforcement of the rule of law in the EU. As a result, the principle of effective judicial protection appears as the factotum of the EU legal system: it acts as a fundamental right and is an expression of the EU rule of law; furthermore, it is a legal basis to influence national fundamental rights and to impose procedural obligations on the EU institutions. This overview Article offers a novel account of the evolution of this principle in the EU legal landscape. First, it reflects on the trajectory of this evolving principle in the EU case law and in the academic discourse. Second, it identifies conceptual issues surrounding the role of effective judicial protection in the EU legal order in the light of the latest jurisprudential developments.

Keywords: EU constitutional law; effective judicial protection; Court of Justice; national courts; rule of law

1. Introduction

The EU general principle of effective judicial protection (or 'effective judicial protection') is one of the foundations of the EU legal order's ethos and the epitome of the EU liberal constitutionalism. In essence, this principle offers the guarantee of obtaining effective protection of the entitlements deriving from EU law. Effective judicial protection has a twofold function: it works as a fundamental right, and it constitutes the normative vessel for the standards of rule-of-law protection at the EU and at the national level. Hailed as a pillar of the EU constitutional architecture,[1] the principle of effective judicial protection has offered the legal anchor for 'creative solutions' in the EU case law.[2] As a result, effective judicial protection is the factotum of the EU legal order and constitutes an essential component of the EU enforcement toolbox.

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

[2]A Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' 36 (1) (2011) European Law Review 51; C Mak, 'Rights and Remedies: Art 47 EUCFR and Effective Judicial Protection in European Private Law Matters' (2012) Social Science Research Network <https://papers.ssrn.com/abstract=2126551> accessed 4 March 2022; S Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in C Paulussen, T Takacs, V Lazic, B van Rompuy, (eds), *Fundamental Rights in International and European Law* (Springer 2016) 143; M Bonelli, 'Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature' 12 (2019) Review of European Administrative Law 35.

This principle is currently reaffirmed in Article 47 of the EU Charter of Fundamental Rights (or 'the Charter'),[3] which lays down the right to a fair trial and to an effective remedy. An additional source is Article 19 TEU,[4] which distributes the division of competences between the EU and national courts in the enforcement of EU law. Since its establishment in the *Johnston* case,[5] this principle has generated significant discussion in the literature due to its wide application both at EU and national level. We may believe to be sending owls to Athens when discussing the principle of effective judicial protection further. But then again, some owls are endangered species and deserve our special care. In particular, the principle of effective judicial protection deserves renewed scholarly attention because of its 'endangered' status due to recent changes in the EU habitat, and especially following the rule of law backsliding in some Member States. Such developments have not only put the standards of judicial protection in the EU under strain, but they have also challenged the very foundations of the EU legal order. The principle of effective judicial protection was employed both as a legal weapon to capture violations of the rule of law as well as to build the EU constitutional identity in the face of the regression of fundamental guarantees in some Member States. As a result, conceptual issues on the very nature of this principle have emerged and remain so far under-explored.

This overview article seeks to take stock of these developments while contributing towards theorising the evolving role of effective judicial protection in the EU legal landscape. The article first outlines the EU case law on the double nature of the principle of effective judicial protection. It then delves into the literature and identifies different streams of studies on this principle. It concludes with reflections on the evolving function of effective judicial protection in the EU constitutional architecture.

2. Effective judicial protection as a fundamental right

Effective judicial protection was born as a fundamental right. Having its origins in Articles 6 and 13 ECHR (European Court of Human Rights), the principle of effective judicial protection grants a series of guarantees to ensure that EU rights are effectively enforced. In particular, the principle shapes the individual entitlements to protection of EU rights both at the national and the EU levels of governance. Through the principle of effective judicial protection, the Court of Justice embedded human rights considerations in the enforcement of EU law, thus transforming the effective enforcement of EU rights into a fundamental entitlement.

This dimension of the effective judicial protection principle powerfully emerged in two seminal cases: *Johnston* and *Kadi*. In the *Johnston* case[6] the principle has displayed its potential for the creation of procedural guarantees to pursue EU law legal claims before national authorities effectively. In that judgement, it was established that Article 6 of Directive 76/207/EEC included a right to judicial control stemming from Article 6 and 13 of the European Convention on Human Rights. Such a right '[. . .] reflects a general principle of law which underlies the *constitutional traditions common* to the Member States.' Accordingly, the procedural rules that existed in the United Kingdom and precluded review of a claim based on Directive 76/207/EEC had to be disapplied. In parallel, the action alleging a violation of that Directive was to be deemed as admissible before British courts. An essential aspect of effective judicial protection thus came to light in *Johnston*: the right to access national courts to vindicate the individual entitlements stemming from EU law.

The *Johnston* case is only the first instance in which the principle has demanded the setting aside of rules which hindered the effectiveness of EU law, in particular, at national level. Indeed, the power of effective judicial protection has also manifested itself at EU level, for example, in the

[3]Case C-279/09 *DEB v Bundesrepublik Deutschland* EU:C:2010:811, para 33.
[4]Case C-64/16 *Associação Sindical dos Juízes Portugueses* v *Tribunal de Contas* (*Associação*) EU:C:2018:117 para 35.
[5]Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206.
[6]*Johnston* (n 5).

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Kadi saga.[7] Having found a violation of that principle in the procedure used by the EU institutions to adopt sanctions implementing a UN Security Resolution, the Court of Justice ruled that these EU measures at stake were incompatible with EU law. On the basis of this judgement, the EU Courts introduced procedural requirements for EU institutions in the context of the issuance of sanctions: the imposition of these EU restrictive measures cannot disregard the minimum guarantees of procedural fairness.

The principle has later evolved so as to incorporate additional sub-rights. For instance, the right to equality of arms,[8] the principle of judicial independence,[9] and the right to proportionate court fees[10] are all emanations of the macro-principle of effective judicial protection. Effective judicial protection has become the compass of the effective application of EU law both in the EU and the Member States. Seen from another point of view, the principle has been instrumental to strengthen the right-based discourse initiated with *Van Gend en Loos*[11] and dominating in the EU jurisprudence. The involvement of courts in the application of EU law is one of the premises on the basis of which the EU was able to evolve.[12] In case national and EU authorities violate EU law, courts constitute the ultimate stronghold for the defence of EU legal entitlements.[13] All in all, effective judicial protection is the right to have EU rights: without that right, the other EU rights cannot be meaningfully enforced. Nevertheless, the principle of effective judicial protection has not only provided fundamental procedural rights in favour of individuals, but has also strengthened the standards of the rule of law in the EU and national constitutional space.

3. Effective judicial protection as the legal basis to protect the rule of law

It is well established that the rule of law requires the presence of a judicial system which can ensure the effective and equal application of the law and thus can limit abuses of power.[14] In the *Les Vert* judgement,[15] the Court of Justice embraced this principle and affirmed that 'the European Economic Community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.'[16] In this sense, effective judicial review of EU measures before the EU judicature is of the essence to ensure that the EU constitutional principles, including the rule of law, are respected.

More recently, since 2018 the Court of Justice has innovatively applied effective judicial protection to fight the rule of law backsliding in some Member States. This principle has thus become the vehicle for the *enforcement* of the rule of law at the national level. In *Associação*[17] the Court of Justice first recalled that Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It then stated that '[t]he very

[7]Joined cases C-104/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461.

[8]Case C-580/12 P *Guardian Industries Corp. and Guardian Europe Sàrl v European Commission* EU:C:2014:2363.

[9]*Associação* (n 4).

[10]Case C-61/14 *Orizzonte Salute Studio Infermieristico Associato* v *Azienda Pubblica di Servizi alla persona 'San Valentino'* EU:C:2015:655.

[11]Case C-26/62 *Van Gend en Loos* v *Netherlands Inland Revenue Administration* EU:C:1963:1.

[12]According to this judicial narrative, individual rights and their effective enforcement by national courts drive European integration. See JHH Weiler, 'The Transformation of Europe' 100 (1991) The Yale Law Journal 2403, 2477.

[13]The centrality of courts in the EU has attracted significant interest from European lawyers and researchers. See T Nowak and M Glavina, 'National Courts as Regulatory Agencies and the Application of EU Law' 43 (2021) Journal of European Integration 739.

[14]See for instance the first principle of the rule of law developed by Dicey. AV Dicey, *The Law of the Constitution* (10th ed, Oxford University Press 1959).

[15]Case-294/83 *Les Verts* v *Parliament* EU:C:1986:166.

[16]Ibid., para 23.

[17]*Associação* (n 4).

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existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law'[18] and that Member States must ensure that 'courts and tribunals' within the meaning of EU law meet the requirements of effective judicial protection. Such an interpretation of the principle of effective judicial protection took place though the prism of Articles 47 of the Charter and 19 TEU.

Following these developments, effective judicial protection is not only considered as a *manifestation* of the rule of law in the EU; rather, a violation of this principle *may entail breaches* of the rule of law in the EU, one of the EU founding values protected under Article 2 TEU. The normativisation of the rule of law via the channel of effective judicial protection has especially emerged in the context of the litigation concerning the judicial reforms introduced in Poland. In a series of ground-breaking judgements,[19] the Luxembourg Court has indicated that violations of the principle of judicial independence led to attacks on the rule of law.

The implications of this transformation are far-reaching. First, the rule of law in the EU has acquired bite and can be more easily enforced through the gateway of effective judicial protection. Consequently, the EU's role as guarantor of the rule of law was strengthened. Second, the rule of law in the EU appears to have acquired a scope of application equally broad to that of effective judicial protection. This latter principle has a wide content and captures various remedial deficiencies emerging in the context of judicial and even administrative procedures.[20] Third, judicial independence, as part of the rule of law, is a *sine qua non* condition for the effective enforcement of EU law.

However, this evolution has reshaped the function of effective judicial protection in the EU legal order. Indeed, the application of this principle in the rule of law saga appears to have stretched the scope of EU law through a jurisdictional question concerning the structure of national courts. Namely, the Court of Justice relied upon this principle as a gateway to scrutinise the structure of courts which *could* find themselves in the position of applying EU law.[21] This becomes evident in *Associação*, being the result of a preliminary ruling request. In that judgement, the Court of Justice held that the Tribunal de Contas, as a court that *may* rule on questions of EU law, should respect the requirements of effective judicial protection. Yet the Court was unclear whether the interpretation of EU law in the case at hand was necessary to solve a dispute pending before the referring court, and whether, in other words, the Tribunal de Contas was adjudicating upon EU law issues. It is a longstanding principle that the Court of Justice offers its answer to preliminary ruling requests whose purpose is to solve a dispute pending before a national court,[22] and that where the question on EU law is not relevant to the solution of a litigation, that Court declines jurisdiction under Article 267 TFEU.[23] These principles seem to have been interpreted more loosely in *Associação* and its progeny. Hence, we can observe that *Associação* was a test case to establish application of Article 19 TEU not only as an independent source of the principle of effective judicial protection, but also as a jurisdictional provision which entitles the Court of Justice to review the structure of national courts which may act as European courts. Lenaerts argued that this application of effective judicial protection is a natural evolution of the integration-through-the-law-paradigm of the EU legal order.[24]

As a consequence, effective judicial protection may act as a jurisdictional rule to strengthen the Court of Justice's oversight on national procedural rules governing the courts' structure. Seen from another perspective, the principle appears to be detaching itself from its original nature of entitlement in favour of individuals who seek to enforce EU-derived rights. Effective judicial

[18]Ibid., para 36.
[19]See for instance Case C-618/18 *Commission v Poland* EU:C:2019:615.
[20]Case C-73/16 *Puškár* EU:C:2017:725.
[21]*Associação* (n 4).
[22]Case C-244/80 *Pasquale Foglia* v *Mariella Novello* EU:C:1981:302.
[23]Ibid, para 32.
[24]K Lenaerts, 'New Horizons for the Rule of Law within the EU' 21 (2020) German Law Journal 29.

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protection is increasingly becoming entangled with the rule of law and thus gives effects to a value which protects the EU general interest as opposed to legal individual claims stemming from EU law. Yet several contentious issues stem from this transformation and shake the very understanding of this principle. This evolution is ground-breaking and has entailed a rethinking of the very role of effective judicial protection in the EU constitutional architecture, as reflected in the literature.

4. Views from the literature: consolidated and emerging trends in the academic discourse on effective judicial protection

Academic research has progressively captured the metamorphosis of effective judicial protection in EU case law. Accordingly, authors have studied this principle mostly under two perspectives. First, they have analysed the *fundamental right* nature of that principle, thus investigating the entitlements deriving from it (A). Second, scholars have dissected and theorised effective judicial protection as a *structural principle* interplaying between the national and the EU judicial orders and governing the effective application of EU law (B). In the light of the recent developments in the EU case law, and, in particular, the *Associação* judgement,[25] the second stream of literature is monopolising the discussion on effective judicial protection: researchers increasingly theorise effective judicial protection *less* as a *fundamental right*, and *rather* as a *principle*, which can be instrumental to the protection of the court's structural features directly linked to the rule of law. The following sections explore the main debates and research approaches adopted in the literature concerning the EU principle effective judicial protection.

A. Effective judicial protection as a source of fundamental individual entitlements

The literature focusing on the fundamental right nature of effective judicial protection has investigated three issues: first, the sources of the principles; second, its emerging and evolving essence; and, third, its impact. These streams of literature will be considered in turn.

Following the entry into force of the Lisbon Treaty, the literature has analysed the various sources of the principle of effective judicial protection with the view to rationalise a crowded field. Indeed, with the Charter's acquisition of binding effects, the Court of Justice has initiated the practice to interpret the principle through the prism of 47 Charter. That provision is divided in three paragraphs, each of them including different rights. The right to an effective remedy, provided under the first sentence, is to be exercised under the conditions of the second and third sentence, which, instead grant the right to a fair trial and to legal aid respectively. Attempts have been made to conceptualise how these different rights contributes towards enhancing procedural and substantive fairness in the EU legal order, especially in the field of competition law.[26] As established in *Egenberger*,[27] 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 on which they may rely as such. The horizontal application of Article 47 Charter brings this provision closer to the principle, which can be applied in horizontal disputes under the *Mangold* jurisprudence.[28]

Overall, scholars' views converge in considering that the principle has a broader scope than Article 47 Charter because of its judicial-crafted nature which accommodates adaptation.[29]

[25]Ibid.

[26]G Gentile, 'Two Strings to One Bow? Art 47 of the EU Charter of Fundamental Rights in the EU Competition Case Law: Between Procedural and Substantive Fairness' 4 (2) (2020) Market and Competition Law Review 169.

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

[28]Case C-144/04 *Mangold* EU:C:2005:709.

[29]S Prechal, 'Effective Judicial Protection: Some Recent Developments – Moving to the Essence' 13 (2020) Review of European Administrative Law 175, 178.

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However, the connections between Article 47 Charter and effective judicial protection are such that the latter shapes the content of the former. Another element examined in the literature is the interplay between the level of protection of the Charter, including Article 47 thereof, and that of the corresponding provisions of the European Convention, namely Articles 6 and 13.[30] In addition, there is the question of the level of protection of Article 47 Charter and the interplay of this norm with the national and the Convention's standards pursuant to Article 53 Charter.[31] The present author has demonstrated that constitutional traditions common to the Member States may still exercise a certain influence on the content of effective judicial protection, which could further expand under the lead of national legal traditions.[32]

Another provision in which effective judicial protection finds reaffirmation is Article 19 TEU,[33] requesting Member States to provide effective remedies in the fields covered by EU law. Scholars have observed that reliance on Article 19 TEU as a source of the principle has engendered a shift in the function of effective judicial protection. We will come back to the literature on this case law in the following section.

Article 47 Charter, like the principle of effective judicial protection, is not an unfettered prerogative, and can be limited under the test included in Article 52 Charter. This has prompted scholars to reflect on the emerging and evolving essence of effective judicial protection. As argued by Gutman,[34] the Court of Justice is progressively discovering the essence of Article 47 of the Charter: *Schrems I*[35] and *Associação*[36] are valuable illustrations in this respect. While in *Schrems I* the Court of Justice found that the absence of remedies to protect data protection rights in the US was contrary to the essence of Article 47 of the Charter,[37] in *Associação* the same court held that the principle of judicial independence forms the essence of effective judicial protection in the EU.[38] Gutman observes that the identification of the essence of Article 47 of the Charter builds a list of non-derogable features of the judicial systems in the Member States.[39] Such requirements should apply equally to the EU and the national judiciaries, in principle.[40] The discovery of the essential content of Article 47 Charter further contributes towards the establishment of the EU constitutional essentialism, which reflects the core of the EU ethos.[41] The principle and Article 47

[30]Under Art 52(3) of the Charter the European Convention's provisions corresponding to Art 47 of the Charter act a non-regression threshold below which Charter rights cannot go. Nevertheless, the Court of Justice can surpass the Convention's guarantees by providing more encompassing protection under the Charter's rights. See E Sharpston, 'Effective Judicial Protection through Adequate Judicial Scrutiny: Some Reflections' 4 (2013) Journal of European Competition Law & Practice 453; J Krommendijk, 'Is There Light on the Horizon? The Distinction between "*Rewe* Effectiveness" and the Principle of Effective Judicial Protection in Art 47 of the Charter after *Orizzonte*' 53 (2016) Common Market Law Review 1395; T Konstadinides and N O'Meara, 'Rebalancing Fundamental Rights and Judicial Protection in Criminal Matters after Lisbon and Stockholm' in DA Acosta Arcazaro and CC Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2017) 77; W Piątek, 'The Right to an Effective Remedy in European Law: Significance, Content and Interaction' 6 (2019) China–EU Law Journal 163.

[31]B de Witte, 'Art 53: Level of Protection' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1523–38.

[32]G Gentile, '"Faraway So Close!" The Principle of Effective Judicial Protection and the Constitutional Traditions Common to the Member States' 64 (2021) EU Law Live Weekend Edition 7–11.

[33]Prechal (n 29).

[34]K 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?' 20 (2019) German Law Journal 884.

[35]Case C-362/14 *Maximillian Schrems* v *Data Protection Commissioner* (*Schrems* I) EU:C:2015:650.

[36]*Associação* (n 4).

[37]*Schrems I* (n 35) para 95.

[38]*Associação* (n 4) para 40.

[39]Gutman (n 34).

[40]For a discussion, see M Safjan and D Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-Level Challenge through the Lens of Art 47 CFREU' 33 (2014) Yearbook of European Law 3.

[41]G Gentile, 'The CJEU Scrutiny of National Procedural Rules under Art 47 EUCFR: Between EU Constitutional Essentialism and the Enhancement of Procedural Justice in the Member States' in B Kas and C Mak (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law in Europe* (Hart, forthcoming).

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of the Charter apply to both EU and national institutions, Article 47 of the Charter being subject to the conditions of Article 51 of the Charter. Yet scholarship has noted that, due to the crucial role of national courts in enforcing EU law, it is at the national level that the impact of Article 47 of the Charter and the principle of effective judicial protection may be especially observed.[42] The substantial amount of preliminary references concerning Article 47 of the Charter reveals that national jurisdictions are actively engaging with the Luxembourg Court to identify the requirements stemming from that provision.[43]

Accordingly, legal scholars have addressed the question of the impact of this principle as a source of fundamental rights which facilitate the application of EU law, especially in the Member States. Indeed, effective judicial protection positions itself into a complex and crowded panorama: beyond the principle of direct effect[44] and supremacy,[45] the pre-existing *Rewe* principles[46] of effectiveness and equivalence already regulated the enforcement of EU law at the national level. Hence, effective judicial protection has somehow entangled the test for verifying the suitability of national procedural rules for the enforcement of EU law. As noted by Havu, while the principle of effective judicial protection 'seems to occupy an overarching role and to precede EU procedural autonomy law', 'the situation is anything but clear.'[47] As a result, authors have offered different reconstructions on the interplay between effective judicial protection and other principles used to facilitate the enforcement of EU law in the Member States. Prechal and Widdershoven argue that effective judicial protection could be partially seen as a 'more robust manifestation' of effectiveness under the *Rewe* formula,[48] although they recognise that it is a distinct principle. Other scholars such as Arnull have pointed out that effective judicial protection has an autonomous value – being the fact that it constitutes the legal basis for creating new remedies to protect individual rights.[49] Arnull's views are convincing. Multiple constitutional decisions in the EU are based on the principle of effective judicial protection. To begin with, in *Francovich*[50] the Court of Justice introduced an EU-based damage claim against national authorities to ensure the effective judicial protection of EU rights that are not provided with direct effect. We should also cite *Unibet*,[51] where the Court detailed the duty of national courts to provide effective remedies in the fields covered by EU law. These judgements had at their centre EU individual rights and the need to ensure effective protection in the territory of the Member States.

In further disentangling the peculiar value of effective judicial protection, it has been observed that the crucial difference between the principles of effectiveness and equivalence and the principle of effective judicial protection is that the latter grants a bundle of fundamental entitlements in

[42]Ibid.

[43]Gentile (n 41); E Frantziou, 'The Binding Charter Ten Years on: More than a "Mere Entreaty"?' 38 (2019) Yearbook of European Law 73.

[44]*Van Gend en Loos* (n 11).

[45]Case C-6/64 *Costa v E.N.E.L.* EU:C:1964:66.

[46]Case C-33/76 *Rewe* v *Landwirtschaftskammer für das Saarland* EU:C:1976:188.

[47]K Havu, 'EU Law in Member States Courts: Adequate Judicial protection and Effective Application – Ambiguities and Nonsequitur in Guidance by the Court of Justice' 8 (2016) Contemporary Readings in Law and Social Justice 158, at 160.

[48]S Prechal and R Widdershoven, 'Redefining the Relationship between "Rewe-Effectiveness" and Effective Judicial Protection' 4 (2011) Review of European Administrative Law 31, 39.

[49]A Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' 36 (2011) European Law Review 51.

[50]R Caranta, 'A New Jus Commune Takes Shape' 32 (1995) Common Market Law Review 703; Z Varga, 'National remedies in the Case of Violation of EU law by Member States Courts' 54 (2017) Common Market Law Review 51.

[51]Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd* v *Justitiekanslern* EU:C:2007:163. For an analysis, see A Arnull, 'Case C-432/05, Unibet (London) Ltd and Unibet (International Ltd v Kistitiekanlern' 44 (2007) Common Market Law Review 1763–1780.

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favour of EU claim-holders.[52] By contrast, the principles of effectiveness and equivalence do not offer additional rights, but are simply a test to verify the appropriateness of procedural rules utilised by national courts in the fields of EU law. The difference lies in the fact that, as a fundamental right, the principle of effective judicial protection may be subject to limitations but should not be totally annulled. This is confirmed by Article 52 of the Charter, which requires that the core of Charter rights should always be respected. It follows that the essential guarantees of the principle of effective judicial protection and Article 47 Charter cannot be totally renounced and compressed: individuals who are bringing a claim based on EU law should be able to exercise the essential content of the principle of effective judicial protection and, by reflection, of Article 47 of the Charter, undisturbed by public powers. By contrast, the principles of effectiveness and equivalence do not grant any autonomous entitlement from the underlying EU rights they seek to enforce. They focus on the effective enforcement of EU derived rights and thus directly contribute to the achievement of the objectives of EU substantive law. Overall, the principle of effective judicial protection is more encompassing.[53]

The impact of effective judicial protection has also been studied with reference to several areas of EU law. For instance, while Mak has argued in favour of the constitutionalising effect of Article 47 of the Charter in the field of private law,[54] Eliantonio has highlighted the perils of a non-harmonised system of procedures for information exchange from the angle of effective judicial protection in the EU.[55] Furthermore, Simoncini has discussed the double standards applied by the Court of Justice with reference to standing to challenge measures in the field of banking law before national and EU courts.[56] Finally, van Duin has demonstrated that Article 47 of the Charter promotes the judicial protection of both consumers and traders in the field of consumer protection,[57] whilst Ellingsen has shed light on the notion of 'effective remedy' in the field of data protection.[58]

B. Effective judicial protection as a structural principle

Beyond its fundamental right dimension linked to an individual-centred judicial narrative, the principle of effective judicial protection has been analysed for its effects on the cooperation between the EU and national judiciaries to ensure the effective enforcement of EU law. Under this standpoint, effective judicial protection operates as a *structural* principle which determines the allocation of enforcement duties between national and EU courts. Within this stream of literature, a rupture has occurred following the *Associação* judgement, which, as mentioned, has revolutionised the role of effective judicial protection in the EU.

[52]A Biondi Andrea and G Gentile, 'National Procedural Autonomy' in H Ruiz Fabri (ed), *Max Planck Encylopedia of International Procedural Law* (Oxford University Press 2019) <http://opil.ouplaw.com/view/10.1093/law-mpeipro/e1878.013.1878/law-mpeipro-e1878> accessed 4 March 2022.

[53]J Krommendijk, 'Is There a Light on the Horizon? The Discussion between "*Rewe* Effectiveness" and the Principle of Effective Judicial Protection in Art 47 of the Charter after Orizzonte' 53 (2016) Common Market Law Review 1395, at 1405.

[54]C Mak, 'Rights and Remedies – Art 47 EUCFR and Effective Judicial Protection in European Private Law Matters'. Amsterdam Law School Research Paper No. 2012-88; Centre for the Study of European Contract Law Working Paper Series No. 2012-11.

[55]M Eliantonio, 'Information Exchange in European Administrative Law: A Threat to Effective Judicial Protection?' 23 (2016) Maastricht Journal of European and Comparative Law 531.

[56]M Simoncini, 'Different Shades of Legal Standing and the Right to Judicial Protection of Private Parties in the Banking Union: Trasta Komercbanka' 57 (2020) Common Market Law Review 1867–86.

[57]A van Duin, 'Metamorphosis? The Role of Art 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC' 6 (2017) Journal of European Consumer and Market Law 190.

[58]H K Ellingsen, 'Effective Judicial Protection of Individual Data Protection Rights: Puškár' 55 (6) (2018) Common Market Law Review 1879.

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Before Associação

The focus of this second stream of scholarship shifts towards the role of courts in the EU legal order and the concepts of 'remedies' and 'procedures'. In this sense, effective judicial protection earns a specific role in the context of the EU judicial federalism, in so far as it allocates enforcement duties between national and EU courts. Consequently, it gives form to the remedies and the procedures necessary to redress incorrect applications of EU law. The overarching questions addressed in this literature are whether and to what extent the EU offers a complete system of remedies,[59] and how effective judicial protection influences the procedural systems of the EU and the Member States.

As observed by Dougan,[60] the introduction of the principle of effective judicial protection is linked to the imperfect nature of the EU enforcement system which relies not only on the EU courts but also on the cooperation with national courts. He advances the idea that effective judicial protection is a tool to regulate the decentralised enforcement model of the EU.[61] In his account, effective judicial protection had pervasive effects in the application of EU law at the national level, demanding national courts to resort to various forms of remedies against both public and private parties violating EU law.[62] The work of Claes also deserves attention. She observed that the principle of effective judicial protection transformed the mandate of national courts: the latter have acquired a *European* status, in addition to the *national* one.[63] As a matter of fact, one of the requirements of the principle of effective judicial protection is that Member States' courts should secure that claims based on EU law are heard. Under this perspective, effective judicial protection is the long arm of the EU judicature in the application of EU law. Effective judicial protection is also connected to the preliminary ruling procedure, the foundational mechanism for the judicial cooperation between the national and the EU judiciary. In this respect, Lacchi argued that effective judicial protection imposes an obligation for Member States not to hinder the right for courts to submit preliminary ruling requests to the Court of Justice.[64] Under this logic, effective judicial protection entails that national authorities should facilitate dialogue between the EU and national courts through the procedure of Article 267 TFEU.

The connection established in the EU case law between the preliminary ruling procedure and the principle of effective judicial protection in not accidental. As known, the EU remedial system relies not only on national but also EU courts. The latter have the exclusive monopoly on the interpretation of EU law, and are the sole competent bodies to settle selected actions involving EU law, such as the action for damages against the EU[65] and the action for annulment.[66] These procedures are centralised at EU level and constitute an avenue for individuals, States and EU institutions to be heard by the EU judicature. Yet, as observed in the literature, these mechanisms are not primary in the enforcement of EU law.[67] This is because significant procedural constraints impede successful pursuit of these claims and, ultimately, cast a shadow on the effectiveness of these actions. For instance, since the *Plaumann* case individuals are subject to a demanding test to obtain standing before the EU courts.[68] Due to the limited access for individuals to challenge EU law before the EU courts, Member States are consequently requested to grant

[59]See for instance N Bačić Selanec, 'A (More) Complete System of Remedies: Effective Judicial Protection of EU Member States in Czech Republic v. Commission' 59 (1) (2022) Common Market Law Review 171–86.

[60]M Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart 2004) 4.

[61]Ibid.

[62]Ibid., 41 and following.

[63]M Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) 59.

[64]This requirement for Member States may give rise to corresponding rights for individuals. See C Lacchi, 'Multilevel Judicial Protection in the EU and Preliminary References' 53 (2016) Common Market Law Review 679, at 686.

[65]See TFEU Art 340.

[66]See Ibid., Art 263.

[67]Dougan (n 60), at 2.

[68]Case C-25/62 *Plaumann v Commission* EU:C:1963:17.

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remedies at national level.[69] Therefore, the preliminary ruling procedure should be seen as a pivotal instrument to permit a dialogue between national courts and EU judges, establish the correct interpretation and assess the validity of EU measures.[70] In the reconstruction of the Court of Justice, the existence of judicial cooperation between national courts and the Luxembourg judges via the preliminary ruling ultimately ensures respect of the principle of effective judicial protection. The preliminary ruling is thus the 'second best' alternative to the direct access to EU judicature.[71]

Yet the effectiveness of the preliminary ruling to ensure effective judicial protection in the EU system of remedies is controversial. Several scholars have highlighted the limits of this procedure from an effective judicial protection standpoint. First, when exercising their discretion on the decision to refer to the Court of Justice, national courts have been often reluctant to trigger Article 267 TFEU and, more generally, to apply EU law.[72] This finding emerges powerfully when considering the *CILFIT* doctrine's application by national courts.[73] This jurisprudence, which allows national courts of last instance to derogate from their obligation to submit preliminary ruling requests, has been often misapplied, if not abused.[74] Second, access to national courts in connection with EU law matters may not be possible in the absence of national implementing measures or directly applicable EU law.[75] As a result, EU law may not be successfully contested before national courts. Finally, due to the absence of strict time limits, the preliminary ruling may be triggered at a point in time in which the effects of EU law have already taken place, the restoration of the EU law entitlements and obligations becoming tardive and excessively complex.[76] Consequently, the doubts regarding the achievement of effective judicial protection through the preliminary ruling procedure appear, at least to a certain extent, well founded. Groussot's work advances a possible solution to compensate such a gap of protection.[77] He claims that legislative reforms would be a more efficient solution. In any event, if one takes effective judicial protection seriously, this principle should apply equally at the national and the EU level of governance.[78]

The structural nature of effective judicial protection has also been evaluated with reference to the EU Common Foreign and Security Policy (CFSP). This area of EU law regulates the organised, agreed foreign policy of the EU for security and defence diplomacy and actions. It has intergovernmental features, including a limited jurisdiction for the Court of Justice.[79] As observed by

[69]See TEU Art 19. For an analysis of the role of national courts in the EU, JA Mayoral, U Jaremba, and T Nowak, 'Creating EU Law Judges, the Role of Generational Differences, Legal Education and Career Paths in National Judges' Assessment Regarding EU Law Knowledge' 8 (21) (2014) Journal of European Public Policy 1135.

[70]See *Plaumann* (n 68); C-614/14 *Ognyanov* EU:C:2016:514, para 15.

[71]The recent *Consorzio* judgement (Case C-561/19 *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* EU:C:2021:799) has strengthened the role of effective judicial protection in connection to the preliminary ruling. The Court has established that it is a matter of effective judicial protection that courts of last instance should provide a statement of reasons in case they do not submit a preliminary ruling request to the Court of Justice under Art 267(3) TFEU, see para 51. For an analysis, G Gentile and M Bonelli, 'La jurisprudence des petits pas: C-561/19, Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi' *REALaw.blog* <https://realaw.blog/2021/11/26/780/> accessed on 4 March 2022.

[72]S Bogojević, 'Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity' 33 (2015) Yearbook of European Law 5–25, 23.

[73]Case C-283/81 *CILFIT v Ministero della Sanità* EU:C:1982:335.

[74]A Arnull, 'Cilfit on Trial?' *REALaw.blog* <https://realaw.blog/2021/11/24/770/>.

[75]A Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?' 62 (1) (2003) Cambridge law Journal 72–92, at 82 and ff.

[76]See for instance G Gentile, 'Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach' 16 (2020) European Constitutional Law Review 466.

[77]X Groussot. 'The EC System of Legal Remedies and Effective Judicial Protection: Does the System Really Need Reform?' 30 (3) (2003) Legal Issues of Economic Integration 221–48.

[78]Safjan and Düsterhaus (n 40).

[79]See Art 24 TEU.

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several authors,[80] the principle of effective judicial protection has constituted the legal basis for Kirchberg to strengthen its jurisdiction in this field by allowing preliminary rulings on the validity of CFSP measures for which the Court would have jurisdiction under Article 24(1) TEU and Article 275 TFEU. Hillion and Wessel contend that the interpretation of effective judicial protection in favour of the Court of Justice's jurisdiction on CFSP measures is legitimate.[81] However, loopholes in the judicial protection in this field still remain and engender adverse effects on the rule of law.

To conclude, this scholarship has sought to disentangle the impact of effective judicial protection as a principle of judicial federalism. Although with a different standpoint, the same enquiry has taken place in subsequent literature, especially following the *Associação* judgement.[82]

After Associação

Effective judicial protection as we know it has acquired renewed features with the *Associação*[83] decision. As mentioned, in that case, the Court of Justice held that Article 19 TEU enshrines the principle of effective judicial protection and gives 'concrete expression'[84] to the value of the rule of law. Compliance with the rule of law requires that EU law should be respected in the territory of the Member States. For this purpose, Member States are required to create judicial systems able to grant remedies which ensure effective judicial protection in the fields covered by EU law. In the subsequent *Commission v Poland* judgement,[85] the Court clarified that the 'requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.'[86] These two decisions introduced a crucial novelty: they have given normative content to the EU rule of law, in so far as violations of the requirements of effective judicial protection may lead to breaches of the rule of law. Additionally, they signal that national courts which *may* act as European courts – ie in the sense that they may apply EU law – have to respect the conditions originating from the principle of effective judicial protection.[87]

The scholarly reactions to this jurisprudence have concentrated on reconceptualising the interplay between effective judicial protection and the rule of law. Moreover, attempts to delimiting and distinguishing the various sources of effective judicial protection to study their impact on the division of labour between national and EU courts under the EU judicial federalism system have been advanced. Generally, authors appear to agree that the relationship between effective judicial protection and the rule of law is dialectic and strengthened by the broad interpretation of the

[80] C Hillion and RA Wessel, 'The Good, the Bad and the Ugly': Three Levels of Judicial Control Over the CFSP' in S Blockmans and P Koutrakos (eds), *Research Handbook on EU Common Foreign and Security Policy* (Cheltenham/Northhampton: Edward Elgar Publishing 2018) 65; P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' 67 (2018) ICLQ 1–35; M Cremona, '"Effective Judicial Review Is of the Essence of the Rule of Law": Challenging Common Foreign and Security Policy Measures Before the Court of Justice' 2 (2017) European Papers 671.

[81] Hillion and Wessel (n 80).

[82] *Associação* (n 4).

[83] Ibid.

[84] Ibid., para 32.

[85] *Commission* v *Poland* (n 19).

[86] Ibid., para 58.

[87] Interestingly, in *Achmea* – a case that was decided following the *Associação* judgement – the Court of Justice used Art 19 TEU as a source of the fundamental right to effective judicial protection, and not as a structural requirement for the national judiciaries in the Member States. The Court recalled that 'it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law.' See Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea BV* (*Achmea*) EU:C:2018:158, para 36.

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scope of Article 19 TEU given by the Court of Justice. Using the words of Bonelli and Claes,[88] the links between effective judicial protection and the rule of law emerge in so far as the former entrusts 'the key function of judicial review not only to the Court of Justice, but also to national courts and tribunals. In other words, Article 19 makes all national courts or tribunals, or more precisely all courts and tribunals that may potentially be called to interpret or apply Union law, part of the European judiciary and thus "European courts".' As a consequence, national courts which could apply EU law should comply with the requirements of effective judicial protection; in turn, respect of the requirements of effective judicial protection by national courts ensures the compliance with the rule of law in the EU. Such conditions include the respect of the principle of judicial independence, which forms the essence of the principle of effective judicial protection. These authors further observe that the reach of Article 19 TEU is broader than that of the Charter, which is limited by the clause included in Article 51 thereof. Pech and Platon have discussed the implications of the novel interpretation of Article 19 TEU in great depth.[89] On the one hand, this provision may allow to extend the reach of EU law *in concreto*, by expanding the scope of EU law to situations which are not 'themselves covered by EU law but belong to a field covered by EU law.'[90] On the other hand, the added value of Article 19 TEU lies in facilitating the challenge of national measures which structurally undermine the right to a fair trial. This case law is not free of controversy, according to Pech and Platon. Indeed, these authors conclude that, although the operationalisation of the EU rule of law via the gateway of effective judicial protection is a positive step in the fight against illiberal democracy, 'it is also likely to raise constitutional issues related to the retained competences of Member States and the vertical distribution of powers within the EU.'[91]

In light of the broad scope of Article 19 TEU, authors such as Rizcallah and Davio have attempted to theorise the limits of this provision.[92] They argued that the protection of Article 19 TEU should be triggered to shield the essence of the principle of effective judicial protection. They explain that the essence of effective judicial protection is 'institutional', meaning that it can apply only in the event of a generalised curtailment of judicial protection in a Member State. Such institutional understanding of effective judicial protection protects 'an objective institution' rather than 'the subjective right of a single individual.'[93] In this way, the authors have tried to distinguish the rationale of Article 47 of the EU Charter – which grants the individual fundamental right to effective judicial protection – and that of Article 19 TEU – dealing with foundational institutional aspects of the judicial systems of the Member States. This proposed approach is more restrained and essentialist, as it views Article 19 TEU as a *lex specialis* to Article 47 of the Charter and the principle of effective judicial protection. Notably, Article 19 TEU can be operationalised to sanction grave violations of the principle of effective judicial protection. Based on Rizcallah's and Davio's proposal, one may wonder how to identify the threshold for the emergence of institutional and systemic aspects of judicial protection in the Member States.

Finally, Roeben's research deserves mentioning. He adopts a broader approach in analysing the judicial developments on effective judicial protection and innovatively offers a novel conceptualisation of the structural role of effective judicial protection in the EU. He submits that the

[88]M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juízes Portugueses' 14 (2018) European Constitutional Law Review 622, at 632.

[89]S Platon and L Pech, 'A. Court of Justice Judicial Independence Under Threat: The Court of Justice to the Rescue in the ASJP Case' 55 (6) (2018) Common Market Law Review 1827–54.

[90]Ibid., 1838.

[91]Ibid., 1847.

[92]C Rizcallah and V Davio, 'The Requirement That Tribunals Be Established by Law: A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust' 17 (2021) European Constitutional Law Review 581.

[93]Ibid., 595.

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principle has transformed into a 'meta-norm for governing the EU judicial architecture.'[94] This rule operates in a three-directional mode: 'horizontally towards full review by the Court of all acts of the political institutions, vertically towards central-uniform jurisdiction and procedure for national courts, and towards coordination between both pillars.'[95]

In the light of this overview, it is evident that the evolution of effective judicial protection has given rise to more questions than answers in the European legal scholarship. While the considered academic works have substantively explored the implications of the *Associação* and its progeny, some issues remain unsolved and offer fertile ground for future research.

5. Some conceptual issues on effective judicial protection

The discussed case law and literature raise questions of analytical, procedural, theoretical and political nature regarding the EU principle of effective judicial protection. These issues are likely to shape the future trajectory of the academic work covering this principle.

To begin with the analytical matters, an underexplored matter is how the decisions belonging to the *Associação* jurisprudence are moulding effective judicial protection as a fundamental right. As explained, the principle of effective judicial protection is used to protect EU rights which cannot be effectively enforced. This is the classical scenario of *Johnston*[96] or *Unibet*[97]: there is an EU substantive right which is encountering enforcement obstacles at the national or EU level. In these cases, the Court of Justice applies this principle to ensure protection to the EU entitlements. What becomes of the essence are the identification of the EU rights or claims and the granting of an appropriate form of protection. However, the principle of effective judicial protection can also be infringed in itself. This may occur when procedural guarantees necessary to pursue legal actions in the field of EU law are denied. In both circumstances, attention is paid to the remedies and procedures to utilise for the enforcement of EU law, and, in particular, EU rights. In essence, the enquiry conducted under the principle of effective judicial protection boils down to verifying whether there is a meaningful possibility to bring an EU law claim, particularly before national authorities. The principle ultimately supports the decentralised, private enforcement model on which the EU order is built.

Yet, the new application of the principle of effective judicial protection reverses the process of incarnation of that principle into a fundamental right used to enforce EU substantive law, now the fundamental right becoming more similar to a *principle* detached from EU substantive law. As discussed above, in the recent jurisprudential developments on effective judicial protection the focus is not on the effective enforcement of EU substantive law invoked by individuals, but rather on the procedural rules governing the general structure of national courts which *may adjudicate* upon EU law matters. In this sense, effective judicial protection has also become the vehicle of the EU founding value of the rule of law – intended as the guarantee of judicial independence for the purposes of the effective enforcement of EU law – beyond the consolidated scope of application of the principle of effective judicial protection.[98] This double soul of effective judicial protection[99] – being a fundamental right and the long arm of a EU founding value – sits

[94]Roeben (n 1) at 60.

[95]Ibid.

[96]*Johnston* (n 5).

[97]C-432/05 *Unibet* EU:C:2007:163.

[98]In order to invoke Art 47 of the EU Charter, there should be a situation falling within the scope of EU law in the Member States (See Case C-617/10 *Åkerberg Fransson* EU:C:2013:280), while the principle and Art 19 TEU may apply without the presence of the implementation of EU law, yet always in the field of application of EU law.

[99]In principle, it may be argued that in *Associação* the Court of Justice has expanded the scope of effective judicial protection so as to introduce a 'new sub-right', being the entitlement to have national judiciaries compliant with the standards of effective judicial protection. Nevertheless, such a reconstruction does not seem to stem from the wording used by the Court in its judgement. Moreover, this type of right is not enshrined explicitly in the Treaties; additionally, the wording of Art 19

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somewhat uneasily with the original purpose of that principle, being that of upholding individual entitlements stemming from EU law and granting procedural guarantees in the enforcement of EU law. The boundaries between effective judicial protection and the EU rule of law inevitably become blurred. What is more, this process signals a detachment of effective judicial protection from a rights-based narrative and its parallel emerging nature as a provision used to achieve the general interest of the EU.

This issue becomes evident when considering the procedural implications of this new line of case law. Indeed, unclarity on the legal protection granted under effective judicial protection also translates into procedural issues. Both the case law and the literature currently leave unresolved doubts on the type of claims that can be lodged under the renewed principle of effective judicial protection. Should claims brought under that principle seek to protect *individual* or *general* interests within the EU? Whose interests is effective judicial protection pursuing: those of individuals or those of the EU system as a whole – which is concerned with the effectiveness of its laws?[100] For instance, could procedural rules that are deemed as not suitable to effectively prosecute individuals who are addressees of a European Arrest Warrant be contested under the principle of effective judicial protection? After all, the rule of law demands effective remedies provided by independent courts to effectively enforce EU law – in principle, also in the field of EU criminal law. Via a claim of this kind, effective judicial protection would pursue an EU general interest and ultimately apply against an individual.[101]

In this context, we should mention that an excessively broad content for fundamental rights may also upset the division of powers and competences in a legal community, in particular in the EU where a delicate system of checks and balances exists. On a practical level, the broad scope of effective judicial protection may additionally lead to a litigation flood before national and EU courts. Due to the comprehensive content of effective judicial protection, this principle could be invoked in an expanding set of circumstances. Therefore, the future trajectory of this principle should be developed with cautiousness.

The legitimacy of the Court of Justice of the EU may be overall affected by an unclear, broad interpretation of the EU concept of effective judicial protection. The effectiveness of the mandate of international courts depends on their abilities to offer to national authorities a clear jurisprudence that guides them when enforcing the law.[102] Hence, this shift in the EU case law on effective judicial protection may also affect the fruitful cooperation between the EU judicature and national courts, which are currently left in the dark regarding the implications and effects of the principle of effective judicial protection.

Moreover, the distancing of effective judicial protection from EU substantive entitlements raises theoretical questions which require further reflections and research. Namely, the *Associação* progeny may risk rendering effective judicial protection and by reflection the rule of law in the EU *too procedural* and *too little substantive*. A purely procedural understanding of effective judicial protection focused on remedies and the structure of courts may favour constitutional postures on the protection of thin aspects of the rule of law, thus disregarding 'thicker' conceptions of that value.[103] By no means these remarks aim to criticise the importance of the

TEU does not necessarily support the presence of such a right in the EU legal order. The focus of that provision is rather the imposition on Member States the duty to provide legal remedies sufficient to grant protection in the fields covered by EU law. Hence, that provision focuses on the concept of remedies in the fields covered by EU law. Yet, seen from another perspective, it may also be argued that duties of the Member States correspond to rights for individuals.

[100]In this context we should recall that in *Repubblika* (Case C-896/19 *Repubblika* EU:C:2021:311) the Court of Justice explained that Art 47 of the Charter is a fundamental right stricto sensu used to protect rights and freedoms stemming from EU law, while Article 19 TEU imposes structural obligations on the Member States with reference to their judiciaries. See paras 36 and following.

[101]Confront with Case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114.

[102]Safjan and Düsterhaus (n 40).

[103]T Konstadinides, *The Rule of Law in the EU: The Internal Dimension* (Hart 2017), at 63.

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procedural rule of law and its centrality in the EU constitutional architecture. Without national courts willing and able to apply EU law, the European legal order would suffer a significant blow which could hinder the very foundations of the EU. Therefore, the essential crux is not only whether effective judicial protection should be used as a vehicle for the enforcement of the rule of law. The answer to this question depends on what we believe the purpose and scope of fundamental rights should be. Rather, an additional central issue is what kind of rule of law the EU should seek to protect – whether only procedural, and thus focused on the existence of procedural guarantees contributing to the effective enforcement of EU law, or also substantive, whereby the rule of law means that individuals should *effectively enjoy* EU rights and entitlements.

Finally, the role played by the principle of effective judicial protection in the context of the rule of law backsliding also highlights its political use by EU institutions. This principle has been instrumental and instrumentalised for the creation of the EU rule of law conditionality framework.[104] Being an essential part of the EU conceptualisation of the rule of law, effective judicial protection should be respected by the Member States as a condition to access EU funds under the newly introduced conditionality framework. Such reliance on effective judicial protection has certainly strengths but also limits. While shaping the rule of law by reference to judicial protection certainly finds its roots in the EU case law,[105] this rule-of-law conception appears highly contingent in light of the current challenges in some Member States from the angle of judicial reforms. One may wonder whether the politicisation of effective judicial protection for the purposes of the protection of the rule of law may have the perverse consequence of rendering this value too monolithic and thus not able to capture other rule-of-law challenges, which can involve, for instance, the effective enjoyment of the substantive rights stemming from EU law, such as the right to freedom of expression and non-discrimination on the ground of sex and sexual orientation.[106] While courts are undoubtedly the last resort to process claims based on EU law, the effective enjoyment of EU rights also depends on the broader institutional framework and general implementation of EU law policies in the Member States' territories. Hence, although a crucial element for systems embracing the rule of law, such as the EU, the guarantee of judicial independence may not in itself be sufficient to protect the rights stemming from EU law.

6. Conclusions

Effective judicial protection and its younger sibling, Article 47 of the Charter, are virtually omnipresent in the EU case law.[107] They are also among the most applied provisions of EU law in the Member States. Effective judicial protection has given leeway to the Court of Justice to adopt creative solutions to achieve the enforcement of EU law. Not surprisingly it was defined as 'an unruly horse.'[108] Moreover, the prominence of this principle in the EU constitutional settings led Safjan and Düsterhaus to speak about a 'Union of effective judicial protection.'[109] Taking stock of the relevance of this principle in the EU legal architecture, this overview article has shed light on the evolution of this principle in three acts. First, it has given an account of the convoluted

[104]Regulation (EU Euratom) 2020/2092 of the European Parliament and of the Council on a General Regime of Conditionality for the Protection of the Union Budget, OJ L 433I/1.

[105]Lenaerts (n 24).

[106]Recent developments indicate that violations of fundamental rights in the EU representing systemic attacks to the EU founding values are protected under the value of human dignity, rather than the rule of law. See European Commission, 'EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ People' <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668> accessed 16 July 2022. The Commission brought Hungary before the Court of Justice regarding the recent policies limiting the right to non-discrimination on the ground of sexual orientation and the freedom of expression.

[107]Frantziou (n 43).

[108]Arnull (n 2).

[109]Safjan and Düsterhaus (n 40).

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and fast-paced transformation of effective judicial protection in the EU case law and has illustrated its trajectory. Second, it has summarised the main debates in the literature concerning this principle. Finally, it has discussed some conceptual issues on effective judicial protection emerging from the recent case law.

The Article has mapped the not-so-silent evolution of effective judicial protection: from essentially being a fundamental right, effective judicial protection has gained the additional role of protector of the rule of law in the EU. Such development raised numerous questions which remain underexplored in the literature so far. These issues are analytical, procedural, theoretical and political in nature. There are two major takeaways which can be drawn from the Article. First, the standards of effective judicial protection are certainly evolving. Judicial interpretations are a natural development in any legal order which seeks to embed fairness considerations in its by-nature imperfect, partial legislation. Yet a consistent approach towards the conceptualisations of effective judicial protection is essential to ensure not only the protection of EU-derived rights, but also the coherence of the EU legal order and the legitimacy of the EU judicature. Second, the centrality of the principle of effective judicial protection in the EU reflects the importance of courts in the construction of the EU legal order's ethos. This principle is the symptom of a humanistic conception where the individuals and her rights are at the core of a legal community. Seen from another perspective, the principle of effective judicial protection mirrors the trust that liberal democracies have given to courts to solve conflicts. This reveals an intrinsic pacifistic European Weltanschauung, whereby disagreement is constructed and resolved through judicial reasoning rather than violence and prevarication.

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