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Introduction

Every (quasi-) federal system needs to secure that the law of the larger unit is judicially applied throughout its territory. The steering resource for this purpose is judicial procedure. This judicial procedure then is not merely a means to the fixed end of applying rules of substantive law. It becomes the expression of the underlying conception of what such application is to achieve, which in turn is rooted in the polity’s very federalism. This is the case for the USA, composed of the Federation and the non-sovereign states. It is no less so for the European Union, composed of the Union and its sovereign member states. In the case of the EU, the focus of this article, two broad conceptions of judicial procedure can then be distinguished.

The first is objective. The starting point is the authority of Union law, and implicit in it is a top-down view and exclusive focus on the procedure before the member states courts with an onus of justification on member states. It is rooted in the idea of a shallow federalism in which the two levels of the Union and the member states remain juxtaposed. This conception of authority has arguably been a predominant narrative in the field.¹ The alternative is a subjective concept of genuine judicial protection. The point is that rights become real, protected in equal measure against infringements from either the Union or the member states. This places the focus on the procedures of both Union and member states courts. It is rooted in the concept of a federal order in which the two levels are joined together by shared values, in particular legally protected self-determination.

This article argues that the Lisbon Treaty now institutionalises such genuine judicial protection, making that institution a building block of the deeper federalism that it seeks to establish. By enshrining the fundamental right to judicial protection in article 47 of the Charter of Fundamental Rights at the highest level of the Union’s normative hierarchy, the Lisbon Treaty subjects the judicial application of Union law to a single meta-norm.² This means, first of all, that Lisbon re-defines the

¹ Further Michael Dougan, The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts, in THE EVOLUTION OF EU LAW (Paul Craig and Gráinne de Búrca, eds) (2nd ed, 2011) (‘effectiveness dominant narrative’).
² Charter of Fundamental Rights of the European Union art. 47, 2012 O.J. C 326/391, at 405. [hereinafter Charter of Rights or CFR]. Art. 47 ‘Right to an effective remedy and to a fair trial’ reads in full: “(1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. (2) Everyone is entitled to a fair and public hearing within a reasonable time by an
very rationale of judicial procedure. As a fundamental right, judicial protection has normative quality, not just a functional or instrumental one. It shares in and concretises human dignity, the source norm of all Charter rights, in the sense of real legal self-determination. This normative quality determines the object of protection. Protected are the rights that individuals hold under Union law, and these only, to become effective in equal measure against infringements from the authority of the Union and the member states through a judicial architecture that rests on the two pillars of Union and member states courts.

The Treaty sets in motion the process of realising this rationale. It fully institutionalises this fundamental right to judicial protection by harnessing the law-making resources of both the Union and the member states. The primary responsibility for it lies with the elected legislatures, both at Union and Member State level. Ultimate responsibility lies with the Court of Justice. Post-Lisbon, judicial protection comes to determine the trajectory of legal development, in particular the construction of a common Union order judicial procedure for national and Union courts. It thus comes to be composed of three normative tiers: The Charter itself; implementing procedural legislation by the Union and the member states; and judicial doctrine. This means constructing a single baseline order of procedure for the courts both of the Union and the Member States. This Union procedural order has three parameters: Union jurisdiction, a common general procedure, and European judicial federalism. The concrete development of this Union procedural order then reflects the fact that the Treaty places the fundamental right to judicial protection within a subsidiary democracy. The key procedural parameters and the countervailing effects, such as legal certainty and judicial economy, are to be realised through particular-plural democracy and a decentralised judicial power. As all fundamental rights can, the right to judicial protection can be limited. Providing these limitations is the prerogative of the elected legislature. These principles become embedded in the judicial methodology that the Court of Justice is to follow when ensuring the respect of and to promote the fundamental right to judicial protection.

Procedure it not only a reflection of the federalism that Lisbon envisages, more so than any sectoral substantive law. This institutional judicial protection becomes a building block of the federalism that the Lisbon Treaty envisages. Its federalism rests on a divided competences competence under unifying principles, chief among them human dignity. Human dignity provides a common objective

\[\text{id., art. 1, 2012 O.J. C 326/391, at 396.}\]
and justification for judicial action at both levels together. The importance of Lisbon’s institutionalising judicial protection can then hardly be overstated.

The article is structured as follows.

Part I conceptualizes judicial protection as an institution of Union law, aimed at protecting individual rights on the basis of a single Union order of procedure for the Union’s two-pillared judicial architecture.

Parts II through IV discuss the consequences of this conception in detail for the emerging Union order of procedure comprising Union jurisdiction, the common Union procedure of Member States courts, and of Union courts, and a European judicial federalism. The discussion throughout focuses on cases that the Court sitting in Grand Chamber formation has handed down, as complemented by certain chamber cases. In the period since the entry into force of the Lisbon Treaty in 2009, art. 47

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of the Charter has become one of the most litigated provisions, giving the Court to develop a jurisprudence, rather than isolated judgments, allowing testing the argument that this paper makes.

Part II turns first to Union jurisdiction, demonstrating that under the cases, member states courts are vested with full jurisdiction in law and fact when protecting an individual right conferred by Union law. It then discusses that this threshold function implies a thick concept of the right. It concludes that this judicial protected is rooted in a conception of human dignity as real legal self-determination.

Part III examines the Union procedure of member states courts when they have Union jurisdiction. It starts by outlining the Treaty prescribed judicial methodology of the Court in concretizing the standard of judicial protection while respecting the systemic integrity of the particular-plural procedures at national level. This is exemplified by reference to remedies, fair process and legal aid. It concludes that this emerging doctrine of a common procedure operationalizes pluralist parliamentary democracy.

Part IV then addresses this Union procedure in its vertical dimension. It argues that both sets of procedures are converging as a result of the Court transferring procedure from the member state level to the Union level, and vice versa.

Part V discusses European judicial federalism. It first explains that the Union courts’ own procedure is subject to the right to judicial protection. It then demonstrates the consequence that within the two-pillared judicial architecture there is increasing coordination of jurisdiction and convergence regarding procedures. It argues that European judicial federalism operationalizes the rule of law throughout the Union’s non-hierarchical judicial architecture.

Part VI explores what role remains for the judge-made standards of equivalence and effectiveness for national procedure. It argues that the Lisbon preference for judicial protection absorbs these other standards. As such, they come to form its prima facie application.

Part VII draws conclusions from the article’s findings on institutional judicial protection post-Lisbon. The conceptual implication is for the constitutional identity that is shifted from a shallow to a deeper federalism grounded in human dignity joining together the Union and the member states. This insight is reinforced by reference to the parallel role of human dignity in the federalism of the USA.

The constructive implication is that judicial protection ought to subsume the fragmented standards that had underlain the Court’s jurisprudence in this field.6

I. Real rights. Institutionalizing judicial protection
Art. 6(1) of the post-Lisbon TEU elevates the Charter of Fundamental Rights of the European Union to the level of the supreme law of the Union.7 Art. 47 of this Charter of Fundamental Rights enshrines for everyone the fundamental right to judicial protection, making this right the principal reference point for the judicial application of Union law.8 Its rationale is that all individual rights of Union law are guaranteed to receive judicial protection across the two-pillared judicial architecture. The underlying idea is that the judicial application of Union law serves individual self-determination through rights that can be defended against any contestation. This rationale of real rights replaces the previously reigning rationale of the authority of Union law, secured, variously, on the basis of direct effect, effectiveness and equivalence, and the Treaty system of procedural rules. The Treaty also sets in motion the process of institutionalising this judicial protection. That proceeds along four vectors: law-dependent realisation (1), harnessing of legal actors (2), formalisation on three normative tiers (3), and operationalization of the constitutional context (4).

1. The law-dependency of the fundamental right to judicial protection
The right to judicial protection analytically is a right to a state of affairs rather than to specific action or omission.9 This state of affair is complex, and it is unfolded into a range of more specific rights and supporting rules. The fundamental right itself remains necessarily at a certain level of generality. It requires further authoritative concretisation. From other fundamental rights, this right is set apart by being intensely law-dependent, in the sense that it depends on an implementing procedural legal

framework. The fundamental right then provides the authoritative baseline for that procedural framework. It also integrates the very demands of a legal system that may then limit the optimal realisation of the substantive right, such as considerations of legal certainty, standing and judicial economy. The right to judicial protection then is undoubtedly a subjective right. But it also is an objective yardstick for judicial procedure, yielding parameters against which procedures at lower rungs of that hierarchy can be measured. That gives it the capacity to direct the development of the legal-procedural system to underpin it.

The right to protection also unifies diverse procedural choices where the judicial competence is divided between several levels. For the same right receives different protection depending on the author of its contestation or the court of litigation. Judicial protection defines its telos by reference to the individual right for the entire system formed by the Union and the member states. Art. 47 of the Charter indeed demands that the individual right guaranteed by Union law be protected regardless of whether it is infringed by a member state or by the Union and regardless of whether it is invoked before member state or Union courts. This is indicated in the text of Art. 47 not specifying the possible authors infringing any rights. It is concretised by Art. 51(1) of the Charter of Rights stipulating that all Charter rights are binding on the Union’s organs and on the member states when implementing Union law. It is in light of this objective that procedure is to be constructed across the levels of the Union and the member states. The outcome of this measuring is standardisation, in the sense that uniform rules are substituted for particular solutions.

2. Harnessing machinery
Full realisation of this right then is achieved by Lisbon harnessing the two sets of actors imbued with legal power, legislative and judicial.

The legislative power rests with the constituent power of the Treaties, the Union legislature, and the several Member States legislatures. The primary responsibility for the implementation of the right to protection lies with these law-makers. Of the three obligations to respect, protect and fulfil that Charter rights create for its addressees, the right to protection particularly activates the obligation of the legislator to fulfil. The Charter grounds for them the obligation legislatively to provide for the

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10 Explanations Relating to the Charter of Fundamental Rights, art. 47, 2007 O.J. C 303/17, at 29 [hereinafter Explanations].
12 Fundamental and human rights are now generally recognised to create the three obligations to respect, to protect and to fulfil such rights. The obligation to respect means that the addressee must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires positive action to guard against other individuals and groups committing human rights
procedural rules needed to implement it and make it operational. The procedural legislators of the Union and the member states need to provide rules that fulfil the right to protection within their respective competences.

The Lisbon Treaty makes the Court of Justice the final arbiter of the standard of judicial protection. The Court is ultimately responsible to ensure the respect and promote the application of the fundamental right to protection by all other powers. That needs to take place within the jurisdiction that the treaties confer on the Court, since the Charter prevents the Court deriving from Art. 47 of the Charter of Rights procedural powers not already conferred on it. As Lisbon has not underpinned the Charter with an individual complaints procedure, the Union judicature reviews Union procedural law through interpretation or invalidation of secondary law pursuant to art. 267(1) of the Treaty on the Functioning of the European Union. Decisions of the lower Union courts on procedure can be reviewed by the ECJ on appeal. It can review national procedures de facto through the preliminary reference procedure. The Court’s jurisdiction under post-Lisbon TFEU art. 267(1)(a) to ‘interpret’ the primary law allows concretizing art. 47 of the Charter of Rights to such a degree that it can serve as a legality yardstick for the national procedures and executive decisions in the hands of the referring court. National court decisions can be reviewed through actions for damages in conjunction with a reference and on the basis of infringement actions brought by the abuses. Because of the obligation to fulfil, positive action must be taken to facilitate the enjoyment of basic human rights.


15 Charter of Rights, supra note 2, art. 51(1), 2012 O.J. C 326/391, at 406.

16 *Id.* art. 51(2). Thomas Pringle v Government of Ireland, Ireland, The Attorney General, [2012] ECR I_, (delivered Nov. 27, 2012), ¶ 179, confirms that CFR art. 47 does not create powers for the ECJ.


18 *Id.* arts. 256, 257, 2012 O.J. C 326/47, at 159.

19 *Id.* art. 267.
The Treaty then conceives of the ECJ carrying out its responsibility in conjunction with the Member States courts. Both act within their respective competences.\(^{21}\)

### 3. Three-tiered formalisation

This yields a three-tiered legal formalisation of the procedural baseline.

The Charter-enshrined fundamental right to judicial protection itself forms the first tier. The Charter provisions themselves determines the procedural baseline to a considerable degree of precision in its Title VI ‘Justice’. Art. 47 of the Charter of Rights itself addresses in its three paragraphs the rights to an effective remedy, to court and a fair process, and to legal aid. The fair process of art. 47(2) is supplemented for criminal procedure by arts. 48-50 of the Charter of Rights. These provisions respectively establish the presumption of innocence and the right to defence, the principles of legality and proportionality of criminal offences and penalties, and the ne bis in idem principle.\(^{22}\)

Finally, certain material rights of the Charter of Rights contain implicit procedural guarantees.\(^{23}\)

The second tier is formed by the rules laid down by the procedural legislators of the both Union and the member states acting under their respective competences. Such implementation also is provided by the founding Treaties themselves, by setting forth the procedures of the Union judicature. By virtue of art. 6(1) of the TEU post-Lisbon conferring on the Charter of Rights the same legal value as the Treaties, the fundamental right to judicial protection becomes both the principal legality yardstick for all procedure within the scope of application of Union law and the generator of supplementary normative layers.

The third tier is formed by the jurisprudence of the Court of Justice on the right to judicial protection. The Court concretizes the standard of judicial protection in a general form in the types of judicial review set out above. The Court’s preliminary rulings on a reference from the national courts always are general interpretations of the law. But more generally, judicial decisions on fundamental rights disputes always carry at least some exemplary value in relation to other individual disputes.\(^{24}\)

The Court’s judgments on art. 47 thus generate judicial doctrine. Because these judicial doctrines derive from art. 47, they effectively partake in its normative position. Most Charter rights have had

\(^{20}\) Id. art. 258, 2012 O.J. C 326/47, at 160.

\(^{21}\) Id. art. 19(1) subparagraphs 1 and 2.

\(^{22}\) Id. arts. 48-50, 2012 O.J. C 364/391, at 405-06. The Schengen-acquis contains in particular the ne bis in idem principle of art. 54 of the Schengen Convention at the level of secondary law and subject to Art. 50 of the Charter of Rights. Zoran Spasic, Case C-129/14 PPU,[2014] E.C.R. I (delivered May 27, 2014).

\(^{23}\) In particular the right of the child to be heard, id. art. 24, 2012 O.J. C 364/391, at 400.

\(^{24}\) INSTITUTIONS, supra note, at 220.
the legal effect of limiting the exercise by the Union of its competences. The fundamental right to judicial protection has had that effect as well. But it also has a profoundly law-constructive function. This directly applicable right is a source of supplementary procedural rules of Union law, which Union and national courts are empowered and indeed obligated to apply. These rules also enjoy primacy over any conflicting national procedural rules. The recent judgment in *Baláž* illustrates this well. The case concerns the execution by a national court of a financial penalty entered in another member state pursuant to Council Framework Decision 2009/299/JHA on the application of the principle of mutual recognition to financial penalties. The Grand Chamber in line with the Opinion of Advocate General Sharpton then states that in order to comply with art. 47 of the Charter of Rights, the trial court must have full jurisdiction and comply with a number of specific procedural rules deriving from that provision: The decision imposing the financial penalty be made available to its addressee in a language that he could understand; that there are clear instructions about how to appeal and within what time-limit; that there is a clear indication of the date from which time for appealing started to run; that the addressee is informed about whether he had to be represented or could represent himself; and that he is told whether legal aid is available and that language issues are dealt with clearly and helpfully.

4. Judicial protection within the Lisbon constitution

The right to judicial protection and its legislative and judicial concretisation then form a body of law that yields a constitutionally determined Union order of procedure. The Lisbon Treaty undoubtedly much advances the legal constitutionalization of Union’s primary law. It articulates a set of

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29 The notion that the Union as a non-statal polity can possess a constitution in the legal sense is often expressed as pluralism. See NEIL MACCORMICK, QUESTIONING SOVEREIGNTY (2007); Neil Walker,
constitutional principles. Judicial protection as one such principle is placed in the context of namely pluralist democracy and a subsidiary competence structure. All three principles then underpin the actual development of the Union order of procedure around the three key elements of a Union jurisdiction, a Union general procedure, and European judicial federalism.

II. Union jurisdiction. The obligation and power of national courts to protect individual rights

This Union order of procedure comprises first of all a doctrine of Union jurisdiction for national courts. Under Lisbon, the Member States retain the residual judicial competence within the Union.30 The point of judicial protection then becomes to ensure that courts that organisationally member states courts come to serve as functional Union courts of ordinary jurisdiction – the juge communautaire de droit commun. This part first demonstrates that Art. 47 of the Charter of Rights confers on the national courts the full Union jurisdiction to review in law and fact (1). This guaranteed Union jurisdiction is conditional upon an individual right under Union law being present, requiring a thicker concept of the right than was the case before (2). The consequence of this threshold requirement is that there is no direct Union jurisdiction for member states courts over purely objective Union law. However, jurisdiction over such law can only be conferred by secondary Union legislation (3). The Part concludes that this rights-centred Union empowerment of the national courts operationalises the value of human dignity (4).

1. The right to protection and the direct Union jurisdiction of national courts

Art. 47(1) of the Charter of Rights provides that everyone has the right to an effective judicial remedy for their ‘rights guaranteed by Union law’. The provision obligates national courts to provide such protection. It also empowers them to do so.31 The provision directly grounds the full jurisdiction of the national courts to review in fact and in law. It guarantees the Union jurisdiction of national courts to protect a right under Union law.

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31 Of course, actual compliance with that obligation and exercise of that power require the cooperation of the national courts. On this issue Gareth Davies, Activism Reloaded. The self-restraint of the Court of Justice in its national context, 19 J. EUR. PUBLIC POL’Y 76 (2012).
The Grand Chamber in *Otis* has clearly articulated this connection between the presence of a Union right and the Union jurisdiction of the national court to adjudicate the dispute concerning it.\(^\text{32}\) There, the Court first emphasized that any person can rely on a breach of the treaty prohibition of anticompetitive concerted practices before a national court and therefore rely on the invalidity of an agreement or practice prohibited under that article.\(^\text{33}\) It then stated that when that right was exercised, the fundamental rights of the defendants as safeguarded by art. 47 of the Charter of Rights needed to be observed. For the provisions of the Charter were addressed pursuant to its art. 51(1) to the member states when implementing Union law. The *Otis* Court indicates that the individual right must be present in fact and that the national court must establish that. Where the national court has not done so, or cannot do so, it has no jurisdiction under Union law. The Court in a series of Chamber cases has drawn just that conclusion. *Zakaria*, as pars pro toto, does so very clearly. There, the Chamber acknowledged that the Schengen Borders Code could have applied, but it pointed out that the referring national court had not established that the right to dignity in border controls under the Regulation conferred was actually implicated on the facts of the case. The national court did not have Union jurisdiction to decide the case and the ECJ did not have jurisdiction to give the requested preliminary under Art. 267(1) TFEU post-Lisbon.\(^\text{34}\)

Art. 47 of the Charter of Rights vests national courts with Union jurisdiction to review infringements of the right and with the requisite procedural powers to correct those. This comprises the indirect power to interpret national procedure in line with the protective needs. It also comprises the direct power to set aside offending rules of national procedure or to supply any requisite rules. No national procedural law may stand in the way of the national court exercising these powers.\(^\text{35}\) Both sets of powers indisputably lie in vertical disputes between an individual and a member state. There, the corrective powers of the member states courts are the corollary of the obligation that the member state is under the obligation to provide for a procedure that complies with art. 47 of the Charter of Rights.\(^\text{36}\) In horizontal constellations, art. 47 protects the procedural interests of both private parties. It is true that the Charter does not obligate private parties.\(^\text{37}\) Yet the procedural legislator and the


\(^{36}\) Charter of Rights, supra note 2, art. 51(1), 2012 O.J. C 362/391, at 406.

courts adjudicating such a dispute still have to comply with art. 47.\textsuperscript{38} Where the national civil procedural legislator has not provided for the requisite procedures, the courts in its stead have the power to proceed as required, and indeed must do so.\textsuperscript{39} In line with this analysis, the Court of Justice has activated art. 47 in both disputes between an individual and the state and between individuals \textit{inter se}. In ZZ, the Court brought to bear art. 47 in a vertical dispute. ZZ, an EU citizen, had challenged the national decision denying him entry into the UK. The referring British court wanted to know whether art. 47 required that the applicant had to have full knowledge of the reasons underlying the decision. The ECJ concluded that art. 47 is the source of obligations and corresponding powers of the national court in such proceedings.\textsuperscript{40} On that basis, the Court in the case developed a set of directly applicable procedural rules for the national court to strike a fair balance between the right to judicial protection and the state’s security interests. In \textit{Lindner}, the Court applied art. 47 to a horizontal dispute. The reference was made in proceeding between a mortgage loan bank and Lindner whose current address was unknown. The Court concluded that the referring court of the member state of the last known domicile had jurisdiction.\textsuperscript{41} It then broached the question whether the case could proceed in absentia as permitted by national procedure. The Court specified that the right of defense under art. 47 also applied to civil procedure. But that right had to be balanced in a proportionate manner with the right of the applicant under art. 47 to effective civil action.\textsuperscript{42} The Court then concluded that art. 47 permitted the in absentia trial, provided that the national court had taken all reasonable measures to locate the defendant.

2. The concept of right
The guaranteed Union jurisdiction of national courts thus depends on an individual right being present. This right assumes a threshold function. That function must determine the conceptualisation of what a right in this context is.\textsuperscript{43} A thin concept would not suffice, only describing the structure of a rule of Union law. The Charter of Rights presupposes a thicker concept of right that references the underlying intentional legislative value judgments. The wording of art. 47 provides three important pointers for conceptualising the individual right in such thicker manner.

\textsuperscript{38} This corresponds to the jurisprudence of the ECtHR holding the Contracting Parties responsible for compliance with the Convention in disputes between private parties.
\textsuperscript{39} Further Adrian Vermeule, \textit{Hume’s Second-Best Constitutionalism}, 70 U. CHI. L. REV. 421 (2003) (second best constitutional argument serves to demonstrate that something that would not be permissible otherwise becomes so because it overcomes the shortcomings of a first best argument).
\textsuperscript{40} ZZ, [2013] E.C.R. I-(delivered June 4, 2013), 50\textsuperscript{\textsection}.
\textsuperscript{41} Pursuant to the \textit{Brussels I} Regulation of the Council No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. L 12/1.
First, the provision refers to the ‘law of the Union’ rather than just the Charter. This makes apparent that Union law of all rungs can confer rights on individuals, i.e. primary, secondary and tertiary law.\(^\text{44}\) Secondly, this Union law must ‘guarantee’ a right. This assumes that Union law is primarily objective in the sense that it obligates the member states, the Union or individuals. Guarantee being a strong term, it expresses that the rule of Union law must reflect the intent of the Union legislator that it is to legally protect specific interests of a defined group of individuals. In this sense, the rule in question must be construed; the Court must primarily identify the specific individual interests that it is intended to protect. This thick concept of right is distinct from other judicial doctrines of Union law. It becomes dislodged from the criteria of precision and unconditionality that mark the direct effect of a rule of Union law; these are neither necessary nor sufficient conditions for the rule to guarantee a right. Thirdly, the right is to be protected if it is ‘violated’ regardless of the author, so rights potentially lie against public authorities and private parties. The concept of a right thus comprises the categories of public-law rights, private-law rights, and procedural rights. Fourthly, it also comprises as the bearer of the right all persons; ‘everyone’ comprises natural persons but also juridical persons of private or public law, including the EU itself.

In its recent jurisprudence, the Court has been developing such a thick concept of individual rights. That jurisprudence materialises the right for primary, secondary and tertiary Union law, disassociating substance from legal form. This extends to public and private rights as well as substantive and procedural rights. It is the gateway to judicial protection in these cases.

That materialisation is evident first for primary Union law. Union citizenship now is the fundamental status of nationals of EU member states. It confers rights on EU citizens.\(^\text{45}\) But it also confers rights on third country nationals that are ‘derived’ from the rights of the citizen. The derived right must thus be construed functionally on the facts of each case. Protecting the third country national must be necessary to protecting the rights to free movement or non-discrimination of the EU citizen.\(^\text{46}\) Where it lies, such a derived right is, however, a right within the meaning of art. 47 of the Charter of Rights its judicial protection is guaranteed.\(^\text{47}\) All fundamental freedoms of the Treaty on the Functioning of the European Union have also been recognised by the Court as individual rights grounding judicial protection claims. The Court had to identify the individual entitlement conferred


by these provisions that on their face stipulate obligations. That was originally recognised by the Court for the free movement right of workers for the purpose of judicial protection. Rights are now recognised to also be conferred by free establishment, the free provision of services, and the free movement of goods. These confer rights on natural and juridical persons. Chapters I-III and V of the Charter of Rights all are individual rights falling under art. 47. This also is true for the rights of Chapter VI on Justice. The term ‘rights’ of the Charter comprises both the classic universal guarantees of freedom and the right to participation in political, social and economic life and certain citizens’ right. The ECJ has already held that certain social rights are judicially cognisable. By contrast, where a Charter provision protects collective interests within political decision-making, it is a principle justiciable only in regard to implementing legislation. Such principles may be found particularly in Chapter IV ‘Solidarity’, although none of its provision is designated a ‘principle’.

This materialisation is also evident when it comes to whether secondary law confers a right. Thus, it is no longer enough that Regulations and Decisions are always directly applicable in national courts. Each instrument must be shown to be intended to confer a right. Directives are per only

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52 Danske Slagterier v Bundesrepublik Deutschland, Case C-445/06, [2009] E.C.R. I-2119, ¶¶ 22, 26; Brasserie du Pêcheur, id.
53 The applicability of the Charter rights is then accessory to the scope of Union competences, in the twofold sense of the law-making competences of the Union organs and the law-implementing competences of the member states.
55 No legal significance attaches to the terminology of rights or freedoms, see Anderson and Murphy, supra note , at 161.
57 That would qualify CFR arts 36-38 as principles, although the Explanations mention arts. 25, 26 and 37, id.
58 Koen Lenaerts, Exploring the Limits of the EU Charter of Fundamental Rights, 8 EUR. CONST. L. REV. 375, 401-03 (2012).
59 TFEU post-Lisbon, supra note 17, art. 288(2) and (4), 2012 O.J. C 362/47, at 172-73.
binding on the member states and not directly applicable. Yet, they can still confer a right that is guaranteed protection. The DEB case makes apparent the judicial operations for determining whether a non-transposed Directive confers an individual right. DEB, a company and thus a legal person, was denied legal aid, so that it could not sue for state liability on grounds of late transposition of the Directives intended to make non-discriminatory access to the national gas networks possible. The DEB Court confirmed that the Directives were intended to confer individual rights, and that art. 47 of the Charter of Rights guaranteed the judicial protection of these rights. The DEB case makes apparent the judicial operations for determining whether a non-transposed Directive confers an individual right. DEB, a company and thus a legal person, was denied legal aid, so that it could not sue for state liability on grounds of late transposition of the Directives intended to make non-discriminatory access to the national gas networks possible. The DEB Court confirmed that the Directives were intended to confer individual rights, and that art. 47 of the Charter of Rights guaranteed the judicial protection of these rights. The Court thus grounds afresh in art. 47 the Francovich rationale that the individual right is separate from direct effect. In Francovich, the Court had already recognised that a Directive that was textually incomplete and therefore not capable of being applied directly, could nevertheless confer individual rights giving rise to the secondary remedy of state liability. A Directive-based right then gives rise to the fundamental right to its judicial protection. Such rights are to be judicially protected, either primarily on the basis of direct and indirect effect or secondarily through state liability or restitution. Finally, The Court has recognised that rights can indeed be conferred by all rules of Union law, including the so-called tertiary law.

These are individual public-law rights, but the Court has also recognised that Union law confers private-law rights that than give rise to a right of protection against other private parties. It has held that citizenship and non-discrimination, but also the fundamental freedoms of workers, establishment and services also create private-law individual rights. This is matter of their judicial construction; crucially these three fundamental freedoms also are fundamental rights, and that

61 Pre-Lisbon already Fratelli Variola, Case 34/73, [1973] E.C.R. 981, ¶¶ 8, 27, holding that a Regulation obligating individuals confers the corresponding right on the addressees not to obligated in excess.
provides the rationale that they also confer private-law rights. By contrast, the Court has not recognised the free movement of goods to confer a private law right, not because it is any less directly effective but because of its content lacking the fundamental right character of the free movement of workers.\(^{72}\) Primary law that imposes obligations on private parties, can create functional individual rights to remedy the breach by others. Competitors thus have a right under TFEU post-Lisbon art. 101\(^{73}\) before national court for the necessary actions to remedy its violation, comprising the invalidity of an agreement or practice prohibited by that article as well as compensation for loss caused.\(^{74}\) Such private-law rights can also be conferred by secondary law. Again, the fact that Regulations are directly applicable is not enough. Rather, the concrete Regulation must be intended to afford protection to the specific interests invoked and the protection sought. As the Opinion of Advocate General Geelhoed in Muñoz makes clear, it ‘must be examined on a case-by-case basis whether its provisions confer rights on individuals’.\(^{75}\) The Muñoz-Court then concluded that the Regulation 2200/96 on fair trading conferred individuals right that must be judicially enforceable against other private parties.\(^{76}\) In L’Oreal, the Court interpreted Regulation 40/94 to confer a trademark rights only against other economic operators engaged in trade.\(^{77}\) Accordingly, the proprietor could not invoke it against the sale of a product bearing a trade mark through an online marketplace outside of a commercial activity. The Court has, of course, consistently held that the private–law rights that a Directive intends to confer cannot give rise to a right of action against another private party in the period before the transposition of the Directive into national law.\(^{78}\) But that is not denying that the Directive is intended to confer such a right, it only limits the remedies. Finally, the concept of individual rights comprises not just material but also procedural rights. The fundamental right to legal protection applies to them, for instance in the

\(^{72}\) Sapod Audic v Eco-Emballages SA, Case C-159/00, [2002] E.C.R. I-5031, ¶ 74.

\(^{73}\) TFEU post-Lisbon, supra note 17, art. 101, 2012 O.J. C 326/47, at 88.


\(^{75}\) Opinion of Advocate General Geelhoed in Antonio Muñoz y Cia SA, Superior Frutticola SA and Frumar Ltd, Redbridge Produce Marketing Ltd, Case C-253/00, [2002] I-7291, ¶¶ 23, 47.


\(^{78}\) Private-law rights still result from the primary law that the Directive is designed to implement, Werner Mangold v Rüdiger Helm, Case C-144/04, [2005] E.C.R. I-9981.
respect of the internal market based harmonisation of civil procedure,\textsuperscript{79} or judicial cooperation within the Area of Freedom, Security, and Justice.\textsuperscript{80}

The Court has also recognised that all persons can be the bearer of rights under Union law, to the extent that that is the intention. ‘Everyone’ comprises natural persons but also juridical persons of private law,\textsuperscript{81} and indeed juridical persons of public law, including the EU itself.\textsuperscript{82}

3. Objective Union law

After Lisbon, the presence of an individual right has become a threshold condition. Art. 47 of the Charter guarantees their judicial protection and confers the requisite Union jurisdiction on the national courts. This guarantee cannot be interfered with by the political actors.\textsuperscript{83} By contrast, the jurisdiction of national courts over Union law that serves collective interests, and thus is merely objective, is not guaranteed.\textsuperscript{84} This threshold function of the individual right for judicial protection is apparent in particular for international law that has become part of the Union legal order, environmental law of the Union, and merely objective primary law.

An example is the UN Convention on the Law of the Sea. Upon accession by the Union, the Convention became in large part is subject to the exclusive jurisdiction of the Court.\textsuperscript{85} Yet in\textit{Intertanko}, the Court concluded that the Convention only conferred rights and obligations on states, but not on individuals. The Court did not deny the precision or unconditionality of the Convention. Rather, it found it generally not to entitle states, not individuals.\textsuperscript{86} It is a consequence of this understanding, and the lack of any compensatory secondary legislation, that the Convention is not judicially enforceable qua Union law.

Union environmental law illustrates much the same point. The earlier jurisprudence of the Court had tied the judicial application of the law in the field to protection to an individual right or at least an individual concern. Thus, in\textit{Kraaijiveld} the Court declared that ‘concerned’ individuals had the procedural right to invoke in national court the ‘direct effect’ of the Environmental Impact

\textsuperscript{79} L’Oréal, ¶ 142.
\textsuperscript{80} TFEU post-Lisbon, supra note 17, arts. 67-89, 2012 O.J. C 326/47, at 73-84.
\textsuperscript{82} Otis, [2012] E.C.R. I_ (delivered Nov. 6, 2012), ¶ 44.
\textsuperscript{86} The Queen on the application of: International Association of Independent Tanker Owners (Intertanko) and others v Secretary of State for Transport, Case C-308/06, [2008] E.C.R. I-4057, ¶ 59.
Assessment Directive 85/337\(^87\). So concerned was clearly the plaintiff in the main proceedings there, whose livelihood was allegedly in danger as a consequence of his not being heard in violation of the EIA Directive.\(^88\) Advocate General Elmer had pointed that out,\(^90\) and he even expressly affirmed that the obligation for the authorities to hear the public conferred a corresponding individual right on the plaintiff.\(^91\) Leth states that there is a right of concerned individuals to have the environmental impact of a project assessed by the competent services, whose violation then gives rise to member state liability for any ensuing pecuniary damage.\(^92\) The Court has also tied demands as to the form of legislative implementation of environmental directives to an individual right. The Court has required that the Air Pollution Directive\(^93\) be transposed in a legally binding manner because that was needed to secure the judicial enforceability of the individual right to human health that the Directive was intended to confer.\(^94\) But in Enichem, the Court found that the obligation in art. 3(2) of the Waste Directive 75/442\(^95\) to inform the Commission in advance of draft rules only concerned relations between the member states and the Commission and did not give rise to any right for individuals. Judicial protection thus did not lie there.\(^96\)

Yet Union environmental law also demonstrates that the lack of guaranteed judicial protection for an individual right not need necessarily mean that there is no judicial application at all. Indeed, the Union legislator by means of specific procedural legislation has sought to ensure that Union environmental law still become judicially enforceable. The Court has acknowledged that it can do so in Trianel. The case concerned the standing of environmental organisations to bring representative actions for environmental claims. Such actions were introduced by Directive 2003/35 on public participation, which amended inter alia art. 10 ¶ 3 of Directive 85/337 on environmental impact


\(^{89}\) Directive 85/337 art. 6(2).


\(^{91}\) Id. ¶¶ 69, 70.


assessments. There, the Court first emphasized the purely objective character of much substantive environmental law. It then opined that the amendment of Directive 2003/35 aimed to strengthen the judicial enforceability of this objective law by introducing the instrument of representative action of environmental organisations. The Court then deployed the principle of effectiveness in support of this procedural legislation. The effective purpose of art. 10a ¶ 3 of Directive 85/337 required that actions brought by environmental protection organisations be admissible in national court without further conditions to challenge national acts under Union environmental law having direct effect and national law implementing Union environmental law. The Court evidently considers this legislation to go beyond the guarantee of art. 47 of the Charter of Rights. Yet, it still seeks to make it fit within the rationale of the fundamental right. To do so, it construes the Directive to confer a procedural right on environmental organisations that would be impaired by any unlawful application of Union environmental law. In Edwards the Court then considered that art. 47 was implemented by the equally new paragraph 4 of 10a ¶ 4 of Directive 85/337 limiting litigation costs as this served to protect individual rights in the environmental sector. Much primary law is indeed addressed to the Union or the member states. It is objective. The Court has not failed to emphasize and draw the consequence of lack of Union jurisdiction over it. Illustrative are the judgements on the novel post-Lisbon TFEU art. 67 containing general provisions for the Area of Freedom, Security and Justice. Such objective law are also the rules on economic and monetary union. In the Pringle case, the Full Court was faced with a reference that essentially queried the compatibility with the TFEU rules on economic union of the international treaty by which the Eurozone members established the European Stability Mechanism. The Court still answered that reference, and arguably had to so in this exceptional case, but it still emphasized that it needed not provide a full review as the relevant TFEU provisions did not confer rights.

99 Id. ¶¶ 43, 48.
100 Id. ¶ 46.
101 Id. ¶¶ 47, 48.
103 Anton Vinkov v Nachalnik Administrativno-nakazatelnalnay deynost, Case C-27/11 (delivered June 7, 2012), ¶¶ 41, 42; Cholakova, Case C-14/13 (delivered June 6, 2013), ¶ 24.
104 Thomas Pringle v Government of Ireland, Ireland and The Attorney General, Case C 370/12 (delivered Nov. 27, 2012), ¶ 34.
4. Judicial protection of legal self-determination
The Treaty of Lisbon installs human dignity as the umbrella norm of all fundamental rights, including that to judicial protection. The thus determined Union jurisdiction operationalizes the value of human dignity. The respect of human dignity is a value shared by the Union and the member states. It is the keystone fundamental right of the Charter. This dignity is expressed in the self-determination that the individual enjoys within the perimeter of rights conferred by Union law. The understanding of self-determination through rights goes back to the very core idea of van Gend en Loos that the Treaties create a new legal order precisely because they establish the comprehensive subjectivity of the individual. Judicial protection is the complement of that self-determination. It both shares in it and concretises it. Judicial protection is co-extensive in its scope in that it, too, is not limited to any sector of the law. Judicial protection by both national and Union courts ensures that this self-determination through rights conferred by Union law across all sectors vis-à-vis both the member states and the Union gets real. This underpins the trust in the normative claim that the Union legal order is based on human dignity.

The jurisdictional doctrines of the Union order of procedure operationalise this individual self-determination. The right to protection guarantees Union jurisdiction of member state courts on the condition of the presence an individual right. That must be established by the national court. Where this is lacking neither the national court nor the Union court have jurisdiction. This is a sharp line that the Court has occasionally had trouble sticking to as in in Pringle. The guaranteed protection thus covers only a portion of the objective acquis of Union law. The upshot is that this leaves unaffected the discretionary conferral of Union jurisdiction through secondary legislation. The Charter of Rights neither limits nor excludes procedural rule-making. It may also do so to ensure the judicial enforcement of objective Union law beyond what is required by art. 47. This then becomes the second, not constitutionally protected strand of judicial application of Union law. It in turn harks back to the Union rule of law, rather than judicial protection. The Court has now accepted that this is possible.

III. The common Union procedure (1). The process before national courts
Art. 47 of the Charter of Rights secondly determines a common Union procedure for member states courts when exercising their Union jurisdiction. The Charter provides the Court with a methodology

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106 Charter of Rights, supra note 2, art. 1, 2012 O.J. C 326/391, at 396, reads: “Human dignity is inviolable. It must be protected and respected.”
for developing this common procedural order (1). The parameters of this order are set forth in art. 47, which in its three paragraphs provides for remedies, right to court and fair process, and legal aid (2-4). Complementary guarantees exist for criminal procedure (5). The Part concludes that the Court has been determining this common Union procedure by balancing effective judicial protection with the pluralist procedural choices reflective of parliamentary democracy at member states level.

1. The Charter-prescribed methodology of the Court for determining the procedure before national courts

The Member States retain the residual legislative competence for the procedure of their courts even when these apply Union law. Art. 4(1) of the TEU post-Lisbon specifies that the member states remain competent unless a competence has been specifically conferred on the Union; 108 no such general transfer has taken place for general judicial procedure. Art. 19(1) of the Treaty confirms this. 109 It obligates member states to provide for remedies that are ‘sufficient’ to ensure effective legal protection in the fields covered by Union law, presupposing their competence. 110 The Union has no general shared competence for procedure and may only act on the basis of specific competence titles. 111 The Lisbon Treaty thereby formalizes the Court’s anterior jurisprudence that in the absence of Union rules, the member states autonomously set the procedures for their courts even when applying Union law. 112 Still, this autonomy is limited. For Art. 51(1) of the Charter of Rights obligates the member states to respect the right to judicial protection in the exercise of that autonomy-competence, provided they are implementing Union law. 113

The Charter of Rights prescribes the methodology that the Court is to employ in judicially resolving this tension. This methodology yields uniform criteria for art. 47, while making their application sensitive to the systemic working of each member state procedure, allowing for differences between them. That methodology is modified for that purpose somewhat the general provisions laid down in its Title VII. 114-115 It has four prongs:

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108 TEU post-Lisbon, supra note 7, art. 4(1), 2012 O.J. C 326/13, at 18. It reads “In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States”.
109 Id. at 27.
110 The French and German texts use the term ‘necessary’. The provision is judicially cognisable, but the failure of national law to provide for the necessary procedures can only be overcome on the basis of CFR art. 47.
113 Charter of Rights, supra note 2, art. 51(1), 2012 O.J. C 326/391, at 405.
114 Id. arts. 52 and 53, 2012 O.J. C 326/391, at 406-07.
The first prong of that methodology is that the Charter only binds the member states when ‘implementing’ Union. It requires the Court to determine, as a first step, the very applicability of the right to judicial protection. In the literature, the general understanding of the ‘implementing’ criterion remains controversial where the member states act without intending to carry out Union law.116 The overall general methodological approach to Union is, however, based on effect, rather than process. The generally convincing interpretation therefore is that the Charter is applicable to the extent to which Union law actually is determinative of the facts, regardless of intention.117 This is, however, concretised through the wording of Art. 47. It is applicable where there is an individual right conferred by Union law. The provision then covers the member state’s entire procedure, regardless of whether it has been enacted to carry out that right.118 In the application of the right, there then arises a tension between the uniform Union guarantee and the space for particular-plural procedures of the member states.119

The second methodological prong is contained in art. 52(1) of the Charter of Rights.120 It prescribes the general judicial methodology based on the conception of fundamental rights as principles rather

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115 For the Court’s style of reasoning under the Charter see Gráinne de Búrca, After the EU Charter of Fundamental Rights: the Court of Justice as a human rights adjudicator?, 20 MAASTRICHT J. EUR. AND COMP. L. 168 (2013).


117 That is arguably the direction of the cases. Murat Dereci and Others v Bundesministerium für Innen, Case C-256/11, [2011] E.C.R. I-11,315, ¶ 72, establishes that the Charter applies if the facts of the case are covered by Union law. According to Åkerberg, it does not matter whether the member state in the instance applied a rule specifically designed to transpose Union law. The Court recognised, however, that to the extent that Union law does not determine the facts, there is space for autonomous member state action subject to constitutional fundamental rights, [2013] ECR I_(delivered Feb. 26, 2013), ¶¶ 21, 29.


119 The Charter reference to subsidiarity is embedded in its general strengthening by the Lisbon Treaty (TEU post-Lisbon, supra note 7, arts. 2(1), 5(3), 2012 O.J. C 326/13, at 17-18). Subsidiarity embodies the preference for normative plurality rather than uniformity within the non-exclusive competences of the Union, and, a fortiori for retained member state competences.

than rules.\footnote{Principles are preference standards that dictate that something be implemented relative to the legal and actual possibilities, for instance ROBERT ALEXY, A THEORY OF FUNDAMENTAL RIGHTS (2010) 75-6.} The optimal realisation of the rationale of each right then is limited by countervailing considerations, with the balance to be struck in the concrete instance through the mechanism of proportionality. The overall rationale of the right to judicial protection is to best effectuate of individual rights against any contestation through the means of public, criminal or civil procedural law. Art. 47 concretises this rationale through three elements: remedies (¶ 1), right to a court and to a fair procedure (¶ 2), and effective access to court (¶ 3). It is immaterial whether the right is violated by the Union, a member state or a private party. Countervailing considerations arise from ‘objectives of general interest recognised by the Union’. The procedural autonomy of member states as such is not an objective of general interest. It rather is a chiffre for the objectives that underlie procedural choices each of which must ultimately be recognised by the Court of Justice. The national procedural choice will then stand if it is suitable to further the objective, if it is necessary as there are no alternative less intrusive means available, and if the limitation on the optimal protection is proportionate given the weight of the objective. CFR art. 51(1) specifically subjects the Charter–related jurisdiction of the Court to the subsidiarity principle, so that the Court has to justify it when its jurisprudence under art. 47 leads to uniform procedural rules being substituted for particular-plural ones. That, however, requires looking at the system of the national procedure as a whole.

The third prong concerns the internalisation of the European Convention on Human Rights.\footnote{Opinion of Advocate General Kokott in Case C-489/10, Łukasz Marcin Bonda, [2012] E.C.R. I- (delivered Dec. 11, 2011),¶ 43.} Arts. 52(3) and 53 of the Charter of Rights contain the so-called homogeneity principle that obligates the ECJ to shadow the jurisprudence of the European Court of Human Rights on the corresponding rights enshrined in the European Convention on Human Rights.\footnote{This internalisation of the Convention will be reinforced by the EU acceding to it pursuant to TEU post-Lisbon art. 6(2) and Protocol (No 8) Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the ECHR and the Accession Agreement (See Final Report to the CDHH, Fifth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, June 10, 2013, Doc 47+1(2013)008 rev2). After its entry into force, all acts of the Union will be subject to review by the ECtHR after exhaustion of the Union remedies. Member states will remain responsible under the ECHR for their acts even when implementing Union law. In the negotiations, the Union did not insist on a codification of the controversial Bosphorous jurisprudence of the ECtHR, Bosphorous Hava Yollari Turizm v Ireland [GC], no 24833/94, ECHR 2005-VI that in such cases only tests the general quality of fundamental rights protection at Union level. See Jörg Polakiewicz, EU law and the ECHR: Will EU accession to the European Convention square the circle? (September 26. 2013). Available at SSRN: http://ssrn.com/abstract=2331497.} This covers both the methodology of the ECtHR and the concrete scope and meaning that that Court has given to the Convention rights. To
the rights of arts. 47-50 of the Charter of Rights correspond the rights laid down in arts. 5, 6, 7 and 13 of the Convention. In its interpretation of these rights, the ECtHR is guided more than elsewhere by their specific wording. Yet it still approaches them broadly in line with its general methodology, balancing legal protection with countervailing considerations expressed in the national procedure through proportionality. The ECtHR in particular understands each national procedure to form a system. It ascertains the systemic rationality of the national procedure, meaning that differences between them are acceptable. Uniform rules should thus reflect the procedural consensus of the Contracting States. The sheer quantity of the Strasbourg case-law on Arts. 5, 6, 7 and 13 ECHR then represents a reservoir of outcomes of the concrete balancing of judicial protection within the margin of appreciation to be accorded to states.

This is counterbalanced by an element of autonomy in the methodology of the ECJ. Art. 52(3) of the Charter of Rights permits the Court to go beyond the ECHR standard to take account of the fact that Charter attaches to a supranational polity with own law-making competences. The clearest recognition of this rationale is to be found in the wording of art. 47 of the Charter of Rights itself, protecting all the rights conferred on individuals by Union law. By contrast, ECHR art. 6 presupposes rights granted in national law which must concern civil rights and obligations, and ECHR art. 13 only protects rights the Convention itself enshrines. Art. 47 thus confers the power on the ECJ to align protective requirements with the function and purposes of the individual rights within the broader context of the Union legal order. Levels of protection above the ECHR also are codified by the Charter in art. 49(1) prescribing the retroactivity of a more lenient penal law and in art. 50 providing for a transborder ne bis in idem guarantee. That can then reflect back on the

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124 Explanations, supra note 10, art. 47, 2007 O.J. C 303/17, at 29. As well as the rights of Additional Protocol no 7 to the ECHR, although it has not been ratified by all member states of the Union.
125 Golder v United Kingdom (1979-1980) 1 EHRR 524, ¶ 36; Klass and others v Germany (1994) 18 EHRR 305, ¶ 49; Ashingdane v the United Kingdom (1985) 7 EHRR 528, ¶ 55-57; and Lithgow and others v United Kingdom (1986) 8 EHRR 329, ¶ 194.
127 On the declining ECJ references to the ECtHR see de Bürca, supra note, at 174-75
128 An own and thus somewhat autonomous Charter of Rights for the Union is in keeping with the European Convention on Human Right and the subsidiary nature of its protection system.
130 These are instances of the protection of individual rights against public authority. Determining a higher level of protection becomes more questionable in proceedings between private parties that both are bearers of the right to protection.
interpretation of the Convention by the ECtHR. The Charter and the Convention become mutually permeable.

The following will demonstrate that acting through this methodology, the Court has been developing a common Union procedure on the basis of Art. 47, which provides the skeleton of this procedure based on remedies, right to court and a fair hearing, and legal aid. This jurisprudence has amounted to a minimum harmonisation of national procedure.

2. Right to a remedy, art. 47(1) of the Charter of Rights

Art. 47(1) of the Charter of Rights guarantees effective remedies. What an effective remedy depends ultimately on the individual right; its content ought to be realised.

In general, remedies of administrative judicial review must be available. The Court will assess the availability of such remedy within the system of the national procedure. The judgment in Samba Diouf exemplifies this. The reference concerned the review of the decision for accelerated procedure for asylum applications under Luxembourg law. The Court stated that that intermediary decision need not be reviewable on its own, provided it is comprised in the judicial review of the final decision on the application. The Court thus assessed the systemic working of the national procedure, rather than only its individual elements.

There must also be legislative review. It also is subject to a system-wide analysis, as Unibet demonstrates. This is the leading case on art. 47 of the Charter of Rights during the transition to Lisbon. There, the referring court wanted to know whether Union law demanded a free-standing application for review of national legislation alleged to be incompatible with the individual right of free service provision. Swedish law did not provide that, it rather allowed each court to rule on this compatibility as a preliminary issue within another action. The Court found that the right to protection does not require a freestanding application for legislative review, provided the legality issue can be raised indirectly and the plaintiff does not have to incur administrative or criminal penalties. The Court reached this conclusion through the methodology that is now prescribed by the Charter. It acknowledged that a direct application would be the most effective form of judicial protection, but considered that the legality review as a preliminary issue provided was acceptable on

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131 The ECtHR has recently interpreted the concept ‘idem’ in light of the case-law of the ECJ, placing the emphasis on the identity of the facts instead of their legal classification, Sergey Zolotukhin v. Russia, Judgment of 10 Feb. 2009 [GC], No. 14939/03, ECHR 2009.
134 Id., ¶ 64.
balance. The Court thus understood the national procedure as a system and as such tested it for its proportionality. Unibet implicitly acknowledged that legislative review can be realised in different ways; either decentrally by all courts or centrally by a constitutional court. Handed down under Lisbon, Melki confirms this. There, the Court makes clear that the centralised legislative review by a constitutional court is also compatible with art. 47. That comes, however, with the proviso that the powers of each national court must remain unfettered to refer the interpretation of Union law, to disapply national legislation as a result, and to grant interim relief in the meantime.

The right to a remedy under art. 47(1) also puts on a firmer basis the earlier jurisprudence of the Court on remedies before national courts, including state liability, the refund of unlawful charges, and interim relief. In finding these remedies to be required under Community law, the Court had based itself on an array of unreconciled bases ranging from the system of the Treaties, effectiveness, to protection of the right in question. That made the outcomes unpredictable. If they were nevertheless accepted by national courts, then most likely because the Court really established a judicial consensus on the availability of these remedies. It thus absorbed a key element of the methodology of the Court of Human Rights in developing the Convention, anticipating the precepts of the Charter of Rights. Under the Charter, these remedies are all now directly grounded on Art. 47(1), which thus becomes their legal source. Union law also contains the outline of their respective further conditions. These must be proportionate, and may be provided by national law, secondary Union law, or failing that by judicial doctrine directly under Art 47.

Art. 47(1) of Rights guarantees a remedy also against private parties. In L’Oreal, the Court now recognises this. The preliminary reference there concerned the interpretation of Directive 2004/48

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135 Id., ¶¶ 41, 42. See also Opinion of Advocate General Sharpston in the case, [2007] E.C.R. I-2275, ¶ 56. Note that the Court also pointed out that the right to protection could demand a specific remedy not yet provided in national law if otherwise no protection can be obtained. Id. ¶¶ 56-65.

136 Melki, [2010] I-5667, ¶¶ 63-75.


139 The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others, Case C-213/89, [1990] ECR I-2433.


142 We will return to this issue in the discussion of the effectiveness-cum-equivalence standard below.

on the judicial enforcement of trademarks.\textsuperscript{144} The Court stated that the ‘right to an effective remedy’ requires the national court in the absence of national transposing legislation to take specific and effective procedural measures, including injunctive relief.\textsuperscript{145} That power can only derive from art. 47. It is this provision, not the substantive law, which determines the procedural powers of the national courts also in private disputes.\textsuperscript{146} There also is a remedy of private damages.\textsuperscript{147}

3. Right to court and a fair process, art. 47(2) of the Charter of Rights

Art. 47(2) of the Charter contains the right to court and fair process.

The individual has the right to such court, but not to several levels of jurisdiction.\textsuperscript{148} The court must satisfy the standards of independence and subjective and objective impartiality.\textsuperscript{149} The right to a court requires it be fully competent for review in law and fact.\textsuperscript{150} The court must have the power to disapply offending national law, including constitutional law.\textsuperscript{151}

This right to a court is not an absolute, but subject to proportionate limits for a legitimate objective. Thus can be limited the access to court, which is an aspect of the right to court.\textsuperscript{152} The national procedure can therefore make the admissibility of actions subject to requirements as to standing, time-limits and others, provided those requirements are proportionate in regard to the right. Thus, in \textit{Club Hotel Loutraki AE}, the Court found disproportionate the standing requirement in Cyprus law that members of a bidding consortium could only collectively challenge the administrative decision on procurement was disproportionate admissibility restriction.\textsuperscript{153} In \textit{Samba Diouf}, the Court tested the time-limit for challenging the administrative decision in asylum cases under Luxemburg law.

\textsuperscript{145} \textit{L’Oreal}, [2011] E.C.R. I-6011, ¶¶ 141 and 142.
\textsuperscript{146} The Court in tasking the national court to interpret the national civil procedure consistently with effective judicial protection aligns itself with the doctrine that Directives do not to have horizontal direct effect, that is cannot be relied on by private parties for imposing substantive law obligations on another individual, \textit{Seda Kücükdeveci v Swedex GmbH & Co. KG}, Case C-555/07, [2010] I-365, ¶ 46.

\textsuperscript{151} Id. ¶ 63

\textsuperscript{153} \textit{Club Hotel Loutraki AE}, [2010] E.C.R. I-4165, ¶¶ 78, 80. Earlier in \textit{Safalero Sri v Prefetto di Genova}, Case C-13/01, [2003] I-8679, ¶ 54, the Court had accepted a standing requirement, which limited the protection of the right to free movement of goods to a direct action against the member state, but did not allow his intervention in proceedings against a third party.
finding it to strike a proportionate balance between legal certainty and the individual right.\textsuperscript{154} In \textit{Alassini}, the Court saw the Italian law’s mandatory attempt of an out-of-court settlement in disputes between providers and end-users under the Universal Service Directive\textsuperscript{155} not disproportionate since it left subsequent access to court unfettered.\textsuperscript{156} The Court also accepts that national law can limit access on grounds of \textit{res judicata}.\textsuperscript{157}

The actual process before the national court must be fair. Fairness becomes the comprehensive standard for national procedural institutions, such as party disposition, burden of prove, and evidence. Again, it is the individual right that determines what the fair process requires.\textsuperscript{158} \textit{Oceana Group Editorial} illustrates that well. There, the Grand Chamber pointed out that the purpose of the Directives for consumer protection was to level the playing field between the consumer and economically powerful market participants. That purpose demanded that in civil procedure the national courts have the power to raise proprio motu unfair terms in consumer contracts.\textsuperscript{159} While the disposition principle that binds the national court to the pleadings of the parties may ensure a fair hearing in general, that is not the case when these rights are at stake.

Art. 47(2) in its second sentence specifies the fair process through several sub-guarantees. In \textit{ZZ}, the Grand Chamber confirmed this for the right of defense in administrative procedure; that right guarantees an adversarial procedure and thus the right of the defendant to know the grounds of an adverse decision.\textsuperscript{160} M. G. adds that the serious violation of the right to be heard can have the direct consequence that the detaining measure must be quashed.\textsuperscript{161} In \textit{Lindner}, the Court stated that the right of defense also applies to civil procedure. That then served as the standards for the proceedings in absentia permitted in Hungarian civil procedure. In \textit{Otis}, the Grand Chamber confirmed that the equality of arms is an integral part of the fundamental right to protecting serving as a standard for the procedures of the national court as well as the Union courts.\textsuperscript{162}

\begin{footnotesize}
\begin{enumerate}
\item Ufficio IVA di Piacenza v Belvedere Costruzioni Srl, Case C-500/10 (delivered 29 March, 2012), operative part.
\end{enumerate}
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Additional specifications of the fair process are contained in certain substantive fundamental rights of the Charter of Rights. Thus, in Aguirre Zarraga, the Court finds that the right of the child to be heard set forth in art. 24 of the Charter also needed to be respected in judicial proceedings. But they also ensue from non-fundamental rights, for instance the citizen’s right to a use her language in court proceedings of the host state.

4. The right to legal aid, art. 47(3) of the Charter of Rights
Art. 47(3) of the Charter requires that legal aid be made available by national procedure where this is necessary for effective access to court. The Court has used that right in DEB to test the provision of legal aid in national law. German procedure granted legal aid to legal persons under conditions that were more restrictive than those for natural persons. The Court concluded that art. 47(3) also protected legal persons such as DEB, and that legal aid therefore had to be provided to them for enforcing their Union rights. The Court arrived at that conclusion through the prescribed methodology. It balanced the rationale of art. 47(3) with the countervailing considerations underlying the restrictive national procedure, finding these disproportionate. The Court backed up its position with the jurisprudence of the ECtHR. It also established the consensus of the national legal orders on legal aid in general. The lack of consensus on legal aid for legal persons in particular did not prevent the Union’s right to effective judicial protection from providing so. The Court effectively relied on Art. 47(3) with art. 52(3) of the Charter of Rights to establish a higher level of protection than the national legal orders.

5. Criminal procedure guarantees in the Charter of Rights
The Charter sees the criminal trial as the epitome of the right to judicial protection, structuring it through a set of specific guarantees that supplement the fair process guarantee of art. 47(2) of the Charter of Rights. These are the presumption of innocence and the right of defense, the legality and proportionality of criminal offences and penalties, and the ne bis inident guarantee. These safeguards protect the individual against that most powerful exercise of public authority that

166 Id. ¶¶ 45-52. Legal aid is demanded by the ECtHR under art. 6(3)(c) ECHR in criminal cases. BEG extends this to the protection of all individual rights under Union law; the ECJ thus chooses to align CFR art. 47 with the higher standards of protection that the ECtHR establishes for criminal over private of public law procedure.
167 Id. ¶¶ 59-61.
168 Id. ¶ 62.
169 Charter of Rights, supra note 2, art. 48, 2012 O.J. C. 326/391, at 405.
170 Id. art. 49.
171 Id. art. 50.
restricts personal freedom. In the case of the Union, they apply to criminal proceedings under national law with a transborder element, that is where the individual has made use of the right to move. But the ECJ has been extending this protective safeguard to such administrative procedures that imply the sanctioning of individuals affecting the rights that they hold under Union law, particularly the free movement rights of every EU citizen and the free movement rights of every worker. This reflects the case-law of the European Court of Human Rights which attaches the stricter safeguards of art. 6 ECHR to all cases of detention.

6. Judicial Protection in pluralist democracy
The Treaty of Lisbon makes clear that judicial protection is to take place within a pluralist democracy. The Treaty makes democracy a value of the Union, defining it primarily as representative democracy. This commitment extends to the levels of both the Union and the member states. This accounts for the participation of national parliaments in Union decision-making. It also accounts for the respect for the national parliaments’ decision-making on matters within member states’ competences. Procedure is such a matter. It reflects concrete choices between competing interests that are the remit of the legislatures. They may and indeed will differ. Respect for particular-plural procedure is thus respect for parliamentary democracy in each member state and indeed the constitutional identity of each member state. This dovetails with the idea of subsidiary decision-making at Union-level.

The art. 47-based common Union procedure operationalizes this pluralist democracy. The jurisprudence of the Court has been taking the systems of national procedure seriously by identifying and evaluating its underlying objectives, in the balancing with the objective of judicial protection. Within the boundaries of shared procedural rationality, for instance, legal certainty, these systems reflect the particular choices made by each procedural legislator. That is true for the legislator of the Member States, as it is for the Union legislator.

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173 ZZ, [2013] E.C.R. I- (delivered June 4, 2013) determines this for the free movement right of European citizens in entry control cases.
175 Id. art. 10, 2012 O.J. C 326/13, at 20.
176 Id. art. 12, 2012 O.J. C 326/13, at 21.
177 For criminal and civil procedure post-Lisbon TFEU post-Lisbon art. 67(1) provides: “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal traditions of the member states” (emphasis added), supra note, 2012 O.J. C 326/47, at 73.
IV. The common Union procedure (2). The process before Union and national courts

Art. 47 of the Charter of Rights governs the procedure of the member states courts and that of the Union courts. The rationale of effective protection and the countervailing objectives underlying procedure are essentially the same for both.\(^\text{178}\) The ECJ also tests Union procedure on the basis of the same judicial methodology prescribed by arts. 47, 51 and 52/53 of the Charter of Rights that it follows in regard to member state procedure. That still leaves room for differences in implementation, as the procedural legislators of the Union and of the member states each enjoy a margin of discretion. The single protection standard will thus lead to similar if not identical outcomes for procedural choices of the Union and its member states. A procedure that is common, not uniform, for Union and national courts ensues. This Part discusses its concretisation. It demonstrates that the Court’s mode of concretisation has been to drive for converging procedural institutions of Union and national law. It has driven such convergence bottom-up from the national to the Union levels (1), and top-down from the Union to the national levels (2).

1. Aligning the procedure of the Union courts

The Court’s practice reflects the conscious effort to secure this convergence by transferring to the procedure of the Union courts rules established originally for the national courts.

The two Kadi cases highlight this.\(^\text{179}\) These cases concerned Commission acts putting individuals suspected of association with Al Qaida on the list contained in the annex of Regulation 881/2002 providing for individual financial sanctions, thereby implementing preceding UN Security decisions. Under the original Regulation 881/2002 at issue in Kadi I, the Commission could do so without communicating the reasons and without hearing the individual concerned.\(^\text{180}\) In its judgment, the Court emphasized that Union acts infringing individual rights must be subject to in principle full judicial review. It then defined the standard of such review by reference to that of national acts by national courts defined in its Heylens judgment.\(^\text{181}\) Adverse administrative decisions must be

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\(^{179}\) The cases have been much discussed for the willingness of the Court to review Union acts that implement Security Council resolutions. See Gráinne de Búrca, The European Court of Justice and the International Legal Order After Kadi, 51 HARV. J. INT’L L. 1, with further references in note 75. The present discussion concentrates on the standard of review that the Court applied.

\(^{180}\) Council Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, 2002 O.J. 139/9 (as amended). Its Annex I contains a list, which is regularly reviewed, of organisations, entities and persons suspected of being involved in terrorist activities.

motivated in such a way that the court can effectively review them and the individual attack them in court.\textsuperscript{182} Accordingly, Union acts also had to be motivated to enable the individual concerned to make an informed decision whether to seek recourse and the competent court or tribunal to be in a position to review the act. As Regulation 881/2002 was found not to meet this standard, the Court annulled it insofar as it concerned the applicant.

\textit{Kadi II} then concerned the subsequent re-listing of Kadi under the amended Regulation 881/2002.\textsuperscript{183} The Commission had provided a statement of the grounds against Kadi obtained from the UN Security Council. Again, the Court referred to the judicial review by national courts of national acts, which it had recently dealt with in \textit{ZZ}.\textsuperscript{184} There, the Court had refined the balance to be struck between effective judicial review and legitimate security concerns. It meant that the individual had to have knowledge of the main grounds, by reading the decision itself or by obtaining disclosure of those grounds, and that the court having jurisdiction had to have the power to require the authority concerned to disclose that information. The ECJ transferred to the Union level the detailed procedural rules developed in \textit{ZZ}, including that the courts must base its review only on the information divulged and allow for rigorous contestation.\textsuperscript{185} As the procedure against Kadi did not satisfy this standard, the Regulation again in part was invalid. The \textit{Kadi II}-Court makes that clear that the ‘Union constitution’ requires that the individual receive judicial protection even where this means that absolute loyalty to international law must give way. However, the methodology of the Charter leads the Court to internalising international law. The Court conceives of it as an ‘objective’ that needs to be balanced against the rationale of judicial protection.

\textit{Kadi II} demonstrates that the Court will review Union judicial procedure for whether it secures the judicial protection required by art. 47 of the Charter of Rights.\textsuperscript{186} That presents a step in the direction of integrating international law and Union law, rather than treating the two as isolated from each other. \textit{Kadi II} also marks the Court differentiating standards of judicial procedure and of administrative procedure. Those standards derive from the right to good administration in Art. 40 of the Charter of Rights, including the requirement of motivation of administrative decisions.

\begin{itemize}
  \item \textsuperscript{182} \textit{ZZ}, [2013] E.C.R. I_ (delivered June 4, 2013), ¶ 61.
  \item \textsuperscript{184} \textit{Kadi II}, [2013] E.C.R. I_ (delivered July 18, 2013), ¶ 100.
  \item \textsuperscript{185} \textit{Id.} ¶¶ 120-30. The Court emphasises that such review needs to balance between the right to protection and the respect for UN Charter art. 24 and the international anti-terrorism regime, which it recognises as an objective within the meaning of CFR art. 52(1) CFR, \textit{id.} ¶¶ 103, 131.
  \item \textsuperscript{186} \textit{Id.} ¶¶ 117-134.
\end{itemize}
In much the same manner, the Court has transferred procedural elements of fair process from the national levels to the Union courts. In *Otis*, having declared that the Union courts have exclusive jurisdiction over the validity of Union acts, the Court expressly stated that the equality of arms derived from that provision is valid both in national proceedings and in proceedings before the Union judicature which concern Union law rights. The Court has emphasised this sameness also for the countervailing objectives. Thus, the respect of *res judicata* is an objective equally valid for both the Union and national procedures. Both Union and national procedure may legitimately provide for time-limits in the interest of legal certainty, provided they meet the same reasonableness test. For the legal aid guarantee of art. 47(3) of the Charter of Rights, *BEG* confirms that it must be accorded in similar conditions in proceedings against national acts and against Union acts.

2. The reverse impact on the procedures of national courts

In the reverse constellation, the Court has also been transferring Union rules of procedure to the procedure of national courts, to the point of displacing the national rules completely. Where a case before national court concerns the alleged violation of an individual right by an act of the Union, the procedure becomes analogous to that of the Union courts. The Court has affirmed this in *Unibet* for the interim relief that national courts can grant against Union acts. Uniform Union rules thus govern this procedure before national courts; effectively pre-empting the national procedure. By contrast, where the right has been allegedly violated by a national act, national courts continue to apply their national procedure. In *Unibet*, the Court acknowledged this by distinguishing the uniform rules on interim relief against Union acts by Union or national courts from the particular-plural rules that govern interim relief against national acts. Still, in its recent practice, the Court has been transferring to that procedure important principles of Union procedure. Thus, in *Unibet* the Court suggested that the right to protection demands there must be interim relief against both Union member state acts under similar conditions.

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187 That judgment is problematic in regard to another aspect, for when applying the principle of equality of arms, the relevant ECHR case law relied upon by the defendants was distinguished and eventually not taken into account. This creates conflicting procedural demands for national courts.


193 *Id.*, ¶ 79.

194 *Id.*, ¶ 81.
Union and the member states for their violating individual rights are also converging. That is true in particular for the grounds of illegality that are incidentally reviewed within such an action.\footnote{Liability of the Union for unlawful acts has its base in TFEU post-Lisbon art. 340, whereas that of the member state is considered to be inherent in the system of the Treaty, Günter Fuß v Stadt Halle, Case C-429/09, [2010] ECR I-12167, ¶.} The template here has been the action for liability of the Union before the Union judicature, which presupposes that a higher norm conferring a right be violated in a qualified manner.\footnote{Schöppenstedt, Case 5/71, [1971] E.C.R. 975.} Particularly in economic matters, the Court has accorded the Union legislator broad discretion.\footnote{HNL, Case 83/76, [1978] E.C.R. 1209.} The Court has been moving towards such review of member state legislation by national courts as well. Certain formal grounds of illegality will then per se lead to a verdict of member state liability, such as legislative omission or pre-empted legislation.\footnote{Erich Dillenkofer and others v Bundesrepublik Deutschland, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, [1996] E.C.R. I-4845 (non-transposition of directive); ex parte Hedley Lomas, Case C-5/94, [1996] E.C.R. I-2553, and Commission v Denmark, Case C-23/94, [1994] E.C.R. I-3450 (pre-empted legislation).} But otherwise, the member state legislature must have manifestly and gravely disregarded the limits of its discretion.\footnote{Combinatie Spijker Infrabouw-De Jonge Konstruktie and others, Case C-568/08, [2010] ECR I-12,655, ¶ 87; earlier Test Claimants in the Fil Group Litigation v Commissioners of Inland Revenue, Case C-35/11, [2006] I-11,753, ¶ 212.} In so doing, the Court explicitly recognized that the protection of an individual right must be the same against infringements by either the Union or the member states.\footnote{Id.; earlier Brasserie du pêcheur, [1996] E.C.R. I-1029, ¶ 47, and Bergaderm v Commission, C-352/98 P, [2000] E.C.R. I-5291, ¶ 41.} This reflects a balancing of effective judicial protection with the principle of democratic accountability on both levels.

V. European judicial federalism. Protection through Union and national courts

The third and final component of the Union order of procedure is European judicial federalism. It addresses the specific organisation of the judicial power in the Union. Under the founding Treaties, the judicial architecture of the Union indeed rests on the two pillars of the Union judicature and of the several member states judicatures. The point of judicial protection then is to secure the coordination of this two-pillared judicial architecture. This part first establishes the binding effect of the right on the constituent power of the Treaty \footnote{Id.} (1). It then demonstrates that the Court has been developing doctrines that seeks to coordinate the pillars. There is vertical coordination between the Union and member states judicatures \footnote{Id.; earlier Brasserie du pêcheur, [1996] E.C.R. I-1029, ¶ 47, and Bergaderm v Commission, C-352/98 P, [2000] E.C.R. I-5291, ¶ 41.} (2), and there is horizontal coordination between the several member states judicatures \footnote{Id.; earlier Brasserie du pêcheur, [1996] E.C.R. I-1029, ¶ 47, and Bergaderm v Commission, C-352/98 P, [2000] E.C.R. I-5291, ¶ 41.} (3). The concluding section points out that the emerging European
judicial federalism is reflective of the Lisbon Treaty placing judicial protection within a federal order based on the principle of subsidiarity.

1. The binding effect of art. 47 of the Charter of Rights for the Union constituent and constituted powers.

The founding Treaties themselves share out the judicial power organisationally between courts that are part of the Union and the member states. It would seem a truism that the fundamental right to judicial protection then is the binding yardstick for that law. But that clearly is the case only where the Union’s constituted organs and bodies act under the Treaties. Less clear is the effect of art. 47 of the Charter of Rights on the jurisdiction, organisation and procedure of the Union judicature as laid down in the founding Treaties. For the constituent power of the Treaties is not included in the explicit addressees of the Charter of Rights by its art. 51(1). Still, the convincing view is that art. 47 is the standard also for this primary law. The constituent power must be presumed to be giving effect to that guarantee, not least because this law and its application are subject to the European Convention on Human Rights. The ECJ appears to be adopting this viewpoint. Prior to Lisbon, The Union judicature had implicitly accepted this by correcting the Treaty procedure, even though its practice remained somewhat ambiguous.

Post-Lisbon, the Court has made this point more clearly. In both Chalkor and Otis, the Court stated that art. 47 of the Charter of Rights requires judicial review of Union acts and that this review is arranged in the founding Treaties. This presupposes that art. 47 is the standard for primary law. Furthermore, art. 47 being clearly binding on the Union legislator, the Chalkor-Court suggests that it can become necessary for that legislator to supplement the Treaty-based review, there in regard

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201 Charter of Rights, supra note 2, art. 51(1), 2012 O.J. C 326/391, at 406
203 The ECtHR has tested the Treaty-based procedure of the ECJ against the rights enshrined in arts. 6 and 13 of the Convention, Cooperative Productenorganisatie v Netherlands, Jan. 20, 2009, Application No 13645/05 (decision not to re-open the oral procedure on a preliminary reference not manifestly deficient).
204 In Evropaïki Dynamiki v EMSA, Case T-70/05, [2010] E.C.R. II-313, the General Court established beyond the wording of EC art. 230(1) that acts of created Union bodies were also reviewable. The Lisbon Treaty has amended TFEU post-Lisbon art. 263(1) accordingly. In UPA, the Court opined that the primary law needed to provide judicial protection, allocating the responsibility for closing gaps to the constituent power. Unión de Pequeños Agricultores v Council, Case C-50/00 P, [2002] E.C.R. I-6677, ¶ 43, and Commission v Jégo-Quéré, Case C-263/02 P, [2004] E.C.R. I-3425, ¶ 33.
206 Charter of Rights, supra note 2, art. 51(1), 2012 OJ C 326/391, at 406. The ‘institutions’ of the EU are enumerated in TEU post-Lisbon art. 13 inter alia as the Parliament, the Council, and the Commission, supra note 7, at 22.
to the penalties for undertakings engaged in anticompetitive behaviour laid down in Regulation.207 Finally, art. 51(1) of the Charter requires the Court itself to respect the standard of art. 47 of the Charter when called upon to interpret and apply the primary law.

2. The coordinated jurisdiction of the Union and national courts

Post-Lisbon, art. 47 of the Charter of Rights thus is the single standard for judicial procedure at all normative rungs within the scope of application of Union law. On that conceptual basis, it becomes possible to evaluate the very Treaty-based organisation of the two-pillared judicial architecture, in which the member states judicatures retain residual jurisdiction, while that of the Union courts remains circumscribed by conferred heads of jurisdiction. This is relevant not just for the protection afforded by each judicature, but also between them. Ensuring that the rights of individuals under Union law are protected then requires that the Union courts coordinate their jurisdiction and procedures with that of national courts. This the Court has been working towards, as will be shown in what follows regarding the indirect jurisdiction of the Union judicature (a), its exclusive jurisdiction (b), and its direct jurisdiction (c).

a) Indirect jurisdiction of the Union judicature

That is true first for the indirect jurisdiction of the Court of Justice under post-Lisbon TEU art. 267, which is limited to giving preliminary rulings on the interpretation of primary and secondary Union law.208 Where the ECJ has jurisdiction to give the requested interpretation of Union law, it exclusively falls to the competent national court to provide the requisite judicial protection, by applying the individual Union right to the facts, including by interpreting and applying the national law, and by determining the remedies.

Art. 47 of the Charter of Rights does not override this division of powers between the Union and the national judicatures.209 It rather ensures that it is coordinated. Art. 47 of the Charter of Rights empowers the Court to render preliminary rulings where the referring national court itself has Union jurisdiction over the case before involving an individual right under Union law. The Court has acknowledged this jurisdictional link. In ZZ, the Grand Chamber confirmed that the reference concerned a genuine dispute on an individual right before the national court and that that founded its own jurisdiction to render the preliminary ruling requested.210 In many other Chamber cases, the Court has declined jurisdiction to answer the referred question as there was no individual right at issue in the national proceedings. The Zakaria judgment discussed above demonstrates this pars pro

toto.\textsuperscript{211} By contrast, references must not be coordinated with infringement proceedings brought by the Commission as these are an objective means of legality control.\textsuperscript{212}

\textbf{b) The exclusive jurisdiction of the Union courts for the invalidation of Union acts}

Ever since \textit{Foto-Frost}, it has been an established judicial doctrine that the Union judicature has the exclusive jurisdiction to declare any Union act invalid by way.\textsuperscript{213} The otherwise discretionary referral for a preliminary ruling by the Court on then becomes mandatory for the national court wishing to leave the act disapplied. Post-Lisbon, this received doctrine of exclusive Union jurisdiction must be compliant with the fundamental right to judicial protection. The Court has recognised just that in \textit{Otis}. There, the Commission had issued a decision against Otis on grounds of anti-competitive practices. It then brought a private law action for the damages arising out of those practices against Otis in national court. That court referred the question to the ECJ whether Regulation 1/2003 on the implementation of the rules on competition barred it from reviewing the Commission decision incidentally in the action for damages.\textsuperscript{214} The Grand Chamber confirmed that the division of judicial power is such that only the Union judicature can declare acts of the Union invalid.\textsuperscript{215} From that followed the obligation of the national court to treat the Commission act as valid as long as it has not been declared invalid. The Court acknowledged, however, that this limits the right to court at member state level as guaranteed by art. 47(2) of the Charter of Rights. That right guaranteed a court fully competent for review of infringing acts in law and in fact, including the competence to leave infringing Union law disapplied. The Court of Justice was satisfied, however, that the exclusive jurisdiction of the Union judicature over the validity of Union served legal certainty.\textsuperscript{216} It was proportionate, provided that the individual had access to a Union court competent to make a declaration of invalidity. The Court then examined whether the General Court would effectively possess such jurisdiction in the concrete instance on the basis of an admissible annulment action under post-Lisbon TFEU art. 263(4).\textsuperscript{217} \textit{Otis} thus coordinates the exclusive jurisdiction of the Union courts with access to them to achieve the requisite invalidation. The ECJ has drawn additional consequences in \textit{Criminal proceedings against E and F}. There, it emphasizes the right of individuals to plead the illegality of normative Union acts and to ‘prompt’ the national court to refer the

\begin{footnotesize}
\begin{enumerate}
\item[214] Art. 16 of Regulation 1/2003 on the implementation of the rules on competition, 2003 O.J. L 1/1, prohibits national courts from taking decisions running counter to the decision adopted by the Commission and requires them to avoid conflicts with pending proceedings of the Commission.
\item[216] Id. ¶ 54.
\item[217] Id. ¶ 56-7.
\end{enumerate}
\end{footnotesize}
question of illegality. That limits the discretion of the national court not to refer a question of validity to the Court of Justice.

c) Direct jurisdiction of the Union judicature

Such coordination also concerns the direct jurisdiction that the Union judicature has over annulment actions brought by individuals. That direct jurisdiction is subject to considerably restrictive standing conditions. Individuals have standing to challenge before the General Court decisions of the Union addressed to them, but not generally normative acts. It is true that the Lisbon Treaty amended the standing requirement in TFEU art. 263(4) to take account of art. 47 of the Charter of Rights. A plaintiff can now bring a direct action for the annulment of a ‘regulatory act’ of the Union without having to show that she is individually concerned. However, the Treaty does not define this term, and it was thus for the Court to do so in Inuit. There, the Grand Chamber understands the term ‘regulatory act’ only to comprise executive rule-making by the Commission. Furthermore, no standing exists to challenge such acts that require further implementation and are thus not of direct concern. Direct actions against legislative acts adopted by Parliament and the Council still require that the plaintiff is both directly and individually concerned. This remains the case only where certain persons that are differentiated from the group of addressees of the legislative act. As a consequence, the review of Union legislative acts and of regulatory that require implementation can only be affected on the basis of the indirect jurisdiction of the ECJ on the basis of preliminary references from member state courts.

The important point is that the Court interpreted these Lisbon amendments under Art. 47 of the Charter of Rights. In so doing, the Court developed its doctrine of vertically coordinated European judicial federalism. The restrictive standing and thus jurisdiction of the Union judicature for the annulment of normative Union acts after Inuit indeed limits the right to court of art. 47(2) of the

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222 The Commission has such powers under TFEU post-Lisbon arts. 290 and 291, supra note 17, 2012 O.J. C 326/47, at 172-173.
223 In Sugars, id., ¶ 53, the General Court has reconfirmed that the ‘direct concern’ requirement is compatible with CFR art. 47. There is no direct concern whenever the regulatory act requires an implementation by the Union or the national administrations, regardless of whether these have discretion.
225 The so-called Plaumann test. Lisbon constituent power consciously retained the ‘individual concern’ for the review of legislative acts, see Explanations, supra note 10, art. 47, 2007 O.J. C 303/17, at 29.
Charter of Rights. This limitation is grounded, however, in the division of powers between the Union and the national judicatures within the judicial architecture. It is proportionate if compensated for by the jurisdiction of the national courts. That is indeed what the Court has emphasized in Criminal proceedings against E and F. There, the Grand Chamber established that the national courts have prima facie jurisdiction over Union normative acts. 226 The national court may thus start the process of legislative review, which ECJ will complete when seized by the national court through the preliminary reference procedure. This prima facie jurisdiction of the national courts over Union normative acts also ensures that issues of national law are properly addressed. Legislative acts of the Union will almost always require implementation in national law and thus raise issues of member state law. Executive rule-making by the Commission will normally need implementation by national administrations, raising issues of member state law subject to member state court jurisdiction. It is then for the member state procedure to secure that judicial protection can be obtained before national courts where individual rights are concerned. 227 Nor has the ECtHR required a principal application for legislative judicial review under art. 13 of the Convention. By contrast, a direct action must be open against executive rule-making that is self-executing, and that is the case.

3. The coordinated jurisdiction of the judicatures of different member states
Ensuring that the rights that individuals hold under Union law are protected within the two-pillared judicial architecture also requires that the courts of different member states coordinate their jurisdiction. The need for such horizontal coordination arises more urgently after Lisbon, as the Union is making increasing use of its competences to harmonise the rules on transborder judicial cooperation in civil and criminal matters. 228 Art 47 of the Charter of Rights then requires that individuals must receive judicial protection for their rights in one but only in one member state. The jurisdiction of a national court can only be limited if this is compensated for by the courts of another member state having full jurisdiction and following an adequate procedure. This horizontal understanding of judicial protection trumps any specific guarantees that national procedure may...

227 The Opinion of Advocate General Kokott in Inuit, ¶ 210, suggests that the individual may apply for a national implementing act stating the legal situation and then attack it before national court. The General Court in Sugars (id. ¶¶ 58-59) recognises that the amended art. 263(4) post-Lisbon TFEU serves to avoid a situation in which a person would have to break the law in order to have access to justice, but does not obligate the national legislator to provide for a remedy.
228 Area of Freedom, Security and Justice, TEU post-Lisbon art. 3(1), and Part III Title VI of the TFEU post-Lisbon, in particular arts 82-86, supra note 17, 2012 O.J. C 326/47, at 79-83.
provide for, notwithstanding Art. 53 of the Charter of Rights allowing for a higher level of judicial protection in constitutional law.\textsuperscript{229}

The Court has demonstrated just that in its jurisprudence on the European arrest warrant, a key instrument for the transborder judicial cooperation in criminal matters.\textsuperscript{230} In this procedure, the courts of one member state may request that a person present in another member state be surrendered for purposes of prosecution or sentencing. In testing such surrender requests against the right judicial protection, the Court has developed a doctrine of the horizontally coordinated jurisdiction. \textit{Radu} articulates this specifically for the right of defense in art. 48(2) of the Charter of Rights. The case concerned an arrest warrant issued by a German court for the purposes of prosecuting the Romanian defendant for crimes allegedly committed in Germany. The Court opined that it was sufficient for the right of defense to be met if the accused was able to defend himself effectively in the issuing court there rather than in the surrendering Romanian courts.\textsuperscript{231} In Melloni, an arrest warrant issued has been issued by an Italian court for the purposes of execution of a sentence. Melloni had been tried in Italy in absentia and the Spanish court wanted to make surrender conditional upon the review of that judgement. The Court tested Melloni’s trial in absentia against his right of defense under art. 48(2) of the Charter of Rights and Art. 4a of the amended Framework Decision on the arrest warrant, finding that guarantee to have been respected. Since the defendant had a procedure complying with art. 47 of the Charter before the Italian court, the Court found art. 53 of the Charter of Rights not safeguard the review of the absentia trial before the Spanish court.\textsuperscript{232} Similar principles are at work for the execution of financial penalty in another member state. The Court in Balaz requires that by reference to art. 47 of the Charter where the defendant has a right of review before a fully competent court in a fair process in the state entering the penalty.\textsuperscript{233} The \textit{ne bis in indem gurantee} of art. 50 of the Charter of Rights then works as a restraint on jurisdiction where the facts have been before the court of another member state with

\textsuperscript{229} Charter of Rights, \textit{supra} note 2, art 53, 2012 O.J. C 326/391, at 407, reads in pertinent part: “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, ..., and by the Member States’ constitutions.”


\textsuperscript{232} \textit{Melloni}, [2013] E.C.R. I_ (delivered Feb. 26, 2013). Constitutional protection applies where Union law is not full determinative. Such is the case for instance for the fundamental freedoms that allow for a derogation by national law within more or less broad parameters.

criminal jurisdiction.\textsuperscript{234} That is to be determined by reference to three criteria. The first criterion is the legal classification of the offence under national law, the second is the nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur.\textsuperscript{235}

Within the transborder judicial cooperation in civil matters, the rules on jurisdiction and mutual recognition of judgments have become key instruments.\textsuperscript{236} As Lindner demonstrates, here as well the right to protection bind the Court having jurisdiction on that basis. Specific procedural rules then govern the process before the national court with jurisdiction to issue the request for recognition.

4. Judicial Protection through a decentralised judicial architecture
The Lisbon Treaty makes clear that judicial protection is to take place within a subsidiary competence structure. Subsidiarity is a constructive principle for the Union that Lisbon entrenches.\textsuperscript{237} It expresses the normative preference for particular-plural decision-making on all matters, including judicial. Subsidiarity underpins not just for the initial distribution of the judicial power between the levels of the Union and the member states. The Treaty endorses the judicial architecture traditional since the Treaty of Rome that combines the first instance jurisdiction of national courts over Union law with the interpretive power upon referral of a single Union court. It also controls the structuring of the judicial doctrines on the exercise of the respective judicial competences.\textsuperscript{238}

The doctrines of European judicial federalism that the Court has been developing operationalise both judicial protection and the provision for a decentralised judicial architecture. Pursuant to them, judicial protection can be effectuated within a judicial organisation resting on the two pillars of the Union judicature and the national judicatures. They do not align Union law with Union court

\textsuperscript{234} Charter of Rights, \textit{supra} note 2, art. 50, 2012 O.J. C 326/391, at 406.
\textsuperscript{235} \textit{Bonda}, [2012] E.C.R. I \text决定了 (delivered June 5, 2012), ¶ 37, this is the so-called \textit{Engel} test of the ECtHR. In \textit{Bonda}, the Court qualified a penalty provided for by Union agriculture regulations as administrative not criminal in nature. In \textit{Akerberg}, it left the qualification of tax fraud charge provided in national law to the national court.
\textsuperscript{237} TEU post-Lisbon, \textit{supra} note 7, art. 1(2), 2012 O.J. C 326/13, at 6.
\textsuperscript{238} \textit{Id.}, art. 5(1),(3) in conjunction with art. 51(1) of the Charter of Rights, \textit{supra} note 2, 2012 O.J. C 326/391, at 406.
organisation, nor do they superimpose the Union courts hierarchically over national courts. Rather, all courts exercise their jurisdiction in a coordinated fashion vertically between the Union and the member states courts and horizontally between the member states courts.

VI. What role for the effectiveness-cum-equivalence standard?
Prior to the entry into force of the Lisbon Treaty, the standards for national procedure within the scope of application of the Treaties had their legal basis in the unwritten general principles of the then Community law. By amending the primary law, the Lisbon constituent power has designated Art. 47 of the Charter of Rights as the primary reference for procedure within the Union.239 This has a profound effect on the alternatives having their basis in the general principles. These are not repudiated, rather their rationales and application are absorbed within by the Charter-based fundamental right.

The Charter fundamental right to judicial protection first absorbs its parallel manifestation protection grounded in the general principles. The Court had indeed modelled such a right on ECHR arts 6 and 13 and a comparison of member states constitutional law. TEU post-Lisbon art. 6(3) determines that this right continues to be valid as a ‘general principle of the Union’s law’.240 However, the first paragraph of art. 6 makes the Charter of Rights the primary source of fundamental rights.241 The specific manifestation of the fundamental right to judicial protection in art. 47 of the Charter thus becomes the primary yardstick, absorbing its unwritten parallel manifestation and the case-law on it. The Court has articulated this.242

239 DEB, ¶ 30.
240 TEU post-Lisbon, supra note 7, art. 6(3), 2012 O.J. C 326/13, at 19.
242 Chalkor, [2011] E.C.R. I-13,085, ¶ 51: “Article 47 of the Charter implements in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47” (emphasis added); see also Otis, [2012] ECR I (delivered Nov. 6, 2012), ¶ 46; ZZ [2013] ECR I_ (delivered June 4, 2013), ¶ 50. Pre-Lisbon, the Court had used the inverse relation between the Charter-based rights and general principles: “The principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR, this principle having furthermore been reaffirmed by Article 47 CFR”, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Kadi), Joined Cases C-402/05 P and C-415/05 P, [2008] E.C.R. I-6351, ¶ 335. Kadi II, [2013] E.C.R. I___(delivered July 18, 2013), ¶ 100, now only mentions CFR art. 47.
Art. 47 of the Charter also absorbs the standard of effectiveness and equivalence of national procedure, which was grounded in broad principle of loyal cooperation now enshrined in art. 4(3) TEU post-Lisbon. This standard required national procedure to be minimally effective, and to provide equivalent protection for Union and national law. Effectiveness-cum-equivalence may continue to be valid as an unwritten general principle post-Lisbon. However, the right to protection has been codified specifically by the constituent power, making it the primary standard. Effectiveness-cum-equivalence becomes a mere part of the evaluation of national procedure under art. 47 of the Charter of the Rights. This does not exclude functional considerations. But these remain secondary. They can complement, but not contradict the normative foundation. Indeed, such complementary functional consideration would be that Union law that confers rights is the law that is most likely to be litigated seriously so scarce judicial resources should be concentrated here. Determining the presence of an individual right and its protective requirements may also be the legal-judicial task squarely within the capacity and legitimacy of the Court of Justice. Finally, demands of judicial protection for such rights are more likely to be acceptable for the national courts, as in most national procedures access to court is linked to at least an individual interest.

The Court has not yet articulated this consequence. It is true that in Otis, the General Chamber declared art. 47 of the Charter of Rights to be the standard for national procedure and applied it, but mentioned neither effectiveness nor equivalence. In other cases, however, Chambers have continued to apply effectiveness cumulatively with art. 47. There may be a number of reasons for that, such as the apparent ease of application or the desire to preserve its reserve function for remaining uncertainties regarding art. 47. However, on closer scrutiny, the Court has advanced their absorption by aligning the objective and methodology of the effectiveness-cum-equivalence standard with those of the fundamental right judicial protection. Thus, the objective of effectiveness control now also is the protection of individual rights, while that used to be merely the incidental

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247 Alassini, [2010] E.C.R. I-2213, ¶ 48: “... the detailed procedural rules governing actions for safeguarding an individual’s rights under EU law ... must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).” Emphasis added.
effect of making all Community law effective procedurally. Methodologically, effectiveness is now also assessed by looking at the national procedure as a whole.\textsuperscript{248} On that basis, the Court really uses effectiveness analysis on burdensome requirements as a prima facie application of the right to judicial protection. \textit{Alassini} reflects this technique. There, the Court first inquired whether the requirement of an attempted out-of-court settlement in Italian law made obtaining protection for Union rights excessively difficult and thus ineffective. But it then submitted the same requirement to the test whether it disproportionately impeded access to court as guaranteed by art. 47 of the Charter of Rights.\textsuperscript{249} In other instances, the Court has applied both tests to different elements of the national procedure. And so does \textit{Agrokonsulting}, where the Court first used effectiveness to examine the Bulgarian rules concentrating actions regarding agricultural aid before administrative tribunals.\textsuperscript{250} It then tested these rules against art. 47 for a positive requirement that plaintiffs have access to a court located within reasonable distance.\textsuperscript{251} However, where the right to protection leads to different outcome in the instance, it will prevail over effectiveness. \textit{BEG} demonstrates this outcome.\textsuperscript{252} Still, the recent \textit{Kone} case illustrates that effectiveness retains a residual role in instances where the applicability of art. 47 may be uncertain. The case turned on the question whether the national law on civil damages had to be interpreted to include compensation for so-called umbrella effects caused by providers not part of the cartel raising their prices. The Chamber emphasizes that Union law here guarantees an individual right to damages.\textsuperscript{253} It still proceeds under effectiveness-cum-equivalence, finding that effectiveness of the Union’s competition rules required that such damages be included.\textsuperscript{254} The national rule on the rupture of the chain of causation through the decision of a separate actor could not stand. Effectiveness may come into play there as the question whether damages are a matter of substantive or procedural law, is affected by the fault line between the civil law and the common law traditions.\textsuperscript{255}

\begin{thebibliography}{9}
\bibitem{Alassini} \textit{Alassini}, ¶ 48 and ¶ 61, respectively.
\bibitem{Agrokonsulting2} \textit{Agrokonsulting}, \textit{id.}, ¶ 57.
\bibitem{Id2} \textit{id.}, ¶ 60.
\bibitem{Deb} The Court explicitly recast the referred question as concerning art. 47(3) of the Charter of Rights, rather than effectiveness, \textit{DEB}, [2010] E.C.R. I-13,849, ¶ 33. It then ruled that art. 47(3) required legal for juridical persons under the circumstances, contrary to the Opinion of Advocate General Mengozzi, who had concluded that the national procedure was not missing in effectiveness, [2010] E.C.R. I-13,852.
\bibitem{Kone} \textit{Kone} AG and Others v ÖBB Infrastruktur AG, Case C-557/12, [2014] E.C.R. I (delivered June 5, 2014), ¶ 23.
\bibitem{Id} \textit{id.}, ¶ 33.
\end{thebibliography}
In a similar fashion, the Court has aligned the equivalence standard with art. 47 of the Charter. Its original understanding had simply been that the national procedure must not reserve a less favourable treatment for claims based on Union law. But in its recent practice, the Court focuses on the individual right. This right then determines whether any special rules that the national procedure designs for Union rights are nevertheless lawful. Samba Diouf illustrates this. There, the Grand Chamber accepted that the national procedural legislator was justified in providing for a special accelerated procedure in asylum matters governed by Union law that deviated from the ordinary administrative procedure, as this accelerated procedure was to ensure that deserving persons received the recognition as refugees earlier.

VII. Conclusions

Art. 6(1) of the Post-Lisbon TEU constitutionalises the Charter of Fundamental Rights of the EU. The fundamental right to judicial protection is part of the Union’s constitutional make-up post Lisbon. Form it flow the parameters for judicial procedure at lower rungs of the normative hierarchy. Grounded in art. 47 of the Charter, the institutionalised judicial protection effectively partakes in the constitutional law of the Union. Genuine judicial protection becomes the normative objective of all judicial procedure. The point is that individual rights under Union law are guaranteed to be protected throughout the two-pillared judicial architecture on the basis of a common Union order of procedure. This emerging Union procedural order comprises of doctrines of jurisdiction, a common procedure, and European judicial federalism. Its realisation rests on the three-tiered framework of the Charter itself, the legislative implementation, and the development of judicial doctrine by the ECJ. While the legislative responsibility of implementation is primary, the Court is ultimately responsible for the progressive development of this order. The Court’s institutional power to develop this order is then determined by methodological parameters derived from fundamental rights interpretation. Arts. 47 and 51-53 of the Charter require the Court to balance the protection with countervailing objectives expressed in national or Union law through the mechanism of proportionality. This methodology embeds and operationalises the constitutional context of the fundamental right to protection. This is so for parliamentary democracy. Procedural autonomy means that within their competence, the member states parliaments may shape procedure according to their choices. Such procedural margin is also enjoyed by the Union legislator by virtue of the same principle. It is also so for a (judicial) competence order based on subsidiarity. The

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256 Alassini, id., ¶ 48: “... the detailed procedural rules governing actions for safeguarding an individual’s rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence).” (Emphasis added).

respect for the Treaty provision for a decentralised judicial architecture order reflects this. So does securing the coordination of judicial competence within that architecture. This institutionalization of judicial protection then has a powerfully rationalising effect on the law in the field, which in turn contributes to it legitimising the Union polity. As an institution, judicial protection makes further developments in the field path-dependent towards further concretising the single order of judicial procedure. Judgments of the Court on judicial protection then become relevant for and migrate freely between the Union and the national judicatures. Judicial protection before all courts, both Union and Member States absorbs hitherto disjointed judicial doctrines, such as member state procedural autonomy, effectiveness and equivalence, the complete system of remedies of the Treaties, and the consistency of supranational and national procedures. At the same time as strengthening the prescription of judicial procedure, this has differentiated the legal standards for the application of Union law. There are now distinct standards for judicial procedure, for administrative procedure, for substantive concepts, and for objective Union law.

Lisbon’s institutionalising judicial protection has clear conceptual implications for the Union federalism as envisaged by Lisbon. Ever since van Gend en Loos, the judicial application of European Community/Union law has demarcated the trajectory of the Union becoming a quasi-federal polity, rather than remaining essentially an international organisation. Judicial protection is a horizontal institution across all Union policies. For that reason, it becomes the truest reflection of the constitutional principles that the Lisbon Treaty establishes. Its guiding idea is no longer the shallow federalism aimed at securing a functioning Union. It is the idea of a deeper federalism of a constitutional polity of divided competences bound together by common constitutive values. Human dignity as legally protected self-determination is such a value. Judicial protection means that individual self-determination within the perimeter of rights conferred by Union law is actual rather than aspirational, in the sense that these rights gain reality when contested. It actualises the claim that the Union actually furthers individual autonomy. This understanding of human dignity as a unifying concept for the federal system of the Union has a parallel in US federalism. The much discussed judgment of the US Supreme Court in Windsor demonstrates this. There, the Supreme Court found that State law recognising same-sex marriage contracts had to be respected by the Federation as well. In so ruling, the Supreme Court emphasised that this empowering law confers dignity on individuals. Human dignity is understood as self-determination expressed through rights conferred. And that has to be respected throughout the federal order of competences. This shared value of human dignity is realised in the first instance by the state conferring a right and in the second instance by the Federation needing to respect this right.

For the actors in the field specific constructive implications ensue. First of all for the Court post-Lisbon, judicial protection provides the reference point for its jurisprudence on judicial procedure and for construing the Union procedural order. To the entry into force of the Lisbon Treaty, the Court has indeed responded by increasingly basing its judgments on procedure on art. 47 of the Charter of Rights. The general principles recede, yet they do not disappear and their continuing role remains unexplained. As a result, judicial protection may well continue its career as an unruly horse. This is not just a concern for coherent outcomes and standards. It is indeed a constitutional concern. The Lisbon changes at primary law are indeed an instruction by the European constituent power, composed of the European Convention for the Future of Europe, the member states governments represented at the Lisbon Intergovernmental Conference, and parliaments during ratification. The Lisbon choice reflects its specific value judgment about the foundations of Union rules in this sensitive field. While the alternatives that had found their basis in the general principles are not repudiated, their rationales and application are absorbed within by the Charter-based fundamental right. There are then for the Court also constructive implications within this judicial protection paradigm. Chief among those is the thick concept of the right, which carries the full commitment to legally protected self-determination. It is not descriptive, or instrumental. Specifically, this concerns the Court’s stance on international law, which ought to be interpreted as a source of rights on par with the Union’s internal law. Lisbon’s institutionalising judicial protection remains circumscribed, though. It presupposes the individual right and thus comprises only a subset of all Union law. Lisbon does not, however, condemn law that serves collective interest to unenforceability. Judicial enforceability of objective Union law can be ensured by the Union or member states legislatures providing for the requisite procedures under their respective competences within a considerable margin of discretion.