1. Introduction

The effectiveness of Union law means, ‘the authorities of the Member State must take the general or particular measures necessary to ensure that Community law is complied with within that state’, as the Court put it in Jonkman.¹ Recall that Article 4 (3) TEU states that the Member States ‘shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’. This clearly shows the close relation between effectiveness and loyalty, which will be explored from a methodological perspective in Chapter 13.

It has been noted that the principle of effectiveness is employed by the Court in a number of different constellations, from secondary law and the fundamental freedoms to being applied independently of specific Union legislation.² This Chapter will not discuss effectiveness exhaustively, but will focus on its roles in effective judicial protection and in effective compliance with Union law. As I will argue, these are two interrelated sides to the principle of effectiveness in Union law, and loyalty has repeatedly been mentioned as the legal basis in both strands of case law. Exemplarily, Advocate General Léger has noted the role of loyalty in Factortame as being ‘to ensure the legal protection which persons derive from the direct effect of provisions of Community law’, as well as in Francovich as being ‘to ensure fulfilment of their obligations under Community law’.³

Thus, in the following, I will discuss the role of effectiveness as a means to ensure the effective judicial protection of Union citizens in exercising rights provided in instruments of Union law such as directives.⁴ In this vein, it will be shown that, such as supremacy, the principle of effectiveness can lead either to the disapplication of national (procedural) law or to the introduction of new rules to the realm of national law.⁵ The first approach has been called positive convergence and has been associated with the Francovich/Brasserie case law, whereas the second approach was

¹ Joined cases C-231/06 to C-233/06 Jonkman [2007] ECR I-5149, para 38; Case C-495/00 Azienda Agricola Giorgio, Giovanni e Luciano Visentin and Others [2004] ECR I-2993, para 39.
seen to reflect a tendency of negative convergence and was associated with the *Rewe* case law.  

Moreover, I will show the shared ancestry of the principle of state liability with the jurisprudence on the binding force of national decisions. Against this background, more recent case law will be analysed, which is increasingly blurring the border between supremacy, direct effect, and indirect effect both with regard to secondary law as well as international agreements concluded by the Union. This development is connected with judicial control becoming first a general principle of law, then being awarded constitutional status by the Court, and finally being lifted to the constitutional level by Article 19 (1) TEU and Article 47 of the Charter of Fundamental Rights.

2. The Principle of Effectiveness and the Enforcement of Individual Rights

2.1 The Initial Autonomy of the Member States

In the landmark case *Rewe*, the Court referred to ‘the principle of cooperation laid down in Article 5 of the Treaty’ for reminding the national courts of their duty to ensure the legal protection ‘which citizens derive from the direct effect of the provisions of Community law’. It continued that, in the absence of Union rules, it was for the domestic legal system of each Member State ‘to designate the courts having jurisdiction and to determine the procedural conditions’ with respect to such protection, ‘it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature’. In *Denkavit*, the Court added that these conditions must not ‘make it impossible in practice to exercise the rights which the national courts are bound to protect’. This thus introduced what was later to be called the ‘principle of effectiveness’ and the ‘principle of equivalence’.

\[\text{‘communautarisation’ of national procedural law is characterized by the gradual replacement of national procedural rules by (then) Community law standards on the one hand, and by the creation of (then) Community minimum standards on the other.} \]


9 Art. 19 TEU requires ‘remedies sufficient to ensure effective legal protection in the fields covered by Union law’.


While these first cases were about the direct effect of a Treaty provision and a regulation, in later judgments the principle of effectiveness was applied in the same manner with the enforcement of the direct effect of directives.¹⁵ More generally, the ECJ has emphasized repeatedly, ‘national authorities may not undermine either the effect or the effectiveness of Community law’.¹⁶ This makes effectiveness the focal point of mergence of both supremacy and direct effect,¹⁷ the ‘consequential development’ of the case law on the direct effect of directives,¹⁸ and a principle applied in the context of the primacy of Union law,¹⁹ respectively derived from both supremacy and direct effect.²⁰

At the same time, the Court for a long time deferred responsibility to the Member States for establishing a system of legal remedies and procedures in order to ensure effective judicial protection.²¹ This procedural and institutional autonomy in implementing the prescriptions of Union law was expressed in the following dictum of the Court in International Fruit:

Although under Article 5 of the Treaty the Member States are obliged to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty, it is for them to determine which institutions within the national system shall be empowered to adopt the said measures.²²

This means that it was up to the Member States to choose which ‘specific national bodies’ should be competent in the Member States, as well as how these bodies should be entrusted with the powers to implement Union law requirements.²³ The question of the availability of remedies was also determined under national law.²⁴

However, we will show in the following that this balance between the demand of Member States to be active and take measures to protect Union law rights on the one hand, and the non-intervention approach adopted with regard to the ways and means of the required national framework on the other has recently been tipped in favour of intervention. It has thus been claimed, ‘the general principle of effective judicial protection seems to have established itself as hierarchically superior to that of national procedural autonomy’²⁵. It has even been proffered that because of its recently gained primary law

¹⁸ K.-D. Borchardt, ‘Richterrecht durch den Gerichtshof der Europäischen Gemeinschaften’, in A. Randalzhofer, R. Scholz, and D. Wilke (eds), Gedächtnisschrift für Eberhard Grabitz (Munich: Beck, 1995), 29, 36, who notes that direct effect itself has already been an example of judicial lawmaking, yet that this has already been condoned by the German Federal Constitutional Court.
¹⁹ Tridimas, General Principles, 5.
²⁰ Tridimas, General Principles, 418.
²¹ Joined cases 51 to 54/71 International Fruit Company [1971] ECR 1107, para 3.
²² Joined cases 51 to 54/71 International Fruit Company [1971] ECR 1107, para 3. In several judgments, the Court explicitly used the term discretion in connection with the modalities of the implementation of Union legislation. National authorities must ‘exercise their discretion in compliance with the general rules of Community law, which include the principles of proportionality, legal certainty and the protection of legitimate expectations’. See Joined cases C-231/00, C-303/00 and C-451/00 AIMA [2004] ECR I-2869, para 57.
2.2 The Exclusionary Side of Effectiveness

It has been argued that under the application of effectiveness, national rules regulating judicial proceedings have only played an ‘ancillary’ or subservient role in European Union law, and that they were to be set aside to the extent that they significantly impeded effective EU law enforcement. Thus, based on what is now Article 4 (3) TEU, Member States were prevented from pleading national provisions or domestic practices in order to justify failure to observe obligations and time limits arising from Union regulations. Similarly, the Court ruled that for the enforcement of a regulation, ‘recourse to rules of national law is possible only in so far as it is necessary for the correct application of that regulation and in so far as it does not jeopardise either the scope or the effectiveness thereof...’

In this context, the *Rewe* doctrine has been criticized for lack of clarity and predictability in its application in subsequent case law. Thus, the *Peterbroek* judgment, where the Court ordered the setting aside of a procedural rule restricting national courts from raising issues of their own motion because it would exclude the application of Union law, has been claimed to represent the nadir of the power of subsistence of national procedural rules in the face of the exigencies of Union law. On the same day, in *Van Schijndel*, the Court upheld a similar national rule, distinguishing *Peterbroek* on the facts. It seems that this more measured approach has prevailed in cases such as *Heemskerk*, where the Court held that national courts were not required to consider questions of Union law of their own motion if the result would be to infringe a national principle such as the prohibition of a *reformatio in pejus*.

However, in the *Connect Austria* case the exclusionary potential of effectiveness came to full blossom. Under Austrian law, individuals did not have a right to appeal against decisions of the national regulatory authority on the allocation, removal, and revocation of licences and on the approval of transfers of and amendments to licences in telecommunications matters. While the review by the Constitutional Court was limited...
under the Austrian Constitution, Article 133 (4) B-VG ruled out appeals to the Austrian Administrative Court alleging the unlawfulness of decisions by the national regulatory authority. However, Article 5a (3) of Directive 90/387 required Member States to ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to an independent body. Article 5a (3) of Directive 90/387 was not directly effective—at least the Court did not say so. The Court found that ‘the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in the measure the application of which would…lead to a result contrary to that directive, whereas national law would comply with the directive if that provision was not applied…’.

2.3 The Creationist Side of Effectiveness

Member States are required to introduce sanctions for breaches of Union law, in case Union legislation does not provide penalties for infringement or refers to national law. These sanctions must be imposed ‘under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive’. Consequently, Article 4 (3) TEU requires that such measures may even include criminal penalties where Union legislation only provides for civil ones.

Similarly, the Court in early case law held that when Union law contains no specific provisions relating to supervision by competent national authorities, the ‘only requirement’ is that these authorities ‘act in this field with the same degree of care as they exercise in implementing their national legislation, so as to prevent any erosion of the effectiveness of Community law’. This thus was an expression of the principle of equivalence. Later, however, Factortame established the principle that a national court seized of a dispute governed by Union law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. Factortame has been called a ‘high-water mark of this loyal acceptance of the integrationist logic of Community law’. It can

42 See the memorable words of N. MacCormick, Questioning Sovereignty (Oxford: Oxford Univ. Press, 1999), 98: ‘Norms that had hitherto been considered central to the basic doctrine of UK constitutional law, the doctrine of parliamentary sovereignty, turned out to be defeasible in favour of a weak
therefore be said that procedural autonomy with regard to remedies under national law is confined to the procedural framework, whereas the choice of remedies is mandated by Union law.\(^{43}\)

This creationist side of the principle of effectiveness has also been displayed in recent case law of the Court. *Unibet* concerned British and Maltese internet betting companies that had advertised in Sweden, but had been stopped by claims by the Swedish authorities of a violation of national gaming laws. Under Swedish law, there was no self-standing action for declaratory judgment in order to dispute the compatibility of the Swedish gaming law with Union law.\(^{44}\) The Court argued that Union law should not create new remedies, unless it was ‘apparent . . . that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual’s rights under [Union] law . . . ‘.\(^{45}\) In *Impact*, a specialized Irish court was ordered directly to apply the provisions of a directive, in spite of the fact that national law did not explicitly grant it permission to do so.\(^{46}\) The Court referred to the argument of whether a separate claim based directly on the directive before an ordinary court would involve ‘procedural disadvantages’ that were liable to render excessively difficult the exercise of the rights conferred by EU law.\(^{47}\)

Finally, another recent case demonstrates that effectiveness can also mean that competences may be created or that procedural rights that have not existed under national law may be introduced by virtue of Union law. The *VEBIC* case concerned the Belgian procedural organization of judicial review against decisions by competition authorities within the scope of EU competition law. Council Regulation 1/2003\(^{48}\) had provided in Article 35, entitled ‘Designation of competition authorities of Member States’, that the Member States shall designate the competition authority or authorities, including courts, responsible for the application of ex Articles 81 and 82 EC ‘in such a way that the provisions of this regulation are effectively complied with’. Moreover, it stated that the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial. The Court held that Article 35 must be interpreted as precluding national rules which do not allow a national competition authority to participate, as a defendant or respondent, in judicial proceedings brought against a decision that the authority itself has taken.\(^{49}\) However, because the ‘mere’ setting aside of the national rule did not provide an adequate solution in this case, the Court granted the national competition authorities the right to participate in appellate proceedings against their own decisions as a matter of EU law.\(^{50}\)


\(^{44}\) Arnulf, ‘The Principle of Effective Judicial Protection in EU Law’, 55–56: ‘The judgment in *Unibet* makes it clear that the overriding consideration is the effective protection of Union law rights.’

\(^{45}\) Case C-432/05 *Unibet* [2007] ECR I-2271, para 41.

\(^{46}\) Case C-268/06 *Impact v Minister for Agriculture and Food* [2008] ECR I-2483. See, in a similar vein, Van Cleynenbreugel, ‘Judge-Made Standards of National Procedure’, 93, who has deemed this case the advent of a new yet unclear standard for effectiveness, requiring not merely the disapplication of national rules, but the development of new national procedural rules.


\(^{49}\) Case C-439/08 *VEBIC* [2010] ECR I-12471, para 64.

\(^{50}\) Case C-439/08 *VEBIC* [2010] ECR I-12471, para 59.
Thus, all the cases mentioned earlier show that if national procedural law jeopardizes the effective enforcement of EU law, this can lead to the adaptation of national rules, both of a procedural nature as well as of national rules on competence.  

3. Effectiveness and Compliance by the Member States

Effectiveness has also served the interest of the effective compliance of Member States with Union law, such as expressed in cases like *Kraaijeveld* \(^{52}\) and *CIA Security*.\(^{53}\) In the following, however, I will briefly analyse how the Court has ‘closed the circle’ by establishing a ‘loyalty red line’ connecting case law on state liability, the binding force of national decisions, and the duty of rectification of national law. All these at first sight very diverse strands of case law are based on loyalty and the idea of the nullification of unlawful consequences of infringements of Union law.\(^{54}\)

Recall that the Court, in *Francovich*, rationalized the introduction of the principle of state liability with ensuring ‘the full effectiveness of Community rules’.\(^{55}\) Effectiveness and state liability here, of course, also serve the interest of the individual in judicial protection, such as in the case law described earlier. However, what distinguishes this example of the application of effectiveness here is that it is not necessarily connected to directly effective rights or supremacy in general, such as with the enforcement case law discussed earlier. In *Dillenkoffer*, already the failure to transpose a directive into national law within the prescribed time limit was deemed a sufficiently serious breach to give rise to state liability.\(^{56}\) Subsequent case law has shown that state liability applies to any form of breach of Union law, including by acts of the national judiciary.\(^{57}\) State liability has thus been created by the Court to come to terms with situations when Member States do not comply with their EU law obligations, and when direct effect is unavailable. In such situations, state liability is the ultimate ratio, not for enforcing the substance of the Union instrument concerned, but for making good the damage caused by the omission of a Member State.  

This function of effectiveness has even been considered the most important by Tridimas.\(^{59}\) Recall further that in *Brasserie du Pêcheur* the effectiveness rationale for state liability was supported by an explicit reference to what is now Article 4 (3) TEU.\(^{60}\)

The fact that the payment of damages may not be the only way to nullify the unlawful consequences of an infringement of Union law had already been expressed in *Humblet*, where the Court spoke of the obligation ‘to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued’.\(^{61}\)

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\(^{51}\) See, for an account of the related Case C-279/09 Deutsche Energiehandels- und Beratungsgesellschaft mbH (DEB) v Germany [2011], Van Cleyenbreugel, ‘Judge-Made Standards of National Procedure’, 94.

\(^{52}\) Case C-72/95 *Kraaijeveld* [1996] ECR I-5403.


\(^{54}\) See for the ‘circle’ metaphor, the Opinion of AG R. J. Colomer in Joined cases C-392/04 i-21 *Germany GmbH* and C-422/04 *Arcor AG & Co. KG* [2006] ECR I-8559, para 92.

\(^{55}\) Joined cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, para 34.


\(^{57}\) See Case C-224/01 *Gerhard Köbler v Austria* [2003] ECR I-10239.

\(^{58}\) Constrast the view by Schroeder, *Gemeinschaftsrechtssystem*, 435, who relates effectiveness to the uniform application of Union law in the Member States.

\(^{59}\) Tridimas, *General Principles*, 498.


\(^{61}\) Case 6/60 *Humblet* [1960] ECR 559, 569.
the intimate relation between state liability and the revocation of national decision is clearly shown.\(^{62}\) When the United Kingdom contended that there was no obligation on the competent authority to revoke or modify the permission issued for the working of the quarry in issue in this case or to order discontinuance of the working therein, the Court responded with a succession of arguments on Member State duties of nullification. Firstly, referring to \textit{Francovich}, the Court found that ‘it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law’, and that this obligation was owed by every organ of the Member State concerned.\(^{63}\) Secondly, and flowing from this obligation, the Court held that ‘all the general or particular measures necessary’ would include ‘the revocation or suspension of a consent already granted’.\(^{64}\) In the pertinent case, this led the Court to find that the national court must determine whether it is possible under domestic law to revoke or suspend a consent that had already been granted, or alternatively, whether it is possible to claim compensation for the harm suffered.\(^{65}\)

The judgment in \textit{Kühne & Heitz} specified the conditions under which the exclusionary side of nullification must be applied.\(^{66}\) The facts of the case are well known and need not be repeated.\(^{67}\) In essence, a German administrative body had taken a decision that did not conform to a judgment of the European Court of Justice. The Court found that ‘the administrative body concerned is, in accordance with the principle of cooperation arising from Article 10 EC, under an obligation to review that decision . . . ’.\(^{68}\) This was confirmed as a matter of principle in \textit{Kapferer}, where the Court concluded, however, that ‘Article 10 EC does not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law’.\(^{69}\)

Finally, in the third strand of the nullification case law and again based on loyalty, the Court held that direct effect and supremacy ‘do not release Member States from their obligation to remove any provisions incompatible with Community law from their domestic legal order’.\(^{70}\) This obligation is also without prejudice to the principle of state liability.\(^{71}\) The rationale is that the maintenance of such provisions would

\(^{62}\) Case C-201/02 \textit{Wells} [2004] ECR I-723, para 64; Joined cases C-231/06 to C-233/06 \textit{Jonkman} [2007] ECR I-5149, para 37.

\(^{63}\) Case C-201/02 \textit{Wells} [2004] ECR I-723, para 64.

\(^{64}\) Case C-201/02 \textit{Wells} [2004] ECR I-723, para 65.

\(^{65}\) Case C-201/02 \textit{Wells} [2004] ECR I-723, para 70.

\(^{66}\) Case C-453/00 \textit{Kühne & Heitz} [2004] ECR I-837.


\(^{68}\) Case C-453/00 \textit{Kühne & Heitz} [2004] ECR I-837, para 27. This obligation however was subject to several conditions, \textit{viz.} whether the administrative body has the power to reopen the final decision under national law, the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance, that judgment is based on a misinterpretation of Union law, no preliminary ruling has been sought, and the person concerned complained to the administrative body immediately after becoming aware of the misinterpretation. Case C-453/00 \textit{Kühne & Heitz} [2004] ECR I-837, para 28. See also Case C-2/06 \textit{Willy Kempeet} [2008] ECR I-411, paras 38–39.

\(^{69}\) Case C-234/04 \textit{Kapferer} [2006] ECR I-2585.

\(^{70}\) Case 104/86 \textit{Commission v Italy (Recovery of Undue Payment)} [1998] ECR 1799, para 12.

\(^{71}\) Joined cases C-231/06 to C-233/06 \textit{Jonkman} [2007] ECR I-5149, paras 39–40.
cause ambiguity and the resulting legal uncertainty would ‘affect rights deriving from Community rules’. To this end, national authorities must ensure that national law is rectified as soon as possible, and that the rights that individuals derive from Union law are given full effect.

Hence, the principle underlying the liability, the revocation, and the rectification strands of case law is that unlawful consequences of breaches of Union law, whatever form they may take, must be nullified, by whatever means required. All this serves the overarching purpose of the effective enforcement of Union law within a Member State, and is ultimately founded on Article 4 (3) TEU.

4. Effectiveness, Effective Judicial Protection, and Indirect Effect

So far, I have discussed the indirect effect of Union directives in national law relating to the legal basis of this duty of interpretation. Moreover, I have dealt with the duty of consideration incumbent on Member States’ authorities with regard to the binding objective of directives prior to their entry into force. Finally, I have explained that supremacy also operates in the context of this interpretation obligation in the form of a disapplication of national methods of interpretation if these prevent the fulfilment of the objective of a directive. Like state liability, indirect effect does not require the existence of direct effect and the latter principle’s effects, viz. the exclusion and/or substitution of substantive national law must be distinguished from the effects of the former, viz. the exclusion and/or substitution of national methods of interpretation. However, recall also that in Marleasing the border between direct and indirect effect has been blurred and that there were several calls for an exclusion effect qua consistent interpretation. I will show in the following that the employment of these various instruments combined with the increasing reliance on the overarching purpose of effectiveness has begun to blur the borders between direct effect, indirect effect, and the non-frustration obligation.

Indirect effect has the ultimate aim of ensuring the full, correct, and timely implementation of directives. The connection with effectiveness is revealed in Pfeiffer, where the Court held that the interpretation obligation is ‘inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law . . . ’. By tying indirect effect to the principle of effective judicial protection, the Court may have bolstered the legal basis for indirect effect. However, the close relation to the effectiveness case law is already apparent in

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72 Case C-264/96 Imperial Chemical Industries [1998] ECR I-4695, para 34.
73 Joined cases C-231/06 to C-233/06 Jonkman [2007] ECR I-5149, para 38.
74 See Chapter 3.
75 See Chapter 5.
76 See Chapter 6.
77 See Chapter 5.
78 See Case C-54/96 Dorsch Consult [1997] ECR I-4961, para 43, stating that ex Art. 10 EC prescribes the obligation of consistent interpretation ‘in the light of the wording and the purpose of the directive so as to achieve the result it has in view’. This does not mean that in general implementation will require a clear and transparent legislative action in a Member State.
79 Joined cases C-397/01 and C-403/01 Pfeiffer [2004] ECR I-8835, para 114, citing C-160/01, Mau, [2003] ECR 4791, para 34, where the nexus between the principle of effectiveness and indirect effect was only made implicitly. More precisely, for the obligation to interpret national law in conformity with Community law, which is apparently meant to encompass indirect effect as an umbrella term, cf. W.-H. Roth, ‘Die richtlinienkonforme Auslegung’, Europäisches Wirtschafts- und Steuerrecht, 9 (2005), 385–396, 386.
the early von Colson case, which represents both the effective judicial protection paradigm, as well as the duty of consistent interpretation. In von Colson, the Court required Member States ‘to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned’.\textsuperscript{81} It has thus correctly been observed that there is an ancestral line from von Colson on indirect effect via Johnston on effective judicial protection to UPA on the standing of individuals to challenge Union law.\textsuperscript{82} In UPA, the Court held as follows:

\ldots in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.\textsuperscript{83}

In the Connect Austria case discussed earlier, where national constitutional law had to be set aside, the national courts were also required to use consistent interpretation ‘to determine whether domestic law establishes suitable mechanisms to recognise the right of individuals to appeal against decisions of the national regulatory authority’.\textsuperscript{84} At the same time, the recent Angelidaki case shows the connection between the nullification case law and the non-direct effects of directives.\textsuperscript{85} After requiring the national court to interpret its national law consistent with the pertinent directive, the Court held that national courts must ‘so far as possible’ ‘interpret and apply the relevant provisions of national law in such a way that it is possible duly to punish the abuse and to nullify the consequences of the breach of Community law’.\textsuperscript{86} The Court then required Greece not to frustrate the attainment of the directive’s result, followed by the concluding statement that ‘all the authorities of the Member States are subject to the obligation to ensure that provisions of Community law take full effect’.\textsuperscript{87}

Interestingly, the Marleasing judgment questioned earlier, of all precedents, has come to play an increasing role in recent case law on effective judicial protection. Already in his Opinion in Pfeiffer, AG Colomer required that where it is impossible to provide an interpretation which conforms to the directive concerned, the national court must ensure the full effectiveness of Community law by setting aside on its own authority,
where appropriate, any conflicting provisions of national law. The *Unibet* judgment has finally been claimed to show that a broader principle of effective judicial protection ‘imposes on national courts a duty of consistent interpretation reminiscent of that laid down in *Marleasing*’. Indeed, the way the Court phrased the part on indirect effect and effective judicial protection in this case makes it difficult to ascertain where indirect effect should have its limits for fulfilling this objective. The Court held that ‘it is for the national courts to interpret the procedural rules governing actions brought before them…in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective…of ensuring effective judicial protection of an individual’s rights under Community law’. This tension has not gone unnoticed. In her Opinion in *Unibet*, AG Sharpston doubted that by virtue of the interpretation obligation the national court must extend the right under national law to seek a declaratory judgment to applicants. She had pointed to the *contra legem* limit of indirect effect and to the prevailing view in Sweden, that Swedish law could not possibly be construed in such a manner.

*Lesoochranárske* is another case where the Court seemed impervious to the strong indication that national law could not be interpreted in a manner to accommodate (an international agreement forming a part of) Union law. A Slovak environmental protection association (the ‘zoskupenie’) had been informed of the initiation of a number of administrative proceedings brought by hunting associations on the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas, and requests for the use of chemical substances in such areas. The zoskupenie applied to the Slovak Ministry of the Environment to be given the status of a party to the administrative proceedings concerning the grant of those derogations. However, since environmental associations can only be ‘participants’ in administrative proceedings according to Slovak law, this request was rejected at the administrative level. In the subsequent court proceedings, the zoskupenie argued that Article 9 (3) of the Aarhus Convention had direct effect. The direct effect of Article 9 (3) was denied by the Court. It then made broad references to the *Impact* case, concluding that ‘if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law’. The Court continued that it would be for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way that, to the fullest extent possible, is consistent with the objectives laid down in Article 9 (3) of the Aarhus Convention.

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88 AG Colomer in Joined cases C-397/01 and C-403/01 *Pfeiffer* [2004] ECR I-8835, para 58.
91 AG Sharpston in Case C-432/05 *Unibet* [2007] ECR I-2271, para 54.
92 See AG Sharpston in Case C-432/05 *Unibet* [2007] ECR I-2271, para 55.
94 This provision obliges the parties to the Convention to ensure that members of the public ‘have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment’.
97 Case C-240/09 *Lesoochranárske* [2011] ECR I-1255, para 50. See also para 51 for the references to *Unibet* and *Impact* and the conclusion that it is the duty for the referring court ‘to interpret, to the fullest
I have argued elsewhere that this finding can only be understood based on the Court's earlier claim that Article 9 (3) of the Aarhus Convention fell within the scope of EU law because of the Habitats Directive. By this argument, the Court managed to make the access to justice in Article 9 (3) a procedural right conferred by EU law and, consequently, the standard of interpretation for national law.\(^98\) Moreover, this has been the first time as far as I can see that the Court has imposed a duty of consistent interpretation of national law in the light of international agreements.\(^99\) Again, the wording recalls the Marleasing formula, and again, national law was not very receptive to such interpretative solution.

5. Effectiveness, Effective Judicial Protection, and Duties of Abstention

In the preceding chapters, I have explained that loyalty is the basis of duties of abstention for the Member States, and that these duties can be unrelated to supremacy. I have also expounded that Union directives cannot partake in the effects of supremacy, \textit{viz.} substitution and/or exclusion, before the implementation period has expired for the Member States.\(^100\) Recall that the abstention duty established in the \textit{Inter-Environnement Wallonie} line of case law, which I have discussed earlier, took effect before the expiry of the transposition deadline of a directive, and did thus not presuppose its direct effect. The \textit{Impact} case discussed in the following suggests that one of these two qualifications to the non-frustration obligation may no longer be valid in the context of effective judicial protection.\(^101\)

\textit{Impact} concerned a reference by an Irish court on the interpretation of the framework agreement on fixed-term work annexed to Directive 1999/70.\(^102\) The directive was only implemented by Ireland in 2003, two years after the expiry of the deadline. Note therefore that, in contrast to \textit{Inter-Environnement Wallonie}, the case is situated in the ‘post-term’ period, yet pre-transposition. The referring court had asked whether provisions of the framework agreement were directly effective. While affirming that framework agreements implemented by Council directives might have direct effect, the Court found that the framework’s provision on preventing abuse arising from the use of successive fixed-term contracts did not possess direct effect, because it let Member States choose from a range of alternative methods for preventing such abuse. Thus, direct effect was wanting here not because of the nature of the relationship involved, which extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

\(^{98}\) An international agreement can only be the yardstick for the interpretation of national law if it forms a part of Union law. Since this depends on the Union’s competence, such analysis cannot evade an assessment in these terms, and applying reasoning based on the ‘sphere of EU law’ such as in \textit{Merck} or the ‘application’ or ‘scope’ of EU law such as in \textit{Lesnochnárske} is no substitute for this.


\(^{100}\) Case C-129/96 \textit{Inter-Environnement Wallonie} [1997] ECR 7411, paras 40, 43–44.

\(^{101}\) Case C-268/06 \textit{Impact} [2008] ECR I-2483.

\(^{102}\) Council Directive (EC) 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE, and CEEP [1999] OJ L175/43. This directive was also relevant in Case C-155/04 Mangold [2005] ECR I-9981.
was vertical, but because of the insufficient level of determination of the framework agreement’s provision.

The referring court then wanted to know whether a Member State, acting as an employer, was precluded from renewing a fixed-term employment contract for up to eight years shortly before the national implementing legislation entered into force. According to the Opinion of AG Kokott in Impact, this should not have been the case in view of the absence of direct effect. The Court in contrast found that the Directive’s obligation would be rendered ineffective if a Member State, acting as an employer, were permitted to renew contracts for an unusually long term in the period between the expiry of the deadline for implementation and the entry into force of the national implementing legislation. For this finding, it relied on ex Article 10 EC, the third paragraph of ex Article 249 EC, and on Directive 1999/70 itself.

The judgment in Impact has been criticized for blurring the boundaries between direct effect and the duty of abstention as operated in the Inter-Environnement Wallonie case law. While it has been argued that the ruling in Inter-Environnement Wallonie might extend a fortiori beyond the expiry of the implementation deadline where measures giving effect to the directive have not been adopted in good time, it has been observed that the consequences of the Impact decision seem to be markedly different from those of the Inter-Environnement Wallonie case. In Impact, the effect prescribed by the Court precluded Ireland from renewing employment contracts for a certain term. This cannot be compared to direct effect on formal grounds because there was no Union law norm applied to exclude provisions of national law, such as has occurred in CIA Security or Wells. Clearly, the rationale of the decision in Impact was to safeguard the effect of the directive’s objective, which would have been seriously compromised had Ireland as an employer created a contractual fait accompli before the entry into force of the implementing laws.

Hence, the finding in Impact did not involve supremacy, nor did it rely on direct effect (that is based on supremacy). I would argue that the rationale must be sought in loyalty, which here establishes a rather pragmatic solution for a breach of Union law, which needs a more effective sanction than available under the infringement procedure. This means, however, that the difference between the Inter-Environnement Wallonie case law and what has been called exclusionary (direct) effect has been eroded, which the Court should have acknowledged in its judgment by setting its finding in relation to Inter-Environnement Wallonie. Moreover, this finding in Impact implies that it is the objective of a directive which is vested with powers to establish duties of abstention for the Member States, independent from the direct effect of individual provisions in directives.

6. Conclusion

The fundamental right to an effective remedy in Article 47 of the Charter and the principle of sincere cooperation have been suggested as the two main constitutional principles enabling the creation of procedural standards by the European Court of Justice. 109

104 Case C-268/06 Impact [2008] ECR I-2483, para 91.
It has been argued that what is at work here is ‘guided deference’, where the ECJ provides a blueprint for national courts for a coherent and unified procedural framework, with the right to a fair trial and the principle of loyal cooperation demanding a judicial dialectic between the national and the EU level.\(^{110}\) Thus, curiously, here for once loyalty has been relied on to counter claims of judicial activism.\(^{111}\)

This could, however, also be seen differently. Loyalty and the fundamental right to an effective remedy could be seen to provide the two additional constitutional bases in combination with Article 19 (1) TEU to legitimize a mandate for the Court to intervene in matters of national procedural law. The Impact case in particular could be qualified as requiring that the fundamental principle of effective judicial protection were directly applied within national law. It has thus been observed that the principle of effective judicial protection, as a general principle of law with constitutional status in certain circumstances may produce direct effect and this may lead to renewed activism on the part of the Court.\(^{112}\) Indeed, what else was prescribed in the Inter-Environnement Wallonie case law than a form of exclusionary effect of directives, yet pre-term, while in Impact, this effect was post-term?\(^{113}\)

The close relationship between loyalty and effective judicial protection, which I have demonstrated, has prompted Arnulf to submit that the clause ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’ in Article 19 (1) TEU should better be included at the end of Article 4 (3) TEU.\(^{113}\) This is an apposite observation in view of the fact that Union loyalty places the bulk of its obligations on the Member States, and in view of the fact that loyalty plays a ubiquitous role in all duties imposed on the Member States to further the effectiveness of Union law in a broad sense. I would suggest that there is no need to conceive effective judicial protection as a general principle in its own right. It could instead be argued that it embodies a qualified constitutional interest of the Union. As such, it could be made effective based on Article 4 (3) TEU by imposing duties of abstention irrespective of direct effect and supremacy. This would, however, run counter to the requirement I have defended that a Union interest must be sufficiently concrete.

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\(^{110}\) Van Cleynenbreugel, ‘Judge-Made Standards of National Procedure’, 97: ‘Sincere co-operation thus requires the Court to take harmonised legislation into account; but if such legislation does not exist, the principle invites the Court to develop particular standards that could guide national procedural systems in implementing the right to a fair trial under art. 47 of the Charter.’


\(^{113}\) Arnulf, ‘The Principle of Effective Judicial Protection in EU Law’, 53. In Art. 19 the provision is located in a title headed ‘Provisions on the Institutions’ with the rest of it concerning the Court of Justice.
Conclusion of the Part on Cohesion

Loyalty is the basis of various effects of Union measures and other expressions of the Union interest on national regulatory and contractual autonomy. We have seen that it fills gaps in constellations where supremacy or competence cannot take full effect. This can concern the need for effects cross-cutting from the internal to the external domain, cases where there is no conflict between national and EU measures, or where the Union measures have not yet ‘matured’ to take full effect, such as with directives before the expiry of the transposition or a concerted action in the Council. The underlying rationale and the required point of reference for the resulting duties of abstention is a qualified Union interest as a specific concretization of a Union objective. I have shown that there are no convincing reasons to refer to a distinct legal principle of pre-emption to explain these matters.

I have also discussed the common genealogy of two seemingly very different strands of case law, viz. on the effective judicial protection of Union citizens in exercising rights provided in instruments of Union law, and on the compliance by the Member States with Union law. In both strands of the case law, which are commonly seen as based on the principle of effectiveness, loyalty has taken very diverse and arguably central roles. This shared conceptual and systematic basis of the ‘nullification’ and the ‘revocation’ case law makes effective judicial protection a close relation of a traditionally very interventionist side of Union law.

Thus, while there is still an inherent limit with directives because of the Member State prerogative in Article 288 TFEU, state liability shows that the nullification paradigm can also spawn rules that transplant national standards. This, I have shown, reflects on recent case law on judicial protection, where the Court has approached the watershed where indirect pre-emptive effect strongly resembles exclusionary direct effect. This would make sense if we understood effective judicial protection as a qualified constitutioonal interest of the Union. However, as I will discuss in Part III regarding the interest in the unity of international representation, without concretization such interest cannot create obligations for the Member States.