**Effective judicial protection of individual data protection rights: *Puškár***

Case C-73/16, *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy,* judgment of the Court (second Chamber) of 27 September 2017

1. **Introduction**

In *Puškár*, the ECJ addresses a timely topic: the effective judicial protection of individual data protection rights. On 25 May 2018, the General Data Protection Regulation (Regulation 2016/679 – the ‘GDPR’) replaced the former Data Protection Directive (Directive 96/46/EC). The GDPR improves and harmonizes the level of data protection across the European Union. The regulation gives substance and detail to the right to protection of personal data, as enshrined in Article 8 of the Charter of Fundamental Rights and Article 16 of the Treaty on the Functioning of the EU (TFEU), and reflects the nature of data protection as a fundamental right in the European Union.[[1]](#footnote-1)

The Union legislator has acted in tandem with the ECJ to strengthen the protection of personal data within the EU. The Court’s commitment to upholding the fundamental right to data protection is visible in landmark cases, such as *Digital Rights Ireland*,[[2]](#footnote-2) *Google Spain*,[[3]](#footnote-3) *Schrems*,[[4]](#footnote-4) and *Tele2*.[[5]](#footnote-5) Although the *Puškár* case, in contrast to the mentioned rulings, has not caught the headlines, it is still worth taking a closer look at the ruling under review here. The Court addressed the matter of lawful processing of personal data. The significance of the ruling lies, however, not so much in its substantive aspects, but rather in what the Court says about effective judicial protection for individuals affected by a breach of EU data protection law. Individuals enjoy a vast array of data protection rights, such as a right of access to their personal data, a right to rectify inaccuracies and to have personal data erased, and a right to restrict processing of their personal data.[[6]](#footnote-6) These rights are of little worth without adequate judicial mechanisms for their protection and observance. In *Puškár*, the Court was presented with an opportunity to clarify the discretion left to the Member States in limiting access to court through procedural restrictions. As such, the case adds to the string of cases in which the Court expresses its opinion on the limits to national procedural and remedial autonomy.[[7]](#footnote-7)

The ECJ was confronted with a domestic provision requiring the claimant to exhaust available administrative remedies prior to instigating court proceedings, and a restriction on admissible evidence. The Court was quick to note that these measures constituted limitations on the right to effective judicial protection as laid down in Article 47 of the Charter of fundamental rights.[[8]](#footnote-8) The right to effective judicial protection is, however, not absolute. Article 52(1) of the Charter allows for limitations on the exercise of Charter rights insofar as they are prescribed by law, they respect the essence of the right and comply with the principle of proportionality. This means that limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others. The Court scrutinized the national rules in question against the conditions laid down in Article 52(1), thereby providing valuable guidance as to when national procedural rules which limit access to a remedy are acceptable. In particular, the Court provided guidance as to the type of measure that could impair the “essence” of the right to effective judicial protection.

The ruling was rendered pursuant to the Data Protection Directive, but the reasoning of the Court is equally relevant under the new legal framework. The substantive aspects of the ruling, pertaining to the lawful grounds for processing personal data and the principles relating to such processing, is transferable to the application of the GDPR, since the Directive provisions on data processing remain in place under the Regulation.[[9]](#footnote-9) The Directive provision on effective judicial protection, which is the focus of this annotation, is also broadly replicated under the Regulation.[[10]](#footnote-10) Article 79 GDPR prescribes the right to an “effective judicial remedy,” and this provision must be read in light of Article 47 of the Charter of Fundamental Rights on effective judicial protection.[[11]](#footnote-11) It should be recalled that Article 47 safeguards the right to effective judicial protection for individuals against the violation of all EU rights and freedoms. The procedural issues addressed in this ruling are of a cross-sectoral nature, and the parts of the Court’s ruling that pertain to Article 47 and 52(1) of the Charter are formulated in a manner apt for generalization. This means that the ruling may have ramifications well beyond the field of data protection law.

1. **Factual background**

The annotated case originates from a request for a preliminary ruling under Article 267 TFEU from the Slovak Supreme Court in the course of proceedings between Mr. Puškár and Slovak tax authorities. The tax authorities had drawn up a blacklist of persons purporting to act as ‘fronts’ in company director roles. The list was created for the purpose of collecting taxes and combating fraud, and contained the persons’ names and national identification number, and the tax identification number of the companies they were associated with.

Mr. Puškár applied to the Supreme Court of the Slovak Republic, asking that the tax authorities be ordered not to include his name on the contested list and similar lists and to remove his name from such lists and from their IT system. His inclusion in the list, he argued, infringed his personal rights, in particular his right to the protection of his good name, dignity and good reputation.

The Supreme Court rejected his claims, partly on substantive grounds, partly because Mr. Puškár had not exhausted the available administrative remedies. Following an appeal, the Constitutional Court of the Slovak Republic set aside the decision, and referred the case back to the Supreme Court to be reheard. The Constitutional Court found, with reference to the case law of the European Court of Human Rights (ECtHR), that the Supreme Court had infringed the applicant’s fundamental rights, *inter alia*, the right to a fair trial, the right to privacy and the right to protection of personal data.

The Supreme Court stayed the proceedings, and referred four questions to the ECJ for a preliminary ruling: *first*, whether article 47 of the Charter precludes a national rule which makes the admissibility of a legal action conditional on a prior exhaustion of available administrative remedies; *second,* whether Article 7 and 8 the Charter of Fundamental rights and the Data Protection Directive prevent the tax authorities from keeping a list of persons purporting to act as company directors of specific legal persons, without the data subjects’ consent; *third*, whether the list had to be rejected as inadmissible evidence in accordance with Article 47(2) of the Charter if it was obtained by the claimant without the consent of the tax authorities; and *fourth*, whether to give precedence to the case law from the ECJ or the ECtHR, where those two courts are in conflict.

1. **Opinion of the Advocate General**

The Opinion of Advocate General Kokott analyzed the first and third questions in succession, since both concerned the principle of effective judicial protection. In answering the first question, pertaining to the mandatory exhaustion of administrative remedies, the Advocate General started with Article 22 of the Data Protection Directive, requiring that individuals whose data protection rights are violated must be afforded a judicial remedy. Since the provision did not clarify whether the availability of such a remedy could be made contingent on the exhaustion of an administrative remedy, she turned to Article 79 GDPR for guidance.[[12]](#footnote-12) The latter provision prescribes the right to an “effective” judicial remedy, without prejudice to any available administrative or non-judicial remedy, and the Advocate General noted that the effectiveness requirement must also be read into Article 22 of the Directive.[[13]](#footnote-13) An obligation to exhaust an administrative procedure before seizing the court, she concluded, will be impermissible if the judicial remedy is rendered ineffective as a result thereof.[[14]](#footnote-14)

Before turning to examine the (in)effectiveness of the judicial remedy, the Advocate General made some interesting remarks as to the relationship between the principle of effectiveness and the right to effective judicial protection. She noted that the principle of effectiveness – pursuant to which national procedures may not make the exercise of Union rights virtually impossible or excessively difficult[[15]](#footnote-15) – has increasingly been linked to the right to effective judicial protection as enshrined in Article 47 of the Charter of Fundamental Rights.[[16]](#footnote-16) After comparing the two principles, she concluded that these “ultimately embody the same legal principle” and may therefore be examined jointly by using the rules in Article 47(1) and 52(1) of the Charter.[[17]](#footnote-17)

The Advocate General noted that an obligation to exhaust an administrative remedy before bringing an action constitutes a limitation on the right to effective judicial protection, since it would delay access to a judicial remedy and could cause additional costs to be incurred.[[18]](#footnote-18) She examined whether such a restriction could nevertheless be justified under Article 52(1) of the Charter. The restriction was provided for by law, and the essence of the right was unlikely to be undermined, since the provision did not “restrict the category of people who could in principle have recourse to judicial review.”[[19]](#footnote-19) The objectives pursued – a more effective and less expensive process, lightening the burden on the courts – were perceived as legitimate; the procedural requirement was found capable of achieving these objectives; and a less onerous method did not suggest itself as capable of realizing them to the same extent.[[20]](#footnote-20) Although it was ultimately for the referring court to make the assessment of proportionality, the Advocate General noted that the national court should pay due regard to whether the bringing of an action was significantly delayed or whether the claimant would incur excessive costs.[[21]](#footnote-21)

Tackling the third question on the admissibility of the contested list, the Advocate General’s first move was to reformulate the question referred. Whereas the Slovak court asked whether the list should be regarded as unlawful evidence which it “must refuse to admit” pursuant to Article 47(2) of the Charter, the Advocate General examined whether the list “may be excluded as evidence” without infringing upon the principle of effective judicial protection.[[22]](#footnote-22) Hence, rather than examining whether a Member State is *obliged* to exclude the list, she examined whether Union law *prevents* a Member State from such exclusion. The Advocate General thereby places emphasis on the effective judicial protection of the data subject’s rights, rather than the right to a fair trial of the tax authorities.[[23]](#footnote-23)

She noted that a restriction on the evidence admissible in order to prove a breach of Union law interferes with the right to effective judicial protection.[[24]](#footnote-24) She turned to examine whether the restriction was justified pursuant to Article 52(1), stating laconically that the essence of the right was not undermined, since “only potential evidence” was affected.[[25]](#footnote-25) The objective of preventing unauthorized use of internal documents in court proceedings was found to be legitimate, and the restriction in question was considered appropriate to achieve this objective.[[26]](#footnote-26) Nevertheless, she stated that an unconditional rejection of such evidence was not the least onerous method; rather the referring court should determine whether the affected person had a right of access to the relevant information, in which case the interest in preventing unauthorized use would no longer merit protection.[[27]](#footnote-27)

The conclusions reached by the Advocate General under the second question, pertaining to the lawfulness of the list, do not merit a separate presentation, as they are largely in line with those of the Court. The Advocate General expressed doubts as to the relevance of the last question referred – pertaining to the handling of conflicting case law from the ECJ and the ECtHR on corresponding rights – but nevertheless provided an answer. She noted that pursuant to Article 52(3) of the Charter, the Court is permitted to accord more extensive protection to Charter rights than their counterparts in the European Convention on Human Rights. Thus, when the case law of the ECJ affords a higher level of protection, the national courts should apply this jurisprudence directly. Conversely, if the case law of the ECtHR affords enhanced protection of Convention rights, the national court should seek guidance from the ECJ pursuant to Article 267 TFEU.[[28]](#footnote-28)

1. **Judgment of the Court**

It its judgment, the ECJ largely followed the opinion of Advocate General Kokott. The fourth question pertaining to conflicting case law from the ECJ and the ECtHR was found inadmissible, however, due to its hypothetical nature.[[29]](#footnote-29)

The Court started by examining the Union law compatibility of the obligation to exhaust administrative remedies before seizing the court. After noting that Article 22 of the Directive is silent on the matter, the Court turned to examine whether Article 47 of the Charter precludes a Member State from imposing such a procedural requirement.[[30]](#footnote-30) Regrettably, the Court did not respond to the Advocate General’s call to express itself in unequivocal terms as to the relationship between the right to effective judicial protection and the principle of effectiveness. It observed that pursuant to Article 4(3) TEU and Article 19(1), Member States must ensure effective judicial protection of Union rights and provide adequate remedies, and stated the view that this requirement corresponds to the right enshrined in Article 47 of the Charter.[[31]](#footnote-31) The ECJ made no mention of the principle of effectiveness, pursuant to which national law must not render the enforcement of EU law practically impossible or excessively difficult, and consequently did not help clarify the relationship between this principle and that of effective judicial protection.[[32]](#footnote-32) The Advocate General’s statement that the two principles “ultimately embody the same legal principle” was left unaddressed.

The Court endorsed the view of the Advocate General that requiring the exhaustion of administrative remedies before seizing the court, constitutes a limitation on the right to an effective legal remedy, since it would cause delay and possibly also extra costs.[[33]](#footnote-33) It went on to consider whether the limitation could nevertheless be justified pursuant to the conditions laid down in Article 52(1) of the Charter. The Court first noted that the obligation was provided for by national law.[[34]](#footnote-34) It then expressed the view that the obligation respected the essence of the right to effective judicial protection since it did not bar the claimant from bringing an action to enforce his rights; it merely imposed an additional procedural step for access to the courts.[[35]](#footnote-35) With regard to the proportionality of the measure, the Court largely echoed the views put forward by the Advocate General. It noted that the obligation to exhaust administrative remedies was intended to relieve the courts of disputes which can be decided by the administration, and to increase the efficiency of judicial proceedings by allowing the court to rely on the administrative record. These objectives were found to be legitimate; the obligation was seen as appropriate for achieving these objectives, and no less onerous method suggested itself as capable of realizing the objectives as efficiently.[[36]](#footnote-36)

It was ultimately left to the referring court to examine whether the practical arrangements for the exercise of this right disproportionately affected the right to a judicial remedy. Nevertheless, the Court did make reference to its previous ruling in *Allasini*, concerning the Union law compatibility of a mandatory out-of-court settlement procedure, and stated that the conditions laid down in that ruling “apply *mutatis mutandis*” to the obligation to exhaust administrative remedies.[[37]](#footnote-37) The referring court therefore needed to make sure that the limitation period was suspended, and that the prior exhaustion of the administrative remedy did not lead to a substantial delay or excessive costs. Moreover, an obligation to exhaust administrative remedies would only be compatible with Article 47 of the Charter insofar as the procedure could be accessed by means other than electronic, and insofar as interim measures were available in exceptional cases.

The ECJ then, in line with the approach of the Advocate General, considered whether the contested list could be rejected as inadmissible evidence. After noting that such a rejection did constitute a limitation on the right to an effective legal remedy, the Court left it to the referring court to determine whether this limitation could qualify as a justified interference pursuant to Article 52(1) of the Charter.[[38]](#footnote-38) When examining whether the measure affected the essential content of the right to effective judicial protection, the Court urged the referring court to ascertain whether the existence and content of this list was disputed, and whether the claimant had other evidence in this regard.[[39]](#footnote-39) The ECJ noted that the objective of avoiding unauthorized use of internal documents appeared to be capable of constituting a legitimate general interest objective, adding that the measure could possibly also serve to protect the rights of other natural persons on the list.[[40]](#footnote-40) Finally, the Court noted that a rejection of the list would be a disproportionate measure if the data subjects enjoyed a right of access to those data pursuant to the Directive.[[41]](#footnote-41)

With respect to the lawfulness of the list, the Court first noted that if the conditions for lawful processing laid down in the Directive were fulfilled, the processing should be deemed to satisfy also the requirements laid down in Articles 7 and 8 of the Charter (the right to privacy and data protection, respectively).[[42]](#footnote-42) Subject to the exceptions permitted under Article 13 of the Directive, the processing of personal data must comply with the principles relating to data quality set out in Article 6, and with one of the criteria for making data processing legitimate listed in Article 7 of the Directive.[[43]](#footnote-43) The Court found it likely that the drawing-up of the list fell within Article 7(e) of the Directive, since the collection of tax and combating tax fraud should be regarded as tasks “carried out in the public interest,” but left it to the referring court to determine whether the national legislation had invested the Slovak tax authorities with such tasks.[[44]](#footnote-44) With reference to Article 6(1)(b), requiring that personal data be collected for specific, explicit and legitimate purposes, the Court emphasized that the task transferred to the controller must include the purpose of the processing.

It was left to the referring court to ascertain whether the drawing up of the list and the inclusion of the names of the data subjects were necessary and proportionate to the objective pursued.[[45]](#footnote-45) That notwithstanding, the Court noted that since the placing of a person on the list is likely to infringe some of his rights – such as the presumption of innocence in Article 48 of the Charter – the measure was proportionate only if there were sufficient grounds to suspect that the person concerned acted as a ‘front’ in a company director role, thereby undermining the public interest in the collection of tax and combating fraud.[[46]](#footnote-46)

1. **Comments**

The *Puškár* case raises several interesting questions that are worthy of discussion. Regrettably, the reference for a preliminary ruling did not provide the Court with an opportunity to express itself on the interesting question as to how a national court should proceed if there seems to be a discrepancy between the case law stemming from the courts in Luxembourg and Strasbourg, pertaining to corresponding rights. This particular concern will therefore be omitted from the following. Moreover, the substantive aspects of the ruling, including the close connection between the lawful grounds for processing and the principles relating to processing (in particular, purpose limitation) will be left to others to address. This section considers two interesting aspects of the case: *First*, the extent to which the ruling sheds light on the relationship between the principle of effectiveness and the principle of effective judicial protection (section 5.1); *second*, the Court’s contribution to determining what constitutes the ‘essence’ of the right to effective judicial protection (section 5.2).

* 1. **Effectiveness and effective judicial protection: Two sides of the same coin?**

Several types of national procedural rules may restrict access to an effective remedy for individuals whose Union rights are impaired. Two examples are short time-limits to institute legal proceedings[[47]](#footnote-47) and high court fees.[[48]](#footnote-48) When asked whether such rules violate Union law, the Court often refers to the principles of equivalence and effectiveness and effective judicial protection as limits to the procedural autonomy of Member States.[[49]](#footnote-49) How the principle of effectiveness and effective judicial protection interrelate is not clear, and the case law of the ECJ is not consistent. The Court has held that the principle of effectiveness “embod[ies] the general obligation on the Member States to ensure judicial protection of an individual’s right under Community law”[[50]](#footnote-50) or that it “implies a requirement of judicial protection, guaranteed by Article 47 of the Charter.”[[51]](#footnote-51) Yet there are also rulings where the Court treats them as different principles that apply in parallel.[[52]](#footnote-52)

At first glance, it could seem as if the Court took a stance on the matter in *Puškár*, and agreed with Advocate General Kokott that the principles of effectiveness and effective judicial protection “ultimately embody the same legal principle.”[[53]](#footnote-53) On closer inspection, however, the Court was a lot less forthcoming on the relationship between the two principles. It did not mention the principle of effectiveness at all, merely noting that under the principle of sincere cooperation laid down in Article 4(3) TEU it is for the courts of the Member States to ensure the judicial protection of a person’s rights under EU law, and pursuant to Article 19(1) TEU they must provide remedies to that end.[[54]](#footnote-54) The Court took the principle of effective judicial protection as its starting point, which had implications for how it scrutinized the procedural measures in question. It used the legitimate justification test laid down in Article 52(1), rather than the ‘procedural rule of reason’ test applicable under the principle of effectiveness.[[55]](#footnote-55)

This is not the first time the Court has ignored the Advocate General’s call to clarify the relationship between the two principles. In his opinion in *Finanmadrid*, for instance, the Advocate General addressed head-on the interrelationship between the two principles,[[56]](#footnote-56) but the Court dodged the issue without further analysis.[[57]](#footnote-57) Legal scholars have attempted to make sense of the Court’s case law pertaining to the two principles.[[58]](#footnote-58) It has, for example, been argued that procedural rules which obstruct *access* to judicial process must be assessed with reference to the principle of effective judicial protection, whereas restrictive rules that apply in the *subsequent legal proceedings* must be assessed against the requirement of effectiveness.[[59]](#footnote-59) There is admittedly some support for this distinction in the jurisprudence of the Court. In *DEB*, the Court was asked whether a company was entitled to legal aid under the Charter, and found it necessary to “recast the question referred [as to the principle of effectiveness] so that it relates to the interpretation of the principle of effective judicial protection as enshrined in Article 47 of the Charter.” There are, however, also rulings which do not fit this pattern.[[60]](#footnote-60) Questions pertaining to time-limits have, for instance, regularly been scrutinized for compliance with the principle of effectiveness.[[61]](#footnote-61)

In recent case law, the Court has increasingly tended to base its reasoning solely on the principle of effective judicial protection, now enshrined in Article 47 of the Charter, making no mention of the principle of effectiveness.[[62]](#footnote-62) In *Puškár*, domestic rules on admissible evidence were scrutinized with reference to the principle of effective judicial protection, making a contrast to the Court’s earlier rulings, where comparable rules were examined for compliance with the principle of effectiveness.[[63]](#footnote-63) Yet to assume that Article 47 of the Charter has replaced the principle of effectiveness would be too hasty a conclusion. The principle of effectiveness does indeed seem to be alive and kicking.[[64]](#footnote-64) Unfortunately, the Court did not clarify the relationship between the two principles in *Puškár*.

The requirements flowing from the principles are quite similar, and an examination under the principles may often lead to the same results.[[65]](#footnote-65) There are nevertheless differences that merit consideration.[[66]](#footnote-66) *A first difference* lies in the rationale underlying the judicial intervention in domestic enforcement measures. The principle of effective judicial protection seeks to ensure that, in a Union based on the rule of law, individual rights are protected by the courts.[[67]](#footnote-67) The effectiveness principle, on the other hand, aims at ensuring that national rules do not impede the effective application of Union law. In that sense, the latter is a manifestation of the broader principle of *effet utile*.[[68]](#footnote-68) These two rationales – protection of individual rights and effective enforcement of Union law *per se* – are closely linked, and they often pull in the same direction and reinforce each other.[[69]](#footnote-69) Yet this is not always the case, and the principle of effectiveness may on occasion be applied to the detriment of individuals.[[70]](#footnote-70) *Second*, the two principles have a different legal basis. The principle of effectiveness is derived from the duty of loyal cooperation enshrined in Article 4(3) TEU; the principle of effective judicial protection was traditionally derived from the ECHR Articles 6 and 13 and the common constitutional traditions of the Member States,[[71]](#footnote-71) but now has its legal basis in Article 47 of the Charter. *Third*, whereas the principle of effectiveness merely provides for the disapplication of national provisions rendering the application of Union law practically impossible or excessively difficult, the principle of effective judicial protection has a “more encompassing nature” entailing not only negative but also positive procedural obligations.[[72]](#footnote-72) Based on the latter principle, the Court also has defined for itself measures that must be taken by Member States, thereby prescribing a Union standard of protection which can be used to fill gaps in existing legislative schemes.[[73]](#footnote-73)

In *Puškár*, the Court reiterated that Article 47 of the Charter constitutes a “reaffirmation” of the pre-existing right to effective judicial protection.[[74]](#footnote-74) Even before it was formally set out in the Charter, the Court had considered that the right to a judicial remedy was a general principle of EU law.[[75]](#footnote-75) The Charter codifies this right, and when interpreting Article 47, the Court builds on its case law predating the entry into force of the Lisbon Treaty.[[76]](#footnote-76) It may nevertheless be that the change in status has had implications for the evolvement of the right to effective judicial protection.[[77]](#footnote-77) The scope of the right and the way in which it has to be interpreted is now more sharply defined.[[78]](#footnote-78) The Court has found Article 47 to be “sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.”[[79]](#footnote-79) By formalizing the framework for permissible limitations to fundamental rights in the Charter, Article 52(1) also contributes to structuring the Court’s scrutiny of domestic limitations of the right to effective judicial protection.[[80]](#footnote-80) In particular, the Court is encouraged to examine separately whether a procedural restriction affects the very essence of the right to judicial protection.[[81]](#footnote-81)

In recent times, the Court also seems to have adopted a more elaborative style, giving more detail on what the principle of effective judicial protection requires. *Schrems*, addressed in section 5.2 below, is one example; another one is *DEB*, where the Court held that it had to be possible, in principle, also for legal persons to obtain legal aid. This is not, however, an unequivocal trend. In *Puškár*, the Court adopted a more restrained approach, leaving the referring court a great deal of leeway to determine whether the procedural restrictions constitute a proportionate interference with the right to effective judicial protection.

It could well be that the Court perceives it as more legitimate to elaborate on what the principle requires rather than whether it has a firm legal mandate in the Treaties. After all, Article 47 of the Charter constitutes a “more visible and highly legitimate legal basis upon which the Court can develop its standards of fundamental rights protection in relation to the right to an effective remedy.”[[82]](#footnote-82) An explicit legal basis in the Treaties makes the Court more resilient to accusations of judicial activism directed at its jurisprudence pertaining to procedures and remedies available to domestic courts.[[83]](#footnote-83) Whether the Court will seize the opportunity to define more precisely the EU standard of protection in its future case law remains to be seen.

* 1. **The ‘essence’ of the right to effective judicial protection**

The second element of Article 52(1) of the Charter requires that any procedural limitation on access to court must respect the ‘essence’ of the right to effective judicial protection.[[84]](#footnote-84) In *Puškár*, the Court afforded us some (limited) guidance as to what this ‘essence’ consists of. An obligation to exhaust available administrative remedies before seizing the court, the Court held, respects the essence of the right to effective judicial protection, since the obligation does not “call into question that right as such.” On the contrary, it merely imposes “[a]n additional procedural step ... in order to exercise it.”[[85]](#footnote-85) The Court had held already in *Allasini* that requiring the satisfaction of additional steps before access to a Court can be granted does not, in principle, impair the essence of the right to effective judicial protection. Since the outcome of the mandatory out-of-court settlement procedure in question was not binding on the parties concerned, it did not “prejudice their right to bring legal proceedings.”[[86]](#footnote-86)

An *a contrario* reading of these rulings, could imply that a complete denial of access to court amounts to a breach of the essence of the right of effective judicial protection. The *Schrems* ruling, which is the only case where the ECJ has explicitly found the essence of Article 47 CFR to be violated, supports such a reading. The case, which should be familiar to many readers, concerned the validity of the Commission Decision on the adequacy of the protection provided by the Safe Harbour agreement, pursuant to which personal data were transferred from the EU to the US. The measure did not provide for judicial review of compliance with the data subjects’ rights. The Court held that

legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter.[[87]](#footnote-87)

The crux lies in the phrase “any possibility.” The Court seems to stress that the complete absence of a legal avenue for individuals alleging an infringement of their Union rights, impinges upon the very core of the right to effective judicial protection. The measure addressed in *Schrems* failed to provide for an adjudicative machinery to conduct judicial review of compliance with individuals’ data protection rights. Yet one can easily imagine situations in which such a machinery is present, but strict procedural rules prevent the claimant from initiating judicial proceedings. This may be due to restrictions as to the type of decision susceptible to judicial review, statutory ouster clauses, or rules on *locus standi*.

The Court has never explicitly stated that rules of this kind violate the essence of the right to effective judicial protection. Yet the way the Court goes about in scrutinizing such measures could indicate that this is indeed the case. When examining whether national procedural rules which limit access to a remedy are acceptable, it normally applies, or calls on the referring court to apply, the proportionality test laid down in Article 52(1) of the Charter, and balance(s) possible justifications with competing values. Such an approach is evident, for instance, in the jurisprudence pertaining to the payment of court fees,[[88]](#footnote-88) legal aid,[[89]](#footnote-89) and mandatory pre-trial obligations.[[90]](#footnote-90) The Court has accepted that there may be valid reasons for Member States to set requirements for access to a remedy; court fees can, for instance, constitute a source of funding which contributes to the proper functioning of the judicial system and avoid manifestly unfounded claims,[[91]](#footnote-91) and mandatory out-of-court settlement procedures provide quicker and less expensive settlements of disputes and relieve pressure on the courts’ dockets.[[92]](#footnote-92) To determine whether a limitation on the right to effective judicial protection is legitimate, a balance must be struck between the values protected by Article 47 of the Charter and these competing values. Remarkably, though, there are no signs of this balancing approach being taken in several rulings where the Court has been called upon to address domestic provisions completely barring a claimant from seizing a court.

The ECJ has relied on Article 47 of the Charter in order to preclude national rules on *locus standi*, depriving the claimant from the possibility to initiate legal proceedings. In *Olainfarm* and *E.ON Földgaz*, the Court found that private parties whose EU rights were potentially infringed by decisions taken by national authorities must have standing to challenge such decisions in court.[[93]](#footnote-93) There is no mention in these cases of any specific factors that could justify restrictions in this regard. The reason the Court does not resort to its traditional approach in these cases can be explained by the fact that a denial of *locus standi* would undermine the very essence of the right to effective judicial protection, since it would constitute an absolute obstacle to enforcement. Allowing States to bar enforcement of Union rights through restrictive rules on standing would in effect render these rights nugatory. After all, access to judicial process is a necessary precondition for obtaining effective judicial protection of Union rights.

A similar approach can be found in the case law pertaining to the type of acts susceptible to judicial review. In *Borelli*, where the Court was asked about the right to challenge a measure rendered in the course of a composite decision-making procedure, it held that it is for the national courts to rule on the lawfulness of such a measure on the same terms by which they review any definitive measure adopted by the same national authority which is capable of adversely affecting third parties. Consequently, they must ”regard an action brought for that purpose as admissible even if the domestic rules on procedure do not provide for this in such a case.”[[94]](#footnote-94) The Court is thereby saying that measures capable of adversely affecting the Union rights of individuals must be subject to an appeal before a court. Reference can also be made to the Court’s seminal ruling in *Johnston*, where the Court unequivocally stated that a statutory ouster clause, precluding judicial review of an administrative measure in violation of Union law, was contrary to the principle of effective judicial protection.[[95]](#footnote-95)

The common denominator in these cases is the complete lack of a legal avenue to individuals whose Union rights are impaired. The thrust of the Court’s jurisprudence seems to be that the possibility of applying to a court for a remedy may be *restricted*, but not *denied* altogether. Although the Court does not say so explicitly, it can arguably be read between the lines of these judgments that measures that *entirely deprive* individuals of a legal avenue impinge on the very core of the right laid (now) down in Article 47 of the Charter. Consequently, there can be no possible justification for such breaches.

The possibility of judicial review to ensure compliance with EU law is an essential ‘rule of law’ requirement.[[96]](#footnote-96) As the Court held in *Associação Sindical dos Juízes Portugueses*,

Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals.[[97]](#footnote-97)

The enactment of a measure that completely deprives individuals of their right to judicial control of compliance with their EU rights, would constitute a breach of the Member States’ obligation under Article 19(1) TEU to “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

It bears mentioning that it is not sufficient to assess a measure *in abstracto*; a restriction which might be justified in principle, may well infringe the principle of effective judicial protection given the particular circumstances of the case. In *Puškár*, the Court left it to the referring court to determine whether the rejection of the disputed list respected the essence of the right to judicial protection. It stated that, in this context, the referring court should ascertain, in particular, whether the existence of the list and the fact that it contains data relating to the claimant were challenged, and if he has other evidence in that regard.[[98]](#footnote-98) The Court thereby encouraged the referring court to examine whether the rejection of the list as inadmissible evidence would mean that the *particular* claimant was left without a legal remedy. This passage serves to remind the referring court that the question whether there is an infringement of the rights of the right to effective judicial protection must be examined in relation to the specific facts of each case.

1. **Conclusion**

With the *Puškár* case, the Court has elaborated what the principle of effective judicial protection laid down in Article 47 of the Charter requires with respect to domestic rules of pre-trial obligations and admissible evidence. In particular, it has provided valuable guidance on what it takes for such procedural restrictions to be acceptable under Article 52(1) of the Charter. The findings of the Court contribute to ensuring that individual data protection rights stemming from GDPR have legal bite. At the same time, due to the method of precedent applied by the Court, the ruling is relevant beyond the field of data protection law. The Court makes connections between cases at a high level of abstraction, which enables it to move freely between sectors of Union law.[[99]](#footnote-99) EU policies are framed in the language of rights across a variety of sectors, such as environmental protection, competition policy and consumer protection, and pursuant to Article 47 of the Charter, Member States are obliged to ensure the protection of *all* individual rights stemming from the Union legal order.

Clearly, ensuring the effective enforcement of the rights that private parties derive from Union law must be seen as an objective in and of itself.[[100]](#footnote-100) Yet mobilizing individuals to enforce their rights has also the (intended) side-benefit of ensuring that Member States and private parties comply with their Union law obligations. Private lawsuits serve a role beyondprotecting the individual, since by initiating legal proceedings, private parties become “part of the implementation process.”[[101]](#footnote-101) They uphold the policies embodied in the Union law provision in question and “serve as the eyes, ears, and long arm of Brussels.”[[102]](#footnote-102)

1. See first recital of the preamble to the GDPR. [↑](#footnote-ref-1)
2. Joined Cases C‑293/12 and C‑594/12, *Digital Rights Ireland*, EU:C:2014:238, where the Court declared invalid the Data Retention Directive (Directive 2006/24/EC). [↑](#footnote-ref-2)
3. Case C‑131/12, *Google Spain,* EU:C:2014:317, where the Court recognized the ‘right to be forgotten’. [↑](#footnote-ref-3)
4. Case C-362/14, *Schrems,* EU:C:2015:650, where the Court declared the Commission’s approval of the Safe Harbor framework (Decision 2000/52/EC) invalid. [↑](#footnote-ref-4)
5. Joined Cases C-203/15 and C-698/15, *Tele 2*, EU:C:2016:970, where the Court found that Article 7 and 8 of the Charter precluded the general and indiscriminate retention of all traffic and location data. [↑](#footnote-ref-5)
6. See respectively GDPR Article 15 (access), Article 16 (rectification), Article 17 (erasure) and Article 18 (restriction of processing). [↑](#footnote-ref-6)
7. For a detailed account, see, *inter alia*, Póltorak, *European Union Rights in National Courts* (Wolters Kluwer, 2015) and Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart, 2004). [↑](#footnote-ref-7)
8. The provision comprises both the right to an effective judicial remedy, a fair trial and legal aid (first, second and third paragraph, respectively), but it is primarily the first facet which is of interest for present purposes. [↑](#footnote-ref-8)
9. Article 6 of Directive 95/46 on principles relating to the processing of personal data is now Art. 5 GDPR, and Art. 7 of the Directive on the lawfulness of processing is now Art. 6 GDPR. [↑](#footnote-ref-9)
10. Article 22 of Directive 95/46/EC on judicial remedies is replaced by Article 79 GDPR [↑](#footnote-ref-10)
11. Provisions in secondary legislation pertaining to effective judicial protection must be read in light of Article 47 of the Charter, see for instance, Case C-69/10, *Samba Diouf,* EU:C:2011:524 and Joined Cases C-439/14 and C-488/14, *Star Storage*,EU:C:2016:688. [↑](#footnote-ref-11)
12. Opinion para. 37-41. [↑](#footnote-ref-12)
13. Para. 44 [↑](#footnote-ref-13)
14. Para. 45. [↑](#footnote-ref-14)
15. See *inter alia*, Case 33/76, *Rewe,* EU:C:1976:188, para 5 and Case 199/82 *San Giorgio*, EU:C:1983:318, para. 12. [↑](#footnote-ref-15)
16. Para. 49. [↑](#footnote-ref-16)
17. Para. 51. [↑](#footnote-ref-17)
18. Para. 53-54. [↑](#footnote-ref-18)
19. Para. 56 [↑](#footnote-ref-19)
20. Para. 59-62. [↑](#footnote-ref-20)
21. Para. 63-69. [↑](#footnote-ref-21)
22. Para. 72. [↑](#footnote-ref-22)
23. The approach of the Slovak Supreme Court is further explained in para. 82 of the Opinion. [↑](#footnote-ref-23)
24. Para. 80. [↑](#footnote-ref-24)
25. Para. 81. [↑](#footnote-ref-25)
26. Para. 82. [↑](#footnote-ref-26)
27. Para 83. She made reference to Article 8(2) of the Charter and Article 12 of the Data Protection Directive, on the right of access to one’s own data, and Article 13(1) of the Directive prescribing restrictions to this right. [↑](#footnote-ref-27)
28. Para. 122-126. [↑](#footnote-ref-28)
29. Para. 119-124. [↑](#footnote-ref-29)
30. Para. 55-56. [↑](#footnote-ref-30)
31. Para. 57-58. [↑](#footnote-ref-31)
32. The relationship between the two principles will be addressed in section 5.1 below. [↑](#footnote-ref-32)
33. Para. 61. [↑](#footnote-ref-33)
34. Para. 63. [↑](#footnote-ref-34)
35. Para. 64. [↑](#footnote-ref-35)
36. Para. 66-68. [↑](#footnote-ref-36)
37. Para. 70-71, with reference to Joined Cases C-317/08 to C-320/08, *Allasini* EU:C:2010:146, para. 67. [↑](#footnote-ref-37)
38. Para. 87-91. [↑](#footnote-ref-38)
39. Para. 90. [↑](#footnote-ref-39)
40. Para. 92. [↑](#footnote-ref-40)
41. Para 94. The referring court had to ascertain whether the information and access rights enshrined in Articles 10-12 could be lawfully limited in accordance with the rules laid down in Article 13(1), cf. para. 95-97. [↑](#footnote-ref-41)
42. Para. 102. [↑](#footnote-ref-42)
43. Para. 104. [↑](#footnote-ref-43)
44. Para. 106-109. [↑](#footnote-ref-44)
45. Para. 111-113. [↑](#footnote-ref-45)
46. Para. 114. [↑](#footnote-ref-46)
47. Case C-417/13, *ÖBB Personenverkehr* EU:C:2015:38. [↑](#footnote-ref-47)
48. Case C-61/14, *Orizzonte*, EU:C:2015:655 and Case C-205/15 *Toma* EU:C:2016:499. [↑](#footnote-ref-48)
49. See case C-12/08, *Mono Car Styling*, EU:C:2009:466, para. 49, where the Court referred to all the principles. [↑](#footnote-ref-49)
50. Case C‑268/06, *Impact,* EU:C:2008:223, para 47 and Case C-63/08, *Pontin*, EU:C:2009:666, para. 44. [↑](#footnote-ref-50)
51. Case C-169/14, *Sánchez Morcillo,* EU:C:2014:2099, para. 35 [↑](#footnote-ref-51)
52. See, *inter alia*, Case C-93/12, *ET Agroconsulting* EU:C:2013:432, paras 48-60, Joined Cases C-317/08 to 320/08, *Alassini,* EU:C:2010:146, paras 47-65 and Case C-205/15 *Toma,* EU:C:2016:499, paras 39-59. The inconsistencies in the Court’s jurisprudence is discussed by Krommendijk, “Is There Light on the Horizon? The Distinction between “Rewe Effectiveness” and the Principle of Effective Judicial Protection in Article 47 of the Charter after Orizzonte”, 53 CML Rev. (2016), 1395-1418, at 1408-1412. [↑](#footnote-ref-52)
53. Opinion para. 51. [↑](#footnote-ref-53)
54. Para. 57. This largely echoes the Court’s statement in Case C-432/05 *Unibet,* EU:C:2007:163, para. 38. [↑](#footnote-ref-54)
55. The Court has held that the principle of effectiveness shall be examined having regard to “the role of that provision in the procedures, its progress and its special features, viewed as a whole, before the various national instances” and the basic principles of the domestic judicial system, such as protection of the rights of defence, the principle of legal certainty and proper conduct of procedure”, cf. Joined Cases C-430/93 and C-431/93, *Van Schijndel,* EU:C:1995:441, para. 19 and Case C-312/93, *Peterbroeck,* EU:C:1995:437, para. 14. On the differences between these two tests, see further Krommendijk, op.cit. *supra* note 52, at 1406-1407. [↑](#footnote-ref-55)
56. Advocate General Szpunar in Case C‑49/14, *Finanmadrid,* EU:C:2015:746, para. 85. The differences between these forms of effectiveness were also addressed by Advocate General Jääskinen in Case C-61/14, *Orizzonte*, EU:C:2015:307, at paras 33-37. [↑](#footnote-ref-56)
57. Case C-49/14 *Finanmadrid*, EU:C:2016:98, para. 40. [↑](#footnote-ref-57)
58. See, inter alia, Prechal and Widdershoven, “Redefining the Relationship between `Rewe-Effectiveness´ and Effective Judicial Protection” 4 REALaw (2011), 31-50 and Arnull, “The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?” 36 EL Rev. (2011) 51-70. [↑](#footnote-ref-58)
59. Krommendijk, op.cit*. supra* note 52, at 1413. See also Engström, “The principle of effective judicial protection after the Lisbon Treaty” 4 REALaw (2011) 53-68, at 63. [↑](#footnote-ref-59)
60. This has also been pointed out by Krommendijk op.cit. *supra* note 52 at 1414. [↑](#footnote-ref-60)
61. See, *inter alia*, Case C-177/10, *Rosado Santana,* EU:C:2011:557, paras 92-96 and Joined Cases C-89/10 and C-96/10, *Q-Beef*, EU:C:2011:555, paras 34-37. This has also been pointed out by Prechal and Widdershoven op.cit. *supra* note 58 at 48. [↑](#footnote-ref-61)
62. See, inter alia, Case C-104/13 *Olainfarm* EU:C:2014:2316, and Case C-279/09 *DEB*, EU:C:2010:811. Cf. Opinion of Advocate General Kokott in the annotated case para.49. [↑](#footnote-ref-62)
63. Joined Cases C-442/98, *Kapniki Michailidis,* EU:C:2000:479; C-228/98, *Dounias,* EU:C:2000:65 and C-224/02, *Pusa,* EU:C:2004:273. [↑](#footnote-ref-63)
64. See e.g. Case C-93/12, *ET Agrokonsulting*, EU:C:2013:432; Case C-61/14, *Orizzonte,* EU:C:2015:655 and Case C-205/15, *Toma*, EU:C:2016:499. See further Krommendijk, op.cit*. supra* note 52 at 1402-1403, substantiating the claim that *Rewe* is not “dead”. [↑](#footnote-ref-64)
65. For illustration, see Joined Cases C-317/08 to C-320/08, *Allasini,* EU:C:2010:146. [↑](#footnote-ref-65)
66. Prechal and Widdershoven, op.cit. *supra* note 58 at 39-43. [↑](#footnote-ref-66)
67. Prechal and Widdershoven op.cit. *supra* note 58 at 46 and Krommendijk, op.cit. *supra* note 52 at 1405. [↑](#footnote-ref-67)
68. Lenaerts, Maselis and Gutman, *EU Procedural Law* (OUP, 2014) p. 110 [↑](#footnote-ref-68)
69. Wilman, *Private Enforcement of EU Law Before National Courts: The EU Legislative Framework* (Edward Elgar, 2015) p. 457-458. [↑](#footnote-ref-69)
70. See, *inter alia*, Case C-74/14, *Eturas*, EU:C:2016:42, paras 34-35 (evidence and standard of proof in competition law proceedings) and Case C-24/95, *Alcan,* EU:C:1997:163, para. 24 (recovery of unlawfully received funds). [↑](#footnote-ref-70)
71. Case 222/84, *Johnston,* EU:C:1986:206, para. 18 and Case 222/86, *Heylens,* EU:C:1987:442, para. 14. [↑](#footnote-ref-71)
72. Krommendijk, op.cit. supra note 52 at 1408. [↑](#footnote-ref-72)
73. Van Cleynenbreugel, “The Confusing Constitutional Status of Positive Procedural Obligations in EU Law” 5 REALaw (2012) 81-100 at 89-91. Prechal and Widdershoven op.cit. *supra* note 58, 41-42. The most well-known example of a such a positive obligation is the Member States’ liability for infringements of EU law pursuant to the Francovich doctrine, cf. Joined Cases C-6/90 and C-9/90 *Francovich*, EU:C:1991:428 [↑](#footnote-ref-73)
74. See also Case C-69/10, *Samba Diouf,* EU:C:2011:524, para. 49 and Case C-93/12, *ET Agroconsulting,* EU:C:2013:432, para. 59. [↑](#footnote-ref-74)
75. Case 222/84, *Johnston,* EU:C:1986:206 and Case 222/86 *Heylens* EU:C:1987:442. [↑](#footnote-ref-75)
76. See, for example, Case C-562/12, *Liivimaa Lihaveis,* EU:C:2014:2229, where the Court draws directly on Case C-97/91, *Borelli,* EU:C:1992:491 and Case C-269/99, *Kühne,* EU:C:2001:659. [↑](#footnote-ref-76)
77. Similarly Strand, who states that “the inclusion of the right of access to court in Article 47 and the introduction of the Article 52(1) test must be seen as advances in the protection of the right of access to court.”, cf. Strand, *The Passing-On Problem in Damages and Restitution under EU Law* (Edward Elgar, 2017) p. 49. [↑](#footnote-ref-77)
78. Prechal, “The Court of Justice and Effective Judicial Protection: What has the Charter Changed?”, in Paulussen, Takács, Lazić and Van Rompuy (eds) *Fundamental Rights in International and European law: Public and Private law Perspectives* (Springer, 2016), p. 156 [↑](#footnote-ref-78)
79. Case C‑414/16, *Egenberger*, EU:C:2018:257, para. 78. [↑](#footnote-ref-79)
80. It follows from the Explanations Relating to the Charter of Fundamental Rights, O.J. 2007, C 303/17, 32, that Article 52(1) corresponds in essence to the Court’s earlier jurisprudence, see for example Case C-292/97, *Karlsson*, EU:C:2000:202, para. 45. In recent case law, the Court examines the compliance with each requirement individually, paying attention to the different elements of the test, see *inter alia* joined cases C-317/08 to C-320/08, *Allasini*, EU:C:2010:146, paras 64-65, Joined Cases C-439/14 and C-488/14, *Star Storage,* EU:C:2016:688, paras 49-61 and now Case C-73/16, *Puškár,* EU:C:2017:725, paras 63-75. [↑](#footnote-ref-80)
81. Prechal, op.cit. *supra* note 78 p. 154. What this “essence” consists of will be addressed in the following. [↑](#footnote-ref-81)
82. Drake, “More Effective Private Enforcement of EU Law Post-Lisbon: Aligning Regulatory Goals and Constitutional Values” in Drake and Smith (eds.), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar 2016) 35. Along the same lines, Mak, “Rights and Remedies: Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters” in Micklitz (ed.), *Constitutionalization of European Private Law* (OUP 2014) p. 251. [↑](#footnote-ref-82)
83. See, *inter alia*, Widdershoven, “The Principle of Loyal Cooperation: Lawmaking by the European Court of Justice and the Dutch Courts” in Stroink and Linden (eds.), *Judicial Lawmaking and Administrative Law* (Intersentia, 2005) pp. 21-22. [↑](#footnote-ref-83)
84. The notion of ‘essence’ appears also in the case law of the ECtHR, see inter alia ECtHR*, Ashingdane v. the United Kingdom*, Appl. No. 8225/78, judgment of 28 May 1985, para. 57. The court held that “the right of access to the court is not absolute but may be subject to limitations.... Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.” [↑](#footnote-ref-84)
85. Para. 64. [↑](#footnote-ref-85)
86. Joined cases C-317/08 to C-320/08, *Allasini,* EU:C:2010:146, para. 54. [↑](#footnote-ref-86)
87. Case C‑362/14, *Schrems*,EU:C:2015:650, para. 95. [↑](#footnote-ref-87)
88. Case C-205/15, *Toma*, EU:C:2016:499, para. 45. [↑](#footnote-ref-88)
89. Case C-279/09, *DEB,* EU:C:2010:811, para. 60. [↑](#footnote-ref-89)
90. Joined Cases C-317/08 to C-320/08, *Allasini,* EU:C:2010:146, paras 64-65 and Case C-73/16, *Puškár*, EU:C:2017:725, paras 63-75. See similarly joined cases C-439/14 and C-488/14, *Star Storage*, EU:C:2016:688, para. 51-61, concerning national legislation requiring a ‘good conduct guarantee’ for a claim to be admissible. [↑](#footnote-ref-90)
91. Case C-61/14, *Orizzonte,* EU:C:2015:655, para. 73. [↑](#footnote-ref-91)
92. Joined cases C-317/08 to C-320/08, *Allasini,* EU:C:2010:146, para. 64. [↑](#footnote-ref-92)
93. Case C-104/13, *Olainfarm*, EU:C:2014:2316, paras 36-39 and Case C-510/13*, E.ON Földgaz,* EU:C:2015:189, paras 42-51. In its case law on *locus standi* before domestic courts, the ECJ has not used the restrictive *Plaumann*-doctrine, applicable under Article 263(4) TFEU, cf. Case 25/62, *Plaumann,* EU:C:1963:17. [↑](#footnote-ref-93)
94. Case C-97/91, *Borelli*,EU:C:1992:491, para. 13. The Court used similar formulations in Case C-269/99, *Kühne,* EU:C:2001:659, para. 58 and Case C-562/12, *Liivimaas Lihaveis,* EU:C:2014:2229, para. 75. [↑](#footnote-ref-94)
95. Case 222/84, *Johnston*,EU:C:1986:206, para. 21. [↑](#footnote-ref-95)
96. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, para. 36. See also Case C‑362/14 *Schrems*, EU:C:2015:650, para. 95. [↑](#footnote-ref-96)
97. Case C-64/16, *Associação Sindical dos Juízes Portugueses* EU:C:2018:117, para. 32. See also Case 294/83, *Les Verts*, EU:C:1986:166, para. 23. [↑](#footnote-ref-97)
98. Para. 90. [↑](#footnote-ref-98)
99. Leczykiewicz, ‘Effectiveness of EU Law Before National Courts: Direct Effect, Consistent Interpretation and Member State Liability’ in Arnull and Chalmers (eds), *Oxford Handbook of European Union Law* (OUP 2015) p. 213 [↑](#footnote-ref-99)
100. Wilman, op.cit. *supra* note 69 p. 522 and Dougan, “The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts” in Craig and de Burca (eds.), *The Evolution of EU law* (OUP 2011) p. 431. [↑](#footnote-ref-100)
101. Ruffert, “Rights and Remedies in European Community Law: A Comparative View”, 34 CMLRev (1997) 307-336, at 316. He uses the term “functional subjectivation”. Along the same lines, Galetta has stressed that “the citizen of the EU becomes an instrument in the process of implementation of EU law and the pursuit of its *effet utile*”, cf. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer, 2010) p. 21. [↑](#footnote-ref-101)
102. Kelemen, “Suing for Europe Adversarial Legalism and European Governance” 39 Comparative Political Studies (2006) 101-127, at 121. [↑](#footnote-ref-102)