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## **An approach to today's EU constitutionality control – understanding this EU inter-jurisdictional phenomenon in light of effective judicial protection**

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*ABSTRACT: Under today's European constitutional demands, effective judicial protection sets the tone concerning potential jurisdictional instruments able to act as constitutionality control mechanisms. Inter-jurisdictionality stands for different and complementary jurisdictional systems living together in the same space and it aims to understand how their reflexive interactions can be maintained to promote effective judicial protection. Both the infringement procedure and the preliminary ruling act as constitutional controls. The first allows the Court of Justice of the European Union (CJEU) to evaluate the incompatibility of national solutions/omissions with EU law but, to meet its full effectiveness, widening legitimate parties needs to be considered as well. Also, validity preliminary rulings act as a constitutional control in proceedings relating to individuals – national judges should be aware of their referring obligations to the CJEU. There are voices amongst European academia that advocate a new constitutional procedure to promote fundamental rights' protection. However, the main formulas highlighted rely on solutions tested on the national level which can compromise their efficacy. We perceive an inter-jurisdictional paradigm as the proper approach since it will allow the promotion of effective judicial protection at a constitutional level as a new EU dogmatically thought phenomenon. This is to ensure judicial integration can be perceived as a reality, engaged in pursuing the future of the EU.*

*KEYWORDS: EU constitutional control – effective judicial protection – infringement procedure – validity preliminary ruling – inter-jurisdictionality.*

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## 1. Context and teleology: an effective judicial protection as European Union general principle and fundamental right

Effective judicial protection comes, in light of the European Union (EU) law, as a general principle that received concrete consecration in Article 19(1) and (2) of the Treaty of the European Union (TEU). For that matter, it stands for the ability that all must go to court in order to exercise a right or to demand a conduct/abstention from another. When it relates to EU law themes, it states that someone can appear before the European courts (both organic and national courts when the latter applies EU law) to “*uphold a right conferred to a litigant by Union law*”.<sup>1</sup> It directly relates to a jurisdictional approach that all legal orders must allow and it permits to approach one of the major characteristics that make the EU a Union based on the rule of law.

As recognised by Alessandra Silveira, “[t]he EU creates law and is bound by the law that it itself creates” since it has “(1) its own institutions; 2) procedures that aim to set and interpret European rules; 3) mechanisms which sanction its eventual violation”<sup>2</sup> – this allows us to describe EU as an Union based on the rule of law because “*the Union’s public power’s exercise must be submitted to the law*”.<sup>3</sup> In this matter, the EU also relies on “*its own procedural system*” with “*jurisdictional mechanisms and courts that secure the judicial protection*”.<sup>4</sup>

However, looking at the 2<sup>nd</sup> paragraph of the Article 19(1) of the TEU, we find the following legal provision: “*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*”. From this statement, we can derive that effective judicial protection relates, in a closer sense, to another EU general principle: the principle of National Procedural Autonomy.<sup>5</sup>

The principle of National Procedural Autonomy made clear that is it up to Member States to create all necessary judicial means and legal procedures that can be used to enforce/recognise rights derived from EU law. In fact, since the *Rewe* judgement, the CJEU described the principle: “*in the absence of [Union] rules on the subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from [...] [Union] law*”.<sup>6</sup>

So, in effect, the *Rewe* principle states that it is the Member States, themselves, that determine effective judicial protection, using their own procedural rules. However, procedural autonomy demands limits, which will be set under the “*test-principles*” of equivalence and effectiveness (in a strict sense).

The principle of equivalence will allow us to test if national procedural solutions are not “*less favourable than those governing similar domestic actions*”.<sup>7</sup> This test demands, so far, situations’ comparability and not a complete identity. When it is not possible to establish a comparison, this test will be seen as passed.

<sup>1</sup> See Anthony Arnull, “*The principle of an effective judicial protection in EU law: an unruly horse?*”, *European Law Review*, Volume 36, n.º 1, February, Sweet & Maxwell (2011), 51.

<sup>2</sup> See Alessandra Silveira, *Princípios de Direito da União Europeia – Doutrina e Jurisprudência*, (2.<sup>a</sup> Edição actualizada e ampliada, Coleção Erasmus – ensaios & monografias, Quid Juris, 2011), 28 (free translation).

<sup>3</sup> See Alessandra Silveira, *Princípios de Direito*, 28 (free translation).

<sup>4</sup> See Alessandra Silveira, *Princípios de Direito*, 29 (free translation).

<sup>5</sup> First references made to this particular principle came from CJEU’s judgement *Rewe*, 16 December 1976, case 33/76.

<sup>6</sup> See CJEU’s judgement *Rewe*, recital 2.

<sup>7</sup> See, among others, CJEU’s judgement *Unibet*, 13 March 2007, case C-432/05, recital 43.

The principle of effectiveness will allow us to test if those national procedural solutions render “*practically impossible or excessively difficult the exercise of rights conferred by [Union] law*”.<sup>8</sup> If so, national rules must be set aside in order to national judge be able to recognise and enforce rights derived from EU law.

As we can understand – not only in a literal sense, but also in a teleological one – both effective judicial protection and procedural autonomy have a close relation, working together towards the same goal: to create the necessary environment so national judicial structures feel engaged on developing and pursuing European solutions, using national procedural means in a perspective of close application of EU law.

In this sense, the principle of effective judicial protection can be applicable “*to both the Union judicature and to the national courts of the Member States*”<sup>9</sup> – it is, in fact, from this synergy that we are able to unravel our context in order to understand the idea of a Union’s inter-jurisdictionality, which allocates implicit means of constitutionality control.

Furthermore, effective judicial protection also received literal consecration as a fundamental right, in Article 47 of the Charter of Fundamental Rights of the European Union (CFREU). For that matter, we can find, in its three paragraphs, several dimensions inserted in the scope of effective judicial protection: the right to action (in the 1<sup>st</sup> paragraph), defence rights (in the 2<sup>nd</sup> paragraph), the right to be represented in litigation (in the 2<sup>nd</sup> part of the 2<sup>nd</sup> paragraph) and the right to legal aid (3<sup>rd</sup> paragraph). Nowadays, fundamental rights’ protection and observance assume a “*central place*” “*which was reasserted through the entry into force of the Lisbon’s Treaty, which brought, with article 6 of the TEU, the recognition of legal bidding force to the Charter of Fundamental Rights of the European Union*”.<sup>10</sup> It started to appear as “*the proper catalogue of fundamental rights [...] bidding to all organs and to the EU Institutions, as for the MS, when they apply Union law*”.<sup>11</sup>

In fact, this is the way forward since, as we already stated before, “*[o]nly something like this would be possible to mature a system of fundamental rights’ protection and it would allow judicial operators to be able to grasp, in a effective way, its functioning in the European juridical system, being able to overcome difficulties derived from this new regime that does not relate to appeals to an international instance [...] but that installs itself, primarily, in litigation posed before national instances*”.<sup>12</sup>

Having said this, effective judicial protection is the setting where our own scope rests since it clarifies the intrinsic and external manifestations where the involvement capacity has been widened to promote a better functioning of the mechanisms we are going to approach today.

Since effective judicial protection is the beginning and the ending of our

<sup>8</sup> See, among other, CJEU’s judgment *Unibel*, recital 43.

<sup>9</sup> See Anthony Arnull, “*The principle of...*”, 51.

<sup>10</sup> See Joana Covelo de Abreu, “As interações entre jurisdições no contexto da adesão da União Europeia à Convenção Europeia dos Direitos do Homem: para onde caminha a tutela jurisdicional efetiva? – um exemplo no contexto do apoio judiciário”, in *IX Encontro de Professores de Direito Público (e-book)*, ed. Ana Gouveia Martins, Anabela Leão, Benedita Mac Crorie, Patrícia Fragoso Martins, (Universidade Católica Editora, 2017), 132 (free translation).

<sup>11</sup> See José Joaquim Gomes Canotilho, Mariana Canotilho, “Comentário ao artigo 6.º do TUE”, in *Tratado de Lisboa – Anotado e Comentado*, ed. Manuel Lopes Porto and Gonçalo Anastácio (Almedina, 2012), 40 (free translation).

<sup>12</sup> See Joana Covelo de Abreu, “*As interações entre jurisdições*”, 143 (free translation)

dogmatic digression, we must set the tone of our first premise: it is important to adopt a better, modernised and improved sense of EU Procedure. In fact, this is the operational concept that must be engaged when we talk about procedural solutions to demand rights, i.e., when we talk about effective judicial protection.

And it is important to adopt European terminology and adapt it to new realities: since EU Procedure can embrace all procedural realities, as we will be able to see.

### ***1.1. Widening the concept of EU Procedure: reflections***

Dogmatically, this concept can be understood in two major senses:

- Concerning its functional or organic approach;
- Concerning its material approach.

The first one originally related and described the setting of the organic European courts. It described how the CJEU worked, how it was composed (nowadays, by the Court of Justice, the General Court and the Specialized Courts), its structure, functioning and organisation. Nonetheless, there were authors<sup>13/14</sup> that could innovate and this widened the functional notion of EU Procedure. In fact, those authors remembered that EU law is mainly applied by national courts which, by doing so, are acting as European functioning courts<sup>15</sup> or as courts of “*common law of the European Union*”.<sup>16</sup>

In this concept’s enlarged understanding, EU Procedure aims to understand and to study the procedural impulses that are given both by European organic courts and national courts, when applying EU law. This, in fact, opened the opportunity to study the articulations between national and European courts through the preliminary ruling, when doubts concerning the validity of EU acts and/or a difficulty with the interpretation of EU law arises, allowing national courts to establish a profound dialogue with the CJEU.

In this scenario, we have paid special attention to the dichotomy “Formal Dialogue/Informal Dialogue” that can be maintained between national courts and the CJEU, which we will be able to address later.

We also should understand the material approach of EU Procedure. In fact, most authors have not devoted enough attention to this dimension that is still presented in a strict sense, as the setting of procedural rules that establish how procedures/litigation will be developed before European organic courts. Bearing this definition in mind, only the rules of procedure dealt with in the Treaties, in the Rules of Procedure and the Statute of the European organic courts would be operant to that notion. However, this approach would only lead us to an outdated setting, especially if bearing in mind, the enlarged concept adopted under the organic concept of EU Procedure we already stressed.

In this concept, we believe two major innovations should be made:

- It also has to endorse procedural rules contemplated on European secondary

<sup>13</sup> See, on the matter and for greater development, Fausto de Quadros and Ana Maria Guerra Martins, *Contencioso da União Europeia* (2.<sup>a</sup> edição – revista e actualizada, reimpressão, Almedina, 2009).

<sup>14</sup> See, on the matter and for greater development, Alessandra Silveira, *Princípios de Direito*.

<sup>15</sup> See, on the matter and for greater development, Alessandra Silveira, *Princípios de Direito*.

<sup>16</sup> See, on the matter and for greater development, Nuno Piçarra, “*As incidências do direito da União Europeia sobre a organização e o exercício da função jurisdicional dos Estados-Membros*”, *Revista da Faculdade de Direito da Universidade do Porto*, VII especial (2010), 212 (free translation).

law, namely Regulations that must be met and applied by national courts;

- It has also to endorse national procedural rules when national courts face EU litigation, even though the national rule is, in fact, European law at its fount (because it derives from transposition or EU law concretisation measures) or not (it is only national law applicable by the observance of the principle of the procedural autonomy).

Therefore, if today it is consensual that, organically, also national courts can be subsumed to the notion of EU Procedure, we also have to modernise the material approach in order to cover all procedural rules that can be activated when EU law is applicable to the case – it will include procedural rules derived from primary EU law, but also secondary EU law (namely Regulations) and national rules when they are applicable to the litigation in the scope of application of EU law, despite the fact that those derive from a transposition or a EU law national concretisation or they are national rules called to the equation by the principle of procedural autonomy.

Taking into consideration the need to define EU Procedure, we are going to bear in mind two major European procedural mechanisms to understand if there is a method/a means of constitutional review in the EU context: the infringement procedure and the preliminary ruling process and, for that matter, if we should understand the need of the fundamental rights procedural mechanism existence.

## 2. Procedural instruments under EU law as potential constitutional control mechanisms

Dogmatically, there are two mechanisms that can act in that sense: the infringement procedure and the preliminary ruling. The first one is more intuitive since it can be related to an abstract constitutional review made by a specialised court – the Court of Justice. The second one, the preliminary ruling, in its validity approach, can operate as a *suis generis* incidental, concrete and diffuse constitutional control secured by the same specialised court (also the Court of Justice).

### 2.1. The infringement procedure

The infringement procedure is set under Articles 258 to 260 TFEU. It does not contemplate the possibility of private parties to resort to the CJEU since they lack active legitimacy.

As we already stressed, the EU appears as a Union based on the rule of law “*since its Treaties act as its material Constitution*”<sup>17</sup> – they created a “*juridical legal order, integrated in the juridical systems of Member States and imposed itself [the legal order] to their jurisdictional organs*”.<sup>18</sup>

As a Union based on the rule of law, the EU needs to react to all EU law infringements in which Member States are engaging – and it does not do this by assessing which national entity is responsible for the infringement. Therefore, when

<sup>17</sup> See Joana Covelo de Abreu, “New European Framework relating to the making available on the market of radio equipment (Directive 2014/53/UE): national legislator and ANACOM’s role – inadequate pursue of the accused? Perspectives under EU procedure”, in, IX Annual Competition Spanish Seminar, (The Basque Competition Authority forthcoming), 18 (provisional reference).

<sup>18</sup> See João Mota de Campos, António Pinto Pereira and João Luiz Mota de Campos, *O direito processual da União Europeia – Contencioso Comunitário*, (2.<sup>a</sup> Edição revista e aumentada, Fundação Calouste Gulbenkian, 2014), 515 (free translation).



Member States are in breach of EU law, they are setting all necessary elements so an “*original, important and severe*”<sup>19</sup> procedure can commence. In this procedure, “*ECJ’s competence is exclusive and mandatory – Member States are bound to its jurisdiction just because they are Member States*”<sup>20</sup> and, in the non-litigation phase, Commission usually makes informal approaches to breaching Member States, which give the litigation “*a different tone*”.<sup>21</sup> It is also a quite important procedure since it is “*the effective means to guarantee Treaties’ respect and to secure Member States’ equality treatment principle to avoid transgressions to common rules and to secure [...] law application uniformity [...]*”<sup>22</sup>

For this reason, we can understand why the infringement procedure can act, in the EU, as a constitutional control mechanism in order to “*refrain breaches of EU Treaties*”<sup>23</sup> since they are the EU’s “*basic constitutional charter*”<sup>24/25</sup>.

Therefore, the CJEU appears, in the infringement procedure, as “*EU law’s assurer*” as this procedural mechanism has, “*as last addressee, the national legislator*”<sup>26</sup>.

In addition to those characteristics, this procedure has a strong impact on Member States juridical orders – in fact, “*it means subdue a Member State to a public procedure where it is exposed for its infringement amongst its peers and before public opinion*”.<sup>27</sup>

It has two major legitimate parties that can initiate the proceedings: the European Commission (under Article 258 of the TFEU) and another Member State (under article 259 of the TFEU).

However, it can be seen as the *underdog* by the doctrine, especially since it does not recognize individuals’ legitimacy.

As stated in the beginning, effective judicial protection establishes the context and the setting of this dogmatic approach. Therefore, it is already clear that the infringement procedure acts as an abstract and concentrated constitutional control mechanism. Its functioning has been improving – on what effective judicial protection is related – especially, with the increasing importance given to private parties’ complaints presented to the Commission.

In fact, a private party (an individual or a legal person) can present a complaint to the European Commission about actions/omissions of a Member State’s public entities that can determine a breach of the EU legal order.

There are some formal requirements that a complaint must meet, to be accepted; it has to be written, stating, as accurately as possible, the infringement and determining the losses already felt by the complainant. “*It must also state why*

<sup>19</sup> See João Mota de Campos, António Pinto Pereira and João Luiz Mota de Campos, *O direito processual...*, 517 (free translation).

<sup>20</sup> See Joana Covelo de Abreu, “*New European Framework?*” (forthcoming), 19 (provisional reference).

<sup>21</sup> See Joana Covelo de Abreu, “*New European Framework?*” (forthcoming), 19 (provisional reference).

<sup>22</sup> See João Mota de Campos, António Pinto Pereira and João Luiz Mota de Campos, *O direito processual*, 518 (free translation).

<sup>23</sup> See Joana Covelo de Abreu, “*New European Framework?*” (forthcoming), 19 (provisional reference).

<sup>24</sup> See, among others, CJEU’s judgement *Commission v. EIB*, 10 July 2003, case C-15/00, recital 75.

<sup>25</sup> For that matter, accordingly to article 6(1) of the TEU, also the CFREU sets the “tone” to understand infringements in this matter. For further reading concerning the scope and the importance of article 6 of the TEU, see José Joaquim Gomes Canotilho and Mariana Canotilho, “*Comentário ao artigo 6.º*”.

<sup>26</sup> See Joana Covelo de Abreu, “*Infringement procedure and the Court of Justice as an EU law’s assurer: Member States’ infringements concerning failure to transpose directives and the principle of an effective judicial protection*”, in *Towards a Universal Justice? Putting international courts and jurisdictions into perspective*, Ed. Dário Moura Vicente (Brill, Nijhoff, Leiden: Boston, 2014), 469.

<sup>27</sup> See Joana Covelo de Abreu, “*New European Framework?*” (forthcoming), 19 (provisional reference).

*Commission's intervention is important to resettle EU legality*'.<sup>28</sup> However, no juridical reasoning is mandatory.<sup>29</sup> It is submitted online, using an electronic form (available in all EU official languages). The Commission will give notice to the complainant of the receipt of the complaint "*within 15 working days and it will have a time frame of 12 months to analyse the complaint and to decide whether to initiate an infringement procedure or not*". Despite this, the Commission continues to maintain its discretionary power on how to initiate the infringement procedure and whether or not it will present the case to the CJEU.<sup>30</sup> This discretionary power also prevents individuals from demanding, from the Commission, the adoption of any procedural position.<sup>31</sup>

Taking into consideration effective judicial protection constraints, the Commission made this complaint instrument a powerful tool so that private parties are able to report Member States' infringements – which steamed from the update made on the Commissions' Communication on how to handle complaints.<sup>32</sup>

As determined in this Communication, those complaints are "*free of charge*"<sup>33</sup> and, despite some exceptions,<sup>34</sup> they will be recorded in a central application. So that the private party can be aware of the complaint's reception, a registration number will be given to it and all further communications with the European Commission must mention that number.<sup>35</sup>

The most important feature is that "*[a]ll further developments will be noticed, in writing, to the complainant – from the formal notice to the referral to the ECJ or the closure of the case*".<sup>36</sup>

Complainants' data will be secured since the Commission is bound to fulfil European data protection standards.<sup>37</sup>

Despite these precisions concerning securing claimants' rights to understand how their complaints are being dealt, there are still voices raised concerning the need to open up the possibility of private parties being able to have active legitimacy.<sup>38</sup>

In this sense, I have already recognised the need to settle an avenue individuals can use in order to directly address the Court. It is our belief that the next step may be that (or a similar) development. Despite the fact there is an increased importance given to the complaint presented by individuals, that can act as a means of improving fundamental rights' protection and, therefore, be able to determine truly that the infringement procedure can act as a constitutional control.

<sup>28</sup> See Joana Covelo de Abreu, "*New European Framework?*" (forthcoming), 22 (provisional reference).

<sup>29</sup> See João Mota de Campos, António Pinto Pereira and João Luiz Mota de Campos, *O direito processual...*, 562.

<sup>30</sup> See, for further developments concerning Commission's discretionary power, CJEU's judgements *Commission v. Greece*, 6 December 1989, case C-329/88; *Commission v. Greece*, 27 November 1990, case C-200/88; *Commission v. Germany*, 1 June 1994, case C-317/92; *Commission v. Belgium*, 21 January 1999, case C-207/97; *Commission v. Ireland*, 25 November 1999, case C-212/98; *Commission v. Federal Republic of Germany*, 14 May 2002, case C-383/00; *Commission v. Spain*, 6 October 2009, case C-562/07.

<sup>31</sup> See, for further development, CJEU's judgement *Lefebvre and others v. Commission*, 14 September 1995, case T-571/93.

<sup>32</sup> See European Commission, *Communication to the Council and the European Parliament, updating the handling of relations with the complainant in respect of the application of Union law*, Brussels, 2 April 2012, COM(2012) 154 final.

<sup>33</sup> See European Commission, *Communication*, 4.

<sup>34</sup> For instance, if the complaint was made anonymously; it does not show which Member State is in breach; it does not deal with EU law, among others.

<sup>35</sup> See European Commission, *Communication*, 5.

<sup>36</sup> See Joana Covelo de Abreu, "*New European Framework?*" (forthcoming), 24 (provisional reference).

<sup>37</sup> See European Commission, *Communication*, 6.

<sup>38</sup> See, for further developments, Joana Covelo de Abreu, "*Infringement procedure?*".

## 2.2. Preliminary ruling: validity issues

On the other hand, we also find the preliminary ruling process. It is enshrined under Article 267 of the TFEU which is “available to national courts, as European functioning courts, so they can ask the competent jurisdictional organ to that matter (i.e. the CJEU, the interpretation/validity’s verification of EU law with relevance to the sub judice circumstance”).<sup>39</sup>

As ascertained by the CJEU, “[t]he reference for a preliminary ruling is a fundamental mechanism of European Union law aimed at enabling the courts and tribunals of the Member States to ensure uniform interpretation and application of that law within the European Union”.<sup>40</sup> However, as some European authors stress, this is a very innovative mechanism, since it does not presuppose any hierarchical relationship between national courts and the CJEU.<sup>41</sup>

In the wise words of Christiaan Timmermans, the preliminary ruling can be perceived as a “*formal dialogue*”<sup>42</sup> between national courts and the CJEU since it delivers a jurisdictional cooperation<sup>43</sup> between courts.<sup>44</sup>

As we will see, the most relevant type of preliminary ruling to this discussion is the validity one. For that matter, we need to settle the notion of validity: in this particular theme, the Advocate General Karl Roemer was able, in its Conclusions,<sup>45</sup> to lead the Court of Justice to say the validity notion has to be understood in a widened sense,<sup>46</sup> in order to allow questions concerning material legality (“*intrinsic, resulting from the observance of deep conditions*”),<sup>47</sup> but also formal legality (“*which relates to the satisfaction of formal requirements*”)<sup>48</sup> of European acts.

This ‘validity’ concept wide interpretation allows “*large practical consequences on what concerns individuals’ protection, since it considerably reinforces the legality system of jurisdictional safeguard in the Union’s scope*”.<sup>49</sup> In fact, this approach is also a concrete observance of that subjective dimension that, more recently, underlies the preliminary ruling.

As presented by Alessandra Silveira, the preliminary ruling is “*an effective judicial protection’s service – i.e., doctrine has been highlighting the subjective dimension of the preliminary*

<sup>39</sup> See Joana Covelo de Abreu, “Anotação ao Despacho do Tribunal de Justiça (10.ª Secção) de 16 de julho de 2015 – Processo n.º C-507/14”, in *Anuário de Direito Internacional 2014/2015* (Instituto Diplomático, Ministério dos Negócios Estrangeiros, Lisboa, 2016), 415 (free translation).

<sup>40</sup> See Court of Justice of the European Union, *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*, (2012/C 338/01), 6 November 2012, 1, recital 1.

<sup>41</sup> See, for further development, Alan Dashwood, Michael Dougan, Barry Rodger, Eleanor Spaventa and Derrick Wyatt, *European Union Law* (6th Edition, Hart Publishing, 2011), 209 to 210 and 216.

<sup>42</sup> See Christiaan Timmermans, “Multilevel judicial co-operation”, in *Constitutionalising the EU judicial system: Essays in honour of Pernilla Lindh*, Eds. Pascal Cardonnel, Allan Rosa and Nils Wahl (Hart Publishing, 2012), 16.

<sup>43</sup> The word “cooperation” also appears in the contribution written by Maria Eugénia Martins de Nazaré Rodrigues, concerning the preliminary ruling. See, on the matter, Maria Eugénia Martins de Nazaré Rodrigues, “Anotação ao artigo 267.º do TFUE”, in *Tratado de Lisboa Anotado e Comentado*, (Coords.) Manuel Lopes Porto and Gonçalo Anastácio (Almedina, 2012), 963.

<sup>44</sup> See, for further development, Joana Covelo de Abreu, “Anotação ao Despacho”, 416.

<sup>45</sup> See Advocate General Conclusions, 16 December 1963, joint cases C-73/63 and C-74/63.

<sup>46</sup> See CJEU’s judgement *Internationale Crediet*, 18 February 1964, joint cases C-73/63 and C-74/63.

<sup>47</sup> See João Mota de Campos, António Pinto Pereira and João Luiz Mota de Campos, *O direito processual*, 379 (free translation).

<sup>48</sup> See João Mota de Campos, António Pinto Pereira and João Luiz Mota de Campos, *O direito processual*, 379 (free translation).

<sup>49</sup> See João Mota de Campos, António Pinto Pereira and João Luiz Mota de Campos, *O direito processual*, 379 (free translation).



*ruling, that one which is important to the defence of individuals' rights*".<sup>50</sup>

When preliminary references have been made to pose questions concerning invalidity of a European disposition (of derived law), we can foresee that the validity is going to be assessed under the standard given by the Treaties and the CFREU, so it can also be devised as a constitutional control. For that matter, when it comes to asking the CJEU about a European act's validity because of its potential damage to fundamental rights, enshrined in the CFREU, it will also serve as a judicial cooperation function in fundamental rights' protection in the EU.

Furthermore, this subjective dimension seems to be deepened by the decision *Foto-Frost*.<sup>51</sup> Actually, from the literal sense derived from Article 267 of the TFEU (and its predecessors), it seemed that, even when validity issues would be raised in the preliminary reference, it would only be mandatory courts to refer to the CJEU if they were deciding at last instance. Conversely, the decision *Foto-Frost* changed that understanding; the CJEU stated that the observance of just an unlimited ability to refer, when validity questions were raised, could compromise the uniformity of EU law, as derived from Recitals 14 and 15 of the decision.<sup>52</sup>

However, there are voices that do not accept this reasoning, understanding the CJEU went too far since the Article concerning preliminary references did not mean this. They understand "*CJ adopted [...] a solution that implied a praetorian creation of law – innovating, one more time, against the rules enshrined in the Treaties*".<sup>53</sup>

That notwithstanding, a national judge, facing a matter of validity appreciation, has the ability not to submit a preliminary reference to the CJEU "*if he considers that he must see as valid the questioned act*".<sup>54</sup> However, there will be always an obligation to present a preliminary reference if he is able to devise that the litigation solution can "*imply an invalidity declaration*".<sup>55</sup>

This approach has been advanced, by the Court, in its IATA decision, when this Court clearly stated that "*[i]t is settled case-law that national courts do not have the power to declare acts of the Community institutions invalid. The main purpose of the jurisdiction conferred on the Court by Article [267 FEU] is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly vital where the validity of a Community act is in question. Differences between courts of the Member States as to the validity of Community acts would be liable to jeopardise the very unity of the Community legal order and*

<sup>50</sup> See Alessandra Silveira, *Princípios de Direito*, 233 and 234 (free translation).

<sup>51</sup> See CJEU's judgement *Foto-Frost*, 22 October 1987, case C-314/85.

<sup>52</sup> See CJEU's judgement *Foto-Frost*, recitals 14 and 15: "*14. Those courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling into question the existence of the Community measure*"; "*15. On the other hand, those courts do not have the power to declare acts of the Community institutions invalid. [...] [T]he main purpose of the powers accorded to the Court by Article [267] is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty*".

<sup>53</sup> See João Mota de Campos, António Pinto Pereira and João Luiz Mota de Campos, *O direito processual*, 423, footnote 905 (free translation).

<sup>54</sup> See, for further development, João Mota de Campos, António Pinto Pereira and João Luiz Mota de Campos, *O direito processual*, 424 (free translation).

<sup>55</sup> See, for further development, João Mota de Campos, António Pinto Pereira and João Luiz Mota de Campos, *O direito processual*, 424 (free translation).

*undermine the fundamental requirement of legal certainty*”.<sup>56</sup>

At last, invalidity causes that can trigger a preliminary ruling under Article 267 of the TFEU are only those that can undermine an act of EU Institutions, bodies, offices and agencies and they are the same as those evoked under the action of annulment (Article 263 of the TFEU).

Despite methodological criticisms that can be levelled against *Foto-Frost* decision, the reality is that one allow us, in an even more proper sense, to understand that the preliminary ruling can act as a constitutional control, especially because, in the name of EU law’s uniform application, validity questions have always to be referred to the CJEU.

### 3. Concretisations under inter-jurisdictionality theory

Inter-jurisdictionality stands for different and complementary jurisdictional systems living together in the same constitutional and legal space and it aims to understand how their reflexive interactions can be maintained to fully promote the principle of effective judicial protection.<sup>57</sup>

This unique concept has profound effects on the “*organizational scheme of access to justice consecrated in the constitutional texts [...] and in the States’ internal legislation*”.<sup>58</sup> In the EU context, inter-jurisdictionality will allow that “*the applicability of material law of a normative level is secured within that same level*”,<sup>59</sup> which means that, when litigation derives from the scope of application of EU law, the courts will have to solve it using the means set in that same legal space – the EU space (even if the procedural solutions derive from national legislation, they are being used based on the general principle of Member States’ procedural autonomy, which is developed under EU law).

Furthermore, fundamental rights’ protection (or the inter *jusfundamentalidade*<sup>60</sup> approach, as perceived by Gomes Canotilho) is a concern that cannot be also forgotten when we are dealing with an inter-jurisdictional setting. In fact, “*accumulation and overlapping of fundamental rights, recognised and guaranteed in several levels, demand an adequate organization, especially when the protection obeys different standards and allows the comparison of different protection stages achieved by accumulated and overlapped rights in the several levels of protection*”.<sup>61</sup>

This acquires particular importance in the EU context, where fundamental rights’ protection achieved a new standard of protection. As enshrined under Article 53 of the CFREU, the EU is going to promote the highest standard of fundamental rights’ protection, when EU law is called upon to solve the litigation. Therefore, the accumulation and overlapping we were discussing, in the EU context, derives from the fact that fundamental rights’ protection was developed by taking into consideration the standard derived from Member States’ constitutional traditions and international derivations of human rights’ protection, especially the protection

<sup>56</sup> See CJEU’s judgement *LATA*, 10 January 2006, case C-344/04, recital 27.

<sup>57</sup> This definition was inspired on José Joaquim Gomes Canotilho’s concept of “interconstitutionality” and the theory this author developed around it.

<sup>58</sup> See José Joaquim Gomes Canotilho, “Estado de direito e internormatividade”, in *Direito da União Europeia e transnacionalidade*, ed. Alessandra Silveira (Ação Jean Monnet - Information and Research Activities, Quid Juris, 2010), 177 (free translation).

<sup>59</sup> See José Joaquim Gomes Canotilho, “Estado de direito”, 177 (free translation).

<sup>60</sup> See, for further development, José Joaquim Gomes Canotilho, “Estado de direito”.

<sup>61</sup> See José Joaquim Gomes Canotilho, “Estado de direito”, 181 (free translation).

promoted under the European Convention on Human Rights (ECHR). This left “*the European Convention on Human Rights and the constitutional fundamental rights protected under Member States’ Constitutions stay[ed] undisturbed*”.<sup>62</sup>

Taking those developments into consideration, effective judicial protection and the inter-jurisdictional approach (that emanates from it) are in close connection with those worries concerning fundamental rights’ protection in the EU. When we try to perceive constitutional control mechanisms in this same legal space, we are also trying to unravel efficient judicial mechanisms that are able to secure and ensure fundamental rights in this legal order and, for that matter, the highest standard of protection that exists in the EU context, namely the CFREU. Here, we try to exercise, even if timidly, the necessary exegesis to unravel the jurisdictional mechanisms the EU legal system has so that they are able to appear as constitutional review mechanisms (and act as those). Consequently, they will be able to secure fundamental rights’ protection without needing a new and proper judicial figure to do so because “[l]ooking for a parameter of unitary control is particularly important in the European Union system”.<sup>63</sup>

So, the organic concept of EU Procedure becomes vital since both national courts and the CJEU are going to be mobilised in this inter-jurisdictional approach. National courts have a decisive role on the matter since “*the competence [can be] of national courts but the law that determines the acts submitted to jurisdictional appreciation of Member States’ courts is EU law*”.<sup>64</sup> This understanding allows us to take the step forward. Since national courts are called upon, Member States’ procedural autonomy also comes into light, which also determines that national procedural rules have to be contemplated in the wider material notion of EU Procedure.

One of those instruments of unitary control is the preliminary ruling but, it also aims to consider those judicial control means “*composed by procedural [...] impositions that conduct the discretionary range’s reduction of national authorities*”.<sup>65</sup> In this sense, the infringement procedure fits in this profile because it can be seen as the ultimate judicial mechanism to limit and even control national discretionary powers, especially when it comes to Directives’ lack of transposition.

In fact, the preliminary ruling, especially the validity type, can be at the service of fundamental rights’ protection and become a *sui generis* constitutional control in which the CJEU by considering invalid a European legal rule, it is going to be doing that taking as legality referral the constitutive Treaties and the CFREU [article 6(1) of the TEU]. On the other hand, the infringement procedure can be seen as a more intuitive constitutional control instrument of both actions and omissions of Member States, taking as reference, the terms emanating from the Treaties and the CFREU.

But our reflection also has some support on empirical sensibilities, namely based on the recently published CJEU’s 2016 Annual Report.

In 2016, 453 preliminary rulings and 34 infringement procedures were brought before that Court. 31 concerning failure to fulfil obligations and three concerning twofold failure to fulfil obligations.<sup>66</sup> Particularly concerning infringement procedure,

<sup>62</sup> See José Joaquim Gomes Canotilho, “*Estado de direito*”, 181 (free translation).

<sup>63</sup> See José Joaquim Gomes Canotilho, “*Estado de direito*”, 183 (free translation).

<sup>64</sup> See José Joaquim Gomes Canotilho, “*Estado de direito*”, 183 (free translation).

<sup>65</sup> See José Joaquim Gomes Canotilho, “*Estado de direito*”, 183 and 184 (free translation).

<sup>66</sup> See Court of Justice of the European Union, 2016 Annual Report – “*The year in review*”, 27, available, in English, in the website: [https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-04/ragp-2016\\_final\\_en\\_web.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-04/ragp-2016_final_en_web.pdf) (access: May 15<sup>th</sup> 2017).

the CJEU declared the infringement of 16 Member States in 27 different procedures and decided twofold failure to fulfil obligations in two situations.<sup>67</sup>

Furthermore, the Court is the competent one to deal with these procedures, where the proceedings' duration is around 14.7 months long.<sup>68</sup>

In this particular context, Christiaan Timmermans also called our attention to an “*informal dialogue*”<sup>69</sup> between the CJEU and national courts. This dialogue aims to increase effective judicial protection:

- Two times a year, the Court promotes an informal meeting with Member States' judges to inform them on its functioning and to hear about their doubts and worries;

- The Court of Justice also receives Member States' superior courts delegations and reunions happen following a round-table system;<sup>70</sup>

- The Court also visits national supreme and constitutional courts;

- It is usual to the CJEU to engage in interactions with judges and public prosecutors' associations.<sup>71</sup>

This judicial proximity (which promotes sociological integration) comes from the courts' will to collaborate. This knowledge demands improving judicial relations between the CJEU and national courts so that the latter feel engaged in the prosecution of fundamental rights recognised under the EU legal order.

In the same informal approach, we must bear in mind improvements made on complaints presented by individuals before the European Commission concerning grounds for infringement procedures. As we had the opportunity to mention, complaints are one of the most effective means to improve, in an indirect way, the engagement of individuals and has recently received a more transparent treatment by the Commission.

#### **4. Practical derivations concerning fundamental rights' protection: effective judicial protection under the microscope – legal aid dimension and Portuguese reality**

Effective judicial protection saw its dimensions being stipulated as fundamental rights, in the CFREU, and one of those is the right to have legal aid in circumstances of financial insufficiency.

Concerning legal aid, the EU has adopted Directive 2003/8/CE to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

Portugal adopted national legislation, Lei 34/2004,<sup>72</sup> to partially transpose that Directive, which gives Member States the possibility to predict less restrictive conditions since the European act only established minimum rules.

It was thought to promote better access to justice, mainly to those who “*lack*

<sup>67</sup> See Court of Justice of the European Union, *2016 Annual Report*, 28.

<sup>68</sup> See Court of Justice of the European Union, *2016 Annual Report*, 28.

<sup>69</sup> See Christiaan Timmermans, “*Multilevel judicial co-operation*”, 17.

<sup>70</sup> See, for further reading, Court of Justice of the European Union, *2016 Annual Report*, 34 and 35.

<sup>71</sup> See Christiaan Timmermans, “*Multilevel judicial co-operation*”, 17 to 19.

<sup>72</sup> Lei 34/2004, of July 29<sup>th</sup>, revised under Lei 47/2007, of August 28<sup>th</sup>, available, in Portuguese, in the website [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=80&tabela=leis&ficha=1&pagina=1&so\\_miolo=&](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=80&tabela=leis&ficha=1&pagina=1&so_miolo=&) (access: May 15<sup>th</sup> 2017).



*sufficient resources*<sup>73</sup> – being able to fully understand and follow the goals set under effective judicial protection as consecrated in Article 47 of the CFREU<sup>74</sup> since “[n] either the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute’s cross-border dimension should be allowed to hamper effective access to justice”.<sup>75</sup> Bearing this in mind, the Directive’s direct goal “lies in the providing access to justice to those without the financial means necessary, in order to guarantee that no person is legally defenceless because they lack the financial resources to litigate”.<sup>76</sup>

This came into light because, before the Directive’s adoption, all Member States regulated legal aid in different ways and with various approaches, where “concession conditions were disparate and its extent also ended up varying”.<sup>77</sup>

Taking into consideration the Green Paper from the Commission concerning legal aid, some risks were studied about effective judicial protection. Those emerged in the absence of economic resources. This Green Paper even stated that “[a] comparative study of the national schemes on legal aid shows that in fact these systems differ considerably, thereby presenting a cross-border litigant with serious difficulties”.<sup>78</sup>

The Directive allows “a growing harmonization between Member States’ legislation, obliged to its transposition, in strict respect for the principle of their procedural autonomy”.<sup>79</sup>

In this sense, the Directive does not define legal person but it only refers to persons. In fact, it derives “from its literal sense that [legal persons] do not have this kind of aid”.<sup>80</sup> The Directive is binding and requires Member States to observe its minimum rules – forbidding them from adopting more restrictive ones – but leaves them the necessary freedom to create a more favourable regime in their internal legal order. Taking into consideration this ability, some of them – such as Portugal – recognised the possibility of some legal persons to have the right to legal aid, as we can derive from Article 7(3) of the national legislation (Lei 34/2004).

Despite this, we already had the chance to comment on some national jurisprudence that wrongfully interpreted EU law applicable to the litigation<sup>81</sup> – not only the Directive’s scope of application, but, more incisively, the interpretation of Article 47 of CFREU, forgetting the settled case law of the CJEU, namely the *DEB Deutsche* decision.<sup>82</sup> New developments concerning national jurisprudence were faced, especially in a Portuguese Constitutional Court’s decision and it is important to analyse this particular jurisprudence in order to understand, in a practical way, how

<sup>73</sup> See Directive 2003/8/CE, recital 5

<sup>74</sup> See Directive 2003/8/CE, recital 5.

<sup>75</sup> See Directive 2003/8/CE, recital 6.

<sup>76</sup> See Virginia Pardo Iranzo and Rosa Pascual Serrats, “Minimum common regulations on legal aid: Directive 2003/8”, in *European Civil Procedure*, ed. Maria Pía Calderon Cuadrado, Fernando Gascon Inchausti, Carmen Senés Motilla and Jaime Vegas Torres (European Commission, Aranzadi, Swett & Maxwell, 2011), 265.

<sup>77</sup> See Joana Rita de Sousa Covelo de Abreu, *Tribunais nacionais e tutela jurisdiccional efetiva: da cooperação à integração judiciária no Contencioso da União Europeia*, (PhD thesis, University of Minho, 2014), 279 (free translation).

<sup>78</sup> See European Commission, *Green Paper “Legal aid in civil matters: the problems confronting the cross-border litigant”*, February 9<sup>th</sup> 2000, COM(2000) 51 final, available, in English, in the website <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0051&qid=1494929615360&from=PT> (access: May 16<sup>th</sup> 2017)

<sup>79</sup> See Joana Rita de Sousa Covelo de Abreu, *Tribunais nacionais*, 279 (free translation).

<sup>80</sup> See Joana Covelo de Abreu, “*As interações entre jurisdições*”, 136 (free translation).

<sup>81</sup> See, for further development, Joana Covelo de Abreu, “*As interações entre jurisdições*”.

<sup>82</sup> See CJEU’s judgement *DEB Deutsche*, 22 December 2010, case C-279/09.



fundamental rights' protection has been observed under Portuguese national reality so that we able to settle which steps forward must be set in motion and derived dogmatically so that fundamental rights can be truly observed in a integrated judicial space as it is the EU.

#### ***4.1. Analysing the Portuguese Constitutional Court decision: namely, decision 591/2016***

In this particular approach, the wording of Gomes Canotilho is particularly enlightening: “[i]n terms of interjurisdictionality, it is interesting to verify if the articulation of several levels of access to courts can or not be translated in restrictions to opening the judicial *via*”.<sup>83</sup> As we will perceive, there is a matter concerning the understanding of effective judicial protection and it is important to unravel how the Portuguese Constitutional Court approached the matter, especially when it comes to one of the most effective judicial protection dimensions – legal aid.

On November 9<sup>th</sup>, 2016, the Portuguese Constitutional Court issued decision nr. 591/2016, concerning an incidental and concrete constitutionality control presented before this court.

In the litigation, a legal person presented, before the competent national administrative authority (Instituto da Segurança Social, I.P. – Centro Distrital de Braga), a request for legal aid, which was refused without further consideration since Article 7(3) of the Lei 34/2004 is clear when it states that “*legal persons operating for profit and individual establishments of limited liability do not have the right to legal aid*”.<sup>84</sup>

Not accepting that decision, the legal person presented an action before the national first instance court where they pleaded for Article 7(3) of the Lei 34/2004 to be deemed unconstitutional and, simultaneously, in contravention of Article 47 of the CFREU.

The court decided against the legal person because of the “*clear impracticability*” of the litigation, holding, *inter alia*, that the national legislation was not unconstitutional since Article 20 of the Portuguese Constitution demands concretisation matters and, for that matter, the limitation emanating from the national legislation was not compromising the Constitution’s setting since other legal mechanisms could be used by the litigator, such as financial stress.

However, the national court did not mention anything concerning EU law and the interpretation national legal rules should meet under EU general principles.

The litigator did not rest with that decision and presented a constitutionality appeal to the Portuguese Constitutional Court, which gave light to the decision we are now addressing, considering the national rule as contrary to Article 20 of the Portuguese Constitution when it states that legal persons operating for profit are not able to have legal aid, without minding their particular economic situation or their financial specificities.<sup>85</sup>

Concerning its appeal reasoning, the Portuguese Constitutional Court understood Article 7(3) of the Lei 34/2004 was unconstitutional because “*the access*

<sup>83</sup> See José Joaquim Gomes Canotilho, “*Estado de direito*”, 178 (free translation).

<sup>84</sup> See article 7(3) of the Lei 34/2004, which states, in portuguese, “*As pessoas coletivas com fins lucrativos e os estabelecimentos individuais de responsabilidade limitada não têm direito a proteção jurídica*”.

<sup>85</sup> See Portuguese Constitutional Court judgment 591/2016, 9 November 2016, case 278/16, 2, available in the website <http://www.tribunalconstitucional.pt/tc/acordaos/20160591.html> (access: May 16<sup>th</sup> 2017).

*to courts [...] is an indispensable guarantee of fundamental rights protection and, as such, inherent to the idea of the Rule of Law: without prejudice of its nature of rendered dependent right and legally bind right, what is certain is that nobody – individual or legal person, national or not – can be deprived to lead his cause to appreciation before a court’.*<sup>86</sup>

Therefore, “[t]he content of this right cannot be emptied or practically unused because of economic means’ insufficiency”.<sup>87</sup>

Furthermore, accepting the complete and absolute exclusion of legal persons operating for profit from the ratio and the teleology of Article 7(3) of the Lei 34/2004, it would take away from a whole category of subjects (that also have the right to access to courts to exercise their rights) a right that is acknowledged both by the national Constitution but also by binding international regimes of fundamental rights/human rights’ protection, to which Portugal is bound. In this sense, the Constitutional Court states that an evaluation about the legal person’s economic situation should be made in order to prevent there being an absolute and disproportionate lack of legal aid to all legal persons operating for profit.

We must bear in mind the final tale of numbers 7 and 8 of this decision in order to understand major conclusions we are going to extract.

In this particular approach, the Constitutional Court summarized the majority position under the Constitutional Court by stating that, under this understanding “[...] legal aid to legal persons operating for profit comes as dysfunctional and potentially, a generator of inequalities between competing companies in the same market and [...] as a potential unbalancing factor for that market”.<sup>88</sup>

Refusing that approach, the Portuguese Constitutional Court recalls the CJEU *DEB Deutsche* decision.

In this decision, the CJEU started to understand that, although Article 47(3<sup>rd</sup> paragraph) of the CFREU seems to refer itself only to individuals, it does not exclude legal persons, even if taking its literal sense into consideration. In fact, “reflecting on the Chapter VI where article 47 is inserted, makes sense, systematically, to include legal persons”:<sup>89</sup> in fact, in that Chapter VI we can find “other procedural principles [...] which apply to both natural and legal persons”.<sup>90</sup> Furthermore, since effective judicial protection was not included in the CFREU’s Chapter concerning “Solidarity”, it cannot be “[...] conceived primarily as social assistance” to understand it “[...] reserved to natural persons”.<sup>91</sup>

Even more, to set aside any doubts, the CJEU continues, despite the fact that Directive 2003/8/CE does not contemplate legal aid to legal persons, that does not mean that we can derive from that a general conclusion since it derives, from the scope of the Directive’s application, that it only establishes minimum rules, allowing Member States to create more favourable regimes.

In this sense, the CJEU concluded that “the grant of legal aid to legal persons is not in principle impossible, but must be assessed in the light of the applicable rules and the situation of the company concerned”<sup>92</sup> – by doing so, the CJEU shows the company’s economic situation must be assessed, taking into consideration the criteria this court underlines in Recital 54: “the form of the company [...]; the financial capacity of its shareholders; the objects

<sup>86</sup> See Portuguese Constitutional Court judgment 591/2016, 4, n.º. 4, 2<sup>nd</sup> paragraph.

<sup>87</sup> See Portuguese Constitutional Court judgment 591/2016, 4, n.º. 4, 2<sup>nd</sup> paragraph.

<sup>88</sup> See Portuguese Constitutional Court judgment 591/2016, 6, n.º. 7, 3<sup>rd</sup> paragraph.

<sup>89</sup> See Joana Covelo de Abreu, “As interações entre jurisdições”, 137 (free translation).

<sup>90</sup> See CJEU’s judgement *DEB Deutsche*, recital 40.

<sup>91</sup> See CJEU’s judgement *DEB Deutsche*, recital 41.

<sup>92</sup> See CJEU’s judgement *DEB Deutsche*, recital 52.

of the company; the manner in which it has been set up; and, more specifically, the relationship between the resources allocated to it and the intended activity”.

As stated before, “[w]ith this decision, the Court of Justice does not close the door so legal persons can be granted, under Union law, with legal aid” – however, this conclusion emanates from the interconstitutionality phenomena:<sup>93</sup> taking into consideration “ECHR’s settled jurisprudence, which helps to interpret the CFREU’s dispositions (influenced by common Member States’ traditions and by instruments of human rights’ protection of international character, where ECHR is highlighted), ECJ derived, systematic and literally, from the CFREU, that also legal persons will be able to enjoy legal aid in situations of economic scarcity”.<sup>94</sup>

All these developments were considered by the Portuguese Constitutional Court – in fact, this Court come to the conclusion that the understanding stressed by the CJEU of this effective judicial protection dimension “sets aside the idea of a necessary incompatibility between legal aid granted to legal persons operating for profit and the good functioning of competing markets, as it is in the Internal Market”. And it goes on: “[...] legal aid does not necessarily constitute a competition distortion factor or of favouring commercial companies; [...] this cannot be considered equivalent or qualified as aid granted by the State or derived from public financial resources which distorts or threatens to distort competition”.<sup>95</sup>

Still, the Portuguese Constitutional Court shows a systemic worry: “It is enough to think in the hypothesis of a commercial company, Portuguese or national from another Member State of the European Union, in economic difficulties due to the violation of European Union law by the Portuguese State and that wants to enforce the civil liability of the latter: an absolute impossibility of discussing – it is that the sense of the legal aid request’s rejection [...] – with the competent Portuguese authorities its economic insufficiency [...] is contrary to article 47, third paragraph of the CFREU and puts it in a situation of inequality towards other legal persons in parallel situation in other Member States”.<sup>96</sup> In the same sense, it uses the previous syllogism to avoid a discrimination of legal persons domiciled in Portugal and pleading here. Despite not saying so, the Constitutional Court derived that sense from the need to

<sup>93</sup> Concerning the concepts of interconstitutionality or of plural constitutionalism – both characterizing the European integration process after Lisbon, see, among others, José Joaquim Gomes Canotilho, “Brançosos” e Interconstitucionalidade. Itinerários dos discursos sobre a historicidade constitucional (Almedina, 2006); Paulo Castro Rangel, *O estado do Estado. Ensaios de política constitucional sobre justiça e democracia* (Dom Quixote, 2009); Miguel Poiars Maduro, *A Constituição Plural. Constitucionalismo e União Europeia* (Principia, 2006); Miguel Poiars Maduro, “Three Claims of Constitutional Pluralism”, in *Constitutional pluralism in the European Union and beyond*, (eds.) Matej Avbelj and Jan Komárek (Hart Publishing, Oxford and Portland, Oregon, 2012); Alessandra Silveira, “Intersubjectividade, interdemocrática, interconstitucionalidade, Filosofia Política e juridicidade europeia”, in *Pensar radicalmente a humanidade, Ensaios em homenagem ao Prof. Doutor Acílio da Silva Estanqueiro Rocha*, (Org.) João Cardoso Rosas and Vítor Moura (Edições Húmus, Universidade do Minho, Centro de Estudos Humanísticos, 2011); Di Federico Giacomo, “Fundamental rights in the EU: Legal pluralism and multi-level protection after the Lisbon Treaty”, in *The EU Charter of fundamental rights: from Declaration to Binding Instrument*, (Ed.) Di Federico Giacomo (Ius Gentium: Comparative Perspectives on Law and Justice 8, Springer, 2011); Alexander Egger, “EU-fundamental rights in the national legal order: the obligations of the Member States revisited”, in *Yearbook of European Law*, 25 (2006); Leonard Besselink, “Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union”, in *Common Market Law Review*, n.º 35 (1998); Joseph H. Weiler and Nicholas Lokhart, “Taking rights seriously: the European Court and its fundamental rights jurisprudence, Parts I and II”, in *Common Market Law Review*, n.º 32 (1995); Christiaan Timmermans, “Multilevel judicial”.

<sup>94</sup> See Joana Covelo de Abreu, “As interações entre jurisdições”, 139 (free translation).

<sup>95</sup> See Portuguese Constitutional Court judgment 591/2016, 8, n.º 8, 4<sup>th</sup> paragraph.

<sup>96</sup> See Portuguese Constitutional Court judgment 591/2016, 8, n.º 8, 5<sup>th</sup> paragraph.

avoid discrimination based on nationality, also a fundament derived from EU law.

As we can foresee, the Portuguese Constitutional Court had an impressive approach on the matter, using EU law to reinforce its position, especially to undermine previous jurisprudence of that same Court in the opposite sense. However, as we could derive, EU law was called upon in the discussion concerning the possibility of distorting competition in the Internal Market and, especially, appearing as state aid, in the sense of Article 107 of the TFEU.

The litigation was quite similar to the one posed before the CJEU in the *DEB Deutsche* case. However, after using the settled jurisprudence, the Portuguese Constitutional Court derived new approaches and understood, in the underlying context of that decision, something innovative concerning legal aid not being seen as a means to distort competition and, furthermore, not appearing as state aid. Since it is a completely new approach, the Portuguese Constitutional Court should have presented a preliminary ruling to the CJEU in order to fully fulfil the integration purpose the preliminary ruling brings.

By not doing so, the Portuguese Constitutional Court still does not really understand how and when it has to refer to the CJEU – and the case only posed an interpretative preliminary reference... Therefore, in an issue of fundamental rights' protection, a Constitutional Court was not able to refer – this means that there is still some unfamiliarity concerning how contemporary European judicial mechanisms work. Creating new schemes and procedural solutions would only import new problems to an old discussion.

Nonetheless, the CJEU's Annual Report shows Portuguese preliminary references are increasing – and we must enjoy this reality instead of creating and setting a new mean of disturbance.

Furthermore, it is quite impressive seeing the Portuguese Constitutional Court approach EU law in such an innovative way – however, it would be greater if a preliminary ruling was made concerning those potential distortions in the Internal Market and in free competition, so that all Member States could enjoy new developments in understanding effective judicial protection and, especially, legal aid, namely when it comes to legal persons operating for profit.

## 5. Final remarks

Effective judicial protection sets the tone, the context and the finalistic approach we are aiming to meet in these final remarks since it is the visible, palpable and operative face of interjurisdictional phenomenon which explains the setting and functioning of judicial mechanisms in the EU.

Therefore, interjurisdictional phenomenon comes as the method to be adopted so we can extract conclusions that do not collide with the promotion of efficient legal and judicial protection.

This is quite important – if not vital – in a legal order with its own judicial instruments to both interpret and to scrutinize the rules that the juridical order creates – which leads us to the idea of the EU being a true Union of Law.

Taking this into consideration, this reflection is only possible if we embrace a wider notion of EU Procedure: not only from a functional/organic approach, where national courts are contemplated in its definition; but also in a material approach to mind derived EU law where procedural rules are established and national procedural solutions are used to deal with EU law litigation under the scope of Member States'



procedural autonomy.

Bearing in mind EU is acting as a Union of Law, where the Treaties (and the CFREU, as stressed by Article 6 of the TEU) are its constitutional basis, we understand there are two main instruments that can act as constitutional control mechanisms:

- The infringement procedure;
- The preliminary ruling, namely the validity type.

The first one operates as an abstract and concentrated constitutional review since it aims to declare infringements committed by breaching Member States to fulfil obligations that emanate from the Treaties (as those obligations derived from national Constitutions that demand legislative concretisation).

The second one can be perceived as a concrete and diffuse constitutional control, being operated on litigation emerging before “*common courts*”<sup>97</sup> of EU law – national courts. In fact, especially when it comes to the obligation of referring cases to the CJEU which concern validity issues, we are able to understand that a constitutional analysis is demanded from the Court: national courts are referring this to the Court of Justice so it can state if a European act/disposition is in conformity with the European constitutional framework set by the Treaties or not.

Another premise we had to bear in mind demands an empirical approach: are these judicial instruments working well? Are they being able to maintain, in the future, this constitutional feature?

Well, when we address effective judicial protection and interjurisdictional setting in a constitutional approach, the most visible feature is to understand if, simultaneously, those “constitutional” mechanisms are able to provide and to ensure fundamental rights’ protection and if they act as a potential instrument to improve that protection:

- Nowadays, infringement procedure can also incidentally act as fundamental rights’ instrument since it will assess Member States’ behaviour under the scope of the CFREU;
- Concerning preliminary ruling, fundamental rights’ protection is one of major addressed issues.

On fundamental rights’ protection, we should call upon a recent decision of the Portuguese Constitutional Court where one of the most mentioned fundamental rights’ dimension is brought into the equation: legal aid. The Portuguese Constitutional Court steps away from its dominant position on the matter, stating legal persons operating for profit can be granted legal aid and, to do so, it uses the CJEU’s reasoning in the *DEB Deutsche* decision. With this decision, national court adopt a way to activate the highest standard of fundamental rights’ protection, emanating from EU law, since it comes to the conclusion that the CJEU’s interpretation of Article 47 (3<sup>rd</sup> paragraph) of the CFREU provides a higher standard of protection than the one this court, in its previous decisions, was able to derive from its Constitution’s interpretation.

However, despite going so far, it did not make a reference to the CJEU: in fact, it solves an apparent fundamental rights’ conflict between legal aid and free competition and the entrepreneurial freedom by resorting the CJEU reasoning in the *DEB Deutsche* decision. Still, this Court’s decision did not address this issue and the fundamental rights’ conflict should have been solved in the EU legal order. As there

<sup>97</sup> See, on the matter and for greater development, Nuno Piçarra, *As incidências...*



was no European settled jurisprudence on this issue, the Portuguese Constitutional Court had to refer in order to promote the preliminary ruling final tale: to promote uniform application and interpretation of EU law in all of its space.

This shows how there is still a resistance to refer to the CJEU. So, introducing a new mechanism would only create further difficulties – in fact, when that Court's Annual Report starts to unravel meaningful developments concerning both mechanisms, introducing a new scheme, which would only compromise further integration.

Under the opportunity opened by the CJEU, in its 2016 Annual Report, concerning “*Looking ahead: quality of justice, an ongoing challenge*”,<sup>98</sup> we have the chance to devise some procedural solutions.

As the Court states: “*the quality of justice constitutes an ongoing challenge for every judicial institution*” and, therefore, it sets three main axes to reflect in the future: 1) “*reforming judicial structure of the European Union*”; 2) “*recasting the rules of procedure*”; and 3) “*modernising and reviewing working methods*”.<sup>99</sup>

Under this CJEU's sensibility, we are concerned on presenting some procedural solutions to improve both fundamental rights' protection and that can justify a densification of constitutional control mechanisms. However, it is our aim that the structure and genesis of the EU judicial system remain untouched for operative reasons.

The EU cannot take a different path when it was so difficult for Member States' courts to understand the judicial functioning in this widened range of action. In fact, perceiving the CJEU as an appeal court would have this distorting effect we want to avoid. Furthermore, it would compromise that idea of justice's proximity, creating alarming elements in a setting that was hard to accommodate. Recently, Samo Bardutsky stated: “*preliminary ruling can overcome some federal flaws...*”<sup>100</sup> that can be perceived in the EU.

In this sense, it was our belief, already made public, the infringement procedure should be subjected to a revision, taking into consideration the right to action, one of effective judicial protection's dimensions, besides the ability private parties have to complain to the Commission – which was particularly developed in order to make it more transparent – especially when it comes to failures to fulfil caused by the lack of Directives' transposition, “*it would be useful if private parties could gain active legitimacy like the one it is recognised to Member States, in order to have the chance to promote an infringement procedure before the CJEU when the Commission does not deliver its reasoned opinion within three months of the date on which the matter was brought before it*”.<sup>101</sup>

This solution could be quite innovative since “*when national law is not in compliance with EU law – namely, when Directive's transposition does not occur – first repercussions are felt by European citizens' juridical sphere*”.<sup>102</sup> But some kind of filtering should be thought of in order to prevent the CJEU from receiving an excessive number of infringement

<sup>98</sup> See Court of Justice of the European Union, 2016 Annual Report – “*The year in review*”, 47.

<sup>99</sup> See Court of Justice of the European Union, 2016 Annual Report – “*The year in review*”, 47.

<sup>100</sup> This sensibility was developed under Samo Bardutsky's intervention, as Distinguished speaker, in the International Conference *More EU Conference – The federal experience of the European Union: past, present and future*, held at the Faculty of Law of the New University of Lisbon, 22<sup>nd</sup> – 23<sup>rd</sup> May 2017, in the panel “*European Union and federalism on the sixtieth anniversary of the Treaty of Rome*” – 9:00 a.m.

<sup>101</sup> See Joana Covelo de Abreu, “*Infringement procedure*”, 474 and 475.

<sup>102</sup> See Joana Covelo de Abreu, “*Infringement procedure*”, 473.

actions.

It would also have an impact on how citizens perceive themselves as being part of an integrated system as it is the EU: “*it would promote a closer relationship between private parties and the European institutions and it would promote a better way to look after compliance with EU law*”.<sup>103</sup>

To better achieve fundamental rights’ protection in a proximity matter, we can also vote our attention to a new approach on preliminary ruling references. In fact, when national courts and tribunals face litigation where fundamental rights were the main issue and it was submitted to EU law’s scope of application, a particular proceeding to deal with these topics in a more expedient manner should be created. Furthermore, it would have mandatory character since the CJEU should be the privative instance to deal with these relevant topics, despite which national instance was faced with the fundamental rights’ problem.

So far, it is quite clear that the path cannot be to create an entirely new instrument but, perhaps, to rely on those that already work as such constitutional control and fundamental rights’ protection means; otherwise, functioning problems will emerge. And we already sensed this in another context: “*so the European Union jurisdictional structure was not reconfigured, which was always seen as different, it would be important to create a fundamental rights’ mechanism which could run before the Court of Justice but that would suffer some kind of filtering to avoid this court would start to seem as an appeal instance and that can be cases’ ‘overwhelmed’*”.<sup>104</sup>

Already addressing this sensibility, if a new fundamental rights’ protection mechanism would be thought, it would run with influences of existing procedural mechanisms (namely the infringement procedure and the preliminary ruling),<sup>105</sup> despite the evolving awareness we have of the conviction that the existing mechanisms are adequate and able to both act as constitutional control and fundamental rights’ protection.

This setting will be suited to better improve effective judicial protection in the EU – as our teleological goal – using the method of inter-jurisdictionality and relying on a wide approach to the EU Procedure concept.

Therefore, we believe we now face a real judicial integration which also emanates from the fact of it now being possible to understand that the EU is already equipped with some constitutional control and fundamental rights’ protection mechanisms. As stressed recently by the Portuguese judge in the CJEU, Judge Cruz Vilaça, it is quite clear the EU has adopted the idea of a “*judicial federalization*” to surpass a mere “*judicial cooperation*”<sup>106/107</sup> – and we think when the Portuguese Judge understands it, he is going further than the expression he is using since there are already signs

<sup>103</sup> See Joana Covelo de Abreu, “*Infringement procedure*”, 474.

<sup>104</sup> See Joana Covelo de Abreu, “*As interações entre jurisdições*”, 142 and 143 (free translation).

<sup>105</sup> See, for further developments, Joana Covelo de Abreu, “*As interações entre jurisdições*”, 143 (free translation).

<sup>106</sup> This sensibility was developed under José Luís da Cruz Vilaça’s intervention, as Distinguished speaker, in the International Conference *More EU Conference – The federal experience of the European Union: past, present and future*, held at the Faculty of Law of the New University of Lisbon, 22<sup>nd</sup> – 23<sup>rd</sup> May 2017, in the panel, in Portuguese, “*A União Europeia como sistema federal sui generis: crise e desafios recentes*”.

<sup>107</sup> For further development, Alessandra Silveira, July 4, 2017, Editorial of June 2017 “*Waiting for a federal big bang in EU? Updating the theory of federalism in times of liquid modernity*”, UNIO – EU Law Journal – The official blog – Thinking and debating Europe, June 1, 2017, <https://officialblogofunio.com/2017/06/01/editorial-of-june-2017/>.

that show we face a judicial integration, more relatable to the integration process EU is constantly experiencing. It is also this Judge's opinion that the "*scheme must be maintained: and what is already existing must be deepened*".<sup>108</sup> In order to meet this goal, this Judge stated, inter alia, some scenarios that must be greatly emphasised so that judicial integration can fulfil its goals: the CJEU's competences must be enlarged; the cross-border fertilisation between the CJEU and national courts must be densified; a quality interoperable justice must be settled; national supreme courts must intervene, under preliminary references, as *amicus curiae*...<sup>109</sup>

Therefore, our sensitivity was corroborated by this European organic Judge because we firmly believe the path must be by deepening judicial integration, which sets aside breaking with the past but, relying and improving jurisdictional instruments already existing in the EU. Only by doing so – it is our belief –, will the EU will be able to overcome those difficulties with which it has been struggling for so long.

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<sup>108</sup> This sensibility was developed under José Luís da Cruz Vilaça's intervention, as Distinguished speaker, in the International Conference *More EU Conference – The federal experience of the European Union: past, present and future*, held at the Faculty of Law of the New University of Lisbon, 22<sup>nd</sup> – 23<sup>rd</sup> May 2017, in the panel, in Portuguese, "A União Europeia como sistema federal sui generis: crise e desafios recentes".

<sup>109</sup> This sensibility was developed under José Luís da Cruz Vilaça's intervention, as Distinguished speaker, in the International Conference *More EU Conference – The federal experience of the European Union: past, present and future*, held at the Faculty of Law of the New University of Lisbon, 22<sup>nd</sup> – 23<sup>rd</sup> May 2017, in the panel, in Portuguese, "A União Europeia como sistema federal sui generis: crise e desafios recentes".