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## Identifying Individual Rights in EU Law

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What constitutes an individual ‘right’ under EU law? Although this is as much of a central question for the constitutional and administrative system of the EU, as it is for every other legal system, there is surprisingly little conceptual clarity or structural guiding approach. Six decades of case law of the CJEU and of development of the EU’s legal system have not put an end to a great diversity in approaches to applying EU law. This article discusses various conceptions of individual rights under EU law and presents a model allowing for consistent interpretation and application of EU legal acts by Union bodies as well as by Member States legislatures, administrations and courts. It thereby aims at offering a systematic approach to identifying the source, scope and possible limitation of the notion of individual rights under EU law, in view of great legal uncertainty given diverging interpretation of rights by national courts and scholars as well as voices from within the CJEU.

In order to do so, the article revisits the basics of the notion of an individual right in EU law as developed in the early case law of the CJEU on direct effect, of effective judicial protection and to damages. The notion of an individual right under EU law is not only an important preliminary issue in the context of the right to an effective judicial remedy but is also a key component for identifying a right to damages for violations of EU law. Beyond this, the concept of an individual right is also important for defining legal relations in the multi-level legal system as it defines and delimits of the scope of the possible direct effect of EU law in its Member States. This article also looks at the notion of protected interests and whether the introduction of the Charter of Fundamental Rights of the EU (CFR)<sup>2</sup> as binding law by the Treaty of Lisbon, and of a distinction between rights and principles in this instrument, has challenged the established model of individual rights. It then discusses how the various elements can fit together and addresses the problem of enforceability.

## **A The basic case law**

The concept of an individual right under EU law, its sources and the approach to identifying the scope of a right have been developed by the case law of the CJEU since the early days of its case law developing the possibilities of direct effect of EU law in Member State legal systems. The concept of protecting individual rights has thereby been important to ensure both effectiveness and legitimacy of EU law. In this context, individual rights were developed *inter alia* as an instrument of enforcing obligations. This was especially relevant in times in which the Union had no explicit constitutional Charter of Fundamental Rights. Deriving individual rights from obligations filled the gap in a legally coherent manner and ensured at the same time, that identifying rights under EU law would not lead to a ‘competence creep’ in that identifying individual rights would not at the same time open up new legal basis for EU powers. This is an ongoing concern, which

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<sup>2</sup> Charter of Fundamental Rights of the European Union, OJ 2012 C326/02.

has led to the current Article 51(2) of the Charter of Fundamental Rights of the EU (CFR)<sup>3</sup> and the repeated reaffirmations of this in the case law of the CJEU.<sup>4</sup>

The concept of individual rights in EU law was developed since the earliest cases of the CJEU not only as rights to challenge acts of EU institutions, but also to challenge acts of Member States as well as to apply between individuals. Three seminal cases in the development of EU law illustrate this understanding:

### ***I Individual rights in disputes with EU institutions and bodies***

As early as 1956, in *Algera*,<sup>5</sup> the CJEU developed the notion of individual rights of employees of the ‘Common Assembly’ of the European Coal and Steel Community (now the European Parliament) to challenge the legality of acts of the Common Assembly, which had a negative effect on their remuneration and employment situation. In absence of positive Union law governing the situation, the court identified the nature, extent and limits of the employees’ individual rights by identifying, on the basis of a comparison between the legal systems of the six founding Member States, the obligations of the Common Assembly to protect and respect the legitimate interests of individuals.<sup>6</sup> It was the existence of public obligations, on one hand, and individual interests in need of protection on the other, that led the CJEU to develop the individual rights to be protected under Union law.

### ***II Direct effect of EU law and rights arising from Member State obligations***

This approach of deriving individual rights from obligations was confirmed and developed in the famous case *Van Gend en Loos* which was decisive in the constitutionalisation of EU law by laying the very foundations the relation between EU law and the Member States legal systems. *Van Gend en Loos* is methodologically important because it confirmed the link between, on the one hand, obligations of public authorities, with, on the other hand, the individual rights. This has been ever since a distinctive feature of EU law.<sup>7</sup>

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<sup>3</sup> “The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.”

<sup>4</sup> Judgment of 7 May 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105 paras 19-23; Judgment of 1 December 2016, *Daouidi*, C-395/15, EU:C:2016:917, para 63; Judgment of 25 May 2016, *Meroni*, C-559/14, EU:C:2016:349, para 43; Judgment of 6 October 2015, *Delvigne*, C-650/13, EU:C:2015:648, paras 25-27; Judgment of 11 November 2014, *Dano*, C-333/13, EU:C:2014:2358, para 88.

<sup>5</sup> Judgment of 12 July 1957, *Algera and Others v Assemblée Commune*, Joined cases C-7/56 and 3-7/57, C:1957:7.

<sup>6</sup> Judgment of 12 July 1957, *Algera and Others v Assemblée Commune*, Joined cases C-7/56 and 3-7/57, C:1957:7 at p. 54. It found that ‘[u]nless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries.’

<sup>7</sup> J.H.H. Weiler, ‘Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy’ (2014) 12 *International Journal of Constitutional Law* 94.

In *Van Gend en Loos* the Court held that, given the *telos* of the Treaty, individual rights exist not only where they are expressly granted by EC law, but “also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.”<sup>8</sup> The Court thus focused on the nature of the obligation arising from European law and not only on the wording of the law. Since the wording of the relevant Treaty article (then Article 12 EEC) “contains a clear and unconditional prohibition... ideally adapted to produce direct effects in the legal relationship between Member States and their subjects,”<sup>9</sup> the Court identified an individual right arising from a precisely formulated negative obligation of the Member State in EU law which was to be protected by national courts.<sup>10</sup>

The CJEU further explicitly recognises, that the functioning of the Common Market is “of direct concern to interested parties”, implicitly acknowledging that *Van Gend en Loos* had an individual interest in challenging the Member State violation of its obligation not to increase import duties.<sup>11</sup> It notes the link between individual rights and effective enforcement of EU law in that “the vigilance of individuals concerned to protect their rights amounts to an effective supervision” of compliance of Member States with EU law.<sup>12</sup>

### ***III Rights arising from EU law obligations in disputes between individuals***

*Van Gend en Loos* had also confirmed a third context in which individual rights could arise from clear and precise obligations under EU law. In *Van Gend en Loos* the CJEU had stated that these should also be enforceable “in actions between individuals before a national court” where individuals could plead “infringements of those obligations”.<sup>13</sup> *Defrenne II*<sup>14</sup> is the most famous example of this where the CJEU found that (what was then) Article 119 EEC<sup>15</sup> stating the principle

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<sup>8</sup> Judgment of 5 February 1963, *Van Gend en Loos*, C-26/62, EU:C:1963:1, p. 12.

<sup>9</sup> Judgment of 5 February 1963, *van Gend en Loos*, C-26/62, EU:C:1963:1, p. 13 (“The wording of Article 12 contains a clear and unconditional prohibition... ideally adapted to produce direct effects in the legal relationship between Member States and their subjects”).

<sup>10</sup> Judgment of 5 February 1963, *van Gend en Loos*, C-26/62, EU:C:1963:1, p. 25.

<sup>11</sup> Judgment of 5 February 1963, *van Gend en Loos*, C-26/62, EU:C:1963:1, p. 12.

<sup>12</sup> Judgment of 5 February 1963, *van Gend en Loos*, C-26/62, EU:C:1963:1, p. 21 The words “individuals concerned” in the English version is ‘particuliers intéressés’ in French and ‘interessierten Einzelnen’ in German.

<sup>13</sup> Judgment of 5 February 1963, *van Gend en Loos*, C-26/62, EU:C:1963:1, p. 13.

<sup>14</sup> Judgment of 8 April 1976, *Defrenne v. SABENA*, C-43/75, EU:C:1976:56. Ms. Defrenne claimed rights under Article 119 EEC to challenge terms of her contract with the airline SABENA obliging her to retire at the age of 40 whilst her male colleagues were allowed to work until the age of 55 allowing them to reach higher levels of salaries and retirement pensions.

<sup>15</sup> Now Article 157 TFEU, which requires Member States to eliminate discrimination between men and women in professional settings.

of non-discrimination of pay at work, conferred an individual right to the plaintiff in the contractual relation between herself and her employer.<sup>16</sup> *Defrenne II* also shows that the origin of “individual rights which the courts must protect” may be temporary and/or contextual:<sup>17</sup> the Court finds that although the former Article 119 EEC may require certain specific legislative and non-legislative measures for implementation,<sup>18</sup> the provision is sufficiently clear and precise to identify prohibited discrimination on the basis of gender - at least in some circumstances. The court thus held that “any individual who has an interest in the performance of the duties thus laid down” i.e. anyone who is subject to such identifiable discrimination on the basis of gender, has an enforceable individual right under EU law.<sup>19</sup>

#### ***IV The development of the concept of individual rights in state liability cases***

The approach developed *inter alia* in *Algera*, *Van Gend en Loos* and *Defrenne II* is the starting point for identifying individual rights in primary and secondary law.<sup>20</sup> In addition, the CJEU has developed state liability of Member States of the EU for violation of EU law along the concept of individual rights laid down in *Algera*, *Van Gend en Loos* and *Defrenne II*. Liability, in view of the Court is “the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.”<sup>21</sup> Where provisions of a directive, for example, are “sufficiently clear, precise and unconditional for an individual to rely on them as against a Member State before a national court”, their violation may give rise to liability.<sup>22</sup>

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<sup>16</sup> In that respect, the approach was similar to a the development of rights arising from obligations in religious law maintain commandments of the nature of ‘though shalt not’.... See for a discussion Benjamin Porat, ‘Rights-Based Law v Duty-Based Law: Old Dilemma, New Perspective’, Hebrew University of Jerusalem Legal Studies Research Paper Series No. 16-04 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2696463](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2696463)> accessed 12 January 2016.

<sup>17</sup> Judgment of 8 April 1976, *Defrenne v. SABENA*, C-43/75, EU:C:1976:56, para. 19 see also paras 20-24. See agreeing, C. Hilson and T. Downes, ‘Making sense of rights: Community rights in E.C. law’ [1999] *European Law Review* 121, p. 138 quoting P. Eleftheriadis, ‘The Direct Effect of Community Law: Conceptual Issues’ (1996) 16 *Yearbook of European Law* 205, p. 211 (direct effect cannot be the attribute of rules themselves: legal effects depend on the application of those rules in concrete cases).

<sup>18</sup> Judgment of 8 April 1976, *Defrenne v. SABENA*, C-43/75, EU:C:1976:56, para. 19.

<sup>19</sup> See Judgment of 8 April 1976, *Defrenne v. SABENA*, C-43/75, EU:C:1976:56, para. 31 which reads in the French version of the judgment “tout particulier intéressé à l’observation des obligations ainsi définies” and in the German version “allen an der Einhaltung der so umschriebenen Pflichten interessierten Privatpersonen Rechte verliehen sein können.”

<sup>20</sup> Rights in regulations: Judgment of 14 December 1971, *Politi v. Ministero delle finanze*, C-43/71, EU:C:1971:122, paras 9-11; rights in decisions: Judgment of 6 October 1970, *Grad v Finanzamt Traunstein*, 9/70, EU:C:1970:78, para 9; Judgment of 10 November 1992, *Hansa Fleisch v. Landrat des Kreises Schleswig-Flensburg*, C-156/91, EU:C:1992:423, paras 12-13; Judgment of 12 December 1990, *Kaefer and Procacci v French State*, C-100/89, EU:C:1990:456, para 24; Judgment of 28 September 1999, *Fruchtbandelsgesellschaft Chemnitz v Commission*, T-254/97, EU:T:1999:178, para 29 and case law cited. Rights in directives: Judgment of 4 December 1974, *Van Duyn v. Home Office*, C-41/74, EU:C:1974:133, paras 11 to 14; Judgment of 12 May 1987, *Traen*, Joined Cases C-372/85 to C-374/85, EU:C:1987:222, paras 25-26; Judgment of 20 September 1988, Beentjes, C-31/87, EU:C:1988:422, paras 43-44; Judgment of 23 February 1994, *Comitato di coordinamento per la difesa della Cava v Regione Lombardia*, C-236/92, EU:C:1994:60, paras 8-9. A. Dashwood, ‘The Principle of Direct Effect in European Community Law’ (1982) 16 *Journal of Common Market Studies* 229.

<sup>21</sup> Judgment of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame*, Joined cases C-46/93 and C-48/93, EU:C:1996:79 para 20-22.

<sup>22</sup> Judgment of 18 January 2001, *Stockholm Lindöpark*, C-150/99, EU:C:2001:34, para 33.

The way that the CJEU has formulated the conditions for state liability has raised some questions as to whether the existence of a clear and precise obligation can give rise to an individual right to compliance with that obligation, which in case of violation results in a right to damages. The reason for is that the condition for a breach of EU law to give rise to state liability under *Brasserie du Pêcheur* refers to whether a sufficiently serious infringement of a rule “intended to confer rights on individuals” caused the damage sustained.<sup>23</sup>

It has been argued that this formulation contains additional criteria for liability. It would be, in this view, conceptually distinct from the notion of direct effect and of the simple link between obligations and rights formulated in *Algera*, *Van Gend en Loos* and *Defrenne II*.<sup>24</sup> The reason is that the term “intended” is seen as an apparent departure from the more generally formulated requirement that the rule should “entail” the grant of rights as required in *Francoovich*. This evokes for many readers the concept of what in German and Austrian legal systems is referred to as a “*Schutznorm*”. Under the *Schutznorm* doctrine, liability requires that the legal act which was breached must have explicitly intended to confer an individual right on the damaged party. Should the *Schutznorm* approach be applicable to state liability cases, the violation of a clear and precise obligation would not in itself be sufficient. Instead, liability would exist only in cases in which the violated provision could be proven to have been intended to protect individuals individually. However, when taking an overall view, it appears that the case law of the CJEU has generally applied a much broader notion of ‘intent’ than generally applied in the narrower *Schutznorm*-style sense.<sup>25</sup>

For example, in *Kampffmeyer*, an early agriculture case, German authorities had withheld from the plaintiff *Kampffmeyer* an authorisation to import maize on the basis of a European Commission decision. The plaintiff asked for damages from the Commission for wrong interpretation and application of the relevant regulation. The Court found that even though the provisions at issue were “of a general nature,” this did not prevent “their including the interests of individual undertaking such as the applicants.”<sup>26</sup> The same broad understanding of ‘intent’ is to be found in the case law on state liability, for instance in *Dillenkofer*. The Court stressed that the absence of clear indication that the provision at issue should confer rights did not prevent it from doing so.<sup>27</sup>

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<sup>23</sup> Judgment of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame*, Joined cases C-46/93 and C-48/93, EU:C:1996:79, para 51 and Judgment of 4 July 2000, *Bergaderm and Goupil v Commission*, C-352/98 P, EU:C:2000:361. F. Mariatte and R. Munoz (D. Simon ed), *Contentieux de l’Union européenne / 2 - Carence. Responsabilité*, Lamy (Paris 2011), p. 239. By contrast, *Francoovich* required in different terms that the rule of law allegedly breached should “entail the grant of rights to individuals”. Judgment of 19 November 1991, *Francoovich and Bonifazi v. Italy*, Joined cases C-6/90 and C-9/90, EU:C:1991:428, para 40.

<sup>24</sup> A. Türk, *Judicial review in EU law*, Elgar Publishing (Cheltenham 2009), p. 258.

<sup>25</sup> Judgment of 14 July 1967, *Kampffmeyer and Others v Commission of the EEC*, Joined cases C-5/66, C-13/66, C-16/66, C-21/66, EU/C/1967:31.

<sup>26</sup> Judgment of 14 July 1967, *Kampffmeyer and Others v Commission of the EEC*, Joined cases C-5/66, C-13/66, C-16/66, C-21/66, EU/C/1967:31, p.262; Mariatte and Munoz, ‘Contentieux de l’Union européenne / 2 - Carence. Responsabilité’, p. 240; K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford University Press (Oxford 2014), p. 516.

<sup>27</sup> Judgment of 8 October 1996, *Dillenkofer and Others v Bundesrepublik Deutschland*, Joined cases C-178/94, C-179/94, C-188 to C-190/94, EU:C:1996:375 para 40-41. See also Judgment of 15 June 1999, *Rechberger and Others*, C-140/97, EU:C:1999:306

Instead, the Court analysed the wording, purpose and preamble of the directive and made clear that while the directive intended to ensure broadly defined objectives such as the freedom to provide services, this did not preclude its provisions from also protecting consumers.<sup>28</sup>

Just when this issue seemed sufficiently settled, in *Peter Paul* of 2004 the CJEU applied a very restrictive ‘intentionalist’ approach to the conditions of state liability, for which the Court was abundantly criticised by some of the commentators.<sup>29</sup> In *Peter Paul* a German court had referred a question regarding the liability of the German state for the violation of a number of supervisory obligations vis-à-vis credit institutions, which were conferred on the national authorities by several EU directives. The CJEU held that “it does not necessarily follow” from the existence of Member State obligations vis-à-vis credit institutions that the directives “seek to confer rights on the depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities.”<sup>30</sup> Thereby, *Peter Paul* to a certain degree disconnects obligations from rights, when obligations in the directive are aimed at protecting the general public.<sup>31</sup>

But the 2009 case of *Danske Slagterier* overturns the stricter interpretation of *Peter Paul*. In *Danske Slagterier* the German Federal High Court (Bundesgerichtshof) sought clarification from the CJEU as to whether producers and marketers of pork could seek damages for violation of a directive describing in detail the obligations of national veterinary inspection authorities but which makes no explicit mention of individual rights. In *Danske Slagterier* the CJEU explicitly rejected the AG’s arguments in favour of an ‘intentionalist’ approach based *inter alia* on an application of the German *Schutznorm* approach to identifying individual rights<sup>32</sup> and the earlier case *Peter Paul*.<sup>33</sup> The CJEU found that since the directive prohibits the Member States from prevent-

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para 33, paras 60-61. *A contrario*, see Judgment of 17 October 1996, *Denkavit Internationaal and Others v Bundesamt für Finanzen*, C-283/94, EU:C:1996:387, paras 50-53 where the Court held that no sufficiently clear obligation could be identified and that there was therefore no need for further assessment of liability. Liability cases concerning rules which have direct effect also highlight that there is no need to search for an intention to grant a right where the norm invoked imposes a clear, precise and unconditional obligation: Judgment of 2 April 1998, *Norbrook Laboratories v Ministry of Agriculture, Fisheries and Food*, C-127/95, EU:C:1998:151, para 108; Judgment in *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)*, C-5/94, EU:C:1996:205, para 27; Judgment of 18 January 2001, *Stockholm Lindöpark*, C-150/99, EU:C:2001:34, para 29, paras 39-40.

<sup>28</sup> Judgment of 8 October 1996, *Dillenkofer and Others v Bundesrepublik Deutschland*, Joined cases C-178/94, C-179/94, C-188 to C-190/94, EU:C:1996:375 para 39.

<sup>29</sup> See e.g. M. Tison, 'Do Not Attack the Watchdog! Banking Supervisors Liability after Peter Paul' (2005) 42 Common Market Law Review 639. See also: N. Reich, 'Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights' (2007) 44 Common Market Law Review 705, p. 718; S. Prechal, 'Protection of Rights: How Far?' in S. Prechal and B. Van Roermund (eds), *The Coherence of EU Law* (Oxford University Press 2008), p. 166; A. Biondi and M. Farley, *The Right to Damages in European Law*, Kluwer Law International (2009), p. 36.

<sup>30</sup> Judgment of 12 October 2004, *Paul and Others*, C-222/02, EU:C:2004:606, para 40.

<sup>31</sup> Judgment of 12 October 2004, *Paul and Others*, C-222/02, EU:C:2004:606.

<sup>32</sup> Opinion of AG Trstenjak in *Danske Slagterier*, C-445/06, EU:C:2008:464.

<sup>33</sup> Judgment of 24 March 2009, *Danske Slagterier*, C-445/06, ECLI:EU:C:2009:178, para 24 and Opinion of AG Trstenjak in *Danske Slagterier*, C-445/06, EU:C:2008:464. See also D. Simon and A. Rigaux, 'La responsabilité des Etats membres en cas de violation du droit communautaire revisitée, ou comment le problème technique de l'odeur sexuelle des porcs non castrés conduit à trancher des questions fondamentales' (2009) 19 *Europe*.



ing importation of meat, which had been properly inspected in the country of origin. This, according to the CJEU “gives individuals the right to market in another Member State fresh meat that complies with the Community requirements”<sup>34</sup> and any violation of this right may give rise to liability of the State.<sup>35</sup>

In 2015 the General Court (GC) confirmed in *Staelen v Ombudsman* the well-established CJEU case law by accepting that the requirement of a “rule of law intended to confer rights” is satisfied by a variety of rules, including those that essentially protect the general interest but that are also “of a protective nature” towards individuals. According to the GC, the principles of diligence, the right to good administration and the rules governing inquiries conducted by the Ombudsman fall into this category.<sup>36</sup> On appeal the Court of Justice did not explicitly address this issue but its asking the question whether there was ‘*a sufficiently serious breach of the Ombudsman’s duty to act diligently*’ may be read as an implicit acknowledgement that this duty constitutes a ‘rule intended to confer rights’.<sup>37</sup>

## **V Result: The ‘subjectivation’ of obligations under EU law**

The approach developed by the CJEU discussed so far in this article defines individual rights in EU law as arising from clear, precise and unconditional obligations, which individuals are interested in seeing fulfilled. Obligations, according to the Court, can be formulated in positive law – Treaties, legislation and other acts. But, as *Algera* testifies, and the early case law of the CJEU on fundamental rights since *Stauder*<sup>38</sup> confirms, obligations can also arise from unwritten general principles of law.

The reason for the Court’s approach is twofold: *Van Gend en Loos* had already pointed to an important factor in EU law, which is that individuals, when enforcing their rights, do not only act in their individual interest but also, by what has become known as functional ‘subjectivation’, contribute to enforcing obligations established in the general good.<sup>39</sup> As the clear, precise and unconditional obligation of an EU institution, a Member State or an individual under EU law may amount to a right for the concerned individual, the latter in turn has an incentive to make sure that the obligation is respected. Individuals, by detecting and tackling violations of Union

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<sup>34</sup> Judgment of 24 March 2009, *Danske Slagterier*, C-445/06, ECLI:EU:C:2009:178, para 24.

<sup>35</sup> Judgment of 24 March 2009, *Danske Slagterier*, C-445/06, ECLI:EU:C:2009:178, para 24.

<sup>36</sup> Judgment of 29 April 2015 in *Staelen v Ombudsman*, T-217/11, EU:T:2015:238, para 73 and the case law cited and para 88.

<sup>37</sup> Judgment of 4 April 2017, *European Ombudsman v Staelen*, C-337/15 P, EU:C:2017:256, para. 41.

<sup>38</sup> Judgment of 12 November 1969, *Stauder*, C-26/69, EU:C:1969:57, and subsequent case law, e.g. Judgment of 14 May 1974, *Nold v Commission*, 4/73, EU:C:1974:51, and Judgment of 13 December 1979, *Hauer*, C-44/79, EU:C:1979:290.

<sup>39</sup> M. Poiares Maduro, *We the Court*, Hart (Oxford 1998), p. 9; M. Ruffert, ‘Rights and Remedies in European Community Law: a Comparative View’ (1997) 34 *Common Market Law Review* 319, 327; J. Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichem Recht*, Duncker & Humblot (1997), p. 22 – writing prior to becoming judge at the German Constitutional Court, he uses the term ‘*Versubjektivierung*’.

law and subsequently their individual rights, contribute to realizing the objectives of the Union.<sup>40</sup> In order to achieve this, the Court is not concerned with establishing whether the obligation which gives rise to the right had intended to grant rights to individuals, similar to the interpretation of the concept of a ‘subjective right’ under the doctrine of the ‘*Schutznorm*’ as applied in several Member States including Germany and Austria. Instead the question is only put as to whether an individual is, as *Van Gend en Loos* states, “concerned”, in French “intéressés” and in German “interessiert” in the compliance with the obligation. The notion of interest or concern in a measure or its outcome includes not only legally pre-defined interest but also economic and other interests.

Irrespective of possible legislative intent identifiable or not in a purposive analysis of the provision, the approach is marked by an analysis of the concrete circumstances assessed through testing whether a norm defining an obligation is sufficiently clear, precise and unconditional to grant a party concerned by the obligation a right to enforce it. An action based on rights has effects beyond the individual sphere, since individuals, by claiming rights, contribute to realizing the objectives of the Union in a way a centralised enforcement of EU law through the Commission as ‘guardian of the Treaties’ could and would not be able to do.<sup>41</sup>

*Algera* and *Van Gend en Loos* also led the way to understanding that Union law, which did not initially identify individual rights neither in the Treaty law nor in a Charter of fundamental rights, did not mean that the subjects of EU law were only the Member States. Obviously, this public international law-based understanding was explicitly rejected by the early case law of the CJEU in favour of a concept of ‘constitutionalisation’ of EU law by which enforceable individual rights were regarded to be part of the legal fabric of EU law. In view of protecting such rights, the ‘subjectivation’<sup>42</sup> of Union law as a whole from the perspective of enforcement of compliance with EU generated and generates, from the point of view of effective enforcement of EU law, a virtuous circle.<sup>43</sup>

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<sup>40</sup> B. De Witte, ‘Direct Effect, Primacy and the Nature of the Legal Order’ in: G. De Burca and P. Craig (eds), *The Evolution of EU Law*, 2nd edn, Oxford University Press (Oxford 2011), pp. 323-362; C. Callies, ‘Kohärenz und Konvergenz beim europäischen Individualrechtsschutz - Der Zugang zum Gericht im Lichte des Grundrechts auf effektiven Rechtsschutz’ (2002) 49 *Neue Juristische Wochenschrift* 3577, p. 3579.

<sup>41</sup> Ruffert, ‘Rights and Remedies in European Community Law: a Comparative View’, p. 327; see also Callies, ‘Kohärenz und Konvergenz beim europäischen Individualrechtsschutz - Der Zugang zum Gericht im Lichte des Grundrechts auf effektiven Rechtsschutz’, p. 3579; L. Azoulai, ‘L’autonomie de l’individu européen et la question du statut’ EUI Department of Law Research paper 4; R. Lecourt, *L’Europe des juges*, Bruylant (Brussels 1976), p. 260.

<sup>42</sup> Poiaras Maduro, *We the Court*, p. 9.

<sup>43</sup> De Witte, ‘Direct Effect, Primacy and the Nature of the Legal Order’; see also F. Mayer, ‘Van Gend en Loos: the Foundation of a Community of Law’, in: M. Poiaras Maduro and L. Azoulai (eds), *The Past and Future of EU Law: the Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart (2010), 16-25, at 24. Grzeszczick further argues that the development of subjective rights in EU law had shown how the individual can become a motor for the implementation of objective law and therefore contribute to the protection of the interests of the Union: B. Grzeszczick, ‘Das Grundrecht auf eine gute Verwaltung - Strukturen und Perspektiven des Charta-Grundrechts auf eine gute Verwaltung’ (2006) *Europarecht* 161, p. 179.

The advantage of this approach is that it results in empowerment of each individual person, combining a public objective, as expressed in the obligation under EU law, and a private interest.<sup>44</sup> It allows a legal system to disregard the *Schutznorm*-doctrine's implicit distinction between, on one hand, a public interest, which is only for public entities to pursue, and, on the other hand, a genuine private interest which is recognised as such by the law and can result in individual rights. Instead, the CJEU's approach is to accept the role of individuals in a pluralistic society to enforce individual rights and corresponding obligations also in the interest of the public. This approach is both a historically grown essential characteristic of EU law and a guarantee for its effective enforcement.<sup>45</sup>

## ***VI The dirty secret when it comes to enforcement of EU law before the CJEU as opposed to before national courts***

The familiar pattern of combining obligations with individual interests to identify rights does not always apply smoothly. Some elements of both procedural and substantive EU law challenge the application of the classic model. In terms of procedural law, the restrictive conditions for individuals lodging an action for annulment make access to court infamously difficult, especially by comparison with the broad access to court that the Court requires from Member States in order to protect individual rights under EU law.<sup>46</sup> The reliance on a restrictive conception of interest as a filter additionally creates a bias by limiting the possibility of identifying rights being claimed before the EU courts, as opposed to before national courts where comparable filters are not acceptable under EU law, thus allowing rights to be identified by reference to broadly conceived individual interests.

Concerning substantive law, at least two areas depart from the familiar pattern. In State aid, the very limited direct effect of Treaty provisions means that problems are not phrased in terms of rights. Individual interests do not matter much in a relationship that is predominantly one between the Commission and the Member States,<sup>47</sup> and in which individuals are prevented from playing the role of 'vigilante' that *Van Gend en Loos* granted them. Another area where this role is

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<sup>44</sup> Weiler, 'Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy' p. 96; quoting T.C. Hartley, *The Foundations of European Union Law*, Oxford University Press (Oxford 2010), pp. 209-258.

<sup>45</sup> Ruffert, 'Rights and Remedies in European Community Law: a Comparative View', p. 327; Callies, 'Kohärenz und Konvergenz beim europäischen Individualrechtsschutz - Der Zugang zum Gericht im Lichte des Grundrechts auf effektiven Rechtsschutz', p. 3579; L. Azoulai, 'L'autonomie de l'individu européen et la question du statut', p. 4; Lecourt, *L'Europe des juges*, p. 260; Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichem Recht*, p. 44; A. Voßkuhle and A.-B. Kaiser, 'Grundwissen – Öffentliches Recht: Das subjektiv-öffentliche Recht' (2009) *Juristische Schulung* 16, p. 18; D. Curtin, 'Directives: the Effectiveness of Judicial Protection of Individual Rights' (1990) 27 *Common Market Law Review* 709.

<sup>46</sup> See e.g. A. Arnulf, 'The action for annulment: A case of double standards?' in D. O'Keefe and A. Bavasso (eds), *Judicial Review in European Union Law* (Kluwer Law International 2000).

<sup>47</sup> In *Costa v E.N.E.L.* the Court held, concerning Article 93 EEC (laying down the framework for State aid control): 'By so expressly undertaking to inform the Commission 'in sufficient time' of any plans for aid, and by accepting the procedures laid down in Article 93, the States have entered into an obligation with the Community, which binds them as States but creates no individual rights except in the case of the final provision of Article 93(3)'. Judgment of 15 July 1964, *Costa v E.N.E.L.*, C-6/64, EU:C:1964:66, p. 596.

limited is access to documents of the EU institutions. Regulation 1049/2001 posits that anyone has an interest in having access to documents. This backfires in a peculiar way: the ‘right’ is subjected to so many conditions that it corresponds to an enforceable obligation only residually. In addition, individual interest, which classically would function as a powerful trigger, is taken out of the equation and the balancing exercise is between a relatively abstract public interest and the precisely defined private interests against disclosure.<sup>48</sup> These ‘anomalies’ putting under strain the basic concept of a right might be revealing the limits of the rationale behind this concept; the interests of individuals are not always presumed to converge with effectiveness of EU law and more generally the interests of the EU. This would in turn need to be acknowledged and clarified.

## **B Did the Charter of Fundamental Rights render obligations irrelevant?**

The very existence of the Charter of Fundamental Rights of the EU (CFR) has led to some important challenges to this method of developing individual rights under EU law. The CFR introduced into EU law a positive law list of individual rights, as opposed to the often obligation-based language used in other Treaty provisions thus far used to identify rights. If rights are formulated in a different document than the obligations the link between rights and obligations become less obvious. Consequently, several questions arise as to the future of deriving individual rights from clearly and precisely formulated obligations when their enforcement is in the interest of an individual.

One such question relates to the methodology of the Charter as source of rights and its relation to rights arising from obligations under the Treaty (1). Another question is linked to the issue whether the introduction of the distinction between rights and principles in Articles 51(1), and 52(2) and (5) CFR has caused the link between rights and obligations under EU law to rupture (2).

### ***I A change in sources of rights?***

Two arguments would appear to be speaking against a systematic switch to an all positive-law based approach. One is the declaration in paragraph five of the Charter’s Preamble explaining that the CFR merely “reaffirms” pre-existing rights. The source of the rights is thereby not touched by the fact that the rights are reaffirmed from their original sources as rights derived from obligations formulated in the Treaties in legislation or as rights recognised by General Principles of EU law. Further, the explanations of the Charter “set out the sources” for each of the rights listed in the Charter. These explanations include the origins of the case law based on the rights-obligations link. Since CFR rights “shall be interpreted” “with due regard to these explanations”,<sup>49</sup> one might argue that nothing substantial should change as to the origin of rights.

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<sup>48</sup> E.g. Judgment of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, para 46.

<sup>49</sup> See Art. 6(1)third subpara TEU, paragraph five of the Preamble of the CFR, Article 52(7) CFR.

Another argument arises from the fact that Article 6 TEU lists two parallel sources of fundamental rights of the Union: Next to the CFR referred to in Article 6(1) TEU, Article 6(3) TEU also recognises fundamental rights as general principles of EU law. Although some voices in legal writing had initially argued in favour of relegating the general principles of law to a secondary position for gap filling purposes only, and thereby advocating a ‘hierarchical’ understanding of the relation between sources of fundamental rights in the Union,<sup>50</sup> the CJEU never followed this suggestion in its case law. In our view, the CJEU did so correctly since the Charter was never intended to mark an entirely new start in the application of fundamental rights in the Union.<sup>51</sup> Instead, it was designed to be a document which makes transparent the *acquis*, developed over decades of case law, “by making those rights more visible in a Charter”,<sup>52</sup> but maintaining the flexibility necessary for future developments. General principles of EU law therefore continue to be a parallel source of fundamental rights in the Union next to the Charter under Article 6(3) TEU.<sup>53</sup> Additionally, individual rights are not always ‘fundamental’, constitutional rights but can arise from multiple legal documents, including fundamental freedoms defined in the TFEU, and legislative and non-legislative acts of the institutions. The inclusion of the Charter as binding legal document did not intend to overthrow the legal system of the Union by excluding that effective enforcement of obligations formulated in EU law by individuals, a staple of EU law since *Algera*, *Van Gen den Loos* and *Defrenne II*.

The idea of a continuation of the existing approach also arises from Article 52(2) CFR according to which any right under the Charter must be interpreted and “exercised under the conditions and within the limits” defined by relevant Treaty provisions which make provision for it. This provides for a continuous link between the formulation of rights in the Charter and obligations under the Treaty provisions.<sup>54</sup> Procedural rights positively formulated in the Charter serve as

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<sup>50</sup> V. Skouris, Working Group II ‘Intégration de la Charte/adhésion à la CEDH’ (2002), <http://european-convention.eu.int/docs/wd2/3063.pfd> (last access on 31 March 2012): ‘Mon sentiment est, que, à partir du moment où la CE/PUE se dotera d’un catalogue contraignant de droits fondamentaux, il ne faudra plus recourir aux principes généraux du droit (et, par conséquent, aux traditions constitutionnelles communes et à la CEDH) en tant que source parallèle ou, pour ainsi dire, “concurrente et équivalente” en matière de droits fondamentaux, mais seulement en tant que *source subsidiaire et complémentaire*. Ainsi la Cour devrait recourir aux principes généraux du droit uniquement pour combler les éventuelles lacunes du texte de la Charte [...]’; S. Prechal, ‘Competence creep and general principles of law’, 3 *Review of European Administrative Law* (2010), 5-22, at p. 21. For a more recent contribution, see S. Prechal, S. de Vries and H. van Eijken, ‘The principle of attributed powers and the ‘scope of EU law’, in L. Besselink, F. Pennings and S. Prechal (eds), *The Eclipse of the Legality Principle in the European Union* Kluwer (The Hague, 2011), 213-247; C. Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon*, Mohr Siebeck (Tübingen, 2010), p. 322.

<sup>51</sup> This is occasionally claimed in the doctrinal discussion, see e.g. C. L. Thomas, ‘Zum Verhältnis zwischen Grundrechtcharta und allgemeinen Grundsätzen’ 2011 *Europarecht*, 715-735 at p. 733.

<sup>52</sup> Preamble of the Charter of Fundamental Rights of the European Union.

<sup>53</sup> H.C.H. Hofmann and B. Mihaescu, ‘The Relation between the Charter’s Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case’ 9 *European Constitutional Law Review* 73.

<sup>54</sup> See for an example, the link between Article 19(1) TEU and Article 47(1) CFR. Other examples include, as acknowledged in the Explanations: the right to the protection of personal data, enshrined at Article 8 of the Charter but based on Article 286 TEC, now replaced by Article 16 TFEU and Article 39 TEU; the right to non-discrimination (Article 21 CFR and Articles 18 and 19 TFEU); the right to environmental protection (Article 37 CFR, Article 3(3) TEU and Articles 11 and 191 TFEU); the right to vote and stand as a candidate at European and municipal elections (Articles 39 and 40 CFR and Article 20(2) TFEU); the right to good administration (Article 41 CFR and Articles 20, 25, 296 and 340 TFEU), etc.

good examples for this approach. Most of the rights listed under the Right to Good Administration (article 41 CFR) are obligations already existing in the Treaty such as relating to fairness, compliance with the rule of law and its sub-principles, obligation to grant access to documents, to reason an act and to make good damages. Others were accepted in the case law of the CJEU as general principles of law.<sup>55</sup> Equally, Article 47 CFR establishing the right to an effective judicial remedy to protect rights arising under EU law, has an equivalent in Article 19(1) TEU under which Member States “shall provide the remedies sufficient to ensure effective legal protection in the fields covered by Union law.” This right has been protected as a general principle of EU law since *Johnston* and *Heylens*.<sup>56</sup> It was subsequently reaffirmed in Article 47 CFR as the right to an ‘effective remedy before a tribunal’ which is also a specification of the general obligation under the principle of sincere cooperation (Article 4(3) TEU) obliging Member States to “take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising” from EU law. The CJEU has repeatedly held that the principle of sincere cooperation includes the obligation of judicial enforcement of EU law before national Courts.<sup>57</sup> The obligations of the Member States under Articles 4(3) and 19 TEU are thus mirrored by the individual right to an

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Barents uses the French term ‘dédoublement’: R. Barents, ‘Een grondwet voor Europa (VI): de grondrechten’ (2005) *Nederlands tijdschrift voor Europees recht* 39, p. 42.

<sup>55</sup> H.C.H. Hofmann and B. Mihaescu, ‘The Relation between the Charter’s Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case’. The General Court, relying on Article 52(2) CFR, has pointed out the link between the right to a reasoned decision as set out in Article 41(2)(c) CFR and the obligation to give reasons laid down at Article 296 TFEU: Judgment of 3 December 2015, *Cuallado Martorell v Commission*, T-506/12 P, EU:T:2015:931, para 36. The CJEU also seemed to equate Article 296 TFEU and Article 41 CFR in *Pesce*: Judgment of 9 June 2016, *Pesce and Others*, Joined Cases C-78/16 and C-79/16, EU:C:2016:428, para 94.

<sup>56</sup> The Court of Justice has repeatedly found this right to be a fundamental right of individuals resulting from the common constitutional traditions of the Member States and recognised Articles 6 and 13 of the ECHR. The fundamental rights arising from this are thus also protected as General Principles of EU law under Article 6(3) TEU. See e.g.: Judgment of 15 May 1986, *Johnston v Chief Constable of the Royal Ulster Constabulary*, C-222/84, EU:C:1986:206, paras 18 and 19; Judgment of 15 October 1987, *Unectef v Heylens*, C-222/86, EU:C:1987:442, para 14; Judgment of 27 November 2001, *Commission v Austria*, C-424/99, EU:C:2001:642, para 45; Judgment of 25 July 2002, *Unión de Pequeños Agricultores*, C-50/00 P, EU:C:2002:462, para 39; Judgment of 19 June 2003, *Eribrand*, C-467/01, EU:C:2003:364, para 61; Judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, para 37; Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, Joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, para 335; Judgment of 16 July 2009, *Mono Car Styling*, C-12/08, EU:C:2009:466, para 47; Judgment of 18 March 2010, *Alassini and Others*, Joined cases C-317 to C-320/08, EU:C:2010:146, para 61.

<sup>57</sup> See to the relation between the principle of sincere cooperation and the right to an effective judicial remedy e.g.: Judgment of 16 December 1976, *Rene v Landwirtschaftskammer für das Saarland*, C-33/76, EU:C:1976:188, para 5; Judgment of 16 December 1976, *Comet BV v Produktschap voor Siergewassen*, C-45/76, EU:C:1976:191, para 12; Judgment of 9 March 1978, *Simenthal*, C-106/77, EU:C:1978:49, paras 21 and 22; Judgment of 19 June 1990, *The Queen v Secretary of State for Transport, ex parte Factortame*, C-213/89, EU:C:1990:257, para 19; Judgment of 14 December 1995, *Peterbroeck, Van Campenhout & Cie v Belgian State*, C-312/93, EU:C:1995:437, para 12; Judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, para 38: ‘Under the principle of cooperation laid down in Article 10 EC [now Article 4(3) TEU], it is for the Member States to ensure judicial protection of an individual’s rights under Community law’. The Court regularly recites the formulation according to which ‘it is settled case-law that in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)’. See: Judgment of 4 December 2003, *Evans*, C-63/01, EU:C:2003:650, para 45 with reference also to Judgment of 21 January 1999, *Upjohn*, C-120/97, EU:C:1999:14, para 32.

effective judicial review, recognised also by Article 47 CFR.<sup>58</sup> Likewise in *Delvigne*, concerning the right to vote in the elections for the European Parliament, the Court acknowledged the correspondence between rights formulated in Articles 39(1) and 39(2) CFR and obligations laid down in Articles 20(2)(b) TFEU and 14(3) TEU. The existing case law on the rights arising from obligations established by Treaty provisions was in each case used order to interpret the equivalent provisions formulating specific individual rights in the Charter.<sup>59</sup>

## ***II The distinction between rights and principles in Articles 51 and 52 CFR***

An altogether different question is whether the rights-principles distinction contained in Article 51(1) as well as in Article 52(1) and (5) CFR requires a re-definition of the nature and origin of a ‘right’ under EU law. The distinction drawn in Article 52(5) CFR runs counter to the established notion of a principle in EU law as expressed for example in *Defrenne II* where some Member States had argued that non-discrimination as an expression of the social intentions of the Treaty was merely the expression of a ‘principle’ and could as such not have direct effect.<sup>60</sup> In essence the argument was that the principle did not contain an obligation sufficiently clear and precise to confer a right on Ms Defrenne. The Court had rejected that argument stating that a Treaty provision labelled as a principle indicates that it “is specifically used in order to indicate the fundamental nature” of certain provisions, which actually supports the idea of deriving rights instead of denying them.<sup>61</sup>

Article 52(5) CFR seems to come back to the notion that there are rights, which are sufficiently clear and precise to be applied directly in favour of an individual as individual rights and there are principles, which require further development in legislative acts in order to grant individual rights. However, the introduction into the Charter of the distinction between rights and principles had also been understood in a more far reaching sense, in that an individual right under the Charter existed only where the (constitutional) legislator had ‘intention’ of conferring such right to an individual. Where no clear intention of conferring a specific individual right would be detectable, so the argument forwarded by several AGs in cases before the CJEU and some voices in the literature went, the Charter provision would need to be categorized as a ‘principle’ in the

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<sup>58</sup> See for example with many further references C-93/12 *Agrokonsulting* of 27 June 2013, paras. 34-61. An example of a substantive right for which the Court follows the same logic of relating rights to obligations is the free movement of persons, protected as right arising from Article 45 TFEU, setting out obligations, as well as from Article 15(2) CFR, formulated as individual right. Judgment of 4 July 2013, *Gardella*, C-233/12, EU:C:2013:449, para 39; Judgment of 7 April 2016, *ONEM and M*, C-284/15, para 33.

<sup>59</sup> Judgment of 6 October 2015, *Delvigne*, C-650/13, EU:C:2015:648, para 41.

<sup>60</sup> Judgment of 8 April 1976, *Defrenne v. SABENA*, C-43/75, EU:C:1976:56, para. 7.

<sup>61</sup> Judgment of 8 April 1976, *Defrenne v. SABENA*, C-43/75, EU:C:1976:56, para. 28. This has also been emphasized by S. Prechal, ‘Rights v principles, or how to remove fundamental rights from the jurisdiction of the courts’ in: J. De Zwaan, J.H. Hans and F.A. Nelissen (eds), *The European Union: An Ongoing Process of Integration - Liber Amicorum Alfred E Kellermann*, T.M.C. Asser Press (The Hague 2004) 177-185 and S. Prechal, ‘EU Gender Equality Law: a source of inspiration for other EU legal fields?’ [2008] *European Gender Equality Law Review* 10.

sense of Article 52(5) of the Charter.<sup>62</sup> Such concept of searching for the legislative intention as basis for recognising a right is strongly evocative of the doctrine of subjective public rights (subjective öffentliche Rechte) based on the doctrine of the *Schutznorm* advocated prominently, but not exclusively, in German-speaking legal systems.<sup>63</sup>

The problem with this approach looking for legislative intention is not only that the Charter's explanations are famously tight-lipped on classifying rights and principles. Only a few Charter Articles are marked as containing principles,<sup>64</sup> some others are identified to contain both rights and principles.<sup>65</sup> Also, intention is difficult to discern abstractly in Charter provisions alone. Charter provisions, under Article 52(4) CFR, "shall be interpreted in harmony with" General Principles of EU law. And as Article 6(3) TEU makes clear, fundamental rights are also protected as General Principles of EU law. But since General Principles of EU law also, under Article 6(3) TEU, arise from the ECHR, Article 52(3) CFR requesting interpretation of the Charter as far as possible in line with the ECtHR case law would become relevant for the search of intention.

Additionally, many rights arising from obligations are not only Treaty-based but are also formulated in legislative acts:<sup>66</sup> whose intention counts in this case? For example in *Association de Médiation Sociale (AMS)*, the referring court sought clarification as to whether Article 27 CFR on 'Workers' right to information and consultation' as implemented by EU Directive 2002/14 requiring that all categories of workers of an undertaking be taken into account for calculation of the number of employees, could have horizontal direct effect in the employee-employer relation. Advocate General (AG) Cruz Villalón's Opinion in *AMS* suggested a somewhat rigid distinction between rights and principles in that provisions which can be identified as rights would apply to individual situations, while principles would only define general matters and outcomes for guiding the action of public authorities.<sup>67</sup> According to AG Cruz Villalón, Charter 'principles' are thus obligations which bind the Member States and/or the EU Institutions, and their very nature excludes that rights could be derived from them.<sup>68</sup> "The obligation in a Charter principle is addressed not only to the executive, but also to the legislature. Therefore, where the article refers to 'implementation' it is referring primarily to a *specifically legislative* implementation."<sup>69</sup> The AG's position is problematic in that it would not only prevent applicants from challenging measures

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<sup>62</sup> See Krommendijk's review of the literature: J. Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11 *European Constitutional Law Review* 321, p.22 citing in particular: 'The Charter of Rights-A Brake Not an Accelerator' (2004) *European Human Rights Law Review* 473, p. 476.

<sup>63</sup> See e.g. the description in: J. Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichen Recht*, Duncker & Humblot (1997), p.14.

<sup>64</sup> Articles 25, 26 and 37 CFR.

<sup>65</sup> Articles 23, 33 and 34 CFR.

<sup>66</sup> e.g. Articles 5(3), 11(2), 23, 27, 31(1), 31(2), 32 and see P. Craig, 'Rights, Legality, and Legitimacy' in: P. Craig (ed), *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford University Press (Oxford 2010), p. 228.

<sup>67</sup> S. Robin-Olivier, 'The evolution of direct effect in the EU: Stocktaking, problems, projections' (2014) 12 *International Journal of Constitutional Law* 165, 169.

<sup>68</sup> Opinion of AG Cruz Villalón in *Association de médiation sociale (AMS)*, C-176/12, EU:C:2013:491, para 62.

<sup>69</sup> Articles 25, 26 and 37 CFR.



which clearly violate Charter ‘principles’, as long as they do not give expression to them,<sup>70</sup> it would also violate Article 277 TFEU by restricting recourse to the plea of illegality.

The Court, in our view correctly, decided not to follow the suggestion of the AG in *AMS*,<sup>71</sup> and ignored AG Cruz Villalón’s overly complex system for abstractly distinguishing Charter rights and principles.<sup>72</sup> In fact, in *AMS* the Court does not refer to the rights/principles distinction in its reasoning and its solution is perfectly compatible with the *Van Gend en Loos* approach: Because of its wording, Article 27 CFR needs to be given more specific expression in order to be fully effective.<sup>73</sup> Importantly, the circumstances of a case may lead to Article 27 CFR also directly conferring a right, even though, generally, the principle might not contain obligations sufficiently clear and precise to transform into a right.<sup>74</sup>

Some recent cases confirm this impression. In *PAN Europe*,<sup>75</sup> the General Court found that the obligation to “integrate into the policies of the Union” a “high level of environmental protection” “in accordance with the principle of sustainable development” under Article 37 CFR required further legislative specification in order to be directly applicable as an individual right. In *Glatzel*<sup>76</sup> the General Court found that Article 26 CFR, which states that the “Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure” certain benefits has been regarded as principle in that “must be given more specific expression in European Union or national law” since “that article cannot by itself confer on individuals a subjective right which they may invoke as such.”<sup>77</sup>

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<sup>70</sup> L. Burgorgue-Larsen, ‘L’article II-112’ in: L. Burgorgue-Larsen, A. Levade and F. Picod (eds), *Traité établissant une Constitution pour l’Europe : commentaire article par article, Tome 2, Partie II La Charte des droits fondamentaux de l’Union*, Bruylant (Brussels 2005), p. 687; K. Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *European Constitutional Law Review* 375, p. 400; K. Lenaerts and J.A. Gutierrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’, in: S. Peers and others (eds), *The EU Charter of Fundamental Rights. A Commentary*, Hart, (London 2014), p. 1577.

<sup>71</sup> Judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2.

<sup>72</sup> Yet, because the Court ended up stating that Article 27 of the Charter could not be invoked in the dispute, this ruling has sometimes been presented as one that categorized the latter provision as a ‘principle’. Opinion of AG Jääskinen in *Schönberger*, C-261/13 P, EU:C:2014:2107 para 57-58 and see also Judgment of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350, para 78.

<sup>73</sup> Judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, para 45.

<sup>74</sup> For this situation, not unlike the early sex discrimination case *Defrenne II*, see Judgment of 17 December 2015, *Seigneur v ECB*, F-95/14, EU:F:2015:155 and Judgment of 17 December 2015, *Bowles v ECB*, F-94/14, EU:F:2015:156, para 59. The CST also did not need to rely on the distinction between rights and principles in order to reach a solution in *Heath*, where it acknowledged that Article 28 enshrines the right to freedom of association, especially the right for workers to organise unions to defend their interests, but added that these rights do not translate into an obligation for EU institutions to establish procedures for collective bargaining, nor into an obligation to grant any codecision power to trade unions as regards the development of terms and conditions on employment (the GC then rejected the appeal without considering this issue). Judgment of 29 September 2011, *Heath v ECB*, F-121/10, ECLI:EU:F:2011:174 and Judgment of 18 June 2013, *Heath v ECB*, T-645/11 P, ECLI:EU:T:2013:326.

<sup>75</sup> Judgment of 28 September 2016, *PAN Europe and Others v Commission*, T-600/15, EU:T:2016:601, paras 46-48.

<sup>76</sup> Judgment of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350.

<sup>77</sup> Judgment of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350, paras 77-78.

Equally the Court of Justice in *Delvigne*<sup>78</sup> applied this approach of linking rights and principles to the principle of democratic participation and specific rights deducted therefrom (Article 39 CFR). The same applies to the right of petition. Although AG Jääskinen in *Schönberger* built his Opinion on a strict distinction between objective requirements and subjective rights, the CJEU in *Schönberger* looked at the substance of the obligation reflected in Article 20(2)(d) TFEU, Article 24, paragraph 2 TFEU, Article 227 TFEU and Article 44 CFR. It held that the individual had a corresponding right to have his petition examined.<sup>79</sup> The same approach has been extended to European citizen initiatives (ECIs).<sup>80</sup>

Given the risks inherent in a strict and intentionalist understanding of the rights/principles dichotomy, the more consistent and reliable alternative is to interpret this distinction as a restatement of the Court's original methodology for identifying rights. Under this, any provision, even if phrased as an obligation, may give rise to rights in a given situation if it is sufficiently clear, precise and unconditional. This corresponds to Prechal's view that the rights/principles distinction "is nothing new" but should be applied on a case-by-case basis instead of through an a priori categorisation.<sup>81</sup> Once the test has been performed *in concreto*, the rights/principles terminology could then come in to mark the justiciability gradation between 'rights' and 'principles'. Supportive of this interpretation is that the introduction of the CFR intended no 'freezing' of the case law recognising only rights which were reaffirmed at the moment of the creation of the CFR<sup>82</sup> or even 'deconstitutionalising'<sup>83</sup> some pre-existing rights. This is finally well demonstrated by the parallel existence of Articles 6(1) and (3) TEU with rights arising from the Charter and rights arising from general principles of EU law on the same hierarchic level.

Moreover, the formal and substantial proximity of Charter provisions with general principles of EU also provides arguments in favour of the potential direct effect of these provisions. Indeed, Charter provisions function a lot like general principles: the review of legality with Charter provisions is triggered when the Court controls acts of secondary legislation which either implement

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<sup>78</sup> Judgment of 6 October 2015, *Delvigne*, C-650/13, EU:C:2015:648. H. Van Eijken and J.W. Van Rossem, 'Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship?' (2016) *European Constitutional Law Review* 114.

<sup>79</sup> Opinion of AG Jääskinen in *Schönberger*, C-261/13 P, ECLI:EU:C:2014:2107 (see especially paras 57-58 and 78-81) and Judgment of 9 December 2014 in *Schönberger*, C-261/13 P, ECLI:EU:C:2014:2423, paras 22-24.

<sup>80</sup> Judgment of 30 September 2015, *Anagnostakis v Commission*, T-450/12, EU:T:2015:739, para 26. See also Judgment of 19 April 2016, *Costantini and Others v Commission*, T-44/14, EU:T:2016:223, para 73. Judgment of 3 February 2017, *Minority SafePack - one million signatures for diversity in Europe v Commission*, T-646/13, EU:T:2017:59, para 17. For a detailed assessment of the mechanism of the ECI see A. Karatzia, 'The European Citizens' Initiative and the EU institutional balance: On realism and the possibilities of affecting EU lawmaking' (2017) 54 *Common Market Law Review*, Issue 1, pp. 177-208.

<sup>81</sup> Prechal, 'Rights v principles, or how to remove fundamental rights from the jurisdiction of the courts' 183.

<sup>82</sup> See L. Burgorgue-Larsen 'Ombres et Lumières de la constitutionnalisation de la Charte des droits fondamentaux de l'Union européenne', *Cahiers de droit européen* 681, p. 683: the Explanations have "la fâcheuse conséquence de congeler la jurisprudence en matière de protection des droits fondamentaux à l'échelle européenne".

<sup>83</sup> J.H.H. Weiler, 'A Constitution for Europe? Some Hard Choices' (2002) 40 *Journal of Common Market Studies* 563, p. 576.

a Charter provision, refer to the Charter in a Preamble, or are reviewed against the Charter because the matter falls within the scope of EU law (Art. 51(1) CFR).<sup>84</sup> After all, *in abstracto*, general principles often would not pass the direct effect test; yet, they clearly have been granted that effect in numerous concrete occasions when they did fulfil the requirements of precision, clarity and unconditionality. In such situations general principles entail rights which individuals may rely on.<sup>85</sup> The same is true of several Charter provisions. The notion of ‘principles’ under Article 52(5) CFR would come in to compensate for the lack of direct effect of a provision in a given situation.

Such reasoning is also sound from a more theoretic point of view. An individual right in any given situation will first and foremost be reviewed in the context of that legislative act or its implementing measures. Only if doubts arise about the validity of the legislative act can the fundamental right be called upon to guide interpretation or establish a reason for annulment. Article 277 TFEU is the embodiment of this concept, and is a standard feature in the case law of the CJEU for Charter rights (Art. 6(1) TEU) as well as for fundamental rights arising from General Principles of EU law (Article 6(3) TEU).

## C The relation between individual rights and remedies

Individual rights arising from EU law have to be “effectively protected in each case”,<sup>86</sup> as a matter of effectiveness of EU law (Article 4(3) TEU) and according to the obligations under

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<sup>84</sup> D. Guðmundsdóttir, 'A Renewed Emphasis on the Charter's Distinction Between Rights and Principles: Is a Doctrine of Judicial Restraint More Appropriate?' (2015) 52 *Common Market Law Review* 685, p. 706.

<sup>85</sup> Van Meerbeeck, 'De la généralité in abstracto des principes généraux à leur effet direct in concreto', 2016 1 *Cahiers de droit européen* (Les principes généraux du droit de l'Union européenne, Brussels, 10 September 2015) p. 65. Van Meerbeeck relies in particular on Opinion of AG Sharpston in *Bartsch*, C-427/06, EU:C:2008:297, para 79 ("*It is trite Community law that general principles of law are capable of being invoked vertically against the State*"); Opinion of AG Mazak in *Palacios de la Villa*, C-411/05, EU:C:2007:106, para 134; Opinion of AG Trstenjak in *Dominguez*, C-282/10, EU:C:2011:559, paras 116-136. *Kucukdeveci* and *Dansk Industri* are prominent examples of this effect of GPs in horizontal relations, and also highly problematic: the Danish court has also seen the parallel between how GPs work and how Charter provisions work and has rejected the possibility for both types of instruments to be sources of obligations and therefore of rights. see p. 47.

<sup>86</sup> Judgment of 9 July 1985, *Bozzetti v Invernizzi*, C-179/84, EU:C:1985:306, para 17; Judgment of 15 May 1986, *Johnston v Chief Constable of the Royal Ulster Constabulary*, C-222/84, EU:C:1986:206, para 18. Understood in that sense, Article 47 CFR requires a broad interpretation of Article 51(1) CFR. However, the right to an effective judicial remedy is also, next to its recognition under Article 47 CFR recognised as General Principle of EU law (Article 6(3) TEU), the application of which to Member States is limited by the case law and is not subject to Article 51 CFR.

Article 19(1) TEU.<sup>87</sup> The effectiveness of this protection, however, may suffer when the questions of whether an individual right exists becomes confounded with the notion of whether a remedy exists.<sup>88</sup>

For example in *Olainfarm*<sup>89</sup> the CJEU had to decide whether a particular article of an EU directive on admission of medicines to the single market contained a ‘subjective’ individual right. The Latvian court asking for the interpretation of EU law linked the right to a judicial remedy to the existence of a subjective individual right<sup>90</sup> - an approach typical of legal systems requiring a subjective or individual right as a pre-condition for the admissibility of an action under the *Schutznorm* approach. Instead of looking at whether the directive intended to create a subjective right, the CJEU deducted from the the obligation imposed by the directive that it also “confers a concomitant right” on that individual to demand that his rights “are observed” and protected under Article 47 CFR.<sup>91</sup>

The CJEU took the same approach in *Bund für Umwelt und Naturschutz*.<sup>92</sup> The local administrative court referred to the CJEU for interpretation of a directive on environmental impact assessments and the Habitats directive. The German legal provisions implementing the directives were interpreted by German case law as protecting only the general public and thus not granting individual rights, meaning that individuals—including environmental NGOs explicitly to be empowered under the directive—were de facto excluded from the possibility to ask for review of legality of a permit to construct a coal-fired power station. The CJEU held that the provisions of the directive allowing standing in court for NGOs to defend the interests protected by the directives being “unconditional and sufficiently precise”,<sup>93</sup> NGOs may therefore rely on these provisions

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<sup>87</sup> See to the relation between the principle of sincere cooperation and the right to an effective judicial remedy e.g.: Judgment of 16 December 1976, *Rene v Landwirtschaftskammer für das Saarland*, 33/76, EU:C:1976:188, para 5; Judgment of 16 December 1976, *Comet BV v Produktschap voor Siergewassen*, 45/76, EU:C:1976:191, para 12; Judgment of 9 March 1978, *Simmenthal*, C-106/77, EU:C:1978:49, paras 21 and 22; Judgment of 19 June 1990, *The Queen v Secretary of State for Transport, ex parte Factortame*, C-213/89, EU:C:1990:257, para 19; Judgment of 14 December 1995, *Peterbroeck, Van Campenbout & Cie v Belgian State*, C-312/93, EU:C:1995:437, para 12; Judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, para 38: ‘Under the principle of cooperation laid down in Article 10 EC [now Article 4(3) TEU], it is for the Member States to ensure judicial protection of an individual’s rights under Community law’. The Court regularly recites the formulation according to which ‘it is settled case-law that in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness).’ See: Judgment of 4 December 2003, *Evans*, C-63/01, EU:C:2003:650, para 45 with reference also to Judgment of 21 January 1999, *Upjohn*, C-120/97, EU:C:1999:14, para 32.

<sup>88</sup> Sometimes, detailed legislative and non-legislative acts outlining quite specifically not only substantive rights and obligations but also certain procedural aspects of protection might re-enforce this impression.

<sup>89</sup> Judgment of 23 October 2014, *Olainfarm*, C-104/13, EU:C:2014:2316.

<sup>90</sup> Judgment of 23 October 2014, *Olainfarm*, C-104/13, EU:C:2014:2316, para 22.

<sup>91</sup> Judgment of 23 October 2014, *Olainfarm*, C-104/13, EU:C:2014:2316, paras. 36-37.

<sup>92</sup> Judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein Westfalen*, C-115/09, EU:C:2011:289.

<sup>93</sup> Judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein Westfalen*, C-115/09, EU:C:2011:289 para 54.

“even where (...) the rules relied on protect only the interests of the general public and not the interests of the individuals.”<sup>94</sup> The application of the German *Schutznorm* could not override the obligation to protect rights allocated under EU law.

What these examples have in common is that they show that the uncertainty at the national level in some Member States on the relation between rights and remedies appears in some cases to be the consequence of an intentionalist approach to the identification of rights. To make sense of Court's reply in these cases, instead, it is important to see that the right to an effective remedy, exists where a right is identified under EU law. This right may be either explicitly phrased as individual right, or phrased as an obligation the enforcement of which is in the interest of the plaintiff because the plaintiff is concerned by the matter. The right of access to court in turn amounts to an obligation for Member States to provide that access, as the Court has made clear many times including in *ClientEarth*.<sup>95</sup> The CJEU thereby confirms its earlier case law in cases such as *CLA Security*<sup>96</sup> and *Unilever*<sup>97</sup> in which it held that individuals that have a direct interest in the enforcement of an obligation imposed by a directive on a Member State could invoke this provision despite the directive creating “neither rights nor obligations for individuals”.<sup>98</sup>

## **D Restating the question – identifying the sources of rights, their scope and their limitations**

This article is about identifying individual rights, not just ‘fundamental’ rights. The origins of EU law did not distinguish between various categories of rights. These categories came into play with the constitutionalisation of EU law during which not only administrative acts à la *Algeria* needed to be addressed, but the questions to be dealt with in EU courts were often enough of constitutional nature. They addressed, either, the relation between EU law and national (constitutional) law or they were relevant to asking which criteria were applicable for reviewing acts of legislative nature of the EU.

Dissecting the approach to individual rights and the challenges the concept has undergone, especially with questions posed by the nature of the Charter rights, shows very familiar patterns. The identification of individual rights, when looked at through these conceptual differentiations has three steps which each contains elements of the overall concept.

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<sup>94</sup> Judgment of 12 May 2011 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein Westfalen*, C-115/09, EU:C:2011:289 para 59. See also Judgment of 16 April 2015, *Gruber*, C-570/13, EU:C:2015:231, para 41, and Judgment of 15 October 2015, *Commission v Germany*, C-137/14, EU:C:2015:683, para 90-94.

<sup>95</sup> Judgment of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382. See also Judgment of 17 September 2014, *Liivimaa Lihaveis*, C-562/12, EU:C:2014:2229.

<sup>96</sup> Judgment of 30 April 1996, *CLA Security International v Signalson and Securitel*, C-194/94, EU:C:1996:172.

<sup>97</sup> Judgment of 26 September 2000, *Unilever Italia*, C- 443/98, EU:C:2000:496, *Unilever Italia* [2000] ECR I-7535.

<sup>98</sup> Judgment of 26 September 2000, *Unilever Italia*, C- 443/98, EU:C:2000:496, para 51. For further discussion see: Türk, *Judicial review in EU law*, p. 259.

First, it is important to keep in mind, that the source of an individual right under EU law can be the positively formulated rights in the Charter as well as rights arising from obligations concerning an individual or from general principles of EU law. The latter is especially important to recall, when it comes to discussions as to whether the CJEU could identify rights without acting *ultra vires* from general principles as it did in *Danske Industri* which has given rise to one of the most pointed court disputes regarding the *ultra vires* nature of EU law to date.<sup>99</sup>

Second, independently from whether the right arises from a norm identified as right or as an obligation, thinking in terms of obligations then helps identify the substance of the rule at issue, i.e. what behaviour (obligation to do, obligation not to do) or result is prescribed. Since any right has to be analysed as regards the scope of protection it affords to an individual, this is where the abstract rule may materialise into a right in a concrete case.

The personal scope of protection, the question who is protected, is defined by the question of who is concerned, with other words who has an interest in the performance of the obligation. The interest does not need to have been predefined by the legislator: EU law identifies this issue not from the point of view of a possible legislative interest but from the point of view of the real-life effect. This is the basis of the concept of ‘functional subjectivation’ making individuals in charge of enforcing law and is one of the important legacies of *Van Gend en Loos* visible and applied in EU law to this day. The personal scope of the correlative obligation thus mirrors the personal scope of the right, identifying who is obliged: it could be an institution or administration (in which case one might speak of ‘institutional’ scope) or a private individual.

The material scope of an individual right then, not surprisingly, is influenced by whether its source allows for its clear, precise and unconditional identification. *Defrenne II* is the model example showing that an obligation, being the source of the individual right, can in some contexts be regarded as sufficiently precise and unconditional for identifying an individual right therefrom but not in others. The specific situation of an individual might decide whether the individual is ‘concerned’ and thus protected by the material scope of the right. This finding from *Defrenne* is also highly relevant for the discussion of the rights-principles divide as laid out in Article 52(5) CFR. Under this interpretation, where a rule possibly giving rise to a right is not sufficiently clear, precise and unconditional, it can give rise to individual rights only in view of norms further specifying the right to a degree which allows the finding of precise and unconditional rights. This interpretation is then in line with the general conceptualisation of rights arising from umbrella principles such as the rule of law or good administration, judicable only through their more specific sub-concepts of, for example, the right to protection of legitimate expectations or the right to be heard respectively.<sup>100</sup>

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<sup>99</sup> Danish Supreme Court, decision n. 15/2014 of 6 December 2016.

<sup>100</sup> It may also be relevant to delineate the temporal scope, for instance where a right will depend on the expiration of transition deadlines for directives.

Finally, the identification of an individual right has two consequences which highlight further elements of the concept of a right. One, an individual right has as a collateral, an obligation to protect that right effectively on public bodies under the principle of effectiveness and the right to an effective judicial remedy.

The second consequence is that no right is absolute. This truism is of course applicable to any individual right. The approach which developed in western legal traditions in the post-war period to deal with the necessity of balancing of interests has been adjudicated through a two-step process.<sup>101</sup> The first step addresses ‘whether’ a right is granted by looking at the scope of protection. The second step establishes whether an infringement of the scope by means of limiting or overriding the right can be justified. The justification can lie in the necessity of balancing various rights against each other, but it can also be a limitation resulting from a public policy need not related to other individual rights. The rise of the principle of proportionality as tool of the judiciary is a key element of proceduralising this very concept.<sup>102</sup> What appears from this is that all rights, constitutional, fundamental or otherwise, are actually to be treated as ‘principles’ in the sense that they require, through a careful balancing exercise calibrated by the principle of proportionality, to receive maximum recognition.<sup>103</sup>

The concept of individual rights under EU law is thus a complex one, deeply integrated into the legal and philosophic frames of thought of the twentieth century and influenced by the need of ensuring effective enforcement of all interests protected by the law. Individuals, as would befit the notion of an individual in a pluralistic society, are key actors in the process of protecting these interests. EU law does not conscript individuals to defending only those narrow categories of rights explicitly assigned to them while requiring that only public actors act on behalf of a public interest. The broad and dynamic set of sources of rights is key to the developing EU legal system, where functional subjectivation simultaneously ensures the effectiveness of EU law and of individual rights.

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<sup>101</sup> S. Gardbaum “The structure and scope of constitutional rights” in: T. Ginsburg, R. Dixon (eds.) *Comparative Constitutional Law* Elgar Publishing (Cheltenham 2011), pp. 387-405 at 388.

<sup>102</sup> For a model application thereof by the CJEU see Judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paras 52-67.

<sup>103</sup> Alexy characterises principles as ‘optimisation requirements’: R. Alexy, ‘Rights and Liberties as Concepts’ in M. Rosenfeld and A. Sajo (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), p. 291. See also M. Borowski, ‘The Charter of Fundamental Rights in the Treaty on European Union’ in: M. Trybus and L. Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar 2012), p.211; H. Avila, *Theory of Legal Principles* (Springer 2007), p. 9; C. Hilson, ‘Rights and Principles in EU Law: A Distinction Without Foundation?’ (2008) 15 *Maastricht Journal of European and Comparative Law* 93 211.