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The notion of effectiveness in the law of the European Union

Introduction

This paper is meant to outline the concept of “effectiveness”, which is present in the law of the European Union. While “effectiveness” may be understood differently in many different scientific disciplines, the present work aims to address its iteration found in the legal system of the European Union. To that end, the author employs doctrinal legal analysis of that system to discern whether there is a legal concept of “effectiveness” under EU law, and if so, what constitutes its features. Such analysis is especially required due to the fact that there is certain disagreement in the academia as to the nature and content of such a concept. In that regard, some authors devote either no coverage¹ or scarcely any space to it², while others note that the concept at issue may be, inter alia, used to review national procedures³.

Still, other authors assert that the legal concept of “effectiveness” produces legal effects on its own⁴. Furthermore, the notion of effectiveness has been declared a general principle of European Union law, and therefore a part of primary law of the Union⁵.

¹ J. Fairhurst, *Law of the European Union*, Harlow 2012. Curiously enough, this work does not even mention effectiveness *per se* when discussing the application of EU law, as the closest it manages to get to it is a single mention of „effectiveness of remedies” in passing, at p. 306.

² K. Lenaerts et al., *European Union Law*, London 2011, p. 1059, wherein effectiveness is stated to be mentioned thrice over the course of 1083 pages (at pp. 143, 151 and 761), with no in-depth analysis.

³ P. Kapteyn et al., *The Law of the European Union and of the European Communities*, Alphen aan den Rijn 2008, p. 551.

⁴ P. Craig, G. de Búrca, *EU Law — Text, Cases and Materials*, Oxford 2011, pp. 223 and 251.

⁵ T. Tridimas, *General Principles of EU law*, Oxford 2006, p. 418 et seq.

In addition, the concept at issue has been described as “a source from which virtually all judicial concepts (e.g. direct effect, primacy, effective and uniform application and State liability for breach of EU law) are derived” — a source that constitutes the very nature of EU law and the public authority exercised by the Union (and therefore the EU itself)⁶. This character of “authority” is consistent with the theme of the Conference that preceded this paper (i.e. ‘The Nature of Law in the Context of Morality and Political Authority’).

The relevant methodology used herein is the legal positivist approach⁷, or, more specifically, the explanatory non-normative legal doctrine (ENNLD)⁸. The author would like to explain the state of law as it is, rather than to present a normative — and thus, yet unrealised — picture of what the law may be or ought to be. Jurisprudence of the Court of Justice of the European Union is referred to and account of the law is to be taken as it stood on 11th October 2015, in order to present a coherent and convincing argument.

Effectiveness as enshrined in the law of the Union

Primary EU law, which — inter alia — encompasses the Treaty on the European Union (“TEU”), the Treaty on the Functioning of the European Union (“TFEU”) and the Charter of Fundamental Rights of the European Union (“CFR”)⁹, refers to the notion of effectiveness in various instances, either by reproducing “effectiveness” verbatim, or by addressing it in a specific field of application.

Examples of “effectiveness” include: effectiveness of EU’s policies and actions to be ensured by the institutional framework of the Union (Article 13(1) TEU), effectiveness as a cohesive force in international relations which the Member States are not to impair (Article 24(3) TEU), an obligation for the Council and the High Representative of the Union for Foreign Affairs and Security Policy to ensure the effectiveness of the Union action (Art. 26(2) TEU), the prohibition for the Member States to impair the effectiveness of Council decisions taken under Articles 28(1) and 28(5) TEU, effectiveness of the Structural Funds (Art. 177 TFEU) with effective legal protection to be provided through sufficient remedies by the Member States (Art. 19(1) TEU), ensuring effective access to

⁶ A. von Bogdandy, *Principles of European Constitutional Law*, ed. J. Bast, Oxford 2009, p. 29.

⁷ R. Cryer et al., *Research Methodologies in EU and International Law*, Oxford-Portland, Oregon 2011, p. 37.

⁸ On it see A. Mackor, ‘Explanatory Non-Normative Legal Doctrine’, [in:] *Methodologies of Legal Research — Which Kind of Method for What Kind of Discipline?*, ed. M. van Hoecke, Oxford-Portland, Oregon 2011, p. 45 et seq.

⁹ Latest consolidated versions (from January 2015) available at <http://data.consilium.europa.eu/doc/document/ST-6655-2008-REV-8/en/pdf> (obtained: 11.10.2015).

justice (Art. 81(2)(e) TFEU), effective implementation of EU law by the Member States essential for the proper functioning of the EU regarded as a matter of common interest (Art. 197 TFEU), effectiveness of the excessive deficit procedure (Article 3 of Protocol no. 12 on the excessive deficit procedure) and the right to an effective remedy (Art. 47 CFR).

Textually speaking, “effectiveness” means the quality of being effective, that is, being successful and working in the way that was intended, whereas to do something effectively is to produce a result that was intended. Effectiveness is synonymous with “efficacy”, that is, the ability to produce the right result¹⁰. However, there is no legal definition of “effectiveness” under primary law of the Union. It may be pointed out that the construction of “effectiveness” is shaped by the case-law of the Court of Justice of the European Union, as it is a judicially created concept envisaged in the Treaties, or a “key principle”¹¹ applied by the CJEU¹².

That concept is either recalled verbatim in case-law (viz. “effectiveness” of EU law as a whole or in relation to a specific legal act), or denoted as “effet utile”, “practical effectiveness” and “full effectiveness” of EU law. At other times, it is depicted as a *principle* of effectiveness, both as a part of the legal test of equivalence and effectiveness or as a stand-alone principle. Moreover, the CJEU is quite willing to employ it, and increasingly does so¹³. A specific application of this concept constitutes an *effective* judicial protection, carried out in accordance with the “dual character of judicial protection in EU law” (i.e. the one shared between the CJEU and national judiciaries)¹⁴.

As such, effective judicial protection has been recognised as a general principle of the law of the European Union and inscribed into Article 47 CFR, as mentioned above¹⁵. However, effective judicial protection is but one of possible

¹⁰ *Longman Dictionary of Contemporary English*, Harlow 2011, p. 542.

¹¹ G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, Oxford-Portland, Oregon 2012, pp. 171 and 405.

¹² A. Arnulf, *The European Union and Its Court of Justice*, Oxford 2005, p. 330.

¹³ As of 2009, effectiveness has been reported to be used by the CJEU, since the beginning of its operation, a total of 10 543 times; see A. von Bogdandy, op. cit., p. 29, infra b). As of 12.10.2015, the Eur-Lex website shows a grand total of 22 725 uses of “effectiveness” throughout all of EU jurisprudence, including 10 719 judgments, 7466 opinions of AGs, 1405 orders and 20 Opinions of the Court, pursuant to 218(11) TFEU. Therefore, it appears that its usage rises rather rapidly over time, as the number of mentions has been rendered almost three times greater over the course of six years. Additionally, “effet utile” has been used an additional 112 times by the same jurisprudence. Therefore, the issue begs the question as to specifically *why* some works on EU law do not consider effectiveness as a matter worth considering. To contrast, “direct effect” yields only 5832 mentions in *all* of EU law (2491 instances in case-law).

¹⁴ T. Tridimas, ‘Bifurcated Justice: The Dual Character of Judicial Protection in EU Law’, [in:] A. Rosas, E. Levits, Y. Bot, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, The Hague 2013, p. 368.

¹⁵ See e.g. judgment of the Court of 10 July 2014, case C-295/12 P *Telefónica SA and Telefónica de España SAU v European Commission*, EU:C:2014:2062, para. 40.

applications of the concept of effectiveness, a means to an end¹⁶. It may as well be that effectiveness would require a measure to be introduced to the detriment of an individual¹⁷, including criminal sanctions¹⁸.

It is often noted in the legal doctrine that effectiveness is a prominent feature of the interpretative techniques of the CJEU, a cornerstone of the teleological approach to law employed by the Court. However, it should be added that it mandates insistence on the aims of the law, rather than its letter¹⁹.

The legal status of “effectiveness” under EU law

As mentioned above, the modus through which effectiveness is used appears to be varied. Therefore, a scrutiny of the ways in which the Court of Justice has used it needs to be conducted, to ascertain its features. It appears from the systematic point of view that the hierarchical place and the legal rank of the notion at issue should be the starting point of the analysis.

The Court is known to address effectiveness as a principle which can be used for the purposes of judicial protection, as seen in *Brasserie / Factortame III*²⁰. In this sense, it is often employed as a part of the test of equivalence and effectiveness (i.e. the *Rewe/Comet* test)²¹. This test stipulates that it is for the national legal order of each Member State to establish such rules of protection, in accordance with the principle of procedural autonomy, provided, however, that those rules are not less favourable than those governing similar domestic law (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).

Part of the test that relates to effectiveness requires that every case, where an allegation as to whether a national procedural provision makes the application of EU law impossible or excessively difficult emerges, must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before various national bodies. It is also necessary

¹⁶ D.-U. Galetta, *Procedural Autonomy of EU Member States — Paradise Lost? A Study on the “Functionalized Competence of EU Member States”*, Milan-Heidelberg 2011, p. 21.

¹⁷ M. Dougan, ‘Remedies and Procedures for Enforcing Union law’, [in:] P. Craig, G. de Búrca, *The Evolution of EU Law*, Oxford 2011, p. 426.

¹⁸ G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge 2012, p. 46.

¹⁹ See e.g. G. Beck, op. cit., p. 198, wherein this author notes the “expansive interpretation of the Union’s powers through the principles of effectiveness and uniform application of EU law”.

²⁰ Judgment of the Court of 5 March 1996, joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1996:79, para. 95.

²¹ Cf. judgment of the Court of 15 April 2008, case C-268/06 *Impact v Minister for Agriculture and Food and Others*, EU:C:2008:223, para. 46.

to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings²². The usual effect of breaching the principle of effectiveness is the one of preclusion, as a national procedural provision rendering the exercise of rights derived from EU law practically impossible or excessively difficult has to be disapplied²³, similarly to the principle of primacy. In addition, withholding the power from the national court having jurisdiction to do everything necessary, while applying EU law, to set aside national legislative provisions which might prevent European Union rules from having full force and effect, in itself is incompatible with effectiveness of EU law²⁴. The Court further adds that effectiveness is within “the very essence of Union law”. That essence would be broken in the event of a conflict between a provision of EU law and a national law, if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply EU law. It would be so even if such an impediment to the full effectiveness of EU law were to be only temporary²⁵.

However, it is not limited to such an effect, as it also precludes a specific *manner* in which a procedural rule may be introduced — the retroactive inclusion of a procedural requirement (e.g. abstaining from fixing limitation periods in advance)²⁶. Moreover, effectiveness is able to require a national court which is seized of a dispute to *create* a remedy where there would be no national law (i.e. a *lacuna*), but only if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law, or if the sole means of access to a court was available to parties who were compelled to act unlawfully²⁷. Furthermore, it is within the ambit of the principle in question to modify the powers of a court — to allow claims *ex officio*, that is, of the court’s own motion²⁸.

²² Judgment of the Court of 1 October 2015, case C-32/14 *ERSTE Bank Hungary Zrt. v Attila Sugár*, EU:C:2015:637, para. 49 and 51.

²³ See for consideration of this type of effect e.g. judgment of the Court of 16 January 2014, case C-429/12 *Siegfried Pohl v ÖBB Infrastruktur AG*, EU:C:2014:12, para 21 et seq.

²⁴ Judgment of the Court of 26 February 2013, case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105, para. 46.

²⁵ Judgment of the Court of 22 June 2010, joined cases *Aziz Melki (C-188/10) and Sélim Abdeli (C-189/10)*, EU:C:2010:363, para. 44.

²⁶ Judgment of the Court of 12 December 2013, case C-362/12 *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue and Commissioners for Her Majesty’s Revenue and Customs*, EU:C:2013:834, para. 33.

²⁷ Judgment of the Court of 3 October 2013, C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, EU:C:2013:625, para. 104.

²⁸ Judgment of the Court of 3 October 2013, C-32/12 *Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA*, EU:C:2013:637, para. 39.

Failure to exercise effectiveness may also constitute the basis for finding an infringement of Article 4(3) TEU²⁹, remediable by the Commission through Article 258 TFEU. Under Article 4(3) TEU and by virtue of effectiveness of EU law, it is also required from Member States to take all effective measures to penalise harmful conduct to the financial interests of the Union. Such measures may include criminal penalties even where EU legislation only provides for civil ones. Provided penalty must be analogous to those applicable to infringements of national law of similar nature and importance, and must be effective, proportionate and dissuasive³⁰.

Having in mind the above, it must be therefore said that “effectiveness” produces legal effects on its own, while being capable of being invoked by an individual. It must be then accepted that it is a general principle of the law of the European Union, reflected in the Treaties, not unlike the principle of proportionality. However, the Court has not yet *expressly* classified it as a general principle, using it as a general principle of law of the EU in all but name.

Effectiveness as a notion underpinning the law of the Union

Apart from the above legal status, effectiveness features extensively in the legal reasoning of the Court of Justice of the European Union, to the “point of persistence”, as one author put it³¹. However, a particular trend emerges from the analysis of case-law — namely, the one whose effectiveness is the underlying notion of many landmark cases handed down by the Court. In this sense, one can assess whether effectiveness indeed is the source of key legal concepts in EU law — that is, *inter alia*, direct effect, primacy, State liability for breach of EU law, and prohibition of discrimination on various grounds.

The obvious place to begin would be the origin of direct effect, i.e. the decision of the Court in *Van Gend en Loos*³². This seminal case for the law of the Union as a whole contains a remark on the part of the Court which suggests that the concern for effectiveness was one of important reasons (if not the most important) for reaching the famous conclusion in the instant case.

²⁹ Judgment of the Court of 18 December 2014, C-640/13 *European Commission v United Kingdom of Great Britain and Northern Ireland*, CELEX 62013CJ0640, para. 35 and operative part. See also judgment of the Court of 21 September 1989, case 68/88 *Commission of the European Communities v Hellenic Republic*, EU:C:1989:339, para. 23 and paragraph 4 of the operative part.

³⁰ Judgment of the Court of 8 July 1999, case C-186/98 *Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos*, EU:C:1999:376, para. 9 and operative part.

³¹ G. Conway, *op. cit.*, p. 224.

³² Judgment of the Court of 5 February 1963, case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1.

The Court's reasoning in *Van Gend en Loos* addresses the question of justifying the capability of a Treaty article to be enforced by an individual in paragraphs 9 and 10 of Section II(B) of the decision. The Court notes that restricting the guarantees against infringement of EU law contained in Articles 258 and 259 TFEU would be "ineffective", whereas "the vigilance of individuals concerned to protect their rights amounts to an *effective* supervision in addition to the supervision entrusted by [258 and 259 TFEU] to the diligence of the Commission and of the Member States". Text-wise, this is the final argument put forth by the Court to justify that a Treaty article may have direct effect³³.

The question of primacy also concerns matters related to effectiveness of EU law. While the decision in *Costa v ENEL*³⁴ does not contain an express reference to effectiveness, the judgment in *Internationale Handelsgesellschaft* mentions "uniformity and efficacy"³⁵ of EU law as reasons for barring recourse to national law, including national constitutions. Even more obviously, *Simmenthal*³⁶ prominently features effectiveness as grounds for decision of the Court. According to the judgment in question, "any recognition that national legislative measures which encroach upon the field within which the [Union] exercises its legislative power or which are otherwise incompatible with the provisions of [EU] law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the treaty and would thus imperil the very foundations of the [Union]"³⁷.

In addition, "the effectiveness of [267 TFEU] would be impaired if the national court were prevented from forthwith applying [EU] law in accordance with the decision or the case-law of the Court"³⁸. *Simmenthal* is also the original authority for the exposition of the Court carried out in *Melki and Abdeli*, as presented above³⁹.

³³ An interesting comment from "behind-the-scenes" has been made in the literature, mentioning that "l'effet utile" featured in the Court's deliberations — and within the essence of the answer was the Court's wish "not to render the system of preliminary rulings practically inoperable". See P. Pescatore, 'Van Gend en Loos, 3 February 1963 — a View from Within', [in:] M. Maduro, L. Azoulai, *The Past and Future of EU Law — The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford-Portland, Oregon 2010, p. 6 *infra* a) and p. 7.

³⁴ Judgment of the Court of 15 July 1964, case 6-64 *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

³⁵ Judgment of the Court of 17 December 1970, case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114, para. 3.

³⁶ Judgment of the Court of 9 March 1978, case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, EU:C:1978:49.

³⁷ *Simmenthal*, para. 18.

³⁸ *Simmenthal*, para. 20.

³⁹ *Simmenthal*, para. 22 and 23.

Furthermore, effectiveness underlies the assertion of the Court in regard to the capability of directives to have direct effect. The decision in *Van Duyn*⁴⁰ uses the term “useful effect” (which is a direct translation of the French version’s *l’effet utile*), while the judgments in *Ratti*⁴¹ and *Becker*⁴² invoke effectiveness.

What is more, indirect effect of directives (that is, on a proper construction, the obligation of consistent interpretation⁴³) also exhibits links to effectiveness. The seminal case of *von Colson* features “the need to ensure that directives are effective” and echoes the need of an *effective* transposition of a directive (which is linked to the need of interpretation in conformity)⁴⁴. Latest jurisprudence (e.g. *decisions in Pfeiffer*⁴⁵ and *Adeneler*⁴⁶) dictates that the requirement for national law to be interpreted in conformity with EU law is inherent in the system of the Treaty and it obliges the national court, for the matters within its jurisdiction, to ensure *the full effectiveness* of EU law when it determines the dispute before it⁴⁷. This obligation is a trait of the entirety of binding EU law, not only with respect to directives⁴⁸.

Another cornerstone of EU law as it stands is the principle of State liability for breach of EU law, introduced in *Francovich and Bonifaci*⁴⁹ and later modified in the above-mentioned *Brasserie/Factortame III* and, subsequently, *Dillenkofer*⁵⁰.

⁴⁰ Judgment of the Court of 4 December 1974, case 41-74 *Yvonne van Duyn v Home Office*, EU:C:1974:133, *infra* para. 12: “In particular, where the [EU] authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of [EU] law”.

⁴¹ Judgment of the Court of 5 April 1979, case 148/78 *Criminal proceedings against Tullio Ratti*, EU:C:1979:110, para. 21, slightly different wording: “Particularly in cases in which the [EU] authorities have, by means of directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of [EU] law”.

⁴² Judgment of the Court of 19 January 1982, case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt*, EU:C:1982:7, para. 23, reproducing *Ratti* above.

⁴³ As noted by Judge S. Prechal, *Directives in EC Law*, Oxford 2005, p. 181.

⁴⁴ Judgment of the Court of 10 April 1984, case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, EU:C:1984:153, para. 15 and 26.

⁴⁵ Judgment of the Court of 5 October 2004, joined cases *Bernhard Pfeiffer (C-397/01)*, *Wilhelm Roith (C-398/01)*, *Albert Süß (C-399/01)*, *Michael Winter (C-400/01)*, *Klaus Nestvogel (C-401/01)*, *Roswitha Zeller (C-402/01)* and *Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, EU:C:2004:584.

⁴⁶ Judgment of the Court of 4 July 2006, case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)*, EU:C:2006:443.

⁴⁷ *Pfeiffer*, para. 114, *Adeneler*, para. 109.

⁴⁸ Judgment of the Court of 18 July 2007, case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA*, EU:C:2007:434, para. 60.

⁴⁹ Judgment of the Court of 19 November 1991, joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, EU:C:1991:428.

⁵⁰ Judgment of the Court of 8 October 1996, joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer*,

The Court decided in *Francovich and Bonifaci* that the principle of State liability for breach of EU law is inherent in the system of the Treaty, as “the full effectiveness of EU rules” would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of EU law for which a Member State can be held liable. The Court has further pointed out that the possibility of obtaining redress from the Member State is particularly indispensable where *the full effectiveness of EU rules* is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce the rights conferred upon them by EU law before the national courts⁵¹. It follows that effectiveness of EU law was the primary consideration of the Court in the case in question. While the decision did refer to the duty of sincere cooperation, now found in 4(3) TEU, it was only a supporting argument, or — borrowing the words of the Court — “a further basis”⁵².

In addition, effectiveness of what is now EU law was the crux of the famous case of *Factortame I*, which involved interim relief granted by national courts⁵³. The Court went on to say that the full effectiveness of EU law would be just as much impaired if a rule of national law could prevent a court seized of a dispute involving EU law from granting interim relief in order to ensure full effectiveness of the judgment to be given on the existence of the rights claimed under EU law. It follows that a court which in such circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule⁵⁴.

Landmark cases of the Court on prohibition of discrimination on grounds of sex (*Defrenne*⁵⁵) and age (*Mangold*⁵⁶), through which the Court expanded the boundaries of the prohibition of discrimination under EU law, also contain a reference to effectiveness. In *Defrenne*, the Court confirmed the direct effect of what is now Article 157 TFEU, mainly through recalling the requirement of effectiveness⁵⁷. In *Mangold*, it went on to stress that it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination

Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland, EU:C:1996:375. The Court pronounced therein that there is a single regime for State liability outlined in relation to legislative breaches in *Brasserie/Factortame III*, which is to incorporate a notion of a sufficiently serious breach of EU law (para. 23).

⁵¹ *Francovich and Bonifaci*, para. 33 and 34.

⁵² *Francovich and Bonifaci*, para. 36.

⁵³ Judgment of the Court of 19 June 1990, case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1990:257.

⁵⁴ *Factortame I*, para. 21.

⁵⁵ Judgment of the Court of 8 April 1976, case 43-75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, EU:C:1976:56.

⁵⁶ Judgment of the Court of 22 November 2005, case C-144/04 *Werner Mangold v Rüdiger Helm*, EU:C:2005:709.

⁵⁷ That is, by stating that “the effectiveness of [now — 157 TFEU] cannot be affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act (at para. 33)”.

in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of EU law and to ensure that the rules are fully effective, setting aside any provision of national law which may conflict with that law. Moreover, according to the Court's decision in *Mangold*, it is the responsibility of the national court to guarantee *the full effectiveness* of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with EU law, even where the period prescribed for transposition of that directive has not yet expired⁵⁸.

As to the issue of fundamental rights, the specific application of the notion of effectiveness, that is, effective judicial protection (described as a general principle of law of the EU in its own right by the Court in *Johnston*)⁵⁹ has been — along with the rights of defence — the pivotal point of the *Kadi* saga⁶⁰. Furthermore, effectiveness features in the tripartite test for asserting the applicability of the CFR (along with primacy and unity of EU law) in a situation not entirely determined in EU law, should the levels of fundamental rights protection differ between EU and national law, as provided in the *Fransson* case cited above⁶¹.

However, effectiveness *per se* has also been invoked by the Court to limit the scope of fundamental rights. This approach is found in the decision of the Court in *Stefano Melloni*⁶². In that case, the Court was faced with the issue of different levels of protection of fundamental rights, with the level present under EU law

⁵⁸ *Mangold*, para. 77 and second part of the operative part.

⁵⁹ Judgment of the Court of 15 May 1986, case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, para. 18.

⁶⁰ Judgment of the Court of 3 September 2008, joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (Kadi II)*, EU:C:2008:461, esp. para. 334 and 343, endorsed in the latter *Kadi IV* decision (Judgment of the Court of 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi*, EU:C:2013:518).

⁶¹ Para. 29, *Fransson*: “Where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised”. Apparently, this legal test introduced by the Court has the effect of “extending” EU law where it previously were not, as a given situation had not been entirely determined by it. In practice, such an “extension” limits the boundaries of that, which is often called a “purely internal situation”. See also judgment of the Court of 6 March 2014, case C-206/13 *Cruciano Siragusa v Regione Sicilia — Soprintendenza Beni Culturali e Ambientali di Palermo*, EU:C:2014:126, para. 32. For further reading on this subject see Ł. Stępkowski, ‘Purely internal situations in EU law after *Åklagaren v Hans Åkerberg Fransson*’, *Prawo*, 317, Wrocław 2015, pp. 147–159.

⁶² Judgment of the Court of 26 February 2013, case C-399/11 *Stefano Melloni v Ministero Fiscal*, EU:C:2013:107.

being lower than the one under national law. In addition, a national rule providing more extensive protection was of a constitutional rank. The national court (or, more specifically, Spanish *Tribunal Constitucional*) took note of Article 53 CFR, which endorses national constitutions as sources of fundamental rights⁶³. The national constitution forbade a trial *in absentia* as a part of the right to a fair trial, whereas the Framework Decision on the European Arrest Warrant expressly required a defendant to be surrendered.

The Court responded by stating that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State, and Article 53 CFR confirms that, where an EU legal act calls for national implementation measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection required by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not compromised by such standards⁶⁴.

However, according to the Court, the EAW decision effects a harmonization. Therefore, a Member State may not avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, as it is a possibility not provided under Framework Decision 2009/299. It may not be done even in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, as it would cast doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision and would undermine the principles of mutual trust and recognition which that decision purports to uphold and finally would, therefore, compromise the *efficacy* of that framework decision⁶⁵.

⁶³ Article 53 CFR reads “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”. However, neither the national court nor (perhaps obviously) the CJ took note of recital 12 in the preamble to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) (‘Framework Decision 2002/584’), which specifically permits higher constitutional standards of national protection. It is telling that the CJ “rediscovered” recital 12 in a less controversial yet later case, i.e. judgment of the Court of 30 May 2013, case C-168/13 PPU *Jeremy F. v Premier ministre*, EU:C:2013:358. The recital in question existed since the adoption of the EAW Framework Decision.

⁶⁴ It would be obvious to note that the requirements of a differing level of protection along with the primacy, unity and effectiveness of EU law are nowhere to be found in 53 CFR.

⁶⁵ *Melloni*, para. 59, 62 and 63.

It is important to note that this approach was confirmed in a recent Opinion of the Court, pursuant to Article 218(11) TFEU, in regard to the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms⁶⁶. Therein, the Court went on to say that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the CFR or the primacy, unity and effectiveness of EU law. Moreover, the Court held that “in so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice [emphasis added], so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised”⁶⁷.

Conclusions

The preceding remarks outline the legal content of effectiveness under EU law. However, this paper would not be complete without norm-descriptions, norm-contentions and norm-recommendations⁶⁸ provided for in and required by the explanatory non-normative legal doctrine.

The principal norm-description is that effectiveness is indeed — as *von Bogdandy* put it — a notion from virtually all judicially-created concepts under EU law (including direct effect, primacy and State liability for breach of EU law), as well as a very common teleological feature in the approach of the Court to interpretation and application of EU law. However, such a norm-description must be accompanied with a norm-contention that effectiveness is a general principle of law, as it is used as such by the Court (i.e. it is capable of being invoked, directly applicable, interpretable, capable of being used for the purposes of judicial review, and able to generate legal effects on its own)⁶⁹. It is necessarily a norm-contention rather than a norm-description, as the Court has not yet directly addressed it as

⁶⁶ Opinion 2/13 of the Court of 18 December 2014, EU:C:2014:2454.

⁶⁷ Opinion 2/13, para. 188 and 189. Quite interestingly, the issue with Articles 53 of the ECHR and CFR is presented as a prime reason as to why the EU cannot accede to the ECHR (para. 258, first indent).

⁶⁸ See A. Mackor, *op. cit.*, pp. 63–67.

⁶⁹ While the full description of the legal usage of the principle in question is precluded herein by space, an interested reader may avail himself of this matter in the work of *Tridimas* above, or, as to the Polish legal doctrine, in the work by S. Biernat (also ed.), ‘Zasada efektywności prawa wspólnotowego w orzecznictwie Europejskiego Trybunału Sprawiedliwości’, [in:] *Studia z prawa Unii Europejskiej*, Kraków 2000, pp. 27–76.

such, despite the continuous use of it in this manner. In a sense, “effectiveness” encapsulates a dual nature, that of a general principle and a teleological aid to interpretation (or, from another point of view, an interpretative *topos*). Therefore, the norm-recommendation must be that it would be preferred — for the sake of systemic clarity of EU law — if the Court clearly addressed the principle in question as a general principle of law of the Union (granted it is already used as such), rather than continuing to resort to a general notion of effectiveness. It would provide a clear systematic understanding of the principle, particularly as it already serves both as a means to check conflicting national law (as a part of the test of equivalence and effectiveness) and a way to evade the *lacuna* under national law (per the decision in *Kanatami* above).

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THE NOTION OF EFFECTIVENESS IN THE LAW OF THE EUROPEAN UNION

Summary

The work submitted herein aims to address the question of effectiveness of EU law. Effectiveness of that law is subject to an ongoing controversy, as there is no agreement in legal literature either on the legal status of effectiveness or its use by the Court of Justice of the European Union. The author undertakes to outline the grounding of effectiveness in EU law in relation to both written

law and jurisprudence of the Court. The work assumes the use of the descriptive approach in the legal doctrine, specifically the explanatory non-normative legal doctrine by A.R. Mackor. In this manner, this paper elects to present descriptive statements with extensive use of the Court's case law as a feature to establish the content of applicable law. This work takes account of the law and jurisprudence as they were on 11th of October 2015.

Keywords: European Union law, effectiveness, efficacy, system of law of the European Union, *effét utile*.

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