‘Access to Justice’ and the Development of Van Gend en Loos Doctrine: The Role of Courts and of the Individual in EU Law

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Abstract

The ‘access to justice’ within the meaning of the Treaty of Lisbon and the pertinent CJEU jurisprudence is primarily seen as an access to the EU judicial system, i.e. to the Member States’ national courts applying the EU law or the CJEU. The concept of ‘access to justice’ is therefore developing such premises of the Van Gend en Loos judgment as direct effect, vigilance of the EU individual and symbiotic relationship between the CJEU and national courts via the preliminary reference procedure. Nevertheless, the development of these Van Gend ideas through the lens of the Lisbon Treaty ‘access to justice’ concept has not been studied, although the CJEU and the ECtHR post-Lisbon practice in this area is quite extended. This work aims to explore the development of two basic ideas of Van Gend en Loos judgment, i.e. granting directly enforceable EU rights to the individuals and authorizing national courts to protect those rights, in the light of the ‘access to justice’ concept within the meaning of the Lisbon Treaty – considering their importance for the realization of EU individuals’ substantive rights and uncertainty surrounding this issue. The paper develops a critique of the theory of justice in EU Law, analyzing if and how Van Gend en Loos premises influenced the role of individuals making an attempt to claim their EU rights and the role of the EU courts responsible for the enforcement of ‘access to justice’ in the European Union. The claim

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of this paper is that the new concept of ‘access to justice’ brought by the Lisbon Treaty may be seen as the further development of the Van Gend ‘federalizing effect’ for the greater integration through law and an enhanced protection of the individual within the EU multilevel system of Human Rights protection.

I. Introduction

It is common knowledge that Van Gend en Loos is a key case for the understanding of European legal integration since it manifested the central symbols and ideals of EU law. The ideas of an autonomous legal order with more power than traditional treaties and the basic principle of the EU Law primacy over the national laws are the concepts which remain unchanged.¹ At the same time, such premises of great importance as (1) proclaiming of the individual as a European subject, alongside his or her national identity, and (2) constitution of the symbiotic relationship between the Court of Justice of the European Union (CJEU) and domestic courts of the EU Member States, which defined a special importance of the preliminary reference procedure for the EU legal order, developed over time greatly and are now shaping the ‘access to justice’ concept created by the Treaty of Lisbon.

The Treaty of Lisbon is the first binding European law which incorporates the formula of ‘access to justice’ via the Treaty on the Functioning of the European Union (‘TFEU’) and provisions of the Charter of Fundamental Rights. Systematic analysis of the Lisbon Treaty provisions and pertinent CJEU case-law allows to state that the Treaty of Lisbon sees the ‘access to justice’ primarily as the access of the individuals or legal persons (Van Gend en Loos) to the EU judicial system.² The Treaty drafters used such expressions as ‘the Union shall facilitate access to justice... through the principle of mutual recognition of

² Elvira Méndez Pinedo, ‘Access To Justice As Hope In The Dark: In Search for A New Concept In European Law’ (2011) 1 International Journal of Humanities and Social Science 9.
judicial and extrajudicial decisions’, 3 ‘cross-border implications’, 4 ‘addressed to the institutions and bodies of the Union... and to the Member States only when they are implementing Union law’. 5 The approach chosen allows for the central adjudication of European law through actions directly brought before the CJEU (Art. 19(1) TEU) and also provides for the decentralised adjudication of European law in the national courts of the Member States.

In accordance with Art. 2 TEU, the ‘rule of law and respect for human rights’ are among the basic values of the Union. Art. 6 TEU proclaims that fundamental rights, as guaranteed by the European Convention on Human Rights (including Arts. 6 and 13 ECHR) shall constitute general principles of the Union’s law, and now considers the EU Charter of Fundamental Rights provisions (including Art. 47 CFREU) a legally binding instrument of same legal value as the Treaties, which had a great influence on the post-Lisbon CJEU case-law development. The approach of the Treaty of Lisbon seems to be designed in accordance with the so-called third-wave ‘access-to-justice approach,’ which aims at coping with access barriers in a comprehensive manner and therefore shall lead to the increased level of interaction between the potential applicant(s) and the court(s) in question. 6

Nevertheless, the development of these Van Gend premises through the lens of the Lisbon ‘access to justice’ concept has not been studied, although the CJEU and the European Court of Human Rights (ECtHR) post-Lisbon practice in this areas is quite extended. This work aims to explore the development of two basic ideas of Van Gend en Loos judgment, i.e. granting directly enforceable EU rights to individuals and authorizing national courts to protect those rights, in the light of the ‘access to justice’ concept within the meaning of the Lisbon Treaty – considering their importance for realization of the EU individuals’ substantive rights and uncertainty surrounding this issue. The

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2 ibid, art 81(1).
paper develops a critique of the theory of justice in EU Law, analyzing if and how Van Gend en Loos premises influenced the role of individuals making an attempt to claim their EU rights, and the role of the EU courts responsible for the enforcement of ‘access to justice’ in the European Union. The claim of this paper is that the new concept of ‘access to justice’ brought by the Lisbon Treaty may be seen as the further development of the Van Gend ‘federalizing effect’ for the greater integration through law and an enhanced protection of the individual within the EU multilevel system of Human Rights protection.

To illustrate these developments, firstly, an attempt is made to define the role of the individual making an attempt to access the EU judicial system in the light of the CJEU’s Vereniging Milieudefensie7 and Inuit8 lines of reasoning, as well as relevant ECtHR’s judgments (Dahahi9 and Schipani10). Secondly, this paper elaborates on the role of the EU courts for the realisation of the ‘access to justice’ concept in the light of the CJEU’s Sánchez Morcillo11 and Opinion 2/1312 lines of reasoning in conjunction with the relevant provisions of the Charter of Fundamental Rights of the EU. Part II of this paper is devoted to the analysis of the role of an individual in EU Law in the light of the Lisbon ‘access to justice’ concept. Part III discusses the role of the national courts and the Court of Justice of the European Union as the actors responsible for the enforcement of ‘access to justice’, since the construct of Art. 19(1) TEU makes it clear that national judges are also the judges of Union law. Part IV presents my conclusions on the developments brought by the post-Lisbon case-law regarding actors responsible for legal enforcement of the ‘access to justice. I do not claim to investigate the access to the broader notion of

9 Dahahi v Italy, App no 17120/09 (ECHR, 8 April 2014).
10 Schipani and Others v Italy, App no 38369/09 (ECHR, 21 July 2015).
11 Case C-169/14, Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA, EU:C:2014:2099.
‘access to social justice’ within the meaning of Arts 3, 6 TEU and the actors responsible for the distribution of social goods under the European law, but rather to focus on the ‘access to justice’ as the possibility to approach the EU judicial system.\textsuperscript{13} The applications to the European Commission will not be discussed either as these procedures are not (with rare exceptions) available for individuals aiming to invoke the EU Law provision in question.

II. ‘Access to Justice’ and \textit{Van Gend en Loos}: A Role of an Individual in EU Law

In \textit{Van Gend en Loos}, the CJEU explicitly recognised the potential of an individual as a subject of the EU Law, although making the access to justice conditional upon ‘direct effect’ of the EU Law provisions in question, while also connecting the importance of cooperation between the individual and the EU legal system.\textsuperscript{14} This premise was developed after the Treaty of Lisbon adoption due to the new constructs of annulment proceedings (Art. 263 TFEU) and the defensive approach towards the preliminary rulings procedure (Art. 267 TFEU) as an individual Human Rights guarantee from the part of the ECtHR.

A. \textit{Locus Standi} of Individuals for the Purposes of Art 263(4) TFEU

As a reaction to a wave of critique after the Courts’ earlier judgments in the \textit{UPA}\textsuperscript{15} and \textit{Jego-Quere}\textsuperscript{16} cases reaffirming the classic \textit{Plaumann} test for ‘individual concern’ precluding individuals from the usage of the annulment procedure, the TFEU created a potential for easier access to the EU legal system via the relaxation of the standing rules in relation to


\textsuperscript{14} The CJEU held: ‘[T]he Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Community law, therefore, apart from legislation by the member States, not only imposes obligations on individuals but also \textit{confers on them legal rights}’.

\textsuperscript{15} Case C-50/00 P, \textit{Unión de Pequeños Agricultores v Council}, EU:C:2002:462.

The text of Art 263(4) TFEU directly enables ‘[a]ny natural or legal person’, under the conditions laid down in the first and second paragraphs, to institute proceedings under the EU Law against an act addressed to that person or which is of direct and individual concern to them, and – in efforts to improve judicial protection for individuals – relaxes the standing requirements by removing the condition of individual concern for the category of regulatory acts which are of direct concern to such persons and do not entail implementing measures.

It is necessary to notice that the CJEU has recently made several important clarifications of these Treaty provisions, while giving interpretation to the notions of ‘regulatory act’ and an ‘act which does not entail implementing measures’ for the purposes of Art 263(4) TFEU. In Inuit, the CJEU defined a ‘regulatory act’ as an act of general application adopted according to a procedure which is different from the legislative one (ordinary or special) as defined in Art 289 TFEU. In T&L Sugars, the Court of Justice espoused a broad interpretation of ‘implementing measures’, including any measure that at the European or national level gives effect or even only applies a regulatory act, irrespective of the existence of any discretion on their side to decide on the content of that measure. In almost all cases, the Court made an emphasis on the rationale of Art 263(4) TFEU – to give access to justice to individuals that otherwise would not have other alternatives than infringing the law.

Nevertheless, in Inuit or T&L Sugars the Court reasserted the Plaumann test, despite it having been criticised for being based on a formalistic rather than substantial element. Moreover, although in Inuit the CJEU agreed that the conditions of admissibility laid

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19 Inuit Tapiriit (n 8) para 61.
21 Inuit Tapiriit (n 8) para 50, Case C-274/12 P, Telefónica SA v European Commission, EU:C:2013:852, para 27.
down in the fourth paragraph of Art 263 TFEU must be interpreted in the light of the fundamental right to effective judicial protection proclaimed by Art. 47 of the Charter, the Court emphasised that such an interpretation cannot have the effect of setting aside the conditions expressly laid down in the Treaty.\textsuperscript{23} \textit{Inuit} is also important since it proclaimed that ‘...it is therefore for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection’.\textsuperscript{24} In the context of Art 263(4) TFEU it may be seen as an intention of the Union to reduce the CJEU intervention and to shift the responsibility for EU Law enforcement to the Member States’ courts so as to avoid overburdening the CJEU with the individual complaints.

It will be argued that this approach to the individual \textit{locus standi} is not likely to change in the light of recent \textit{Vereniging Milieudefensie} and \textit{Stichting Natuur} judgments elaborating on the access of NGOs to the CJEU in the light of Art. 9(3) of the Aarhus Convention, in which the CJEU dismissed the applications for annulment without referring the cases back to the General Court. An important aspect of the legal reasoning was that the annulment procedure in relation to the Regulation No 1367/2006 ‘concerns only one of the remedies available to individuals for ensuring compliance with EU environmental law’, and recalled that Art. 9(3) of the Aarhus Convention leaves leeway and discretion to the Contracting Parties when defining the rules for the implementation of administrative or judicial procedures in the context of environmental cases. Considering earlier CJEU statement in \textit{Lesoochranárske zoskupenie} about the potential applicability of Aarhus convention on the national level, it may be seen as a strong message to the national courts to relinquish their well-vested traditional approaches to standing for environmental NGOs to prevent parties from an application of Art 263(4) TFEU in environmental matters.\textsuperscript{25} Since Art. 9(3) of the Aarhus Convention may also be applicable to the individual applicants (‘members of the public’), it is quite probable that

\begin{itemize}
\item \textsuperscript{23} \textit{Inuit Tapiriit} (n 8) para 35.
\item \textsuperscript{24} ibid paras 98 and 100.
\item \textsuperscript{25} Case C-240/09, \textit{Lesoochranárske zoskupenie} VLK v Ministerstvo životného prostredia Slovenskej republiky, EU:C:2011:125, para 46.
\end{itemize}
the CJEU may follow the similar path in further cases related to admissibility of individual applications for annulment.

Moreover, an additional argument in this regard may be the Strasbourg system view on individual locus standi expressed in the Bosphorus case. The ECtHR recognised the limited standing for individuals under Art 263(4) TFEU but accepted the alternative means of redress in actions for damages and the preliminary ruling procedure as sufficiently protecting their rights. It referred to the whole system of review in the EU as guaranteeing the compliance with Union rules, thus also the control exercised by actions brought by Member States and Institutions of the Union. Consequently, the restriction on locus standi in Art 263(4) TFEU was not in itself found to be in breach of the ECHR, but a rebuttal of the presumption could be possible if the protection would be deemed as ‘manifestly deficient’, which was not the case in Bosphorus. These lines of legal reasoning allow to claim that the CJEU is now unwilling to reconsider its well-entrenched Plaumann doctrine for direct actions, while the case law on individual access to justice at national level looks seemingly progressive and makes an emphasis on the duty of consistent interpretation that is resting upon the national courts in this respect.

B. Locus Standi of Individuals for the Purposes of Art 267 TFEU

Art 267 TFEU concerns either ‘any court or tribunal of a Member State’ (‘may’) or the court or tribunal of a Member State against whose decisions there is no judicial remedy under national law (‘shall’) which request the Court of Justice to give a ruling concerning (a) the interpretation of the Treaties or (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. The Treaty of Lisbon has not directly defined an individual participating in the national procedure as a subject enabled to invoke the procedure, since the right and the duty to submit a reference have been vested in the national courts - not only to enable them to make sure that the individual’s

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26 Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland App no 45036/98 (ECHR, 30 June 2005).
27 ibid paras 162–164.
28 ibid para 166.
EU Law rights are respected, but also more generally to ensure the uniform and correct application of the EU Law in all Member States.

However, preliminary rulings procedure has historically been an important route of access to the CJEU from the part of individuals since it is the initiative of the party of the case which often instigates a judge to request a preliminary ruling.\textsuperscript{29} The need for this cooperation between the individual, national court and the Court of Justice arises from two limitations of the Union system, \textit{i.e.} the lack of standing for individuals to bring appeals from national judicial decisions or bring an action for annulment to the Court of Justice on the one hand, and the CJEU’s lack of coercive powers to enforce its judgments on the other – which makes the preliminary rulings procedure the only (indirect) way for individuals to challenge national law inconsistent with the EU Law provisions.\textsuperscript{30}

Again, it is still within the discretion of the Member States to enable a party of the case to invoke a preliminary ruling mechanism – for example, in Germany the judge’s refusal to submit a request to the CJEU is considered a breach of the constitutional law principle.\textsuperscript{31} Another factor which may enable a private party to instigate preliminary rulings procedure is the Member State’s legal culture. For example in those legal systems where the role of legal counsel in clarifying the case is considerable, such as Great Britain, Ireland, and Denmark, references for preliminary rulings are generally made at the initiative of the parties. This has even led some to argue that, in the UK at least, the reality behind the preliminary procedure even before the Lisbon was already closer to a litigant-Court of Justice relationship (with the national court acting as a relay between the two) than a national court – Court of Justice dialogue as frequently proclaimed by the CJEU.\textsuperscript{32}

\textsuperscript{30} Marcus Klamert, \textit{The Principle of Loyalty in EU Law} (OUP 2014) 14.
\textsuperscript{32} Morten Broberg, \textit{Preliminary References to the European Court of Justice} (OUP 2014) 281.
The CJEU post-Lisbon case law also makes an emphasis on the role of preliminary rulings procedure for the protection of the individual’s EU rights. In *Inuit* and *Telefónica*, the Court of Justice encourages private parties to plead the invalidity of the basic act at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court of Justice, pursuant to Art 267 TFEU, when the implementation of the ‘regulatory act which entails implementing measures’ is a matter for the Member States. Since these statements are made in the context of discussion on the individual *locus standi* for the purposes of Art 263(4) TFEU, the CJEU seems to recognise a preliminary rulings procedure as a way of challenging of European law alternative to the individual action of annulment.

The recent developments in the ECtHR case-law interpreting the position of the EU individual in preliminary rulings procedure in the light of Art. 6 ECHR (‘the right to a fair trial’) also presents a special interest for the present research. In some way, the ECtHR was forced to touch upon the question of EU law in cases concerning the failure of the national court to make a preliminary reference to the CJEU, finding this under certain circumstances to constitute a violation of Art. 6(2) ECHR. In *Dhahbi v. Italy*, the ECtHR stated that a refusal by a national court of last instance (Corte de Cassazione) to make a reference to the Court of Justice, providing no reasoning at all when justifying its decision, entails a breach of Art. 6 ECHR. When the ‘court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’ refuses to make use of Art 267 TFEU providing no legal reasoning, despite the fact that the appellant has raised it in the appeal, such refusal would be in breach of Art. 6 ECHR. This line of reasoning is supported by *Schipani vs. Italy*, where the submissions of the parties supporting the necessity to submit a preliminary reference were disregarded by the same court in question; the only aspect which was considered was whether the issue was an *acte clair* or an *acte éclairé*. According to the ECHR, it was therefore not clear from the reasoning of the judgment whether that question was considered not to be relevant or to relate to a provision which was clear or had already been interpreted by the CJEU, or

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33 *Inuit Tapiriit* (n 8) para 93, *Telefónica SA* (n 22) para 29.
34 *Dhahbi* (n 9) paras 33–34.
whether it was simply ignored; it therefore came to the conclusion that there had been a breach of Art. 6 ECHR.\textsuperscript{35}

Although these outcomes may be seen as an intervention by the ECtHR in EU Law’s most sensitive area, the Strasbourg Court emphasises on the individual litigant’s benefits stemming from the guarantee of Art. 6(1) of the Convention. The ECtHR stated that providing no justification for the refusal would amount to denying the individual’s right, ‘…in the determination of his civil rights and obligations (...) to a fair and public hearing (...) by an independent and impartial tribunal (...).’ In this specific case, the court’s statement may be seen as a proposal to the CJEU to consider Art. 6(1) of the European Convention as a relevant basis for a EU Law individual to invoke a preliminary reference mechanism in the procedure before the Member State national court or tribunal.

III. ‘Access to Justice’ and \textit{Van Gend en Loos}: the Role of the European Union Courts

The judgment, through the direct effect doctrine, created a two-level system of EU law adjudication: the CJEU and the Member States courts, acting as an integral part of the EU legal system (\textit{Foto-Frost}).\textsuperscript{36} In \textit{Van Gend}, the Court of Justice was concerned that a different outcome ‘would remove all direct legal protection’ of the individual rights of the Community’s nationals: ‘[t]here is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty’.\textsuperscript{37}

This multilevel system of protection was driven by the implicit idea that the individual and his/her rights enjoy better protection if an ‘external’ judicial control complements

\textsuperscript{35} Schipani (n 10) paras 71–73.


‘internal’, domestic, judicial remedies. Kilpatrick explains these routes as the ‘by-products of the ‘great leap’ taken by the Court of Justice: ‘...the twin doctrines of direct effect and supremacy to ensure that private individuals... would provide both more and better compliance by Member States with EU law obligations they had assumed... The Court of Justice set out a division of remedial competences which recognised the inevitable reliance of the Union legal order and the Court of Justice on national courts and remedies in the private enforcement model. Rights or substantive issues concerning EU law were for the Court of Justice while remedies and procedural issues concerning the enforcement of EU law rights were for the national legal orders and the national courts.’

The TEU confirms this viewpoint and uses an innovative reference of ‘remedies’ in the text of Art. 19(1) TEU: this provision recalls that it is for the Member States’ courts – and therefore not in principle for the EU – to provide ‘remedies sufficient to ensure effective legal protection in the fields covered by Union law’, which formalises the model of decentralised judicial review chosen by the Union. This approach was further developed through the Lisbon Treaty provisions, and now the institutions responsible for the legal enforcement of the ‘access to justice’ concept shall therefore be divided in two large groups: (a) the national courts and tribunals of the Member States (Art. 19(1) TEU, Rewe-Comet) and (b) the CJEU. The post-Lisbon case law demonstrates that the role of both groups has become even more significant.

A. ‘Access to Justice’: The Role of National Courts and Tribunals of the EU Member States

It will be argued that the role of the national courts in relation to the ‘access to justice’ concept should be seen through the lens of the loyalty principle codified by the Treaty of

Lisbon. Supranational loyalty enshrined by Art. 4(3) TEU looks to national federal systems for solutions in defining the cooperation duties of federative entities vis-à-vis the federal State; in this sense, EU loyalty can be considered an expression of federal loyalty, under which ‘each level and unit of government must act to ensure the proper functioning of the system of governance as a whole’. The role of the national courts in the area of ‘access to justice’ may therefore be seen in two dimensions: the duty of consistent interpretation established by Von Colson and Marleasing (guaranteed by the principles of sincere cooperation and loyalty after the Treaty of Lisbon) and the new legal construct of a right (Art 267(2) or a duty (Art 267 (3) TFEU to submit a request for preliminary ruling to the Court of Justice).

The duty of consistent interpretation is based on the principle of direct effect, and is a natural consequence for the functioning of a decentralised system such as the EU legal order. According to the Rewe-Comet formula, national courts are entrusted with ensuring the legal protection which individuals derive from the direct effect of the Union law, applying the principle of sincere cooperation laid down by Art. 4(3) TEU. Therefore, the role of national courts as the EU courts when adjudicating in an EU matter may be seen in two dimensions: for the individual and the national court itself – ensuring the protection of rights granted under EU law; for the EU – ensuring the effectiveness of EU law.

It could be said that the duty of consistent interpretation after the Lisbon Treaty is closely connected with the principle of effective judicial protection stemming from Art. 47 of the Charter of Fundamental Rights of the EU. The obligations of the Member States under Arts. 4(3) and 19 TEU are thus mirrored by the individual right to effective judicial review. This means that much of the case law on Art. 47 concerns the rights on access to national courts and the remedies available before such courts in cases when the EU Law

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42 Rewe (n 39) para 5, Comet (n 39) para 12.
element is present. This provisions codifies such pre-Lisbon case-law as the Unibet case, where the national court was required to interpret the rules governing its own jurisdiction ‘in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective...of ensuring effective judicial protection of an individual’s rights under Community law.’ The Unibet judgment has finally been claimed to show that a broader principle of effective judicial protection ‘imposes on national courts a duty of consistent interpretation reminiscent of that laid down in Marleasing.’

In recent judgments, this tendency is becoming more and more evident. For example, the Court of Justice tested the respect of both the limits of loyalty and of the principle of effective judicial protection in Alassini. While founding, in principle, no violation of the principles of equivalence and effectiveness, provided that certain conditions were respected, the Court conversely recognised the existence of a restriction to the principle of effective judicial protection, maintaining that national legislation introduced an additional step for access to the courts which might prejudice judicial protection of the individuals. Such a restriction was nevertheless found admissible in the light of the principles of necessity and proportionality. In Sánchez Morcillo, the CJEU stressed that, as regards the duty of consistent interpretation and the principle of effectiveness, the Court held that a requirement of judicial protection, guaranteed by Art. 47 of the Charter, is binding on the national court. In Orizzonte Salute, the CJEU made an emphasis on interpretation of Directive 89/665 in the light of the fundamental rights set out in the Charter, in particular the right to an effective remedy before a court or tribunal, laid down in Art. 47 thereof. This approach is quite in line with the intentions of the Lisbon drafters who intended, with Art 19(I) TEU, to strengthen individual legal protection in the fields covered by Union law before national courts – which defines an increasing

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44 Case C-432/05, Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern, EU:C:2007:163, para 44.
46 Joined Cases C-317/08 to C-320/08, Alassini and Others, EU:C:2010:146, paras 47, 50–60.
47 Sánchez Morcillo (n 11) para 35.
48 C-61/14, Orizzonte Salute, EU:C:2015:655, para 49.
importance and, in some way, widens the discretion of the national courts in enforcing the ‘access to justice’ concept.\textsuperscript{49}

Cooperation of the national courts and the CJEU in the form of preliminary references may also be seen as a realisation of the principle of sincere (loyal) cooperation under Art. 4(3) TEU; from this point of view, Art. 19(1) TEU and 267 TFEU may be seen as lex specialis to Art. 4(3) TEU and a manifestation of Lisbon adherence to the principles of cooperative federalism, even in relation to the ‘access to justice’ concept. It will be argued that recent CJEU practice demonstrates quite a defensive approach to the right (or duty) of the national courts to submit preliminary references to the CJEU, therefore making the preliminary rulings procedure a crucial element of the ‘complete system of legal remedies and procedures designed to ensure review of the EU acts’.\textsuperscript{50}

In the \textit{Melki and Abdeli} cases, the CJEU stated that national courts cannot be prevented from referring questions to the Court, and therefore, if an interlocutory procedure giving priority to the review of constitutionality of national law effectively prevents these courts from referring questions to the Court, such a procedure shall be prohibited under Art 267 TFEU.\textsuperscript{51} The Court emphasised the special importance of Art 267 TFEU stating that the national courts shall remain free to submit a reference for a preliminary ruling to the Court, at whatever stage of proceedings they consider appropriate, on any question they consider necessary.\textsuperscript{52} In groundbreaking Opinion 2/13, the Court of Justice goes even further, describing the preliminary reference procedure as ‘the keystone of the judicial system established by the Treaties’, which will be affected if no special provisions are made to balance the relationship between optional Protocol I6 ECHR and the preliminary ruling procedure of Art 267 TFEU, as it will influence the autonomy and effectiveness of the latter procedure.\textsuperscript{53} In \textit{Ferreira da Silva}, the CJEU again emphasised a duty of a national

\textsuperscript{49} \textit{Inuit Tapiriit} (n 8) paras 34–35.

\textsuperscript{50} ibid para 92.

\textsuperscript{51} Joined Cases C-188/10 and C-189/10, Aziz Melki and Selim Abdeli, EU:C:2010:363.

\textsuperscript{52} ibid, para 57.

\textsuperscript{53} Opinion 2/13 (n 12) paras 197–199.
court or tribunal, against whose decisions there is no judicial remedy under national law, to comply with its obligation to make a reference to the Court in order to avert the risk of an incorrect interpretation of EU law, considering its crucial importance for judicial coherence and overcoming divergences in judicial decisions within the European Union.\textsuperscript{54} These lines of reasoning demonstrate that the CJEU continues to encourage the Member States courts, especially the courts or tribunals against whose decisions there is no judicial remedy under national law, to invoke the preliminary rulings mechanism, even in case of small doubts, therefore shifting responsibility for EU Law enforcement from the Court of Justice to the courts in the Member States.

B. ‘Access to Justice’: the Role of the Court of Justice of the European Union

In accordance with Art. 19(1) TEU, the Court of Justice remains the highest court of the legal order which has the task of adjudication on the validity of norms by reference to the Treaties, and its jurisdiction is exclusive as no other court has the competence to annul EU legislation. The Court is expressly granted jurisdiction to assess the legality of union acts and can exercise both \textit{ultra vires} and \textit{fundamental rights} review. This entails CJEU jurisdiction for both inter-institutional and Union/Member States conflicts of competence, i.e. jurisdiction which corresponds to essential functions of a typical \textit{federal state} constitutional court.\textsuperscript{55} These features define exclusive position of the Court of Justice as an actor \textit{shaping} the concept of ‘access to justice’ within the meaning of the Lisbon Treaty. The key instrument in this regard is the Charter of Fundamental Rights of the European Union which has the same legal value as the Treaties.\textsuperscript{56} After the Treaty of Lisbon, the Charter obtained a prominent position in the EU legal system and its application has become a matter of daily business.\textsuperscript{57}

\textsuperscript{54} Case C-160/14, João Filipe Ferreira da Silva e Brito and Others v Estado português, EU:C:2015:565, paras 43–44.
\textsuperscript{55} Kaarlo Tuori, \textit{European Constitutionalism} (CUP 2015) 50.
\textsuperscript{56} Consolidated version of the Treaty on the European Union [2008] OJ C 115, art 6(1).
For example, in ZZ v UK Home Secretary, whilst deciding a case concerning the implementation of Directive 2004/38 on the freedom of movement which does not harmonise the national rules of procedure in case of refusal, the CJEU considered that national remedies must afford effective judicial protection as set out in Art. 47 of the Charter and that the basis for a refusal must be disclosed to the person concerned. The case of DEB (although not directly related to individual persons) involved such an expansion of the right of effective judicial protection. After having engaged in a thorough analysis of the ECtHR case law, the CJEU eventually relied mainly on Art. 47 of the Charter to expand the right to legal aid to legal persons and not only to natural persons, thus reaching an outcome that did not clearly emerge from the ECtHR jurisprudence.

In the N.S. case, the Court held that Member States are prohibited from transferring an asylum seeker in accordance with the Dublin II Regulation, if there are substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Art. 3 ECHR and Art. 4 Charter of Fundamental Rights, also considering the guarantees enshrined in Art. 47 of the Charter. Since the CJEU followed the approach earlier taken by the ECtHR in M.S.S. v Greece and Belgium, the N.S. judgment has opened a floor for the questions concerning the application of higher Charter standards of protection than those guaranteed by the corresponding ECHR provisions in individual cases, therefore adding an additional argument to the discussion.

The CJEU approach taken in Chalkor case may present a special interest as the CJEU noted that since Art. 47 Charter implements in EU law the protection afforded by Art. 6(1) ECHR, it was necessary to refer only to Art. 47 Charter. The Explanations relating to the Charter of Fundamental Rights emphasise that Art. 47 of the Charter is primarily based on the rights enshrined in Arts. 13 and 6(1) ECHR, and therefore the meaning and

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58 Case C-300/11, ZZ v Secretary of State for the Home Department, EU:C:2013:363.
59 Case C-279/09, Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, EU:C:2010:811.
scope of these rights shall be the same as laid down by the Convention.\textsuperscript{61} In line with Opinion 2/13, where the CJEU applied the principle of absolute primacy to the CFREU, it may be seen as a claim for the development of independent body of the CJEU case-law favoring more extensive protection within the fields covered by the EU Law. Considering the extension of the CJEU jurisdiction to the police and judicial cooperation in criminal matters\textsuperscript{62} and to the policies related to free movement of persons\textsuperscript{63} (in particular, judicial cooperation in civil matters, recognition and enforcement of judgments), one may expect further developments in these areas based on Art. 52(3) of the Charter of Fundamental Rights, which will further develop the concept of ‘access to justice’ in European Law.

\textbf{IV. Conclusion}

In this paper, I focused on development of \textit{Van Gend en Loos} premises within the framework of the ‘access to justice’ concept framed by the Treaty of Lisbon, i.e. enabling individuals to evoke their EU rights before the EU courts and the duty of the EU courts to apply the EU Law to the disputes before them, therefore providing private parties with the access to the said substantive rights. First, I analysed the present role of the individual making an attempt to access the EU judicial system in the light of the \textit{Vereniging Milieudefensie}, \textit{Inuit} and \textit{Dhahbi lines of reasoning}, then tried to analyse the role of the EU courts for the realization of the ‘access to justice’ in the light of the \textit{Sánchez Morcillo} and Opinion 2/13 lines of reasoning in conjunction with Art. 47 of the Charter of Fundamental Rights of the EU. The main argument presented was that the ‘access to justice’ concept reflects the federalist approach of the Treaty of Lisbon aiming both at the better legal protection of EU individuals and the coherent cooperation within multilevel judicial system of the European Union. There are several crucial points which are worthy of being mentioned.

\textsuperscript{61} Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/02.
\textsuperscript{62} Formerly Title VI of the EU Treaty.
\textsuperscript{63} Formerly Title IV of the EC Treaty.
Firstly, the analysis of recent practice demonstrates the CJEU’s awareness of the individual access to justice and adherence to coherent cooperation between different levels of the EU legal system – which may be seen as a reflection of the ‘federalist’ spirit of the Lisbon Treaty. The main purpose of ‘access to justice’ formula has been not only to improve the position of the individual due to the duty to follow the ECHR standards of protection (Arts. 6, 13 of the Convention) and binding force of the CFREU provisions (Art. 47 of the Charter), but to guarantee effective application of the EU Law on the EU and Member States’ levels. One can say that the two main levels, the national courts and the Court of Justice, work together enforcing the ‘access to justice’ in EU law, being complementary parts in a shared legal sphere, instead of operating independently in separate spheres – which illustrates the EU legal order shift to ‘cooperative federalism’ model.64

Secondly, it is possible to claim that the role of the EU individual as an actor enabled to gain access to the EU judicial system has significantly increased due to the Lisbon legal novelties and pertinent CJEU and ECtHR jurisprudence. Although the Plaumann test restricting locus standi for the purposes of Art 263(4) TFEU is not likely to be reconsidered, the Inuit and Telefónica lines of reasoning seem to encourage private parties to challenge the EU Law before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court of Justice, at least when the case concerns the act entails implementing measures from the part of the Member States. This viewpoint may also be supported by the Strasbourg Dhahbi and Shipani judgments which demonstrate that Art. 6(1) of the European Convention may be considered a relevant basis for an EU individual to invoke a preliminary reference mechanism, at least in the procedure before the Member State court or tribunal of a Member State against whose decisions there is no judicial remedy under national law.

Thirdly, the ‘access to justice’ concept framed by the Lisbon Treaty changes the roles of the EU courts sufficiently. The Alassini line of reasoning demonstrates that the principle

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of loyalty enshrined in Art. 4(3) TEU is becoming more and more important for the enforcement of EU rights by the Member States’ courts, since this duty of the national courts is scrutinised in the light of the effective judicial protection principle codified by Art. 47 of the Charter provisions. This emphasis on national remedies may be seen as the shift of responsibility for the enforcement of EU Law to the Member States level, reducing the necessity of Court of Justice intervention and enabling the issues of EU Law to be resolved closer to the citizens. At the same time, Melki approach demonstrates the crucial role of the national courts as the key elements of preliminary rulings system set up by Art 267 TFEU, as part of which the former are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order. The CJEU becomes an actor shaping the concept of ‘access to justice’ as such, and even the interventions of the Strasbourg system of Human Rights protection do not seem possible in the light of Opinion 2/13 defensive approach to the Charter primacy. Art. 47 of the CFREU is of special importance in this regard since it may serve as a legal basis for formation of the body of the CJEU case-law, favoring more extensive protection in comparison with the ECHR level in accordance with Art. 52(3) of the Charter of Fundamental Rights.