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JUDICIAL LAW-MAKING AND THE PRINCIPLE OF EFFECTIVENESS IN EUROPEAN UNION (PRIVATE) LAW[1]

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Abstract

This paper aims to analyze the role and legitimacy of the «principle of effectiveness» in private law adjudication at European and national level, by adressing two preliminary goals: *a*) defining the meaning and normative force of the «principle of effectiveness» in European Union (EU) law, and whether they differ from the national courts' understanding; *b*) analyzing the impact of the right to an effective remedy (art. 47 Charter of Fundamentals Rights of the European Union [EUCFR]) in horizontal disputes.

By relying on the methodology offered by the philosophy of language, the paper analyzes the two major specifications of effectiveness in the Court of Justice of the European Union (CJEU) case law —«effectiveness of EU law» and «effectiveness of judicial protection»—, and critically assesses the coherence and institutional fit of each «Sprachgebrauch», as well as their interactions. It then re-conceptualizes effectiveness as an «argument» which, being essentially indeterminate, may be easily misused, to foster integration in constitutionally sensitive areas, also trough private law adjudication.

The results are finally used to evaluate the impact of the principle of effectiveness on national private law, suggesting that judges shall play a strong and pro-active role in their dialogue with the CJEU, forcing the latter to second-guess and further weighting its decisions, to open up new deliberative spaces in the EU project.

Keywords: effectiveness, judicial law-making, European private law, legal reasoning and argumentation.

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JURISPRUDÈNCIA I PRINCIPI D'EFECTIVITAT EN EL DRET (PRIVAT) DE LA UNIÓ EUROPEA

Resum

L'article analitza el paper i la legitimitat del principi d'efectivitat en el dret privat en l'àmbit europeu i nacional amb dos objectius preliminars: *a*) comprendre el significat i la força normativa del principi d'efectivitat en el dret europeu i si això difereix en l'aplicació de la jurisprudència dels tribunals nacionals; *b*) analitzar l'impacte del dret a un recurs efectiu (article 47 de la Carta dels Drets Fonamentals de la Unió Europea) en disputes horitzontals.

Partint de la metodologia oferta per la filosofia del llenguatge, l'article analitza les principals especificitats de l'efectivitat en la jurisprudència del Tribunal de Justícia de la Unió Europea (TJUE) —«efectivitat del dret europeu» i «efectivitat de la protecció judicial»— i, de manera crítica, examina la coherència i l'ajustament institucional de cada *Sprachgebrauch*, així com les seves interaccions. Successivament, l'article reconceptualitza l'efectivitat com un «argument» que, com que és essencialment indeterminat, pot ser fàcilment mal utilitzat, per a fomentar la integració en àrees constitucionalment sensibles, també mitjançant l'adjudicació de dret privat.

Els resultats són utilitzats per a avaluar l'impacte del principi d'efectivitat en el dret privat nacional, així com per a guiar el seu desenvolupament en els tribunals nacionals, i suggereixen que els jutges han d'exercir un paper fort i proactiu en el seu diàleg amb el TJUE, i han d'obligar aquest últim a suposar i ponderar més les seves decisions, a fi d'obrir nous espais en el procés deliberatiu sobre el projecte de la Unió Eueropea.

Paraules clau: efectivitat, jurisprudència, dret privat europeu, raonament jurídic, argumentació.

JURISPRUDENCIA Y PRINCIPIO DE EFECTIVIDAD EN EL DERECHO (PRIVADO) DE LA UNIÓN EUROPEA

Resumen

El artículo analiza el papel y la legitimidad del principio de efectividad en el derecho privado a nivel europeo y nacional con dos objetivos preliminares: *a*) comprender el significado y la fuerza normativa del principio de efectividad en el derecho europeo y si esto difiere en la aplicación de la jurisprudencia de los tribunales nacionales; *b*) analizar el impacto del derecho a un recurso efectivo (artículo 47 de la Carta de los Derechos Fundamentales de la Unión Europea) en disputas horizontales.

Partiendo de la metodología ofrecida por la filosofía del lenguaje, el artículo analiza las principales especificidades de la efectividad en la jurisprudencia del Tribunal de Justicia de la Unión Europea (TJUE) —«efectividad del derecho europeo» y «efectividad de la protección judicial»— y, de manera crítica, examina la coherencia y el ajuste institucional de cada *Sprachgebrauch*, así como sus interacciones. Sucesivamente, el artículo reconceptualiza la efectividad

como un «argumento» que, al ser esencialmente indeterminado, puede ser fácilmente mal utilizado, para fomentar la integración en áreas constitucionalmente sensibles, también mediante la adjudicación de derecho privado.

Los resultados son utilizados para evaluar el impacto del principio de efectividad en el derecho privado nacional, así como para guiar su desarrollo en los tribunales nacionales, y sugieren que los jueces deben desempeñar un papel fuerte y proactivo en su diálogo con el TJUE y obligar a este último a suponer y ponderar más sus decisiones, a fin de abrir nuevos espacios en el proceso deliberativo sobre el proyecto de la UE.

Palabras clave: efectividad, jurisprudencia, derecho privado europeo, razonamiento jurídico, argumentación.

INTRODUCTION

It is commonly appreciated that the Court of Justice of the European Union (CJEU), together with national courts, constitutes a main driver of the European integration and Constitutionalization.[2] However, this process raises various theoretical and practical problems, needing careful conceptualization to avoid abuse and reinforce its potentials. In this paper, the role and legitimacy of judicial law-making is analysed by focussing on one of the most fundamental instrument, which said process is carried out through, namely the «principle of effectiveness».[3]

Indeed, on the one hand, the principle developed by the CJEU —now enshrined in art. 19 of the Treaty of the European Union (TEU) and 47 of the European Charter of Fundamental Rights (EUCFR)— requires national judges to enforce European law, both through negative and positive interventions. On the other hand, they are constrained by fundamental principles common to the member States' constitutional traditions —separation of powers, rule of law, equality and legal certainty—, as well as by the division of competences set out in articles 4-5 TUE, often clashing with the aforementioned duties, thus sitting between a rock and a hard stone.

2. Patrick Neill, *The European court of justice: a case study in judicial activism*, London, European Policy Forum, 1995; Alec Stone Sweet, «The European Court of Justice and the judicialization of EU governance», *Living Reviews in European Governance*, vol. 5 (2010), no. 1; Jürgen Basedow, «The Court of Justice and private law: vacillations, general principles and the architecture of the European judiciary», *European Review of Private Law*, vol. 18 (2010), p. 443; Hans Wolfgang Micklitz, «Introduction», in Hans Wolfgang Micklitz (ed.), *Constitutionalization of European private law*, Oxford, Oxford University Press, 2014, p. 1.

3. For an overview of the principle and its application: Takis Tridimas, *The general principles of EU Law*, 2 ed., Oxford, Oxford University Press, 2006, p. 418; Dorota Leczykiewicz, «Effectiveness of EU law before national courts: direct effect, effective judicial protection, and state liability», in D. Arnull and A. Chalmers (eds.), *Oxford handbook of European Union law*, Oxford, Oxford University Press, 2015, p. 212; Norbert Reich, *General principles of EU civil law*, Cambridge, Intersentia, 2016, p. 89.

In this context, the idea is sometimes suggested that the CJEU is progressively moving from an «objective» account of effectiveness, functional to the enforcement of European law as well as to the achievement of its market-centred objectives, towards a «subjective» effectiveness, paving the way for judge-made remedies that «upgrade» national laws, compensating for the legislative social deficit and improving the judicial protection of vulnerable subjects (such as consumers and employees) all over Europe.[4] In this sense, the increasing reference to art. 47 EUCFR shall be welcomed as displaying a change in the CJEU's ideology, and as a contribution by domestic courts to the Constitutionalization of European law and the modernization of national rules.

Thus, the legitimacy of the principle of effectiveness at both the European and national level seems to rest on an ideological stance: the more one supports European integration, and considers the anti-formalist trend, as well as the judicial law-making associated with, as a source of positive harmonization and innovation, the more s/he will make effectiveness trump contrasting national and European principles and attribute to domestic courts a pro-active role in its realization.

However, framing the problem as a matter of values and ideology creates more problems that the ones it solves, as it gives no guidance on the practical use of the principle of effectiveness, leaving domestic courts to solve the matter in a heterogeneous and therefore unworkable way, possibly though solutions unsupported by neither national law, nor European law itself.

My claim is that the *impasse* may be untangled, once tackled from a different perspective. Indeed, this deadlock is determined by the tendency to read European norms as akin to national constitutional principles, and to mould their effects

4. Hans Wolfgang Micklitz, «The ECJ between the individual citizen and the member states – A plea for a judge-made European law on remedies», in Hans Wolfgang Micklitz and Bruno De Witte (eds.), *The European Court of Justice and the autonomy of the member states*, Cambridge, Interesentia, 2012, p. 347; N. Reich, *General Principles of EU Civil Law*, no. 2, p. 90; Chantal Mak, «Rights and remedies. Article 47 EUCFR and effective judicial protection in European private law matters», in Hans Wolfgang Micklitz (ed.), *Constitutionalization of European private law*, Oxford, Oxford University Press, 2014, p. 236; Anna Van Duin, «Metamorphosis? The role of article 47 of the EU charter of fundamental rights in cases concerning national remedies and procedures under Directive 93/13/EEC», *Journal of European Consumer and Market Law*, no. 6 (2017), p. 190. In Italian scholarship, this thesis is most famously sustained by Giuseppe Vettori, «Effettività delle tutele civili (diritto civile)», in *Enciclopedia del diritto*, vol. 10, *Annali*, Milano, Giuffrè, 2017, p. 381.

The distinction between objective and subjective effectiveness is expressly mentioned in Paolisa Nebbia, «The double life of effectiveness», *Cambridge Yearbook of European Legal Studies*, n. 8 (2007), p. 287-288; D. Leczykiewicz, «Effectiveness of EU law before national courts: direct effect, effective judicial protection, and state liability», p. 214, n. 8; Stefano Pagliantini, «Principio di effettività e clausole generali: il canone "armonizzante" della corte di Giustizia», in Salvatore Mazzamuto and Luca Nivarra (eds.), *Giurisprudenza per principi e autonomia privata*, Torino, Giappichelli, 2016, p. 81 and 103.

accordingly.[5] On the contrary, a comparative perspective shall be adopted, as to make sure that their peculiar features are taken into consideration, highlighting the need to adjust and alter them before their national reception. In order to identify under which conditions the principle of effectiveness may be legitimately used by the CJEU, and to what extent national judges shall contribute to its realization, we first need to have a clear picture of said principle at the European level.

2. UNDERSTANDING EFFECTIVENESS: AN ANALYTICAL INQUIRY INTO THE CJEU'S *LINGUISTIC USES* AND THEIR RELATIONSHIPS

The references to «effectiveness» in European law are so numerous and heterogeneous, that it is difficult to pinpoint exactly what it means, and what it is used for. However, by relying on the methodological tools offered by the philosophy of language, it is possible to reconstruct the composite framework of meanings attributed to it, identifying the relevant *linguistic uses*[6] within the CJEU case law.

5. In Italy, for example, it is common among both judges and scholars to consider the «principle of effectiveness» as corresponding to the constitutional principle enshrined in art. 24 of the Italian Constitution, which reads: «Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi. La difesa è diritto inviolabile in ogni stato e grado del procedimento. Sono assicurati ai non abbienti, con appositi istituti, i mezzi per agire e difendersi davanti ad ogni giurisdizione». See: Cass. Civ., Sez. III, 17 september 2013, no. 21255 (2013), Foro italiano I, 3121: «Da qui, la necessità di partire dalla ricerca del profondo e decisivo significato del principio di effettività, rettamente inteso, nella sua innegabile dimensione di regola-cardine dell'ordinamento costituzionale, come diritto ad un rimedio adeguato al soddisfacimento del bisogno di tutela di quella specifica, univa, talvolta irripetibile situazione sostanziale di interesse giuridicamente tutelato […]. Il diritto ad una tutela effettiva è, in ultima analisi, la facoltà «di beneficiare di strumenti idonei a garantire la piena soddisfazione dell'interesse azionato, dovendosi interpretare la norma costituzionale sull'(inviolabile) diritto alla tutela giurisdizionale non solo seguendo l'itinerario di pensiero indicato dalle sentenze della Consulta […], ma anche alla luce del più generale contesto rappresentato dall'ordinamento internazionale che quella norma integra […], ordinamento nel quale il moltiplicarsi di accenni sul diritto al rimedio effettivo che emerge dalla lettura degli artt. 8 della Dichiarazione universale dei diritti dell'Uomo, 13 della Convenzione dei diritti dell'Uomo (stante l'interpretazione offertane dalla Corte di giustizia già a far data della sentenza Johnston del 1986) e 47 della Carta dei diritti fondamentali dell'Unione e oggi del Trattato di Costituzione Europea, è indicativa del fatto che quello alla tutela giurisdizionale non viene inteso soltanto come diritto di accesso al giudizio o all'esercizio di un determinato potere processuale, ma è concepito pure, in una prospettiva contenutistica, come diritto alla misura appropriata alla soddisfazione del bisogno di tutela». See also G. Vettori, «Effettività delle tutele civili (diritto civile)», n. 3.

6. «For a large class of cases of the employment of the word 'meaning' —though not for all— this word can be explained in this way: the meaning of a word is its use in the language»: Ludwig Wittgenstein, *Philosophical investigations*, Cambridge, Blackwell, 1974, § 43. Under this view, when investigating meaning one must "look and see" the variety of uses to which the word is put, just if it were a tool in a toolbox; since the «functions of words are as diverse as the functions of these objects», one shall not theorize upon meaning but rather describe its uses as part of specific activities («language-games»; see n. 47).

2.1. Effectiveness as an indeterminate concept

Effectiveness is not a self-standing concept, but rather an «incomplete symbol»:[7] it represents the conceptualization of a given property, which the speaker attributes to an object. Furthermore, effectiveness has no unique and definite meaning, being an *intrinsically indeterminate* term.[8]

More specifically, effectiveness is *ambiguous*, since its denotation depends on the context where the term is used, as well as on the entity it is attributed to.[9] For example, a first-order norm constitutes a reason for action,[10] thus is effective if concretely applied in a given system by private individuals and by the officials in charge of sanctioning its violation, regardless of whether said effectiveness is achieved mostly through first-order or second-order compliance.[11] On the contrary, a second-order norm —such as that prescribing a remedy against the violation of a first-order norm— makes good for a wrong caused by the deviant behaviour, and is *ab imis* functionally oriented: in order for a remedy to qualify as effective, it is not sufficient that the addressees of the second-order norm apply it, as the remedy must prove adequate in achieving the result it was set for. Mere norm-compliance is not enough; teleological efficacy is required.

Yet, even if we narrow it down to one specific referent, a major degree of indeterminacy remains. For example, does only absolute compliance make a norm effective, or is a certain level of non-compliance tolerated? If so, at which degree of non-compliance does the norm cease being effective? The difficulty in answering these questions derives from two additional forms of indeterminacy that characterize effectiveness, namely, vagueness and contestability. Effectiveness is *vague*, because its semantic boundaries are physiologically undetermined, being «there […] cases, actual or possible, in which one does not know whether or not to apply an expression or rather to withhold it»;[12] it is also *essentially contestable*, because different subjects

7. Bernard Russell, «On denoting», *Mind New Series*, no. 56 (1905), p. 479.

8. Thomas Endicott, *Vagueness in law*, Oxford, Oxford University Press, 2000; Jeremy Waldron, «Vagueness in law and language: some philosophical issues», *California Law Review*, no. 82 (1994), p. 509.

9. J. Waldron, «Vagueness in law and language: some philosophical issues», p. 512.

10. The aforementioned distinction between first-order and second-order is developed by Norberto Bobbio, «Norme primarie e norme secondarie», in Tommaso Greco (ed.), *Studi per una teoria generale del diritto*, Torino, Giappichelli, 2012, p. 149. With a similar meaning, despite with the opposite denomination: Hans Kelsen, *General theory of law and the state*, Cambridge (MA), Harvard University Press, 1945.

11. H. Kelsen, *General theory of law and the state*, p. 70: «[…] though the efficacy of law is primarily its being applied by the proper organ, secondarily its efficacy means its being obeyed by the subjects».

12. Paul Grice, *Studies in the way of words*, Cambridge (MA), Harvard University Press, 1989, p. 177. On this matter, see also Dominic Hyde and Diana Raffman, «Sorites Paradox», in Edward Zalta (ed.), *The Stanford encyclopedia of philosophy*, summer 2018 edition, available online at <https://plato.stanford.edu/archives/sum2018/entries/sorites-paradox/> (access: june 8, 2019).

conceive different meanings of it, precisely because attributing the property of effectiveness constitutes a normative judgment, which in turns depends on the ideology each subjects adheres to.[13]

All said forms of indeterminacy offer useful insights on the role and legitimacy of effectiveness in European (private) law (§ 3). For the moment, however, we will focus on the corollaries of its *ambiguity*. Since it makes no sense to consider what effectiveness means in abstract terms, we shall understand what it means that some entity is (or shall be) effective, which in turn begs for the identification of the relevant referents. What, then, does the CJEU attributes the property of «being effective» to?

2.2. The linguistic uses of effectiveness in the case law of the CJEU

Within the Court's case law, two major specifications can be identified, having played a fundamental role in shaping the institutional architecture of the European Union, as well as the rights and obligations private parties hold *vis à vis* public and private subjects alike: «effectiveness of European law and European norms», and «effectiveness of judicial protection».[14]

Effectiveness of European law and European norms has been pivotal in order to create the doctrine of direct effect[15] and those complementing it —the «quasi-horizontal direct effect»,[16] the «incidental direct effect»,[17] the «duty of consistent interpretation»[18] and the «*effet utile* of direct effect»—,[19] as well as to expand the scope of application of both.

Effectiveness of judicial protection has been applied to review member States' procedural autonomy, by requiring that the exercise of European-based rights is not made «practically impossible or excessively difficult» (Rewe-*effectiveness*),[20] while, being recognized as a general principle (Johnston-*effectiveness*) and a fundamental

13. J. Waldron, «Vagueness in law and language: some philosophical issues», p. 513.

14. See n. 2.

15. C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos *versus* Netherlands Inland Revenue Administration, [1963] ECLI:EU:C:1963:1, par. 13.

16. C-36/74 B.N.O. Walrave and L.J.N. Koch *versus* Association Union Cycliste Internationale, Koninklijke Nederlandsche Wierlen Unie e Federación Española de Ciclismo, [1974] ECR 1405.

17. C-443/98 Unilever Italia SpA *versus* Central Food SpA, [2000] ECR I-7535.

18. C-14/83 Sabine Von Colson and Elisabeth Kamann *versus* Land Nordrhein-Westfalen, [1984] ECR 1981.

19. C-453/99 Courage Ltd. *versus* Bernard Crehan and Bernard Crehan *versus* Courage Ltd. and Others, [2001] ECR I-6297.

20. C-33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG *versus* Landwirtschaftskammer für das Saarland, [1976] ECR 1989; C-45/76 Comet B.V. *versus* Produktschap voor Siergewassen, [1976] ECR 2043.

right (art. 47 EUCFR), it was extended to bind national rules falling within the scope of European law[21] as well as the acts adopted by European institutions.[22] In this second meaning —as general principle and fundamental right— effectiveness has been claimed to allow the judicial development of remedies that «upgrade» national legislations and increase the social engagement of European law.[23]

2.3. Relationships and interactions among the different uses of effectiveness

Such framework may appear neat and clear-cut, with the two types of effectiveness being expressed in a series of different standards, and the increasing reference to the principle of effective judicial protection and art. 47 EUCFR expressing a new personalist-oriented approach in the Court's judicial ideology. In practice, however, this picture has extremely blurred lines: all said specifications are correlated in complex ways, while the evolution in the CJEU case law may prove less significant than it appears.

The Rewe-Comet test, for example, is often associated with the *Johnston-effectiveness* and art. 47 EUCFR, but it is unclear how the relationship among them is shaped. Despite some structural differences,[24] they are all used as standards against which to perform an indirect judicial review of national legislation, whenever European-based rights do not receive effective judicial protection. Moreover, the CJEU either refuses to articulate the relationship they entertain with one another, or does so in inconsistent and contradictory terms.[25] In Unibet[26] and Impact[27] it outlines the Rewe-

21. C-222/84 Marguerite Johnston *versus* Chief Constable of the Royal Ulster Constabulary, [1986] ECR 1651.

22. T-315/01 Yassin Abdullah Kadi *versus* Council of the European Union and Commission of the European Communities, [2005] ECR II-03649.

23. See n. 3.

24. Sacha Prechal and Rob Widdershoven, «Redefining the relationship between "Rewe-effectiveness" and effective judicial protection», *Review of European Administrative Law*, no. 4 (2011), p. 51 and 38ff.

25. On this matter: Sacha Prechal and Rob Widdershoven, «Redefining the relationship between "Rewe-effectiveness" and effective judicial protection»; Jasper Krommendijk, «Is there light on the horizon? The Distinction between "Rewe Effectivenesss" and the principle of effective judicial protection in article 47 of the charter after Orizzonte», *Common Market Law Review*, no. 53 (2016), p. 1395; Anna Van Duin, «Metamorphosis? The role of article 47 of the EU charter of fundamental rights in cases concerning national remedies and procedures under Directive 93/13/EEC», p. 190.

26. C-432/05 Unibet (London) Ltd. and Unibet (International) Ltd. *versus* Justitiekanslern, [2007] ECR I-2271, par. 42-3, 64, 83.

27. «Those requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law, apply

test as an expression of the broader Johnston-*effectiveness*, so that a violation of the former equals a breach of the latter. In Mono Car Styling[28] and Alassini[29] it claims that even if the Rewe-test is passed, national laws still need to meet the standard of effectiveness of judicial protection identified by the CJEU or by the EUCtHR pursuant to art. 6 and 13 of the Charter. In DEB,[30] the Court operates a direct shortcut, reformulating the preliminary question pertaining to the *Rewe-effectiveness* as related to the respect of art. 47 EUCFR. With a still different approach, in Orizzonte[31] it recognizes the Rewe-Comet test as «impl[ying] a requirement of judicial protection, guaranteed by Article 47 of the Charter», entrusting it with the resolution of the question, and reversing the *genus ad speciem* relationship identified in Unibet and Impact.

Even within a narrower cluster of cases —those triggered by the application of the Unfair Contractual Terms Directive—[32] the interaction between the Rewe-*effectiveness*, the *Johnston-effectiveness* and art. 47 EUCFR is equally muddled. In Aziz[33] art. 47 EUCFR is not mentioned, while in Kušionová[34] the CJEU states that «[i]n view of the fact that the first three questions […] seek to determine the level of protection afforded to consumers and the judicial remedies available to the latter, [art. 47] should be included amongst the European Union legal instruments which the referring court seeks to have interpreted by the Court», but, in the end, it relies on the traditional Rewe-*effectiveness*, and uses art. 47 EUCFR neither to interpret the directive, nor to alter the structural or qualitative assessment of the Rewe-test.

equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law. A failure to comply with those requirements at Community level is —just like a failure to comply with them as regards the definition of detailed procedural rules— liable to undermine the principle of effective judicial protection»: C-268/06 Impact *versus* Minister for Agriculture and Food, Minister for Arts, Sport and Tourism, Minister for Communications, Marine and Natural Resources, Minister for Foreign Affairs, Minister for Justice, Equality and Law Reform, Minister for Transport, [2008] ECR I-2483, par. 47-8.

28. C-12/08 Mono Car Styling SA in liquidation *versus* Dervis Odemis and Others, [2009] ECR I-6653, par. 46ff.

29. Joint cases C-317/08 Rosalba Alassini *versus* Telecom Italia SpA, C-318/08 Filomena Califano *versus* Wind SpA, C-319/08 Lucia Anna Giorgia Iacono *versus* Telecom Italia SpA, C-310/08 Multiservice Srl *versus* Telecom Italia SpA, [2010] ECLI:EU:C:2010:146.

30. C-279/09 Deutsche Energiehandels- und Beratungsgesellschaft mbH *versus* Bundesrepublik Deutschland, [2010] ECR I-13849, par. 33.

31. C-61/14 Orizzonte Salute - Studio Infermieristico Associato *versus* Azienda Pubblica di Servizi alla persona San Valentino - Città di Levico Terme and Others, [2015] ECLI:EU:C:2015:655, par. 48-50.

32. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29.

33. C-415/11 Mohamed Aziz *versus* Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), [2013] ECLI:EU:C:2013:164.

34. C-34/13 Monika Kušionová *versus* SMART Capital, a.s., [2014] ECLI:EU:C:2014:2189, par. 45.

Finally, in Pohotovost',[35] Sánchez Morcillo I[36] and Sánchez Morcillo II[37] —where the issues at hand pertain, respectively, to «articles 6 to 8 of Council Directive 93/13/EEC […], *in conjunction with* Articles 38 and 47 of the Charter» and «article 7(1) of Directive 93/13, *read in conjunction with* Articles 47 […] of the Charter» the Rewe-test and art. 47 EUCFR are presented as two essentially intertwined standards leading, almost by definition, to the same result; thus, this correlation radically distinguishes itself from the two-pronged approach seen in Alassini and Mono Car Styling,[38] as well as from the *genus as speciem* relationship displayed, despite in opposite terms, in Unibet/Impact and Orizzonte.

2.4. Legal discourses: the interaction between the objective and the subjective dimensions of effectiveness

With such a complex framework, mere reference to the *linguistic uses* is insufficient to grasp the meaning and significance of effectiveness in European private law, let alone the conditions for its legitimacy. To solve the problem, we may try to further classify said *uses* according to the function they perform, by identifying which *legal discourse* they fall within.

Indeed, the concept of effectiveness is normally connected to a series of fundamental questions: the definition of law (LD 1), the conditions for the existence and validity of legal norms (LD 2), as well as those of legal systems themselves (LD 3), and the legal protection granted to legal subjects (LD 4).[39] Although said issues may seem of mere theoretical and abstract relevance, they underpin all the legal matters which courts are normally called upon to decide. For example, the CJEU relies on effectiveness to: (i) determine the factual elements to be regulated, regardless of their national formal qualification, and rather focussing on the «effect» that they have on the European legal system (LD 1);[40] (ii) develop a notion of substantive, rather than

35. C-470/12 Pohotovost' S.R.O. *versus* Miroslav Vašuta, [2014] ECLI:EU:C:2014:101, par. 36 (emphasis added).

36. C-169/14 Juan Carlos Sánchez Morcillo and María del Carmen Abril García *versus* Banco Bilbao Vizcaya Argentaria SA, [2014] ECLI:EU:C:2014:2099, par. 47-8 (emphasis added).

37. C-539/14 Juan Carlos Sánchez Morcillo, María del Carmen Abril García *versus* Banco Bilbao Vizcaya Argentaria SA, [2015] ECLI:EU:C:2015:508, par. 46 (emphasis added).

38. C-470/12 Pohotovost' s. r. o. *versus* Miroslav Vašuta, par. 46-51, 53-56.

39. Please allow reference to Francesca Episcopo, «Principio di effettività e diritto giurisprudenziale nell'ordinamento europeo», in Emanuela Navarretta (ed.), *Effettività e Drittwirkung: idee a confronto. Atti del Convegno*, Torino, Giappichelli, 2017, p. 187.

40. In the case Fra.bo, for example, the Court considers a certifying company as subject to the obligations deriving from articles 28-37 TFEU, despite not qualifying as a public subject —not even on the ground of the *Foster* doctrine (C-188/89, Foster and other *versus* British Gas Plc., [1990] ECR I-3313)—

formal validity, so that European norms —just as the European legal order itself— is deemed existent and valid only if complied with by other subjects of law, both at the international and the national level (LD 2 and LD 3); and (iii) to protect individuals, by granting them specific European-based entitlements, and by providing them with tailored-made remedies, or ensuring that they are protected by national non-harmonized laws (LD 4).

Yet, again, it is impossible to retrieve a one-to-one relationship between *linguistic uses* and *legal discourses*,[41] since each specification seems to answer to all the different matters which the discourses mentioned above pertain to. In the leading cases Van Gend en Loos, Costa and Simmenthal, for example, the doctrine of direct effect is affirmed by saying that «every national court must, in a case within its jurisdiction, *apply Community law in its entirety and protect the rights which the latter confers on individuals* and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule».[42] By allowing European citizens to directly rely on a European norm before national courts, obtaining the recognition of the entitlement they derive from it, or merely excluding the application of national rules incompatible with the latter,[43] the Court ultimately ensures the effectiveness of European rules, and that of the European legal system itself.

In this sense, the «objective» and the «subjective» dimensions of effectiveness (the former being connected to LDs 1, 2 and 3, the latter to LD 4) have always been used to enforce European law, by concretizing European-based subjective rights through remedies that go beyond relevant legislation, raising private parties and national judges to private attorneys' general of European law, and promoting substantive as well as procedural harmonization.[44] Back to Francovich, the Court affirmed the States' liability for breach of European law claiming that «the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction *must ensure that those rules take full effect* and *must protect the rights which*

precisely because its activity «has the effect of restricting the marketing of products which are not certified by that body», C-171/11 Fra.bo Spa *versus* Deutsche Vereinigung des gas- und Wasserfaches eV (DVGW) - Technisch-Wissenschaftlicher Verein, [2012] ECLI:EU:C:2012:453, par. 28 ff.

41. Eugen Ehrlich, *Grundlegung der Soziologie des Rechts*, Munich; Leipzig: Duncker & Humblot, 1913.

42. C-106/77 Amministrazione delle Finanze dello Stato *versus* Simmenthal SpA, [1978] ECR 629, par. 21 (emphasis added). See also C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos *versus* Netherlands Inland Revenue Administration, 13; C-6/64 Flaminio Costa *versus* Enel, [1964] ECLI:EU:C:1964:66, par. 595.

43. On the distinction between substitutive and exclusionary direct effect, see Michael Dougan, «When worlds collide! Competing visions of the relationship between direct effect and supremacy», *Common Market Law Review*, no. 44/4 (2007), p. 931.

44. F. Episcopo, «Principio di effettività e diritto giurisprudenziale nell'ordinamento europeo», no. 38, p. 204 ff.

they confer on individuals».[45] In all the cases pertaining to procedural autonomy, the Rewe-test requires domestic law not to make the exercise of the rights attributed to the individual by Community law impossible or excessively difficult. Likewise, art. 47 EUCFR structures the right to effective remedy as a necessarily «ancillary» entitlement: its application is triggered by the violation of «those rights and freedoms guaranteed by the law of the Union», by definition backing up the effective enforcement of European-based rights and of European law itself.[46]

This consideration has a fundamental bearing on the evaluation of the CJEU's increasing use of art 47 EUCFR. Indeed, one may question whether the growing reference to art. 47 EUCFR really means that the Court is more involved with the protection of individual rights, or if it merely fits within the constant interaction between the subjective and objective effectiveness, as a means of decentralized enforcement of European law. Indeed, the analysis conducted so far already shows that, at least in the area of consumer and employment law, the legal protection achieved by referring to Johnston *effectiveness* and art. 47 EUCFR is largely fungible with that granted by the traditional *Rewe-effectiveness*, or even the primacy of European law. In Sánchez I, for example, the Court refers to the *Johnston-effectiveness* and art. 47 EUCFR in combination with the *Rewe-effectiveness*, but no significant shift in the overall judgment derives from that. Likewise, *Francovich* and *Factortame* demonstrate that the creation of new remedies, either through negative or positive integration, may be achieved by relying on instruments such as the *Rewe-effectiveness* or the *effet utile* of direct effect, which are traditionally associated with ensuring the structural primacy and effectiveness of European law, rather than judicial protection, taken as an axiological principle.[47]

This consideration begs for a critical evaluation of use of effectiveness in European private law. If different uses of effectiveness are intrinsically connected with one another and perform similar and complementary functions, what does the increasing use of art. 47 EUCFR *really* stand for? If there are no conclusive reasons to choose among the various forms of effectiveness, how can we grasp the meaning of the so

45. Joint cases C-60/90 and C-9/90, Andrea Francovich and others *versus* Italian Republic, [1991] ECR I-5357, par. 32.

46. See, for example: C-539/14 Juan Carlos Sánchez Morcillo, María del Carmen Abril García *versus* Banco Bilbao Vizcaya Argentaria SA, par. 43 ff: «However, it must be borne in mind in that regard that the scope of Directive 93/13 is limited to the protection of consumers against unfair terms in contracts which they enter into with sellers and suppliers. Therefore, issues arising from the fact that, under the national legislation at issue, consumers do not have the right to bring an appeal against a decision rejecting their objection based on grounds other than the unfairness of the contractual term which forms the basis of the enforcement order does not fall into the scope of that directive, and is therefore not liable to jeopardise the effectiveness of consumer protection which by the directive seeks to provide».

47. On the distinction between structural and axiological principles: T. Tridimas, *The general principles of EU law*, p. 3.

called principle of effectiveness, and set the conditions for its legitimate use by the CJEU and national courts?

3. RETHINKING EFFECTIVENESS IN EUROPEAN (PRIVATE) LAW: DOING THINGS WITH WORDS

Reference to *linguistic uses* and *legal discourses* proved on its own insufficient to understand how and when effectiveness operates legitimately. Yet, it shed light on the inconsistencies and unclarities in the CJEU's case-law, elevating the complex correlation among its different specifications, as well as the confusion deriving therefrom, to self-standing objects of inquiry, suggesting a way out of the fly-bottle.

Since no insights on the legitimacy and normative force of effectiveness may be derived directly from its meaning —which remain elusive—, we shall broaden the picture, and ask ourselves which kind of *Sprachspiel*[48] effectiveness is deployed for. Once seen as a tool employed to perform a specific activity, we could identify the conditions for its correct use indirectly, i.e. from the rules governing the activity itself.

In this perspective, all *linguistic uses* —whatever the context— represent *decision-making, hermeneutical and justifying canons*: when faced with controversial legal issues, the CJEU uses effectiveness as (*a*) the reason for adopting the desired solutions, (*b*) the hermeneutical directive for defining the meaning of European norms, to achieve the intended results, as well as (*c*) the external justification explaining the process leading to said decisions, and proving its correctness. Since deciding, sense-attributing and justifying are different expressions of the same phenomenon, effectiveness shall thus be understood as part of an *interpretative* practice.

A comprehensive review of the different theories on the interpretation of European law goes beyond the province of this paper. For the sake of the argument, it is sufficient to recall that European law lacks positive rules on its interpretation, and the CJEU was left to develop its own parameters and techniques, both as far as norm-interpretation and precedents-following are concerned.[49] Despite unsystematic, said

48. The term *Sprachspiel* (language-game) is used by Wittgenstein to designate elementary forms of language, «consisting of language and the actions into which it is woven» and was intended «to bring into prominence the fact that the speaking of language is part of an activity, or a form of life», which gives language its meaning: L. Wittgenstein, *Philosophical investigations*, § 23.

49. On precedent following, see Marc Jacob, *Precedents and case-based reasoning in the European Court of Justice. Unfinished business*, Cambridge, Cambridge University Press, 2014. Within the vast literature on the interpretation and legal reasoning of the CJUE, see Hjalte Rasmussen, *On law and policy in the European Court of Justice: A comparative study in judicial policymaking*, *Leiden,* Martinus Nijhoff Publisher, 1986; Joxerramon Bengoetxea, *The legal reasoning of the European Court of Justice. Towards a European Jurisprudence*, Oxford, Oxford Clarendon Press, 1993; Gerard Conway, *The limits of legal rea-*

tools are traditionally considered as valid second-order norms, precisely because they are effectively used by the Institution entrusted with the interpretative monopoly of European law, and ensure the highest level of integration. In the aftermath of Rasmussen's *On law and policy*,[50] a debate spread on the legitimacy of said approach, with a raise of normative claims advocating for a structured hermeneutic, capable of performing a serious external review on the Court's case law.[51] In particular, it has recently been claimed that the CJEU should be bound by literal and orginalist means of interpretation over dynamic ones, thus elaborating a hierarchy of interpretative criteria, which could ensure correct and predictable adjudication, as well as the respect of the principles of democracy, rule of law and separation of power.[52]

However, absence of specific interpretation-directive rules does not necessarily lead to totally unverifiable practices and results; on the contrary, it merely requires judicial-interpretation to be qualified according to its essential nature of practical moral discourse, whose correctness depends on the rationality of the underlying argumentation.[53]

If this is true, then —putting the traditional qualification of «general principle» into brackets— effectiveness shall first and foremost be qualified as an *argument*, and the normative theory for its legitimacy shall be constructed accordingly.

By relying on the studies on practical reasoning and argumentation, we may say that, within a given discourse, an argument is correctly used when the following basic conditions are met: (*a*) when it is clear (i.a) what its meaning is and (i.b) what relationship the latter entertains with the claim it is supposed to justify, and (*b*) when the premises on which it is based are accepted by the audience.[54]

From the analysis conducted so far, it seems that the aforementioned standards of correctness are not always present in the Court's jurisprudence. Indeed, effective-

soning and the European Court of Justice, Cambridge, Cambridge University Press, 2012; Gunnar Beck, *The legal reasoning of the Court of Justice of the EU*, Oxford, Hart Publishing, 2012.

50. Hjalte Rasmussen, *On law and policy in the European Court of Justice: A comparative study in judicial policymaking*.

51. See n. 48. For an overview, see Michael Bobek, «Legal reasoning of the Court of Justice of the EU», *European Law Review*, no. 39 (2014), p. 418.

52. Gerard Conway, *The limits of legal reasoning and the European Court of Justice*, Cambridge, Cambridge University Press, 2012, p. 273 ff.

53. Jerzy Wroblewsky, «Legal decision and its justification», *Logique & Analyse*, no. 14 (1971), p. 409.

54. Chaim Perelman and Lucie Olberechts-Tyteca, *Traité de l'argumentation. La nouvelle rhétorique*, Paris, Presses Universitaires de France, 1958; Stephan Toulmin, *The uses of arguments*, Cambridge, Cambridge University Press, 1964; Jerzy Wroblewsky, «Legal decision and its justification»; Robert Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Berlin, Suhrkamp, 1983; Paul Ricoer, «Interpretazione e/o argomentazione», *Ars Interpretandi. Annuario di Ermeneutica Giuridica*, no. 77 (1996).

ness appears as a *rhetorical argument*, used to persuade its audience about the opportunity and acceptability of its decisions,[55] rather than to ensure their legal exactness.

Firstly, given the complex interaction among its various specifications, effectiveness is used to present solutions adopted to enforce European law, as if they were exclusively or predominantly aimed at ensuring the protection of subjective rights and freedoms. Indeed, the increasing reference to art. 47 EUCFR in consumer law as an argument *ad abundantiam* may constitute an expression of this tendency (§ 2.3). However, even *linguistic uses* normally associated to the effectiveness of European law —such as the direct effect or its *effet utile*— may be portrayed as pertaining to the effectiveness of judicial protection, exploiting the *family resemblance* that the various uses of effectiveness share with one another.[56]

Secondly, if national courts do not grant effective remedies against the violation of European-based rights, regardless of the public or private nature of the wrongdoer, then the refusal to grant the requested protection may violate an additional entitlement, i.e. the fundamental right to an effective remedy, which, according to the Court's statement in Egenberger, has direct effect and needs no further implementation.[57] By relaying on said right, as well as the correlative duty to grant effective judicial protection, the CJEU may turn horizontal disputes into vertical ones, thus circumventing the peculiarities and restraints that the horizontal nature of the case would require. This may happen whenever the Court makes a selective use of effectiveness, leading to an asymmetric management of the dispute at stake.[58] If effectiveness of judicial protection is to be considered as an autonomous entitlement with its own constitutional relevance —not being merely complementary to the objective dimension of effectiveness—, then it should apply to all the legal situations involved. Pursuant to art. 47 EUCFR, «every individual whose rights and freedoms guaranteed by European law are violated has the right to an effective remedy before a judge, in compliance with the conditions set forth in this article»; taken seriously, said right shall also cover one's interest not to be imposed new obbligations due to an activist

55. Chaim Perelman and Lucie Olberechts-Tyteca, *Traité de l'argumentation. La nouvelle rhétorique*, p. 26 ff.

56. In Wittgenstein's theory, family resemblance constitutes «a complicated network of similarities overlapping and criss-crossing», exhibiting the lack of boundaries among different uses of the same concept: L. Wittgenstein, *Philosophical investigation*, § 66.

57. «Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such»: C-414/16 Vera Egenberger *versus* Evangelisches Werk für Diakonie und Entwicklung eV, [2018] ECLI:EU:C:2018:257, par. 78.

58. For an example of asymmetric management of the interests at stake, see C-438/05 International Transport Workers' Federation and Finnish Seamen's Union *versus* Viking Line ABP and OÜ Viking Line Eesti, [2007] ECR I-10779; Emanuela Navarretta, «Libertà fondamentali dell'U.E. e rapporti fra privati: il bilanciamento di interessi e i rimedi civilistici», *Rivista di Diritto Civile*, vol. 61, no. 4 (2015), p. 878.

interpretation on the applicability of direct effect, especially when —as in Dansk Industri— the right at stake could find adequate satisfaction through different remedies, e.g. by relying on State liability.[59]

Furthermore, effectiveness constitutes the *ratio* underlying different doctrines and legal tools, which may be easily used in combination with one another: (*a*) the direct effect is necessary to ensure the effectiveness of both European law and judicial protection;[60] (*b*) the *effet utile* of direct effect extends its application, for example including private parties among the addressees of the obligations imposed by European law,[61] or creating new remedies, such as compensation for breach of anti-trust rules;[62] (*c*) the *Rewe-effectiveness* requires national procedural autonomy not to make the exercise of European-based rights and freedoms impossible or excessively difficult;[63] (*d*) finally, according to the dominant view, *Johnston-effectiveness* and art. 47 EUCFR require domestic judges to further «upgrade» national remedies to ensure adequate protection to European-based rights. If said instruments are used together, without acknowledging that they are all designed to ensure the effectiveness of European law and the judicial protection of the rights and freedoms deriving therefrom, they ultimately shift the balance between the interests of the Union and those of the member States, obtaining an incremental integration of European law.[64]

Lastly, the more the determination of its meaning is treated as a premise, subtracting it from the burden of justification, the more effectiveness may be perceived as a state of fact, rather than as a vague and essentially contestable normative standard. The clash between effectiveness and national procedural autonomy enshrined in the *Rewe-Comet* test is paradigmatic of this process: invoking an unspecified need for effectiveness, especially when the asserted obstacles to the exercise of European-based rights are marginal, or due to the subject's failure to care for his own interests,[65] the

59. C-441/14 Dansk Industri (DI), acting on behalf of Ajos A/S *versus* Estate of Karsten Eigil Rasmussen, [2016] ECLI:EU:C:2016:278, par. 42-43.

60. C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos *versus* Netherlands Inland Revenue Administration.

61. C-415/93 Union royal belge des sociétées de football association ASBL *versus* Jean-Marc Bosman, [1995] ECR I-4921, par. 83-84.

62. C-453/99 Courage Ltd. *versus* Bernard Crehan and Bernard Crehan *versus* Courage Ltd. and Others.

63. C-557/12 Kone AG and Others *versus* ÖBB-Infrastruktur AG, [2014] ECLI:EU:C:2014:1317, par. 32-7.

64. Matej Accetto and Stefan Zleptnig, «The principle of effectiveness: rethinking its role in community law», *European Public Law*, no. 11 (2005), p. 375.

65. For cases in which claimants ask national to compensate for a procedural omission on the part of a consumer who is unaware of his rights, or fails to formulate its requests accordingly, see C-40/08 Asturcom Telecomunicaciones SL *versus* Cristina Rodríguez Nogueira [2009] I-09579 (where the Court, indeed, considered the time-limit consistent with the principle of effectiveness, since it was not in itself likely to

Court may present its interventions as mere application of value-neutral and technical rules, whereas they reflect discretionary choices on the degree of realization of the norm in question, altering the interplay between European and national law, as well as between judicial and legislative harmonization.

To sum up, the use of an indeterminate concept such as «effectiveness» as a decision-making and argumentative canon may lead to easy misunderstandings, and covertly steer the conflict between institutional interlocutors, moved by essentially different interests. Not addressing the question of why, how, and to what extent something —a rule, a remedy— must be made effective, the Court presents its decisions as the outcome of a necessary interpretative procedure, immanent to European law; yet, the alternative is not between effective and non-effective rights, as the Court seems to suggest, but among different *measures* of effectiveness. Meanwhile, adopting a language attributable to the individual rights talk, it selects its justificatory reasons —e.g. forms of «subjective» instead of «objective» effectiveness— as to promote the integration and construction of European law while persuading the interlocutors of the opportunity of its decisions, in a system where the precarious balance between different legal sources makes legitimization and acceptance converge.

4. CONCLUSIONS. ESCAPING THE LOOSE-NORMATIVE CONUNDRUM

Through a series of argumentative twists and turns, the Court expands its competences against member States and other European Institutions, to foster integration in constitutionally sensitive areas, also through private law adjudication. However, according to the principle of democracy, such practice may be accepted when sustained by a pre-existing consensus, but is less acceptable when new adhesion is needed, and in the long run may weaken the political Union. According to a theory of justice in private law matters, the conditions of legitimacy of judicial law-making need to be re-conceptualized, also questioning the unconstrained regulatory dimension attributed to horizontal cases by the CJEU.

These considerations shed a new light on the national implementation of the so called principle of effectiveness of European law. In general, national judges shall perform a strong and pro-active role in their dialogue with the CJEU, forcing the latter

make it virtually impossible or excessively difficult to exercise any rights which the consumer derives from Directive 93/13, par. 47-50); C-32/12 Soledad Duarte Hueros *versus* Autociba SA and Automóviles Citroën España SA, [2013] ECLI:EU:C:2013:637 (on the non-necessity of the ex officio power of national court to grant price reduction in case on non-conformity of goods, see Opinion of Advocate General Kokott, [2013] ECLI:EU:C:2013:128, par. 47 ff).

to second-guess and further weight its decisions, in order to open up new spaces in the deliberative process on the European project. Moreover, understanding the rhetorical dimension of effectiveness may help identifying to what extent national judges shall consider themselves bond to it. If —regardless of the version in which it manifests itself— effectiveness operates as a predominantly structural principle,[66] aimed at guaranteeing the maximum realization of European law, then judges shall not directly and autonomously contribute to its realization; for example, they shall not modify, via judicial corrective interpretation aiming at fostering their *effet utile*, directives that have been correctly transposed, because this would amount to alter the choices legitimately made by the national legislator. On the contrary, when effectiveness functions as an axiological principle, courts should try to implement it, seeking, by means of institutional dialogue,[67] to adjust it with national values of solidarity and justice, pursuant to the maximization of fundamental rights' legal protection. However, when doing so, they would be acting on the basis of a «national» account effectiveness. The potentials and limits of this domestic dimension of effectiveness shall constitute the next object of investigation of this research.

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66. T. Tridimas, *The general principles of EU law*, p. 3.

67. C-105/14 Criminal proceedings *versus* Ivo Taricco and Others, [2015] ECLI:EU:C:2015:555; C-42/17 Criminal proceedings *versus* M.A.S. and M.B., [2017] ECLI:EU:C:2017:936; C-42/17 Criminal proceedings *versus* M.A.S. and M.B., [2018] ECLI:EU:C:2017:936; Corte Costituzionale, ordinanza n. 24/2017, ECLI:IT:COST:2017:24; Corte Costituzionale sentenza 115/2018, ECLI:IT:COST:2018:115.

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