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Self-Preserving Policy or Fundamental Rights Adjudication?

– Mapping EU limitations of National Procedural Autonomy in the Name of Effective Judicial Protection

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Contents

Summary

This thesis examines the complex legal landscape of situations where the national procedural autonomy of EU Member States is affected by the general principle of EU law known as the principle of effective judicial protection. The meaning of effective judicial protection is unclear in the legal doctrine as well as in the case law from the Court of Justice of the European Union. It is often linked to the principles of equivalence and effectiveness, which also limit the national procedural autonomy of the Member States, as well as to several statutes in the Charter of Fundamental Rights and the European Convention on Human Rights.

The discrepancy in the ECJ's application of the principle of effective judicial protection risks a situation of legal uncertainty, problematic for both individuals seeking to ensure rights derived from EU law in courts, and for Member States seeking to fulfil their obligation to provide effective judicial protection of fundamental rights. Since national courts are entrusted with the task of applying and upholding EU law this legal uncertainty also risks a situation where the principle of effective judicial protection is not applied correctly throughout the EU. Therefore, this thesis maps the current legal landscape in regard of effective judicial protection by examining its development in the case law of the ECJ. The case law developing the principles of equivalence and effectiveness is also analysed, as is the potential codifications of the principle of effective judicial protection in Article 19(1) TEU, Articles 47 and 41 of the Charter and Articles 6(1) and 13 of the ECHR. For the purpose of analysing how the principle of effective judicial protection relates to the principles of equivalence and effectiveness as well as to the abovementioned statutes the thesis then analyses four judgments from the ECJ. Lastly, it examines the purposes of the principle of effective judicial protection, and whether the EU is providing sufficient protection of them.

It finds that the principle of effective judicial protection is an independent principle that should not be bundled with the principle of effectiveness since it has a different legal basis, different characteristics and a different purpose. Furthermore, the principle of effective judicial protection is enshrined in Article 47 of the Charter, and likely in Article 41 of the Charter and Article 19(1) TEU. There is also a clear link between the principle of effective judicial protection and Articles 6(1) and 13 ECHR, both through established case law and through the EU treaties.

The thesis finds that the purpose behind the principle of effective judicial protection is the obligation of EU Member States to secure the protection of individual rights derived from EU law. It thus differs somewhat from the purpose underlying the principle of effectiveness, which is to secure the effectiveness of EU law. It is hard to draw definitive conclusions on the adequacy of the ECJ's protection of this objective, due to a lack of case law. The ECJ's ambiguity in the existing case law is criticised.

Sammanfattning

Denna uppsats analyserar det komplexa rättsläget i situationer när principen om effektivt rättsskydd, som är en allmän princip inom EU-rätten, påverkar medlemsstaternas nationella processautonomi. Det är oklart, såväl i doktrin som i EU-rättslig praxis, vad principen om effektivt rättsskydd innebär. Den kopplas ofta samman med både likvärdighets- och effektivitetsprinciperna, som också begränsar den nationella processautonomin, och med flera bestämmelser i Europeiska unionens stadga om de grundläggande rättigheterna och i Europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.

EU-domstolens motsägelsefulla tillämpning av principen om effektivt rättsskydd riskerar att skapa rättsosäkerhet både för individer som vill få sina rättigheter fastställda av domstol och för medlemsstater som vill fullfölja sin skyldighet att säkerställa ett effektivt domstolsskydd av grundläggande rättigheter. Eftersom nationella domstolar är ansvariga för att tillämpa och upprätthålla EU-rätten riskerar denna rättsosäkerhet också att leda till ett rättsläge där principen om effektivt rättsskydd inte tillämpas korrekt i hela EU. Därför är syftet med denna uppsats att kartlägga rättsläget kring principen om effektivt rättsskydd genom att undersöka dess framväxt i praxis. Likvärdighets- och effektivitetsprincipernas framväxt i praxis analyseras också, liksom de eventuella kodifikationerna av principen om effektivt rättsskydd i artikel 19(1) EUF, artikel 47 och 41 i stadgan och artikel 6(1) och 13 i EKMR. Därefter analyseras fyra fall från EU-domstolen där domstolen hade möjlighet att tillämpa såväl principerna som deras kodifikationer i syfte att undersöka hur principen om effektivt rättsskydd förhåller sig till likvärdighets- och effektivitetsprinciperna å ena sidan och till de relevanta bestämmelserna i EUF, stadgan och EKMR å andra sidan. Slutligen undersöks vilka syften som principen om effektivt rättsskydd grundar sig på och huruvida EU-domstolen skyddar dessa syften tillräckligt.

Uppsatsen kommer fram till att principen om effektivt rättsskydd är en självständig princip, som inte ska klumpas ihop med effektivitetsprincipen eftersom den har en annan rättslig grund, andra egenskaper och ett annat syfte. Principen om effektivt rättsskydd är vidare kodifierad i artikel 47 i stadgan och troligtvis också i artikel 41 i stadgan och artikel 19(1) EUF. Det finns också en tydlig koppling mellan principen om effektivt rättsskydd och artikel 6(1) och 13 i EKMR, både i praxis och i EU-fördragen.

Uppsatsen finner att syftet med principen om effektivt rättsskydd är medlemsstaternas skyldighet att säkerställa ett skydd av individuella rättigheter som härstammar från EU-rätten. Det skiljer sig alltså från syftet med effektivitetsprincipen som är att säkerställa EU-rättens effektivitet. På grund av knapphändig praxis är det svårt att dra några slutgiltiga slutsatser om huruvida EU-domstolen skyddar detta syfte tillräckligt. EU-domstolens tvetydighet i den praxis som finns kritiseras.

Preface

Jonas and Linnea, I sincerely apologise for turning your office into mayhem during the writing of this thesis. Thank you for your consideration.

There are plenty of ways to summarise my time in Lund. I have chosen this eloquent and appropriate quote from *Charles Dickens'* A tale of Two Cities:

> *It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us (...)*

First, I would like to thank my family and wonderful friends. You have helped me make these past years the best of times. What is more, you have supported me when they felt like the worst of times.

My deepest gratitude is also extended to all of the truly incredible professors and teachers that made my studies the age of wisdom. Your intellectual brilliance will never cease to overwhelm me.

Laura, Hrafnhildur and Christin. Together we ran into the age of foolishness that is the ELMC. It turned out to be a true epoch, both of hope and of incredulity. At the end of the day, however, it became a true season of light, although it took some darkness to get there. Rest assured, I will always remember our adventure as the highlight of my studies. We would of course never have made it without our coaches, Xavier, Angelica, Justin, Eduardo and Megi. I will always envy your ability to inspire the people in your surroundings. There are no words that can aptly describe what your passion and dedication have meant to me.

Being accepted to the law programme meant a true spring of hope for me, but, as in all great times, there have also been winters of despair. However, these have been easily endured for two reasons. The first being the challenge and responsibility that comes with being employed as an amanuensis at the faculty, thank you Magnus and all of my fellow colleagues and friends. You have been invaluable to me. The second reason is the joy of the Master's programme; it truly made all the difference for me.

As did meeting you on the 7 March 2012, Sanja. From our first discussion at the lunch-seminar concerning case C-366/10, to receiving your e-mail with the final comments on this thesis, you have been my role model. Thank you for exceeding the designated time for thesis supervision already before I registered for the course. Thank you also for letting me assist you with the bibliography of your book, allowing me to be inspired in the process. But most of all, thank you for believing in me.

There is one person above all others that have made these past five years the best years of my life. Alexandra, we have everything before us.

Abbreviations

AG	Advocate General
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECJ	Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

This thesis sets out to examine the complex legal landscape of situations where EU law limits, or at least affects, the national procedural systems of its Member States in the pursuit of what is referred to as 'effective judicial protection', the meaning of which is unclear both in doctrine and in the case law of the Court of Justice of the European Union.[1]

It is important to bear in mind the special features of the EU procedural system. From the very beginning of the EU legal order, it has been the responsibility of the Member States to enforce EU law in their pre-existing national procedural systems. The Court of Justice[2] already in the seventies held that in the absence of harmonising EU law the organisation of procedural and judicial systems is a competence of the Member States, subject only to the limitations of two principles of EU law – the principles of equivalence and effectiveness.[3] As long as national procedural systems complied with these requirements, the EU would not interfere even though it meant that the remedies for breaches of EU law would be different, depending on the national legislation of the Member State in question.[4]

Since then, the legal context surrounding national procedural autonomy has evolved. The simplified picture of national procedural autonomy only being limited by the principles of equivalence and effectiveness is no longer true. Now, the legal landscape is significantly more complex for at least three reasons.

Firstly, the regulatory landscape has changed. The CJEU has in its case law, parallel to developing the principles of equivalence and effectiveness, utilised another principle, namely that of 'effective judicial protection'.[5] There is also a multitude of new legal statutes governing procedural safeguards of individual rights to consider. The Charter of Fundamental rights[6] containing Articles 41 (right to good administration) and 47 (right to an effective remedy and to a fair trial) is one example. Another example, perhaps the most obvious one, is the European Convention on Human Rights[7], which according to provisions of primary law[8], as well as case law

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[1] Hereinafter 'CJEU', the term used when referring to the Court of Justice of the European Union as a whole. When referring specifically to one of the three courts that together constitute the CJEU their respective name or abbreviation is used, see Articles 13 and 19 of the Treaty on European Union (hereinafter 'TEU') establishing the CJEU and its three instances.
[2] Hereinafter 'ECJ'.
[3] Case C-33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989 and Case C-45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 02043 and Anthony Arnull, 'The Principle of Effective Judicial Protection in EU Law: an Unruly Horse?' (2011) 36 EL Rev 51, 51–52.
[4] Paul Craig, *EU Administrative Law* (2nd edn OUP 2012) 704.
[5] Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 01891.
[6] Hereinafter 'Charter'.
[7] Hereinafter 'ECHR'.

of the ECJ[9], must be considered along with the case law of the European Court of Human Rights.[10] Furthermore, the Treaty on European Union[11] that entered into force in 2009 entails Article 19(1), governing 'effective legal protection' as a responsibility of the Member States.

The differentiation of these various legal sources can of course be argued to be merely a chimera, meaning that all of the mentioned principles and statutes represent but different labels for the same right, and that no real change of the law has occurred since the seventies. Where there are many names there are, however, often many meanings and therefore a risk for confusion as to what the substance referred to actually consists of. Given the binding, but unclear, relationship between these different principles and statutes, ensuring effective judicial protection has become a complicated affair.

Secondly, the CJEU is not the sole interpreter of the legal sources described above. The ECJ is, of course, the sole interpreter of EU law as such,[12] but it is, nonetheless, bound by various other legal sources such as the ECHR and other instruments of International law.[13] These legal sources have their own interpreters, such as for example the ECtHR, responsible for interpreting the ECHR. As a result, a case from the ECtHR may change the meaning of the principle of effective judicial protection in EU law, without any action from the EU legislator or the CJEU.

Thirdly, the purposes behind the different norms limiting national procedural autonomy have evolved. The primary purpose of the principles of equivalence and effectiveness is to safeguard the effective application of Union law.[14] This stands in contrast to case law stating that the protective purpose of the principle of effective judicial protection is the possibility of individuals to ascertain their rights derived from EU law.[15] Articles 41 and

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[8] Article 6(3) TEU and Articles 52(3) and 53 of the Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (hereinafter 'Charter').

[9] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 00491, para 13 and Case C-36/75 *Roland Rutili v Ministre de l'intérieur* [1975] ECR 01219, para 32.

[10] Article 52(7) of the Charter, which refers to the Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17, which in turn clarifies in relation to Article 52 that also case law of the European Court of Human Rights (hereinafter 'ECtHR') shall be taken into account.

[11] Consolidated Version of the Treaty on European Union [2012] OJ C326/13. Hereinafter, 'TEU'.

[12] Article 267 of the Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47. Hereinafter 'TFEU', and case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 04199, para 12.

[13] See regarding the ECHR Article 6(3) TEU, and regarding other instruments of international law Article 216 TFEU and case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, para 50. The importance of International agreements in regard of the development of fundamental rights as general principles of EU law are described in section 4.3.1 below.

[14] Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 00629, paras 20–23.

[15] Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651, para 20.

47 of the Charter as well as Articles 6(1) and 13 of the ECHR, similarly set out to protect the rights of individuals, as is clear from their wording.

This scattered image of effective judicial protection raises many questions. First and foremost, what does the concept entail? Are there differences between the different principles and statutes affecting national procedural autonomy? If so, what are they and in which situations should the different principles and statutes be applied?

Once the answers to these questions have been concluded, other questions are raised, such as whether or not the current application of these legal sources actually protects their intended purposes.

In sum, the principle of effective judicial protection is a concept that is far from clear. The legal framework governing it consists of different legal sources, whose meaning and interaction is not fully clarified. This unclear image generates a need for mapping the principle of effective judicial protection in CJEU case law, as well as in EU legislation, and evaluate whether it is sufficiently accomplishing its purpose.

1.1 Background

Ever since the early days of the European Union, it has been the task of national courts to apply and enforce EU law.[16] In the absence of harmonised procedural rules, they have been obliged to apply EU law according to their respective national procedural systems and as an integral part of their own legal system.

The potential danger of the emergence of a diversified and ineffective application of EU law was countered by the adoption of the principles of equivalence and effectiveness, established by the ECJ in *Rewe*[17] and *Comet*[18]. They have since been confirmed in numerous cases, including recent ones showing that they are still valid law.[19] In short, the principle of equivalence prevents national procedural provisions from discriminating, both directly and indirectly, between claims under EU law and similar claims under national law.[20] The principle of effectiveness prevents national rules from making it impossible, or render it excessively difficult,[21] to invoke provisions of EU law. The two principles are cumulative, meaning

[16] *Rewe* (n 3), para 5.
[17] ibid.
[18] Case C-45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 02043.
[19] Case C-268/06 *Impact v 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 and Joined cases C-317/08 to C-320/08 *Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08)* [2010] ECR I-2213.
[20] *Rewe* (n 3), para 5.
[21] Case C-199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 03595, para 14.

that they must both be fulfilled in order for a national procedural system to comply with EU law.[22]

This system, in which the Member States are responsible for upholding EU law under their national procedural laws, has been described as one of national procedural autonomy that is limited only by the principles of equivalence and effectiveness.[23]

In the case law of the CJEU individuals looking to benefit from rights under EU law have often relied upon the principles of equivalence and effectiveness to secure their rights.[24] However, the primary purpose of the principles of equivalence and effectiveness has never been to safeguard the right of individuals, but to ensure the effective application of EU law.[25] The rationale for this has been the view that the principles of equivalence and effectiveness are part of a larger legal system assuring the effectiveness of EU law.[26]

Nial Fennelly identifies this system as comprised of the principles of Direct Effect, Supremacy (or Primacy), conform interpretation of national law (or Indirect Effect), the Duty to apply EU law ex officio, Effective Judicial Protection for EU rights, State Liability and the Preliminary Ruling Procedure. Together they ensure the effective and uniform application of EU law throughout the Union.[27]

Parallel to developing the principles of equivalence and effectiveness, the ECJ also developed case law concerning similar situations, but where the court instead relied upon the principle of 'effective judicial protection'[28]. A principle having as its purpose to protect individual rights,[29] and therefore differs from the principles of equivalence and effectiveness which, as mentioned, serve a different purpose.

Since the entry into force of the Lisbon treaty in 2009, individuals have been given an explicit right to an effective remedy and to a fair trial in Article 47 of the Charter, which is a codification of already existing rights, stemming from case law of the CJEU. [30]

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[22] ibid, para 17.
[23] *Craig* (n 4).
[24] All of the cases described in chapter two concerned individuals seeking to rely on EU rights, but being prevented from doing so due to national rules, subsequently evaluated against the principles of equivalence and effectiveness.
[25] *Simmenthal* (n 14).
[26] Nial Fennelly, 'The National Judge as a Judge of the European Union' in Allan Rosas, Egils Levits and Yves Bot (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law* (T.M.C. Asser Press 2013) 69.
[27] ibid, 63–64.
[28] See chapter three.
[29] *Johnston* (n 15), para 20.
[30] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17, given interpretative value according to Article 52(7) of the Charter. The explanations also clarify that Article 47 is a right corresponding to Article 6(1) ECHR.

Through Article 6(3) TEU, individuals are also protected by the ECHR, as well as by constitutional principles common to the Member States, as General Principles of EU law.[31]

There are other statutes entailing similar protection, which are yet to be developed in the case law of the CJEU. Article 19(1) TEU states that Member States have an obligation of ensuring 'effective legal protection', the meaning of which is still unclear. Furthermore, Article 41 of the Charter gives individuals a right to good administration that has recently been the focus of the ECJ, which has found it to be of general application.[32]

1.2 Problems and research questions

As described, determining the substantive content of effective judicial protection in EU law is difficult. Some scholars rely on Article 47 of the Charter and case law of the ECJ to conclude that the principle of effective judicial protection is a more general principle, whilst the principles of equivalence and effectiveness are additional 'overarching principles'. [33] Others seem to avoid the concept altogether and instead address the principles separately.[34] The case law of the ECJ provides little guidance, since the CJEU varies in its use of the principles, leading to case law where seemingly similar situations are met with different reasoning by the courts. The first question of this thesis is therefore what the principle of effective judicial protection entails.

In order to answer this question it must be divided into two sub-questions, firstly

1)

   a) *Is there any difference between the principle of effective judicial protection on the one hand and the principles of equivalence and effectiveness on the other?*

In relation to the first sub-question it is also of interest to examine the role played by the different codifications said to encompass parts, or the whole of, the principle of effective judicial protection. Does the court utilise Articles 47 and 41 of the Charter, Articles 6(1) and 13 ECHR or Article 19(1) TEU? If so, how do they relate to the principles developed in case law? The second sub-question is therefore,

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[31] Article 52(3) and (4) of the Charter.
[32] See section 4.3.6.
[33] Koen Lenaerts, 'Effective Judicial Protection in the EU' (Assises de la justice conference, Brussels, November 2013) <http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf> accessed 23 May 2014, 1 and similarly, Johanna Engström, *The Europeanisation of Remedies and Procedures through Judge-made Law: Can a Trojan Horse achieve Effectiveness?* (European University Institute 2009) 50–54 who describes the principles of equivalence and effectiveness as overarching.
[34] See *Fennelly* (n 26), who addresses the principles of equivalence and effectiveness under the headline 'National Procedural Autonomy', and subsequently addresses the principle of effective judicial protection under its own headline.

b) *How do the codifications of the principle of effective judicial protection relate to the principles of equivalence, effectiveness and effective judicial protection?*

After clarifying the structure and content of the principle of effective judicial protection, in case law as well as in codifications, it is relevant to make a normative evaluation of how the ECJ applies the principle. Since there is confusion as to which legal sources the national procedural legislation is to be compared with, questions arise as to which underlying purposes there are and whether they are being adequately protected by the ECJ. In order to answer these, the second question is,

2)

a) *Which is/are the purpose(s) underlying the principle of effective judicial protection?*

b) *Is the ECJ adequately protecting this/these purpose(s) in its case law?*

The purpose of this thesis is thus twofold. First, it is a descriptive thesis that seeks to establish what the law *is*. The last sub-question is however of a different nature, since it seeks to establish the adequacy of the protection offered by the principles of equivalence, effectiveness and effective judicial protection. In that sense, this thesis seeks to establish what the law *ought* to be. The answer to that question will therefore consist of normative values.

1.3 Structure and methodology

This thesis is thematically structured. It describes the different principles and codifications in separate chapters. The chapters are arranged in chronological order, starting with the principles of equivalence and effectiveness, which were developed first, and ending with the codifications that entered into force with the Lisbon treaty. The content of each chapter is also arranged chronologically, describing the developments in the order in which they occurred.

The *second* chapter will describe the evolvement of the principles of equivalence and effectiveness. It divides their evolution into three waves of case law. The *third* chapter will describe and examine case law that the ECJ frames as concerning the principle of effective judicial protection. In doctrine, a differentiation between the cases described in chapter two and three is usually not done. Instead, they are treated as different aspects of the same area of law.[35] The rationale behind the categorisation made in this

[35] See for instance *Engström* (n 33), Angela Ward, *Judicial Review and the Rights of Private Parties in EU Law* (2nd edn, OUP 2007) and Michael Dougan, *National Remedies Before the Court of Justice* (Hart Publishing 2004). In contrast a separation is made by other scholars, see for instance Sacha Prechal and Rob Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 31 and *Fennelly* (n 26). As previously described the latter addresses the principles of equivalence and effectiveness under the headline

thesis is the ambition to examine each possible part of effective judicial protection by its own merits, in order to get a clearer image of the principle altogether. A fitting analogy is that of disassembling a LEGO-figure in order to examine each piece of LEGO separately.

The *fourth* chapter describes different legal statutes that are said to entail the principle of effective judicial protection, or at least parts of it.

The *fifth* chapter takes a slightly different approach than the preceding chapters, as it seeks to describe how the ECJ has approached the issue of effective judicial protection once it got access to the legal statutes described in chapter four. It therefore describes cases that either refer explicitly to one of those statutes, or arose after the 1 December 2009, when the Lisbon treaty entered into force. To return to the LEGO analogy, this chapter describes the figure of effective judicial protection as a whole, the purpose being to investigate how the previously examined LEGO-pieces are being fitted together by the ECJ.

The *sixth* chapter provides some concluding remarks on the findings in the previous chapters, as well as the conclusions that can be drawn from the conducted analysis.

This thesis will use a legalistic method in order to explore what the law *is*. The method consists of several steps, beginning with a textual analysis of the relevant provisions. Thereafter a conceptual analysis will follow, examining not just the wording of the relevant provision, but also their factual context and relation to other similar provisions. The third step, as noted above, is to examine the actual application of the relevant provisions. In order to examine the law as it *is* this thesis will examine how it is applied. This is important, if for no other reason, in order to identify potential discrepancies between the text of the provisions and their actual application. Hence, the emphasis of the method used in this thesis is not on doctrinal interpretations, but on the case law of the ECJ.

1.4 Terminology

Throughout this thesis, 'the principle of effective judicial protection' is used as the term, or concept, being investigated. It has its roots in the ECJ's adoption of the concept in the case law described in chapter three, but it is not equated to it *per se*. The reason for this is to avoid an assumption that the principle has remained the same throughout the evolvement of EU law. In an attempt to clarify this, chapter three has been named 'case law labelled effective judicial protection'.

Some scholars refer to the 'principles of effective judicial protection' in plural.[36] The reason is most likely that they want to use a bundling term, for

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'National Procedural Autonomy', and addresses the principle of effective judicial protection under its own headline.

[36] See, for instance, Xavier Groussot and Henrik Wenander, 'Self-standing Actions for Judicial Review and the Swedish Factortame' (2007) 26 Civil Justice Quarterly 376, 383.

the principles of equivalence and effectiveness and the principle of effective judicial protection. This is likely to have its root in an understanding of the principles as governing the same matter, or at least being closely connected. That assumption is not made in this thesis, and consequently the principle of effective judicial protection is referred to in singular, as does the ECJ.[37]

In the description of case law the term 'the national court' is used to describe all instances of national courts. There is no reason to stay focused on the national judicial procedure prior to a question being referred to the ECJ, if not relevant for the court's assessment. In a few cases, an exception has been made in order to vary the language, and thus facilitate for the reader. These have been clearly marked.

1.5 Delimitations

The purpose of this thesis is not to give a full and exhaustive statement of all aspects of effective judicial protection. Some delimitations are therefore necessary, but also helpful in defining the core of the issues examined.

This thesis seeks to evaluate the principle of effective judicial protection in relation to procedures before national courts. No cases regarding the principle of effective judicial protection in relation to proceedings against the institutions of the EU will therefore be addressed.

The case law examined in this thesis does not include competition law cases. The principle of effective judicial protection does apply in the field of competition law,[38] but it is not without risk to draw analogies from competition law and apply them to other fields of EU law. This is so because of the different and more particular features of competition law cases. They are often focused on economic factors, which may explain diversions from principles as developed in other fields of EU law.

The EU has concluded several international agreements containing provisions on effective judicial protection. One example is the UN Convention on Rights of Persons with Disabilities[39], to which the EU is a signatory. Since the EU is bound by the convention, it forms an integral part of EU law, as confirmed by the ECJ.[40] Even so, such international agreements often constitute their own legal regimes, and will therefore not be addressed.

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[37] See, for instance, Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271.

[38] Regarding the principles recent development in the field of competition law, see Eleanor Sharpston, 'Effective Judicial Protection through Adequate Judicial Scrutiny – some reflections' (2013) 4 Journal of European Competition Law & Practice 453.

[39] The UN Convention on the Rights of Persons with Disabilities <http://www.un.org/disabilities/convention/conventionfull.shtml> accessed 22 May 2014.

[40] Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) v HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (C-337/11)* [2013] OJ C156/6, paras 28–30.

A similar situation is that when the EU is not just a signatory to an international agreement, but also has adopted secondary legislation to enact it. In the context of effective judicial protection, the Aarhus convention[41] is an example of that. In addition to being a party to it, the EU has adopted two directives [42], making its provisions binding on the Member States. Furthermore, the EU has adopted a Regulation[43] making the convention binding also on its own institutions. Since the international agreements upon which such secondary legislation is based will not be addressed, neither will the Directives and Regulations enacting them.

One important exception to the above stated is made in relation to the ECHR, which is intimately connected to EU law, as will be described in chapter four.

In relation to the material used for analysis it is important to note that not all case law on national procedural autonomy and effective judicial protection will be analysed. The cases selected for analysis will be the cases that first establish a relevant principle, or establish a development of such a principle. As far as possible, the selected cases are cases that are considered to be of importance in the legal doctrine, either for developing effective judicial protection in itself (including expanding or defining its areas of applicability), or for confirming that certain aspects of it is still valid law. In order to ascertain the highest possible consistency and credibility, the case law examined is limited to judgments from the ECJ, meaning that cases from the General Court and cases resulting not in judgments, but in orders will not be addressed.

In regard of the last sub-question it is important to note that the analysis of whether or not effective judicial protection fulfils its purpose does not include a *carte blanche* approach, drafting a new concept of the law as it ought to be without relation to its current surrounding context. On the contrary, the analysis will take its starting point in the different sources establishing the principle of effective judicial protection and from there analyse whether or not there are holes in the logic of the ECJ. In other words, the thesis will lay the puzzle and see if there are any pieces missing; it will not evaluate the beauty of the puzzle itself.

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[41] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> accessed 22 May 2014.

[42] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26 and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17.

[43] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13.

Analysing official documents of the EU is always connected with linguistic problems. It has not been possible to conduct a comparative study between different translations of the documents used in this thesis, they have therefore been read, and analysed, solely in English.

Lastly, it should be mentioned that given the purpose of this thesis there is no need to describe in detail the outcome of each particular case. It is the ECJ's reasoning in regard of the principles and provisions themselves, and how they are utilised, that is of interest to the analysis – not whether or not a particular feature of national legislation was held to be in compliance with EU law or not. Several scholars take a different approach, defining the principle of effective judicial protection by the material outcome in regard of, for example, time limits for bringing an action before courts.[44] This will not be done in this thesis.

[44] See for instance Angela Ward, *Judicial Review and the Rights of Private Parties in EU Law* (2nd edn, OUP 2007) ch 4.

2 The Principles of Equivalence and Effectiveness

The principles of effectiveness and equivalence were developed solely in the case law of the CJEU. Therefore, the best way to explain and examine these principles is to follow their evolvement through the case law of the ECJ, starting with the initial cautious evaluation of national procedural autonomy,[45] following it through the ebbs and flows of varying activism ending up with the adoption of the approach used by the court in more recent cases.[46]

2.1 The First Wave of Case Law

In this first wave of case law, the principles of equivalence and effectiveness originated based on a cooperative and respectful reasoning by the ECJ, highlighting the role of national procedural autonomy. The principle of sincere cooperation[47] was used as the basis for intervention in the Member States national procedural laws, and the emphasis was not put on the supremacy of EU law, but on the cooperation between national courts and the CJEU. The principles were established in the cases of *Rewe*[48] and *Comet*[49] as early as in the 1970s.

Rewe concerned the import of French apples by two German companies that had paid a 'phyto-sanitary inspection' charge mandatory under national legislation. It was not disputed that such charges were contrary to EU law, but the national procedural rules at the time prescribed a time limit within which unlawfully paid charges could be challenged. That period had passed before the action was brought to the national court, and thus the question of whether or not such time limitations were in conformity with EU law arose.

The ECJ relied on the principle of sincere cooperation in finding that national courts were entrusted with ensuring the legal protection that Union citizens derive from the direct effect of EU law. It then emphasised that it is, in the absence of EU harmonisation,

> for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such

[45] Paul Craig, *EU Administrative Law* (OUP 2012) 704.
[46] ibid 715.
[47] Now given expression in Article 4(3) TEU.
[48] Case C-33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989.
[49] Case C-45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 02043.

> conditions cannot be less favourable than those relating to similar actions of a domestic nature.[50]

Thereby, the ECJ established the principle of equivalence as a limit to national procedural autonomy. The court then repeated itself by pointing out the specific treaty provisions that enabled harmonisation measures to be taken if national rules restrained the functioning of the internal market,[51] followed by the conclusion that in the absence of such harmonisation the national procedural rules are to apply. The court thus based its scrutiny of national procedural rules on the functioning of the internal market, or, in other words, the effectiveness of EU law.

The court continued its reasoning by stating that national procedural rules could not make it 'impossible in practice to exercise the rights which the national courts are obliged to protect.'[52] That phrasing constitutes the roots of the principles of effectiveness.[53]

The *Comet*-case, delivered on the same day as *Rewe* concerns similar charges, the difference being that they were placed on the exporter instead of the importer. The reasoning, and even the wording, that described the principles of equivalence and effectiveness were identical to that in *Rewe*.[54]

The first cases establishing the principles of equivalence and effectiveness were thus quite clear in stating that the legal foundation of the principles is the principle of sincere cooperation, and that the responsibility for enforcement of EU law is, as a corollary, clearly put on the Member States. In finding so, the court showed respect for the national procedural systems of the Member States, acknowledging that the national courts were also acting as EU courts, enforcing EU law within their jurisdiction.

In the subsequent case, *Rewe-Handelsgesellschaft Nord*[55], the court clarified that there is no obligation on the Member States to introduce new remedies in their national procedural systems. The case concerned so-called *butter-buying cruises* that were organised in Germany. At the time shipping companies organised short cruises that entered territorial waters or the high seas outside of German territory, and therefore also outside of the territory of the EU. As a result of this butter and other goods could be bought by the passengers without the imposition of taxes. In fact, since the ships left the

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[50] *Rewe* (n 48), para 5 at 1997.
[51] At the time the 'Common Market'.
[52] *Rewe* (n 48), para 5 at 1998.
[53] It is sometimes described as the 'principle of practical impossibility', presumably to differentiate it from later developments of the principle of effectiveness, see for instance Paul Craig (n 45) 704. However, *Rewe* is generally accepted as establishing principle of effectiveness, see for instance Sacha Prechal and Rob Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 31 and the ECJ's judgment in case C-279/09 *DEB* [2010] ECR I-13849, para 28, where the court refers to the findings in *Rewe* as 'well-established case-law on the principle of effectiveness'.
[54] *Comet* (n 49), paras 11–16 in comparison with *Rewe* (n 48), para 5.
[55] Case C-158/80 *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v Hauptzollamt Kiel* [1981] ECR 1805.

territory of the EU, all agricultural products (such as butter) were subsidised by the Union. This upset German wholesalers and retailers, who brought charges against these cruises before national court. In those proceedings the question arose of whether a trader had the right to ask a national court to require other traders to comply with Union law. The question was referred to the ECJ, which answered in the negative, declaring that the treaties are 'not intended to create new remedies in the national courts'.[56]

The original jurisprudence is in that sense respectful towards the Member States, and their organisation of judicial procedures. The picture that was painted was indeed a picture with the emphasis on Member State authority. Had the Member States not agreed upon harmonisation of procedures through EU-legislation, then EU law would only in exceptional cases affect national procedural rules. The rhetoric used by the ECJ suggested that the meaning of the principle of sincere cooperation was that the EU should be respectful towards the national procedural orders of its Member States, since the task of applying EU law belonged to the national courts and not the EU. The clear picture that has emerged thus far was, however, nuanced some years later through cases such as *San Giorgio*[57], *von Colson*[58] and *Dorit Harz*[59]. The two latter cases will be addressed in chapter three.

San Giorgio concerned a national rule on the burden of evidence. SpA San Giorgio was an Italian dairy producer subject to unlawful charges on health inspections. Again, it was not disputed that the charges were unlawful, but the Italian government claimed that the costs had been passed on to the customers of SpA San Giorgio, and that reimbursement would therefore amount to unjust enrichment.

The court used the same test as in *Comet* and *Rewe*, stating first that the entitlement to repayment is a right conferred on individuals by EU law. Secondly, it stated that the repayment could be sought only within the framework laid down by national law, and thirdly it stated that those provisions could not be less favourable than those relating to similar national charges.[60]

Next, the court addressed the principle of effectiveness, and widened its scope of application. The court held that 'any requirement of proof which has the effect of making it virtually impossible *or excessively difficult* to secure repayment of charges levied contrary to Community law would be incompatible with Community law'[61] The impossibility criteria from *Rewe* was thereby amended with a criteria of excessive difficulty,

Towards the end of the judgment, the ECJ also clarified that the principles of equivalence and effectiveness are cumulative. It stated that if national

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[56] ibid, para 44.
[57] Case C-199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 03595.
[58] Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 01891.
[59] Case C-79/83 *Dorit Harz v Deutsche Tradax GmbH* [1984] ECR 01921.
[60] *San Giorgio* (n 57), para 12.
[61] ibid, para 14 (emphasis added).

rules rendered it virtually impossible to secure repayment of charges they were incompatible with EU law, even if the same virtual impossibility extended to all national measures as well.[62]

San Giorgio thus marked a development of the principle of effectiveness, easing the requirement of virtual impossibility by including also situations where it was not impossible, but merely excessively difficult, to secure a right conferred by EU law. Another novelty in *San Giorgio* is the statement that in principle, there is a right to be reimbursed for unlawfully levied charges,[63] even if the national legislation does not provide for it. The ECJ thus found that there are situations where new remedies may have to be adopted, putting a limitation to the *no new remedies*-rule adopted in *Rewe-Handelsgesellschaft Nord*[64].

2.2 The Second Wave of Case Law

Some years after the initial cases were delivered a second wave of cases relating to the principles of equivalence and effectiveness arose. This second wave is characterised by a different approach by the CJEU, focusing on the obligation of Member States to ascertain the effective application of EU law, based on the principle of supremacy.[65] The previously respectful attitude towards the national procedural autonomy of the Member States was then replaced by a rhetoric focused on the effective application of EU law, indicating that the principles of equivalence and effectiveness mark a self-preserving policy.

The first case to mark this change of attitude is *Simmenthal*[66]. It concerned charges for public health inspections of beef intended for human consumption. The charges had been declared unlawful in previous proceedings, but the national courts were not empowered to set aside conflicting national legislation until the authorities especially entrusted with this power had done so. The ECJ was asked by the national court whether this was an obstacle to the full, complete and uniform effect of EU law. The ECJ began by stating that the very meaning of direct applicability was that EU law must be fully and uniformly applied in all Member States from the date of entry into force.[67] It then stated that by entering into force these rules automatically declared incompatible existing national legislation inapplicable, and precluded the valid adoption of new conflicting laws.[68] Against this background, the court held that it would be an impairment of

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[62] ibid, para 17.
[63] ibid, para 12.
[64] *Rewe-Handelsgesellschaft Nord* (n 55).
[65] Regarding the principle of supremacy and its legal context, see Sacha Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in Catherine Barnard (ed) *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (OUP 2007).
[66] Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 00629.
[67] ibid, para 14.
[68] ibid, para 17.

the effectiveness of EU law if national courts were prevented from applying it in accordance with a judgment from the CJEU. Therefore, an obligation on national courts to set aside any conflicting national rule existed.[69] The court stated that:

> Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.[70]

The reasoning in *Simmenthal* thus quite clearly differs from the previous reasoning, where the court emphasised that it is for national courts to uphold EU law in accordance with their respective national procedural systems. Instead, the reasoning in *Simmenthal* takes as its starting point the full and uniform application of EU law. Instead of turning to the principle of sincere cooperation, the court turned to the principle of supremacy as the basis for the obligation of national courts to disapply conflicting national procedural rules. The outcome of the cases in the first and second waves of case law is thus similar, but the reasoning differs substantially. In *Simmenthal* there is not even a mentioning of the principle of sincere cooperation, which formed a central part of the court's reasoning in the first wave of case law.

The emphasis on effectiveness of EU law is relevant also when examining the rule that the treaties are not intended to introduce new remedies into the national legislation of EU Member States. The conclusion in *Simmenthal* that Member States have to do 'everything necessary' to set aside conflicting national legislation implies an obligation to introduce new remedies. The court would clarify its reasoning in *Factortame I*[71].

The *Factortame I* case was the first in a series of cases before the ECJ reaching from 1989 to 1996, when the third and final judgment was delivered by the ECJ.[72] The cases have had a great impact on several areas of law and have been addressed extensively in doctrine.[73] The factual

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[69] ibid, paras 20–21.
[70] ibid, para 22.
[71] Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433.
[72] The other cases from the CJEU are case C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-3905 (Factortame II); and joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-01029 (Factortame III). In addition, the affair gave rise to two additional proceedings in national courts, see David Vaughan 'Factortame and After: A Fishy Story' (2005) 16 *European Business Law Review* 511.
[73] See for instance A. E. Munir, *Fisheries after Factortame* (Butterworths 1991), describing a whole new fisheries market in the United Kingdom and *Vaughan*, ibid, which gives a concise review of the sequence of events.

background in *Factortame I* was the national regulation of fishing outside the coast of the United Kingdom. At the time of *Factortame I* the UK had recently changed its laws on registration of fishing vessels in order to 'put a stop to the practice known as "quota shopping" whereby, according to the United Kingdom, its fishing quotas are "plundered" by vessels flying the British flag but lacking any genuine link with the United Kingdom'.[74]

Under the new legislation a vessel could be registered only if it could be proven that ownership of the vessel was British; that it was managed in, and its operations directed and controlled from the UK; and that all charterers, managers or operators of it were qualified persons or companies. The effect of the newly adopted legislation was to exclude vessels that were registered in the United Kingdom, but operated and/or owned by persons or companies in other countries. This included 95 vessels owned by the Spanish companies in question. In response, they contested the legislation's compatibility with EU law before national courts – that decided to halt the proceedings to refer questions to the ECJ. Before the ECJ could decide on the substantive features of the national law, the Commission, joined by the applicants, asked for interim relief until a final ruling had been delivered.[75] The House of Lords, however, ruled that national courts could not grant interim relief against the crown, meaning the government, under an old common law rule in conjunction with a presumption that Acts of Parliament are in conformity with superior norms, including EU law, until a decision on the matter has been given. This led to the question of whether EU law imposed an obligation on national procedural systems to include interim relief as a remedy.

The ECJ initially cited *Simmenthal* in stating that directly applicable EU rules must be fully and uniformly applied in all the Member States, and that any legislative, administrative or judicial practice that prevents national courts from having jurisdiction to apply provisions of EU law is incompatible with EU law.[76] On that basis the court, in relation to the case at hand, reached its conclusion in finding that

> the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.[77]

To be mentioned is the fact that the court this time made an explicit reference to the principle of sincere cooperation in Article 4(3) TEU, to draw the conclusion that national courts must ensure 'the legal protection

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[74] *Factortame I* (n 71), para 4.
[75] ibid, paras 8 and 10 respectively.
[76] ibid, paras 18 and 20.
[77] ibid, para 21.

which persons derive from the direct effect of provisions of Community law'.[78] The rhetoric of *Simmenthal* is thus applied, albeit with an added reference to the principle of sincere cooperation used in *Rewe*. However, in the first wave of cases, the principle of sincere cooperation was used to emphasise the national procedural autonomy of Member States. Its application in *Factortame I* differs in the sense that the rhetoric of the court is instead emphasising the obligation of Member States to secure the application of EU law to begin with.

It is worth noting that the situation in the United Kingdom was not one of a legal vacuum in regard of interim relief; the concept existed and was applied. The problem was thus not that the remedy did not exist, but rather that there existed another national rule prohibiting it to be applied against the crown. That rule was declared incompatible with EU law, and thus it would be wrong to state that *Factortame I* concerned the introduction of a new remedy. On the contrary, it is not possible to deduce from the reasoning of the court how it would address a situation where no institute of interim relief existed in the first place.

The next case to be addressed is *Dekker*[79], concerning the Equal Treatment Directive[80]. The national laws prescribed that damages for a breach of the directive could only be found if it was proven that the employer was at fault and had no grounds for exempting him- or herself from responsibility.[81] The court initially concluded that the directive did not require any specific form of sanction, but that it did require the chosen sanction to guarantee real and effective protection, a requirement established in *Von Colson*, addressed in section 3.2 below. It then added an additional criterion, by stating that a chosen sanction must 'have a real deterrent effect'[82] on the employer. In applying the test to the case, the court found that if liability were made subject to a rule of evidence such as that at hand, the practical effect of the principle of equal treatment would be considerably weakened. As a conclusion, the court found that any breach of the principle of non-discrimination had to, in itself, be sufficient to make the employer liable – without the possibility of exempting him- or herself on the basis of national law.[83]

Four months later, the ECJ delivered its judgment in *Cotter and McDermott*[84]. There, the court held that Member States could not rely on 'their own unlawful conduct'[85] by referring to the principle of unjust

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[78] ibid, para 19.
[79] Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-03941.
[80] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40.
[81] *Dekker* (n 79), para 19.
[82] ibid, para 23.
[83] ibid, para 25.
[84] Case C-377/89 *Ann Cotter and Norah McDermott v Minister for Social Welfare and Attorney General* [1991] ECR I-01155.
[85] ibid, para 26.

enrichment[86] in refusing to pay equal family benefits to men and women. The court simply held that the non-discrimination article in the directive at hand precluded national legislation providing different benefits for men and women, because women 'in the same family circumstances are entitled to the same payments even if that infringes the prohibition on unjust enrichment laid down by national law'.[87] No further elaboration was provided by the ECJ, causing the High Court of Ireland to halt proceedings in the similar case of *Emmott*[88], and refer questions on the meaning of *Cotter and McDermott* to the ECJ. This time, the ECJ developed its reasoning more clearly.

Mrs Emmott was a married woman with two dependent children receiving a disability benefit at a reduced rate applicable to all married women. The Irish government later adjusted that rate, so that she received the same rate as unmarried men and women – but without a certain amendment for dependent children. Finally, she was granted the full rate, but the decision only provided for retroactive effect in respect of some of the time that she had received the lower rates.

In her correspondence with the Irish authorities, Mrs Emmott was told that she could not bring action before the national courts because of the pending litigation in *Cotter and McDermott*. As soon as she could Mrs Emmott did bring an action before national courts, but the Irish government then relied upon a national rule stating that an application for judicial review of these matters had to be brought within three months – a time limit which Mrs Emmott had exceeded by then.

In its assessment the court went back to basics in referring to the formula of equivalence and virtual impossibility from *Rewe* and *San Giorgio*.[89] It then added that '[w]hilst the laying down of reasonable time-limits which, if unobserved, bar proceedings, in principle satisfies the two conditions mentioned above, account must nevertheless be taken of the particular nature of directives'.[90] By reference to *von Colson* the court held that even though the treaties leave Member States free to themselves define the means by which they implement directives into national law, it does not relieve them from their duty 'to adopt, within the framework of their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues'.[91]

The effects of not implementing a directive correctly within the prescribed time limit played a crucial role in the court's conclusion. It held that since the provisions of a directive only in specific circumstances could be given direct effect it was a minimum guarantee, leaving individuals unable to ascertain all of their rights until the date of proper implementation. As a

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[86] See *San Giorgio* (n 57).
[87] *Cotter and McDermott* (n 84), para 27.
[88] Case C-208/90 *Theresa Emmott v Minister for Social Welfare and Attorney General* [1991] ECR I-04269.
[89] ibid, para 16.
[90] ibid, para 17.
[91] ibid, para 18.

conclusion, the court held that Member States could not rely upon time limits in national legislation until the time of correct implementation, which was the earliest point of which such time limits could begin to tick.

This second wave of case law provides for a strengthening of EU law in relation to national procedural autonomy. In *Simmenthal* the ECJ completely left the rhetoric of the principle of sincere cooperation that implies a mutual respect[92], and instead focused on the one-sided rhetoric of supremacy to ensure the effectiveness of EU law.

The development of EU law can be described as ebbs and flows – with new evolutions (flows) often being limited by subsequent cases (ebbs). Such an ebb to this series of cases strengthening the position of EU law can be found in *Steenhorst-Neerings*[93].

The applicant in the case, Mrs Steenhorst-Neerings, sought to be granted a benefit for incapacity for work that previously had been reserved for men and unmarried women. National courts had already declared the legislation invalid, but the extent of retroactive payment to be awarded Mrs Steenhorst-Neerings was still disputed.[94] In the proceedings the Commission, relying on *Emmott*, considered a national law prescribing time limits on the amount of retroactive payment to be applicable only after the Member State had correctly implemented the underlying Directive.[95]

The court's reply was clear. It addressed the Commission's argumentation in just one paragraph by stating: 'That argument cannot be upheld'.[96] It then stated that the facts of *Emmott* were clearly distinguishable from the case at hand in that the purposes behind the two time limits were different. The aim of the rule limiting the retroactive payment of incapacity benefits was, according to the national legislation, to 'ensure sound administration, most importantly so that it may be ascertained whether the claimant satisfied the conditions for eligibility and so that the degree of incapacity, which may very well vary over time, may be fixed', as well as reflecting the need to preserve a financial balance.[97]

The case of *Steenhorst-Neerings* is considered to be not just a limitation of *Emmott*, but also the marking of a more general limitation of the EU courts' more intrusive approach towards national procedural autonomy.[98] Later cases such as *Johnson II*[99] in which the court held that 'it is clear from the judgment in *Steenhorst-Neerings* that the solution adopted in *Emmott* was justified by the particular circumstances of that case'[100] confirms this

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[92] Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 421, 429.
[93] Case C-338/91 *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-05475.
[94] ibid, paras 5 and 13 respectively.
[95] ibid, para 17.
[96] ibid, para 18.
[97] ibid, para 23.
[98] *Tridimas* (n 92).
[99] Case C-410/92 *Elsie Rita Johnson v Chief Adjudication Officer* [1994] ECR I-05483.
[100] ibid, para 26.

interpretation. Similarly, the case of *Sutton*[101] limited *Marshall II*[102] by differentiating the awarding of reparation for loss and damages from social security benefits. There, the court held that the importance of receiving interest for the passing of time set forth in *Marshall II* does not apply to the latter.[103]

2.3 The Third Wave of Case Law

In the third wave of case law, the ECJ takes a more balanced approach to the previous clashes between national procedural autonomy on the one hand and the effectiveness of EU law on the other. It finds that each case must be evaluated on its own merits, taking into account the role of the disputed provision in the procedural system as a whole. This changed approach by the ECJ has been compared to the model of objective justification used by the court in cases concerning free movement.[104]

The third wave was adopted in *Peterbroeck*[105] and *van Schijndel*[106] delivered on the same day. Here, the court developed the criteria to be used by national courts in deciding upon whether or not national legislation was in breach of the principles of equivalence and effectiveness. The court introduced a balancing of the two principles 'by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances'.[107]

Peterbroeck concerned a dispute over taxes in which the applicant had waited to submit the argument that the national tax legislation was in breach of EU law until the proceedings reached a Belgian *Cour d'Appel* after being evaluated by an administrative body. The Belgian state responded with the argument that new pleas could not be made at that point. The question arose of whether there was an obligation on national courts to raise points of EU law by their own notion, even though the time limit prescribed had passed.

It was referred to the ECJ, which began by stating that it had repeatedly held that it was for the Member States to ensure the legal protection that individuals derive from the direct effect of EU law, and that the basis of this is the principle of sincere cooperation. It then repeated the classic formula

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[101] Case C-66/95 *The Queen v Secretary of State for Social Security, ex parte Eunice Sutton* [1997] ECR I-02163.
[102] Case C-271/91 *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-04367.
[103] ibid, paras 24 and 27.
[104] Michael Dougan, *National Remedies Before the Court of Justice* (Hart Publishing 2004) 30 and Gráinne De Búrca, 'National Procedural Rules and Remedies: the Changing Approach of the Court of Justice' in Lonbay J and Biondi A (eds) *Remedies for Breach of EC Law* (John Wiley & Sons 1997) ch 4. For a description of that model see Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th edn, OUP 2013) ch 6.
[105] Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECR I-04599.
[106] Case C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-04705.
[107] ibid, para 19 and *Peterbroeck* (n 105), para 14.

on the principles of equivalence and effectiveness established in *Rewe*.[108] In a subsequent paragraph, it added the guidelines with which the court should analyse these principles, by stating that

> [f]or the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.[109]

In applying this new balancing test the court stated that a 60-day time limit for bringing pleas was not inconsistent with EU law as such, but that the special procedure at hand must be examined. It singled out several relevant factors such as; that the *Cour d'Appel* was the first court that could refer questions to the ECJ; that, in this particular case, the time period in which new pleas could be brought had passed by the time that the *Cour d'Appel* held its hearing; that no other court or tribunal could raise points of EU law in subsequent hearings; and finally, that the impossibility of courts to raise points of EU law by its own motion did not appear to be reasonably justifiable by other principles, such as legal certainty or the proper conduct of procedure.[110]

The court came to the conclusion that EU law thus precluded the national legislation at hand.[111]

Van Schijndel had similar facts. The case concerned a dispute over pensions, and the applicants did not put forth their arguments that the national legislation was precluded by EU law until the proceedings reached the *Hoge Raad*, the supreme court of the Netherlands. At that point, the applicants argued that there existed an obligation for the national court to, if necessary by its own motion, address questions of EU law.

The court addressed the question in the same way as it did in *Peterbroeck*. First it repeated that it is for national courts to lay down the detailed procedural rules under which individuals safeguard their EU rights. Interestingly enough the court did not mention the principle of sincere cooperation, instead it just stated that in the absence of Union measures harmonising procedural rules, the domestic legal system is to be applied. It then quoted *Rewe* in repeating the principles of equivalence and effectiveness and subsequently confirmed the new test mentioned above.[112]

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[108] *Peterbroeck* (n 105), para 12.
[109] ibid, para 14.
[110] ibid, paras 17–20.
[111] ibid, para 21.
[112] v*an Schijndel* (n 106), paras 17 and 19.

In applying the test to the facts of the particular case at hand, it pointed out that the national principle that courts must or may raise points of their own notion was limited by the duty to keep to the point, and not address facts other than those already brought before the courts.[113] It then held that such a limitation was based on the fact that in civil suits it is for the parties to bring pleas, leaving the court passive other than in exceptional cases. The court held that

> [t]hat principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas.[114]

It then reached the conclusion that EU law did not preclude the national legislation at hand.[115]

2.4 The Comparative Neglect of the Principle of Equivalence

In the abovementioned case law, a clear focus has been on the principle of effectiveness. In some of the abovementioned cases, the principle of equivalence is addressed briefly and in others it is not addressed substantially at all. *Michael Dougan* describes this lack of interest in the case law from the CJEU as 'years of comparative neglect', that were countered in the late 1990s by a growing interest amongst litigants to explore the limits of the principle of equivalence in improving protection of their rights derived from EU law.[116] Two cases can be relied upon to illustrate the ECJ's response, *Palmisani*[117] and *Levez*[118].

The former concerned a dispute over loss and damages for an individual negatively affected by the belated transposition into national law of a directive. There was a national rule stating that such actions had to be brought within a year from the date that national legislation implementing the directive was adopted. To be mentioned is that under national law, the general provisions governing the reparation of non-contractual damages was subject to a five-year prescription rule. The question thus was whether the two national legislative regimes were comparable.

The court began its analysis by stating that it is in principle for national courts to decide upon the compatibility of national legislation with the

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[113] ibid, para 20.
[114] ibid, para 21.
[115] ibid, para 22.
[116] *Dougan* (n 104), 24.
[117] Case C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-04025.
[118] Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* [1998] ECR I-07835.

principle of equivalence.[119] Nevertheless, it continued by pointing out that the procedural regime applicable to claims based on the directive and the domestic procedural scheme, both pointed out by the national court, served different purposes, and that it therefore was unnecessary to compare them.[120]

Instead, the court clarified how to address situations where there is no similar national claim to compare with. It held that if

> the national court were unable to undertake any other relevant comparison between the time-limit at issue and the conditions relating to similar claims of a domestic nature, the conclusion would have to be drawn, in view of the foregoing, that Community law does not preclude a Member State from requiring any action for reparation of the loss or damage sustained as a result of the belated transposition of the Directive to be brought within a limitation period of one year from the date of its transposition into national law.[121]

If no comparator can be found, the principle of equivalence is thus not breached, and the focus must instead be turned to the principle of effectiveness.

The second case, *Levez*, was initiated by Mrs Levez, a woman who had been employed as manager of a betting shop in the United Kingdom. After a promotion she replaced a male predecessor who had earned UKL 11 400, but her pay was only raised to UKL 10 800. This in spite of the fact that it was not disputed that she performed the same job as her predecessor, and that all shop managers were subject to the same terms and conditions.[122]

She brought an action before the competent *Industrial Tribunal*, but soon received a letter informing her that since there was a time-limit of two years for bringing such actions the tribunal could not award the damages she sought. Mrs Levez appealed the decision to court, and the proceedings were halted as questions on the compatibility of the two-year time limit was sent to the ECJ.

The court's reply to the questions, in regard of the principle of equivalence, is quite extensive compared to earlier cases. The structure is familiar, and unsurprisingly begins with a reference to *Palmisani*, stating that it is in principle for national courts to ascertain whether national rules are in conformity with the principle of equivalence, with the reservation that the ECJ can always provide guidance to the national court in question. The court took full use of this possibility, providing a detailed examination of the applicable national rules and then reached a clear conclusion, leaving the national court no margin of discretion. First, it stated that the principle of equivalence is not to be interpreted as meaning that Member States must

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[119] *Palmisani* (n 117), para 33.
[120] ibid, para 36.
[121] ibid, para 39.
[122] *Levez* (n 118), paras 9–12.

always extend their most beneficial rules to actions based on EU law, but that national courts have to consider both the purpose and essential characteristics of the alleged similar claims. Once the national courts have established a national claim suitable for comparison they must to compare the procedural rules applicable to these claims by reviewing the role of the provisions in the procedure viewed as a whole. The ECJ thus confirmed that the test adopted in *van Schijndel* and *Peterbroeck* applies also to the principle of equivalence.[123]

In the proceedings, the United Kingdom argued that since claims based on the national law that transposed the directive at hand could be brought under the same procedural rules as claims based on EU law, the principle of equivalence was not breached. The court rejected this argument, since such actions are in fact one and the same, meaning that they, by definition, are not comparable.[124]

Furthermore, the United Kingdom had argued that it was possible for Mrs Levez to bring an action before a regular court, a procedure for which the same time limit did not apply. The court held that in that regard it had to be examined whether or not an applicant would then be put in a less favourable position than that of applicants bringing an action to the *Industrial Tribunal* based on similar domestic claims. As examples of relevant factors, the court mentioned that the *Industrial Tribunal* was not as costly and took less time to settle a dispute, leading to greater convenience for the applicant.[125]

The ECJ concluded that

> the answer to the question referred to the Court must be that Community law, as it stands at present, does not preclude a Member State from requiring any action for reparation of the loss or damage sustained as a result of the belated transposition of the Directive to be brought within a limitation period of one year from the date of its transposition into national law, provided that that procedural requirement is no less favourable than procedural requirements in respect of similar actions of a domestic nature.[126]

The cases of *Palmisani* and *Levez* exemplify several traits of the principle of equivalence, capable of explaining the ECJ's lesser interest in compared to the principle of effectiveness.

One such trait is that it is for national courts to decide upon the compatibility of national legislation with the principle of equivalence. A detailed guidance by the ECJ leading to a clear conclusion, such as that in *Levez*, is very rare. At first glance the discrepancy between the ECJ's more detailed scrutiny, when examining the principle of effectiveness and its more lenient approach when scrutinising the principle of equivalence may

[123] ibid, paras 39–44.
[124] ibid, para 47.
[125] ibid, para 51.
[126] ibid, para 53.

seem odd. However, the underlying rationale is clear. The principle of effectiveness is stated to ensure the effective application of EU law, meaning that the focus on the judicial evaluation lies on the features of EU law, and explaining what the effective application of it entails. In contrast, the principle of equivalence is focused on comparing national legal regimes, and their application in the national procedure as a whole. A task that the ECJ is badly fit to conduct, since it is impossible for it to gather and maintain as detailed knowledge of national rules in all of the Member States as that of the national courts.

Another explanation is that, from a EU law point of view, the principle of equivalence is much clearer than the principle of effectiveness. It consists, as is shown in *Levez*, of a two-staged evaluation, beginning by first finding a comparable claim based on national law, and secondly comparing the national remedies and procedures applicable in the different situations. The substantive evaluation is based on national law, and it is therefore natural that the principle itself has not evolved greatly since it was adopted in *Rewe*.

On that note, the ECJ's conclusion in *Palmisani*, that there is no breach of the principle of equivalence if no comparator can be found, provides an additional explanation. Since many of the rights under EU law, by their nature, lacks a comparator in national law the alleged breaches of the principle of equivalence are likely to be fewer than those regarding the principle of effectiveness. The rights in the *Patient Rights Directive*[127] can serve as a fitting example of this. Since it regulates the right of patients to seek, and be reimbursed for, cross-border healthcare it is not easy to imagine a comparable situation in national law.

[127] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the Application of Patients' Rights in Cross-border Healthcare [2011] OJ L88/45.

3 Case Law Labelled Effective Judicial Protection

3.1 Introduction

As mentioned, the case law of the CJEU textually differentiates between the principles of equivalence and effectiveness on the one hand, and the principle of effective judicial protection on the other. However, the CJEU has not clarified the relationship between them. As will be shown in chapter five there is case law indicating that the two concepts can be used simultaneously,[128] but there is also case law that clearly distinguishes between the two principles,[129] albeit without clearly explaining why the differentiation is made.

Therefore, it is of value to describe the principle of effective judicial protection separately from the principles of equivalence and effectiveness, both to highlight the mere fact that they are separate principles, and to examine them on their own merits, to avoid confusion between them. Once both sets of principles have been analysed, it becomes appropriate to examine how they relate to each other.

In this chapter, cases in which the ECJ examines the compatibility of national procedural rules with the principle of 'effective judicial protection' will be described.[130]

It should be mentioned that some scholars do not clearly separate between the principles. *Johanna Engström*, who successfully defended a doctoral thesis on the principle of effectiveness, takes the view that there is a general principle of effective judicial protection that, in turn, contains two 'macro-requirements', being the overarching principles of equivalence and effectiveness described in the previous chapter.[131] This categorisation is not chosen in this thesis, since such a categorisation assumes that the ECJ has not intended to differentiate between the principles of equivalence and effectiveness one the one hand, and the principle of effective judicial protection on the other. Instead, it assumes that they are part of the same general principle. This thesis seeks to examine the actual approach taken by

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[128] Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271.
[129] Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849.
[130] In some cases the ECJ instead refers to 'effective judicial control' or 'effective judicial remedy'. However, through references in subsequent case law it has become clear that they refer to the same principle. The fact that the court makes a reference to effective judicial protection has been the determining factor for selecting cases in this chapter.
[131] Johanna Engström, *The Europeanisation of Remedies and Procedures through Judge-made Law: Can a Trojan Horse achieve Effectiveness?* (European University Institute 2009) 50–54.

the ECJ in evaluating national procedural legislation against the principle of effective judicial protection, and therefore seeks to avoid linguistic constructions of the court's methodology. In other words, this thesis does not assume that the principles of equivalence and effectiveness and effective judicial protection are two sides (or part of) the same coin.

Nevertheless, it can hardly be disputed that the case law labelled effective judicial protection and the case law related to the principles of equivalence and effectiveness are closely connected. They occurred in the same period in time, and concerned similar situations, namely situations where the conformity of national procedural rules with EU law was questioned. In order to analyse why the ECJ adopted different approaches a summary of the relevant case law is appropriate.

3.2 Cases

The court's reliance on the concept of effective judicial protection originated in the cases of *von Colson*[132] and *Dorit Harz*[133] delivered on the same day.

The case of *von Colson* concerned two women who had applied for positions as social workers at a German prison. They were not hired, and instead the positions were filled by two male applicants. The two women brought an action to national courts claiming that they had been discriminated on the basis of sex. They relied upon national legislation said to implement a directive governing equal treatment of men and women. Primarily, they wanted to be offered the positions that they had been denied and secondarily they sought damages amounting to six months pay and reimbursement for travel costs occurred during the hiring process.[134]

The national court established that the women had been the victim of discrimination, but at the same time found that it could not order the hiring of the women, nor the payment of damages for a 'positive interest'. National law only provided for the reimbursement of actual costs. The national court could therefore only order the reimbursement of travel expenses, but the court nevertheless decided to halt the proceedings to refer questions to the ECJ on whether EU law demanded other remedies than those available, such as the awarding of damages or the offering of the job that was denied.[135]

The ECJ stated that a full implementation of the directive did not require a specific sanction to be enacted against prohibited discrimination, but that it does entail an obligation to ensure that the chosen sanction is such as to guarantee real and effective judicial protection. It also had to have a real deterrent effect on the employer. The court held that it follows that if a Member State chooses to award compensation for breaches of the

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[132] Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 01891.
[133] Case C-79/83 *Dorit Harz v Deutsche Tradax GmbH* [1984] ECR 01921.
[134] *von Colson* (n 132), 1893.
[135] ibid, para 6.

prohibition on discrimination that compensation must be adequate in relation to the sustained damage.[136]

The court continued its reasoning by emphasising that it is for the Member State to choose between different penalties suitable for achieving the objective of the directive. The penalty chosen did however have to comply with the demands of real effective judicial protection and provide a real deterring effect. This meant that compensation based on purely nominal factors, such as only reimbursing costs incurred in the application process, was not in conformity with EU law. The court then left it to the national court to utilise the guidance provided in order to interpret and apply the national legislation adopted to implement the directive.[137]

von Colson is thus a judgment that is respectful of national procedural autonomy in the sense that the ECJ underlined that it is for Member States to choose the remedy they wish to enact. It is however also clear that their choice of remedy is not entirely free. The ECJ states that the member States are free to choose between suitable remedies, indicating that the court could take upon itself to evaluate not only the features of the chosen remedy, as in the case at hand, but also the remedy itself. The ECJ was furthermore clear on the fact that even if the chosen remedy is deemed suitable it is still subject to two additional demands, that of ensuring effective judicial protection and that of it acting as a deterrent for potential discriminators.

The court confirmed its reasoning in *Dorit Harz*.[138]

Approximately six months after the delivery of *von Colson* and *Dorit Harz* the ECJ delivered another judgment concerning what it phrased as effective judicial control and effective judicial remedies. The case of *Johnston*[139] concerned a female police officer in Northern Ireland who challenged a decision of the Chief Constable not to renew her contract of employment. The decision was due to a redundancy of female police officers in Northern Ireland that followed from another decision adopted by the Chief Constable not to allow female police officers to carry arms.

In the United Kingdom, police officers generally do not carry firearms, but that general rule did not apply in Northern Ireland at the time. Due to terrorist activities male police officers were not just allowed, but obliged to carry arms. The reason for refusing female police officers the possibility to carry arms, or even receive weapons training, was based on a belief that it would make them more likely targets for assassination.[140] The Chief Constable decided that general police work required police officers to be armed, limiting the tasks that female police officers could carry out and therefore causing a reduced demand for female police officers.

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[136] ibid, para 23.
[137] ibid, para 28.
[138] *Dorit Harz* (n 133), paras 23–25.
[139] Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651.
[140] ibid, 1665.

Mrs Johnston challenged the decision not to renew her contract, and demanded weapons training. She contended that she had suffered unlawful discrimination and referred directly to EU secondary legislation due to the fact that the applicable national legislation allowed for sex discrimination if done for the purpose of safeguarding national security or of protecting public safety or public order, as was claimed by the Chief Constable to be the case. Adjacent to the applicable provisions of national law there was a subparagraph stating that if the Secretary of State signed a certificate, stating that the purpose of an act was that of safeguarding national security or of protecting public safety or public order, it should serve as sufficient evidence that this was in fact the case. This subparagraph thus prevented the national courts from performing a judicial review of what the purpose of an act actually was.[141]

The *Industrial Tribunal* handling the case referred several questions to the ECJ, who on its own notion rephrased them, dealing first with the issue of 'the right to an effective judicial remedy'.[142]

The court began by stating that there existed a right to judicial review stemming from the secondary legislation in question.[143] In the subsequent paragraph, the court elaborated that that requirement was an expression of a general principle of EU law, stemming from constitutional traditions common to the Member States. The court also stated that the same principle is also laid down in the ECHR, and that the principles on which the ECHR is based must be taken into consideration in EU law.[144]

The court then found that any national provision stating that a certificate was sufficient evidence to justify derogations from the principle of equal treatment allowed the competent authority to deprive an individual of the possibility to ascertain rights conferred by EU law in judicial proceedings, and therefore is contrary to the principle of effective judicial control.[145]

The ECJ thus gave a clear judgment in finding that there is a right to access to court under EU law. The judgment is equally clear in pointing out three legal sources for this right: secondary law, constitutional principles common to the Member States, and the principles underlying the ECHR. It however limited the importance of the two latter sources, by stating that it was by virtue of the Directive at hand, 'interpreted in the light of the general principle' established by the common constitutional principles and the ECHR, that all persons had 'the right to obtain an effective remedy in a competent court'. The court furthermore held that it is a task of national courts to ensure compliance with these rights in relation to applicable provisions of EU law and the national legislation intended to implement it.[146]

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[141] ibid, para 3.
[142] ibid, headline to paras 13–21.
[143] ibid, para 17.
[144] ibid, para 18.
[145] ibid, para 20.
[146] ibid, para 19.

A few months later, the ECJ again got a chance to elaborate on what it referred to as effective judicial review. The case of *Heylens*[147] concerned the famous Belgian football trainer Georges Heylens, who moved to France to train the professional football team in Lille. In order to be allowed to exercise the profession of football trainer in France you, at the time, had to be a holder of a football trainer's diploma or a foreign diploma that had been recognised as equivalent by decision of the Government, after the consultation of a special committee. Mr Heylens had earned a Belgian diploma that he sought recognition for in France, but his application was denied by the government on the basis of the special committee's opinion. The opinion in itself did not state any reasons for recommending that the diploma should not be recognised. Mr Heylens continued to exercise his profession, causing the French football-trainers' trade union to bring Mr Heylens and his employer before the criminal court in Lille.[148]

The court suspended its proceedings in order to refer a question to the ECJ on whether the French legislation complied with the free movement provisions of the EU treaties. The national court's concern was primarily with the fact that the committee did not state its reasons and that there existed no particular remedy against its opinion.[149]

The court began by stating that since the free movement of workers is a fundamental objective of the Union there is a requirement on Member States to secure it under national laws and regulations. The court elaborated that this requirement stems from the principle of sincere cooperation, now entailed in Article 4(3) TEU. According to the court, this obligation means that

> Member States are bound to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.[150]

The court then explained what this requirement meant particularly for the recognition of diplomas, finding that the task of reconciling the need to ascertain qualifications with the need to ensure free movement required Member States to enact a certain procedure. It also elaborated on the features of the procedure, finding that it had to enable authorities to assure themselves, on an objective basis, that the foreign diploma certified that the holder had attained the same or equivalent knowledge and qualifications as a person certified with a national diploma. The assessment was, according to the court, to be done exclusively in light of the knowledge and qualifications that the holder could be assumed to possess in light of the diploma, with

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[147] Case C-222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 04097.
[148] ibid, paras 2–4.
[149] ibid, para 5.
[150] ibid, para 12.

regard being taken to the nature, duration and practical training in the studies underlying it.[151]

Before answering the national court's question, the ECJ thus seems to have engaged in guidance to the national court on how the administrative procedure leading to an opinion of the committee, and subsequently a decision by the government, must be conducted in order to comply with EU law.[152]

In answering the question of the national court, the ECJ stated that since access to court is a right individually conferred by Union law on each worker the existence of a judicial remedy is essential in order to secure for the individual effective protection of his or her right. It then made reference to *Johnston* and its findings that this principle reflects a general principle of EU law based on constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the ECHR.[153]

The ECJ's conclusion was that a national authority is either obliged to state reasons in the decision itself or in a subsequent communication made at the request of a party. The court motivated its conclusion by stating that effective judicial review must be able to cover the legality of reasons for a decision, which in general presupposes that the judicial body reviewing the decision can require the national authority to state them upon request. However, in cases concerning the effective protection of a fundamental right conferred to individuals by the treaties, as was the case in *Heylens*, the court held that the requirements are stricter. In such cases, individuals must be able to defend their rights under the best possible conditions, and have the possibility of deciding with a full knowledge of the relevant facts in order to be able to assess whether or not there is any point in appealing to the courts.[154]

However, the court made it clear that its reasoning did not extend to opinions and other measures occurring in the preparatory or investigatory stages. The stated requirements thus solely apply to final decisions.[155]

In summary, *Heylens* shows the ECJ engaging in a detailed review of the administrative process of Member States. It did not mention its *Rewe*-formula stating that it is for national courts to apply their national procedural legislation, nor did use its terminology related to the principles of equivalence and effectiveness. The court also stated that the right to effective judicial review in cases such as *Heylens* belongs to each individual. This is perhaps not revolutionary, given the express connection to the

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[151] ibid, para 13.
[152] This indicates that there is a right to good administration under EU law, which is interesting in relation to the question of what scope Article 41 of the Charter has, see section 4.3.3 below.
[153] *Heylens* (n 147), para 13.
[154] ibid, para 15.
[155] ibid, para 16.

ECHR, but it is nevertheless noteworthy that the court seems to have shifted the protective purpose, from the effective application of EU law to the rights of each individual to ascertain his or her rights conferred by EU law.

A couple of years later the ECJ for the first time approached the relationship between the principle of effective judicial protection and the principles of equivalence and effectiveness. It did so by reference, in stating that national legislation could not undermine the right to effective judicial protection as set forth in *Johnston* and *Heylens*, nor could it render it virtually impossible to exercise rights conferred by EU law, as held in *San Giorgio*.[156] The court thus clarified that it viewed the principle of effective judicial protection as something separate from the principle of effectiveness. Furthermore, the court provided a link between *Johnston* and *Heylens*, stating that they both concerned the principle of effective judicial protection even though *Heylens* does not explicitly mention it.

In this regard, it would be wrong not to mention *Marshall II*[157], a case regarding equal treatment in relation to age. The case concerned a woman who had been wrongfully dismissed,[158] and the issue of what level of compensation she should be granted as a result. The court developed its reasoning in *von Colson* by first confirming that even though a directive does not prescribe the measures for its transposition into national law it nevertheless imposes an obligation on Member States to take the necessary measures to implement it correctly. Secondly, it held that if the Member State did not fulfil its obligation the purposes of the directive at hand, being 'to arrive at real equality of opportunity'[159], could not be met unless there were 'measures appropriate to restore such equality when it had not been observed'.[160]

Such measures had to take account of the particular circumstances of each breach and could therefore not be subject to an upper limit of financial compensation.[161] Furthermore, such compensation 'must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules'.[162] As a result, national legislation could not

> leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be

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[156] Joined case C-87/90, C-88/90 and C-89/90 *A. Verholen and others v Sociale Verzekeringsbank Amsterdam* [1991] ECR I-03757, para 24.
[157] Case C-271/91 *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-04367.
[158] Case C-152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 00723.
[159] *Marshall II* (n 157), para 24.
[160] ibid.
[161] ibid, para 30.
[162] ibid, para 26.

> regarded as an essential component of compensation for the purposes of restoring real equality of treatment.[163]

In *Marshall II* the court thus took a quite intrusive position in finding that national legislation prescribing a cap on financial compensation of damages was not compatible with EU law. This is more so as it also held that national legislation could not exclude the awarding of interest. It is, however, worthy of noting that the court reached its conclusion by making several references to the national legislation of Member States, thus showing that the court does not require a specific method or means of reaching a remedy – it merely required the existence of a remedy, and that that remedy had to 'be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer'.[164]

The court has developed the concept of effective judicial review further in other cases. It has for example stated that it applies to economic agents, who, on the basis of the principle, were allowed to bring actions for damages sustained through following a EU regulation that was later invalidated by the ECJ, even though the court in its invalidation limited the retroactive effects in a way that would otherwise have excluded part of the damages.[165] The court thus applied the principle to protect private parties in the event of a breach of EU law by the institutions.[166]

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[163] ibid, para 31.
[164] ibid, para 24.
[165] Case C-228/92 *Roquette Frères SA v Hauptzollamt Geldern* [1994] ECR I-01445.
[166] Case C-212/94 *FMC plc, FMC (Meat) Ltd, DT Duggins Ltd, Marshall (Lamberhurst) Ltd, Montelupo Ltd and North Devon Meat Ltd v Intervention Board for Agricultural Produce and Ministry of Agriculture, Fisheries and Food* [1996] ECR I-00389, paras 58 and 62.

4 Statutory Law

4.1 Introduction

As described in the first chapter, the legal landscape surrounding effective judicial protection has evolved to incorporate both case law and statutory law. Since the entry into force of the Lisbon treaty, the latter has gained importance through the entry into force of several statutes in the Charter and the TEU. This chapter gives a brief overview of the statutes governing effective judicial protection, both in the TEU, the Charter and the ECHR. It is very descriptive to its nature, leaving the application of the described statutes by the ECJ for chapter five.

4.2 Article 19(1) TEU

> *The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.*
>
> *Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*

Article 19(1) TEU governs the division of competences between the CJEU and the Member States, including, national courts.

The obligation of Member States to ensure 'effective legal protection' is a novelty in EU law, introduced in the Lisbon Treaty that entered into force on 1 December 2009. This new Article entails at least three interesting aspects.

The first is to put the responsibility of effective legal protection on the Member States, and not the Union itself. This is a codification of the division of responsibilities established in the case law of the CJEU, leaving discretion to Member States as long as they comply with the principles of equivalence and effectiveness. There is no mentioning of the principle of sincere cooperation[167] in the text of Article 19 TEU, but when the principle is traced back to cases such as *Rewe*[168] and *Factortame I*[169] the link to the principle of effective legal protection is found. In those cases, the court explicitly states that the right to legal protection is derived from the direct

[167] Codified in Article 4(3) TEU.
[168] Case Case C-33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989.
[169] Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433.

effect of EU law, and that its enforcement is entrusted the Member States on the basis of the principle of sincere cooperation.[170]

The second aspect to note is that Article 19(1) TEU regulates effective *legal* protection, and not effective *judicial* protection, indicating a difference compared to the principle of effective judicial protection. It is, however, uncertain whether the case law of the ECJ supports such a differentiation. Much like the principle of effective judicial protection and the principles of equivalence and effectiveness, Article 19(1) TEU concerns national remedies ensuring the effective protection of rights given by EU law. This would indicate that the difference between the wording of Article 19(1) TEU and the wording of the principle of effective judicial protection is not to be overestimated. This interpretation also seems to be the one adopted by the ECJ. In *Inuit*[171], the court stated without further elaboration, that the principle of effective judicial protection is 'reaffirmed by the second subparagraph of Article 19(1) TEU'.[172]

There is not much case law developing the meaning, or indeed the importance, of Article 19(1) TEU. Only five cases from the ECJ mention it, amongst those is however *Pringle*[173], a case marking a rare event, since the ECJ sat as a full court. In *Pringle,* Article 19 TEU was used to emphasise the responsibility of the CJEU to ensure that EU law is upheld.[174] In *Telefónica* [175] Article 19 TEU was used as a base for the shared responsibility of judicial review, finding that it falls on both the CJEU and the national courts to ensure the judicial review of compliance with EU law.[176] *Telefónica* thus indicates that Article 19 TEU is a competence provision, governing the jurisdiction of national courts to act in matters regarding effective legal and judicial protection.

There are still many questions to be answered regarding the role of Article 19(1) TEU and its relationship to the principle of effective judicial protection. However, an early conclusion drawing on *Inuit* and *Telefónica* would be that it is to be used as a legal basis for the obligation of both the CJEU and national courts to ensure effective judicial protection, thus functioning much like the principle of sincere cooperation in Article 4(3) TEU.

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[170] *Rewe* (n 168), para 5, and ibid, para 19.
[171] Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament, Council of the European Union, Kingdom of the Netherlands, European Commission* [2013] OJ C344/11.
[172] ibid, paras 100–101.
[173] Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and the Attorney General* [2012] OJ C26/15.
[174] ibid, para 35.
[175] Case C-274/12 P *Telefónica SA v European Commission* [2013] OJ C52/12.
[176] ibid, para 57.

4.3 The Charter of Fundamental Rights

The importance of the Charter for effective judicial protection is shown by the increasing amount of requests for preliminary rulings by national courts concerning Charter provisions.[177]

Effective judicial protection is codified in several Charter provisions, the most obvious of which is Article 47. *Koen Lenaerts*, vice president of the ECJ, has described the principle of effective judicial protection as being 'enshrined in Article 47 of the Charter'[178], a statement confirmed by case law.[179] However, elements of the principle of effective judicial protection can also be found in Article 41, governing the right to good administration. Both Articles will therefore be described. Given the Charter's importance, it is appropriate to begin with a short description of the Charter's background, content and scope of application.

4.3.1 Background

The Charter of Fundamental Rights of the European Union is the first legally binding catalogue of human and fundamental rights in the European Union. It was proclaimed by the presidents of the Commission, the Council and the Parliament in 2000 following a Council meeting in Nice.[180] At that point it was not legally binding, it took nine years for it to become so through the entry into force of the Lisbon Treaty on 1 December 2009. Since then, Article 6(1) TEU has proclaimed that the Charter shall have the same legal value as the treaties. It is, in other words, primary EU law.[181]

The Charter was however referred to in the case law of the ECJ[182] and the opinions of Advocate Generals[183] even before its entry into force, signalling

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[177] European Commission, '2013 Report on the Application of the EU Charter of Fundamental Rights' COM (2014) 224 Final 10.

[178] Koen Lenaerts, 'Effective Judicial Protection in the EU' (Assises de la justice conference, Brussels, November 2013) <http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf> accessed 23 May 2014, 1.

[179] Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849, para 33.

[180] See reference in the Official Journal, Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

[181] Regarding the general importance of the Charter after the Lisbon treaty, see Juliane Kokott and Christoph Sobotta, 'The Charter of Fundamental Rights of the European Union after Lisbon' (2010) EUI Working Papers AEL 2010/6 <http://cadmus.eui.eu/handle/1814/15208> accessed 2 May 2014, and Xavier Groussot and Laurent Pech, 'Fundamental Rights Protection in the European Union post Lisbon Treaty' (2010) Fondation Robert Schuman Policy Paper <http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-173-en.pdf> accessed 2 May 2014.

[182] The first reference to it by the ECJ was in Case C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-5769, para 38.

[183] The first reference by an Advocate general came earlier in the opinion of AG Tizzano in Case C-173/99 *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] ECR I-04881, paras 26 and 28.

its importance.[184] Already during the few years since the Charter's entry into force, it has become an important legal instrument in EU law. *Gráinne de Búrca* found that only between 2009 and 2012 the ECJ made reference to, or drew on, the Charter in at least 122 cases. In 27 of those cases the court substantively engaged in arguments based on the Charter. During the same time period, the General Court referred to the Charter in at least 37 cases, and substantively engaged in argumentation based on it in seven of those.[185]

De Búrca further identifies an increase in rights-based arguments before the CJEU and attributes it to the entry into force of Charter along with the expanded scope of EU law and the extended jurisdiction of the CJEU.[186] *Daniel Sarmiento* also emphasises the importance of the Charter since its entry into force and summarises its relatively short history like this:

> With the benefit of hindsight, it can now be said that the Charter has been the source of very significant changes in EU law. Far from being a decorative declaration validating past practices, the Charter has forced the Union to take fundamental rights even more seriously, a move that has consequently pushed the ECJ in the same direction.[187]

This is true not in the least regarding the rights, freedoms and principles that came new into EU with the adoption of the Charter, and therefore had never been addressed by the CJEU before.

Even so, the court has been accused of steering away from key questions relating to the Charter by avoiding to refer to it altogether, and instead operate in the gray shade 'between judicial minimalism and avoidance', as *Laurent Pech* phrases it.[188]

4.3.2 Structure and Content

The Charter is divided into seven chapters,[189] consisting of altogether 54 Articles that contain rights, freedoms or principles.[190] The first chapter is

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[184] Kokott (n 181), 1.
[185] Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168.
[186] ibid, 2.
[187] Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights in Europe' (2013) 50 CML Rev 1267, 1270.
[188] Laurent Pech, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*' (2012) 49 CML Rev 1841. A recent example from the case law of the ECJ is case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* [2014] OJ C85/3, where the ECJ had the possibility of clarifying the difference between rights and principles in Article 52/5) of the Charter, an opportunity grasped by Advocate General *Cruz Villalón* in his opinion in the case, but ignored by the court.
[189] The chapters are *Dignity*, *Freedoms*, *Equality*, *Solidarity*, *Citizen's rights*, *Justice* and *General provisions.*
[190] See Article 52(1) and 52(5) of the Charter.

entitled *Dignity* and the first Article begins by stating that human dignity is inviolable, much inspired by the German constitution.[191] *Hans Christian Krüger* describes this initial statement as being the foundation for all human and fundamental rights.[192] In legal philosophy, that idea has been argued by *Ronald Dworkin*.[193] The Charter is, however, far from a minimalist declaration of negative rights – on the contrary, it contains several social and positive rights.[194]

Some of the provisions in the Charter were previously known as general principles of EU law, established in case law of the ECJ predating the drafting of the Charter.[195] Other provisions were new to EU law, but familiar from their existence in the ECHR,[196] which is closely connected to charter as described in section 4.3.4 below.

4.3.3 Scope of Application

After the entry into force of the Charter, a debate over its scope of application arose. Some scholars argued that the ECJ had now become 'a second European Court on Human Rights' and that the EU itself had become a 'human rights organisation'.[197] This was opposed by other scholars such as *Koen Lenaerts*, vice president of the ECJ, who reached the conclusion that such far-reaching effects cannot be drawn from the Charter. Instead, he relies upon Article 51(1) of the Charter in arguing that the Charter does not extend the scope of application of EU law, and thus ensures that the principle of conferral is being respected.[198] However, relying on Article 51(1) of the Charter is problematic. Its text namely prescribes that the Charter is only applicable to Member States when implementing EU law. The ECJ had however held in several cases predating the Charter that individuals could rely on fundamental rights also when Member States were derogating from EU law.[199]

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[191] Article 1 of the Grundgesetz für die Bundesrepublik Deutschland begins with 'Die Würde des Menschen ist unantastbar'.

[192] Hans Christian Krüger, 'The European Union Charter and the European Convention on Human Rights: An Overview' in Steve Peers and Angela Ward (eds), *The European Union Charter of Fundamental Rights* (Hart Publishing 2004).

[193] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 417–423.

[194] For an overview of social rights in EU law, see Phil Syrpis and Tonia Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to the Reconciliation' (2008) 33 European Law Review 411.

[195] Article 47 of the Charter is one example, see the Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.

[196] Article 19 of the Charter is a good example of this, see ibid. The link between the ECHR and general principles of EU law was established long before the drafting of the Charter through *Nold*, see section 4.3.4 below.

[197] See Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375, 377 who is of the opposite opinion, but in a clear and concise way summarises the opinions of his adversaries.

[198] ibid.

[199] See Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1993] ECR I-02925 and for a good categorization of case law on the

That debate was settled in *Åkerberg Fransson*,[200] a case concerning a fisherman in the small village of Kalix in the northern parts of Sweden. The question of the scope of the Charter arose in relation to the fisherman's indictment for tax evasion. At the time of his prosecution for tax crimes he had already, in accordance with national law, been imposed an administrative fee. His defence argued that this two-step procedure constituted a breach of the *ne bis in idem* prohibition in Article 50 of the Charter. Since the questioned national legislation was a general procedural scheme, not adopted to implement EU law, the ECJ had to rule on the Charter's applicability. The court held that fundamental rights guaranteed by the Charter were binding on the Member States when acting within the scope of EU law,[201] and very clearly concluded:

> Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations *cannot exist* which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.[202]

Since *Åkerberg Fransson* it is thus clear that the Charter is applicable whenever EU law is applicable, meaning that Article 51(1) does not limit the scope of fundamental rights in EU law. It is still, however unclear what national actions constitute implementing actions, and what degree of connectivity to EU law that will suffice to trigger the application of the Charter.[203]

4.3.4 The Link Between the Charter and the European Convention on Human Rights

Though it was already established case law that fundamental rights as expressed in the ECHR constitutes general principles of EU law,[204] the TEU and the Charter provide the first explicit legislative link between EU law and the ECHR. Article 6(3) TEU brings the fundamental rights of the ECHR

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issue Xavier Groussot, Laurent Pech and Gunnar Þór Pétursson, 'The Scope of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication' (2011) Eric Stein Working Paper No 1/2011 <http://www.ericsteinpapers.cz/images/doc/eswp-2011-01-groussot.pdf> accessed 4 May 2014.

[200] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] OJ C114/7.

[201] ibid, para 20.

[202] ibid, para 21 (emphasis added).

[203] See Emily Hancox, 'The Meaning of "implementing" EU Law Under Article 51(1) of the Charter: *Åkerberg Fransson*' (2013) 50 CML Rev 1411, 1430–1431.

[204] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 00491. For a detailed description of the CJEU's approach to ECHR-rights as general principles of EU law see Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006) ch 2 and Anthony Arnull, *The European Union and its Court of Justice* (2nd edn, OUP 2006) ch 10.

within the scope of EU law, by stating that they shall constitute general principles of EU law. Articles 52(3) and 53 of the Charter provide guidance on the relationship between the Charter and the ECHR. Article 52(3) by stating that the meaning and scope of Charter rights corresponding to ECHR rights shall be the same as the latter,[205] and Article 53 by stating that 'nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised' by the ECHR.

Article 6(2) TEU should also be mentioned in this context. It states explicitly that the EU *shall* accede to the ECHR. The accession of the EU to the ECHR has been subject to lengthy debate,[206] as old as the EEC itself,[207] which falls outside the scope of this thesis. Article 6(2) was adopted after the delivery of an opinion by the ECJ, finding that under the then applicable treaties the EU had no competence to accede to the ECHR.[208] Article 6(1) TEU does not prescribe a time limit, but the accession process commenced on the 26 May 2010 and is currently underway.[209]

4.3.5 Article 47 of the Charter – Right to an Effective Remedy and to a Fair Trial

> *Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
>
> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*
>
> *Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*

Article 47 of the Charter has the descriptive headline 'Right to an Effective Remedy and to a Fair Trial'. It contains three paragraphs that guarantees, in order, the right to an effective remedy, the right to access a court and to receive a fair trial, and lastly, that those who lack sufficient resources should be provided legal aid in so far as it is necessary to ensure 'effective access to justice'.

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[205] This includes their interpretation in the case law of the ECtHR, which is apparent from the Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.
[206] Best described in Paul Craig, 'EU accession to the ECHR: Competence, Procedure and Substance' (2013) 36 Fordham International Law Journal 1114.
[207] ibid, 1150.
[208] See Opinion 2/94 *On Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.
[209] See Council of Europe, 'Accession of the European Union' <http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention> accessed 4 May 2014, which describes the procedure and its current status.

The first paragraph, concerning the right to an effective remedy, is based on Article 13 of the ECHR,[210] but goes further in its protection since it guarantees an effective remedy before a court.[211] The second paragraph of Article 47 of the Charter, concerning the access to court and a fair trial, is based on Article 6(1) of the ECHR.[212] Like the first paragraph, it too goes further than the corresponding ECHR provision in that it does not limit itself to criminal proceedings or proceedings determining civil rights, but instead applies generally. This general application is seen as a corollary to the fact that the EU is a union based on the rule of law, as held by the ECJ in *Les Verts*.[213] This grants it a considerably wider scope of substantive application since it, contrary to Article 6(1) ECHR, also applies to civil disputes, and even in purely administrative procedures.

Article 47 of the Charter is a special right in that it operates in connection with other rights, not just in the Charter but also in EU law as a whole. In doing so, it has been said to reflect a mixture of the ECJ's case law on Member State procedural rules and remedies, and the case law on the principles of equivalence and effectiveness.[214] Phrased differently, it is a procedural right given effect in relation to the process of safeguarding other rights of EU law. It lacks a self-standing material content, and instead gathers that from the wide palette of EU law rights, making it a flexible provision capable of influencing national procedural systems in many different ways depending on the material right in question.[215]

The ECJ has held that the principle of effective judicial protection is 'confirmed by'[216] and 'enshrined in Article 47'[217]. Since the CJEU views Article 47 as a codification of the principle of effective judicial protection it is not strange that it refers relatively often to it.[218]

Article 47 of the Charter is closely linked to other provisions of primary law. Article 41 of the Charter, governing the right to good administration, is one of them but also Article 19(1) requiring Member States to ensure effective

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[210] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17, 29.
[211] See Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651, para 59.
[212] *Legal Explanations to the Charter* (n 210) 30.
[213] Case C-294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 01339, para 23.
[214] See Angela Ward 'Article 47 – Right to an Effective Remedy' in Steve Peers, Tamara Harvey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, forthcoming) 1210.
[215] ibid, 1211.
[216] Joined cases C-317/08 to C-320/08 *Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08)* [2010] ECR I-2213, para 61.
[217] Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849, para 33.
[218] Sacha Prechal and Rob Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 31, 37.

legal protection in fields covered by EU law. The relationship between Charter rights for which provision is made in the treaties is governed by Article 52(2) of the Charter, stating that the former shall be 'exercised under the conditions and within the limits' defined by the treaties. Article 52(2) of the Charter thus provides a link between Article 19(1) TEU and Article 47 of the Charter, obliging national judges, under the principle of sincere cooperation in Article 4(3) TEU, to take into consideration Article 47 of the Charter when exercising their obligation to provide effective legal protection.[219]

4.3.6 Article 41 of the Charter – Right to Good Administration

> *1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.*
>
> *2. This right includes:*
>
> *(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;(b the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
>
> *(c) the obligation of the administration to give reasons for its decisions.*
>
> *3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*
>
> *4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.*

Article 41 of the Charter states that every person, hence not just EU citizens, has the right to good administration. Unlike Article 47 of the Charter, this is a substantive right with material content in several paragraphs. It is, in other words, not dependent of other rights to be operational. The material rights in Article 41 all stem from the general clause in paragraph one, stating that everyone has the right to have his or her affairs 'handled impartially, fairly and within a reasonable time'. The subsequent paragraphs contain a list of examples of what this general clause entails, but it is a non-exhaustive list, which follows from the wording of paragraph two stating that the general clause 'includes' the subsequent norms.

The right to good administration in Article 41 is closely linked to Article 47 of the Charter through Article 41(2)(a), that contains the right to be heard. This right should be read in conjunction with Article 47(2) of the Charter, stating that the hearing should be in front of an independent and impartial

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[219] *Ward* (n 214), 1212–1213.

tribunal established by law.[220] Together they correspond to Article 6 of the ECHR,[221] albeit providing broader protection.[222] Article 47 also guarantees the right to an effective remedy, which of course is an important aspect of disputes relating to good administration.

Article 41 is based on general principles of EU law as well as different provisions of the treaties. It is thus both a codification of case law as well as a repetition of pre-existing paragraphs. The fact that Article 41 is based on general principles is interesting in relation to its scope of application. Since general principles of EU law are binding upon Member States when acting within the scope of EU law it would be natural for Article 41 to have the same scope of application, but according to its wording, it is exclusively directed at the EU and all of its different institutions and bodies. The ECJ has not yet resolved the question of how this inconsistency is to be resolved. There is, in fact, case law supporting both the interpretation that Article 41 is exclusively directed towards the EU[223] and the interpretation that it is of general application,[224] and thus binding on the Member States when acting within the scope of EU law.

4.4 Articles 6(1) and 13 of the European Convention on Human Rights

4.4.1 Relationship between EU law and the ECHR

The relationship between EU law and the ECHR is a close one. As described in section 4.3.4 above there is, since the entry into force of the Lisbon treaty, an explicit connection between the TEU and the Charter on the one hand, and the ECHR on the other hand. The relationship, however, extends much further back in time than 2009.

Fundamental rights, as expressed in the ECHR, has for long been held to be general principles of EU law. In *Nold*[225] the court held that fundamental rights form an integral part of the general principles of EU law, and that 'international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can

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[220] The right to be heard before a court or tribunal had previously been established by case C-506/04 *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECR I-08613, para 47.
[221] Paul Craig 'Art 41 – Right to Good Administration' in Steve Peers, Tamara Harvey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, forthcoming) 1071.
[222] See headline 4.1.5.
[223] Case C-482/10 *Teresa Cicala v Regione Siciliana* [2011] ECR I-14139, para 28.
[224] Case C-277/11 *M. M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General* [2012] OJ C26/9, para 84.
[225] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 00491.

supply guidelines which should be followed within the framework of community law'.[226] The next year, in the case of *Rutili*[227], the court made its first explicit reference to the ECHR in its reasoning.[228] The court has since often referred to the ECHR and it has been of paramount importance in cases regarding effective judicial protection, such as in *Johnston*, described in section 3.2 above.

4.4.2 Article 6(1) ECHR

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

Article 6 of the ECHR concerns the right to a fair trial, but in addition to the rights explicitly mentioned in the wording, the ECtHR has also established that there is a right of access to court inherent in Article 6(1).[229]

Article 6 has generated great attention in all of the states that are parties to the ECHR, due both to the importance of the right, but also due to the great number of cases that it has generated before the ECtHR. The ECtHR has stated that 'the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 § 1 restrictively'[230], a conclusion that should be applied to all paragraphs of Article 6 ECHR.[231] That does not mean that Article 6 contains absolute rights. Limitations are accepted, as long as they do not impair the essence of the right.[232] Any limitation must also require a legitimate aim and be reasonably proportionate to the aim pursued.[233] Furthermore, the rights in Article 6 must not only exist in theory but also be practical and effective, and '[t]his is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial'.[234]

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[226] ibid, para 13.
[227] Case C-36/75 *Roland Rutili v Ministre de l'intérieur* [1975] ECR 01219.
[228] ibid, para 32.
[229] *Golder v the United Kingdom* App no 4451/70 (ECtHR 21 February 1975), para 36.
[230] *Perez v France* App no 47287/99 (ECtHR 12 February 2004), para 64.
[231] David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 201.
[232] *De Geouffre de la Pradelle v France* App no 12964/87 (ECtHR 16 December 1992), para 28.
[233] *Ashingdane v the United Kingdom* App no 8225/78 (ECtHR 28 May 1985), para 57.
[234] *Airey v Ireland* App no 6289/73 (ECtHR 9 October 1979), para 24.

In addition to the specific rights mentioned in Article 6, there is an overall requirement of a fair trial.[235] The content of this requirement cannot be determined in abstract, it can only be considered in the context of the judicial procedure in entirety, including the role of appeal proceedings.[236] This case-by-case evaluation bears a striking resemblance to the reasoning of the ECJ in *van Schijndel* and *Peterboreck*, described in section 2.3 above. It not certain that the legal tests are connected, but it is likely.

Even though the requirement of a fair trial cannot be determined in abstract, a number of minimum requirements have nonetheless evolved through the case law of the ECtHR.

The first of this is the requirement of 'equality of arms', meaning that there has to be a fair balance between the parties.[237] Since the right of access to court is not absolute, there is no obligation on signatory states to provide total equality of arms, or to provide legal assistance to all citizens, regardless of financial status and prospect of winning.[238]

Secondly, and in relation to equality of arms, the right to an adversarial process should be mentioned. The adversarial process means 'the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party'. [239] As a corollary, there is a right to disclosure of evidence, meaning that all relevant material is available to both parties.[240]

Thirdly, Article 6(1) contains an inherent right to reasoned decisions.[241] If a court delivers some reason for its decision there is a presumption that the requirement of stating reasons is met. This presumption can be rebutted by showing that the court has refused to address a cogent and relevant point brought by a party.[242] The obligation to state reasons is thus a flexible right, to be applied on a case-by-case basis. The ECtHR has summed up the content of this right in *Gorou* where it stated that

> Article 6 § 1 of the Convention obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and

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[235] Robin C.A. White and Clare Ovey, *Jacobs, White, & Ovey, The European Convention on Human Rights* (5th edn, OUP 2010) 260–261.
[236] *Fejde v Sweden* App no 12631/87 (ECtHR 29 October 1991), para 26.
[237] *Neumeister v Austria* App no 1936/63 (ECtHR 27 June 1968), para 22.
[238] *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR 15 February 2005), para 62.
[239] *Ruiz-Mateos v Spain* App no 12952/87 (ECtHR 23 June 1993), para 63.
[240] White and Ovey (n 235) 261–263.
[241] *Van de Hurk v the Netherlands* App no 16034/90 (ECtHR 19 April 1994), para 61.
[242] White and Ovey (n 235) 264, and *Luka v Romania* App no 34197/02 (ECtHR 21 July 2009).

> the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 § 1, can only be determined in the light of the circumstances of the case.[243]

Fourthly, there is a right to appear before the court in person. This is also not an absolute right; it is a right that depends on the nature of the proceedings. In *Kremzow*, the ECtHR held that accused persons should generally be able to attend their trials. Since the hearings in the case were of crucial importance to the accused person, it was held to be essential for the fairness of the trial that he could attend it and be afforded the possibility to participate in it.[244] In civil proceedings the same right applies, especially when it features of the concerned person is crucial for the elaboration of the court, for example, the sickness of a person seeking benefits.[245]

Lastly, it must be stated that the abovementioned is not enough in itself to ascertain the right to a fair trial. There is in addition a demand of effective participation, focusing on the possibility of influencing, or at least participating in, the procedure. The ECtHR has held that there was no breach of Article 6(1) in a case where an applicant that was partly deaf and therefore could not hear all of the evidence given at the trial. The court based its decision on the fact that his legal counsel, who could hear the proceedings and communicate with his client throughout the proceedings, had chosen not to request his client to be seated closer to a witness for tactical reasons.[246] In two other cases, involving two children accused of murdering another child, the court held that due to the media attention and the fact that there was evidence of the children suffering from posttraumatic stress syndrome, they were unlikely to have felt sufficiently uninhibited to consult their counsels. This constituted a breach of Article 6(1).[247] A later case also arising in the United Kingdom concerned a child accused of robbery. Unlike the previously described cases, this case had not attracted attention in the media, and the procedure in court was different. For example, the court adjourned for breaks very often, the barristers and judges did not wear wigs or robes, and the accused child was allowed to sit with his social worker. Nonetheless, the ECtHR found a breach of Article 6(1) due to the fact that the child had an intellectual capacity of a much younger child, and that he appeared to have very little understanding of the proceedings and what the consequences could be for him.[248]

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[243] *Gorou v Greece* App no 12686/03 (ECtHR 20 March 2009), para 37.
[244] *Kremzow v Austria* App no 12350/86 (ECtHR 21 September 1993), paras 67–68.
[245] *Salomonsson v Sweden* App no 38978/97 (ECtHR 12 November 2002).
[246] *Stanford v the United Kingdom* App no 16757/90 (ECtHR 23 February 1994).
[247] *T v the United Kingdom* App no 24724/94 (ECtHR 16 December 1999) and V v the United Kingdom App no 24888/94 (ECtHR 16 December 1999).
[248] *SC v the United Kingdom* App no 60958/00 (ECtHR 15 June 2004).

It should be pointed out that Article 6(1) applies both to criminal procedures and to civil rights proceedings, providing a likely explanation to the court's findings that the substance of Article 6(1) vary depending on the procedure and circumstances at hand.

4.4.3 Article 13 ECHR

> *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

The core of Article 13 ECHR is to provide a means with which individuals can obtain relief at a national level for violations of ECHR rights, before having to turn to the ECtHR.[249]

The judicial system upholding ECHR is based on national courts maintaining it by applying national procedural rules and remedies. Article 13 ECHR is a self-standing provision, meaning that there can be a breach of Article 13 without there being a breach of another Article of the convention. There must however be an arguable violation of another ECHR-right.[250] The ECtHR has stated that an arguable complaint is not to be determined in abstract, but rather

> in the light of the particular facts and the nature of the legal issue or issues raised, whether each individual claim of violation forming the basis of a complaint under Article 13 (art. 13) was arguable and, if so, whether the requirements of Article 13 (art. 13) were met in relation thereto.[251]

The threshold is thus quite low; it seems that it is sufficient to identify an issue with the ECHR that merits further examination. The requirements on a claim to be arguable thus seem equal to those of it being admissible.[252]

Article 13 requires effective remedies in national law, but it respects the national procedural autonomy of the signatory states. Each contracting state can themselves determine the forms of remedies offered to meet the obligations of Article 13. There is no need for the remedies to be judicial, but there is a requirement of them being effective. Article 13 requires signatory states to enact effective remedies, meaning that the national procedural autonomy is limited in regard of the very existence of remedies.

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[249] *Kudła v Poland* App no 30210/96 (ECtHR 26 October 2000), para 152.
[250] *Klass and others v Germany* App no 5029/71 (ECtHR 6 September 1978), para 63.
[251] *Boyle and Rice v the United Kingdom* App no 9658/82 (ECtHR 27 April 1988), para 55.
[252] See *Powell and Rayner v the United Kingdom* App no 9310/81 (ECtHR 21 February 1990), para 33 and White and Ovey (n 235) 134.

If a state cannot point out an available remedy before the ECtHR it is very likely to be in breach of Article 13.[253]

When it has been ascertained that a remedy exists it must be examined to what extent that remedy is effective. The ECtHR has concluded its position on the required effectiveness like this:

> The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be 'effective' in practice as well as in law. The 'effectiveness' of a 'remedy' within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the 'authority' referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so. [254]

The key features are thus that the effectiveness of a remedy varies depending on the case, but the remedy must be effective in practice as well as in law. Article 13 does not require a judicial remedy; the evaluation of effectiveness shall rather be made from the powers and guarantees it affords.

As can be seen, there are several similarities between the concept of effective remedies in ECHR law and the principle of effectiveness in EU law. Both principles show respect for the national procedural autonomy of contracting states. Furthermore, the substantive content of the principles must be evaluated on a case-by-case basis. There are also differences, for instance Article 13 ECHR prescribes the creation of new remedies if none were to exist in national law, whilst EU law prescribes that Member States are not required to introduce new remedies in order to comply with EU law.[255] However, as discussed in section 5.1 below, that strict rule has now been modified to require the creation of new remedies in some specific circumstances.

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[253] *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria* App no 15153/89 (ECtHR 19 December 1994), para 53.
[254] *Čonka v Belgium* App no 51564/99 (ECtHR 5 February 2002), para 75.
[255] Case C-158/80 *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v Hauptzollamt Kiel* [1981] ECR 1805, para 44.

5 Application of Case Law and Statutes

After describing the different principles and codifications governing the area it is of course important to examine how the ECJ has approached the issue of effective judicial protection once all instruments that govern it became available to the CJEU. In other words, once all of the tools are in the box it is of interest to examine which ones the court uses, and in what way. Such an examination is best conducted by examining the ECJ's own judgments. Since the CJEU started to refer to the Charter before its entry into force, some of the judgments analysed below are examined even though they were delivered before the Lisbon treaty became legally binding.[256]

5.1 Case C-432/05 Unibet

Unibet [257] is the first judgment taking into account all of the legal instruments described in the preceding chapters, with the exception of Article 19(1).[258] The dispute arose when the British gambling company Unibet challenged the Swedish legislation prohibiting the marketing of gambling. It did so by placing adverts in several of the largest Swedish newspapers, knowing that this was contrary to national laws. The competent Swedish authorities immediately took action against the advertisements by seeking injunctions and initiating criminal proceedings against the newspapers who published the adverts. No proceedings were, however, brought against Unibet, who instead brought its own action for damages before national courts. After their demands were declared inadmissible by the national court of first instance (tingsrätten), Unibet appealed and demanded interim relief until the judicial proceedings had been settled. [259]

Under Swedish law there was no possibility for freestanding judicial review, the legality of norms could however be addressed as a preliminary issue in other actions, such as that for damages brought by Unibet.[260] The national

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[256] Several scholars have also used this approach to examine similar questions, see Dorota Leczykiewicz, '"Effective Judicial Protection" of Human Rights after Lisbon: Should National Courts be Empowered to Review EU Secondary Law?' (2010) 35 EL Rev 326, Johanna Engström, 'The Principle of Effective Judicial Protection after the Lisbon Treaty' (2011) 4 Review of European Administrative Law 53, Anthony Arnull, 'The Principle of Effective Judicial Protection in EU Law: an Unruly Horse?' (2011) 36 EL Rev 51 and Sacha Prechal and Rob Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 31.

[257] Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271.

[258] It does not mention Article 41 of the Charter, but it does take account of the Charter as a legal source.

[259] *Unibet* (n 257), paras 17–18.

[260] ibid, paras 3–9.

court questioned whether this system was compatible with EU law, and decided to refer questions to the ECJ on the compatibility of Swedish law with the effective protection of individual's rights. It also asked whether the requirement of effective legal protection required the Swedish courts to provide interim relief, in the sense of disapplying national legislation in relation to an individual, thus making it possible for him or her to exercise the sought right until the dispute is settled.[261]

The court reformulated the question to address whether the effective judicial protection of an individual's right required the possibility to bring a freestanding action for examination of the compatibility of national legislation with EU law.[262] The court then once again held that the principle of effective judicial protection is a general principle based on constitutional traditions common to the Member States, and is enshrined in Articles 6 and 13 of the ECHR. Not surprisingly, the court made reference to *Johnston* and *Heylens* – but it also held that the principle had been reaffirmed in Article 47 of the Charter.[263] The ECJ then continued by stating that it is for national courts to ensure 'judicial protection' of an individual's rights under EU law, and clarified that the obligation stems from the principle of sincere cooperation in, what is now, Article 4(3) TEU. Interestingly, the court in this regard made reference to its case law on the principle of effectiveness, citing *Rewe*, *Comet*, *Simmenthal*, *Factortame I* and *Peterbroeck*.[264] It thus seems like the court viewed the principles of effective judicial protection and effectiveness as one and the same, or at least that the principle of effective judicial protection, which the case concerned, is one part of the principle of effectiveness, indicating that the latter is a wider principle governing judicial protection in general.[265]

The court then confirmed its classic formula from *Rewe*, stating that in the absence of harmonising EU rules the domestic rules shall apply, and that EU law is not intended to create new remedies before national courts.[266] Thus far, the court verified and clarified which set of rules were still good law, and therefore should be applied. In the subsequent paragraph, however, the court went further and introduced an exception to the no new remedies-rule by stating that if no remedy existed at all, meaning that it would be impossible, even indirectly, to secure EU rights in national courts, Member States were obliged to introduce a suitable remedy.[267]

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[261] ibid, para 30.
[262] ibid, para 36.
[263] ibid, para 37.
[264] ibid, para 38.
[265] Groussot and Wenander are of the opinion that the principle of effectiveness 'constitutes a clear emanation of the general principles of effective judicial protection.', see Xavier Groussot and Henrik Wenander, 'Self-standing Actions for Judicial Review and the Swedish Factortame' (2007) 26 Civil Justice Quarterly 376, 383.
[266] *Unibet* (n 257), paras 39–40.
[267] ibid, para 41.

The court further on in its reasoning widened that exception from applying only to situations where it would be completely impossible to secure EU rights to also include situations where an individual has to subject themselves to criminal or administrative procedures, risking penalties, in order to have the compatibility of national law with EU law examined. When adding this additional exception the court clearly marked that it had left the reasoning of *Rewe*, and instead elaborated on the principle of effective judicial protection,[268] clearly indicating that it saw the principles as separate and leading to different conclusions.

In regard of the question concerning interim relief, the court relied on *Factortame I* and *Zuckerfabrik*[269] to find that the principle of effective judicial protection

> must be interpreted as requiring it to be possible in the legal order of a Member State for interim relief to be granted until the competent court has given a ruling on whether national provisions are compatible with Community law, where the grant of such relief is necessary to ensure the full effectiveness of the judgment to be given on the existence of such rights.[270]

However, when concerned with proceedings seeking to evaluate national legislation's compatibility with EU law

> the grant of any interim relief to suspend the application of [national] provisions until the competent court has given a ruling on whether those provisions are compatible with Community law is governed by the criteria laid down by the national law applicable before that court, provided that those criteria are no less favourable than those applying to similar domestic actions and do not render practically impossible or excessively difficult the interim judicial protection of those rights.[271]

In situations such as that in *Unibet* the court thus subjected the national legislation to its well established test of equivalence and effectiveness.

5.2 Case C-268/06 Impact

Impact[272] arose in Ireland in a dispute between governmental employees and the ministries within which they were employed. The workers were so-

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[268] ibid, para 64.
[269] Joined cases C-142/88 and C-92/89 *Zuckerfabrik SüderdithmarschenandZuckerfabrik Soest* [1991] ECR I-00415.
[270] *Unibet* (n 257), para 77.
[271] ibid, para 83.
[272] Case C-268/06 *Impact v 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.

called unestablished civil servants, claiming that they were being discriminated against due to not having as beneficial terms of employments as so-called established civil servants.[273] The special court in which the applicants had filed their complaint was prohibited from applying EU law directly. Since Ireland had not transposed the relevant directive into national law, it was thus impossible for the applicants to rely on their rights conferred by EU law in the special court. The Irish government, however, pointed out that the applicants could have brought their claim before regular courts – either against the government as an employer or, in an action for damages sustained as a result from the government's failure to transpose the directive correctly and would therefore have access to an effective judicial remedy. [274] The national court halted the proceedings and decided to refer questions to the ECJ, one being whether EU law in general, and the principles of equivalence and effectiveness in particular, required that the special court in question could apply EU law directly.[275]

The court approached the question by initially stating that the Member States have the freedom to choose the ways and means of assuring that a directive is transposed in time, but that this freedom does not liberate them of their obligation, under the principle of sincere cooperation, to ensure that EU law is effective.[276] That responsibility also applies to national courts, which are responsible 'to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.'[277] The court then referred to *Unibet* in confirming that the principle of effective judicial protection is a general principle of EU law, before repeating its standard paragraph from *Rewe*, establishing that in the absence of harmonising EU law it is for the Member States to designate courts and lay down procedural rules.[278] It then, again, referred to *Rewe* and the principles of equivalence and effectiveness, stating that they

> embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law.[279]

The court concluded that a failure to comply with the principles of equivalence and effectiveness is 'liable to undermine the principle of effective judicial protection'.[280] The court found that if it would result in procedural disadvantages, for example additional costs, duration of the process, it would be a breach of the principle of effectiveness to require the

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[273] ibid, para 18.
[274] ibid, para 38.
[275] ibid, para 36.
[276] ibid, para 41.
[277] ibid, para 42.
[278] ibid, para 44.
[279] ibid, para 47.
[280] ibid, para 48.

applicants to bring their claims to a general court. This was due to the fact that the Irish government had assigned special courts as the competent courts to deal with proceedings such as those at hand. [281]

In *Impact* the court thus applied a different line of reasoning compared to that of *Unibet*. Nevertheless, it did not revolutionise its reasoning and relied much upon established sources confirming that the principles of equivalence and effectiveness, as laid down in *Rewe*, are still good EU law. It also linked them to the principle of effective judicial protection, applying them as the test of whether the EU law requirement of effective judicial protection was met, thus implying that there is no substantial difference between them. At the same time, the court stated that a breach of the principles of equivalence and effectiveness was liable to undermine the principle of effective judicial protection – indicating that there is a difference between them, albeit perhaps a semantic one.

5.3 Joined Cases C-317/08 to C-320/08 Alassini

The court had a chance to revisit its judgment in *Impact* two years later in *Alassini*[282]. The case originated before Italian courts in a dispute between a number of consumers and their telecommunications provider. Since telecommunications is an area of law regulated by EU secondary legislation, the dispute fell within the scope of EU law. According to the applicable national law, all disputes of the arisen kind had to be sent to a dispute settlement body before it could be tried in courts. The dispute settlement body had thirty days to decide upon an outcome, if they did not the case could be referred to court. Once the dispute settlement body had reached an outcome its decision could be appealed to courts, irrespective of when the decision was adopted.[283]

In the case at hand, however, the dispute settlement body had not been established, prompting the applicants to bring their action to a general court. There, the defendants argued that the action was inadmissible, since it had not been tried before a dispute settlement body.[284] The national court took the view that even if the settlement procedure had been set up where the applicants live, its mandatory character raised questions about the system's compatibility with EU law. Consequently, it halted the proceedings in order to refer questions to the ECJ. In essence, the national court asked whether or not EU law, including Article 6 ECHR, precluded national legislation

[281] ibid, para 51.
[282] Joined cases C-317/08 to C-320/08 *Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08)* [2010] ECR I-2213.
[283] ibid, paras 2, 13, 16, 54 and 55.
[284] ibid, paras 18–19.

providing for a mandatory dispute settlement system before access to court is granted.[285]

The court approached the question under a headline titled 'The principles of equivalence and effectiveness and the principle of effective judicial protection'. With a reference to *Impact* it then confirmed the *Rewe*-formula, stating that it, in the absence of harmonising EU legislation, is for the Member States to designate courts and procedures governing actions based on EU rights. It continued by stating that the Member States, in doing so, must comply with the principles of equivalence and effectiveness.[286] Interestingly, the court then proclaimed that the requirements of equivalence and effectiveness 'embody the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law'.[287]

Following that statement, the court engaged in a substantive evaluation finding that the principle of equivalence had clearly not been breached,[288] and that it was true that the mandatory settlement procedure did influence the exercise of rights conferred by the Directive at hand.[289] The court did not, however, find that the particular settlement system being disputed was such as to render it in practice impossible or excessively difficult to exercise rights derived from EU secondary legislation.[290] The court pointed to several reasons for this, including that the outcome was not binding on the parties, that the procedure did not cause substantial delay for the purposes of bringing legal proceedings, that the time limit for Bringing proceedings was paused during the thirty-day period and that the settlement procedure was free of charge.[291]

After having stated that it is for the national court to ascertain that the settlement procedure fulfils some additional criteria, such as providing for interim relief when necessary, the court found that the Italian system did comply with the principle of effectiveness as well.[292] Given the court's description of the principles of equivalence and effectiveness as the embodiment of the general obligation to ensure judicial protection one may have expected this to be the end of the judgment, but it is not. Instead, the court continues its reasoning by evaluating the principle of effective judicial protection.

It stated that the principle of effective judicial protection is a general principle of EU law, enshrined in Articles 6 and 13 of the ECHR and confirmed by Article 47 of the Charter. It then held that the mandatory dispute settlement procedure introduced an additional step before access to

[285] ibid, paras 20–21.
[286] ibid, paras 47–48.
[287] ibid, para 49.
[288] ibid, paras 50–51.
[289] ibid, para 52.
[290] ibid, para 53.
[291] ibid, paras 54–57.
[292] ibid, para58–60.

courts, and that that extra condition might prejudice implementation of the principle of effective judicial protection. The court also stated that fundamental rights are not absolute, and can be restricted if the restriction is justified by a general interest pursued by the measure, and the restriction is proportionate.[293]

In its application of this legal test, the court found that the aim of providing a quicker and less expensive settlement of disputes, as well as lightening the burden on the court system, were legitimate objectives in the general interest. It also found that the system did not seem disproportionate, given its features. The court furthermore agreed with Advocate General Kokott[294] on the point that no less restrictive means existed, since imposing a voluntary system of dispute resolution settlement would not be as effective in assuring the aims of the procedure.[295] The court concluded by stating that 'it must be held that the national procedure at issue in the main proceedings *also* complies with the principle of effective judicial protection'.[296]

In spite of the court's reference to *Impact* it seems to have adopted a rather different approach in regards of the relationship between the principles of equivalence and effectiveness on the one hand, and the principle of effective judicial protection on the other. The judgment seems to confirm that the requirements of equivalence and effectiveness are linked to a wider concept of judicial protection, as the ECJ held that they embody the general obligations of Member States in this regard. Yet, by separating its reasoning into two different parts, prescribing two different, albeit similar tests, the court draws a clear distinction between the two sets of principles. The order of the reasoning also raises questions about their relationship. If viewed as part of the same substantive matter, the difference being that the principles of equivalence and effectiveness are wider it would suffice to examine whether or not there was a breach of them. In other words, how can there be a breach of the narrower principle if the much wider principles are complied with? This indicates that a more proper view of the relationship between the principles would be to see them as a spear, where the principles of equivalence and effectiveness are the base, providing general stability, and the principle of effective judicial protection is the tip – penetrating the skin of national procedural autonomy much deeper.

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[293] ibid, 61–63.
[294] Joined cases C-317/08 to C-320/08 *Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08)* [2010] ECR I-2213, Opinion of AG Kokott, para 47.
[295] *Alassini* (n 282), para 65.
[296] ibid, para 66 (emphasis added).

5.4 Case C-279/09 DEB

Nine months after delivering *Alassini* the court continued to develop its reasoning, this time in *DEB*[297], a case stemming from Germany. DEB was a company seeking legal aid in order to be able to bring an action against the German state for damages, due to the state's failure to implement secondary legislation. DEB claimed that the neglect of the German State had caused them substantial damage and lack of income. As a corollary, it had no resources to bring an action for damages, since the German national legislation required that everyone who wishes to bring such actions must make a necessary advance payment of court costs. In addition to those costs, the national legislation also demanded that parties were instructed by lawyers in court, a cost that DEB could not pay for either.[298]

The national court of first instance refused to grant legal aid, since the conditions of national law were not fulfilled. According to national case law there had to be a public interest that could only exist if the decision affected a sizeable population of the business community, or was liable to have social repercussions. The national court of appeals agreed with the court of first instance that this was not the case in the proceedings at hand, but also found that the national legislation might be such as to make it in practice impossible or excessively difficult to seek state liability. It therefore decided to refer a question to the ECJ asking whether this was the case. The national court, in other words, asked a straightforward question on whether or not the national system was compatible with the principle of effectiveness.[299]

The ECJ approached the question by clarifying that the *Rewe*-formula still applied, and in that context referred to both *Unibet* and *Impact*.[300] After summarising the question, the court changed focus, and stated that since

> [t]he question referred thus concerns the right of a legal person to effective access to justice and, *accordingly*, in the context of EU law, it concerns the principle of effective judicial protection. That principle is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR')[301]

The court thus acknowledged that the principle of effectiveness is still good law, but that matters concerning the right of a legal person to effective

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[297] Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849.
[298] ibid, paras 14–17.
[299] ibid, paras 18, 20 and 25.
[300] ibid, para 28.
[301] ibid, para 29 (emphasis added).

access to justice in EU law should instead be measured against the principle of effective judicial protection. In this regard, the ECJ referred to among other cases, *Johnston*, *Heylens* and *Unibet* – but it notably did not refer to Article 47 of the Charter in this context, as it had done in both *Unibet* and *Alassini*.[302]

Instead, the court engaged in a separate analysis of Article 47 of the Charter, stating that since the Charter has the same legal value as the Treaties, it is important that it is taken into consideration in regards of fundamental rights.[303] It then confirmed that Article 47(2) corresponds to Article 6(1) of the ECHR.[304] It subsequently held that

> [i]n the light of the above, *it is necessary* to recast the question referred so that it relates to the interpretation of the principle of effective judicial protection as enshrined in Article 47 of the Charter, in order to ascertain whether, in the context of a procedure for pursuing a claim seeking to establish State liability under EU law, that provision precludes a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs and under which a legal person does not qualify for legal aid even though it is unable to make that advance payment.[305]

Thus, the court did not only reformulate the question, it also held that it was necessary to do so.

Relying on the legal explanations to Article 47 of the Charter, the court then confirmed that account is not just to be taken of the wording of the ECHR, but also to the case law of the ECtHR.[306] It then made reference to such case law[307] in finding that there is an obligation to provide legal aid where the absence of aid would make it impossible to ensure an effective remedy. However, '[t]hat provision must be interpreted in its context, in the light of other provisions of EU law, the law of the Member States and the case‑law of the European Court of Human Rights'[308], indicating that the ECHR is just one part of the legal system as a whole.[309]

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[302] ibid. See also *Alassini* (n 282), para 61 and *Unibet* (n 257), para 37.
[303] *DEB* (n 297), para 30.
[304] ibid, paras 31–32.
[305] ibid, para 33 (emphasis added).
[306] ibid, para 35.
[307] *Airey v Ireland* (n 234).
[308] *DEB* (n 297), para 37.
[309] This complex legal context governed by several layers of law has been aptly described by an analogy to several overhead-slides lying on top of each other. If one is moved it changes not just the image on that slide, but also the image as a whole. See Angelica Ericsson, 'The Swedish Ne Bis in Idem Saga – Painting a Multi-Layered Picture' (2014) Europarättslig Tidskrift 54.

The court then continued to evaluate the facts of the case against the case law of the ECHR and the Charter.[310] It found that it is apparent from ECtHR case law that it is not impossible to grant legal aid to legal persons, but that it must be assessed in the light of the applicable legislation and the situation of the legal person.[311] In the light of its reasoning the court's conclusion was that it was not impossible for DEB to rely on the principle of effective judicial protection, as enshrined in Article 47 of the Charter, and that legal aid granted as a consequence of this may cover exemption from advance payment of court costs and/or the instructions of a lawyer.[312] It was left to the national courts to decide upon whether the national legislation for granting legal aid constituted a limitation on the right of access to court, which undermines the very core of effective judicial protection. National courts were also entrusted with conducting an evaluation of possible justifications and of conducting a proportionality test, should they find that the national conditions constituted a breach of the principle of effective judicial protection.[313]

The case of *DEB* raises several questions on the relationship between the principle of effectiveness and the principle of effective judicial protection, but it also clarified a great deal. Firstly, it clarified that Article 47 of the Charter is to be taken into account in regards of fundamental rights. It also provided clear guidance on how to utilise the legal explanations of the Charter in interpreting rights, stating that it is to be taken into account. Through its substantial analysis, the court also exemplified how to operate within the complex legal field of fundamental rights that are governed by national, EU and ECHR-provisions as well as ECHR-case law.

In regard of the relationship between the principles of effectiveness and effective judicial protection *DEB* becomes of great interest when contrasting it against *Impact* and *Alassini*. In the latter, the court provided a link between the principles, both through its application of them and through statements about their relationship. In *DEB* the court muddied the waters by rephrasing a clear question on effectiveness, turning it into a question of effective judicial protection. This clearly indicates that the application of the principles should differ, based on the circumstances at hand. The court simply stated, as its motivation for reformulating the question, that it was due to the fact that a legal person was seeking effective access to justice. It did not clarify the underlying reasons for why this should be done, nor did it contrast situations in which the principle of effective judicial protection should be utilised against situations in which the principle of effectiveness should be utilised.

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[310] *DEB* (n 297), para 38–44.
[311] ibid, para 52.
[312] ibid, para 59.
[313] ibid, para 60.

5.5 Case C-93/12 Agroconsulting

The most recent case in which the ECJ addressed the principle of effective judicial protection and the principles of equivalence and effectiveness in detail was delivered in June of 2013. *Agroconsulting* [314] concerned agricultural aid sought by a farmer in Bulgaria. The application for aid was denied in a decision adopted by the competent administrative body, and upon appeal of the decision the question of which court had jurisdiction arose. According to national law, it was the court where the administrative body had its seat that had jurisdiction in matters such as those in the case. The applicant had, however, brought charges in the court where he resided. That court considered itself to be unauthorised to initiate proceedings, but before dismissing the case it decided to refer questions to the ECJ of whether or not the national rules were compatible with the principles of effectiveness and effective judicial protection enshrined in Article 47 of the Charter.[315]

The ECJ reformulated the question slightly, to concern the principles of equivalence and effectiveness and Article 47 of the Charter.[316] It then repeated that in the absence of harmonising EU law it is for the legal system of each Member State, in accordance with the principle of national procedural autonomy, to designate the national courts having jurisdiction. Quoting *Impact* and *Alassini*, the court held that Member states nonetheless have the responsibility to ensure that rights derived from EU law are effectively protected. It also confirmed that the national procedural autonomy of Member States is limited by the principles of equivalence and effectiveness, in accordance with Article 4(3) TEU.[317] The court also confirmed its test from *Peterbroeck* and *van Schijndel*[318] on how the compatibility of national legislation with the principles of equivalence and effectiveness is to be conducted. It confirmed that the national legislation 'must be analysed by reference to the role of the rules concerned in the procedure viewed as a whole, to the conduct of that procedure and to the special features of those rules, before the various national instances'.[319]

After providing guidance on how to interpret the principles of equivalence and effectiveness in regard of the particular circumstances at hand, mostly by pointing out relevant factors to be considered, the ECJ left it to the referring court to carry out the evaluation of whether the national law was precluded by EU law.[320]

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[314] Case C-93/12 *ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond «Zemedelie» - Razplashtatelna agentsia* [2013] OJ C225/28.
[315] ibid, paras 24 and 33.
[316] ibid, para 34.
[317] ibid, paras 35–36.
[318] See section 2.3 above.
[319] *Agroconsulting* (n 314), para 38.
[320] ibid, paras 47 and 58 respectively.

The court's reasoning then clearly left the principles of equivalence and effectiveness and instead turned to Article 47 of the Charter. With references to *Johnston* and *Unibet* the court held that Article 47 of the Charter is a reaffirmation of the principle of effective judicial protection that has its foundation in constitutional traditions common to the Member States, as enshrined in Articles 6 and 13 ECHR. The court concluded that in the case at hand 'it does not appear that *an individual* in a position such as that of Agrokonsulting is deprived of an *effective remedy before a court* with a view to defending rights derived from European Union law.'[321] Therefore, Article 47 of the Charter did not preclude the national legislation at hand.[322]

Agroconsulting thus confirms that the principles of equivalence and effectiveness are still valid law, that their content has not changed since the entry into force of the Lisbon treaty, and that they should be utilised by applying the test from *Peterbroeck* and *van Schijndel*. It also confirms that the principle of effective judicial protection is closely linked to Article 47 of the Charter, albeit that the court did not repeat its wording from *DEB*, stating that the principle of effective judicial protection is *enshrined* in Article 47. Instead, it stated that the principle of effective judicial protection is *reaffirmed* in Article 47.

The judgment in *Agroconsulting* did not cast a great deal of clarity on the relationship between the principles of equivalence and effectiveness on the one hand, and the principle of effective judicial protection on the other. Overall, the court's reasoning followed that in *Impact* and *Alassini*, clearly separating the two sets of principles, thus confirming that they are separate.

From the court's application of first the principles of equivalence and effectiveness, and subsequently Article 47 of the Charter it can be concluded that there are situations where both the principles of equivalence and effectiveness and the principle of effective judicial protection apply simultaneously.

In its application of the principle of effective judicial protection the court stated that it concerns situations where an individual is deprived of an effective remedy before a court, indicating that the principle of effective judicial protection is more concerned with individual fundamental rights than with the effectiveness of EU law. The principle of effective judicial protection is, however, only addressed in two paragraphs of the judgment, making it hard to draw clear and certain conclusions from the reasoning.

[321] ibid, para 60 (emphasis added).
[322] ibid, para 61.

6 Concluding Remarks

This chapter summaries and elaborates the analysis and conclusions made in the previous chapters. In order to provide clarity it follows the structure of the research questions set out in the first chapter.

6.1 Question 1 a)

> *Is there any difference between the principle of effective judicial protection on the one hand and the principles of equivalence and effectiveness on the other?*

When addressing this question it should first be stated that the ECJ's interpretation of what the principle of equivalence entails is clear. Its substantive content has not evolved much since it was first presented in *Rewe* and *Comet*. It operates like a principle of non-discrimination, preventing Member States from treating rights established by EU law less favourable than similar rights in national law. The ECJ's development of the principle of equivalence has, as described in section 2.4, been fairly uncontroversial. For instance, the ECJ has now clarified how national courts should address situations where no comparator exists in national law (*Palmisani*), and that the more balanced approach developed by the ECJ in *van Schijndel* and *Peterbroeck*, seeking to reconcile respect for national procedural autonomy with the effectiveness of EU law, also applies to the principle of equivalence.

The ECJ has instead been struggling with the principle of effectiveness. Here, a more substantial evolvement has taken place. The definition of the principle, as defined in *Rewe*, was initially that national legislation could not make it virtually impossible for individuals to ascertain rights derived from EU law. That is a mild criterion, leaving a lot of leeway to the Member States. However, in *San Giorgio* the ECJ widened the principle of effectiveness' scope of application to also include situations where it is not virtually impossible to ascertain EU rights, but merely excessively difficult. It is true that the different 'waves' of case law have addressed the principle of effectiveness differently, emphasising either national procedural autonomy or the full effectiveness of EU law, but the basic criteria of virtual impossibility or excessive difficulty of evoking EU law is still valid law, as confirmed by the ECJ in more recent cases such as *Impact*, *Alassini* and *Agroconsulting*. The principle of effectiveness can thus be described as a threshold principle, providing a bottom limit for national procedural autonomy, preventing Member States from making it too difficult to evoke EU law, but still leaving them a considerable margin of discretion in deciding how to organise their procedural systems.

The principle of effective judicial protection has often been used by the ECJ in relation to the principles of equivalence and effectiveness. As described above, the confusion between the principles seems to have arisen due to the

similar features of the principle of effective judicial protection and, mainly, the principle of effectiveness. However, it is clear when analysing the case law of the ECJ that the principle of effective judicial protection and the principles of equivalence and effectiveness are different principles that should not be bundled.

One reason for clearly separating them is that they have a different legal basis. The principles of equivalence and effectiveness are based on the obligation of sincere cooperation in Article 4(3) TEU, and have been developed by the ECJ from there, without being specifically codified. The principle of effective judicial protection on the other hand, is based on constitutional traditions common to the Member States and the ECHR. Their different legal basis is reason enough to separate the principles, but there are also other reasons.

Firstly, the ECJ itself distinguishes them apart. The most obvious case is *DEB* where the ECJ deemed it necessary to reformulate a question concerning the principle of effectiveness so that it instead addressed the principle of effective judicial protection. In finding the necessity to reformulate the question, the court implicitly acknowledged that the principles are different.

Moreover, when examining the case law relating to the principles of equivalence and effectiveness, and that relating to the principle of effective judicial protection, it becomes clear that the level of scrutiny by the CJEU they entail is different. The principles of equivalence and effectiveness are closely related to national procedural autonomy, and therefore leave the Member States a greater room for manoeuvre compared to the principle of effective judicial protection. The requirements listed in *Rewe*, requiring that the national legislation cannot make it virtually impossible or excessively difficult to ascertain rights stemming from EU law, are lenient towards the national legislation. In contrast, it is clear from cases such as *Johnston* and *Heylens* that the principle of effective judicial protection warrants a more detailed examination of national legislation. In those cases, the ECJ carried out an extensive examination of the national legislation at hand and did not leave much margin of discretion to the national courts. What is more, in *Heylens*, the ECJ explicitly stated that the national laws in question were inconsistent with EU law, leaving the national court no room for interpretation.

As pointed out by *Sacha Prechal* and *Rob Widdershoven* there is also a difference in the very nature of the principles of effectiveness and effective judicial protection. [323] When analysing cases on the principle of effectiveness, it is clear that it imposes negative obligations on Member States, meaning that national courts are obliged to disregard conflicting

[323] Sacha Prechal and Rob Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 31, 41.

legislation. When analysing cases on effective judicial protection, a trend of positive obligations on Member States can instead be identified, meaning that Member States are obliged to introduce new legislation that fulfils the requirements of effective judicial protection. In cases such as *Heylens* and *Unibet* the ECJ went so far as to use the principle of effective judicial protection so as to oblige Member States to introduce new, and appropriate, remedies in cases where the national procedural systems did not already entail them. Similarly, in *Impact*, the court held that a rule prohibiting the applicant from being heard in a specialised court was incompatible with the principle of effective judicial protection, even though it was not impossible or excessively difficult for the applicant to evoke EU law before a general court. However, in this regard it should be pointed out that there are cases contradicting this division. In *Francovich*[324] for instance the ECJ relied on the principle of effectiveness to require Member States to introduce a remedy where none existed under national law, and set out explicit substantive conditions for that remedy.[325]

Still, there is a great deal of confusion regarding the relationship between the principle of effectiveness and the principle of effective judicial protection, both in the doctrine and in the relevant case law. There are cases in which the ECJ could easily have reached the same conclusion independently of which principle it would have utilised. The ECJ has provided some guidance on the relationship between the principles of effectiveness and effective judicial protection, but ambiguities remain. In cases such as *Impact* and *Alassini*, the ECJ muddied the water by first stating that the principles of equivalence and effectiveness *embody* the general obligation of judicial protection – and then stating that a breach of the principles of equivalence and effectiveness means but a *likely* breach of the principle of effective judicial protection.

Another important issue still to be resolved by the CJEU is when to apply the principle of effective judicial protection instead of the principles of equivalence and effectiveness. In this regard, the ECJ has provided very limited guidance in *DEB*, by deeming it necessary to reformulate a question on the principle of effectiveness so that it instead addressed the principle of effective judicial protection. The reason for reformulating the question from the national court was said to be that it concerned 'the right of a legal person to effective access to justice'[326]. That finding would suggest that issues relating to access to court needs to be evaluated under the principle of effective judicial protection instead of under the principles of equivalence and effectiveness, or under both sets of principles for that matter. Given the wording and case law on Article 47 of the Charter and Article 6(1) ECHR it makes sense to apply the principle of effective judicial protection to

[324] Joined case C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357.
[325] See Michael Dougan, 'The Francovich Right to Reparation: Reshaping the Contours of Community Remedial Competence' (2000) 6 European Public Law 103, 106.
[326] Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849, para 29.

situations concerning access to courts. However, it does not follow from that conclusion that the principle of effectiveness should therefore be disregarded. *Rewe* itself concerned time limits making it impossible for the applicants to argue their cause in courts, as did other cases on the principles of equivalence and effectiveness, such as *Emmott*. In these situations, it would therefore seem more appropriate to follow the ECJ's approach in *Alassini* and *Agroconsulting* where it applied both the principles of equivalence and effectiveness and the principle of effective judicial protection.

In its recent case law, the ECJ has thus provided the contours of the principle of effective judicial protection, but full clarity on its relationship to the principles of equivalence and effectiveness cannot be found without further guidance from the ECJ.

6.2 Question 1 b)

> *How do the codifications of the principle of effective judicial protection relate to the principles of equivalence, effectiveness and effective judicial protection?*

It is clear from *Alassini*, *DEB* and *Agroconsulting* that the principle of effective judicial protection is confirmed by, enshrined in, and reaffirmed by Article 47 of the Charter. Therefore, it is not surprising that the ECJ tends to begin its evaluation of issues related to effective judicial protection by investigating Article 47. Even though neither the wording of Article 47 nor the legal explanations to the Charter mention the principle of effective judicial protection, the rationale behind equating them is logical. Through Article 6(3) TEU and Articles 52(3) and 53 of the Charter there is a clear link to the ECHR, meaning in this context a link to Articles 6(1) and 13 of the ECHR. Such a link was established by the ECJ already in *Johnston* and *Heylens*, making it settled case law.

It is thus safe to say that the principle of effective judicial protection is codified in Article 47 of the Charter. However, this does not preclude it from coinciding also with other statutes, and the question thus remains whether Article 47 is the only codification of the principle of effective judicial protection.

Notably, Article 47 of the Charter does not explicitly grant a right to be heard. It does mention the right to an effective remedy before a tribunal, which of course can be said to presuppose a right to be heard. On the other hand, Article 41 of the Charter explicitly mentions that right, raising questions as to whether the presupposed right to be heard in Article 47 is in fact codified in Article 41. There is no clear answer to be found in the case law of the ECJ yet, but the court has recently clarified that Article 41 is of general application, a conclusion contrary to the wording of the Article, making this interpretation possible.

There are also more substantive reasons indicating a link between Articles 41 and 47 of the Charter. In *Heylens* the ECJ engaged in a review of the administrative system that governed the recognition of diplomas from other countries. The court found that effective judicial protection presupposed an administrative procedure that fulfilled certain requirements, in the case at hand the obligation on an administrative body to state reasons for its decision. Even though the fundamental issue of the case concerned access to court, which is a key feature of Article 47, there thus seems to be a link between the requirement of effective judicial protection in Article 47 and the obligation of good administration in Article 41.

The relationship between effective judicial protection and Article 19(1) TEU is also in need of clarification. It is true that effective legal protection, by its wording is different from effective judicial protection, but the differences should not be overestimated. One natural interpretation of legal protection would be to define it as an obligation on Member States to adopt legislation that clearly governs procedures and remedies, thus ensuring legal certainty by making rights clear and easy to access information about. This definition could be contrasted against the principle of effective judicial protection, which governs the access to, and procedure in, courts and tribunals. In this view, effective legal protection in Article 19(1) TEU would be a preventive principle, upholding rights before a breach occurs. The principle of effective judicial protection would, in contrast, be a safeguard once a breach has occurred.

Thus far, the ECJ has only dealt with Article 19 TEU in five cases. However, there is an earlier link between the principle of effective legal protection and the principle of effective judicial protection, stemming from *Rewe* and confirmed in *Simmenthal*, *Peterbroeck* and *Impact*. In those cases, the ECJ used the principle of sincere cooperation to find that national courts are obliged to ensure effective legal protection that individuals derive from EU law. First after having made clear where the responsibility lays, the court continued with its reasoning concerning the principles of equivalence and effectiveness, or the principle of effective judicial protection. Against that background, Article 19(1) TEU seems to be a mere codification of the responsibility following from the principle of sincere cooperation in Article 4(3) TEU.

It should also be pointed out that the ECJ has hinted that there is a more profound connection between effective judicial protection and Article 19(1) TEU. In *Inuit*, the court held that the principle of effective judicial protection is 'reaffirmed by the second subparagraph of Article 19(1) TEU' [327]. The court did not elaborate further on the meaning of this reaffirmation, but it is logical to draw the conclusion that effective legal

[327] Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament, Council of the European Union, Kingdom of the Netherlands, European Commission* [2013] OJ C344/11, paras 100–101.

protection, as codified in Article 19(1) TEU, forms part of the principle of effective judicial protection.

In sum, it is clear that the principle of effective judicial protection has been codified by Article 47 of the Charter. Through the explicit link to the ECHR in the EU treaties, it is clear that Articles 6(1) and 13 ECHR also codify the principle of effective judicial protection. There is not yet enough case law to say with certainty whether it has also been codified by Article 41 of the Charter and Article 19(1) TEU, but such a conclusion seems to be consistent with previous case law from the CJEU.

6.3 Question 2 a)

> *Which is/are the purpose(s) underlying the principle of effective judicial protection?*

The purpose underlying the principle of effective judicial protection has been described in relatively clear terms by the CJEU. Already in *von Colson*, but even more so in *Johnston* and *Heylens* the ECJ emphasised that the protection of individual fundamental rights is the purpose for the principle of effective judicial protection. It did so both explicitly, in its reasoning, and implicitly, through its reference to the ECHR, linking effective judicial protection to Articles 6(1) and 13 ECHR. This conclusion has been confirmed in recent case law, such as *Agroconsulting*.

Since the principle of effective judicial protection is closely connected to the principles of equivalence and effectiveness, it is also of interest to examine whether or not the latter introduce other objectives that may influence the ECJ's reasoning.

It is clear from cases such as *Simmenthal* that the purpose of the principles of equivalence and effectiveness is the effective application of EU law. This, of course, often coincides with the protection of the rights of individuals. *Nial Fennelly* sees this, and the principles of equivalence and effectiveness, as part of a larger system for ensuring the overall effectiveness of EU law, including the principles of supremacy, direct effect and conform interpretation.[328] It is obvious that the application of EU law in national courts will be more effective if not just the EU institutions, but also the whole population of the EU oversee the Member States in this regard.

The case law on the principle of effectiveness, however, is ambivalent in this regard. Already in *Rewe* the ECJ stated that there is an obligation on Member States to protect the rights that citizens derive from EU law. The ECJ later confirmed that obligation in *Peterbroeck*, with a clear reasoning. This indicates that the ECJ had dual purposes for introducing the principles

[328] Nial Fennelly, 'The National Judge as a Judge of the European Union' in Allan Rosas, Egils Levits and Yves Bot (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law* (T.M.C. Asser Press 2013) 69.

of equivalence and effectiveness, both ensuring the effectiveness of EU law and the protection of individual rights. Any further evaluation of whether the ECJ saw the protection of individual rights as a purpose in itself, or viewed it merely as a way to provide individuals with a tool for ensuring the effective application of EU law can only be speculation.

Even if the purposes underlying the principles of effectiveness and effective judicial protection coincide to some extent, it is likely that the CJEU will emphasise the effectiveness of EU law as the objective of the principle of effectiveness in future case law. The ECJ, of course, had its reasons for not abandoning the principles of equivalence and effectiveness in recent cases, such as *Alassini* and *DEB*, even though it could have relied solely on the principle of effective judicial protection to reach the same conclusions. One reason could be to keep a tool that it has full and exclusive control over. As mentioned, the purpose behind effective judicial protection is not to ensure the effective application of EU law, especially since the ECJ is bound by Article 53 of the Charter to respect the case law of the ECtHR as a minimum level of protection. Should a situation occur where the interest of effective application of EU law does not overlap the interest of protecting individual rights, it is to be assumed that the ECJ would wish to keep a judicial tool through which to protect the application of EU law.

6.4 Question 2 b)

Is the ECJ adequately protecting this/these purpose(s) in its case law?

It is hard to draw conclusions on the adequacy of the ECJ's effective judicial protection of individual rights. In one sense, the ECJ is clearly a force for improved judicial protection since there is still case law where national legislation is deemed not to live up to the requirement of ensuring effective judicial protection. In addition, the link between ECHR and EU law in this area empowers the ECJ to safeguard EU-rights corresponding to rights in the ECHR. Given the considerable caseload and subsequent long handling times that burdens the ECtHR, a potentially quicker way of ensuring effective judicial protection has become available for individuals via the ECJ. Furthermore, the entry into force of the Charter has increased the interest and the focus on fundamental rights adjudication in the ECJ, which also indicates that the ECJ's role as a judicial guardian of effective judicial protection will become increasingly important.

Nevertheless, the ECJ should be criticised for its unclear reasoning regarding effective judicial protection. As described, the ECJ has not yet addressed a number of crucial issues relating to the principle of effective judicial protection, in spite of plenty of opportunities to do so. When is it to be applied instead of the principles of equivalence and effectiveness? What exactly does it entail? Is Article 47 of the Charter the only codification of it, or should statutes such as Article 41 of the Charter and 19(1) TEU also be taken into consideration?

The lack of clarity impairs legal certainty, both for individuals seeking to secure their rights under EU law and for Member States, seeking to fulfil their obligation to ensure effective legal protection. In this regard, the basic features of the EU judiciary system should once again be recalled. Ultimately, EU law is not enforced by the CJEU. Its effectiveness is assured by national judges in national courts. Vagueness and ambiguity on behalf of the CJEU risks a situation where the principle of effective judicial protection is not upheld effectively in national courts, and therefore neither in the EU.

The need to map the case law of the CJEU, and the codifications of important principles developed there has been the purpose of this thesis. To draw attention to the abovementioned discrepancies in the case law of the CJEU, and to the potential risks that they entail, is the significance of the thesis.

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