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# EC Procedural Protection: The Principles of Effectiveness and Equivalence

With Particular Focus on Swedish Tax Procedural Law

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# Summary

The notion of a procedural autonomy reserved to the Member States has its roots in the *Rewe* and *Comet* judgments delivered in 1976. In those cases the European Court of Justice held that it is for the domestic systems of each Member States to designate the courts having jurisdiction and the procedural conditions governing actions at law intended to ensure the protection of the rights which subjects derive from the direct effects of Community law. However, that “autonomy” was subjected to two overriding considerations of Community law. First, the national rules applicable to Community law cases cannot be discriminatory or less favourable than those relating to similar actions of a domestic nature (the principle of equivalence). Secondly, the national rules must not make it excessively difficult to exercise Community law rights (the principle of effectiveness). This does however not imply that there is an autonomy contra EC effectiveness contradiction, in fact there is no balancing act to be undertaken, as some commentators has suggested where the interest of respecting the autonomy of the Member States to provide for procedural rules must be weighed against the need for proper protection of EC law. The principle of cooperation enshrined in Article 10 EC requires that Member States provide for adequate protection of EC law rights and this also includes the procedural aspects of the enforcement of those rights. If the application of the principles of effectiveness and equivalence demonstrates that the Member States haven’t fulfilled that duty, then the national courts will have to set-aside those procedural rules that stand in the way of proper procedural protection. The Swedish Tax Courts are of course not exempted from this duty. Whenever they try cases where an individual rely on directly effective EC law they must constantly evaluate whether or not the procedural rules governing those claims fulfil the requirements imposed by the principles of effectiveness and equivalence and thus provide the protection required under Article 10 EC. The purpose of this thesis is to examine Swedish Tax Procedural Law against the EC principles of effectiveness and equivalence with a view to analyse if those rules comply with those principles. This study has shown that it is not easy to point out specific rules that may be contrary to the principles of effectiveness and equivalence. That is particularly so as regards the principle of effectiveness, which is less straight-forward than the principle of equivalence. That notwithstanding, it is still possible to examine certain rules and draw some general conclusions as to their validity.

# Preface

En lektion med en inspirerande lärare kan vara allt som krävs. Allt som krävs för att väcka ett stort intresse och en stor nyfikenhet hos en student. Jag är oerhört tacksam för att där fanns en sådan lärare för mig, som med en inspirerande, originell och stimulerande undervisning skickade iväg mig på den resa som sedermera skulle resultera i detta examensarbete. Under resans gång har samma lärare fungerat som en oundgänglig kompass som väglett och förhindrat mig från att komma på irrvägar. Jag ber därför i detta sammanhang att få framföra min stora tacksamhet till min mentor och handledare Cécile Brokelind.

# Abbreviations

AG	Advocate General
EC	European Communities
ECJ	European Court of Justice
FPL	Förvaltningsprocesslagen
Prop	Proposition
TL	Taxeringslagen
RF	Regeringsformen

# 1 Introduction

## 1.1 Background

Van Gend & Loos changed it all. The Community legal order that is, for ever since the European Court of Justices' ruling in that seminal case it has been recognized that Community law confers rights on individuals which they, if certain conditions are met, can invoke before national courts and authorities. It has often been said, however, that Member States have an unfettered "autonomy" in providing the procedural context in which EC law rights are enforced before national courts, i.e. an autonomy as regards the procedural protection of Community rights. The notion of a procedural autonomy reserved to the Member States has its roots in the *Rewe* and *Comet* judgments delivered in 1976. In those cases the European Court of Justice held that it is for the domestic systems of each Member States to designate the courts having jurisdiction and the procedural conditions governing actions at law intended to ensure the protection of the rights which subjects derive from the direct effects of Community law. However, that "autonomy" was subjected to two overriding considerations of Community law. First, the national rules applicable to Community law cases cannot be discriminatory or less favourable than those relating to similar actions of a domestic nature (the principle of equivalence). Secondly, the national rules must not make it excessively difficult to exercise Community law rights (the principle of effectiveness).

While the Court in *Rewe* and *Comet* *did* state that Member State must ensure that the principles of effectiveness and equivalence are complied with, the common understanding seems to have been that it would only be exceptionally that a procedural rule would be called into question from the viewpoint of those principles. This is false understanding of the matter. There is no autonomy contra EC effectiveness contradiction, in fact there is no balancing act to be undertaken, as some commentators has suggested, where the interest of respecting the autonomy of the Member States to provide for procedural rules must be weighed against the need for proper protection of EC law. The principle of cooperation enshrined in Article 10 EC requires that Member States provide for adequate protection of EC law rights and this also includes the procedural aspects of the enforcement of those rights. If the application of the principles of effectiveness and equivalence demonstrates that the Member States haven't fulfilled that duty, then the national courts will have to set-aside those procedural rules that stand in the way of proper procedural protection irrespective of any interest of preserving a perceived domestic autonomy in procedural matters.

The Court has since *Rewe* and *Comet* continued to rely on those rulings and applied the principles in connection to a large range of national procedural rules. Time-limits for bringing proceedings, procedural rules on evidence, rules governing the finality of judgments as well as many other types of rules have all been tested against the principles with varying results. The Court has shown that these principles have very large implications for the procedural systems of the Member States. Whenever and wherever an individual invokes a directly effective Community right within the Community, that procedure is automatically subject to the system of procedural protection provided for by these principles and if that procedure doesn't fulfil those requirements the national court is required under Community law to interpret the procedure in conformity with those requirements or disapply it completely.

## 1.2 Problem and Purpose

The notion of a procedural autonomy reserved to the Member States is very treacherous. If national courts, who are to apply and deal with Community law, assume that EC law can have none or merely minor influence on the procedural rules governing the enforcement of EC law, they will not be properly prepared to provide the effective protection to EC law, a protection that they, pursuant to Article 10 EC and principle of cooperation, are required to provide. In essence, if national view their duties on the basis of autonomy, they will proceed down the wrong path and the Member State to which they belong may be held accountable under Community law. More importantly is, however, that the effectiveness of Community law will suffer and the achievement of the common objectives will be jeopardized. Whenever Swedish Tax Courts try cases where an individual rely on directly effective EC law they must constantly evaluate whether or not the procedural rules governing those claims fulfil the requirements imposed by the principles of effectiveness and equivalence and thus provide the protection required under Article 10 EC. In that regard it is clear that both the applicable procedural rules as such and the Swedish court's application of them must meet those requirements. Against the backdrop of a comprehensive analysis of the ECJ's case law concerning the application of the principles I will proceed with an examination of the Swedish Tax Procedural Law with a view to examine and analyse if they comply with those principles.

## 1.3 Disposition

In the second chapter I will outline the context of the thesis. The context will provide the proper "looking glasses" from which to view EC law requirements on national procedural law. I argue that the principles of effectiveness and equivalence must be seen as indispensable, but not unique, elements intended to provide proper and effective judicial protection to Community law rights. I further argue that, since these procedural principles must be viewed as spill-over effects from the principle of supremacy, no national procedural autonomy logically can be reserved to the Member States. In that context I examine the principles legal development, features and connection to the overarching purpose of securing the protection of EC law.

In the third chapter I will examine the Court of Justice's application of the principles of effectiveness and equivalence in relation to several different types of national procedural rules. I will examine the Court's case-law on the application of the principles in relation to (a) temporal procedural restrictions, (b) rules governing evidence, (c) rules governing the function of the Court in legal proceedings and (d) rules governing the legal force of judgments. Against that backdrop I will subsequently continue with a comparison with the corresponding Swedish tax procedural rules and examine if the Swedish rules meet those requirements.

In the final chapter I will summarize the previous chapters both as to content and as to conclusions.

## 1.4 Method and Material

The method used in this thesis is the standard legal dogmatic method, i.e. a description and analysis of the law. Consequently, I have studied and examined the traditional legal sources of law: case-law of the courts, law texts, legal articles and literature and preparatory works. With regards to legal literature in general, I have examined both international and Swedish sources. With regards to the case-law of the Court of Justice, all the cases contain some aspect that I have found to be of value to the subject-matter of the thesis. Some cases may only contain a repetition of a former legal argumentation of the



court, most cases does however contain something new or, in certain cases, something old but in a new legal setting. Several cases examined in this thesis do however not concern tax procedural law per se, i.e. they may concern procedural rules governing other matters. It is nonetheless the authors' belief, a belief based on an examination of the Court's case-law, that these cases can have substantial implications as to the general application and understanding of the principles, i.e. the fact that the Court has interpreted the principles in connection to procedural rules governing time-limits for bringing proceedings in a case concerning social law, does not mean that that interpretation is invalid in other circumstances. The ECJ has never been very sensitive to internal legal classifications and the need to achieve protection, which the principles aim to provide, is always the overriding Community concern irrespective of the exact nature of the EC law right enforced before national courts.

## 1.5 Delimitations

The thesis will be an attempt to analyse the case-law of the Court of Justice in order to compare the case-law with certain national procedural rules. It does however depart from the previous work in this field with reference to two factors; the extent of the comparison and the object of comparison. In contrast to the previous works, I will focus on all procedural rules that have been considered by the ECJ. This means that I will analyse the Court's jurisprudence on rules governing temporal procedural restrictions, rules governing evidence, the function of the domestic court and the legal force of judgments; which, in essence, constitute all procedural rules tested against the principles since *Rewe* and *Comet*. Since the thesis, as a partial step, constitutes an attempt to analyse the Court's jurisprudence in applying the principles of effectiveness and equivalence, it will to a great extent also amount to a very comprehensive analysis of the Court's case-law. Most articles written with the aim of analyzing the ECJ's case-law are shorter pieces, often as a commentary to a recent case delivered by the ECJ. Given the nature of these articles, they are often restricted in scope and many of the conclusions reached have become obsolete due to the fact they haven been surpassed by new court development. See for instance Biondi (1999), Prechal (1994, 1997 and 1998), Himsforth (1997) and McKendrick (2000) and Groussout (2007). An exception is perhaps Ward (2000), who, although not entirely complete, conducts a very impressive examination of the Court's case-law in relation to several types of procedural rules.

Some authors adopt a more abstract perspective and aims to examine the relationship between EC Law and national procedural law. Former ECJ judge Kakouris (1997) and Delicostopoulos (2003) for instance argues that the case law of the Court doesn't recognize an "autonomy" reserved to the Member States, and that, in point of fact, the Court has tended to regard national procedural law merely as an ancillary body of law the function of which it to ensure the effective application substantive Community law. Advocate General Jacobs (1997) has however expressed a little different view; according to Jacobs, the ECJ has tried to strike a balance between the autonomy of the Member states and the need to ensure the proper application of Community law. In that context he investigates the court's jurisprudence in relation to several forms of procedural rules with the view to examine when the Court has given precedence to the notion of national procedural autonomy.

As to the object of comparison, my thesis will focus on Swedish Tax Procedural Law and such a comparison has, to my knowledge, never been conducted. Examinations of the implications due to the requirements imposed by the principles has without a doubt received very little attention in the legal doctrine. Merely two articles attempts explicitly to apply the Court's jurisprudence on concrete national procedural rules. The first was written by Szyszack and Delicostopoulos (1997). In that article the authors' attempts to apply the Court's jurisprudence from the *Van Schijndel* and *Peterbroeck* rulings to demonstrate that the ECJ has introduced a new Community law principle that points of Community law must be raised by the lower courts in France of their own motion. The second piece with a clear comparative aim is a doctoral thesis by Torbjörn Andersson (1997). Andersson

intends to clarify some changes in national procedure due to the EC requirements of effectiveness and individual protection. In that regard he analyses the Swedish rules on civil procedure in cases concerning EC competition law in light of the principles of effectiveness and equivalence.

# 2 Enforcement and Protection of EC Law

## 2.1 Securing the Effectiveness of EC Law

Effectiveness is often recognized as precondition and guarantee for the success of any legal system.<sup>1</sup> Because of its entirely singular structure, the EC faces unique challenges in ensuring that the Community system functions properly and effectively. Several inherent features of the Community system contribute to such a pragmatic assessment. From a policy perspective we can conceive of effectiveness as including implementation, enforcement and compliance;<sup>2</sup> and in that context we can assess several Community features that might impede the effectiveness of EC law. If Member states fail to implement, enforce or comply with EC law then the two consequences follows; in concrete, the specific EC provision is devoid of its purpose which on a larger and cumulative level could seriously undermine the foundation of the Community system. The Court of Justice has recognized this dilemma and responded by adopting different legal mechanisms to ameliorate these problems with the view to safeguard the effectiveness of EC law.

## 2.2 Enforcement of EC Law before National Courts

By establishing the doctrine of direct effect in the seminal *Van Gend & Loos* case, the Court of Justice rebutted the ordinary presumption in international public law whereby international legal obligations are result-oriented and addressed to states only.<sup>3</sup> If EC law was directly effective, it could be invoked by individuals before their national courts to challenge or evade inconsistent national law. Giving individuals rights was of course an ingenious way to make Europe more relevant to its citizens while at the same time putting in place a decentralized control mechanism to promote the effectiveness of EC law. Since an EC provision that was sufficiently clear, unconditional and left no room for the exercise of discretion in implementation by Member States or Community institutions could be relied upon before national courts, every individual was given a greater incentive to participate in the European project.<sup>4</sup> The establishment of the doctrine of direct effect solved several problems concerning Member state implementation, enforcement and compliance and it would also, to a greater extent, ensure the promotion of the effectiveness of EC law.

The ECJ's *Van Gend & Loos* rationale – the structure of the EC Treaty, the EC as new legal order, and the effectiveness (*effet utile*) of EC law – has propelled and justified the ECJ's subsequent expansion of direct effect.<sup>5</sup> While *Van Gend & Loos* was restricted to the question whether a Treaty Article could produce direct effect, the Court of Justice has on several subsequent occasions extended the ambit of its doctrine to also include other sources of EC law. This judicial development has in turn meant that individuals have been extended greater and greater possibilities to rely on EC law before national courts. Regulations are by their very nature apt to produce direct effects.<sup>6</sup> However, even for regulations direct effects are not automatic. There may be cases where a provision in a regulation is conditional, or insufficiently precise, or requires further implementation

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<sup>1</sup> Accetto & Zleptnig 2005:375.

<sup>2</sup> Snyder 1993:27.

<sup>3</sup> Hinton 1998:320.

<sup>4</sup> Steiner & Woods 2003:91.

<sup>5</sup> Hinton 1998:321.

<sup>6</sup> Article 189 EC explicitly states that a regulation shall be binding in its entirety and “direct applicable” in all Member States.

before it can take full legal effect.<sup>7</sup> In *Duyn*<sup>8</sup> it was established beyond doubt that directives could produce direct effect and in *Ratti*<sup>9</sup> the ECJ subsequently concluded that a directive cannot, however, be directly effective before the time-limit for implementation has expired. Since recommendations and opinions have no binding force it would appear that they cannot be invoked by individuals, directly or indirectly, before national courts. The Court of Justice ruling in *Grimaldi*<sup>10</sup> does however create some ambiguity in that regard. In that case the ECJ held that national courts were “bound to take Community recommendations into consideration in deciding disputes submitted to them, in particular where they clarify the interpretation of national provisions adopted in order to implement them or where they are designed to supplement binding EEC measures”.<sup>11</sup>

## 2.3 Protection of EC Law and Article 10 EC

While the doctrine of direct effect has been an essential component in advancing the effectiveness of EC law it is not without limitations. Significant gaps exist when direct effect is unavailable or inapplicable, or where the protection of the enforcement of directly effective EC law are rendered ineffective.<sup>12</sup> If the doctrine of direct effect for legal-technical reasons cannot create rights that may be invoked before national courts, then individuals will not benefit from EC law and participate in the decentralized enforcement of EC law. If the doctrine of direct effect, by reasons attributable to the laws or practices of the authorities or Courts of the Member States is rendered ineffective, then this will also in turn compel individuals to refrain from participating in the decentralized enforcement of EC law. In either case, the effectiveness of EC law suffers as a result. The Court of Justice has therefore, utilizing mainly Article 10 EC and the principle of cooperation underlying that provision, attempted to ameliorate these problems by providing individuals with additional protection in those cases where they for these reasons are unable to enforce directly effective EC law before national courts. Article 10 has been described as “the core of the constitutional law of the Community” and can perhaps best be described by saying that national authorities and Community institutions have a legal duty to co-operate in good faith to achieve common objectives.<sup>13</sup> The Court of Justice has held that performance of the duties arising from Article 10 is not only necessary where common rules exist, but also in a situation in which it has appeared impossible, by reason of divergences of interest, to establish such common rules.<sup>14</sup>

### 2.3.1 Protection of Unenforceable EC Law

In cases where direct effect is unavailable or inapplicable the Court of Justice has, relying on Article 10 EC, established the doctrine of indirect effect; in cases such as *Von Colson* and *Marleasing* the Court thus indicated that even when a directive is not directly effective, national authorities have a duty to interpret national provisions intended to implement that directive in the light of its wording and purpose.<sup>15</sup> Furthermore, *Marleasing* extended the scope of *Von Colson* by obligating national authorities to interpret national legislation in light of the Community directive regardless of whether that directive has been implemented or not.

The non-contractual liability of Member States for breaches of EC law closes another gap;<sup>16</sup> In *Francovich* the Court, again in reliance of Article 10 EC, ruled that a Member

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<sup>7</sup> Steiner & Woods 2003:93.

<sup>8</sup> Case 41/74 *Van Duyn*.

<sup>9</sup> Case C-148/78 *Ratti*.

<sup>10</sup> Case C-322/88 *Grimaldi*.

<sup>11</sup> *Ibid* at para. 18.

<sup>12</sup> *Hinton* 1998:321.

<sup>13</sup> *Temple Lang* 1997:43.

<sup>14</sup> *Schermers* 2001: § 40.

<sup>15</sup> Case C-14/83 *Von Colson*; Case C-106/89 *Marleasing*.

<sup>16</sup> *Joined Cases C-6&9/90 Francovich*.

State in principle was required to make good loss and damage caused by a breach of EC law for which it was responsible if (a) the rule of law infringed is intended to confer rights on individuals, (b) the breach is sufficiently serious, and (c) there exist a direct causal link between the breach and the damage sustained.<sup>17</sup> That ruling has subsequently been refined, most notably by the Court of Justice's judgments in *Brasserie du Pêcheur*, where the Court held that state liability isn't dependent on whether or not the provision breached has direct effect. In *Köbler and Traghetti* the Court further elaborated the principle of state liability to also include breaches attributable to national courts.<sup>18</sup>

### 2.3.2 Protection of Enforceable EC Law

Even when direct effect is available and EC law consequently confers rights which may be invoked by individuals before national courts and authorities, it is obvious that several obstacles can impede the effectiveness of EC law. In essence, the creation of individual rights by the establishing the doctrine of direct effect created a secondary problem: the protection of the enforcement of those rights. In that regard it is apparent that the most obvious way to render direct effect ineffective is for Member States to introduce, or keep in force, national provisions that conflict with similar provisions of EC law. In *Costa v. ENEL* the Court however solved that conflict by laying down the principle of supremacy of EC law.<sup>19</sup>

A second conceivable way to render direct effect ineffective is by providing for inadequate remedial- and procedural rules to govern actions intended to safeguard directly effective EC law. If member state were completely free to establish procedural- and remedial rules to govern actions intended to safeguard EC law then it is of course entirely plausible that those rules could make the exercise of EC law before national courts excessively difficult or, *a fortiori*, virtually impossible. Those rules could hence, in essence, threaten the effectiveness of EC law. The Court of Justice has therefore consistently and from very early on held that, insofar EC law confers rights on any natural or legal person the national courts are required to ensure that those rights are protected.<sup>20</sup> That duty consequently satisfies a dual purpose of effectiveness: effectiveness of protection and, as a consequence, effectiveness of the legal rule itself.<sup>21</sup>

For nearly thirty years the Court of Justice has therefore, relying on Article 10 and the principle of cooperation, consistently held that the starting point in the absence of explicit community rules governing the matter, is the duty of national courts to apply domestic remedial- and procedural law to govern actions based on directly effective EC law.<sup>22</sup> This "procedural prerogative" was however simultaneously conditioned by a duty to provide adequate protection as well as by the fact that it was a residual rule of law, i.e. it is only in the absence of Community measures that Member states may lay down procedures to govern such actions. In recognition of the perils connected with a complete reliance on national procedural law and the Member States willingness to fulfil their duty to provide adequate procedural protection for EC law, the Court at the same time adopted two legal instruments to ensure that the duty of protection is fulfilled: the principles of effectiveness and equivalence.<sup>23</sup>

The notion of a "spill-over" from the principle of supremacy into the procedural arena is of course an entirely different matter than stating that the supremacy of EC law requires that any national procedural provision which restricts EC law must be set aside.<sup>24</sup> The principles of effectiveness and equivalence are merely two protective principles that aim to

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<sup>17</sup> Steiner & Woods 2003:114.

<sup>18</sup> Case C-224/01 Köbler; Case C-173/03 Traghetti.

<sup>19</sup> Case C-6/64 Costa v. ENEL.

<sup>20</sup> Case C-13/68 Salgoil (operative part).

<sup>21</sup> Opinion of AG Léger, Case C-224/01 Köbler, para 58.

<sup>22</sup> Case C-33/76 Rewe.

<sup>23</sup> Case C-33/76 Rewe and Case C-45/76 Comet.

<sup>24</sup> Case C-6/64 Costa v. ENEL.

prevent that the procedures governing actions enforcing EC law pose a threat to the effective application of EC law before national courts. The rationale behind those principles is thus similar to that underlying the principle of supremacy; both the principles of effectiveness/equivalence and supremacy are based on Article 10 EC and the principle of cooperation and the rationale behind the principles are also similar; EC Law must be effective in order to achieve common objectives, national law may threaten the effectiveness of EC law and in order to prevent that outcome protection must be provided. While the principle of supremacy was adopted to deal with substantive threats to the effectiveness of EC law and called for certain solution, the principles of effectiveness/equivalence were adopted to deal with procedural threats. The principles, based on the same legal base and rationale, do consequently only differ as to their respective subjects, i.e. the kind of obstacle that the protection is directed against.

## 2.4 The Procedural Prerogative of the Member States

While the member states enjoy a procedural prerogative to lay down the procedural (and remedial) context in which EC law claims are brought, it should also be recognized that the Member states were entrusted to use this prerogative in accordance with Article 10 EC and the principle of cooperation.<sup>25</sup> That implies a duty to provide for a procedural context that gives adequate and proper protection to EC law when individuals enforce directly effective EC law before national courts. The procedural prerogative rests on two pillars. First, since no general EC procedural rules exist that can govern EC law claims, it is of course not possible for the Court to create a procedural context by its own. Secondly, it also seems clear that the procedural prerogative rests on an assumption. Advocate General Jacobs summarized the content of this assumption extremely comprehensibly in *Van Schijndel* by stating that:

“the assumption underlying the system established by the treaties...is that the need for effectiveness and proper judicial protection can normally be satisfied by national remedies enforced through the national courts in accordance with national procedural rules. The underlying premise is that States based on the rule of law will organize their national legal system in such a way as to ensure proper application of the law and adequate legal protection for their subjects. It is therefore only exceptionally that the Court will need to intervene to ensure that effect is given to EC law.”<sup>26</sup>

The assumption underlying the prerogative is consequently, as AG Jacobs noted that Member States are assumed to organize and lay down sensible procedural rules within the domestic legal system that respects and properly protects EC law. The inference from that assumption is accordingly that the procedural prerogative, from a Community perspective, will contribute to the protection of Community rights, not vice versa. Since this is only an assumption, not a certain fact, the Court in both *Rewe* and *Comet* also held that the procedural prerogative was subject to the fulfilment of the requirements imposed by the principles of effectiveness and equivalence. Thus, Member states may only enjoy the procedural prerogative as long as they lay down procedures in a way that fulfils the duty to provide proper protection for rights pursuant to Article 10 EC. The principles of effectiveness and equivalence are thus the way that EC law controls for that Member states fulfil this duty when they use their prerogative to provide procedural rules to govern actions enforcing directly effective EC law.

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<sup>25</sup> See Case C-33/76 *Rewe*, para. 4.

<sup>26</sup> Opinion of Mr General Advocate Jacobs in C-430&431/93 *Van Schijndel*, para. 29.

## 2.5 Limits to the Procedural Prerogative: The Principle of Equivalence

### 2.5.1 Development

Although there seem to be some different opinions on the matter<sup>27</sup>, my view is that the principle of equivalence was affirmed *together* with the principle of effectiveness in *both* the *Rewe* and *Comet* judgments.<sup>28</sup> In *Rewe*, the facts of which were very similar to *Comet*, a trading company imported French apples to Germany. The German customs authorities required the company to pay importation charges for phytosanitary inspection of the apple consignment from France. *Rewe* however brought proceedings against the decision imposed by the administrative body before the administrative court and claimed that the levied import charge was contrary to EC law since it constituted a charge having an effect equivalent to customs duties. The question that arose in the case was whether *Rewe* should be granted restitution of the charges although a domestic time-limit for contesting the administrative measure had passed and thus prevented this possibility. It was in that context that the Court referred to Article 10 EC and held that:

“Accordingly, in the absence of Community rules on this subject, it is 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 EC law, *it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature*”.<sup>29</sup>

The requirement thus imposed by the principle which, according to AG Ruiz-Jarabo Colomer “has gradually lost its initial rigor”<sup>30</sup>, can essentially be said to contain a basic requirement of equal procedural treatment of similar rights irrespective of whether the relevant right is based on a directly effective Community provision or strictly domestic law. In his opinion to *Van der Weerd*, Advocate General Maduro stated that: “the principle of equivalence requires that the same procedural rules apply to claims based on EC law as to comparable claims based on national law”.<sup>31</sup> This statement is however problematic since the principle does not require equivalence where claims based on EC law receives more advantageous treatment than comparable national claims, i.e. reverse discrimination.<sup>32</sup>

While the principle of equivalence is based on the principle of cooperation inherent in Article 10 EC, it also constitutes a more defined and adjusted expression of the general EC principle of equality or equal treatment which, as is well known, comprise a fundamental principle of EC law.<sup>33</sup> Himsworth notes that it is understandable that the principle of equivalence “came to be accepted into the jurisprudence of the E.C. as a natural corollary of the more general anti-discriminatory principle in the Community – that all Community nationals should be treated equally by the Member states”.<sup>34</sup> Indeed, in EC law great care is taken to guarantee equality and prevent discrimination. It is recognized as a compelling legal principle, stemming from the common European legal heritage and setting out binding rules.<sup>35</sup> It underlies several provisions of the treaties which, according to the court, are merely specific enunciations of the general principle of equality.<sup>36</sup> Generally and according to settled case-law, the principle of equality permits to prevent similar situations

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<sup>27</sup> See for example Steiner, p. 103. She claims that the principle of equivalence was laid down in *Rewe* while the principle of effectiveness was established in *Comet*.

<sup>28</sup> Case C-33/76 *Rewe-Zentralfinanz*. C-45/76 *Comet BV*. Both rulings were delivered on the same day.

<sup>29</sup> Case C-33/76 *Rewe-Zentralfinanz*, para. 5; Case C-45/76 *Comet BV*, para. 13.

<sup>30</sup> Opinion of AG Ruiz-Jarabo Colomer, Case C-232/05 *Commission v. France*, para. 85.

<sup>31</sup> *Ibid.* at para. 15.

<sup>32</sup> Schermers § 167.

<sup>33</sup> See case 34/02 *Pasquini*, para. 70. See also Tridimas and Himsworth 1997:309.

<sup>34</sup> Himsworth 1997:309.

<sup>35</sup> Schermers § 54.

<sup>36</sup> Case 36/74 *Walrave*; Joined Cases 117&16/77 *Ruckdeschel*.

from being treated differently, but also different situations from being treated similarly, unless the difference of treatment is objectively justified.<sup>37</sup>

## 2.5.2 Structure

In order to verify that the requirement of equivalence is fulfilled the principle prescribes a two-step test in which first a *valid comparator* has to be identified and where secondly it has to be established whether the comparison subsequently initiated fulfils a certain *criterion of favourability*. The principle's prerequisites are at the outset thus rather uncomplicated.<sup>38</sup> The primary concern is to identify a valid comparator and to establish whether that comparator, if existent, treat actions based on strictly domestic law more favourably than actions based on EC law.<sup>39</sup> The problem is however that the application of the principles requires additional guidelines as to the proper understanding of these two operations to be undertaken, i.e. how do we determine whether two actions are similar and how do we determine whether the procedural rules governing two similar actions are less favourable in regard to one action? Consequently, what initially seems fairly uncomplicated can often become rather complicated at a closer encounter; the principle of equivalence is no exception. The Court of Justices', at times, not entirely coherent interpretation of these requirements does not help either.

## 2.6 Limits to the Procedural Prerogative: The Principle of Effectiveness

### 2.6.1 Development

The most common formulation of the principle of effectiveness was first laid down in the previously mentioned *Rewe* and *Comet* cases from 1976 although there are piece-meal traces of the principle from even earlier case-law of the Court. In *Rewe* and *Comet* one of the parties took the view that to allow national procedural law to apply to claims invoking Community rights would be tantamount to overriding the supremacy of EC law.<sup>40</sup> AG Warner, who delivered a joint opinion to the cases, however disagreed with such a description and stated that: "I do not think that that is a correct description of the situation. I see it as a situation in which EC law and national law operate in combination, the latter taking over where the former leaves off, and working out its consequences".<sup>41</sup> The problem with AG Warner's contention was the complete dismissal of control on the supranational level that the approach proposed would amount to. Warner's approach contained no guarantees for the effective protection of Community rights and no technique for supervising the procedural aspects of enforcement. The approach adopted by the Court of Justice in *Rewe* and *Comet* signified a "middle way" between the solution based on the "supremacy is all" argument forwarded by the plaintiffs in *Rewe* and the solution embracing a complete continuation of the *Salgoil* and *Lorenz* jurisprudence forwarded by AG Warner, which contained a total abdication to the institutional and judicial competence of the Member States.<sup>42</sup> In *Rewe* and *Comet* the Court held that in the absence of Community rules on the subject, it was 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 derived from the direct effect of EC law.<sup>43</sup> However, after having reiterated the Court's traditional approach, evident in *Salgoil* and several previous cases, it also promptly added

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<sup>37</sup> Schermers § 160; See also Joined Cases 117&16/77 Ruckdeschel.

<sup>38</sup> Andersson 1997:116.

<sup>39</sup> Opinion of AG Ruiz-Jarabo Colomer, Case C-232/05 Commission v. France, para. 86.

<sup>40</sup> Argument of the plaintiff in *Rewe*. See the opinion of Mr Advocate General Warner. C-33/76 *Rewe*, p. 2003.

<sup>41</sup> *Ibid.*

<sup>42</sup> Case C-13/68 *Salgoil* & Case C-120/73 *Lorenz*.

<sup>43</sup> Case C-33/76 *Rewe*, para. 5.



that this: "...position would be different only if the conditions...made it impossible in practice to exercise the rights which national courts are obliged to protect".<sup>44</sup>

## 2.6.2 Structure

The technique used by the Court to express the principle is rather revealing. Instead of laying down a positive duty, i.e. the enforcement of Community rights *must be* governed by effective domestic procedural rules; the ECJ chose instead to establish a negative duty; i.e. domestic procedural rules must *not make it* impossible in practice. There is consequently a certain connection between the techniques employed by the Court in laying down the two principles; while the principle of equivalence is deferential to the procedural prerogative of the Member states by merely requiring an extension of the protection already being offered, the principle of effectiveness is deferential by the way it is formulated, i.e. as negative requirement with an extremely low threshold level.

The court's formulation of the principle has however not been entirely consistent. The early<sup>45</sup> case-law of the Court uses almost exclusively the expression that national procedural rules shall not make it "impossible in practice"<sup>46</sup> or "practically impossible"<sup>47</sup> to exercise rights conferred by EC law. Frequently, one of these phrases were also followed by a "or excessively difficult" expression.<sup>48</sup> It seems in general, however, as if the Court in its later case-law has preferred to use the expression "virtually impossible"<sup>49</sup> or simply "impossible"<sup>50</sup> instead, frequently followed by the "or excessively difficult" phrase<sup>51</sup> but far from always<sup>52</sup>. On some rare occasions the ECJ has also altered the initial part by stipulating that national procedural law "must not adversely affect the scope or impair the effectiveness of EC law" by making actions intended to safeguard community rights impossible in practice.<sup>53</sup> While the expression of the principle hence has varied, it is quite clear that no difference in substance purposively has been sought.<sup>54</sup>

The Court's habitual insistence on two terms, one to express some type of impossibility and one additional "excessively difficult"-term appear from a strictly logical interpretation to indicate that *these terms aren't meant to be perceived as interchangeable*, i.e. they communicate two different levels of effectiveness. Certainly, if that isn't the case then there hardly would be any need for the Court's usual insistence on the double-term expression. The case-law of the Court of Justice also suggest that we are dealing with two different thresholds; in Palmisani the court for instance stated that a procedural rule "cannot be regarded as making it excessively difficult or, *a fortiori*, virtually impossible to..."<sup>55</sup>

## 2.6.3 The Requirement of Minimum Effectiveness

Whereas the Court's formulation of the principle, as well as the underlying *raison d'être* of the principle, has appeared rather coherent in the Court of Justices' case-law, it is fairly apparent that the Court of Justices' method in applying the principle hasn't been entirely consistent. More specifically it is possible to discern two broad requirements of effectiveness; one concerning *minimum effectiveness* and one concerning *full effectiveness*. With regards to the requirement of minimum effectiveness it is further possible two

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<sup>44</sup> Ibid. See also C-45/76 Comet BV, para. 16.

<sup>45</sup> Circa 1976-1990.

<sup>46</sup> First used by the ECJ in Case C-33/76 Rewe and Case C-45/76 Comet.

<sup>47</sup> First used by the ECJ in Case C-77/88 Jeunehomme.

<sup>48</sup> First used by the ECJ in Case C-199/82 San Giorgio.

<sup>49</sup> First used by the ECJ in Joined Cases C-205-215/82 Deutsche Milchkontor.

<sup>50</sup> First used by the ECJ in Case C-228/98 Dounias.

<sup>51</sup> First used by the ECJ in Case C-199/82 San Giorgio.

<sup>52</sup> See for example Case C-208/90 Emmott, para. 16.

<sup>53</sup> See for example Case C-54/81 Fromme.

<sup>54</sup> Compare with Himsworth 1997:310. In addition, the Advocate Generals' has recommended that terms such as "unduly obstructed" and "unduly difficult" be applied. See opinion of AG Jacobs in Case C-312/93 Peterbroeck and Case C-2/94 Denkavit Italiana.

<sup>55</sup> Case C-261/95 Palmisani, para. 29.

identify two doctrinal lines in the Court's case-law. The first doctrinal line emanates from the *Rewe* and *Comet* cases delivered in 1976 which, as previously stated, laid the foundation for the principle of effectiveness as such, while the second doctrinal line emerges from the *Van Schijndel* and *Peterbroeck* cases delivered in 1995. These two doctrinal lines approach the requirement of minimum effectiveness from partially diverging directions and even though it is generally accepted to view these cases as starting points of two rather free-standing doctrinal lines, it is also quite apparent that these approaches to the requirement of minimum effectiveness have several common denominators.

The *Rewe* approach to the requirement of minimum effectiveness involves two different, but interconnected criteria. The first criterion stipulates that a procedural rule has to be mandated by an objective considered valid from the perspective of EC law. The ECJ has in that regard on several occasions expressed its views on different aims underlying procedural rules. Principles and objectives such as legal certainty, judicial passivity and the proper conduct of procedure have all been recognized as valid. Since nearly all procedural rules however can be justified by some form of valid objective, the Court has also indicated that the first criterion is not to be construed as a "carte blanche" to pursue that objective in absurdum. Since other objectives also might be valid and warrant consideration, the objective pursued must be proportionate to the aim found valid. If the rule is found to extend beyond what is proportionate it might infringe other objectives considered valid by EC law and thus create a situation where an individual not effectively can exercise her right. The Court's method to proportionality has however been opaque. While it has indicated that an internal comparison with the rules governing the procedures before the court of Justice not are appropriate to use in order to determine proportionality, it has shown some interest in comparing with other member states of the Community. Generally, the Court has however only employed the external comparison in order to create persuasive authority for an independent analysis of proportionality where protection of the individual remains at centre.

The difference between the *Rewe* approach and the *Van Schijndel* approach appears to be that the later adds another layer to the *Rewe* approach. While a procedural rule according to the *Rewe* method is valid if it founded on an objective deemed legitimate and to the extent found legitimate, the *Van Schijndel* approach also contains an additional criterion which national procedural rules must comply with. In *Van Schijndel* the Court held that for the purpose of applying the principle of effectiveness each case which raises the question whether a national procedural provision renders the application of EC 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".<sup>56</sup>

While the court stipulated in *Van Schijndel* that a procedural rule also had to be considered in its procedural context, the case-law indicates that the Court has applied the *Van Schijndel* method in different ways.<sup>57</sup> In some cases the Court has, in addition to the *Rewe* criteria, focused on the EC right relied upon<sup>58</sup>, in some cases it has focused on very specific details of the case<sup>59</sup>, and in some cases it has focused on the procedural context<sup>60</sup>. The additional *Van Schijndel* criterion thus appear eclectic in nature and very arbitrary applied, creating legal uncertainty instead of much needed legal certainty.

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<sup>56</sup> Joined cases C-430/93 and C-431/93 *Van Schijndel*, para. 19 and C-312/93 *Peterbroeck*, para. 14.

<sup>57</sup> The Court has only explicitly referred to the *Van Schijndel* method in six subsequent cases (post *Van Schijndel* and *Peterbroeck*). Case C-327/00 *Santex*; Case C- 473/00 *Cofidis*; Case C-63/01 *Evans*; Case C-276/01 *Steffensen*; Joined cases C-222-225/05 *Van der Weerd* and others; Case C-432/05 *Unibet*.

<sup>58</sup> C-63/01 *Evans*.

<sup>59</sup> C-327/00 *Santex*.

<sup>60</sup> Joined Cases C-222-225/05 *Van der Weerd*; Case C-276/01 *Steffensen*.

## 2.6.4 The Requirement of Full Effectiveness

While the requirement of *minimum effectiveness*<sup>61</sup> usually is formulated as a not “excessively difficult” or “virtually impossible”-constraint, another and more demanding requirement can also be discerned from the case-law of the ECJ. This effectiveness requirement, *full effectiveness*, coexists with that of minimum effectiveness but operates at another level.<sup>62</sup> It was first laid down in the seminal *Simmenthal* ruling from 1979. *Simmenthal* concerned two problems: the existence of a national law which was incompatible with a previous Community regulation, and the existence of a national judge-made rule reserving to the Italian Constitutional Court the power to set aside national provisions which were contrary to EC law.<sup>63</sup> While the solution to the first problem was uncomplicated<sup>64</sup>, the second one was a little bit more complex since it concerned a procedural and constitutional rule. The Court however forcefully stated that “*any provision of a national legal system which might impair the effectiveness of EC law by withholding from the national court the power to do everything necessary to set aside national provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of EC law*”.<sup>65</sup> Doctrinal opinions suggest that, as the case-law progressed, the emphasis shifted from the requirements of minimum effectiveness to a duty to provide full and effective protection.<sup>66</sup> Within the scope of its applicability, the requirement of full effectiveness appears to *substitute* the requirement of minimum effectiveness by imposing the more demanding requirement of *full effectiveness*.<sup>67</sup> Both Van Gerven and Engström has argued that the ECJ has deployed the more demanding requirement of full effectiveness, not in order to preclude a procedural- or remedial rule, but rather in order to *create* a remedy or form of action not available under domestic law. Engström points out that the requirement of full effectiveness mainly has been imposed in cases such as *Francovich*, *Factortame*, *Courage*, *Johnston* and *Muñoz*<sup>68</sup> which all have concerned the availability of remedies or forms of actions rather than the exact rules governing the enforcement of those actions.<sup>69</sup> The rationale behind this difference is however not clearly discernable from the court’s case-law.

## 2.7 The Logic of Effectiveness and Equivalence

It is quite apparent that the principle of equivalence, based on Article 10 EC and laid down to serve the purpose of protecting EC rights, must have been constructed around a presumption that national procedural rules, from a Community perspective, provide adequate and effective procedural protection for rights of a strictly domestic nature.<sup>70</sup> Consequently, if that treatment, which thus is presumed to be in accordance with the requirement of adequate protection, is extended to Community rights of a similar nature, those rights must logically also become adequately protected from a Community perspective. A contrario, it could also be said that EC law is not presumed to be effectively protected where the procedural rules governing the application of EC law before national courts are less favourable than those rules governing comparable claims based on domestic law. The inference is consequently that, if equal procedural treatment can be achieved, this will ensure proper protection, which necessitates a specific requirement of equal treatment. Of course, the logic inherent in the principle only holds true as long as the presumption holds true. If the national legal system does not protect strictly domestic but comparable

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<sup>61</sup> Van Gerven 2000:532ff; Engström 2003:173.

<sup>62</sup> Engström 2003:174ff.

<sup>63</sup> C-106/77 *Simmenthal*.

<sup>64</sup> The principle of supremacy solved this question.

<sup>65</sup> C-106/77 *Simmenthal*, para. 22.

<sup>66</sup> *Tridimas* 2000:466.

<sup>67</sup> Engström 2003:174ff.

<sup>68</sup> Case C-222/84 *Johnston* (access to court), Case C-213/89 *Factortame* (interim relief), Joined Cases C-6&9/90 *Francovich* (compensation), Case C-453/99 *Courage* (compensation); Case C-253/00 *Muñoz* (form of action).

<sup>69</sup> Engström 2003:176f; Van Gerven 2000:502.

<sup>70</sup> Compare with Brealey & Hoskins 1998:99.

actions effectively, then rights derived from directly effective Community provisions will by implication not be safeguarded effectively from a Community perspective. The principle of effectiveness is on the other hand not founded on such a presumption and is specifically designed to examine whether or not that presumption is in fact valid. It is important to note that the presumption only can be breached advantageously by applying the principle of effectiveness, i.e. EC law may not be discriminated against even if the national rule doesn't make it excessively difficult to enforce EC law.<sup>71</sup> Only when a national procedural rule complies with the requirements imposed by both principles will it be in conformity with EC law.<sup>72</sup> If the national court hence finds that a national procedural rule is not compatible with these principles and that no compatible interpretation of the national provision is possible, then the national court must refuse to apply it.<sup>73</sup> There is a consequently a close affinity between the principle of equivalence and the procedural prerogative of the member states since the former rests on the same presumption that underlies the procedural prerogative. It is in fact this presumption that makes the requirement of equivalence logical. If no such presumption existed, it would of course not be of any importance to require that domestic law provides equivalent procedural protection to EC claims. An example might clarify the dual requirements and interrelationship between the principles.

A 60-day time-limit for bringing proceedings in order to contest a tax assessment before a Court may apply equally to actions brought by reference to EC law and strictly domestic law. But, if the 60-day time-limit is considered to be liable to make it excessively difficult to safeguard directly effective EC law, then it would nonetheless have to be set aside despite the fact that it is applied equally. If the Member states on the other hand were to put down a five year time-limit for contesting a tax-assessments based on EC law and a ten year time-limit with respect to domestic law, it would undoubtedly be a clear breach of the principle of equivalence. That is so notwithstanding the fact that a five year time-limit per se doesn't make it excessively difficult to rely on directly effective EC law.

In the first scenario we thus have a situation where the procedural protection provided by national law, presumed to be adequate, is extended to EC law claims. Since member states thus are presumed to provide adequate protection, and the application of the principle of equivalence confirms that EC law claims benefits from that protection, the requirement of equivalence is fulfilled. However, the application of the principle of effectiveness shows that the presumption is false, i.e. the member state did not fulfil its requirement to use its procedural prerogative in accordance with the duty to provide protection. Accordingly, is of no consequence that the inadequate rule is applied equally. In the second scenario we have a situation where the procedural protection provided by national law, isn't extended to EC law claims. Since member states are presumed to provide adequate protection in accordance with the duty to provide protection, and the application of the principle of equivalence shows that EC law claims are governed by inferior rules, it is, a contrario presumed that those claims aren't adequately protected. And that presumption cannot be breached by applying the principle of effectiveness. A first step in this scenario is thus to apply the principle of equivalence and extend the same kind of protection to EC law claims as that offered to similar domestic actions. In so doing, EC law claims are brought in conformity with the presumption of adequate protection. It is first at this stage, when equivalence has been achieved and EC law are presumed to be adequately protected, that the principle of effectiveness may be applied to control that the presumption of adequate protection is in fact valid, i.e. becomes a rebuttable presumption.

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<sup>71</sup> Ibid.

<sup>72</sup> Tridimas 2000:467. Case C- Preston, para. 47.

<sup>73</sup> See Case C-327/00 Santex, para. 63-64. See also Case 125/01 Pflücke; Case C-262/97 Engelbrecht.

# 3 EC Procedural Protection and Domestic Procedural Law

## 3.1 Temporal Procedural Restrictions<sup>74</sup>

The Court of Justice has had several opportunities to interpret the requirement imposed by the principles of effectiveness and equivalence in relation to domestic procedural rules that restrict actions at law intended to enforce EC law by imposing certain temporal restrictions. For example, a time-limit may provide that an action challenging a tax-decision must be lodged within one year from a certain date and that any action lodged after that date is inadmissible. However, time-limits may not always concern time-limits for bringing proceedings; they may also concern to several other types of procedural rules, such as procedural rules governing *res judicata*, change of plea, alternating grounds of a plea, presenting new evidence etc. These restrictions can also concern time-restrictions placed on the extent of a claim. For example, an action for restitution of taxes levied incorrectly may be lodged in time, but restricted by a prescription period so that the action only may comprise incorrectly levied taxes from the last three years. Special temporal restrictions are those that are applied retroactively. For example, a Member State may subsequent to a judgment by the ECJ retroactively amend the time-period in which a claim may be brought.

### 3.1.1 The Length and Extent of Time Periods

*Rewe* and *Comet*, accounted for previously<sup>75</sup>, is of course the cases that started it all, since it was in those cases, both concerning time-limits for bringing proceedings, that the Court formulated the principles of effectiveness and equivalence. In *Rewe* and *Comet* the disputed time-limit was fixed at 1 month, and in some instances, 1 year reckoned from the day when the companies received notice of the contested administrative decisions. It was in those contexts that the Court held that those time-limits for bringing proceedings didn't make it impossible in practice to exercise the rights conferred by EC law since they were *reasonable* and an application of the fundamental principle of legal certainty, a principle protected by the Court.<sup>76</sup>

It seemed accordingly from early on that two integral parts of the effectiveness-test could be identified. First, "reasonability" seemed to be an integral part of the excessively difficult-test since time-limits that were reasonable, without the Court further specifying what that meant, were to be considered as not making it impossible to enforce that right. Secondly, and more importantly, for the purpose of deciding whether a procedural rule made it impossible in practice to rely on Community right, due consideration had to be given to the aim underlying the procedural rule in question. The method to be undertaken apparently should be undertaken objectively, where the time-limit had to be examined as to *reasonability* and *objective*. The principle of equivalence was hardly touched upon at all in *Rewe* although it was laid down in the case; The Court of Justice merely directed the national court to ascertain whether or not national law discriminated against actions

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<sup>74</sup> Case C-33/76 *Rewe*; Case C-45/76 *Comet*; Case C-208/90 *Emmott*; Case C-78/98 *Preston*; Case C-326/96 *Levez*; Case C-261/95 *Palmisani*; Case C-188/95 *Fantask*; Case C-246/96 *Magorrian*; Joined Cases C-52&53/99 *Camarotto*; Case C-231/96 *Edis*; Case C-410/92 *Johnson*; Joined Cases C-114&115/95 *Texaco*; Case C-90/94 *Haahr Petroleum*; Case C-212/94 *FMC*; Joined Cases C-216&222/99 *Prisco*; Joined Cases C-279-281/96 *Ansaldo Energia*; Case C-327/00 *Santex*; Case C-130/79 *Express Dairy Foods*; Case C-338/91 *Steenhorst-Neerings*; Case C-34/02 *Pasquini*; Case C-88/99 *Frères*; Case C-30/02 *Cash & Carry*; Case C-125/01 *Pflücke*; Case C-255/00 *Grundig Italiana*; Case C-228/96 *Aprile*; Case C-343/96 *Dilexport*; Case C-260/96 *Spac*; Case C-128/93 *Fischer*; Joined Cases C-119&126/79 *Lippische*; Case C-394/93 *Alonso-Pérez*; Case C-62/00 *Marks & Spencer*; Joined Cases C-295-298/04 *Manfredi*; Case C-85/97 *SFI*; Case C-68/79 *Just*.

<sup>75</sup> See section 2.5.1.

<sup>76</sup> C-45/76 *Comet* BV, para. 17.

enforcing EC law while not giving any indications as to the correct interpretation of expressions like “similar domestic action” and “more favourable”. The Court upheld the reasoning applied in *Rewe* and *Comet* towards procedural time-limits in several subsequent cases, and it thus appeared as if it would only be very exceptionally that the Court would conclude that a time-limit breached the principles of effectiveness and equivalence. After all, time-limits are normally expressions of principle of legal certainty and reasonable in length. It therefore seemed more likely that a time-limit would breach the principle of equivalence than effectiveness since it would certainly seem more plausible that national law contained more favourable time-limits than considered unreasonable.

In *Aprile II*, which concerned an Italian company seeking reimbursement of custom charges levied in breach of EC law as confirmed by the Court in a previous ruling, the ECJ upheld a three year time-limit for bringing proceedings, reckoned from the date of the contested payment.<sup>77</sup> In *Haahr Petroleum*, which concerned the reimbursement of harbour charges levied in breach of Community law, the Court upheld a rule of national law under which legal proceedings for recovery of charges unduly paid were time-barred after a period of five years, even when the effect of that rule was to prevent, in whole or in part, the repayment of those charges. In *Fantask*<sup>78</sup>, which concerned a Danish company seeking reimbursement of charges paid in contravention of directive 69/335/EEC on indirect taxes on the raising of capital, the Court again reaffirmed its stance towards time-limits, and asserted that time-limits are valid from the viewpoint of EC law insofar as they are expressions of the principle of legal certainty and reasonable. In that regard the five-year period, reckoned from the date on which the debt became payable, had according to the Court, “to be considered reasonable”.<sup>79</sup> In *Prisco*<sup>80</sup> The ECJ similarly upheld a three-year time-limit for bringing proceedings from the date of payment, as regards restitution of charges levied in breach of directive 69/335/EEC concerning indirect taxes on the raising of capital.

In *Roquette Frères*<sup>81</sup> the ECJ was confronted with a temporal rule that restricted the extent to which a claim for restitution of taxes could comprise. More specifically; whether EC law precludes a procedural rule that provided that an action for restitution of taxes based on a finding by a national or Community Court that a national rule is not compatible with a superior rule of national law may only relate to the period following the fourth year preceding that of the judgment establishing such incompatibility. The ECJ held that, while the restriction of the period to which the claim may relate to the four or five years preceding the judgment may mean, in some cases, that the action is dismissed in its entirety, it does nonetheless not thereby render it excessively difficult for individuals to exercise rights conferred on them by EC law since it was reasonable.<sup>82</sup>

*Santex*<sup>83</sup> is a highly interesting case since it concerns the interrelationship between secondary community legislation, a time-limit for bringing proceedings and the principles of effectiveness and equivalence. More specifically it demonstrates how the objectives underlying secondary legislation can have a great influence in applying the principles to the circumstances of a case. The relevant question in the case concerned whether the administrative court was required under EC law to disapply a time-limit of 60 days for challenging an invitation to tender, in order to declare admissible a plea alleging that a disputed clause was in breach of EC law. While the Court usually has approached procedural time-limits from the *Rewe* approach, *Santex* clearly embraces the *Van Schijndel* method. In that regard the ECJ stated that, “Consequently, although a limitation period such as that at issue in the main proceedings *is not in itself* contrary to the principle of effectiveness, the possibility that, in the context of the *particular circumstances of the case* ...the application of that time-limit may entail a breach of that principle cannot be

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<sup>78</sup> Case C-188/95 *Fantask*.

<sup>79</sup> *Ibid.* para 49.

<sup>80</sup> Joined Cases C-216&222/99 *Prisco*.

<sup>81</sup> Case C-88/99 *Roquette Frères*.

<sup>82</sup> *Ibid.* at paras. 24-25.

<sup>83</sup> Case C-327/00 *Santex*.

excluded.”<sup>84</sup> In analysing the specific circumstances of the case, great concern was given to the factual circumstances by means of a detailed examination of the specific conduct of the parties and the effect thereof for the procedure as a whole. From that point of view, the Court felt it necessary to take into consideration the circumstance that, in the particular case, although the disputed clause was brought to the notice of the parties concerned at the time of the publication, the contracting authority created, by its conduct, a state of uncertainty. Since the period for bringing proceedings had expired when the that uncertainty was removed, Santex was consequently deprived of any opportunity to plead before the national court the incompatibility with EC law and that made it excessively difficult for Santex to enforce EC law.<sup>85</sup>

In *Cash & Carry*<sup>86</sup> a reference for a preliminary ruling was initiated in order to ascertain whether, it was contrary to EC law to provide for a time-limit extinguishing a claim for restitution of company registration charges levied in breach of EC law to be fixed at 90 days from the end of the period allowed for voluntary payment of those charges. At the outset it would appear as if a 90 day time-limit for bringing proceedings is a rather short and considerably shorter than several of the time-limits previously upheld by the Court. Although acknowledging its case-law from *Aprile* and other previous cases, the Court simply emphasised that the fixing of time-limits remains the discretion of the Member States. In that connection it held that a 90 day period reckoned from the end of the period allowed for voluntary payment “must be considered to represent a sufficient length of time to enable the taxpayer to take the decision to bring an action for annulment in full awareness of the facts and for that purpose to gather all the matters of fact or law required”.<sup>87</sup> The Court also made a comparison with time-limits in other Member States in order to justify that the time-limit in the case was acceptable.

### 3.1.2 Commencement of Time-Periods

While time-periods on several occasions have been scrutinized as to their length and extent, it will generally also be of substantial interest to ascertain when they may commence. In most cases this does not constitute a problem; many of the time-limits examined has started to run from the date of the contested payment of taxes/charges (or when the debt became payable) and that has been considered to be a reasonable commencement date by the ECJ. But, given the special nature of EC law, the central issue here is when individuals reasonably can be said to be aware of their rights in order for them to invoke them in proceedings. For instance, when is it reasonable that a time-limit start to run, if Member states maintain in force conflicting provisions of domestic law? And is it reasonable to expect an individual to obtain knowledge of her rights if it originates from a non-transposed directive? The ECJ first approached these kinds of questions in the infamous *Emmott* ruling.

In *Emmott*, the applicant sought retrospective payment of a disability benefit for the period of time during which Directive 79/7 had remained unimplemented in Ireland, during which time she had been discriminated against on grounds of sex. She had been told by the relevant government department that no decision could be made in her case pending the ECJ’s ruling in *Cotter and McDermott*, but when she finally applied for judicial review of the decisions relating to her social security benefit the department pleaded her delay in initiating proceedings constituted a bar to the action. Several governments argued that the Court of Justice should continue to apply its well-established jurisprudence on national procedural rules.<sup>88</sup> According to the Commission it would offend the effectiveness of EC law if national authorities could rely on such national rule to defeat a claim based on EC

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<sup>84</sup> Ibid at para. 56-57.

<sup>85</sup> Ibid, para. 60-61.

<sup>86</sup> Case C-30/02 *Cash & Carry*.

<sup>87</sup> Ibid at para. 21.

<sup>88</sup> Ibid.

law where the authorities previously had acted in such a way as to indicate that the satisfaction of the claim would not depend on complying with the rule in question.<sup>89</sup>

In its judgment, which compares as an even stronger stance than taken in the opinion delivered by AG Mischo<sup>90</sup>, the Court reiterated the requirements of the principle and stated that the laying down of reasonable time-limits in principle is valid from an EC law perspective. However, the Court continued, account must nevertheless also be taken of the “particular nature of directives”.<sup>91</sup> When a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights and only the proper transposition of a directive will bring that uncertainty to an end. It follows, stated the Court, that until such time as a directive has been transposed, a defaulting Member State may not rely on an individual’s delay in initiating proceedings.<sup>92</sup>

What are we to make of this ruling? Can time-limits never commence as long as the right concerned emanates from a non-transposed directive? This would, as *Hoskins* have noted, be tantamount to raise directives to an exalted position in the Community legal order, and it would also seriously undermine the concept of direct effect.<sup>93</sup> Well, later case-law confirms that *Emmott* was itself an exception. A little more than two years after the judgment in *Emmott*, the process of revision got under way and a deconstruction pattern materialized in the ECJ’s case-law.<sup>94</sup> The first stage in this process did not take issue with the reasoning in the case, but sought instead to confine the impact of the reasoning to one field, i.e. restricting the material scope of *Emmott*.<sup>95</sup>

In *Steenhorst-Neerings*<sup>96</sup> and *Johnson*<sup>97</sup> the Court principally overturned *Emmott* by limiting it to the very specific circumstances of that case. Both *Steenhorst-Neerings* and *Johnson* was with two exceptions clearly analogous to *Emmott*; whereas the procedural rule in *Emmott* fixed time-limits for bringing proceedings, the procedural rules in both other cases limited the retroactive effect of the claims. After *Steenhorst-Neerings* and *Johnson* it seemed clear that the solution adopted in *Emmott* did not apply to all forms of national procedural rules on time-limits or, by an extensive interpretation of *Emmott*, other procedural rules for that matter.<sup>98</sup> Additionally, it appeared valid to conclude from these rulings that the mere fact that a directive has not been properly implemented does not, in the absence of other circumstances, preclude a Member State from relying upon a time-period.<sup>99</sup> Even though the ratio in *Emmott* wasn’t completely overruled in these cases, merely confined to time-periods whose expiry prior to correct implementation of a directive left the applicant without recourse to rely on Community rights, it appeared highly probable that *Emmott* had been abandoned.<sup>100</sup> This conclusion is further augmented by the Court’s ruling in *Francovich*, delivered only a few months after *Emmott*, which provided individuals with the possibility to bring actions for damages against member states for breaches of EC law.<sup>101</sup>

In *Texaco*, which concerned the reimbursement of harbour charges levied in breach of EC law, the Court continued to narrow down the *Emmott* ruling by explicitly stating that it could only apply to directives and that *Emmott* was justified with reference to “the particular nature of directives and having regard to the specific circumstances of the case”.<sup>102</sup> Since *Texaco* concerned a Treaty article and not a directive the solution adopted

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<sup>89</sup> Ibid.

<sup>90</sup> Advocate General Mischo proposed that such a time-limit should be of reasonable length and should begin to run only from the time when the person concerned should reasonably have been aware of his rights. See the opinion of AG Mischo in Case C-208/90 *Emmott*, para. 38.

<sup>91</sup> Ibid, para. 17.

<sup>92</sup> Ibid, para. 21-23.

<sup>93</sup> *Hoskins*, p. 368-369.

<sup>94</sup> Ward 1995:211.

<sup>95</sup> Flynn 2000:54.

<sup>96</sup> Case C-338/91 *Steenhorst-Neerings*.

<sup>97</sup> Case C-410/92 *Johnson*.

<sup>98</sup> Flynn 2000:58; *Hoskins* 1996:371.

<sup>99</sup> *Jacobs* 1997:29.

<sup>100</sup> Flynn 2000:58.

<sup>101</sup> *Joined Cases C-6&9/90 Francovich*.

<sup>102</sup> Ibid.



in Emmott wasn't applicable, i.e. the fact that Member State keep in force provisions contrary to EC law doesn't create that kind of uncertainty which the ECJ spoke of in Emmott.

In *Fantask*<sup>103</sup> the ECJ however finally did complete its step-by-step overruling of Emmott. In that case a Danish company sought reimbursement of charges paid to the national authorities for registration in the national register of companies. Fantask grounded its action for restitution on that, following *Ponente Carni*<sup>104</sup>, the levying of such charges constituted a transgression of directive 69/335/EEC concerning indirect taxes on the raising of capital. The main question was if EC law prevented a Member State from relying on a time-limit under national law to resist actions for the recovery of charges levied in breach of the Directive as long as the Member State had not properly transposed the Directive. Under Danish law the right to recovery of a whole range of debts became statute-barred after *five years* and that period generally began to run from the date on which the debt became payable.

While the length of rule hence wasn't in breach of the principle of effectiveness, the second question remained, i.e. when the five year period could start to run which of course concerned the validity of the Emmott judgment. The Court simply stated however that the solution adopted in Emmott was, as AG Jacobs proposed in *BP Soupergaz*<sup>105</sup>, justified by the "particular circumstances of the case", while the former reference to the particular nature of directives is absent.<sup>106</sup> In his opinion, AG Jacobs again strongly disagreed with Court's ruling in Emmott, stating that, accepting that an individual does not have notice of a directive because it has not been transposed into national law would mean that rights flowing from directives would be given better protection than those arising from the Treaty or from regulations.<sup>107</sup> Jacobs concluded that the argumentation focusing on different kinds of time-limits wasn't persuasive; the effects of the two limits are similar<sup>108</sup>, so the peculiarity of the Court's decision in *Emmott* is not explained by the nature of the time-limits, but rather by the particular circumstances of the case. According to the AG, the Emmott principle should hence be confined to extraordinary circumstances.<sup>109</sup> The Court's seemed to agree and the ruling appears to be a complete overruling of Emmott.<sup>110</sup>

### 3.1.3 Similar and More Favourable Time-Periods

Several cases have raised the question concerning how Member States may differentiate between applicable time-periods to govern actions at law before the domestic courts given the requirements imposed by the principle of equivalence. The relevant question concerns whether a time-period applicable to a claim not concerning EC law is more favourable than a time-period applicable to a similar claim enforcing EC law rights and the dilemma is of course how to understand the concept of "similar domestic action". The implications of the requirement of equivalence will of course depend greatly on whether the ECJ take a narrow or broad understanding of that concept. If the ECJ adopts a broad understanding, then the EC law claim will have to be compared to a wide number of comparators and that will in turn mean that it will be more likely, given the increased numbers of reference points, to preclude the time-period applicable to the EC claim. A subordinate question is also how to determine "favourability".

In *Palmisani* the Court for the first time explained in greater detail how to understand the concept of "similar domestic action". In that case an Italian employee received only a small part of her salary claims thru distribution on the final dividend from the liquidation of her

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<sup>103</sup> Case C-188/95 *Fantask*.

<sup>104</sup> Joined Cases C-71&178/91 *Ponente Carni*.

<sup>105</sup> Opinion of AG Jacobs, Case C-62/93 *BP Soupergaz*.

<sup>106</sup> C-188/95 *Fantask*, para. 51.

<sup>107</sup> Opinion of AG Jacobs, Case C-188/95 *Fantask*, para. 65.

<sup>108</sup> As Nicola Notaro notes, "In reality, what matters is not the formal qualification of the time-limits under national law but the substantial effects that they produce". Notaro 1998:1392.

<sup>109</sup> *Ibid* at para. 73-74.

<sup>110</sup> See Nicola 1998:1393.

employer. Since the Italian government had failed to implement Directive 80/987/EEC relating to the protection of employees in the event of insolvency, she brought an action for compensation in accordance with the legislative decree adopted because of the belated transposition of the directive. However, since Mrs. Palmisani brought her action for compensation later than one year after the final implementation of the Directive, her action was time-barred as a result of a domestic time-limit. The general question that arose in that context was whether the Italian state could rely on that time-limit, in particular since Italian law provided for much more favourable time-limits in relation to other actions for compensation.

In determining whether or not the principle of equivalence had been complied with, the Court started a search for a valid comparator, i.e. a similar domestic action. One possibility was to use the procedural rules in the Italian decree implementing the directive, especially the procedural rules for bringing proceedings for payment in case of insolvency. The Court however rejected that comparator stating that: “The measures implementing the Directive contained in the legislative Decree pursue an objective that differs from that of the compensation scheme established by the decree. Another comparator that also was considered was the Italian ordinary system of non-contractual liability. The Court, far more interested in that comparator, stated that that it was similar in terms of its objective; however, in order to establish comparability, the essential characteristics of the domestic system of reference had also to be examined.<sup>111</sup> Consequently, a valid comparator for the EC right to compensation for failure to implement a Directive can be sought in the context of non-contractual liability where the purpose is similar rather than in the context of domestic labour law. These requisites for a valid comparator were later upheld by the Court in the similar cases *Ansaldo*<sup>112</sup>, and *IN.CO.GE 90*<sup>113</sup>.

The ECJ had a chance to re-examine these questions in *Edis and Spac*,<sup>114</sup> which concerned two Italian public limited companies seeking reimbursement of registration charges wrongfully paid, as confirmed by the Court of Justices judgment in *Ponente Carni*.<sup>115</sup> In the later ruling the ECJ declared an Italian registration charge contrary to Council Directive 69/335/EEC concerning indirect taxes on the raising of capital. A national procedural proviso stipulated, however, that claims concerning reimbursement were limited to three years from the day of payment, which meant that the claim could not be granted by the national court. The referring court questioned the compatibility of that time-limit with EC law since, under the ordinary rules provided for in the Italian Civil Code, an action between private individuals for the recovery of sums paid but not due were subject to a ten year limitation period. Since the time-limit governing the action for restitution of charges levied in breach of EC law was less favourable than the time-limit governing actions for restitution between individuals, the requirement of equivalence should preclude the former time-limit, *Edis* argued. That argumentation presupposed, however, that the actions being compared were similar in nature.

The Court however held that the two actions would be comparable only if the actions concerned the same kind of charge or dues. The Court consequently took a rather narrow view of “comparable actions” and concluded that the principle of equivalence didn’t prevent a Member State from laying down, alongside a limitation period applicable under ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which were less favourable, governing claims to challenge the imposition of charges and other levies.<sup>116</sup> This position would be different, the Court further held, only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies.<sup>117</sup> The ECJ then continued to examine whether or not those rules applied solely to claims based on Community law. The Court pointed out

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<sup>111</sup> *Ibid* at para. 38.

<sup>112</sup> Joined Cases C-279/96, C-280/96 and 281/96, *Ansaldo Energia* and others.

<sup>113</sup> Joined Cases C-10/97 and C-22/97, *IN.CO.GE 90* and others.

<sup>114</sup> Case C-231/96 *Edis*; Case C-260/96 *Spac*.

<sup>115</sup> Case C-71/91 *Ponente Carni*.

<sup>116</sup> Para. 37.

<sup>117</sup> *Ibid.* para 37.

that the time-limit at issue applied not only to repayment of the contested registration charge but also to that of all governmental charges of that kind.<sup>118</sup> Moreover, a similar time-limit applied to actions for repayment of certain indirect taxes; furthermore, time-limits relating to taxes also applied to actions for repayment of charges levied under laws that had been declared incompatible with the Italian Constitution.<sup>119</sup>

In *Levez*<sup>120</sup> the Court of Justice upheld its former rulings in *Palmisani* and *Edis*, but it also gave the Court a chance to give some more detailed explanations as to when two actions are comparable for the purposes of applying the principle of equivalence. In that case, a woman employee was appointed manager of a betting shop. On leaving her job, she realized that she had been paid considerably less than her male predecessor. She sought payment of arrears but a national procedural law limited to two years the period for which arrears could be claimed. The question of interest, for current purposes, was whether the principle of equivalence was complied with when another remedy was available, but compared with other domestic actions which could be regarded as similar, was likely to entail procedural rules which were less favourable.

Reciting its former jurisprudence from *Edis* the Court held that the principle of equivalence requires that the procedural rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the *purpose, cause of action* and *essential characteristics* are similar. The ECJ also held that the method adopted in *Van Schijndel* could, *mutatis mutandis*, be adopted in order to determine whether a time-limit is less favourable than that governing a similar action. By analogy, this would hence implicate that, whenever it falls to be determined whether a time-limit is less favourable than those governing similar domestic actions, the national court must take into account “the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts”.<sup>121</sup> In *Preston* the Court further added that “...the various aspects of the procedural rules cannot be examined in isolation, but must be placed in their general context. Moreover, such an examination may not be carried out subjectively by reference to the circumstances of fact but must involve an objective comparison, in the abstract, of the procedural rules at issue”.<sup>122</sup> Consequently, when a comparable action has been found, favourability cannot be determined simply by examining the length and commencement of the relevant time-limit; in addition, due notice has to be given to the procedural context within which the time-limit operates.

In *Dilexport*<sup>123</sup> a company was required to pay consumption tax to the revenue authorities in respect of import of a consignment of bananas released into free circulation in another Member State. Considering that sum to have been wrongly paid, in that the tax in question was contrary to Article 95 of the Treaty, *Dilexport* applied for reimbursement of the sums paid, but without success. The question that arose in that context was, *inter alia*, if the principle of equivalence precluded the adoption of a national provision which made the repayment of charges levied in breach of Community law subject to time-limits which were different from and more restrictive than those laid down in the general rules of civil law. The court followed the opinion of AG Ruiz-Jarabo who had taken the position that the search for valid comparator could be narrowed down to the group of taxes covered by the time-limit. Since actions for reimbursement of such duties and taxes in all instances, and irrespective of the cause of action, were governed by the same rules, no discrimination was at hand.<sup>124</sup> The Court concurred and held that it was clear that the three year rule applied to all actions for reimbursement of sums paid in respect of customs operations, is the same as that which...applies to actions for repayment of numerous indirect taxes, the

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<sup>118</sup> *Ibid.* para 38.

<sup>119</sup> *Ibid.*

<sup>120</sup> Case C-326/96 *Levez*.

<sup>121</sup> C-326/96 *Levez*, para 44.

<sup>122</sup> Case C-78/98 *Preston*, para 62.

<sup>123</sup> Case C-343/96 *Dilexport*.

<sup>124</sup> Opinion of Mr Advocate General Ruiz-Jarabo Colomer in Case C-343/96 *Dilexport*, para 22.

subject matter of which may be regarded, if not as identical, at least as closely comparable to that of the actions at issue...<sup>125</sup>

### 3.1.4 Retroactive Temporal Restrictions

In *Deville*<sup>126</sup>, a French regional Court referred a question for a preliminary ruling pertaining to the repayment of national taxes levied in breach of EC law. Mr Deville had paid a special fixed tax in respect of his car, a tax which the Court subsequently declared to be contrary to Article 95 of the EEC Treaty in the *Humblot case*.<sup>127</sup> In order to comply with that judgment the French legislature amended the existing legislation in several aspects, one of which was to enable the taxpayer to obtain a refund of the difference between the amount of the special tax paid and that of the new differential tax laid down to replace the former. When Mr Deville subsequent to the Court's judgment in *Humblot* lodged a claim for reimbursement in accordance with the newly adopted legislation the claim was dismissed on the ground that it was out of time. The question that arose was whether the France could rely on that national provision, adopted subsequent to the Court's ruling in the *Humblot case*, but with the apparent purpose to control the negative effect of that ruling, against claims for reimbursement of taxes levied in breach of EC law?

The Court of Justice commenced its ruling by referring to the principles of equivalence and effectiveness, but then abruptly and without explicit reasoning came to the conclusion that it hence follows from those requirements that a national legislature "may not, subsequent to a judgment of the Court from which it follows that certain legislation is incompatible with the Treaty, adopt a procedural rule which specifically reduces the possibilities of bringing proceedings for recovery of taxes which were wrongly levied under that legislation"<sup>128 129</sup> While the Court explicitly referred to both principles in this judgment, it is evident that it based its ruling on the principle of effectiveness; this point came across more discernibly in the Court's ruling in *Barra*.<sup>130</sup> More specifically it appears as if the Court based its judgment on the basic principle of cooperation evident in Article 10 EC, which of course also underlies the principles of effectiveness and equivalence.

In *Aprile II*<sup>131</sup> the ECJ further developed its ruling in *Deville* and made clear that, while a retroactive rule certainly is a circumstance that the court takes under consideration when the Court considers whether or not a rule is adopted to prevent the effects of judgment, it is not of decisive importance. The case concerned an amended time-limit barring an action for restitution of charges levied in breach of EC law. As regards whether the time-limit was contrary to the *Deville case-law* the Court analysed two aspects: (a) the time of enactment of the amendment, and (b) the scope of the amendment. Since the amendment preceded the ECJ's judgment, in which it held the charge to be incompatible with EC law, and it also encompassed several other charges, the Court could not find that the time-limit was in breach of EC law.

*Grundig Italiana*<sup>132</sup> is different from *Deville* in that the Court considered the application of a retroactive rule with no apparent connection to a judgment of the ECJ. In *Grundig Italiana* a company imported goods from Germany and France and in 1992 it was required to pay Italian consumption tax. The Court of Justice however held that tax to be in contravention of Article 95 of the EC treaty. In response to that ruling the company sought reimbursement of the taxes wrongfully paid. The national authorities partially dismissed the action on the ground that the action was time-barred. Italian law prescribed that the right to reimbursement of taxes paid but not due expired after five years from the date of payment.

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<sup>125</sup> Ibid. para 31.

<sup>126</sup> Case C-240/87 *Deville*.

<sup>127</sup> Case C-112/84 *Humblot*.

<sup>128</sup> Case C-240/87 *Deville*, para. 13.

<sup>129</sup> Ibid., para. 18.

<sup>130</sup> Case C-309/85 *Barra*.

<sup>131</sup> Case 228/96 *Aprile II*.

<sup>132</sup> Case C-255/00 *Grundig Italiana*.

Italian law did however also contain a special provision, adopted in 1990, that stipulated that the five year limit was reduced to three years as from the 90<sup>th</sup> day after the entry into force of the law. The new time-limit thus applied retroactively to all wrongfully paid taxes.

The Court's ruling in *Grundig Italiana* made clear that the principle of effectiveness does not present an absolute bar to the retroactive application of a new period for initiating proceedings that is shorter and more restrictive for the taxpayer. The ECJ also clarified the importance of transitional arrangements. According to the Court, Member States must allow for transitional period and those periods must be *sufficient*. A transitional period is sufficient, the Court further held, when national law provides an adequate time period which allows tax payers to plan their actions with care and not are "compelled to prepare with haste imposed by an obligation to act in circumstances unrelated to the time-limit on which they could originally count".<sup>133</sup> When the Court went on to consider the actual rule in the case, the Court broke new ground. While it first held that the 90 day transitional period in the case was insufficient the Court subsequently stated that the minimum transitional period required prior to the retroactive application of a period of three years in place of a ten or five year time-limit was *six months*. The court hence explicitly informed the national court of when a transitional period is sufficient and thus not in contravention of the principle of effectiveness.<sup>134</sup>

### 3.1.5 Swedish Tax Procedural Law

The tax payer has two general possibilities to contest a tax decision by the tax authorities under Swedish law. She can either request a *review* of the tax decision or lodge an *appeal* against the tax decision before the administrative courts.<sup>135</sup> If the taxpayer asks for a review, the tax authorities are required to re-examine the contested decision unless the matter is *res judicata* or *litis pendens*.<sup>136</sup> If the tax authorities uphold its former decision the tax payer has the possibility to bring the matter before the first administrative court by lodging an appeal against the decision or abide by the tax authorities decision. The right to appeal against a tax decision established by the tax authorities rest with the concerned taxpayer, the general representative<sup>137</sup> and in some cases the municipal authorities.<sup>138</sup> The taxpayer may even appeal against a tax decision that has been decided in his favour.<sup>139</sup> The taxpayers' right to appeal is however restricted by a five year time period commencing the year after the tax decision was finalized by the tax administration.<sup>140</sup> The same time period applies when the general representatives or the municipal authorities appeal is to the tax payers' advantage. However, when the appeal is to the taxpayers' detriment less lenient rules generally applies.<sup>141</sup> In the appeal, which has to be in the *written form, addressed* to the administrative court of first instance, but *submitted* to the tax authorities<sup>142</sup>, the taxpayer shall specify a *plea* and the *grounds* that he bases his plea on.<sup>143</sup> In addition, the appeal shall also include a reference to the decision against which the appeal is brought as well as a reference to the evidence intended to be brought in reliance of the action.<sup>144</sup> Once the tax decision formally is appealed, it is generally subjected to a second review by the tax authorities. If the tax authority decides to revise its decision in accordance with the appeal, the appeal automatically expires.<sup>145</sup> If the tax decision however isn't revised, the tax administration is required to lodge the appeal

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<sup>133</sup> Case C-255/00 *Grundig Italiana*, para 19.

<sup>134</sup> See the Opinion of AG Colomer in Case C-30/02 *Cash & Carry*, para. 32.

<sup>135</sup> 4:7 and 6:1 TL.

<sup>136</sup> 4:8 TL.

<sup>137</sup> Allmänna ombudet.

<sup>138</sup> 6:1 TL.

<sup>139</sup> 6:3 TL.

<sup>140</sup> 6:3 TL. For example, if the tax payers' taxable income derives from 2000 the tax payer is able to appeal against the tax decision by the tax administration until the end of 2006.

<sup>141</sup> 6:8 TL which refers to chapter 4 TL.

<sup>142</sup> 23 § FL.

<sup>143</sup> 4 § FPL.

<sup>144</sup> *Ibid.*

<sup>145</sup> 6:6 TL.

before the first administrative court for a ruling on the matter.<sup>146</sup> This means that it is usually more efficient to appeal against a tax-decision than to ask for a review of it.

### 3.1.6 Analysis and Implications of the Case-Law

The Court's case-law relating to temporal restrictions of a procedural nature is rather clear in comparison to the Court's case-law relating to several other procedural rules. As regards the principle of effectiveness, the Court has been rather consistent; insofar as they can be justified by valid objectives and hence be deemed "reasonable", they do not have the effect of making it excessively difficult to rely on EC law. In that regard the Court has held that a time-limit for bringing proceedings of five and three years as well as 90 days, reckoned from the date of the contested payment, is not in breach of the principle of effectiveness. Against that backdrop it is indeed hard to imagine that the Swedish rules governing the instigation of proceedings in tax cases would be deemed contrary to the principle of effectiveness. The taxpayers' right to appeal against a tax decision is restricted by a five year time period commencing the year after the tax decision was finalized by the tax administration. That would appear to be reasonable length and commencement of time given the ECJ's case-law on the matter.

But, what exactly about a time-period makes it reasonable? The Court has never been very specific in answering that question. A study of the Court's case-law does however suggest that the term "reasonable" is merely a way to indicate that the features of the time-limit should be proportionate with a valid aim underlying it. If a time-limit is proportionate to an aim deemed valid, then it will typically not constitute an obstacle to the proper exercise of EC law. If on the other hand the time-limit isn't legitimate by reference to its objective or proportionate to an aim, then it could possibly constitute such an obstacle. The problem with this type of rationalization attempt is only that the Court on some occasions has precluded temporal restrictions with reference to the particular circumstances of the case. These are consequently situations where the rule in itself not is contrary to the principle of effectiveness, but where the "application" of it, in a very specific situation, has produced a result that is contrary to the principle. *Santex* is the perfect examples of this case-law. In that case the Court went further than to merely restrict itself to consider the typical effects of the rules; it also considered the specific effects. The Court has fortunately been very reluctant to apply that line of reasoning in most cases. The main rule is thus still the one established in *Rewe and Comet*.

Given this shifting approach by the ECJ it is of course not entirely possible to rule out the prospect that the particular circumstances of a case dictates that the Swedish time-limit in conjunction with some other factors creates a situation where it becomes excessively difficult to enforce on EC law. In which situations could such possibility most likely arise then? The Court's case-law suggest that when an individual is late in bringing proceedings because of the unjust or misleading conduct of the authorities (or private party), and thus creates an aura of uncertainty for the individual, leads to a result that makes it excessively difficult to exercise EC law. If we transpose that case-law to the Swedish example we could hence argue that the requirement of effectiveness possibly could be breached if the tax authorities', by its conduct, misleads the tax payer or in some other way acts in an unjust way against her, and that conduct gives the taxpayer motivated, but false reasons for not challenging a tax assessment in time. What type of misleading conduct could that be? It would certainly not have to be intentional. We might for example think of a situation where the tax authorities by correspondence wrongfully informs the tax payer that a certain Swedish tax is in contravention of the EC principle of non-discrimination and that he will be reimbursed the sum paid wrongfully following a routine internal decision by the tax authorities. As a response to the assurances given, the tax payer does not ask for a formal review or appeal against the tax assessment within the time-limit provided for by the Tax Procedural Act. Subsequently, the tax-authorities however decide

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<sup>146</sup> 6:7 TL.

on a new interpretation of the law and do not amend the tax-assessment. In another case decided some time later, the Swedish Supreme Administrative Court however decides that the Swedish tax is in contravention of the principle of non-discrimination. In this example it would certainly be valid to argue that the tax-payer is stripped of all effective ways to enforce EC law due to the misleading conduct of the tax authorities in conjunction with a time-limit. Since the tax authorities have the power to re-open a tax-assessment and disregard the effect of *res judicata* if a tax-decision deviates from a precedent by the Supreme Administrative Court delivered subsequently to that decision, the principle of effectiveness suggest that the tax authorities would have to make use of that power to avoid a result contrary to the principle.

In relation to the principle of equivalence the Court has taken a rather narrow view on meaning of the requisite “comparable actions” in relation to time-limits. The Court has held that the same time-limit should apply to actions that are similar as to *objective, cause of action* and *essential characteristics*. As regards actions for restitution of taxes or charges, the ECJ held in *Edis* that an action alleging infringement of domestic law and actions alleging infringement of EC law would be comparable, with respect to the same kind of taxes or charges. An action for restitution of taxes hence wasn’t comparable to an action for restitution of sums between individuals. It has also held that the same time-limits need not apply for the tax authorities and the tax payer since different and valid aims underlie such a distinction. Since the Swedish rules governing the taxpayers’ possibilities to request a review or appeal against a tax-assessment are the same irrespective of the cause of action, Swedish law cannot be deemed to be in contravention of the principle of equivalence. Even if it were possible to locate more favourable rules governing other actions, such an action would have to be comparable to an action for review of a tax-assessment. The Member States hence appear to have a large discretion to differentiate between time-limits. In restitution cases, which of course are of main interest in this thesis, the consequence apparently is that Member state may lay down different temporal restrictions to govern different tax sectors as long as no difference is made with respect to the cause of action. An interesting scenario would however present itself if a member state would adopt certain rules to govern actions for recovery of a very specific tax that are very unfavourable, but does not make any differentiation as regards the cause of action. Although the court hasn’t faced such a situation, such a scenario could possibly constitute indirect discrimination contrary to the principle.

However, even if it is possible to identify a valid comparator, it still remains to determine whether the EC law claim is treated less favourably than the similar domestic action. Should for example a time-limit for bringing proceedings be considered in isolation or be examined in conjunction with the other procedural rules that are connected to both actions? If the comparison only focuses on the time-limit, the result of the comparison could easily be distorted. Similarly, is the national court to perform a comparison where favourability cannot be determined irrespective of the nature of the claimant’s specific situation? In adopting the *Van Schijndel* method by analogy, the Court in *Levez* answered that question by stating that the various aspects of the procedural rules under consideration in a case must be placed in their general context. The inference is consequently that we cannot consider two time-limits isolated in determining favourability, i.e. we have to consider them in their respective procedural context; moreover, we have to consider them in the abstract without reference to the specific situation. The inference is hence that, even though a time-limit for bringing proceedings governing a claim enforcing EC law is less favourable as regards length compared to that governing a similar domestic action, that does not necessary imply that that national law is in contravention of the requirement of equivalence. The national court must thus conduct a complete comparison between the rules governing the two comparable actions, not only concentrating on the time-limit per se.

The court’s case-law relating to the commencement of a time-period has however not received the same coherent treatment by the Court. Emmott first appeared to indicate that as long as a directive hasn’t been properly transposed, individuals are not able to ascertain

the full extent of their rights, and that meant that any time-period could not begin to run before the date of the proper transposition. The development of state liability in Francovich and the Court's post-Emmott rulings in, *inter alia*, Steenhorst-Neerings, Johnson and Fantask has however indicated that Emmott has been overturned, i.e. time-periods may start to run even though a directive has not been properly introduced. The Court also indicated in, *inter alia*, Haahr that the fact that Member States keep in force conflicting provisions of domestic law, does not mean that individuals are unable to have knowledge of their rights and hence that time-limit may commence.

The Court's case-law in relation to retroactively temporal restrictions of a procedural nature is also rather consistent. A member state may lay down retroactive rules given that two conditions are fulfilled. First, a Member State may not adopt a retroactive rule as a direct response to a judgment by the Court of Justice, whether prior or subsequent to it, and which aims directly to limit the effect of that judgment. That requirement flows *directly* from the principle of cooperation enshrined in article 10 EC. The Court has in that regard indicated that the time of the adoption as well as scope of the retroactive application is of great importance in determining whether or not the amendment is a direct response to a judgment by the ECJ. Second, unless the new rules are accompanied by a transitional period during which individuals can assert their rights in accordance with the old regime, EC law also precludes the rule. A transitional period must be "sufficient", which appears to be another way to say that they should be "reasonable". In order to determine the proper length for a transitional period, guidance may thus be sought, *mutatis mutandis*, from the case-law concerning time-periods in general. The court has nevertheless been rather specific; a transitional period must be of a length that enables individuals to prepare their actions with care and the court has explicitly held that the minimum transitional period required prior to the retroactive application of a period of three years in place of a ten or five year time-limit is *six months*. While the Swedish constitutional act, the *Instrument of Government*,<sup>147</sup> contains a provision on the prohibition of retroactive tax legislation, it merely prohibits the retroactive levying of taxes, not the use of retroactive temporal restrictions.<sup>148</sup> The inference from the court's case-law is that the Swedish courts may not apply a retroactive temporal restriction when it is directed directly against a judgment of the ECJ or when it isn't accompanied by a sufficient transitional period. That also means that the Swedish legislator cannot adopt procedural rules in order to hinder detrimental financial consequences prior to or following a ruling by the ECJ without transitional periods during which the tax payer may obtain knowledge of her new legal surroundings. A transitional period of six months appears to be the minimum time-period in that regard.

### 3.2 Rules on Evidence<sup>149</sup>

The ECJ has had several opportunities to consider the principles of effectiveness and equivalence in the context of rules governing evidential aspects of the court procedure. Although not nearly as vast as the case-law concerning temporal procedural rules, these cases have shown a steady increase since 1983 when they first were considered in *San Giorgio*. The rulings of the ECJ's case-law can be divided into two general categories: cases concerning national rules governing (a) the burden of proof, and (b) admissible evidence and evaluation in the court procedure. In both instances we are faced with the problem of a plaintiff relying on a directly effective EC provision before the national court and where her action is impeded by difficult evidential rules. The application of the rule may thus lead to a result in which the plaintiff on procedural grounds is denied a materially

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<sup>147</sup> Regeringsformen.

<sup>148</sup> 2:10 RF.

<sup>149</sup> Case C-199/82 *San Giorgio*; Case C-104/86 *Commission v. Italian Republic*; Case C-212/94 *FMC*; Joined Cases C-441&442/98 *Mikhailidis*; Case C-242/95 *GT-Link*; Joined Cases C-331&376&378/85 *Bianco*; Case C-343/96 *Dilexport*; Case C-228/98 *Dounias*; Case C-147/01 *Weber's Wine World*; Joined Cases C-123&330/87 *Jeunehomme*; Case C-129/00 *Commission v. Republic of Italy*; Case C-224/02 *Pusa*; Case C-276/01 *Steffensen*; Case C-192/95 *Comateb*; Case C-340/99 *TNT Traco*.



correct judgment from an EC law perspective. The issue then becomes when and to what extent such rules can be tolerated?

### 3.2.1 The Burden of Proof

Most of cases concerning national rules on evidence have been considered in the context of actions for restitution of charges or taxes levied in breach of EC law. More specifically, the Court of Justice has often been compelled to consider them in relation to cases concerning unjust enrichment. The backdrop to that development is that the ECJ in *Hans Just* and subsequently in *Denkavit Italiana* and *Express Dairy Foods* decided that restitution of taxes or charges levied in breach of EC law wasn't required if repayment would entail unjust enrichment.<sup>150</sup> Following those judgments, delivered only a couple of years after *Rewe* and *Comet*, the ECJ was prompted to consider in *San Giorgio* whether EC law precluded rules that placed the burden of proving that no unjust enrichment had taken place on the plaintiff, i.e. the tax-payer had to show, by providing proof of some kind, that restitution wouldn't entail unjust enrichment; failure to rebut the presumption would thus lead to that the tax-payers claim would be denied.

In *San Giorgio*<sup>151</sup>, an Italian trading company had initiated a restitution action against the Italian authorities on the grounds that it had been required to pay import duties contrary to EC law. The Italian court hearing the case decided in favour of the plaintiff and ordered the Italian authorities to repay the sum. Subsequently, the Italian authorities appealed against the decision and claimed that the decision was in violation of an Italian decree enacted after the judgment. The decree stipulated that duties on import, manufacturing duties, taxes on consumption and state taxes which had been levied wrongfully, even prior to the entry into force of the decree, was presumed to have been passed on to other persons, and thus not repayable. This presumption only concerned the abovementioned taxes and duties and no such presumption applied to other forms of restitution of taxes or duties.

The ECJ initiated its reasoning by recalling its rulings in *Just*, *Ariete* and *Mireco* in which it had held that EC law doesn't prevent a national legislation from disallowing restitution where to do so would entail unjust enrichment of the recipients. However, *San Giorgio* also concerned a special presumption placing the tax-payer in a very unfavourable and troublesome position; the tax-payer had to prove a negative fact, i.e. that the tax in question hadn't been passed on to a third party. Additionally, the tax-payer was only allowed to provide documentary proof in order to rebut that presumption. The Court's answer was unambiguous; it would be contrary to the principle of effectiveness for a national legislation to place such a mechanical burden of proving a negative fact on the tax-payer. Additionally, special limitations concerning the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence, would also entail a breach of that principle. The Italian Governments attempted to justify the evidential rules by pointing out that the same rules applied to all claims for restitution *in that tax sector*, i.e. both those arising from an infringement of EC- and national law.<sup>152</sup> AG Mancini and the Court were however not impressed with that argument. AG Mancini responded to that argument by focusing on the principle of equivalence, i.e. by analyzing how to delimit a valid comparator. In that regard he held: "It seems to me that to divide the tax system into a number of sectors...and then to confine the applicability of the principle within each of those sectors amounts not just to weakening the principle but comes close to destroying it."<sup>153</sup> The Court however took its departure from its prior reasoning in connection to the principle of effectiveness; since the rules were found in breach of the principle of effectiveness it didn't matter that the Italian law provided for the same rules in relation to several *possibly* comparable actions for restitution.

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<sup>150</sup> Case C-61/79 *Denkavit Italiana*; Case C-68/79 *Hans Just*; Case C-130/79 *Express Dairy Foods*.

<sup>151</sup> C-199/82 *San Giorgio*.

<sup>152</sup> Import- and manufacturing duties, consumption- and state taxes were seen as one coherent tax sector.

<sup>153</sup> Opinion of Mr Advocate General Mancini. C-199/82 *San Giorgio*, para. 11.

In *Bianco & Girard*, which also concerned a presumption of unjust enrichment, the Court placed even greater emphasis on that the domestic courts ability to evaluate the evidence freely and without restrictions. A rule governing the burden of proof that contains the requirement that the tax-payer has to prove the negative is consequently not in keeping with the principle of effectiveness. Furthermore, the ECJ stressed the importance of that the national courts attain an unrestricted position, unbound by formalistic rules, when examining the evidence put before it, which appears to give expression for the general principle of free examination of evidence. In its ruling the ECJ accentuated that it cannot generally be assumed that a charge has been passed on since the actual passing on of taxes “depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts.”<sup>154</sup> Consequently, the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court which may freely assess the evidence.

Those conclusions were later upheld in *inter alia*, *GT-link* and *Dilexport*. The Court’s ruling in *GT-link* concerned domestic rules of evidence in connection to an action seeking to prove that the conditions for application of Article 86 EC [abuse of dominant position] had been satisfied. In referring to *San Giorgio* it held that “the same principles apply where it is necessary to prove a breach of a provision of EC law which...is capable of having direct effect”.<sup>155</sup> In *Dilexport*, which concerned an action for restitution of taxes, the Court further generalised its previous conclusions, it stated that any rules of evidence, in particular rules on burden of proof and limitations on permissible evidence, which have the effect of making it excessively difficult to secure restitution are incompatible with the principle of effectiveness.<sup>156</sup>

The national courts position to examine and evaluate the evidence was discussed at greater length in *Commission vs. Italy*.<sup>157</sup> In that case the Commission brought infringement proceedings against the Italian State since, *inter alia*, the Italian Supreme Court had developed a requirement, as a condition precedent to any repayment of taxes, for production of the accounting documents of the undertakings seeking reimbursement. The ECJ found that, while failure to produce accounting documents when they are requested by the authorities can be regarded as a factor to be taken into account in showing that the charges have been passed on to third parties, it cannot, by itself, be sufficient for it to be presumed that those charges have been passed on to third parties nor, *a fortiori*, to impose on the claimant the onus of rebutting such a presumption by proving the contrary.<sup>158</sup> In *Weber’s Wine World* the Court likewise held that any administrative or judicial jurisprudence that puts the tax-payer in a position where she has the burden of proving a negative fact is contrary to the principle of effectiveness even though such a presumption isn’t provided for by explicit legal rules.<sup>159</sup> The Court also held that the tax-authorities practice to conclude, simply from the price of the invoice, that the economic burden had shifted to the consumer would constitute an administrative presumption in breach the principle of effectiveness.<sup>160</sup>

### 3.2.2 Admissible Evidence and Evaluation

While the Court in *San Giorgio*, *Girard & Bianco* and other cases have expressed the notion of a general requirement on part of the national courts to freely consider and evaluate different forms of evidence, *Dounias* is important since it was the first case in which the Court dwelled deeper into the meaning of this requirement.<sup>161</sup> In that case, an individual imported photocopiers from Germany for re-sale in Greece. The Greek

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<sup>154</sup> *Girard & Bianco*, para. 17.

<sup>155</sup> *Ibid* at para. 24-26.

<sup>156</sup> Case C-343/96 *Dilexport*, para. 48.

<sup>157</sup> Case 129/00 *Commission v. Italy*.

<sup>158</sup> *Ibid* at para. 37.

<sup>159</sup> Case C-147/01 *Weber’s Wine World*.

<sup>160</sup> *Ibid* at para. 113.

<sup>161</sup> Case 228/98 *Dounias*.

authorities attributed to them a market value higher than the price quoted on the corresponding invoices and in order to recover the goods Mr. Dounias had to pay the taxes on the basis of that value. Because of higher sum of tax required to pay, Mr. Dounias was unable to recover all photocopiers. Mr. Dounias then brought an action for damages against the state before the administrative court claiming that the state had breached several articles of the EC treaty. The question of interest concerned whether a procedural provisions of the Greek tax law, limiting proof through witnesses to exceptional situations, were contrary to EC law, where proceedings were brought before an administrative court seeking to establish the liability of the State with a view to obtaining reparation for damages resulting from the infringement of EC law.

*Dounias* is an interesting case since it marks the first case in which the Court of Justice examined national rules on evidence in a legal setting not concerning restitution and unjust enrichment. The key passage of the Court's judgment is where the Court refers to *San Giorgio* and states that "Member States must ensure that the rules of evidence applicable to actions relating to a breach of EC law are not less favourable.....and that they not make it impossible..."<sup>162</sup> The ECJ thus appeared to indicate that the conclusions and reasoning in the earlier case-law in relation to rules of evidence is, *mutatis mutandis*, transposable to all actions necessitated by the need to safeguard directly effective EC law before national courts. In the opinion delivered by AG Jacobs, he took the view that national provisions restricting the calling witnesses could, if their evidence were critical to a claimant's case, render impossible the exercise of its Community-law-derived rights.<sup>163</sup> While the Court found no contravention of the principle of equivalence (since there was no distinction between liability incurred through the breach of domestic- and EC law), it agreed with assessment made by the AG as regards the principle of effectiveness. However, it also held that the legislation in question would only be incompatible with EC law if the claimant could not benefit from the exceptions and if adducing written evidence would not permit him to establish his case.<sup>164</sup>

In *Mikhailidis*<sup>165</sup> a Greek company which carried on business in the tobacco sector brought an action for restitution before the administrative court on the grounds that an export tax constituted a charge having the equivalent effect to a customs duty on export and was therefore incompatible with several articles of the EC treaty inasmuch as it was imposed unilaterally on domestic tobacco products when they crossed the frontier. After, at the outset, haven given a preliminary ruling on the compatibility of the disputed tax and EC law in the negative, the domestic court also raised some concerns about the applicable national rules on evidence. The national Court more specifically wanted the ECJ to rule on whether the national court should base its findings solely on the documents provided by the competent authorities, as provided by national law, or whether EC law required that the company should be allowed to submit other forms of evidence in support of its action?

In his opinion to the case AG Fennelly took the view that evidence, documentary or otherwise, adduced by the tax authorities must be cogent and probative and not be based on mere presumptions. This implied that when an administration is seeking to satisfy the burden of proof by referring to official documents submitted by a tax payer it must be possible for that tax payer to adduce other forms of evidence to counter the evidence attributed the those official documents.<sup>166</sup> Concurring with the opinion of the AG, the Court first held that the question had to be viewed from the perspective of the person enforcing the rights conferred by EC law. From that viewpoint it stated that such rules on evidence, where the court would have no possibility to consider supplementary forms of evidence submitted by the company in order to rebut allegations of unjust enrichment, would unduly restrict the companies' ability to exercise its EC right and hence contravene the principle of effectiveness. The Court's ruling in *Mikhailidis* thus expands the earlier

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<sup>162</sup> Case C-228/98 *Dounias*, para. 69.

<sup>163</sup> Opinion of AG Jacobs in Case C-228/98 *Dounias*, para. 29.

<sup>164</sup> Case 228/98 *Dounias*, Para. 71.

<sup>165</sup> Joined Cases 441 & 442/98 *Mikhailidis*.

<sup>166</sup> Opinion of AG Fennelly in Joined Cases C-441&442/98 *Mikhailidis*, para. 40.

case-law of the Court from Dounias. The ECJ's earlier accentuation of the general principle of freedom of evidence is thus given a more forceful affirmation in the case and is seen as an indispensable instrument in order to achieve proper judicial protection for a person relying on EC law.

### 3.2.3 Swedish Tax Procedural Law

Swedish Tax procedural law does not contain any specific rules on evidence and the examination thereof before the administrative courts; *the principle of free examination of evidence* does however apply in taxation cases by analogy to the rules governing civil procedure.<sup>167</sup> The code of judicial procedure provides that the Court after a conscientious examination of that which has occurred shall decide what is proven in the case. In academic doctrine this article has been interpreted as to derive from, and give expression to, the general principle of free examination of evidence, and is said to contain two integral parts; the *free evaluation of evidence* and the *free taking of evidence*.<sup>168</sup>

These principles must however be considered in the context of the particular features of the tax procedure. One such feature is the normally applicable *written procedure*, which often is considered to restrict the scope of the principle of free examination of evidence.<sup>169</sup> A tax payer may however, before the lower courts request oral procedure which only may be denied if it is deemed unnecessary and special reasons against it is raised.<sup>170</sup> Since the tax procedure is governed by the *ex proprio motu principle*, the administrative courts are not bound, when evaluating the evidence of the case, to the parties' admissions or acknowledgements. The Courts free role must be considered against the function of the Court in taxation cases, i.e. to ensure a materially correct tax judgment. According to the Administrative Judicial Procedure Act, the courts may however on its own motion reject evidence deemed superfluous.<sup>171</sup> Before the Supreme Administrative Court new evidence may only be allowed for special reasons.<sup>172</sup>

Swedish law contains no formal rules that merely regulate the burden of proof. The legislator intentionally delegated the task of crafting such rules to the courts. Unfortunately, the Supreme Administrative Court has been rather unwilling to lay down rules governing the burden of proof. In general it may however be said that the tax authorities have the burden of proving incomes while the tax payer has the burden of proving expenditures. A common denominator is also that the party which possesses the most effective means to produce the evidence needed also is required to do so.<sup>173</sup>

### 3.2.4 Analysis and Implications of the Case-Law

*Dilexport* and *GT-link* clearly indicates that the Court's case-law on the matter is, *mutatis mutandis*, applicable to all actions enforcing EC law before national courts. Accordingly, we may consider that rules on evidence which makes it excessively difficult to enforce EC law is in breach of the principle of effectiveness and that all rules on evidence that discriminates against actions safeguarding EC law is contrary to the principle of equivalence. In that regard it is clear that the Court has approached these types of rules from the Rewe doctrinal line to the principle of effectiveness, i.e. objectively analyzing aim and proportion of the rule in question.

The Court held in *San Giorgio* that rules that places a very unfavourable burden of proofing the existence or non-existence of a certain fact as well as special rules limiting permissible evidence typically runs counter to the former principle. A burden of proving

<sup>167</sup> 35:1 RB. See also Prop. 1971:30, p. 230. See also Leidhammar 1995:41.

<sup>168</sup> Leidhammar 1995:41.

<sup>169</sup> Diesen (red.) 1999:120.

<sup>170</sup> 9 § FPL.

<sup>171</sup> In practice it is however very unusual for the Court to reject evidence on this ground. See Almgren & Leidhammar 2004:19.

<sup>172</sup> 37 § FPL.

<sup>173</sup> Almgren & Leidhammar 2004:20.

the negative is in that context a rule that typically contravenes the principle of effectiveness. In *San Giorgio, Girard & Bianco* and *Weber's Wine World* the Court has thus precluded rules placing the burden of proving a negative fact on the tax-payer. *Weber's Wine World* indicates that this holds true even if such a burden is established by a Court precedent rather than formal legal rules. This does obviously not imply that presumptions and burdens of proving a fact that are placed on the tax payer generally are in breach of EC law. The tax payer is often in a better position to produce the evidence needed and rules of this nature are of course normally expressions of an acceptable aim and in proportion to that aim. In *Pusa*<sup>174</sup> the Court consequently recognized the perfectly feasible in placing the burden of proving that a tax has been paid in order for the plaintiff to receive a certain pension. AG Jacobs opinion, which the Court followed, accentuated that it was feasible since it constituted the most effective way to secure the evidence required and it is precisely that form of reasoning that underlies most of the rules governing burden of proof in Swedish tax procedural law.<sup>175</sup> However, even rules placing the burden of proof for a positive fact may, if it doesn't meet the Rewe-requirements, be called into question from the viewpoint of the principle of effectiveness.

Special rules limiting permissible evidence may also run counter to the principle of effectiveness; *Dounias* and *Mikhailidis* indicate that rules limiting the forms of permissible evidence cannot be upheld without a clear justification. A national court hearing an action enforcing EC law must thus normally allow all forms of evidence so that the individual has every effective opportunity to show that her action is well-founded. A special rule limiting the forms of permissible evidence must in any case be motivated by some special aim and be proportionate to that aim in order for it to be in conformity with the principle of effectiveness. The same general remarks can be said about rules governing the evaluation of evidence; the Court has on several occasions emphasized that the national courts must be in a position to freely examine the evidence submitted to it. In *Girard & Bianco* it thus held that the national court freely may assess the evidence put before it notwithstanding any rules to the contrary. It has thus expressed the general principle of free examination of evidence common to most Member States of the EC. Rules circumscribing the power of the national court to freely assess the evidence submitted may thus not without good reason be upheld in cases where directly effective EC law are concerned.

The Swedish Courts apply the principle of free taking of evidence and while written procedure is the main rule in taxation cases, Swedish law normally permits oral procedure if requested. The principle of effectiveness merely appears to require that the tax payer relying on EC law is able to benefit from that exception and thus has every reasonable possibility to show that her action is well founded. An interesting question in that regard is if the restriction placed on the submission of new evidence before the supreme administrative court can be upheld in cases concerning directly effective EC law? Would the principle of effectiveness require the Supreme Administrative Court to make use of its discretionary power to allow evidence submitted to it? According to the Rewe case-law that restriction would have to be considered against the objective underlying it and whether or not it is a proportionate restriction. While that restriction is based on the need to concentrate the proceedings to the lower courts and to allow the supreme administrative court to only consider the legal aspects of the case, it is not impossible that the supreme court would have to allow submitted evidence if it is the only way available to the individual to show the merits of her case. The court would in any case have to allow evidence to be submitted to the same extent as it would, had the case not concerned EC law.

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<sup>174</sup> Case C-224/02 Pusa.

<sup>175</sup> Opinion of AG Jacobs in Case C-224/02 Pusa, para. 31.

## 3.3 The Function of the Court<sup>176</sup>

Many of the cases referred to the Court of Justice for preliminary rulings concerns, in essence, which function the national court shall perform in cases brought before those courts by individuals relying on directly effective EC law, i.e. to what extent shall it participate in the proceedings concerning directly effective EC law. The cases delivered by the ECJ can be grouped into two main categories: (i) court participation as regards the application of EC law and (ii) court participation as regards the investigation of facts in cases concerning EC law. The main problem in both instances concerns which task the national court shall serve and whether or not, and to what extent, it shall participate in the proceedings before it. Are the national courts required to apply EC law ex officio even though not party has relied on it and in what circumstances are they required to make a party aware of the fact that action should be based on EC law? Likewise, are the courts to engage in the investigation of facts in a case by ordering additional documents if that is the only way to properly protect EC law?

### 3.3.1 Court Participation: Application of EC Law

*Verholen and others* marks the first case in which the ECJ had to consider aspects of the national courts function in cases involving EC law.<sup>177</sup> In that case a Dutch court referred several questions to the ECJ pertaining to directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. In accordance with the general law, the social insurance bank decided to reduce the plaintiffs' pensions since their husbands had worked outside of the Netherlands for several years. However, this reduction didn't apply for men in the reverse situation. The national court, concerned with the national law's compatibility with the directive, referred the question to the ECJ for a preliminary ruling. Since none of the plaintiffs had relied on the directive before the national court, it also asked the ECJ to rule on whether EC law prevented the national court from considering the directive on its own motion.

The Court of Justice initiated its reasoning by reiterating its ruling in *Rheinmülen*.<sup>178</sup> In that case the ECJ concluded that Article 234 EC gives national courts the power and, where appropriate "imposes on them the obligation to refer a case for a preliminary ruling, as soon as the judge perceives either of his own motion or at the request of the parties that the litigation depends on an interpretation of EC law."<sup>179</sup> In *Verholen* the Court of Justice recognized that the solution in *Rheinmülen* was built on the premise that the national court could consider either that EC law must be applied and, if necessary, national law disapplied. According to the ECJ, the doctrine of direct effect and the possibility for individuals to invoke EC law didn't affect that power of the national court. Consequently the Court held that "...the recognized right of an individual to rely, in certain conditions, before a national court, on a directive where the period for transposing it has expired does not preclude the power for the national court to take that directive into consideration even if the individual has not relied on it."<sup>180</sup> The Court of Justice did however not answer the more interesting question, i.e. if EC law requires national courts to raise points of EC law of its own motion irrespective of whether the parties has relied on it or not. An interesting aspect of the Court's ruling is that the Court of Justice doesn't refer to the principles of effectiveness and equivalence. In his opinion to the case, AG Darmon approached the question from the perspective of the primacy of EC law. In that context he stated that: "the primacy of EC law cannot be left to the discretion of the national courts without the risk of its uniform application being seriously compromised. And the national court is under such

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<sup>176</sup> Joined Cases C-430&431/93 *Van Schijndel*; Case C-312/93 *Peterbroeck*; Joined Cases C-87-89/90 *Verholen*; Case 72/95 *Kraaijeveld*; Case C-473/00 *Cofidis*; Case C-166/73 *Rheinmülen*; Joined Cases C-222-225/05 *Van der Weerd*; Case C-168/05 *Mostaza*; Case C-526/04 *Boiron*.

<sup>177</sup> Joined cases 87 & 89/90

<sup>178</sup> Case 166/73 *Rheinmühlen*.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid* at para. 15.

a duty with regard to both to Community rules which have direct effect and to those which do not have direct effect.”<sup>181</sup> Significantly, however, the Court did not adopt the suggestion of Advocate General Darmon that a national court has a duty to raise of its own motion the existence of a Community rule.<sup>182</sup>

However, in *Van Schijndel*<sup>183</sup> and *Peterbroeck*<sup>184</sup> delivered a couple of years later the Court was asked to elaborate on the more specific meaning of the principles of effectiveness and equivalence in relation to the function of the court in cases involving EC law. In *Van Schijndel* the plaintiffs challenged a national law that forced them to be members of an occupational pension scheme; they lost their case in the national first instance court, where they did not raise any issue of European law in argument. When appealing to the Hague Road, they encountered a national procedural rule which stated that they could not raise new arguments other than those based on pure points of law and secondly that the national court’s ability to raise points was limited by the circumstances of the case. This created a problem for the plaintiff’s. In order to rely on new Community arguments they would have to introduce new facts and evidence, which had not been relied upon at the trial court. The Dutch Supreme Court therefore stayed the proceedings and asked the ECJ whether its procedural rules were valid in view of EC law. In *Peterbroeck* the plaintiff had complained to the Regional Director of Direct Contributions in Belgium about the level of tax which had been imposed on its non-resident partner company. When this complaint was rejected, the plaintiff appealed to the Court of appeal. Before the Court of appeal, the plaintiff for the first time argued that the higher rate of tax on a non-resident company constituted an obstacle to the freedom of establishment under Article 58 EC (as it then was). This argument was however raised outside a 60-day time limit, with effect from the lodging by the director of a certified copy of the contested decision together with all the documents relating to the taxpayer’s objection, during which no new plea could be raised. The Court of appeal also considered that national law prevented it from raising on its own motion a point of which the taxpayer could no longer raise before it, and since this appeared to curtail its power to examine whether national law was incompatible with EC law, a preliminary reference was made to the ECJ. The question asked was whether this particular restriction on the power of the national court to apply EC law was itself contrary to EC law.

The first question referred to the Court of Justice in *Van Schijndel* was whether, in proceedings concerning civil rights freely entered into by the parties, a national court should apply certain directly applicable competition rules ex officio. The Court’s answer was blunt and to the point; In referring to *Rewe* and applying the principle of equivalence the Court held that: “where, by virtue of domestic law, courts and tribunals must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned”<sup>185</sup> The more interesting part was however that the Court also added that the position was the same if domestic law simply conferred on national courts such a discretion to apply of their own motion binding rules of law.<sup>186</sup> This is consequently not a simple application of the principle of equivalence since the Court clearly stated that national court had to give EC law better treatment than strictly domestic law. Even more interestingly is the fact that the court never justified this conclusion by reference to either principle.

The second question referred to the Court of Justice in *Van Schijndel* was whether such a duty also existed where the national court would have to abandon the passive role assigned to it by going beyond the ambit of the dispute. This was of course the question that the ECJ answered by laying the down the so called procedural rule of reason approach and the answer was that the principle of effectiveness, in those circumstances, didn’t require

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<sup>181</sup> Ibid at para. 19.

<sup>182</sup> Brown 1997:69.

<sup>183</sup> Joined Cases C-430 & 431/93 *Van Schijndel*.

<sup>184</sup> Case C-312/93 *Peterbroeck*.

<sup>185</sup> Case C-312/93 *Peterbroeck*, para. 13.

<sup>186</sup> Ibid at para. 14.

national courts to ex officio consider issues concerning the breach of EC law.<sup>187</sup> The Court's ruling was in agreement with the opinion of AG Jacobs, who proposed that the conclusion "should be that a national court must apply of its own motion a provision of EC law only where it would be required to apply of its own motion a corresponding provision of national law".<sup>188</sup> The AG is thus clearly referring to the requirements imposed by the principle of equivalence and concurrently rebutted several arguments based on, in particular, the primacy and effectiveness of EC law forwarded by the intervening Spanish government.<sup>189</sup>

The question referred to the Court of Justice in *Peterbroeck* was whether EC law precluded the application of a domestic procedural rule whose effect was to prevent the national court from considering of its own motion whether a measure of domestic law was compatible with a provision of EC law when the latter provision had not been invoked by the litigant within a certain period. The Court's application of the principle of effectiveness in *Peterbroeck* stands out as a rather stark contrast to its *Van Schijndel* ruling. Taking the same approach to the subject in both cases, the ECJ in *Peterbroeck* concluded that EC law, and more specifically, the principle of effectiveness, precludes such a rule. This conclusion was in fact a clear divergence from the proposed conclusion offered by AG Jacobs. The AG took the same position in both cases and argued that the matter had to be resolved by reference to the *Rewe/Comet* case-law. Since none of the claims covered by certain exceptions provided for by the Belgian rules was comparable to *Peterbroeck's* claim and since the time-limit hindering the national court to ex officio raise points of law laid down by the rules could not be regarded as unreasonable, he concluded that the Belgian rules met the requirements laid down in those judgments.<sup>190</sup> The ECJ justified its conclusion by reference to several factors, among them that the procedural rule wasn't reasonably justified by principles such as the legal certainty and the proper conduct of procedure. It is important to note that the ECJ reached this result by relying on the principle of effectiveness only. *Peterbroeck* is hence the first time when the Court of Justice has precluded a procedural rule governing the courts possibility to ex officio raise points of law on the basis of the principle of effectiveness.

In *Kraaijveld*<sup>191</sup> the question of the national courts function and its ability to consider ex law by its own motion were raised in a different context. In that case the Dutch government adopted a dyke reinforcement plan for an area owned by the company *Kraaijveld*. *Kraaijveld* appealed to the Supreme Administrative Court and sought an annulment of the decision on the ground that the decision had not been prepared with the necessary care. The court stayed the proceedings and referred the question whether an article in directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment had direct effect so that it could be invoked before the court and whether it had to be applied by the court even if it wasn't invoked by the plaintiff in the proceedings.

An interesting aspect of the ECJ's ruling in *Kraaijveld* is the absent (explicit) reference to the principles of effectiveness and equivalence. The court does however refer to the principle of cooperation in Article 10 EC and the duty to ensure protection of directly effective Community rights. By implicitly applying the principle of equivalence, which is made apparent by a reference to the Court's ruling in *Van Schijndel*, the Court however concluded that where, by virtue of national law, "courts and tribunals must, of their own motion, raise points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned".<sup>192</sup> This statement is a clear expression of the principle of equivalence despite the Court's reluctance to explicitly refer to it and is simply a reaffirmation of the case-law established in *Van Schijndel*. The Court's ruling closely follows that of AG Elmer who argued that the question had to be answered in the affirmative since the result otherwise

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<sup>187</sup> Ibid at para. 22.

<sup>188</sup> Opinion of Mr Advocate General Jacobs in Case C-312/93 *Peterbroeck*, para. 38.

<sup>189</sup> Ibid at para. 24-44.

<sup>190</sup> Ibid at para. 17.

<sup>191</sup> Case C-72/95 *Kraaijveld*.

<sup>192</sup> Ibid at para. 57.



would be that the national court didn't consider an "element of superior law".<sup>193</sup> By referring to *Van Schijndel* the AG also applied the principle of equivalence to the case and concluded that "a national court which according to domestic law has a discretion to apply of its own motion rules of law which have not been raised must apply a provision of EC law even when the party with an interest in application of that provision has not relied on it".<sup>194</sup> The AG also noted that the principle of effectiveness in some instances could preclude a national procedural rule that prevents a national court from ex officio applying a provision of EC law. Referring again to the *Van Schijndel* approach the AG was however reluctant to conduct a specific analysis of the provisions in its context and of its relation to the basic principles of the domestic judicial system.<sup>195</sup>

The ECJ's comparison is drawn between the national procedural treatment of binding domestic rules and the national procedural treatment of binding Community rules. Binding domestic rules and binding Community rules are thus viewed as of a similar nature and should hence be treated equally. The inference is consequently that when the national court have the *power* and is *required* to raise certain points of law ex officio, the principle of equivalence require the national court to raise similar certain points of EC law ex officio. While the national court might be able to decide what a "binding" domestic rule is, the question is however what a binding Community rules is and if it is for the domestic court to decide that question? That could certainly not be the case since that would constitute a threat to the uniform application of EC law. The ECJ was however reluctant to conduct a closer comparison. The principle of effectiveness is however not reiterated, explicitly or implicitly, in the case.

*Cofidis*<sup>196</sup> is an interesting ruling by the Court of Justice since it concerns the application of the principles of effectiveness and equivalence in the context of a directive aiming at strengthening consumer protection. In its judgment, the Court firstly focused on the protection intended to be offered by certain articles of directive 93/13/EEC on unfair terms in consumer contracts and concluded that the incapability of courts and consumers to raise the unfair nature of a term in a contract, after the expiry of a certain time-period, was liable to affect the protection conferred on consumers by the Directive. *Cofidis* and the French government relied on the *Rewe* and *Palmisani* cases and argued that, time-periods that are reasonable, expressions of some legitimate objective and not discriminating comply with the requirements of minimum effectiveness and equivalence. Both the Court and the AG were unwilling to approach the question from the *Rewe* doctrinal line and opted instead to refer to its ruling in *Van Schijndel*. Just as the Court subsequently did, the AG focused on the purpose of the directive and held that the effective protection of the consumer "may be attained only if the national court acknowledges that it has the power to evaluate unfair terms of its own motion."<sup>197</sup> This is, as both the AG and the Court indeed recognized, clearly an expression of *Van Schijndel* method to the requirement of minimum effectiveness. Even more interestingly is the way that both the AG and the Court choose to apply that method, i.e. taking account of the purpose of the directive being invoked. Both the Court and the AG thus concluded that "A procedural rule which prohibits the national court, on expiry of a limitation period, from finding of its own motion or following a plea raised by a consumer that a term...is unfair is therefore liable, in proceedings in which consumers are defendants, to render application of the protection...excessively difficult."<sup>198</sup> The Court's reasoning in *Mostaza*<sup>199</sup>, which concerned the ability of the domestic court to raise ex officio that an arbitration clause in a consumer contract was unfair within the meaning of the same directive, clearly echoes the reasoning evident in *Cofidis*. In that context the ECJ similarly held that the power to determine of its own motion whether a term is unfair constitutes an important way to secure the proper effect of

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<sup>193</sup> Ibid, para. 76.

<sup>194</sup> Ibid, para. 79.

<sup>195</sup> Ibid, para. 80.

<sup>196</sup> Case 473/00 *Cofidis*. See also Joined cases 240 & 244/98 *Océano*.

<sup>197</sup> Opinion of Mr Advocate General Tizzano in Case 473/00 *Cofidis*, para. 58.

<sup>198</sup> Ibid, para. 36.

<sup>199</sup> Case 168/05 *Mostaza*.

the directive, i.e. a necessary device to ensure that the consumers benefit from effective protection.

In *Van der Weerd*<sup>200</sup> the administrative court in Netherlands referred a question concerning the duty of national courts to raise pleas of their own motion for a preliminary ruling. The applicants in the main proceedings before the national administrative court had challenged a decision by the authorities to slaughter their animals due to control of a disease. However, in their submissions to the national court they did not, unlike several other applicants, rely on the argument that the laboratory which the national authorities based its decision to slaughter the animals on was not listed in directive 85/511/EEC introducing Community measures for the control of foot-and-mouth disease. The referring court therefore asked whether EC law requires that it raise the issue of its own motion, despite national procedural rules that would normally stand in the way of that option.

As regards the principle of effectiveness, the ECJ adopted the solution in *Van Schijndel* in stating that the limitation of the power of the national court was justified by the principle that, *in a civil suit*, it is for the parties to take the initiative, and that, as a result, the court is able to act of its own motion only in exceptional cases involving public interest. Since the procedural circumstances in *Van der Weerd* and *Van Schijndel* were very similar, the Court saw no reason to reach a different conclusion than that reached in *Van Schijndel*. As regards the principle of equivalence, the ECJ noted that the Dutch Court was competent to consider issues relating to the infringement of rules of public policy of its own motion. In that regard, national rules on public policy was defined as issues concerning the powers of administrative bodies and those of the Court itself, and provisions as to admissibility. The Court of Justice however concluded that since the relevant EC provisions didn't occupy a similar position in the Community legal order they were not considered similar for the purpose of applying the principle of equivalence.<sup>201</sup>

In his opinion to the case, AG Maduro developed his thoughts rather thoroughly on the subject of similar grounds in applying the principle of equivalence. The AG initially concluded that: "where national courts have the power to examine certain grounds based on national law of their own motion, the principle of equivalence requires that they also have that power in respect of *equivalent* grounds based on EC law. The question, therefore, is how to determine which grounds are equivalent."<sup>202</sup> Relying on the Court's judgment in *Eco Swiss*, the Advocate General next concentrated, in the same way as the Court of Justice subsequently did, on the national legal concept of public policy. In that context the AG concluded that the problem with equivalence "must be solved by reference to those grounds and the interests which [national grounds of public policy, my remark] seek to protect within the national legal system."<sup>203</sup> AG Maduro thus found it imperative to examine whether the Community provisions relevant to the case occupied the same position and protected the same interests in the Community legal system as those grounds of public policy recognized by national law did.<sup>204</sup> His conclusion was that they didn't and, hence, the principle of equivalence didn't require the national court to go beyond the ambit of the dispute in order to examine of its own motion grounds based on the relevant EC provisions.<sup>205</sup>

### 3.3.2 Court Participation: Investigation of Facts

*Boiron* is an interesting case since it demonstrates the interplay between the principle of effectiveness, the function of the court and procedural rules governing evidence. In that case, a company which produced medicines which it distributed in France challenged a decision by the tax authorities relating to the levying of tax on direct sales. In support of its

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<sup>200</sup> Joined cases 222-225/05 *Van der Weerd*.

<sup>201</sup> *Ibid*, para. 30.

<sup>202</sup> Opinion of Mr Advocate General Maduro in joined cases C-222-225/05 *Van der Weerd*, para. 34.

<sup>203</sup> *Ibid*, para. 37.

<sup>204</sup> *Ibid*, para. 38.

<sup>205</sup> *Ibid*, para. 41.

action Boiron argued that the tax which it were required to pay for the sales relating to the medicines distributed by means of direct sales, constituted illegal state-aid within the meaning of Article 87 EC since wholesale distributors, which were significant competitors on the medicine market, were exempted from paying the tax. The wholesale distributors were exempted from the tax in order to compensate them for the public service requirements specifically imposed on them by French law. In that context, the national court asked, *inter alia*, whether compliance with the principle of effectiveness was ensured when, in order to be able to obtain reimbursement of sums paid by way of the tax on direct sales in accordance with the applicable national law on the burden of proof, it was for the economic operator seeking reimbursement of those sums to establish that the absence of liability of wholesale distributors amounted to an overcompensation of the latter.

The ECJ firstly noticed that the burden of proof in respect of overcompensation rested on the economic operator alleging that such overcompensation constituted State aid. The Court also noted, however, that national procedural law conferred on the national court a purely discretionary power to order of its own motion all measures of inquiry permissible under national law. In those circumstances, and in order to ensure the compliance with the principle of effectiveness, the national court had to make use of its discretionary power and use all procedures available to it, including that of ordering the necessary measures of inquiry and in particular the production by one of the parties or a third party of a particular document. This requirement was, according to the Court, however only necessary when the rule of burden of proof was likely to make it impossible or excessively difficult for evidence to be produced. Advocate General Tizzano reached the same conclusion and proceeded in the same way as the Court. He firstly held that: “it might perhaps be difficult...to show that the compensation exceeds the additional costs arising from discharge of the public service obligations”<sup>206</sup>, but since the national court possessed a discretionary power to investigate the facts of the cases he added: “i believe therefore, on the basis of those rules, that there is a realistic possibility for the national court to intervene by ordering the measures of inquiry needed.”<sup>207</sup> The rationale of the Court’s as well as the AG’s reasoning hence appear to be that when a national court has the power to investigate the facts of a case, it will have to make use of that power in order to compensate for the unfavourable position which the individual may be placed in. The question that remains is however if a court could have such duty even if national law doesn’t provide for such discretionary powers?

### 3.3.3 Swedish Tax Procedural Law

In the preparatory works of the Administrative Procedural Act (APA), which is applicable as *lex generalis*, it is ordained that administrative proceedings, including the tax-procedure, shall be governed by the *ex proprio motu principle*, i.e. in its most refined form, that the courts shall ensure that the investigation of any given case is as complete as is required in order to give a materially correct judgment and, to that end, that the Court may deliver a judgment without due consideration to the pleas, grounds and other procedural actions taken by the parties in the case.<sup>208</sup> It is however also apparent from the preparatory works that the principle was not anticipated to be applied in its most refined form by the administrative courts. The assumption was however that the courts, where appropriate, would actively engage in the proceedings before it.<sup>209</sup> The function of the principle could be described as to safeguard those material interests that are present in the case irrespective of whether they coincide with those presented by the parties of the case or not.<sup>210</sup> During the proceedings, the *ex proprio motu principle* materializes itself in the form of either *formal* or *material procedural guidance*.<sup>211</sup> Whereas material procedural guidance refer to the courts measures to enrich or restrict the material of the case, formal procedural

<sup>206</sup> Opinion of AG Tizzano in Case C-526/04 Boiron, para. 70.

<sup>207</sup> Ibid at para. 74.

<sup>208</sup> Prop. 1971:30, p. 291.

<sup>209</sup> Petré 1977:157.

<sup>210</sup> Dahlgren 1994:391.

<sup>211</sup> Dahlgren 1994:391.

guidance refer to the courts measures regarding the external course of events of the procedure.<sup>212</sup> In relation to the former, it is evidently of important concern to delimit the courts ability to actively engage in the proceedings by enriching or restricting the material of the case. In the preparatory works it is stated that, since administrative proceedings encompasses several disparate types of cases, the courts involvement has to vary and be appropriated to the specific *nature of the subject-matter* and *the parties* of the case.<sup>213</sup> In that regard FPL provides that it falls upon the Court to ensure that every case is investigated in the manner required by its particular features and, where appropriate, to designate how the investigation in a case should be supplemented. This responsibility is only briefly described in the preparatory works. It is however stated that this responsibility is actualized only when the parties for some reason hasn't been able to satisfactorily produce the proper material for a subsequent judgment.<sup>214</sup> This point is reflected in the legal text which stipulates that the court, where appropriate, shall designate how the investigation shall be supplemented. It may be relevant however to point out that we can distinguish between three different factors in need of investigation in a case; the factual circumstances of the case, the surrounding context specific factors framing the factual circumstances and, the legal provisions applicable to the case.<sup>215</sup> In accordance with the principle of *jura novit curia*, it falls on the court alone to contemplate and investigate the legal provisions applicable to the case. The court is consequently not bound by the views expressed by the parties.<sup>216</sup> It is thus the first category, the factual circumstances of the case that FPL refers to. The Court's jurisprudence does however appear to indicate that the courts have placed a large burden on the parties in gathering the relevant material and investigating the factual circumstances in tax-cases. Seldom does the court exercise their law given power to instruct the parties to supplement the material in the case.<sup>217</sup> The courts possibility to actively participate during the decision phase is also dependent on whether or not the court is bound by the pleas and grounds invoked by the parties of the case.<sup>218</sup> In that regard FPL provides that the court in delivering its judgment only is restricted by the pleas of the parties. The court may however disregard the pleas submitted and decide *to the advantage of a private party* if special reasons warrant such a decision and no third private party interest is prejudiced by it (*reformatio in melius*). A *contrario* it is accordingly permissible for the court to disregard the grounds relied upon by the parties as long as the court stay within the *ambit of the proceedings* drawn up by the pleas of the parties and no reformation in melius situation is present in the case.<sup>219</sup> As far as the basis for the judgment is concerned, the court is only bound by the rule that provides that the courts shall base its judgments on that which the documents contain or that which otherwise has transpired. The rule thus indicates that everything that has been said, written or otherwise has occurred in the case constitutes material of the proceedings. This applies irrespective of which party it was that submitted the material and irrespective of the circumstances in which the material was submitted.<sup>220</sup>

### 3.3.4 Analysis and Implications of the Case-Law

An interesting aspect of the ECJ's case-law is that it generally has been more active in approaching the subject from the viewpoint of the principle of equivalence than that of effectiveness. The basic inference is that the principle of equivalence imposes on the national court a duty to raise points of EC law ex officio when it has a similar duty to raise points of national law ex officio. From this viewpoint it is not surprising that the Court has held that the principle of equivalence also requires the national court to raise *binding rules*, or *rules of public policy character*, of EC law ex officio when it is *required* to raise domestic rules of that kind ex officio. More surprising is however that Court also has found

<sup>212</sup> Ibid.

<sup>213</sup> Wennergren 2003:137.

<sup>214</sup> Prop 1971:30, p. 530.

<sup>215</sup> Petré 1997:158.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid at p. 159.

<sup>218</sup> Ibid.

<sup>219</sup> 30 § FPL.

<sup>220</sup> Dahlgren 1994:394.

that EC law requires the national court to raise *binding rules* of EC law ex officio when it merely has the *power* to raise binding rules of national law ex officio. This is thus not a simple application of the principle of equivalence since the court is not focusing on equality, but rather to require more of national law than equivalence would imply. The Swedish administrative courts are, as previously stated, in accordance with the principle of *jura novit curia* not bound by the legal argumentation presented by the parties. The court is free to consider and apply the law as it see fit. This means that it can apply EC law to the circumstances of the case if it considers EC law to be of relevance for the solution of the dispute even if none of the parties has relied on it. An example might clarify the picture.

A tax payer challenges a tax decision before the administrative court in order to obtain reimbursement of sums levied by the tax authorities. The action is based on the ground that the tax authorities have interpreted national law incorrectly. The relevant national law is based on a community directive which has been transposed erroneously by the legislature. None of the parties invokes the actual directive in its legal argumentation, but the court nevertheless realizes that the national law isn't in conformity with the directive. The Court applies the principle of *jura novit curia* and corrects the tax assessment by reference to the Community directive.

But, what if the court perceives that the private party's action should be based on a breach of EC law in order to be successful? Since the administrative court isn't bound by the grounds put forward by the party it is also free to alternate the grounds of the action. It is therefore open to the tax court to replace the grounds relied upon in support of an action in order to base it on EC law. The principle of equivalence requires that the possibility for the national court to replace the grounds relied on in an action apply in the same way if it perceives that an action should be based on EC law. An example might clarify the picture.

A tax payer challenges a tax decision before the administrative court in order to obtain reimbursement of sums levied by the tax authorities. The action is based on the ground that the tax authorities has interpreted the national law wrongfully, or in the alternative, that he wasn't required to pay the tax on the ground that his company should have been taxed instead. The tax payer doesn't however realize that the tax has been levied in breach of EC law and he therefore doesn't base his action on that ground. The court however recognizes that the tax in question has been levied in breach of directly effective EC law. In such a situation the principle of equivalence requires the national court to alternate the ground of the tax payer's action in the same way it otherwise would.

Since the tax court has far-reaching powers to ensure that every case is as investigated as the case requires such a duty also applies when actions enforcing EC law is concerned. The tax court is thus required to act with the same degree of diligence as it would in other cases. An example might clarify the picture.

A tax payer challenges a tax decision before the administrative court in order to obtain reimbursement of sums levied by the tax authorities. The action is based on the ground that the tax authorities have levied the tax in breach of the prohibition of discrimination. The tax payer did however not present the evidence necessary to show discrimination even though several circumstances points in that direction. In such a situation the principle of equivalence requires that the national court act in the same way as it would, had the tax payer not relied on directly effective EC law. Since national law gives the court the power to investigate the matter ex officio or instruct the parties to complement their action in those situations, the court would have to proceed in the same way in this situation.

While it is clear that the ECJ has applied the Van Schijndel approach to the requirement of minimum effectiveness in connection to rules governing the function of the court, the application of that principle have been less clear. In *Van Schijndel* and *Van der Weerd* the court recognized the legitimate objective of judicial passivity in a civil suit, as well as the extent to which that objective was pursued. The principle of effectiveness consequently did not require the national court to go beyond the ambit of the proceedings, as drawn up by the parties, to take into account points of EC law. The result in *Peterbroeck*, which concerned administrative tax proceedings, was however to the contrary. The procedural context in that case mandated the national court to consider points of EC law by its own motion even if the party had not properly relied on them. The Court's ruling in *Cofidis* suggest that the subject cannot be considered without due account to the legislative measure giving rise to the action before the national court. But, are we to take into account the nature of the legislative measure every time that we consider the principle of effectiveness against the function of the court and its ability to consider EC law ex officio? The inference is that we can never quite ignore the Community measure when considering the duty of the national courts to consider EC law by its own motion. Following

Peterbroeck, it would thus appear as if the national court, in cases where the Court has been given a more active role in the proceedings, such as tax proceedings, have a duty to apply EC law ex officio even if no party has relied on it in the case. The Swedish courts are given a very strong position to participate in the proceedings by, inter alia, the principle of *jura novit curia*, its investigative powers and nearly unrestricted position in giving judgment. These features enable them to protect the interests of an individual relying on EC law. Indeed, the preparatory works explicitly accentuates the protective function of the Court. Peterbroeck suggest that Tax Courts, in particular Swedish Tax Courts, apply EC law ex officio.

The application of the principle of effectiveness could on also require the Supreme Administrative Court to make use of its discretionary power to allow evidence submitted to it. According to the *Rewe* case-law that restriction would have to be considered against the objective underlying it and whether or not it is a proportionate restriction. While that restriction is based on the need to concentrate the proceedings to the lower courts and to allow the supreme administrative court to only consider the legal aspects of the case, it is not impossible that the supreme court will have to allow submitted evidence if it is the only way available to the individual to show the merits of her case. The court would in any case have to allow evidence to be submitted to the same extent as it would, had the case not concerned EC law. *Boiron* suggests that Swedish administrative courts in certain situations will have to make use of its discretionary power to investigate the circumstances of the case. This is particularly so when the tax-payer is put in a very unfavourable evidential position and despite the fact that Swedish courts in practice not usually participate in that way.

The Court's case-law also suggests that the principles have implications for the Swedish court's role in granting leave-to-appeal. If a preliminary ruling is requested by the Supreme Administrative Court, then the domestic court have found that a question concerning EC law needs to be interpreted and that that question hasn't been answered previously or is obvious. This could be interpreted to mean that the case is of importance for guidance as to the application of the law. According to the applicable leave to appeal-rules, that constitutes one of two grounds for granting leave to appeal.<sup>221</sup> This implies that, in order to comply with the requirement of equivalence, the Supreme Administrative Court would have apply that leave to appeal rule equivalent to cases concerning EC law, i.e. if an individual is trying to obtain leave-to-appeal in a case concerning an action enforcing EC law and that case is of importance for guidance as to the application EC law, the national court would have to grant leave to appeal since it would do so if the case had concerned strictly domestic law. Since the national court previously asked for a preliminary ruling, which must be interpreted as case of importance for guidance as to the application of the law, leave to appeal would normally have to be granted. The Supreme Court has in fact also interpreted EC law to impose such a duty. In *Luftfartsverket versus SAS* it held that "In those cases that the Supreme Court is under a duty to refer a question to the ECJ for a preliminary ruling, it should generally also be of importance for guidance as to the application of the law that the appeal is tried by the Court".<sup>222</sup>

It may also be argued that the Swedish Supreme Court is required to grant leave-to-appeal when a preliminary ruling is requested and it shows that the appealed judgment is contrary to EC law. If we approach the problem from the principle of cooperation it appear valid to argue that it would appear manifestly in breach of the preliminary ruling-procedure if national procedural law didn't allow the national court to take into account the answer given by granting leave to appeal. Article 234 read in conjunction with the principle of cooperation and the duty to cooperate in good faith would certainly be breached if such a scenario would present itself. Since, however, Swedish procedural law also provides for leave-to-appeal when it is importance for guidance as to the application of the law, the national court would have to view that ground in light of Article 234, the principle of

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<sup>221</sup> 36 § FPL.

<sup>222</sup> NJA 2004 s. 735.

cooperation and the CILFIT judgment.<sup>223</sup> Since national law provides for leave-to-appeal when the case is of importance to the application of domestic law it would certainly be contrary to that principle to not grant leave-to-appeal when the case is of importance to the application of EC Law. And in those circumstances, the Supreme Administrative Court would also generally be required to refer the question for a preliminary ruling. It may however be argued that the rule doesn't differentiate between cases of importance to domestic and EC law. It is however important to note that equivalence also means that the *application* of the rule by the Courts is equivalent, i.e. it is not only the formal aspect of the rule that is concerned, the domestic court's application of the rule is just as important. In that regard it is clear that the Supreme Administrative Court doesn't apply the rule equivalent; leave-to-appeal in cases concerning EC law is hardly ever obtained while the chances of obtaining such permission in other circumstances, although not great, are clearly more beneficial.<sup>224</sup> It is therefore obvious that actions intended to safeguard EC law, in general, are given less than equivalent treatment. The inference is consequently that the Court must ensure that its application of the leave-to-appeal rule permits cases concerning EC Law to obtain leave-to-appeal to the same extent as it would allow such permission in cases concerning strictly domestic law.

### 3.4 The Legal Force of Judgments<sup>225</sup>

Procedural rules governing the legal force of judgments have been considered against the principles of effectiveness and equivalence on several occasions and in various aspects. The case-law of the Court in connection to these types of rules mainly concerns the following problems: Is a national court required, by its own motion or following a plea from the plaintiff, to reopen a judgment that has attained the force of *res judicata* if it is in breach of EC law?

#### 3.4.1 Negative Legal Force

*Eco Swiss* marks the first time that the Court of Justice was confronted with procedural rules on *res judicata* and then in a very special setting.<sup>226</sup> In *Eco Swiss*, an arbitration committee issued an award which disregarded Article 81 EC. Neither the parties nor the arbitrators paid any attention to this Article during the arbitration procedure. However, when the courts were called upon to review the arbitral award, one of the parties argued that the award was contrary to public policy since the challenged license agreement was void under Article 81 EC. According to the Dutch Procedural Code, an arbitral award could be set aside, *inter alia*, on the grounds of that the award was contrary to public policy. According to Dutch law a violation of Public policy would occur only when the award or its execution breached rules of law which were so fundamental that compliance may not be obstructed by restrictions of a procedural nature. In his opinion to the case, AG Saggio proceeded by citing the *Rewe* and *Comet* case-law while also pointing out that the principle of *res judicata* reflects a general principle of law recognized both by the Court of Justice and the Member States of the Community.<sup>227</sup> The time-limit, the expiry of which produces the effect of *res judicata*, pursued the perfectly legitimate aim of reaching a final settlement of the dispute. On those premises, AG Saggio concluded that the period of three months prescribed by national procedural law applied equally to all appeals against arbitration awards and that it didn't render excessively difficult the exercise of rights conferred by EC law since any party wishing to call in question the validity of an arbitration award was allowed a perfectly reasonable amount of time in which to do so.<sup>228</sup> The Court similarly

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<sup>223</sup> NJA 2004 s.735.

<sup>224</sup> Compare with *Remstam* 2004:747f.

<sup>225</sup> Case C-8/77 *Sagulo & Others*; Case C-234/04 *Kapferer*; Case C-453/00 *Kühne & Heitz*; Case C-118/00 *Larsy*; Case C-126/97 *Eco Swiss*; Joined Cases C-392&422/04 I-21 *Germany*.

<sup>226</sup> Case C-126/97 *Eco Swiss*.

<sup>227</sup> Opinion of AG Saggio in Case C-126/97.

<sup>228</sup> *Ibid* at paras. 34-35.

agreed, without citing either *Rewe* or *Van Schijndel*, and held that the procedural rule was justified by the principle of legal certainty and allowed for reasonable time-period during which any party could contest the arbitration award.<sup>229</sup> Consequently, “EC law does not require a national court to refrain from applying such rules, even if this is necessary in order to examine...whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty”.<sup>230</sup>

In *Kühne & Heitz*<sup>231</sup>, the Court of Justice was referred a question pertaining to the effects of EC law on national rules governing the finality of administrative decisions. The case concerned a decision considered final under Dutch law that had been challenged in accordance with national law, whereas reliance was put on the applicability of a different tariff heading for export refunds for the export of poultry meat to third countries than the one applied by the relevant Dutch authorities. The applicant requested a refund of money unlawfully claimed pursuant to the wrong classification in the light of a subsequent ruling of the ECJ. In that context the ECJ was asked whether an administrative body was required to reopen a decision which had become final in order to ensure the full operation of EC law. The ECJ doesn't mention the principle, but its initial reasoning in the case clearly has the principle of effectiveness in mind. Applying the *Rewe/Comet* approach to the requirement of minimum effectiveness it examined the objective of the procedural rule and stated that:

“Legal certainty is one of a number of general principles recognised by EC law. Finality of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, contributes to such legal certainty and it follows that EC law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way”.<sup>232</sup>

Consequently, the requirement of minimum effectiveness doesn't require a national administrative authority to reopen a decision that has become final. After that swift initial statement the Court however took notice of the constant power of the national administrative authority which allowed for a re-examination of an administrative decision that had become final. In light of that consideration, the ECJ however found that the principle of cooperation imposed on an administrative body a duty to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court. But the ECJ made that requirement dependent on the fulfilment of four different conditions, partially stemming from the principle of equivalence; (1) under national law, it has the power to reopen that decision; (2) the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; (3) that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of EC law which was adopted without a question being referred to the Court for a preliminary ruling under Article 234(3) EC; and (4) the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.

AG Legér's opinion to the case contains an intriguing argumentation that departs drastically from the argumentation present in the actual judgment. The Advocate General commenced by reiterating the *Simmenthal* ruling and swiftly concluded that those judgements were based on the primacy of EC law and the principle of cooperation.<sup>233</sup> The AG then reiterated the requirement of full effectiveness evident in those cases and stated that, “it is not only national courts, but also administrative bodies which are under a duty to set aside any national rule which is an obstacle to the full effectiveness of EC law”.<sup>234</sup> The AG took special notice of the Court's judgment in *Larsy* which addressed the question of the application by a national administrative body of the rule concerning the legal authority

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<sup>229</sup> Judgment, para. 45-46.

<sup>230</sup> Judgment, para. 47.

<sup>231</sup> Case 453/00 *Kühne & Heitz*.

<sup>232</sup> *Ibid* at para. 24.

<sup>233</sup> Opinion of AG Léger in Case C-253/00 *Kühne & Heitz*, para. 45-46.

<sup>234</sup> *Ibid* at para. 54.



of a judicial decision. In that case the Court of Justice held that to the extent that national procedural rules concerning respect for the legal authority of a judicial decision precluded effective protection of the concerned persons rights derived under the direct effect of EC law, the authority should have disapplied those provisions.<sup>235</sup> Advocate General Legér then concluded that, “The principle of primacy prevents a national administrative body from refusing an individual’s claim for payment based on EC law on the ground that the claim seeks to call into question a prior administrative decision which has not been criticised by judicial decision, irrespective of whether it has the legal authority of *res judicata* or that of a final judgment”.<sup>236</sup> Interestingly, the AG hardly mentions the requirement of minimum effectiveness or the principle of equivalence in his opinion at all.

Following the Court’s ruling in *Kühne & Heitz* the ECJ was rather quickly prompted to give another preliminary ruling on the issue of *res judicata*. In *Kapferer*<sup>237</sup> the national court confronted the ECJ with the question whether a national Court was required to review and reopen a final judicial decision if the latter should infringe EC law and if the *Kühne & Heitz* ruling was applicable in those circumstances? *Kapferer* concerned a consumer that had received advertising material on a number of occasions from a German company. Some time after that a letter had been sent to Mrs. *Kapferer* she was informed that a prize in the form of a cash credit was waiting for her. According to the participation conditions, participation in the distribution of the prizes was subject to a test order without obligation. Ms *Kapferer* returned the order form. Not having received the prize she believed she had won, Ms. *Kapferer* claimed that prize and sought an order directing the company to pay her the sum plus interest. The district court dismissed the plea of lack of competence and declared itself to have jurisdiction on the basis of Regulation No 44/2001. As regards the merits of the case, the District Court dismissed all of Ms. *Kapferer*’s heads of claim. The company took the view that the districts courts decision relating to its jurisdiction did not adversely affect it because it had succeeded on the merits. For that reason the company did not challenge that decision on jurisdiction and the decision to dismiss the defence of lack of jurisdiction. The referring court, relying on the court’s judgment in *Kühne & Heitz*, was uncertain to whether it had a duty under Article 10 EC to review and set aside a final and conclusive judgment on international jurisdiction if that judgment was proved to be contrary to EC law.

The Court of Justice started out by reiterating the requirements of the principles of effectiveness and equivalence and then, citing *Eco Swiss*, bluntly stated that since the principle of *res judicata* is recognized by the Community legal order, EC law “does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of EC law by the decision at issue”. Once again the Court of Justice applied the more objective *Rewe* approach to the principle of effectiveness; there is no consideration of the special circumstances of the case at all. The plaintiffs’ reliance on *Kühne & Heitz* is not met with favour either by the Court. The ECJ appeared to follow the opinion of AG Tizzano who took a very strong stance against transposing the solution adopted in that ruling to the circumstances in *Kapferer*. According to AG Tizzano, *Kühne & Heitz* was only concerned with the reviewability of final administrative decisions adopted in breach of EC law and that was an “issue of a different nature and import than one involving the principle of *res judicata*”.<sup>238</sup> Not entirely certain, however, as to the possibility to transpose of the solution adopted in *Kühne & Heitz*, AG Tizzano also stated that, “where such an approach to be adopted, it would not, I believe, lead to the outcome suggested by the referring Court as the facts of the case do not meet the conditions laid down in *Kühne & Heitz*”.<sup>239</sup> The Court of Justice did similarly not appear to be very interested in transposing the solution in *Kühne & Heitz*, and reminiscent of the reasoning of AG Tizzano, it emphasized the different nature of a “final judicial decision”. In contrast to the Advocate General it did however not

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<sup>235</sup> Case C-118/00 *Larsy*, para. 53.

<sup>236</sup> Opinion of AG Léger in Case C-253/00 *Kühne & Heitz*, para. 66.

<sup>237</sup> Case 234/04 *Kapferer*.

<sup>238</sup> Opinion of AG Tizzano in Case C-234/04 *Kapferer*, para. 24.

<sup>239</sup> *Ibid* at para. 25.

completely dismiss the possibility that the solution adopted in *Kühne* could be transposed to decision of that nature. The ECJ opted instead to accentuate that the requirement to review a final decision was dependent on the condition that that body should be empowered under national law to reopen that decision. The ECJ noted that it was apparent from the reference for a preliminary ruling that that condition wasn't satisfied.<sup>240</sup>

In I-21 Germany<sup>241</sup> the ECJ was asked to give a ruling on whether EC law requires that a judgment, that had obtained legal force, should be re-opened if it is found to be in breach of EC law. The case concerned a telecommunications undertaking that, by way of an assessment notice, was charged a fee for a telecommunication licence. The company paid the fee without objection and did not appeal within the time-limit of one month from the date of notification of the fee assessment. In the course of proceedings for annulment of a fee assessment notice which was challenged within the permitted time-limits by another undertaking, the administrative court of second instance held in a judgment that the German law was incompatible with higher-ranking legal rules and upheld the annulment of the assessment in question which had been delivered by an appeal court. Following that judgment, I-21 sought repayment of the fee which it had paid. Since the claim wasn't granted, the company brought proceedings before the Regional Administrative Court. That Court did however dismiss the action on the ground that the fee notice had become final and that no grounds for challenging the administrative body's refusal to withdraw the assessment existed. I-21 appealed against the judgment and claimed before the Federal Administrative Court that the former court had erred in law in relation to, *inter alia*, EC law.

The ECJ's initial reasoning in the case follows the ruling in *Kapferer*; the principle of legal certainty is a principle recognized by EC law and in accordance with that principle EC law normally doesn't require that administrative bodies be placed under a duty to reopen final administrative decisions.<sup>242</sup> The *Kühne & Heitz* ruling is however recognized as a manifestation of the fact that even the principle of legal certainty has limits in certain circumstances. The plaintiffs' plea for a transposition of the solution adopted in that case is however not followed by the Court who found that the circumstances giving rise to the judgment in *Kühne & Heitz* was "entirely different from those at issue in the main proceedings. Whilst the undertaking *Kühne & Heitz NV* had exhausted all legal remedies available to it, I-21 did not avail itself of their right to appeal against the fee assessments issued to them.<sup>243</sup> While the Court distinguished *Kapferer* from *Kühne* by reference to the condition that under national law it has to possess the power to reopen a final administrative decision, I-21 is distinguished by the second condition, i.e. that the plaintiffs didn't exhaust all legal remedies. The court's ruling could however hardly be more divergent from the opinion of its Advocate General.<sup>244</sup> In referring to the principle of primacy, the doctrine of direct effect the AG approached the subject from the viewpoint of the requirement of full effectiveness.<sup>245</sup> In that context he held that the principle of legal certainty cannot always prevail over the principle of legality. He concluded that equity and general principles of law sometimes temper the impact of legal certainty, and that it was reasonable to suggest that so would be the case where its strict application undermines the essence of EC law and gives rise to situations which infringe those principles.<sup>246</sup> Against that backdrop the AG concluded that there had been an infringement of EC law which was contrary to equity and the general principles underlying EC law.<sup>247</sup> When he subsequently mentioned national procedural autonomy and its limits he did so only in order to stipulate that the specific rules governing the review had to follow national procedural law, i.e. the requirement to reopen the judgment flowed from EC law under the requirement of full

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<sup>240</sup> Case C-234/04 *Kapferer*, para. 23.

<sup>241</sup> Joined cases C-392&422/04 I-21 Germany.

<sup>242</sup> *Ibid* at para. 51.

<sup>243</sup> *Ibid* at para. 53.

<sup>244</sup> Opinion of Advocate General Ruiz-Jarabo Colomer to joined cases C-392&422/04 I-21 Germany and others.

<sup>245</sup> *Ibid* at para. 83-93.

<sup>246</sup> *Ibid* at para. 95.

<sup>247</sup> *Ibid* at para. 114.

effectiveness, but the detailed rules governing such a review had to comply with the principles of effectiveness and equivalence.<sup>248</sup>

While the Court didn't follow the reasoning adopted by AG Ruiz-Jarabo in I-21 Germany, it seemed more receptive to the AG's concerns for upholding the principle of legality in *Lucchini*.<sup>249</sup> In that case, The ECJ pointed out that the principle of res judicata could have the effect of attributing to a national judgment effects which exceeds the limits of its jurisdiction, as happened in the present case. Since the principle had the effect of precluding a decision of the Commission which has the exclusive power to assess the compatibility of a State aid with the common market, both the AG and the ECJ concluded that *full effectiveness of EC law* precluded the application of the principle.<sup>250</sup> In *Kempter*<sup>251</sup> the Court was called upon to explain in more detail how the criteria established in *Kühne & Heitz* were to be interpreted. In that case the German administrative authority required a cattle operator to repay export refunds which the former had received. That decision was subsequently confirmed, after appeal, by the final domestic court. Subsequently, the ECJ delivered a ruling that clearly indicated that that decision was contrary to EC law. As a result, Kempter applied to the administrative authorities for a re-opening of the final decision. The administrative authority refused, however, to re-open the matter and Kempter appealed to the district court. While the district court considered that the first two conditions set out in *Kühne* were met, it was uncertain as to the third and fourth criteria. As regards the third criterion laid down in *Kühne* (that the decision is based on a wrongful interpretation of EC law) the ECJ held, sitting in grand chamber, that it is sufficient if either the point of EC law was considered by, or could have been raised by, the domestic court ex officio, i.e. it isn't necessary that EC law *was considered*, following a plea by the individual or by the Court ex officio, in the judgment at all. With regard to the fourth criterion laid down in *Kühne* (that the person concerned complained immediately after becoming aware of the decision of the ECJ invalidating the administrative decision), the ECJ also held that the term "immediately" doesn't mean that EC law has laid down any specific time-frame to be respected. Citing its case-law in relation to temporal periods in general the ECJ held that: "it follows from...settled case-law that the Member States may, on the basis of the principle of legal certainty, require an application for review and withdrawal of an administrative decision that has become final and is contrary to Community law...to be made...within a reasonable period."<sup>252</sup>

### 3.4.2 Swedish Tax Procedural Law

Although the Tax Procedural Act doesn't contain any specific rules concerning the legal force of tax-judgments, it was considered self-evident in the preparatory works that tax-judgments acquire negative legal force after the expiry of the applicable appeal period.<sup>253</sup> Indirectly it can also be discerned from 4:7 TL which states that the tax authorities may not review a tax decision that has been decided by an administrative court. It is important to point out that the tax procedure is constructed around a specific subject matter and not the taxation decision in its entirety, i.e. a certain deduction- or income post. Consequently, it is only the specific subject matter, which is a sub-element of tax- assessment as whole, which gains the force of res judicata.<sup>254</sup> Additionally, the force of res judicata is restricted by the relevant tax-year giving rise to the claim, i.e. it is thus possible for the tax payer to lodge an identical action the following tax-year irrespective of that the former action is res judicata and would be deemed inadmissible by the administrative court.<sup>255</sup> The minister in charge of the legislation stated that the rules governing the possibilities to change a lodged action were of immense importance in that regard. Reciprocity between these rules and the rules

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<sup>248</sup> Ibid at para. 115-121.

<sup>249</sup> Case c-119/05 *Lucchini*.

<sup>250</sup> Ibid at para. 61-63.

<sup>251</sup> Case C-2/06 *Kempter*.

<sup>252</sup> Ibid. at para. 59.

<sup>253</sup> Prop. 1989/90:74, p. 374.

<sup>254</sup> Prop. 1989/90:74, p. 374.

<sup>255</sup> Ibid at p. 375.

governing *res judicata* was thought to exist, i.e. if an amendment of a lodged action is not permitted since it constitutes a new subject-matter according to the rules governing change of action, then the matter may not be affected by the force of *res judicata* in a subsequent dispute.<sup>256</sup>

The legal force of a tax-judgment may however also be disregarded if it is in breach of a precedent delivered subsequently by the Supreme Administrative Court. Hence, if a tax-payer discern that the conclusions to be drawn from a subsequent ruling by the Supreme Administrative Court has implications for the outcome of his taxation case, he may, irrespective of the force of *res judicata*, request a re-opening of the matter. A final remedy that circumscribes the legal force of a tax judgment is also the extraordinary review. An extraordinary review may be granted if, because of special circumstances, there exist extraordinary reasons to try the matter again. The preparatory works indicate that such review may be granted in three situations; (a) where new circumstances surface after the judgment have been given that places the matter in a considerably different light, (b) the judgment *clearly* is not in conformity with the law, and (c) if an error during the handling of the matter or any other circumstance warrants a review.<sup>257</sup>

### 3.4.3 Analysis and Implications of the Case-Law

In what circumstances would it be excessively difficult for an individual to enforce his right due to procedural rule conferring *res judicata* on a judgment? The ECJ's case-law pertaining to rules governing the negative legal force indicates that such rules are generally accepted from the viewpoint of EC law and that is so even if the judgment is in breach of EC law. The Court has stated that procedural rules conferring *res judicata* on judgments are typical expressions of the general principle of legal certainty, a principle recognized by EC law as valid. The extent to which such an objective is allowed to be pursued is however not entirely clear. In all cases referred to previously the Court accentuated that the decisions and judgments must acquire legal force only after a time-period considered to be reasonable. A contrario it could then be said that the principle of effectiveness might preclude a national rule conferring legal force on judgments in circumstances where it is unreasonable. That could for instance be the case when the individual is given none or very small possibilities to circumscribe that effect by, for instance, appealing against the judgment at issue or when the time-frame is excessively short. The ECJ's case-law concerning temporal restrictions could hence also be used for guidance as to temporal features of rules conferring *res judicata*. Besides from these considerations, the ECJ has been very clear; EC law does not, in principal, require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of EC law by the decision at issue.<sup>258</sup> But, since the ECJ has adopted a *formal understanding* of *res judicata*, the principle doesn't prevent individuals from obtaining compensation on the basis of those judgments found in breach of EC law in secondary proceedings.

It is evident that the Court has approached the subject from the viewpoint of the requirement of minimum effectiveness, and more specifically, the *Rewe/Comet* approach. The court's assertion against the solution framed around the more powerful requirement of full effectiveness, which was adopted by AG Ruiz-Jarabo Colomer in I-21 Germany, further strengthens that conclusion. In that context it evident that the Swedish rules governing the legal force of tax-judgments fulfil the requirements imposed by the principle of effectiveness. A tax judgment only becomes final after a time-period of two months during which the tax-payer may bring an appeal against the first judgment. The tax-payer may additionally bring an action for an extraordinary review if certain conditions are fulfilled.

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<sup>256</sup> *Ibid.*

<sup>257</sup> Wennergren 2001:367ff.

<sup>258</sup> Case C-234/04 Kapferer, para. 21.

Does this then mean then that the Tax authorities or Administrative Courts never are required to re-open a decision or judgment in breach of EC if the tax-payer has had a reasonable opportunity and time-frame to challenge a tax-decision? It appears as if the answer to that question is that it is highly unlikely that such requirement would be imposed by the principle of effectiveness. *Lucchini* does however indicate that there are limits to the application of the principle of *res judicata* even if it is accompanied by a reasonable time-period. The case illustrate that when a judgment is *manifestly* in breach of EC law, it will have to be re-opened even though it has become final. The difficulty is only to determine when a ruling is manifestly in breach of EC law. In *Lucchini* the breach was utterly flagrant since the court not only completely disregarded EC law, but also encroached upon the powers of the Commission. Another interesting aspect of the case was that the ECJ applied the *Simmenthal* requirement of full effectiveness. The inference from *Lucchini* is hence that Swedish tax Courts, will have to re-open a tax judgment if it is found to be manifestly in breach of EC law. This does however not appear to amount to more than that the courts apply the extraordinary review under the same conditions as required when a judgment is manifestly in breach of domestic law, and that duty already follows directly from the principle of equivalence.

While it thus appears as if the principle of effectiveness only *exceptionally* would require a court to re-open a final judgment in breach of EC law, it seems as if would be more beneficial to invoke the principle of equivalence. The court's ruling in *Kühne & Heitz*, in which it confessed to such a possibility, was indeed based on the requirements of that principle. But how exactly did it extract those four conditions? While the precondition that the administrative body has to be empowered to reopen a final administrative decision is a clear-cut application of the principle of equivalence, the origins of the other three conditions are elusive. Furthermore, does the formula apply to both administrative decisions and court judgments?

The Court never answered that question in *Kapferer* or *I-21 Germany*; referring instead to that the conditions set out in *Kühne* wasn't met. Since the court however examined these cases against in that context, it is quite possible that the solution adopted in *Kühne* also applies where a final judgment is concerned. If that is the case then a Swedish administrative court is required to reopen a final tax-judgment if that judgment has become final following a ruling by the Supreme Administrative Court, the judgment is based on incorrect interpretation of EC law, the Supreme Administrative Court made no reference to the Court of Justice for a preliminary ruling, and the person concerned lodged an action directly after becoming aware of the Court of Justices' ruling. *Kempter* does however make clear that is not necessary that the point of EC law was raised in the proceedings, i.e. it is thus permissible for the individual to approach the tax authorities with a new ground based on EC law even though such a ground didn't support the claim before the court of last instance. In addition, the term "immediately" should not be interpreted strictly; *Kempter* makes clear that the case-law concerning time-limits in general is applicable to the time-frame in which such a complaint may be made.

This conclusion is however dependent on the precondition that the national court is generally empowered to review a final judgment. While Swedish law allows for a review of a final judgment, it is empowered to do so *ex officio* or by a motion from a party, in extraordinary circumstances only. While wrongful interpretation and application of the law has been recognized as a ground for allowing extraordinary review in the Supreme Administrative Court's case-law, it is usually required that the wrongful application of the law is obvious and manifestly in breach of the law.<sup>259</sup> In the light of that provision the ECJ's ruling could have considerable effects for the principle of *res judicata* which would have to give way to subsequent rulings of the Court.

The Tax Procedural Act also confers on the tax-authorities a possibility to reopen a judgment that has become final as a result of a ruling by the first or second administrative

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<sup>259</sup> *Ibid.*

court, if it deviates from a subsequent ruling by the Supreme Administrative Court. This is consequently a general possibility open to the tax-authorities that applies irrespective of the particular subject-matter of the case. While Swedish law only confers this discretionary power on the tax authorities if the decision is contrary to a subsequent ruling by the supreme administrative court, the principle of equivalence requires that such a duty also exists where EC law is concerned. It should be noted that the Kühne formula transformed the *power* of the administrative body to reopen a final administrative decision into a *duty* under EC law. Leaving aside the Kühne formula, it would still be possible to invoke the principle of equivalence and demand that the tax authorities 'discretionary power to reopen a final case be extended to include decisions contrary to a judgment delivered subsequently by the ECJ. An example might clarify the picture.

A tax payer challenges a tax decision before the administrative court in order to obtain reimbursement of sums levied by the tax authorities. The action is based on the ground that the tax authorities have interpreted EC law incorrectly. The administrative courts uphold the tax decision and the judgment obtains the force of *res judicata*. Six months later, in another case which the national court referred to the Court of Justice rules for a preliminary ruling, the ECJ decides that the tax is levied in breach of EC law. Under such circumstances the principle of equivalence requires that the tax authorities treat an application for review of the first judgment in the same way it would a subsequent judgment by the supreme administrative court, i.e. it has to re-open the matter.

If a judgment in breach of EC law has become final following a judgment by the administrative courts, it would however be valid to argue that the principle of equivalence requires that the individual is given the same opportunity to re-open the case as she would, should the judgment had been in breach of strictly domestic law. This is the central inference from the I-21 Germany ruling. This implies that an individual must be able to confront a erroneous judgment in breach of EC law by using the extraordinary review under the same conditions as those governing the contestation of erroneous judgments in breach of strictly domestic law. Since the case-law and the preparatory works suggest that extraordinary review is, *inter alia*, possible when a judgment is manifestly in breach of the law, this means that the principle of equivalence requires that an individual successfully can apply for a re-opening of a case when the judgment is manifestly in breach of EC law. The question is only when a judgment is manifestly in breach of EC law? In I-21 Germany, the ECJ directed the national court to determine that issue by taking into account the clarity and purpose of the relevant EC provision. In light of those considerations the national court had to determine, within the meaning of national law, whether or not the judgment in fact constituted such a breach. That suggests that when a tax judgment is in breach of EC law, the Swedish courts would have to consider if it constitutes not only a breach, but also a manifest breach of EC law. In that analysis it will have to examine how clear the EC provision is (the clearer the more manifest) as well as its objective (the more contrary to the objective the more manifest) and, within the meaning of national law, determine whether or not the breach is of that nature that it would have to allow for a re-opening of the case.

## 4 Conclusions

The Court's interpretation of the principles of effectiveness and equivalence in relation to rules governing temporal procedural restrictions, rules governing evidence, the function of the court and the legal force of judgments have produced several interesting results. But, it is also a token of the wide scope of protection established by the principles. It is consequently safe to say that there are no procedural rules that are immune to scrutiny. This is of course a logical consequence of the aim of the principles, i.e. to safeguard the protection of directly effective EC law. Viewed from that perspective it is of course of no consequence how we domestically classify our procedural rules.

The procedural prerogative entrusted to the Member States has always been conditioned by the fact that Member States must provide adequate protection. The Principles of Effectiveness and Equivalence are the legal instruments which allow the Community to control for that Member States fulfil that requirement of protection. The rationale for this protection is that substantive EC law supremacy depends existentially on the features of the procedure governing the actions enforcing EC law. The principles of effectiveness and equivalence could hence be considered to be a form of "spill-over-product" from the principle of supremacy in the procedural arena. That does however not imply that actions enforcing substantive EC law cannot be governed by any procedural restrictions. The supremacy of EC law *does* however imply that when the procedures of national law undermine the existence of the actual EC right relied upon, by discriminating against actions enforcing it or making it virtually impossible to rely on and no adequate protection thus is provided, those rules shall receive the same treatment as if they were restrictions flowing from substantive law. Since the effect is the similar, so should the outcome.

This study has shown that it is not easy to point out specific rules that may be contrary to the principles of effectiveness and equivalence. That is particularly so as regards the principle of effectiveness, which of course is less straight-forward than the principle of equivalence. That notwithstanding, it is still possible to examine certain rules and draw some general conclusions as to their validity. The main inferences from the comparison conducted demonstrate the Court's case-law on the procedural rules considered could in all instances have implications for Swedish Tax Procedural Law. As previously stated, it is however much easier to draw conclusions with regards the principle of equivalence. In relation to procedural rules governing the function of the Swedish Tax Courts this has for instance led to the conclusion that the national courts are required to raise points of EC law *ex officio* when a similar duty to raise points of national law *ex officio* exists and that the national court has to make use of its investigative powers in the same way when it rules in case concerning actions enforcing EC law as it would in actions enforcing domestic law etc. Since the Swedish Tax Court's have far-reaching powers to participate in the proceedings when the case concerns domestic tax law, they have a similar duty to actively engage in the proceedings concerning EC law claims. The principle of equivalence also appear to require that, when the Supreme Administrative Court is under a duty to refer a question to the ECJ for a preliminary ruling under Article 234 EC, it should in general also be required to grant leave-to-appeal in the case. That is so since a question referred to the ECJ must be considered to be of importance as to the application of the law within the meaning of domestic law. Would the ECJ's ruling indicate that the appealed tax-judgment is in breach of EC Law, the general principle of cooperation in conjunction with Article 234 EC, should require the Supreme Administrative Court to grant leave-to-appeal in the case.

The application of the principle of equivalence has also led to the conclusion that an individual must be able to confront an erroneous tax judgment in breach of EC law by using the extraordinary review under the same conditions as those governing the contestation of erroneous judgments in breach of strictly domestic law. Since the case-law and the preparatory works suggest that extraordinary review is, *inter alia*, possible when a

judgment is manifestly in breach of the law, this means that when a judgment is manifestly in breach of EC law, the principle of equivalence requires that the individual successfully can apply for a re-opening of the case. The formula laid down in Kühne rests partially on the principle of equivalence and transforms a discretionary power of an administrative body to reopen a final decision, into a duty, if certain conditions are met. That duty also applies when a tax payer applies for a reopening of a tax decision made in breach of EC law as confirmed by the supreme administrative court. Leaving aside the Kühne-formula, the principle of equivalence also requires that the tax authorities use their power to reopen a final tax decision if it is in breach of subsequent ruling delivered by the Court of Justice.

The application of the principle of effectiveness has, inter alia, led to the inference that as long as temporal restrictions are reasonable in length they will not be called into question from the viewpoint of that principle. In that regard a 90 day time-limit for bringing proceedings have been considered reasonable. In relation to rules governing admissible evidence and the evaluation thereof the principle implies that an individual relying on EC law must have the opportunity to show the merits of her case with every reasonable form of evidence available. Restrictions in that regard must in any case be justified by some legitimate objective and in proportion to that objective. In regards to Swedish tax procedural law this means that the national court in cases concerning putative EC rights normally must allow for oral procedure and witnesses if the individual requires it. An interesting question in that regard is if the restriction placed on the submission of new evidence before the supreme administrative court can be upheld in cases concerning directly effective EC law? Would the principle of effectiveness require the Supreme Administrative Court to make use of its discretionary power to allow evidence submitted to it? According to the Rewe case-law that restriction would have to be considered against the objective underlying it and whether or not it is a proportionate restriction. While that restriction is based on the need to concentrate the proceedings to the lower courts and to allow the supreme administrative court to only consider the legal aspects of the case, it is not impossible that the supreme court will have to allow submitted evidence if it is the only way available to the individual to show the merits of her case.

Following Peterbroeck, it would also appear as if the national court, in cases where the Court has been given a more active role in the proceedings, such as tax proceedings, have a duty to apply EC law ex officio even if no party has relied on it in the case. The Swedish court is given a very strong position to participate in the proceedings by, inter alia, the principle of *jura novit curia*, its investigative powers and the Courts nearly unrestricted position in giving judgment. These features enables it protect the interests of an individual relying on EC law. Indeed, the preparatory works of the APA explicitly accentuates the protective function of the Court. Peterbroeck suggest that Tax Courts, in particular such as the Swedish Tax Courts who have been extended a very active role in the proceedings, apply EC law ex officio. Boiron suggests that the principle of effectiveness, in certain situations, will compel Swedish Tax Courts to make use of its discretionary power to investigate the circumstances of the case ex officio. This is particularly so when the taxpayer is put in a very unfavourable evidential position and despite the fact that Swedish courts in practice not usually participate in that way.

However, on many occasions it is more likely to be the domestic court's application of the procedural rules rather than the actual rule itself that will be found to be contrary to the principles. An example of this is Swedish Tax Courts application of the leave-to-appeal rule, which, although not formally contrary to the principle of equivalence, has been applied in a way that appears to breach the requirement of equivalence. Since the principle of equivalence seems to require the Supreme Administrative Court grant leave-to-appeal when it finds that it is required to refer a question to the ECJ for a preliminary ruling, this may provide an explanation for the Court's unwillingness to refer questions to the ECJ.

National courts have been given a very important duty in ensuring that EC law claims are given the appropriate procedural protection and in order for them to be able to provide that protection it is important that we discard the notion of any procedural autonomy



reserved to the Member States. Failing to do so could lead the national courts to misinterpret their duty and lead to a result contrary to EC law. Not only could the Member States to which those Court's belong be held accountable, but the effectiveness of EC law would suffer as result. Thus the national court is no longer necessarily, as Montesquieu was able to say in earlier times, the mouthpiece of the law. On the contrary, national courts have been given extensive powers to cast a critical eye over the domestic procedural law in order to ensure that protection; irrespective of what national law provides, EC law directly empowers them to disapply national procedural law, whatever the kind or type, if they find that it pose a obstacle for them to provide adequate protection to EC law.

Thus, when EC law claims are made before them, domestic courts must always evaluate whether or not the procedural context in which that claim is made, gives the individual the appropriate protection. It is however important to note that the national court must not only focus on the applicable procedural rules as such, but also, and maybe more importantly, on it's own application of them. The principles of effectiveness and equivalence protect EC law claims not only from inadequate procedural law, but also against the inadequate interpretation given to it by the national courts; it's the effect for the protection offered to the individual that is at the centre. Since many questions still remain unanswered as regards the exact scope and specific requirements imposed by the principles, it is imperative that national courts, where appropriate, refer questions to the ECJ for preliminary rulings. Only when national courts are willing to cooperate and refer questions to the Court of Justice's for preliminary rulings will we come to a more comprehensible understanding of the exact requirements imposed by the principles and thus the scope of EC procedural protection.

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