REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 3, NR. 2, 89-98, EUROPA LAW PUBLISHING © 2010

'*Sed Fugit Interea Fugit Irreparabile Tempus*'[1] – Time Limits Under English Law

The Requirement of 'Promptness' and the Scrutiny of the Court of Justice of the European Union

An Analysis Case C-406/08, *Uniplex (UK) Ltd* v. *NHS Business Services Authority*

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Abstract

National time limits for challenging the administrative actions have been often reviewed by the Court of Justice of the European Union for their compliance with the principles of equivalence and effectiveness. In the recent Uniplex ruling, the Court reviewed the requirement, provided by English law, that claims arising in the framework of public contracts be brought 'promptly'. After a short introduction to the facts at stake in Uniplex, the requirement of 'promptness' and the criticisms which arose in this respect are analysed. Thereafter, the Court's ruling in Uniplex is discussed.

1 Introduction

All legal systems provide rules that set out time frames for the possibility of challenging the administrative action before a court. These rules have a 'stabilising effect'[2] for the system of public administration and for the legal system in general, and also guarantee legal certainty. They ensure that, after a certain period of time, the legal positions of the individuals and the public authorities can, in principle, be deemed final.

The Court of Justice of the European Union ('ECJ') has reviewed national time limits applied in the context of EU-based actions with the purpose of checking whether they complied with the principle of effective judicial protection. In particular, according to the ECJ, the establishment of reasonable limitation periods for bringing proceedings is considered an application of the fundamental principle of legal certainty, and is not objectionable per se. It does become objectionable when a national time limit is less favourable than one governing similar actions of a domestic nature, or makes it impossible or excessively difficult in practice to exercise EU rights which national courts have a duty to protect.[3]

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[1] Vergil's *Georgics*, 3.284-5.

[2] E. Schmidt-Aßmann and L. Harings, 'Access to Justice and Fundamental Rights' [1997] *ERPL*, 543.

[3] See e.g. Case C-326/96, *B.S. Levez* v. *T.H. Jennings (Harlow Pools) Ltd* [1998] ECR I-7835; case C-327/00, *Santex S.p.A.* v. *Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke S.p.A., Artsana S.p.A. and Fater S.p.A.* [2003] ECR I-1877.

Recently, this threshold was applied to the requirement, provided by English law, that claims arising in the framework of public contracts be brought 'promptly'. The requirement of 'promptness' is a peculiarity of the English legal system and had already been questioned before the ECJ's ruling and beyond the scope of EU law. After a short introduction to the facts at stake in *Uniplex*, the requirement of 'promptness' and the criticisms which arose in this respect will be analysed. Thereafter, the ECJ's ruling in *Uniplex* will be discussed.

2 The Facts of the Case

Uniplex, a company established in the United Kingdom, participated in a tendering procedure for the conclusion of a framework agreement for the supply of haemostats launched by the National Health Service (hereafter 'NHS'), i.e. the State-owned and operated public health service in the United Kingdom.

The NHS issued an invitation to tender to five suppliers, including Uniplex. A few months later, Uniplex was notified of the fact that it would not be awarded a framework agreement, as it had obtained, according to the award criteria, the lowest marks of the five tenderers that had submitted bids. With the same letter, the NHS also informed Uniplex, amongst others, of its entitlement to seek an additional debriefing. Uniplex did request a debriefing, which the NHS complied with by providing details of its approach to the evaluation of the award criteria as to the characteristics and relative advantages of the successful tenders in relation to Uniplex's tender.

Subsequently, Uniplex sent the NHS a letter alleging a number of breaches of the applicable provisions on public work contracts. In that letter, Uniplex also claimed that time did not start to run for the bringing of proceedings until the date on which the NHS had provided the debriefing details. The NHS responded to Uniplex's letter denying the various allegations made by Uniplex. In that letter, the NHS also asserted, as a preliminary point, that the events giving rise to Uniplex's complaints had occurred no later than the date on which the decision not to include Uniplex in the framework agreement had been communicated to it.

After another exchange of letters, Uniplex brought proceedings before the Queen's Bench Division of the High Court of Justice of England and Wales, seeking, firstly, a declaration that the NHS had breached the applicable public procurement rules and, secondly, damages.

Being unsure as to whether Uniplex brought its action in time, the High Court of Justice decided to stay the proceedings and to refer to the ECJ various questions, amongst which how the requirement of 'promptness' needs to be interpreted.

3 The English Rules on Time Limits and the Requirement of 'Promptness'

Under English law,[4] a claim for review of public work contracts and a claim for judicial review must be made 'promptly and in any event within three months after the grounds to make the claim first arose' (Regulation 47(7)(b) of the Public Contracts Regulations 2006[5] and Rule 54.5(1) of Part 54 of the Civil Procedure Rules – CPR – which has replaced Rule 4(1) of Order 53 of the Supreme Court Rules). The starting point is, therefore, a three-month limitation period.[6] However, the courts have emphasised that a claim can be considered as being out of time if it has not been made promptly even when it is within the three-month period.[7]

Consequently, permission[8] may be refused on grounds of delay even where the applicant has filed the claim within three months of the decision, if, based upon the facts, the court considers that the application was not made promptly.[9] Factors that may be taken into account in relation to promptness include, for example, whether the applicant gave prior warning

4 In general, on the rules on time limits, see C. Lewis, *Judicial Remedies in Public Law* (London 2004, 3rd ed.), 312 ff; P.F. Cane, *Administrative Law* (Oxford 2004, 4th ed.), 114 ff; P. Craig, *Administrative Law* (London 2008, 6th ed.), 903 ff; M. Beloff, 'Time, Time, Time It's on my Side, Yes it is', in C. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord* (Oxford 1998), 267.

5 The Public Contracts Regulations 2006 (SI 2006 No.5) are the legislative instruments with which the UK implemented the EU Procurement Directives.

6 *R. (Al Veg Ltd)* v. *Hounslow London Borough Council* [2003] EWHC 3112 (Admin), [2004] LLR 268, in which it was held that 'a useful starting point is that when judicial review claims are brought within the prescribed three months period, there is a rebuttable presumption that they have been brought promptly' (para. 40).

7 *Finn-Kelcey* v. *Milton Keynes Borough Council* [2008] EWCA Civ 1067, in which it was held that '[I]t is not to be assumed that filing within three months necessarily amounts to filing promptly' (para. 21). Very critical on this point are Gordon and Rogers, who argue that the language of (then) applicable provisions on time limits (Order 53 of the Supreme Court Rules) and their reference to the three-months limitation period is deceptive, because it may 'lull one into a false sense of security'. See R. Gordon and H. Rogers, 'Justice Denied? Delay in Judicial Review Proceedings' [1989] *NLJ*, 1128.

8 In English judicial review proceedings, before a claim is fully reviewed, it must pass the permission stage (Rule 54.4 CPR).

9 In *Re Friends of the Earth Ltd* [1988] JPL 93, a challenge to the grant of planning permission for a power station was held not to have been made promptly even though (by one day) within the three-month period. See also *R.* v. *Westminster City Council, ex p. Hilditch* [1990] COD 434; *R.* v. *The Independent Television Commission, ex p. TVNi Ltd and TVS Television Ltd*, The Times, 30 December 1991; *R.* v. *Bath City Council, ex p. Crombie* [1995] COD 283. For this aspect, see A. Lindsay, 'Delay in Judicial Review Cases: A Conundrum Solved?' [1995] *PL*, 421 ff.

of his intention to challenge the decision,[10] or whether a period of time has elapsed between the taking of the decision and its communication to the applicant. Cases in which third parties (for example, the beneficiaries of a planning permission) are likely to have committed themselves to expenditures on the basis of the decision in dispute are cases in which, according to English law, there is a particular need to pay due regard to the injunction to act 'promptly'.[11]

Failure to comply with the three-month time limit (or the court's determination that the application was not made promptly) implies the refusal of permission to go to the substantive hearing on the claim. However, the delay in filing a claim may not be fatal for the application if the court considers that there is 'good reason' for extending the time. This power was formerly specifically provided for in the rules governing time limits for bringing a judicial review claim; now, the power is contained in the general powers of the courts to extend time (Rule 3.1(2)(a) CPR).

There is no statutory definition of 'good reason', and the court's decision mainly depends on the facts of the case and the extent to which the court regards the actions taken by the applicant as reasonable under the circumstances.[12] In general, it can be said that the delay may be considered excusable if it results from factors outside the applicant's or his advisors' control.[13]

For example, it has been considered that an applicant who has not been informed that a decision has been taken has good reason for the delay, so long as he moves expeditiously once he is aware of the decision.[14] Moreover, it has been repeatedly held that the delay in filing a claim should not be held against the claimant if the latter has behaved reasonably and sensibly, as long as no prejudice is caused by the delay.[15] The importance of the point

[10] *Re Friends of the Earth Ltd* [1988] JPL 93; *R.* v. *Department of Transport, ex p. Presvac Engineering Ltd*, The Times, 10 July 1991.

[11] See *R.* v. *The Independent Television Commission, ex p. TVNi Ltd*, The Times, 30 December 1991, where it was stated that the courts are generally reluctant to intervene in a way which would adversely affect market dealings undertaken in good faith. See also *R.* v. *Secretary of State for Trade and Industry, ex p. Greenpeace Ltd* [1998] COD 59.

[12] Lewis (2004), 322. For a survey of the reasons that have been put forward to explain delays, see R. Leipner, 'What is a "Good Reason" for Extending Time?' [1996] *JR*, 212.

[13] In this respect, Cane argues that the fact that there are no clear criteria for the courts' discretion to extend time creates too much uncertainty. Cane (2004), 115.

[14] *R.* v. *Secretary of State for the Home Department, ex p. Ruddock* [1987] 1 WLR 1482; *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement Ltd* [1995] 1 WLR 386; *R.* v. *Department of Transport, ex p. Presvac Engineering Ltd*, The Times, 10 July 1991; *R.* v. *Greenwich London Borough Council Shadow Education Committee, ex p. Governors of John Ball Primary School and others*, The Times, 16 November 1989; *R.* v. *Licensing Authority, ex p. Novartis Pharmaceuticals Ltd* [2000] COD 232.

[15] *R.* v. *Commissioner for Local Administration, ex p. Croydon London Borough Council* [1989] 1 All ER 1033; *R.* v. *Durham County Council, ex p. Huddleston* [2000] 1 WLR 1484.

of law in discussion, and, more generally, of the issue in question,[16] and the time taken to obtain legal aid[17] were all held to constitute good reasons to extend the time. However, it should be pointed out that none of these reasons automatically result in time being extended.

4 The Requirement of 'Promptness' Scrutinised by the ECtHR and the English Courts

Already before the ECJ's ruling in *Uniplex*, the requirement of 'promptness' had been scrutinised by both the European Court of Human Rights and the English courts.

The discussion of the adequacy of this limitation period, together with the requirement of 'promptness', was at first the subject matter of a claim brought before the European Court of Human Rights (ECtHR).[18] *Lam* concerned a claim for judicial review brought against an administrative decision that had declared the activities carried out in the applicants' neighbour's warehouse, and were causing an alleged nuisance to the applicant himself and to his family, as legitimate. In all instances, the claim had been considered as delayed and, consequently, permission had been refused. The applicants then brought a claim to the ECtHR, and argued that Rule 4(1) of Order 53 of the Supreme Court Rules was in violation of Article 6 ECHR. In particular, the applicants maintained that they had been deprived of access to a court as a consequence of the discretion allowed to the courts in refusing judicial review claims.

The court did not accept this argument and held that:

> 'in so far as the applicants impugn the strict application of the promptness requirement in that it restricted their right of access to a court, the court observes that the requirement was a proportionate measure taken in pursuit of a legitimate aim. The applicants were not denied access to a court ab initio. They failed to satisfy a strict procedural requirement which served a public interest purpose, namely, the need to avoid prejudice being caused to third parties who may have altered their situation on the strength of administrative decisions'.

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[16] *R.* v. *Secretary of State for the Home Department, ex p. Ruddock* [1987] 1 WLR 1482; *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement Ltd* [1995] 1 WLR 386.

[17] In *R.* v. *Stratford-on-Avon District Council, ex p. Jackson* [1985] 1 WLR 1319 the applicant justified his delay by showing that he was waiting for a decision from the Legal Aid Board; see also *R.* v. *Wareham Magistrates' Court ex p. Seldon* [1988] 1 WLR 825; *R.* v. *Surrey Coroner, ex p. Wright* [1997] QB 786.

[18] *Lam* v. *the United Kingdom* (App. 41671/98), Admissibility decision of 5 July 2001, unpublished.

Consequently, it was concluded that the English rules on time limits did not breach Article 6 ECHR.

Some recent cases decided by the English courts combined the EU perspective with the ECHR perspective, especially in relation to the requirement of promptness, and seemed to suggest that Rule 54.5 CPR may fall foul of EU law, since it is up to the national courts to decide whether an application, although brought within a fixed time limit, has been brought 'promptly'. This requirement, which grants the courts a relatively wide discretion to refuse permission to certain claims, was reviewed for its potential to impair an effective judicial protection of rights derived from EU law. As far as the compliance with the ECHR is concerned, some doubts were raised with regard to the compatibility of this provision with Article 6 ECHR. However, in other instances, the courts concluded that, in the light of the ECJ's case law and the ECtHR's ruling in *Lam,* Rule 54.5 CPR ensures an adequate protection of citizens' rights.

The first case which illustrates this perspective is *Burkett.*[19] The applicant filed a claim against a resolution passed by the administrative authorities authorising the granting of planning permissions. Both the Queen's Bench Division and the Court of Appeal refused to grant permission to the claim on the grounds that it did not comply with the prescribed time limits. The House of Lords did not agree with this view and allowed the claim purely on the wording of Rule 54.5 CPR. However, Lord Steyn raised some doubts as to whether 'the obligation to apply "promptly" is sufficiently certain to comply with European Community law and the European Convention for the Protection of Human Rights and Fundamental Freedoms', and whether 'the requirement of promptitude, read with the three-months' limit, is not productive of unnecessary uncertainty and practical difficulty'.[20] These concerns were also shared by Lord Hope. In particular, he considered the word 'promptly' to be imprecise, and stressed that the provision made no reference to any criteria by which the question of whether the test of proptness has been satisfied or not can be judged. However, he argued that Scottish judicial review rules could be used as an interpretive aid: he explained that, under Scots law, there is no specific time limit for the making of an application; however, no Scottish authority supports the proposition that mere delay (or, to follow the language used by Rule 54.5(1) CPR, a mere failure to act 'promptly') is sufficient for a claim to be barred at the permission stage. It has never been held that mere delay will cause an application to be rejected if it is not proven that there has been acquiescence on the part of the applicant, or that there would be prejudice on the side of the defendant. He, therefore, concluded that, if the obligation to act 'promptly' is, without any qualifications, too uncertain to satisfy the requirements of Article 6 ECHR, it does become adequately specified if the concepts of acquiescence

[19] *R. (Burkett)* v. *Hammersmith and Fulham London Borough Council* [2002] UKHL 23, [2003] 1 WLR 1593.

[20] *Burkett,* para. 53.

and prejudice are taken into account. If read in this 'Convention-friendly' way, Rule 54.5 CPR should not be deemed as being incompatible with Article 6 ECHR.

The question as to whether the requirement of promptitude is not in compliance with EU and ECHR law was, however, not resolved by the House of Lords, as the judges only expressed their doubts on this compatibility, but did not take any clear position in this respect. This position was taken up in a later judgment, in which the Court of Appeal, faced with an attempt to challenge the requirement of promptitude on the basis of the ruling in *Burkett,* held that 'the question whether the obligation [to act promptly] is contrary to the Convention or to Community law was not resolved by the House of Lords'.[21] Thus it was held that,

> 'unless and until the issue is resolved adversely to the rule, the obligation to file the claim form promptly remains a feature of English law [...] and the presence of the word "promptly" in the rule should not be ignored. Those who seek to challenge the lawfulness of planning permissions should not assume, whether as a delaying tactic or for other reason, that they can defer filing their claim form until near the end of the three-month period in the expectation that the word "promptly" in the rule is a dead letter'.[22]

In a subsequent case concerning a claim against two measures issued by a local planning authority, the Administrative Court endorsed this position completely, and raised no further points in this respect.[23]

However, these three cases all seem to overlook the fact that these doubts, at least those concerning the compatibility of Rule 54.5 CPR with Article 6 ECHR, had already been solved by the Strasbourg court itself in the *Lam* case discussed above. This circumstance was clearly stated in *Elliott,*[24] *I-CD Publishing Ltd,*[25] *A1 Veg,*[26] and, more recently, in *Hardy,*[27] in which it was made clear that *Burkett* had not taken the ruling in *Lam* into account; that, consequently, the promptness requirement should not be considered to be in breach of Article 6 ECHR; and that, as a result, 'the requirement for a claimant to issue proceedings "promptly" remains'.[28]

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[21] *R. (Young)* v. *Oxford City Council* [2002] EWCA Civ 990, [2002] 3 PLR 86.

[22] *Young,* para. 38.

[23] *R. (Michael Geoffrey Lynes and Sadie Lynes)* v. *West Berkshire District Council* [2002] EWHC 1828 (Admin), [2003] JPL 1137.

[24] *R. (Elliott)* v. *The Electoral Commission* [2003] EWHC 395 (Admin).

[25] *R. (I – CD Publishing Ltd)* v. *Office of the Deputy Prime Minister* [2003] EWHC 1761 (Admin).

[26] *R. (A1 Veg Ltd)* v. *Hounslow London Borough Council* [2003] EWHC 3112 (Admin), [2004] LLR.

[27] *Hardy* v. *Pembrokeshire County Council and Pembrokeshire Coast National Park Authority* [2006] EWCA Civ 240.

[28] *A1 Veg,* para. 40. No further observations were made on this point in *R. (Norton and others)* v. *London Borough of Lambeth* [2007] EWHC 3476 (Admin). Recently, however, doubts were

However, while the issue of the compatibility of the requirement of 'promptness' had clearly been resolved by the ECtHR,[29] there were still doubts as to its compatibility with EU law and, in particular, with the principle of effective judicial protection. Indeed, some had argued that the requirement of promptness is too undefined and allows an excessively broad discretion to the courts to refuse permission to a claim[30] and that it, therefore, may be considered in breach of the principle of effectiveness.[31] It had also been argued that, while the ECJ itself never commented on the English rules in question,[32] a preliminary reference to the ECJ in this respect seemed desirable.[33]

5 The Opinion of Advocate General Kokott and the Ruling of the ECJ

The AG departed from the principle of procedural autonomy and considered that the main question was the compliance of the requirement of 'promptness' with the principle of effectiveness and with the requirement, provided by Directive 89/665, that decisions of contracting authorities be reviewed 'effectively and, in particular, as rapidly as possible'. In the AG's view, in order to achieve the aim of the Directive, the Member States must create a clear legal framework in the field in question. They are thus obliged to establish a sufficiently precise, clear and transparent legal position, so that individuals can know what their rights and obligations are.

A limitation period such as that applicable under English law was not regarded as predictable enough in its effects, since its duration is placed at the discretion of the competent court because of the 'promptness' requirement. In this way '[t]he tenderers and candidates concerned are uncertain as to how much time they have to prepare their applications for review properly, and they are scarcely able to estimate the prospects of success of such applications'.[34]

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still expressed on the compatibility of the requirement of promptitude in the light of Lord Steyn's speech in *Burkett*. See *R. (Hampson)* v. *Wigan Metropolitan Borough Council* [2005] EWHC 1656 (Admin), [2005] All ER (D) 383.

[29] Thus, as has been noted, 'it seems unlikely that any challenge to the need to act "promptly" on the basis of uncertainty would be likely to succeed'. R. Taylor, 'Time Flies Like the Wind: Some Issues that *Burkett* Did Not Address' [2005] *JR*, 250.

[30] A. Samuels, 'Permission for Judicial Review Out of Time: an Overview' [2002] *JR*, 219.

[31] R. Gordon, *EC Law in Judicial Review* (Oxford 2007), 91.

[32] Noted by R. Gordon, *Judicial Review: Law and Procedure* (London 1996, 2nd ed.), 47.

[33] D. Carney, 'The Timing Rules in Judicial Review and the Practical Difficulties they cause Environmental Interest Groups: The Need for Reform' [2006] *Env LR*., 278.

[34] Opinion of AG Kokott, para. 69.

According to the AG, national courts are obliged to interpret national law in a manner consistent with the Directive and with the principle of effectiveness. The AG considered that a consistent interpretation would be possible if the criterion of 'promptness' could be interpreted 'to the effect that it does not constitute an independent barrier to admissibility but merely contains a reference to the need for rapidity'.[35] Should a consistent interpretation of national law not be possible, the AG suggested that the national court would be obliged to apply European law and thus set aside the conflicting provisions of national law.

The ECJ agreed with the AG's view. It departed from its usual statement that the establishment of limitation periods is acceptable (and, in fact, even desirable in order to attain the objective of rapidity of review of public works contracts). However, these rules must respect the principle of effectiveness and hence must not render impossible or excessively difficult the exercise of any rights that the person concerned derives from European law.

In the Court's view, the requirement of 'promptness' gives rise to uncertainty and is not predictable in its effects, since '[t]he possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made 'promptly' within the terms of that provision'.[36] Consequently, the ECJ concluded that Regulation 47(7)(b) of the Public Contracts Regulations 2006 had to be considered in violation of Directive 89/665.

As can be observed, the ECJ did not pick up the possibility, mentioned by the AG, of consistent interpretation and instead directly concluded for the necessity to disapply the national procedural rule in question.

6 Conclusion

As shown in the analysis carried out above, one prominent feature of claims for review of public works contracts and claims for judicial review in the English legal system is that they are required to be initiated promptly. At the permission stage, should the court find that the claim has not been brought promptly, it can refuse permission if there is no good reason for extending time even if the claim was brought within the three-month limitation period.

The ECtHR explicitly commented on the English system of time limits, and found that it was not in breach of Article 6 ECHR. After some hesitation, the English courts seemed to have endorsed this conclusion and to have accepted the ECtHR's ruling. As far as the compliance with the ECJ's case

[35] Opinion, para. 72.

[36] Case C-406/08, *Uniplex (UK) Ltd* v. *NHS Business Services Authority* [2010] ECR nyr, para. 41.

law is concerned, the English courts and scholars had expressed their doubts as to its compatibility with the principle of effective judicial protection.

The ECJ has now made a clear statement and held that Directive 89/665 precludes a national provision which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly. While the ruling in *Uniplex* specifically concerns the rules applicable to public procurement, it can hardly be doubted that it is applicable also to claims for judicial review, as Rule 54.5(1) CPR reproduces verbatim the rule in question before the ECJ.

While it cannot be denied that the requirement of 'promptness' introduces a great deal of discretion on the part of the national courts, it might also be argued that, before asking a question of compatibility of the national rule with EU law to the ECJ, the national court could have tried a 'Europe-friendly' interpretation of the rule in question, as suggested by the AG. In this context, the interpretive aid proposed by Lord Hope in *Burkett*, that is, the concepts of acquiescence and prejudice, might have already ensured compliance with the principle of effective judicial protection.[37]

A 'Europe-friendly' interpretation would also have simplified the task of the national courts, who are currently faced with a double standard of protection for claims based on European law, for which the sole three-month limitation period applies, and claims based on national law, for which applicants still need to act 'promptly'. It remains to be seen how they will maintain the integrity of the system and prevent reverse discrimination.

Finally, one could argue that, aside from complicating the role of national courts, this ruling also complicates the relationship between the Strasbourg and Luxembourg courts, given the contradictory rulings they have issued with regard to the same rule. While, admittedly, the standards to which the two courts currently adhere may not always correspond, and it is well known that in many instances such contradictions have been avoided, cases such as this will pose entirely new challenges with the accession of the EU to the ECHR. The question which will then arise is whether the Court of Luxembourg or that of Strasbourg will have the final word.

[37] A slightly different, but comparable perspective has been put forward by Lewis, who argues that the requirement of 'promptness' does not in itself render the provisions on time limits in breach of EU law, provided that national courts would not apply, in each concrete case, the time limit in a way that made it impossible in practice for applicants to enforce their European law rights. See C. Lewis, *Remedies and the Enforcement of European Community Law* (London 1996), 97.