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Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection

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Abstract

Should a distinction between the principle of effective judicial protection and the principle of effectiveness, as laid down in the 'Rewe mantra', be made? Or have these two principles now been subsumed under Article 47 of the Charter of Fundamental Rights? This article examines what the principles have in common and on what points they differ. On this basis and on the basis of recent ECJ case law it argues that there is a difference and that the relationship between the two principles needs to be reconsidered and clarified. Since the interpretation of the principle of effective judicial protection is strongly inspired by Article 6 and 13 ECHR and the Strasbourg case law, the article also briefly explores what the possible implications of this streamlining could be for the level of protection to be safeguarded under the principle of effective judicial protection.

1 Introduction

While the Union lawmaker is itself increasingly standardising the substance of judicial protection and the enforcement of Union law in the Member States, the national procedural autonomy – and for that matter national remedial autonomy – is still the leading principle that governs the application of Union law in national courts. Often nourished by detailed questions from national courts, the Court's case law on procedural autonomy and its requirements of equivalence and effectiveness has expanded considerably over the last

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three decades. Similarly, it has generated a wealth of literature.[1] One of the many intriguing questions this case law and literature has given rise to is the relationship between national procedural autonomy and other fundamental principles of the EU legal order.

One of the classic questions debated in this context concerns the relationship between procedural autonomy on the one hand, and supremacy, coupled with the requirement of full effectiveness of Union law, on the other. The relatively mild '*Rewe* test',[2] based on the principles of equivalence and effectiveness that circumscribes national procedural autonomy is sometimes, also in recent case law like *Lucchini*,*Melki* and *Winner Wetten*,[3] alternated with a much more radical approach that builds upon the firm supremacy language ushered in by *Simmenthal*.[4] In these cases the Court does not take national procedural autonomy as a point of departure, but holds that national procedural provisions have to be set aside on the basis of the supremacy principle, with, as a rule, a considerably more far-reaching outcome, leaving the Member States hardly any scope for manoeuvre. On the other hand, there have also been cases argued along the lines of supremacy, but treated by the ECJ from the perspective of national procedural autonomy.[5] The differences in the approach and outcome of the cases and, in particular, the reasons behind that difference are difficult to grasp. Various efforts have been made to explain the differences. In German legal writing, for instance, the distinction between 'direct' and 'indirect' conflict is often used in order to clarify the effects (and limits) of supremacy in a procedural context.[6]

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1 See for instance, M. Dougan, *National remedies before the Court of Justice*, Oxford/Oregon: Hart Publishing 2004, and, more recently, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts', in: Craig and De Búrca (eds.), *The Evolution of EU law*, Oxford: OUP 2011, p. 407-438; A. Gerbrandy, *Convergentie in het mededingingsrecht*, The Hague: BJu 2009, p. 17-58; S. Prechal, *Directives in EC Law*, 2nd ed., Oxford: Oxford University Press 2005, p. 131-179; D. Curtin & K. Mortelmans, 'Application and Enforcement of Community Law by the Member States: actors in Search of a Third Generation Script', in: D. Curtin & T. Heukels (eds.), *Institutional Dynamics of European Integration* (Essays in Honour of H.G. Schermers, Vol. 2), Dordrecht: Nijhof 1994, p. 423-466; W. van Gerven, 'Of Rights, Remedies and Procedures', *Common Market Law Review* 2000, p. 501-506; J.H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven, *Europeanisation of Public Law*, Groningen: Europa Law Publishing 2007, p. 35-62; K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', *Common Market Law Review* 2007, p. 1625-1659.

2 Case 33/76 *Rewe* [1976] ECR 1989.

3 Case C-119/05 *Lucchini* [2007] ECR I-6199; Joined Cases C-188/10 and C-189/10 *Melki*, Judgment of 22 June 2010, nyr, and Case C-409/06 *Winner Wetten*, Judgment of 8 September 2010, nyr.

4 Case 106/77 *Simmenthal* [1978] ECR 629.

5 E.g. Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705 and Case C-453/00 *Kühne & Heitz* [2004] ECR I-837. See also the difference in the opinion of the Advocate General and the judgment of the Court in Case C-455/06 *Heemskerk and Schaap* [2008] ECR I-8763.

6 Cf. H. Jarass & S. Beljin, *Casebook Grundlagen des EG-Rechts*, Baden-Baden: Nomos 2003, p. 32-43 and p. 116-117; M. Niedotibtek, 'Kollisionen zwischen EG-Recht und nationalem Recht', *Verwaltungsarchiv* 2001, p. 58-80; M.J.M. Verhoeven, *The Costanzo Obligation. The Obligations of National Administrative Authorities in the Case of Incompatibility between National Law and*

In some cases this distinction may help to understand the route the ECJ chooses, in other cases it does not, like *Factortame*[7] for instance. As is well known, in this case the ECJ found that a national court must have the power to grant interim relief against a national provision that may prove to be contrary to Community law. A rule of national law which precludes it from granting interim relief must be set aside. Although *Factortame* was concerned with a procedural matter and was also argued along the lines of procedural autonomy, the Court took a much more *Simmenthal*-oriented approach, emphasising the imperative of the full effectiveness of Community law. However, the Court also made a somewhat unclear allusion to 'the legal protection which persons derive from the direct effect of provisions of Community law'.[8] Almost two decades later, in *Unibet*,[9] the ECJ reaffirmed the *Factortame* rule that a national court must have the power to grant interim relief. However, in this case, the ECJ added a clear and explicit new element to its argument, namely the need for effective judicial protection of an individual's rights under Community law. Furthermore, the Court considered the procedural aspects of the remedy of interim relief and the applicable standards to be a matter of procedural autonomy (within the requirements of equivalence and effectiveness).

This brings us to the core of the present article, namely the relationship between the principle of effectiveness, as laid down in the *Rewe* mantra,[10] and the fundamental principle of effective judicial protection. This relationship has grown increasingly complex and needs clarification and further reflection.[11] Also here we encounter problems of vague delimitations and difficulties as to the predictability of what test will apply, effective judicial protection or 'Rewe' effectiveness.

In the next sections we propose the following. After a brief account of the development of the principle of effective judicial protection (section 2), we will describe the similarities and differences between the two principles (section 3). The next section concentrates briefly on the relationship between the principles as they emerge from ECJ case law and, to wind up, reflects on the direction that

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European Law (Ius Commune Europaeum Series, no. 93), Antwerp/Groningen/Oxford: Intersentia 2011, p. 79 -107.

7 Case C-213/89 *Factortame* [1990] ECR I-3313.

8 Para. 19 of the judgment. Cf. also para. 55 of the recent judgment in Case C-409/06 *Winner Wetten*, Judgment of 8 September 2010, nyr.

9 Case C-432/05 *Unibet* [2007] ECR I-2271.

10 I.e., to put it briefly, unless EU law provides otherwise, national procedural rules apply. Yet, the national rules or their application must satisfy the following conditions: 1) The rules that govern a dispute with a EU law dimension may not be less favourable than those governing similar domestic actions (*principle of equivalence*); 2) The rules must not render virtually impossible or, at the very least, excessively difficult the exercise of rights conferred by the EU legal order (*principle of effectiveness*).

11 Cf. also A. Arnull, 'The principle of effective judicial protection in EU law: an unruly horse?', *ELRev.* 2011, p. 51-75.

the future development could take (section 4). In section 5 the most important findings are summarised.

2 The Birth and Evolution of the Principle of Effective Judicial Protection

As is well known, general principles of law do not fall from heaven and this is certainly true for the principle of effective judicial protection. In the early case law some very rudimentary indications of its existence can be discerned. For instance, the Member States were requested to ensure that their courts provide 'direct and immediate protection'[12] and that the Community rights are 'effectively protected in each case'.[13] In *Von Colson*, the Court construed Article 6 of Directive 76/207 (equal treatment of men and women)[14] in such a way that the sanction chosen by a Member State must guarantee real and effective judicial protection.[15]

Von Colson was clearly the stepping stone for the explicit recognition of the principle of effective judicial protection in the landmark judgment in the case of Mrs *Johnston*.[16] In *Johnston* the Court objected to an evidential rule in the Sex Discrimination (Northern Ireland) Order 1976 which rendered a decision by the Chief Constable of the Royal Ulster Constabulary judicially unreviewable and, consequently, deprived Mrs Johnston of any remedy. The central provision of this (part of the) judgment was Article 6 of Directive 76/207. With respect to this Article the ECJ held the following:

'The requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. As the European Parliament, Council and Commission recognized in their Joint Declaration of 5 April 1977 (Official Journal, no. C 103, p. 1) and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law.

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12 Case 13/68 *Salgoil* [1968] ECR 453, at p. 463.
13 Case 179/84 *Bozzetti* [1985] ECR 2301, para. 17.
14 OJ 1976, L 39/40.
15 Case 14/83 *Von Colson* [1984] ECR 1891. This judgment marked the development of a new and important general requirement of EU law, namely that sanctions for breaches of EU rules must be effective, proportionate and dissuasive.
16 Case 222/84 *Johnston* [1986] ECR 1651.

By virtue of Article 6 of Directive no. 76/207, interpreted in the light of the general principle stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women laid down in the directive. It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the directive provides.'[17]

The statement that Article 6 reflects a general principle of law proved to be crucial for the further application of the principle in areas of Union law where no such principle exists in a codified form. Only a few months after *Johnston*, the principle appeared in *Heylens* in the field of the free movement of workers, where the Court held, with reference to *Johnston*, that:

'the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right [free access to employment] is essential in order to secure for the individual effective protection of his right.'[18]

The absence of appropriate judicial proceedings would amount to a violation of Article 39 EC (now 45 TFEU).[19] The principle as applied in *Heylens* was subsequently transposed to many other areas of EU law, also to areas where the principle could not be connected to a Treaty freedom, for instance structural funds or customs.[20] It also plays an important role in an area such as public procurement, where the requirement of effective judicial protection is combined with specific provisions of the relevant directives.[21]

It is similarly important to note that the principle applies both to judicial protection in the Member States and at the EU level as such, notably before the EU courts. In accordance with its *general* nature the principle has been extended to the protection of individuals and, where appropriate, even to the protection of Member States against European institutions.[22] Last but not least, in the

17 Case 222/84 *Johnston* [1986] ECR 1651, paras 18-19.

18 Case 222/86 *Heylens* [1987] ECR 4097, para. 14.

19 *Ibid.*, para. 17.

20 Cf. Case C-340/89 *Vlassopoulou* [1991] ECR I-2357; Case C-104/91 *Borelli* [1992] ECR I-3003; Case C-19/92, *Kraus* [1993] ECR I-1663; Case C-459/99 *MRAX* [2002] ECR I-6591; Case C-226/99 *Siples* [2001] ECR I-277; Joined Cases *C-372/09* and Case C-373/09 *Peñarroja Fa*, Judgment of 17 March 2011, nyr.

21 See e.g. C-54/96 *Dorsch Consult* [1997] ECR I-4961; Case C-76/97 *Tögel* [1998] ECR I-5357; Case C-111/97 *Evobus* [1998] ECR I-5411; Case C-81/98 *Alcatel* [1999] ECR I-7671.

22 Or even in cases involving disputes between institutions *inter se*. Cf. the opinion of Advocate General Van Gerven in Case C-70/88 *European Parliament* v. *Council* [1990] ECR I-2041, para. 3 and para. 6. For other direct actions in which the requirement of effective judicial protection played a role see e.g. Case 53/85 *AKZO* [1986] ECR 1965, Case C-312/90 *Spain* v. *Commission* [1992] ECR I-4117, Case 169/84 *Cofaz* [1986] ECR 391, Case C-152/88 *Sofrimport* [1990]

context of the litigation on the restrictive standing rules for individuals under Article 230(4) (now the amended Article 263(4) TFEU), the principle of effective judicial protection was one of the central arguments used in favour of a more lenient interpretation of Article 230(4).[23]

Asides from the broad range of areas covered by the principle, the cases decided by the ECJ also illustrate which aspects of procedures and remedies can be affected by the principle and what the possible implications are of the requirement that the protection should be *effective*. Thus, for instance, the principle requires that there must be actual access to the courts, which must be independent and impartial and be competent to rule on both facts and the law.[24] The possibility of applying to a court for a remedy may not be restricted, and certainly not denied altogether. This may of course have consequences for 'standing' requirements or pre-trial obligations, such as mandatory mediation or other out-of-court settlements.[25] Furthermore, the principle may entail a shift in the burden of proof[26] and it may imply that a preparatory act which would not normally be open to an appeal according to national law may nevertheless be regarded as a decision against which an appeal is possible.[27] The ECJ has also implied from the principle an obligation on the part of the national authorities to give reasons for the decisions they take, so that the person concerned is able to defend his rights under the best possible circumstances.[28]

As a standard for national systems of judicial protection, the principle has also had significant consequences for the remedies that must be made available for breaches of EU law. Above we have already pointed out that in the case of *Unibet*, the *Factortame* rule, requiring interim measures to be available, was also explicitly based on the principle of effective judicial protection.[29] A second, even more clearly articulated case was *Francovich*.[30] According to the Court, the principle of state liability for loss caused to individuals whose rights are infringed follows from the requirement that Member States must ensure EU rules take full effect and must protect the rights they confer on individuals.

ECR I 2477, Case T-24/90 *Automec* [1992] ECR II-2223, Joined Cases C-4002/05 P and C-415/05 P *Kadi* [2008] ECR I-6351.

23 Cf. the litigation that culminated in the Court's judgment in Case C-50/00 P, *Union de Pequeños Agricultores* [2002] ECR I-6677.

24 Case C-506/04 *Wilson* [2006] ECR I-8613.

25 See on 'standing' requirements e.g., Joined Cases C-87-89/90 *Verholen* [1991] ECR I-3757 or Case C-174/02 *Streekgewest Westelijk Noord-Brabant* [2005] ECR I-85. See on pre-trial obligations, Joined Cases C-317-320/08 *Alassini* [2010] ECR I-2213.

26 Case 127/92 *Enderby* [1993] I-5535; Case C-400/93 *Royal Copenhagen* [1995] I-1295.

27 Case C-104/91 *Borelli* [1992] ECR I-3003.

28 Case 222/86 *Heylens* [1987] 4097; Case C-75/08 *Christopher Mellor* [2009] I-3799.

29 Case C-432/05 *Unibet* [2007] ECR I-2271.

30 Joined Cases C-6/90 and C-9/90 Francovich [1991] ECR I-5357.

While it started as a principle developed in the case law of the ECJ, subsequently the requirement of effective judicial protection has (partially) been inserted into secondary law instruments.[31] Indeed, nowadays their interpretation is guided by the general principle of effective judicial protection itself.[32] Finally, with the entry into force of the Lisbon Treaty, the principle acquired a written primary law status. Two provisions matter in this respect. Article 47 of the Charter of Fundamental Rights of the European Union lays down the 'right to an effective remedy and to a fair trial'. According to this Article:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

Article 19 TEU is addressed to the Member States and runs as follows: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. The remedies referred to in this Article should indeed satisfy the requirements laid down in Article 47 of the Charter.[33]

In its case law the ECJ refers relatively often to the codified version of the principle in Article 47 of the Charter and the Court did so even before the Charter became binding upon the Union institutions and the Member States on the 1st December 2009.[34] Moreover, it is common knowledge that the ECJ's interpretation of the principle of effective judicial protection and therefore also of Article 47 is tuned to the case law of the European Court of Human Rights

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31 See e.g. Title VIII of the Community Customs Code; Directive 89/665/EEC (review procedures for the award of public supply and public work contracts), as recently amended by Directive 2007/66/EC; Article 4 of the Framework Directive 2002/21/EC (electronic communications networks and services), Article 30(2) of Directive 2004/38 (right of citizens of the Union and their family members to move and reside freely within the territory of the Member States) and Article 39 of Directive 2005/85 (minimum standards on procedures in Member States for granting and withdrawing refugee status) .

32 Cf. Case C-69/10, *Samba Diouf*, Judgment of 28 July 2011, nyr.

33 For the sake of clarity it should also be pointed out that the term remedy should be understood in this context as referring to the means provided by the law to recover rights or to obtain redress, relief etc. In the French version the term *(voie de) recours* is used and in German the term *Rechtsbehelf*. This is clearly a broader notion then remedy in the sense of (the form of) relief or redress given by a court, e.g. damages, injunction etc.

34 For instance in Case C-432/05 *Unibet* [2007] ECR I-2271.

regarding Article 6 (and 13) of the ECHR.[35] This existing practice has been given a legal basis in Article 52(3) of the Charter, which states that the meaning and scope of fundamental rights contained in the Charter, which correspond to rights laid down in the ECHR, like Article 47 of the Charter, are to be the same as those laid down by the ECHR. According to the explanation of Article 52(3), the meaning and scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR, but also, inter alia, by reference to the case-law of the ECrtHR. However, this does not preclude that wider protection may be granted under EU law. Already, this is now clearly the case with the scope of protection offered by the EU law principle and by Article 47 of the Charter in the sense that these also fully apply to administrative law matters.[36] This in contrast to Article 6 of the ECHR that covers in principle 'civil right and obligations' and 'criminal charges'. On the one hand, through skilful interpretation of these notions the ECrtHR succeeded in bringing a number of administrative law aspects within the ambit of Article 6 ECHR.[37] On the other hand, however, judicial protection in important areas such as migrant law and fiscal law (with the exception of fiscal fines) is still not covered by Article 6 ECHR.[38] In relation to these areas Article 47 of the Charter clearly offers a wider protection.

3 Differences and Common Features between Effectiveness and Effective Judicial Protection

The identification and further development of the principle of effective judicial protection led to a more intensive scrutiny of national procedural and remedial rules and has had a far-reaching impact on the procedural autonomy of the Member States. How then, does this principle relate to the 'other' principle of effectiveness, one of the two pillars of the well-known and relatively mild '*Rewe* test'? It should be highlighted at the outset that *Rewe* is certainly not dead. By using the firm language of effective judicial protection, the Court had perhaps in some cases created the impression that national procedural autonomy and the two minimum requirements it implies no longer

35 See very explicitly Case C-279/09 *DEB*, Judgment of 22 December 2010, nyr.

36 Indeed under the proviso that the national authorities implement Union law or act within its scope. Cf. Article 51 (1) of the Charter and the explanations accompanying this Article.

37 See in particular ECrtHR 23 October 1985 (*Benthem*), Series A, Vol. 97 (1986) (environmental permit as a civil right), ECrtHR 21 February 1984 (*Öztürk*), Series A, Vol. 73 (administrative fine as a criminal charge), and ECrtHR 19 April 2007 (*Eskelinen*), Application no. 63235/00, in which the broader scope of Article 47 Charter is one of the reasons to extend Article 6 ECHR to public function cases.

38 In fiscal matters Article 6 ECHR only applies to fiscal fines, because they qualify as a 'criminal charge'. See f.i. ECrtHR 23 July 2003 (*Janosevic*), Application no. 34619/67.

mattered. However, other cases show that the principles of equivalence and effectiveness as stated in *Rewe* are still fully functional and are further developed in the case law.[39]

In practice it is not easy to predict which line the Court will follow in any specific case: the relatively mild *Rewe* line or the more stringent one of effective judicial protection. In some cases, only the *Rewe* principles are applied, in others they feature alongside the principle of effective judicial protection, again in other cases effective judicial protections seems to take over from the principle of effectiveness.

In part, the principle of effective judicial protection can be regarded as a more robust manifestation of the principle of effectiveness, which has thus acquired a much greater impact on national law than was previously the case.[40] In this view, effectiveness was given a specific basis in the *Johnston* case, namely the constitutional traditions of the Member States and the ECHR.[41] For another part, however, there are many indications that effective judicial protection is now a self-standing general principle of law which has a constitutional status and can therefore not be bracketed together with the principle of effectiveness from the *Rewe* mantra. In order to clarify the relationship between the two it may be useful to point out some important common features and differences of both principles.

First, as was already observed above, the *Rewe* test and therefore also the principle of effectiveness seems less demanding. Initially, at least, the review of national procedural rules against the *Rewe* principles did not produce particularly remarkable results. Most rules of national law withstood the tests of effectiveness and equivalence without any difficulty. The threshold of making claims 'virtually impossible or excessively difficult' was usually not exceeded. The introduction of effective judicial protection marked a clear change in the case law, by introducing more demanding standards. Only in some more recent cases did the Court seem to give national procedural rules a harder look while applying the requirement of 'virtually impossible or excessively difficult'.[42] Whether this marks a reorientation of the case law or not, the fact is that in some cases, for instance in *Johnston*, the same result could have been achieved by the application

39 *Rewe* and *Comet* are still 'good' law. See e.g. Joined Cases C-31/91 to C-44/91, *Lageder et al.*, [1993] ECR I-1761; Joined cases C-430/93 and C-431/93 *Van Schijndel en Van Veen* [1995], I-4705; Case C-2/08 *Olimpiclub* [2009] I-7501.

40 Jans *et al.* 2007, *op. cit. supra* note 2, p. 51.

41 Cf. P. Oliver in its case note under Case C-279/09 *DEB*, Judgment of 22 December 2010, nyr, *Common Market Law Review* 2011 (forthcoming).

42 Cf. Case C-268/06 *Impact* [2008] ECR I-2483; Case 406/08 *Uniplex*, Judgment of 28 January 2010, nyr. The same 'harder look' applies to the principle of equivalence in Case C-63/08 *Pontin* [2009] ECR I-10467; Case C-118/08 *Transportes Urbanos*, Judgment of 26 January 2010, nyr (both on the principle of equivalence).

of the principle of effectiveness. Arguably, the evidential rules at stake did make it 'virtually impossible or excessively difficult' for Mrs Johnston to assert her rights.[43] On the other hand, there are situations where achieving the same or a comparable result by the application of *Rewe* effectiveness is less obvious. For instance, it is difficult to imagine how the requirement that there must be a court of law, which is independent and impartial, could be founded upon the 'virtually impossible or excessively difficult' criterion. In this sense, the principle of effective judicial protection is more encompassing.

Second, the difference in the application and result of the two principles also partially lies in the essentially negative formulation of the principle of effectiveness – national procedural rules should not make claims 'virtually impossible or excessively difficult' – while the principle of effective judicial protection is developing, little by little, into a positive standard.[44] For instance, national authorities must give reasons for decisions which adversely affect Union rights;[45] compensation must be adequate for or commensurate with the damage sustained;[46] in certain circumstances adequate compensation means that loss and damage must be recompensed in full; interest is to be considered an essential part of compensation, since it represents damage on account of the effluxion of time;[47] legal aid may, *inter alia*, cover both dispensation from advance payment of the costs of proceedings and the assistance of a lawyer.[48] Another clear example of laying down positive criteria is the case law on Member States' liability for infringements of Union law or the case law on interim relief in case of the suspension of enforcement of a national provision based on a European regulation.[49] The trend of imposing positive procedural standards is further con-

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43 See also the Opinion of Advocate General Sharpston in Case C-263/08 *Djurgården*, delivered on 2 July 2009, point 80, in which she declares that the application of the principle of effectiveness would have led to the same result as the application of the specific provision on effective judicial protection in Article 9 of the Aarhus Convention and Article 10a of Directive 85/337/EEC, as amended by Directive 2003/35/EC. Cf. also Case C-115/09 *Trianel*, Judgment of 12 May 2011, nyr, in which the ECJ bases its finding that the German Schutznorm requirement cannot be applied to non-governmental (environmental) groups both on the specific Aarhus-provision and on the principle of effectiveness.

44 Cf. already Curtin & Mortelmans 1994, *op. cit. supra* note 2. See also Van Gerven 2000, *op. cit. supra* note 2, advocating a more intensive test of effective judicial protection, the so-called 'adequate protection' test, which should be developed further by means of positive criteria.

45 Case 222/86 *Heylens* [1987] ECR 4097.

46 Cf. Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 and Case C-180/95 *Draehmpaehl* [1997] ECR I-2195.

47 Case C-271/91 *Marshal II* [1993] ECR I-4367. See also Joined Cases C-295-298/04 *Manfredi* [2006] ECR I-6619.

48 Case C- 279/09 *DEB*, Judgment of 22 December 2010, nyr.

49 Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 (both on liability); Joined cases C-143/88 and C-92/89 *Zuckerfabrik Suderdithmarschen and Soest* [1991] ECR I-415; Case C-465/93 *Atlanta* [1995] ECR I-3761 (both on interim relief in validity cases).

firmed in more recent cases. In *Vebic* the ECJ found that, as a matter of effective judicial protection, a national competition authority must have the right to act as a defendant or intervening party in appellate judicial proceedings against its own decisions;[50] from *DEB* it follows that corporate legal persons should be granted legal aid;[51] the judgement in *Samba Diouf* implies that a reviewing court must include another – preparatory – decision into the scope of the review which this court is performing in order to safeguard effective judicial protection.[52]

The 'negative v. positive obligation' dichotomy, as it was aptly coined by Brenninkmeijer,[53] also has another important result. While effectiveness brings about a negative obligation in the first place, the principle of effective judicial protection implies both a *negative* and a *positive* obligation. Here a 'negative obligation' means that national provisions which fail to satisfy the requirements of the principles of effectiveness or effective judicial protection must be set aside. In other words, they are eliminated. The positive obligation, on the other hand, is that new national powers and remedies have to be created.[54]

In its early case law, the ECJ stated that it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by the national system.[55] However, later it became clear that, in particular, effective judicial protection could also have a significant positive effect on national law. Although not entirely undisputed,[56] *Factortame* is often considered as a case which introduced a new remedy into English law and therefore, in fact, amounted to a positive obligation. The national court was required to grant interim relief where the domestic law provided no such relief. Any doubts about the potential positive effects have been put to rest by the judgement in *Unibet*.[57] In this case, the ECJ indicated that if, in a

50 Case C-439/08 *Vebic*, Judgment of 7 December 2010, nyr.

51 Case C-279/09 *DEB*, Judgment of 22 December 2010, nyr. See further below, section 4.

52 Case C-69/10 *Samba Diouf*, Judgment of 28 July 2011, nyr.

53 A.F.M. Brenninkmeijer, 'The Influence of Court of Justice Case Law on the Procedural Law of the Member States', in: J.A.E. Vervaele (ed.), *Administrative Law Application and Enforcement of Community Law in the Netherlands*, Deventer/Boston: Kluwer Law and Taxation 1994, p. 103-117.

54 It should be noted, however, that the distinction is not very sharp and certainly not absolute. There may be instances were the setting aside of national rules which make the claim 'virtually impossible' results in a gap and quite some creativity might be needed on the part of the national court to fill this gap. Cf. in this sense Case C-35/05 *Reemtsma* [2007] ECR I-2425. Similarly, Case C-268/06 *Impact* [2008] ECR I-2483 indicates that the existence of procedural disadvantages for an individual makes the exercise of rights excessively difficult and therefore the jurisdiction of a court must be extended.

55 Case 158/80 *Rewe ('Butter-buying cruises')* [1981] ECR 180.

56 Cf. S. Prechal 2005, *op. cit. supra* note 2, p. 169-170; M. Claes, *The national Courts' Mandate in the European Constitution*, Oxford/Oregon: Hart Publishing 2006, p. 110-111.

57 Case C-432/05 *Unibet* [2007] I-2271. Cf. Lenaerts 2007 *op. cit. supra* note 2, and the comment by Arnull in *Common Market Law Review* 2007, p. 1763-1780.

national legal system, no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's Community law rights, then the Member State concerned must provide for a self-standing action to challenge the compatibility of a national provision with Community law.

The third difference between the two principles is that, on the one hand, the main focus of the principle of effective judicial protection is that individuals should be able to enforce all rights conferred on them by Union law and that they must have the opportunity to assert these rights, on their own, before the courts, i.e. national or Union courts. On the other hand, the principle of effectiveness has a much broader scope of application. It may, for instance, also be relevant for the imposition of sanctions upon individuals,[58] for the way in which the collection of European charges from individuals is organised,[59] for the recovery of illegal state aid[60] or for the access to documents in competition proceedings.[61] In this sense, the principle can work against the individual instead of in his or her favour, as effective judicial protection will usually do. To this one may add that the principle of effectiveness as laid down in the *Rewe* case law by its very nature only operates at the level of the Member States.

The fourth point of interest for the present contribution is the possibility to justify rules that, at first glance, are incompatible with the principles at stake. It is well established, ever since *Van Schijndel*, that where the question of whether a national procedural rule renders the application of EU law impossible or excessively difficult arises, a number of factors must be considered which may, at the end of the day, amount to a justification of the contested rules.[62] The factors to be taken into account include 'the role of [the disputed] provision in the procedure, its progress and its special features, viewed as a whole', and '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'.[63] Although there are also instances where the ECJ does not proceed

58 E.g. Case 68/88 *Commission* v. *Greece* [1989] ECR 2965.

59 E.g. Joined Cases 66, 127 and 128/79 *Salumi* [1980] ECR 1237; Case 54/81 *Fromme* [1982] ECR 1449; Case C-290/91 *Peter* [1993] ECR I-2981; Joined Cases C-383-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening* [2008] I-1561.

60 E.g. Case C-24/95 *Alcan* [1997] ECR I-1591; Case C-210/09 *Scott*, Judgment of 20 May 2010, nyr.

61 Cf. Case C-360/09 *Pfleiderer*, Judgment of 14 June 2011 nyr.

62 Joined Cases C-430-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705.

63 See also e.g. Case C-326/96 *Levez* [1998] ECR I-7835; Case 2/08 *Olimpiclub* [2009] I-7501; Case C-63/08 *Pontin*, Judgment of 29 October 2009, nyr; Case C-246/09 *Bulicke*, Judgment of 8 July 2010, nyr. The judgment in Case C-63/01 *Evans* [2003] ECR I-14447 makes it clear that, under certain circumstances, considerations of speed and the economy of legal costs may serve as a justification.

with this 'procedural rule of reason' test or at least does not do so explicitly,[64] this approach offers a useful mechanism for balancing interests. On the one hand, it is important that the principle of effectiveness is upheld as far as possible, while, on the other, the interest that the national provision aims to protect is duly taken into account and may sometimes outweigh the effectiveness principle.[65]

Also *prima facie* infringements of the principle of effective judicial protection can be justified. As a rule, the 'procedural rule of reason' mechanism can be used for these situations too. However, more recent case law shows that the appropriate balancing should take place in the context of testing for compliance with the fundamental right itself. Thus in *Alassini*, the Court reviewed the question of whether the establishment of a mandatory out-of-court settlement procedure as a condition for the admissibility of actions before the courts is compatible with the right to effective judicial protection.[66] The Court recognised that such a condition amounts to an additional step in accessing the courts and might prejudice the implementation of the principle of effective judicial protection. However, it also pointed out, with reference to *inter alia* ECrtHR case law, that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions correspond 'to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed'.[67] In the Court's view these conditions were satisfied in the case at hand, because – briefly put – the imposition of the out-of-court settlement procedure was not disproportionate in relation to the objective pursued, namely to offer a quicker and less expensive settlement of disputes. In the case of *Varec* the Court applied a similar approach and stated that the national court should balance the right of access to information of a party in an contract award procedure stemming from the requirement of fair trial of Article 6(1) of the ECHR against the right of other economic operators to the protection of their confidential information and their business secrets.[68]

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64 E.g. Case C-268/06 *Impact* [2008] I-2483; Case C-455/06 *Heemskerk and Schaap* [2008] ECR I-8763.

65 Note that the principles which may justify a national procedural provision which hampers the effective application of EU law (legal certainty, rights of defence) are in general also recognised as general principles of European law. The effectiveness principle is not only outweighed by a national provision, but also indirectly by these European principles.

66 Joined Cases C-317 to 320/08 *Alassini* [2010] ECR I-2213.

67 Para. 63 of the judgment in *Alassini*. In relation to the conditions for granting legal aid, their potential to limit the right of access to the courts and the balancing involved in such a case, see Case C- 279/09 *DEB*, Judgment of 22 December 2010, nyr.

68 Case C-450/06 *Varec* [2008] I-581.

Indeed, there are, at the end of the day, many similarities between the 'procedural rule of reason test' and the review of the specific context of the restriction of the right to effective judicial protection. An important difference will probably lie in the intensity of the test. Arguably, this will be stricter and more incisive when the fundamental right is at stake.

4 A Changing Relationship between Effectiveness and Effective Judicial Protection?

In the previous section we briefly set out what the principle of effectiveness and effective judicial protection have in common and on what points they differ. The next question is what this means for their mutual relationship. In some relatively recent cases the Court seems to make a concerted effort in articulating the relationship between effectiveness and effective judicial protection. The first signs of this development can be traced back to the case of *Unibet*, in particular in points 37 to 44 of the judgement.[69] The Court links the principle of effective judicial protection with the general obligation ushered in by *Rewe*, namely by pointing out that under the principle of sincere cooperation laid down in Article 10 EC (now 4(3) EU), it is for the Member States to ensure judicial protection of an individual's rights under Community law. While this is a matter for the Member States, the national rules – in the present case those of standing and legal interest – may not undermine the right to effective judicial protection. With reference to the *UPA* case,[70] the Court also reiterates that it is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right. And when doing this, 'the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (...) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (....)'[71]

In brief, *Unibet* can be paraphrased as follows: there is a right to effective judicial protection. It is up to the Member States to guarantee it. When laying down the respective rules, the Member States must make sure that effective judicial protection is safeguarded and that the principles of equivalence and effectiveness are respected.

In the *Impact* case, the Court is even more explicit.[72] The principles of equivalence and effectiveness are said to embody the general obligation on the

69 Case C-432/05 *Unibet* [2007] ECR I-2271.
70 Case C-50/00 P *Unión de Pequeños Agricultores* v. *Council* [2002] ECR I-6677.
71 Para. 43 of the judgment in *Unibet*.
72 Case C-268/06 *Impact* [2006] I-2483.

Member States to ensure judicial protection of an individual's rights under Community law. A failure to comply with those requirements is liable to undermine the principle of effective judicial protection.[73]

Unibet and, in particular, *Impact* can be understood as saying that equivalence and effectiveness should be considered as part of the more encompassing principle of effective judicial protection. Yet, a more recent case again points in another direction. In *Mono Car Styling*, the Court stated that 'whilst it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires, *in addition to observance* [emphasis added] of the principles of equivalence and effectiveness, that the national legislation does not undermine the right to effective judicial protection'.[74] This points to, in our view, a juxtaposition of the principles, rather than an 'absorption'.

In *Alassini*,the Court again starts by reiterating that 'requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law', butthe review of the national rules at stake against the principle of effective judicial protection, on the one hand, and the principle of effectiveness, on the other, is neatly separated.[75] Both reviews have a specific focus of their own.

As was already mentioned above, the case concerned a mandatory out-of-court settlement procedure that had to be followed before the person concerned could bring legal proceedings. Without such a settlement procedure the action is not admissible. The Court looked first at whether the *Rewe* principles had been observed and, in particular, whether the exercise of rights conferred by the directive concerned in this case, the Universal Service Directive, might be rendered 'in practice impossible or excessively difficult'.

Next the Court turned to the principle of effective judicial protection. First, it reminds us that this is 'a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union'.[76] Then it continues by saying that a mandatory attempt at settlement amounts to an additional step for access to the courts and that that condition might prejudice the implementation of the principle of effective judicial protection. Yet, the Court also observes that fundamental rights do not constitute unfettered prerogatives and may be restricted. The condition is, however, that the restric-

73 Paras 47 and 48 of the judgment in *Impact*. Cf. also Case C-63/08 *Pontin* [2009] ECR I-10467, para. 44.
74 Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, para. 49.
75 Joined Cases C-317-320/08 *Alassini* [2010] ECR I-2213.
76 Para. 61 of the judgment.

tions correspond to objectives of general interest pursued by the measure in question and that they do not involve a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.[77] In the more recent judgement in *DEB*, which concerned the availability of legal aid to legal persons, the Court made a direct shortcut. While the national court asked a question about the principle of effectiveness, the Court translated this into a question of effective judicial protection, enshrined in, *inter alia*, Article 47 of the Charter. As the Charter is binding ever since the entry into force of the Treaty of Lisbon and, moreover, the third paragraph of Article 47 deals with legal aid, the Court made Article 47 of the Charter central to its judgment.[78]

How should one assess this somewhat oscillating case law? As we have seen in the previous section, there is a partial overlap between the *Rewe* principles, in particular the principle of effectiveness and the principle of effective judicial protection. The overlap exists in terms of content, scope and effects. However, since there are also a number of differences and the overlap is only partial, it is submitted that the principles should be applied separately and the national procedural and remedial provisions should be tested against both principles. In our view, it is not useful to make the principle of effective judicial protection become an overarching principle, absorbing the principles of effectiveness and equivalence.[79] Partly because of the reasons just set out, partly on basis of a brief reflection pertaining to the function that the two sets of principles fulfil and the purposes they serve.

The *Rewe* principles are primarily linked to the question of how to articulate substantive EU law and national procedural and remedial law in the context of shared (or composite) administration, or, to put it more broadly, in a shared legal order. While in such a constellation, procedural and remedial law is left to the Member States, the major concern is how to ensure that EU law is actually and effectively applied and enforced. The *Rewe* principles function as the outer limits of the room the Member States have to manoeuvre. In EU law, judicial protection often happens to coincide with this concern of effective application and enforcement, but judicial protection is not the leading idea behind the *Rewe* principles. Their main focus is the effective application of Union law. This is indeed different in the case of the principle of effective judicial protection. The primary considerations behind this principle are intimately linked to fundamental rights and, ultimately, to the idea of the '*Rechtsstaat*'.[80]

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77 See also above, section 3.

78 Case C- 279/09 *DEB*, Judgment of 22 December 2010, nyr.

79 Obviously, this does not necessarily imply that in every single case this 'double test' should be applied consistently. In turning down a case, one of the principles may sometimes suffice.

80 Cf. Prechal 2005, *op. cit. supra* note 2, p. 148, and Gerbrandy 2009, *op. cit. supra* note 2, p. 41-45.

Considered against this background, the principles serve different purposes and are driven by different rationales. This should be taken on board when reflecting upon their future development. *Alassini* gives an interesting hint in this respect. The Court, in very explicit terms, tailors the application and limitation interpretation of the principle of effective judicial protection to the interpretation of Article 6 of the ECHR. In *DEB* the Court embarks upon a detailed analysis of the relevant Strasbourg case law on the availability of legal aid under Article 6 ECHR. This approach was no doubt prompted by Article 52(3) of the Charter and the very fact that the explanations relating to Article 47 of the Charter refer explicitly to the judgement in *Airey* v. *Ireland*.[81] Admittedly, searching for convergence between Union law principles and the ECHR is not new. The case law on the rights of defence, the protection of confidentiality, the presumption of innocence or reasonable time already provide rich examples.[82] Continuing this line of thought, we submit that the EU principle of effective judicial protection (or Article 47 of the Charter) should primarily be used as a vehicle to streamline the articulation between the EU principle of effective judicial protection and the requirements as they follow from the ECHR and the Strasbourg case law. This is necessary in order to facilitate the further convergence between Luxembourg and Strasbourg case law and to contribute to the development of a common minimum standard of judicial protection in Europe, both in Union law cases and in other cases (within the scope of Article 6 ECHR). This is, however, without denying the very fact that Article 47 of the Charter is a self-standing fundamental principle and not 'the mere sum of the provisions of Articles 6 and 13 of the ECHR'.[83]

On what issues should the ECJ seek guidance from the ECHR and the Strasbourg court? In the first place, obviously on procedural matters, that are common to the provisions of Article 6 ECHR and Article 47 Charter, i.e. impartiality and independence, fair trail, reasonable duration of court proceedings and publicity. Moreover, issues that relate to the access to a court should, in line with ECrtHR case law, be approached as a matter of effective judicial protection. This includes the 'appealability' of certain acts, questions of standing, time limits for bringing action, the right to legal aid and the requirement that at least one of the courts hearing the case have full jurisdiction.

Most of these issues are by no means revolutionary for EU law since the ECJ already applies the standard of effective judicial protection in many respects,

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81 ECrtHR 9 October 1979 (*Airey*), Series A, Vol. 32, p. 11.

82 Case C-276/01 *Steffensen* [2001] ECR I-3735 (rights of defence); Case C-450/06 *Varec* [2008] ECR I-581 (confidentiality); Case C-45/08 *Spector* [2009] ECR I-12073 (presumption of innocence); Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland* [2009] I-6155 (reasonable time). See also Case C-400/10 PPU *J. McB*, Judgment of 5 October 2010, nyr, in particular para. 53.

83 Cf. AG Cruz Vilallón in his opinion in Case C-69/10 *Samba Diouf*, point 39.

as was already indicated above, in section 3. One important exception is, however, time limits for bringing action, which obviously restricts the right of access, but in the EU context is still treated as a matter of the 'Rewe effectiveness'. It is submitted that the question whether such time limits can be applied in a certain case is not a matter of effective application of Union law, the focus of the effectiveness principle. Rather, it relates to the fundamental question of access to a court. Therefore, the application of such time limits may prejudice the implementation of the principle of effective judicial protection and should therefore be justified under the more stringent '*Alassini* test', which is also applied by the ECrtHR.[84]

Furthermore, and more importantly, an orientation upon Article 6 ECHR may provide further clues for the development of positive criteria as to the level of protection to be safeguarded under the principle of effective judicial protection in the EU.[85] Especially the ECrtHR requirement of full jurisdiction offers interesting opportunities in this respect. By virtue of this requirement, the court dealing with an appeal against a decision of an administrative body must exercise 'sufficient jurisdiction' and therefore, must be able to examine all questions of fact and law relevant to the dispute before it.[86] In its case law the ECrtHR has elaborated the requirement in detail and offers rather nuanced guidelines which are to be applied by the domestic administrative courts in order to satisfy the requirement of 'sufficient jurisdiction'.[87] In the current case law of the ECJ, at least as far as it pertains to general administrative law,[88] even implicit references to this requirement are very limited and in substance the requirement is hardly given any shape.[89]

Finally the ECJ might draw some inspiration from the ECrtHR case law concerning effective remedies under Article 13 ECHR. In this respect we refer to the case of *Kudla* in which the ECrtHR derived from Article 13 ECHR the positive obligation for the Member States 'to guarantee an effective remedy

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84 See for instance the ECrtHR 16 October 2011 (*Eliazer*), Application no. 38055/97. For the subtle difference between the justification of limitation of fundamental rights and the somewhat more open 'procedural rule of reason' see *supra*, section 4.

85 See already S. Prechal, 'Judge-made harmonisation of national procedural rules: a bridging perspective', in: Jan Wouters and Jules Stuyck (eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a* Ius Commune (Essays in Honour of Walter van Gerven), Antwerp/Groningen/Oxford: Intersentia 2001, p. 39–58.

86 See for instance ECrtHR 10 February 1983 (*Albert and Le Compte*), Series A, Vol. 58, ECrtHR 23 June 1981 (*Le Compte, van Leuven and de Meyere*), Series A, Vol 58, ECrtHR 17 December 1996 (*Terra Woningen*), Reports 1996-VI, and ECrtHR 28 May 2002 (*Kingsley*), Application no. 35605/97.

87 See for a comprehensive summary of this case law, ECrtHR 21 July 2011 (*Sigma Radio Television*), Applications nos. 32181/04 and 35122/05.

88 Note that there is a considerable amount of discussion taking place in the area of competition law, which does however, primarily concern review by the General Court.

89 See Case C-506/04 *Wilson* [2006] ECR I-8613, and – very recently – Case C-69/10 *Samba Diouf*, Judgment 28 July 2011, nyr.

before a national authority for an alleged breach of the requirement under Article 6, to hear a case within a reasonable time'.[90] In subsequent cases, such as *Pizzati* and *Scordino*, the ECrtHR has declared that in order for this remedy to be effective it should at least offer the opportunity for compensation, not only of the material damages which an individual has suffered because of the breach of the reasonable time requirement, but also of immaterial damage.[91] The amount of immaterial damages should be established by applying the so called anxiety and frustration criterion. The assumption of this line of case law is that individuals suffer from anxiety and frustration because the time exceeds what is to be reasonably expected, even if the contested decision is substantively correct. In our view, the ECJ could follow the same approach not only in cases in which it is confronted with breaches of the reasonable time requirement, but for instance also in cases in which a breach of the rights of defence has been established, which does not affect the substance of a decision however.[92]

What role is then left for the *Rewe* principles? Indeed, it may remain and function as one of the 'outer limits' to national procedural autonomy and will be particularly relevant in areas that are not covered by the requirement of effective judicial protection. Yet, in a more daring scenario, the principle of Rewe-effectiveness could develop into an additional and more stringent standard that, if and when needed for the effective application of Union law, may go further than the requirements stemming from Article 6 ECHR.[93] This would indeed require a reorientation of Luxembourg case law, redefining the meaning of the principle of effectiveness far beyond the current criteria of 'virtually impossible or excessively difficult'. Whether this would be necessary and useful will in our view also depend on how Article 47 of the Charter – and at the end of the day the status of the Charter as such – will develop. If the Charter is going to pose stricter standards than the ECHR, redefining *Rewe* effectiveness may seem obsolete.

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90 ECrtHR 26 October 2000 (*Kudla*), Application no. 30210/96,

91 ECrtHR 10 November 2004 (*Pizzati*), Application no. 62361/00; ECrtHR 29 March 2006 (*Scordino*), Application no. 62361/00.

92 We refer to the view of the ECJ in for instance Case 30/78 *Distillers Company* [1980] ECR 2229 and Case C-142/87 *Belgium* v. *Commission* [1990] ECR I-959, according to which a breach of the rights of defence should only be remedied by an annulment of the contested decision in case the procedure without this irregularity would have lead to a different result.

93 Arguably cases like Case C-268/06 *Impact* [2008] ECR I-2483, and Case C-406/8 *Uniplex*, Judgment of 28 January 2010, nyr, in which – as indicated in section 3 – the ECJ seems to give national procedural rules a harder look while applying the effectiveness principle, might be a first step in this direction.

5 Conclusion

In recent case law the ECJ has been redefining the relationship between the principle of effective judicial protection and the *Rewe* principles, in particular the principle of effectiveness. Although the case law is not yet completely clear, the ECJ seems to be moving in a direction in which national procedural and remedial provisions are tested against both principles. In our view a separate application of the principles is desirable, because they serve different purposes and are driven by different rationales. While the effectiveness principle (and also the principle of equivalence) primarily aims to guarantee an effective application of substantive EU law, the principle of effective judicial protection is intimately linked to the fundamental right of access to the court and, ultimately, to the idea of the 'Rechtsstaat'. From this perspective it is fully understandable that, in the case of *Alassini* and also in *DEB*, the ECJ tailors the application and limitation of the principle of effective judicial protection to the interpretation of Article 6 of the ECHR, which has the same background.

The direction in which the case law will develop remains to be seen. A possible development is that the ECJ will use the EU principle of effective judicial protection as a vehicle for streamlining the application of the EU principle with the requirements of Article 6 and 13 ECHR as they follow from Strasbourg case law. This focus upon the ECHR may also provide new possibilities for the development of positive criteria as to the level of protection to be safeguarded under the principle of effective judicial protection, for instance in relation to the requirement of full jurisdiction. It may also contribute to a further development of the Courts' case law on effective remedies.

The *Rewe* principles will still function as 'outer limits' to national procedural autonomy. However, the principle of effectiveness in particular might also develop into an additional and more stringent EU standard that, if and when needed, may go further than the requirements stemming from Article 6 ECHR, in particular where the effective application and enforcement of EU law is at stake.