REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 4, NR. 2, 53-68, PARIS LEGAL PUBLISHERS © 2011

The Principle of Effective Judicial Protection after the Lisbon Treaty

Reflection in the light of case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH

Johanna Engström*

Legal officer, DG Justice, European Commission

Abstract

This article examines the Court of Justice's ruling in the DEB case from December 2010. It looks at the principle of effective judicial protection and its impact on national rules on legal aid for legal persons. In the light of the ruling, the article also discusses the possible effect of the entry into force of the Lisbon Treaty on the principle of effective judicial protection and its codification into Article 47 of the Charter; are there several different principles of effectiveness of rights and has the effective judicial protection gained momentum with the Lisbon Treaty?

1 Introduction

With the entry into force of the Lisbon Treaty the principle of effective judicial protection has come to enjoy a visible place in the Treaties. The principle has gone from being a 'mere' general principle flowing from the constitutional traditions and Article 6 ECHR, to having a Treaty basis of its own. Article 19.1 TEU henceforth provides that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. Moreover, Article 6.1 TEU makes Article 47 of the Charter legally binding and states that the Charter shall have the same legal status as the Treaties.[1] Will this statutory expression of the principle add to its importance? Will it be seen as a reinforced basis for intervention into national procedural autonomy, leading to the Court of Justice scrutinising national procedural and remedial rules in more depth and setting a higher standard of protection for individuals' rights under EU law? And will all cases on effective judicial protection of EU law henceforth be based on Article 47 of the Charter, or will the principles of effectiveness and equivalence, as they were set out in the *Rewe*

* All views expressed are the personal views of the author only and they do not represent the views of the European Commission.

1 Article 47 of the Charter reads: '*1. 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. 2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. 3. Everyone should have the possibility of being advised, defended and represented. Legal aid should be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*'

case-law[2] continue to apply as the usual benchmark against which national procedural and remedial rules have to be assessed?

It will of course take time before one can draw any comprehensive conclusions as to the effect of the codification of the principle. Yet, the *DEB* case[3] delivered in December 2010 provides us with some first indications that the principle might have gained momentum and that it is likely that the Court of Justice will further reinforce the effective judicial protection of EU law rights. After having set out the facts of the case (2) and the Court of Justice's ruling (3), I will explore what the Court of Justice's ruling in *DEB* might mean for national procedural autonomy in the future, with regard to the legal basis and methodology that national judges should use when they assess whether national procedures and remedies comply with EU law (4.1) and what level of effective judicial protection should be granted to rights under EU law (4.2).

2 The Facts of the Case

The company *DEB* sought to bring state liability proceedings against Germany for failure to transpose two Directives[4] intended to give non-discriminatory access to the natural gas markets. As *DEB* could not obtain access to the gas networks, it lost several contracts and had to make its employees redundant as the non-implementation resulted in the company being inactive. To bring state liability proceedings the company would need to make an advance payment of the court costs, according to Article 12 (1) of the German Law of court costs.[5] This would amount to approximately € 275,000. Moreover, German legislation required that the company be represented by a lawyer, a cost that *DEB* estimated to be € 990,000.[6] As *DEB* lacked resources it applied for legal aid to cover those costs.

The Landgericht Berlin (Regional Court) refused to grant legal aid as the conditions in Article 116 of the German Code of Civil Procedure (Zivilprozessord-

---

2 Case 33/76 *Rewe-Zentralfinanz* v. *Landwirtschaftkammer* [1976] ECR 1989.

3 Case C-279/09 *DEBDeutsche Energiehandels- und Beratungsgesellschaft mbH* v. *Bundesrepublik Deutschland*, 22 December 2010, Second Chamber.

4 Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

5 Article 12 (1) of the German Law of court costs provides that: 'In civil litigation, the originating application may, in general, be served only after payment of the administrative charge for the proceedings. Should the grounds of the action be extended, no judicial action may, in general, be undertaken before payment of the administrative charge for the proceedings has been made; this also applies with regard to appellate proceedings'.

6 Article 78 (1) ZPO provides that: 'In proceedings before the Landgericht and the Oberlandesgericht, the parties must be represented by a lawyer'.

nung, 'the ZPO') were not met. Article 116 (2) ZPO provides, *inter alia*,that legal aid shall be given to a legal person or an entity capable of being a party to legal proceedings, which is established and has its principal office in Germany (...) if the costs can be paid by neither that party nor by any parties having an economic involvement in the subject-matter of the proceedings, and where the failure to pursue or defend the action *would run counter to the public interest*. The Landgericht did not find that it would run counter to the public interest if the action was not pursued and dismissed the case.

On appeal, the Kammergericht (Higher Regional Court) also took the view that the conditions for legal aid were not met. It explained that the Bundesgerichthof (Federal Court of Justice) in its case-law has interpreted the notion of 'general interest' as meaning decisions that were to affect a sizeable proportion of the population or the business community, or decisions that were liable to have social repercussions. This could, for example, be the case if a company were unable to continue to fulfill duties in the general public interest, or if the existence of that legal person depended on the action that it had intended to bring and that, accordingly, jobs might be lost or a great many creditors adversely affected. As *DEB* had no employees and few creditors, the Kammergericht found that it would not be contrary to the general interest to discontinue the case.

It noted, however, that the legal concept of public interest made it possible to take into account all conceivable general interests for the benefit of the legal person. Yet, the interpretation of that national provision in the light of the intention of the German legislature provided no basis for extending it to cover any effect, even one that is indirect. The case-law has always required that, in addition to the parties with an economic interest in the proceedings, a significant group of people should be affected by discontinuance of the action before the courts. That the case-law on legal aid is more stringent for legal persons than for natural persons has been held compatible with German Basic law by the Bundesverfassungsgericht (Federal Constitutional Court). The difference of treatment between legal and natural persons is justified as the grant of legal aid is a measure of social assistance for natural persons, derived from the principle of the social state and human dignity. This does not extend to legal persons as the fundamental reason for their existence is there only if they are in a position to pursue the objective for which they are created.

Yet, the Kammergericht had some concerns whether denying legal aid in this case would be compatible with EU law, in particular with the principle of effectiveness. It noted that if *DEB* were denied legal aid, it would be practically impossible or at least excessively difficult to pursue the action for state liability for non-implementation of the Directives. It therefore stayed the proceedings and asked the following question to the Court of Justice: 'In view of the fact that Member States may not, through the structuring of conditions under national law governing the award of damages and of the procedure for pursuing a claim seeking to establish State liability under [EU] law, make the award of

compensation in accordance with the principles of State liability in practice impossible or excessively difficult, must there be reservations with regard to a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs, and a legal person, which is unable to make that advance payment, does not qualify for legal aid?'

3 The Court of Justice's Ruling

The Court of Justice started by relating the principles of equivalence and effectiveness as set out in the *Rewe* case[7] to the general principle of effective judicial protection and Article 47 in the Charter. It recalled that the right of a legal person to effective access to justice concerns the principle of effective judicial protection, which is a general principle of EU law stemming from the constitutional traditions of the Member States. Moreover, where fundamental rights are concerned, it is important to take account of the Charter that has the same legal status as the Treaties and which is addressed to the Member States when implementing EU law. The Court also referred to the explanations of the Charter and clarifies that Article 47 corresponds to Article 6 ECHR. In this light, the Court stated that it is necessary to recast the question of the German court so that it concerns the interpretation of *the principle of effective judicial protection* in Article 47 of the Charter. The question should be understood as being whether Article 47 of the Charter precludes a national rule under which the pursuit of a claim for EU law state liability is subject to making an advance payment in respect of costs and under which a legal person does not qualify for legal aid even though it is unable to make that advance payment.

The Court continued by stating that Article 52 (3) of the Charter does not preclude wider protection granted by EU law. Thereafter it analysed Article 47 (3) of the Charter and the case-law under Article 6 of the ECHR in order to settle whether also legal persons benefit from this right. Article 47(3) provides that legal aid is to be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. The Court made a contextual and linguistic analysis of the Charter, interpreting it in the context of EU law, Member State law and case-law of the ECHR. It is noted that the English and German versions of Article 47 (3) of the Charter also can encompass legal persons. Contextually, it noted that the right to access legal aid is found in a chapter of the Charter that relates to justice, and not in the Chapter of solidarity. It is also noted that other procedural principles are established to apply to both natural and legal persons. Similarly, the inclusion of the right to

7 Case 33/76 *Rewe* [1976] ECR 1989, followed by a vast case-law developing and refining the principles.

legal aid in an article concerning the right to an effective judicial remedy was seen as an indication that the assessment of whether there is a right to legal aid should be made on the basis of the right of the actual person rather than on the basis of the public interest of society, even though that could be one criteria for assessing the need for the aid.

On the other hand, the Court noted that other EU sources on legal aid only cover natural persons, and it mentioned that Directive 2003/08 on legal aid and the Rules of Procedure of the General Court and the Civil Service Tribunal do not apply to legal persons. Yet, as those provisions only relate to specific litigation, it found that no general conclusion could be drawn from this. It also reiterated the conclusion of the Advocate General that one cannot find any common principle in the Member States' legislation with regard to the award of legal aid to legal persons.

The Court then examined ECrtHR case-law to see if it provided any guidance on a right to legal aid for legal persons. In particular, the Court referred to the case *Airey*[8], but concluded that there was no conclusive guidance on whether aid must be given to legal persons under the ECHR or what costs should be covered. It noted that while the right of access to court is an element which is inherent in the right to a fair trial,[9] this right is not absolute, and that one needs to examine whether the limitations on legal aid undermine the very right of access to court.

On the basis of the ECrtHR case-law, the Court pointed out that in order to assess the necessity of legal aid in the form of *assistance of lawyer* one must see whether this is necessary for a fair hearing on the basis of the particular facts and circumstances. This will depend *inter alia* on the importance of what is at stake for the applicant, the complexity of the law and procedure and the applicant's ability to effectively represent himself.[10] Account can be taken of the financial situation of the litigant or the prospect of success. Regarding legal aid in the form of *dispensation from payment of the costs of proceedings or provision of security*, also here all circumstances should be taken into account. The Court points out that in case-law it is examined whether the limitation pursue a legitimate aim and whether there is reasonable relationship of proportionality between the means employed and the aim to be achieved. The Court concluded that it is clear from the ECrtHR case-law that legal aid *may* cover both assistance by a lawyer and dispensation from payment of the costs of proceedings. It also

8 *Airey* v. *Ireland* of 9 October 1979.

9 *McVicar* v. *the United Kingdom* of 7 May 2002.

10 *Airey* v. *Ireland* of 9 October 1979, § 26, *McVicar* v. *the United Kingdom*, of 7 May 2002, §§ 48 and 49; *P., C. and S.* v. *the United Kingdom* of 16 July 2002, § 91, and *Steel and Morris* v. *the United Kingdom* 15 February 2005, § 61.

recognised that there can be a selection procedure for who should benefit from legal aid but that this procedure must be non-arbitrary.[11]

In particular, the Court analysed an ECrtHR case in which a commercial company had applied for legal aid, but was denied this according to French legislation. In France, legal aid was granted only to natural persons or to non-profit companies lacking sufficient resources. The ECrtHR found that the difference between profit-making and non-profit-making companies was based on objective and reasonable justifications.[12]

The Court of Justice framed the following paragraph of its judgment in a rather odd and ambiguous manner. It stated that the case-law under the ECHR showed that in practice it is not impossible to grant legal aid to legal persons, but that the aid must be assessed in the light of the applicable rules and the company's situation.[13] Usually, when speaking about the principle of effectiveness, it is the *exercise of the right* for the individual that should not be in practice impossible, while here, the Court looks at whether it is in practice impossible for a Member State to grant legal aid to legal persons, which is quite a different issue. Does the Court mean that in certain circumstances, Article 6 ECHR could preclude Member States from granting legal aid to legal persons? This would be a very peculiar interpretation of the ECHR, as well as of EU law.

The Court continued by explaining that when assessing whether it is in practice impossible to grant legal aid to legal persons, the subject-matter of the litigation may be taken into consideration, in particular its economic importance. The Court continued by explaining how the financial capacity of the applicant can be relevant for this assessment, and that when the applicant is a legal person, consideration may be given, *inter alia*, to the form of the company; the financial capacity of its shareholders; the objects of the company; the manner in which it has been set up; and, more specifically, the relationship between the resources allocated to it and the intended activity.

The Court specifically addressed a point raised by the EFTA Surveillance Authority, which concerned the fact that the German rule excludes all companies that are not properly set up from bringing proceedings. This can specifically affect applicants relying on EU law rights, such as freedom of establishment and access to markets in a Member State. The Court underlined that these circumstances must be taken into account by the national court, but that it is for those courts to strike a fair balance to ensure that such applicants relying on EU law have access to courts, without favouring them over others. In relation to Germany, the Court noted that it has been explained that the notion of 'general interest' can cover all conceivable interests.

---

11 *Del Sol* v. *France* of 26 February 2002; decision in *Puscasu* v. *Germany* of 29 September 2009, judgment in *Pedro Ramos* v. *Switzerland* of 14 October 2010.

12 *VP Diffusion Sarl* v. *France* of 26 August 2008.

13 Para 52.

In light of all the foregoing, the Court of Justice concluded that the principle of effective judicial protection as enshrined in Article 47 of the Charter must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that the aid granted may cover *inter alia* dispensation for advance payment of the costs of proceedings and/or the assistance of a lawyer. It is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the court which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it sought to achieve. In making that assessment, the national court must take the subject-matter of the litigation into consideration; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect for which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. With regard more specifically to legal persons, the national court may take account of their financial situation and take into consideration, *inter alia*, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.

4 Case Commentary

The *DEB* case is the first case where the Court of Justice was given the opportunity to express its thoughts on the question of legal aid and the principle of effective judicial protection. In particular, the preliminary question from the German court inquires whether the principle of effectiveness might require legal aid to be paid to *legal* persons. The Court's judgment does not really allow us to draw any far-reaching conclusions on the circumstances in which legal aid *must* be made available to legal persons, but nonetheless, it offers a number of interesting questions with regard to the effective judicial protection of EU law rights, after the entry into force of the Lisbon Treaty.

This commentary will examine in more detail two issues that emerge from the *DEB* case; the first is the difference between the principle of effectiveness (understood as the requirement of it not being impossible to exercise certain rights) and the principle of effective judicial protection (4.1). Instead of using the principle of effectiveness for assessing the national limiting procedural rule, as the referring court did and as the Court has done in previously cases, it here reformulates the question as concerning the principle of effective judicial protection and the interpretation of Article 47 in the Charter. This raises the

question of the relationship between the principle of effective judicial protection and the principle of effectiveness. Do these principles in practice require different things from the Member States, or are they an expression of the same idea, only packaged in different ways? The second issue that will be discussed below is what requirements EU law puts on national rules regarding legal aid for legal persons and what possible reasons there can be for the Court's rather prescriptive approach in the *DEB* case (4.2).

4.1 A New Test for Effective Judicial Protection?

The most common manner in which the Court expresses the limitations upon national procedural autonomy is through the principles of equivalence and effectiveness, as set out in Case 33/76 *Rewe* and the ensuing case-law. While doctrine often has seen these two principles as expressing the more general principle of effective judicial protection, the Court of Justice only recently reiterated this idea. In C-268/06 *Impact* the Court of Justice held that the 'requirements of equivalence and effectiveness, [...]embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law'.[14] From this it appears that the principle of effective judicial protection is synonymous with the principles of equivalence and effectiveness. Consequently, the principle of effective judicial protection does not in itself put any further requirements on national remedies and procedures that are not already imposed on the national procedural system through the principles of equivalence and effectiveness. In other words, if a national judge performs the tests of equivalence and effectiveness, he or she can conclude if the national rules also comply also with the principle of effective judicial protection.

But if this is the case, why does the Court find it so important to reformulate the question in the *DEB* case? The national court framed its question in terms of the principle of effectiveness, asking whether the national rules in question made it in practice impossible or excessively difficult to obtain compensation in state liability proceedings, just as has been done in hundreds of cases before. Yet, the Court of Justice found it necessary to rephrase the question[15] so it con-

---

14 See Case C-286/06 *Impact* [2008] ECR I-2483 paragraphs 47 and 48, Case C-63/08 *Pontin* [2009] ECR I-10467.

15 Para 33; 'In the light of the above, it is necessary to recast the question referred so that it relates to the interpretation of the principle of effective judicial protection as enshrined in Article 47 of the Charter, in order to ascertain whether, in the context of a procedure for pursuing a claim seeking to establish State liability under EU law, that provision precludes a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs and under which a legal person does not qualify for legal aid even though it is unable to make that advance payment.'

cerns the interpretation of *the principle of effective judicial protection* in Article 47 of the Charter.

One hypothesis is that the recasting simply is done with the aim of legal clarity and simplification. Since the Charter became legally binding with the entry into force of the Treaty of Lisbon, there is an explicit legal basis for the general principle of effective judicial protection. This principle in its turn encompasses the principles of equivalence and effectiveness, as it was set out in *Impact*,[16] but for reasons of clarity and coherence one should always take Article 47 of the Charter as point of departure when there is a question of whether national procedural and remedial rules comply with EU law. Does this mean that in the future, all cases concerning the principle of effectiveness and that it should not be impossible to exercise EU law rights, should be solved on the basis of Article 47 in the Charter, and that the principle of effectiveness is thus merely a sub-principle contained in that paragraph? There are situations that suggest this is not the case, and this brings me to the second possibility as to why the Court recast the question.

The second hypothesis is that there actually is a difference between the principle of effectiveness and the principle of effective judicial protection, as it is now expressed in Article 47 of the Charter.[17] The reason for recasting the question would thus not only be a pedagogical one and one of legal clarity, but it would actually be of importance for what requirement EU law puts on national law. The principle of effectiveness and the principle of effective judicial protection might be two closely connected, but still different legal operations. If one reads the case *Alassini*[18] delivered nine months before *DEB*, it certainly seems that the Court of Justice makes a difference between the principle of effective judicial protection and the principle of effectiveness. In that case, the Court first analysed whether the national procedural rule at issue complied with the principle of effectiveness and concluded that this was the case.[19] Yet, the Court continued to analyse whether the procedural rule (which introduced an additional step for access to courts) prejudiced the principle of effective judicial protection.[20] This does not seem fully coherent with the statement from *Impact*

16 See Case C-286/06 *Impact* [2008] ECR I-2483.

17 In the *DEB* case, the Court actually stated that the principle of effective judicial protection must be interpreted as meaning that it is *not impossible* for legal persons to rely on that principle, and in another sentence it stated that the ECHR did not make it impossible for Member States to grant legal aid. Did the Court not solve the case on the basis of the principle of effectiveness simply because it had misunderstood what the non-impossibility is actually about? The principle of effectiveness concerns it not being impossible to exercise the EU law right. Yet, I seriously doubt that this is the reason for the Court's decision, but I do find that its use of the non-impossibility language in this context is rather unfortunate.

18 Joined cases C-317/08-C-320/08 *Alassini et al.* [2010] ECR I-2213.

19 Joined cases C-317/08-C-320/08 *Alassini et al.* [2010] ECR I-2213, para 60.

20 Joined cases C-317/08-C-320/08 *Alassini et al.* [2010] ECR I-2213, paras 61-66.

that the principles of equivalence and effectiveness embody the general obligation to provide an effective judicial protection. What has happened between *Impact* and the *Alassini* and *DEB* cases is that the Treaty of Lisbon has entered into force. Does case-law suggest that the fact that Article 47 of the Charter has acquired legal force actually change the requirement of effective judicial protection of EU law rights, so that there are two different principles of effectiveness?

Let us first see whether there really is a difference between the test that the Court of Justice performs when it refers to the principle of effectiveness and test that it performs to see if a national rule complies with Article 47 of the Charter. The principle of effectiveness provides that a national procedural rule should not make it in practice impossible or excessively difficult to exercise EU law rights. In the determination of whether a procedural provision makes the application of EU law in practice impossible or excessively difficult, the Court has introduced the so-called 'procedural rule of reason' established in the cases *Van Schijndel/Peterbroeck*.[21] The test provides that 'each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances'[22] Under the rule of reason, the national court must balance the competing interests and ascertain whether the rule pursues a legitimate aim and is proportionate to reach that aim. This expresses the idea that the protection of EU law rights does not take precedence over all other interests that procedural and remedial rules are set to achieve, but that the interest in enforcing EU law rights must be balanced against other deserving interests.

To find out whether the procedural rule in *DEB* complies with the principle of effective judicial protection laid out in Article 47 of the Charter, the Court carried out a test which is framed differently and which has its origins in the ECrtHR case-law.[23] Yet the test seems to be quite similar and it is not easy to determine if it will lead to different results than the *Van Schijndel/Peterbroeck* test. When assessing whether the limitation is acceptable under the principle

---

21 Joined cases C-430-431/93 V*an Schijndel* [1995] ECR I-4736, para. 19, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para. 14.

22 Joined cases C-430-431/93 V*an Schijndel* [1995] ECR I-4736, para. 19, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para. 14, Case C-276/01, *Joachim Steffensen* [2003] ECR I-3735, para. 66, Case C-125/01 *Peter Pflücke and Bundesanstalt für Arbeit* [2003] ECR-I 9375, para. 33, C-63/01 *Samuel Sidney Evans and the Secretary of State for the Environment, Transport and the Regions, and The Motor Insurers' Bureau* [2003] ECR I-14447, para. 46.

23 See also the *Alassini* case, para 63, where the Court also applied the test from the ECrtHR, stating that 'it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact 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'.

of effective judicial protection, the national court must ascertain whether the limitation undermines the *very core of the right*; whether the limitation pursues a *legitimate aim* and whether there is a reasonable relationship of *proportionality* between the means employed and the legitimate aim that the limitation seeks to achieve. The Court also gave a number of circumstances that should be taken into consideration in the case at hand such as the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure and the applicant's capacity to represent himself effectively. This test is very similar to the procedural rule of reason; there is the need for a legitimate aim of the limiting rule, a proportionality assessment of the rule and the individual circumstances in the case at hand should be taken into account. I fail to see the difference between the two tests, but it remains to be seen if they will both be maintained independently of each other and possibly develop in different directions or if they will be consolidated into one single test.

If we imagine there being two different principles of effectiveness, and two tests to determine whether a national procedural rule complies with EU law, when would the one or the other principle apply? Will certain procedural/remedial rules be tried under the principle of effective judicial protection and others under the principle of effectiveness? Both *Alassini* and *DEB* concerned procedural rules affecting the right of access to court. It might be so that it is when this right is at stake, the case will be examined under Article 47 of the Charter and be framed in the language of fundamental rights. In other cases (concerning for example limitation rules, evidence rules etc.), the principle of effectiveness will be applied. In fact, the Court has also in the past referred to the principle of effective judicial protection in cases concerning access to justice[24] while in other cases it has confined itself to only refer to the principle of effectiveness. It would only make sense to have two different principles if the requirements imposed under each of them, or if the principles' underlying aims, are different. If this is not the case, they should be consolidated. It might be that the Court of Justice will provide a higher standard of rights' protection in cases decided under Article 47 of the Charter and it will be easier for Member States to justify limitations upon the exercise of EU law rights under the procedural rule of reason than under the proportionality test under Article 47 of the Charter. Maybe the principle of effectiveness will be confined to situations where EU law rights are not concerned, but where the case more concerns the effective enforcement of the underlying aim of an EU law measure.

---

24 See e.g., Case 222/84 *Johnston* [1986] ECR 1663, Cases C-87-89/90 *Verholen and Others* [1991] ECR I-3757, Case C-13/01 *Safalero Srl Prefetto di Genova* [2003] ECR I-8679, Case C-174/02 *Streekgewest Westelijk Noord-Brabant* v. *Staatssecretaris van Financiën* [2005] ECR I-85.

To sum up, in *DEB* the Court found it important to solve the case on the basis of the Charter and the principle of effective judicial protection, and not the principle of effectiveness (the non-impossibility to exercise EU law rights) as it was laid down in *Rewe*. In *Alassini*, the Court examined whether a national procedural rule first complied with the principle of effectiveness, and thereafter if it complied with the principle of effective judicial protection. This raises the issue of whether there are two principles that impose different requirements on national procedures and remedies, and, if that is the case, in what circumstances the one or the other applies. At this point, it is not possible to give any answer to that question. It is however also possible that the *DEB* case is a result of the Court seeking to 'streamline' its reasoning in cases on national remedies and procedures post-Lisbon, hereinafter deciding all cases on the basis of Article 47 of the Charter.

In *DEB*, I believe it would have been possible to come to the same result by applying the principle of effectiveness and the procedural rule of reason. Instead, the Court used Article 47 and the proportionality assessment emanating from the ECrtHR. It is possible that the Court did this to underline the coherence between rights in the ECHR and the rights in the Charter, aligning its case-law and methodology in cases on the Charter to the vocabulary and methodology used in the ECrtHR case-law. It remains to be seen in future case-law what this will mean for the relationship is between the *Rewe* effectiveness principle and the principle of effective judicial protection as it is laid down in Article 47 of the Charter. Are there different principles of effectiveness, possibly having different aims and requiring different levels of protection? Will the procedural rule of reason from *Van Schijndel* be linguistically replaced by the 'other' proportionality test? Before the Court provides clarifications to the national judge, the area of effective judicial protection will be, as is often the case, an area of legal uncertainty and complexity.

4.2 EU Law's Impact on Rules on Legal Aid

The right to legal aid is of fundamental importance for effective judicial protection of individual rights. This has been emphasised ever since the first wave of the 'Access to justice movement', a movement that brought the social role of the judicial function to the foreground. The financial circumstances of the parties can result in inequality of arms or in a total denial of justice in case one party lacks the means to bring a rightful claim to court.[25] In order to make the protection of rights effective and to achieve not only theoretical justice but also effective justice, rules on legal aid were considered of utmost

[25] The problems of effective, and not merely theoretical, access to justice are discussed in M. Cappelletti, *The Judicial Process in Comparative Perspective*, p. 237-257.

importance.[26] Behind rules on legal aid lie strong social aims and liberal ideas of equality. The key question in *DEB* springs from the underlying social character of legal aid; is legal aid only an important component of an effective judicial protection for natural persons, or must also legal persons have access to legal aid in order for judicial protection to be effective? And what forms of legal aid do Member States need to provide; must they grant dispensation from payment of the costs of proceedings or provision of security and/or legal aid in the form of assistance of a lawyer?

While it has been clear for quite some time that there is no safe haven for any procedural rule not to be affected by the principle of effective judicial protection, the Court had not yet had the occasion to address what requirements the principle of effective judicial protection might have on rules on legal aid before *DEB*. But the *DEB* case is not very enlightening if we seek to discern some minimum requirements for when legal aid must be provided to legal persons, or what kind of legal aid should be provided. One must remember that under the German law that was the subject of the case, legal persons were not excluded from legal aid, but aid was only granted if there was a public interest in pursuing the action. The main issue was therefore whether such limitation was compatible with EU law. The Court's answer was that the right to legal aid for legal persons can be limited, but that the limitation must be assessed under the 'proportionality test' discussed above. Much of its ruling focuses on guiding the national court on the circumstances that it can take into account when assessing the limiting rules. But can one on the basis of the *DEB* conclude that EU law requires, in principle, that legal aid is available to legal persons, also in cases where the national legislation does not at all provide for legal persons to benefit from such aid?

In the analysis of what EU law requires in terms of availability of legal aid for legal persons, both the Court and AG Mengozzi made a thorough legal analysis of all sources which contain guidance on legal aid in EU law, including Article 47 paragraph 3, the EU Directive on legal aid,[27] ECrtHR case-law and the Rules of Procedure of the Courts as well as Member States' legislation. In none of these sources was there any firm support that EU law requires that legal persons can benefit from legal aid. With respect to Member State legislation, both the Court and the AG found that there is no common understanding in the Member States' legal systems that legal aid also should be available to legal persons.

---

26 For a brief outline of the Access to Justice movement and its waves see M. Cappelletti & B. Garth (eds.), 'Access to Justice – the worldwide movement to make rights effective: a general report', in: M. Cappelletti and B. Garth (eds.), *Access to Justice – A World Survey*, Volume I, Alphen aan den Rijn: Sijthoff & Noordhoff 1978, p. 4-11.

27 Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum scommon rules relating to legal aid for such disputes.

The AG took a clear stance on the issue and stated that there is nothing in the current European legal framework providing that there is an unconditional right to legal aid for legal persons. While it would be possible to interpret Article 47 (3) of the Charter widely, he stated that as EU law currently stands, it would be excessive to require Member States to make legal aid available to legal persons. He continues by stating that it is impossible to infer from the respective practices of the Member States any constitutional tradition whatsoever common to the Member States and that to adopt such a broad interpretation of Article 47 (3) of the Charter when dealing with a case the facts of which predate the entry into force of the Lisbon Treaty ran counter to the spirit of sincere cooperation which must act as the driving force of the Union and its Member States.

The Court's ruling is less straightforward and it is difficult to infer whether EU law really contains a general right to legal aid for legal persons. It expresses itself in terms of the principle of effective judicial protection *allowing* that legal persons are granted legal aid, and that such aid *may* encompass dispensation of payment of the costs of proceedings or provision of security and/or legal aid in the form of the assistance of a lawyer. The Court keeps to the facts of the case and as German law provided a right to legal aid for legal persons (under certain conditions), the Court does not discuss whether such a right is required by EU law. It mainly looks at how to assess whether the limitation to this right complies with EU law. The fact that the Court comes to assess whether a limitation to the legal aid is acceptable seems to suggest that there is, in principle a right to legal aid for legal persons, although it can be limited. Also the Court's overall reasoning suggests that in principle, legal persons have the right to legal aid.[28] But it is possible that the Court in the future will explain that there is no EU law right to legal aid for legal persons. It would not be the first time in the area of effective judicial protection where a seemingly far-reaching judgment is later on circumscribed and explained on the basis of the circumstances in the case.[29]

If it is a correct interpretation of the Court's ruling that EU law in principle requires that legal aid is available to legal persons to protect their EU law rights, the Court has set a high standard of effective judicial protection. Its ruling carries potential for far-reaching incursions into national procedural autonomy as many Member States exclude legal persons from asking legal aid. For those following the Court's case-law on effective judicial protection, such as the writer of this case-note, the ruling is likely to have come as a surprise. The Court has showed a rather balanced approach to remedies and procedures in the last years

---

28 Paras 38-42.

29 See e.g. Case C-208/90 *Theresa Emmott* v. *Minister for Social Welfare and the Attorney General* [1991] ECR I-4269later explained and limited by Case C-326/96 *B.S Levez* v. *T.H. Jennings (Harlow Pools) Ltd* [1998] ECR I-7835 and Case C-327/00 *Santex SpA and Unità Socio Sanitaria Locale n. 42 di Pavia* [2003] ECR I-1877.

and it has tried carefully not to step on any "sore procedural toes". Moreover, one possible explanation for the Court's variegating case-law with regard to the effectiveness of national remedies and procedures over the last thirty five years has been that in cases with a potential far-reaching effect for the Member States' budgets, the Court takes a cautious approach.[30] In fact, besides the AG, also the Commission and a number of Member States submitted that the principle of effective judicial protection cannot extend so far as to require Member States to grant legal aid to legal persons. Yet, the Court seems to suggest the opposite.

One can only speculate the reasoning behind the Court's approach. Legal persons are of course main actors in the internal market and to categorically exclude legal persons from legal aid would indeed have repercussions on the effective enforcement of EU law. It is also possible that the statutory basis in the Charter for the principle of effective judicial protection has played a role. Backed by a Treaty basis to limit procedural autonomy with the object of the protection of fundamental rights, the Court might have found it easier to set a higher level of rights' protection, as well as having a stronger justification for why there might be far-reaching effects for national procedural autonomy. It will take time before we can draw any final conclusions as to whether the codification of the principle of effective judicial protection actually has led to a reinforced judicial protection of EU law rights, and larger incursions into the national procedural autonomy. The *DEB* case points in this direction, but it is possible that the Court in future cases will refine and further explain the case.

5 Conclusion

The Court's case-law on remedies and procedures has often been criticised for being one of legal uncertainty and complexity. It is difficult for national judges to know what effectiveness means, and the Court has in the past often used different principles to express the need for effectiveness, such as the principle of full effectiveness, the *Rewe* effectiveness principle and the principle of effective judicial protection. In the *DEB* case the Court reformulates the question so that it does not concern the principle of effectiveness, but the principle of effective judicial protection and Article 47 of the Charter. It also uses a different test, or at least wording, when assessing the aim and proportionality of the national procedural rule. This raises the question of what the relationship between the principle of effective judicial protection and the principle of effectiveness is, and whether the principles require different things from the Member States, or if they are an expression of the same idea. It might

30 See e.g. R. Craufurd Smith, 'Remedies for Breaches of EU Law in National Courts: Legal Variations and Selection', in: P. Craig & G. de Búrca, *The Evolution of EU law*, Oxford: Oxford University Press 1999, p. 287-320.

be that the *DEB* case is the start of a simplification of the area of effective judicial protection. The Court might be intending to establish a single *modus operandi* when dealing with the effectiveness of national procedural and remedial rules, and always used the principle of effective judicial protection laid down in the Charter. This would indeed be very helpful. But for the time being, the *DEB* case adds to the complexity and it remains unclear whether there is any substantial difference between the protection granted by the principle of effectiveness as laid down in *Rewe*, and the principle of effective judicial protection.

While it cannot be questioned that legal aid is essential for an effective access to justice, it is expensive for the Member States and far-reaching judge-made minimum standards on legal aid could consequently have considerable financial implications for the Member States. Yet, in *DEB* it appears as if the Court of Justice concludes that legal aid must be made available also to legal persons, a finding that can have far-reaching effects for national procedural autonomy. This might be an effect of the codification of the principle of effective judicial protection through the Charter of Fundamental Rights, but it will take time before one can properly assess whether this will be seen as a reinforced basis for incursions into national procedural autonomy and will lead to the Court of Justice scrutinising national procedural and remedial rules in more depth and setting a higher standard of protection for individuals' EU law rights.