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The Confusing Constitutional Status of Positive Procedural Obligations in EU Law

Observations on effective judicial protection and national procedural autonomy in the wake of *Boxus*

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Abstract

The European Court of Justice incrementally relies on the principle of effective judicial protection to justify the imposition of positive procedural obligations on national legal orders. This contribution analyses the Court's October 2011 Boxus judgment as an example of that approach. On the one hand, Boxus confirms the implicit precedence of effective judicial protection over national procedural autonomy arguments and the potentially unlimited scope of judicially established procedural obligations. On the other, the Court emphasises the need for a restraining constitutional framework demarcating the establishment of positive obligations. Although Boxus brings about important clarifications in that regard, the constitutional framework governing positive procedural obligations remains confusing and uncertain.

1 Introduction

The principle of effective judicial protection directly enables the European Court of Justice to impose European standards of national procedure.[1] These judge-made standards often require significant national institutional or procedural adaptations. As a result, they entertain a difficult relationship with the traditional 'national procedural autonomy' narrative guiding the division of procedural competences between the EU and its Member States.[2] This comment discusses the ways in which the Court confirmed that relationship in its October 2011 *Boxus* judgment.[3]

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1 As such, the principle reflects the 'pervasive effects' of federalism at the EU level, see K. Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice', 33 *Fordham International Law Journal* (2009-2010), 1339 and 1375-1385.

2 On the problematic relationship between both narratives, see S. Prechal & R. Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection', 4 *REALaw* (2011), 32.

3 Joined Cases C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and C-135/09, *Antoine Boxus, Willy Roua* (C-128/09), *Guido Durlet and Others* (C-129/09), *Paul Fastrez, Henriette Fastrez* (C-130/09), *Philippe Daras* (C-131/09), *Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh)* (C-134/09 and C-135/09), *Bernard Page* (C-134/09), *Léon L'Hoir, Nadine Dartois* (C-135/09) *v. Région wallonne*, judgment of 18 October 2011, not yet reported (hereinafter referred to as *Boxus*).

In *Boxus*, the Court translated the 1998 Aarhus convention on access to information, public participation in decision-making and access to justice in environmental matters[4] and its implementing EU law provisions[5] into positive procedural obligations directly governing the divisionof member states' jurisdictional competences. On the one hand, the judgment clarified the interaction between the narratives of procedural autonomy and effective judicial protection. In particular, *Boxus* confirms the implicit precedence of effective judicial protection over national procedural autonomy arguments and the unlimited opportunities it creates for extensive judicial lawmaking. On the other, the judgment reflected the Court's search for a restraining constitutional framework defining the establishment of procedural obligations. That framework nevertheless remains far from complete in properly delineating the scope of effective judicial protection claims.

2 Background to *Boxus*

The *Boxus* case emerged in the context of annulment proceedings against administrative decisions before the highest Belgian administrative court, the Conseil d'Etat.[6] In an effort to spur economic development in Belgium's southern Walloon region, the regional government proposed expanding the operations of its regional airports. Expansion projects included among others an extension of runways, improving access and the relocation of storage infrastructure.[7] In order for these projects to be completed, administrative planning consent had to be granted in accordance with regional law.[8] Between September 2003 and September 2006, specific administrative decisions granting environmental and planning consent to execute airport extensions

4 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, available at www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

5 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] O.J. L 156, 17. According to Recital 5, the aim of that Directive was to align EU law with the protection provided by the Aarhus Convention.

6 *Boxus*, para. 15.

7 Opinion of Advocate General Sharpston to *Boxus*, para. 20.

8 Opinion of Advocate General Sharpston to *Boxus*, para. 16. At the same time, the national procedure was governed by the EU's environmental impact assessment directive. See Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, [1985] O.J. L 175, 40, adapted and updated since (hereinafter referred to as EIA Directive). For an overview of the Environmental Assessment Directive, see J. Jans & H. Vedder, *European Environmental Law. After Lisbon* (Groningen: Europa Law Publishing, fourth edition, 2012), 346-354; on the requirements of access to justice in relation to the EIA Directive and the Aarhus Convention, see 230-237.

were adopted. Local residents Antoine Boxus, Willy Roua and numerous others subsequently challenged these administrative decisions before the Conseil d'Etat.[9] While their cases were pending, the regional Parliament adopted a legislative decree that ratified the administrative consent already granted. As a result, the formerly administrative consent obtained legislative status. According to the Walloon legislator, 'overriding reasons in the general interest' justified the need for a legislative instrument incorporating the consent.[10] Since the Conseil d'Etat only reviews administrative decisions,[11] the Walloon Region's actions effectively deprived the applicants before the Conseil d'Etat of their interest in having the administrative consent annulled.[12]

Although the applicants immediately commenced annulment proceedings against the legislative decree before the Constitutional Court, they essentially argued that the deprivation of Conseil jurisdiction frustrated their right to effective judicial review. As the Constitutional Court can only annul a legislative measure when the federal division of competence rules and particular fundamental rights guaranteed by the Belgian Constitution are infringed,[13] the ways in which consultation and impact assessment procedures preceding the adoption of the administrative consent decisions had been conducted would now escape judicial review mandated by Article 10(a) of the Environmental Impact Assessment (EIA) Directive. Since these consultation and participation procedures flowed directly from EU law, the Conseil referred questions for a preliminary ruling to the Court of Justice.[14] The Constitutional Court in turn, and in response to the action for the annulment lodged against the validating decree as well as in response to additional questions on the constitutionality of the validation referred to it by the Conseil d'Etat, also questioned the Court of Justice on these matters.[15]

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9 See among others Belgian Conseil d'Etat, Section du contentieux administrative, Case No. 191.950 of 27 March 2009, *Antoine Boxus and Willy Roua v. Région wallonne*, para. 2-15, available at www.raadvst-consetat.be/.

10 *Boxus*, para. 16. Décret du Parlement wallon du 17 juillet 2008 relatif à quelques permis pour lesquels il existe des motifs impérieux d'intérêt général, *Belgian Official Gazette* (Moniteur Belge) of 25 July 2008, 38900.

11 See Article 160 Belgian Constitution and Article 14 Loi sur le Conseil d'Etat, coordonnées le 21 Mars 1973, coordinated and updated version available at www.raadvst-consetat.be/; Opinion of Advocate General Sharpston to *Boxus*, para. 16.

12 *Boxus*, para. 14; Opinion of Advocate General Sharpston to *Boxus*, para. 23.

13 Article 1 Special Act of 6 January 1989 on the Constitutional Court, *Belgian Offical Gazette* (Moniteur Belge) of 7 January 1989, 315.

14 *Boxus*, para. 19.

15 *Boxus*, para. 18; The Constitutional Court's interim judgment No. 30/2010 of 30 March 2010 is available at www.const-court.be/. See Case C-182/10 *Marie-Noëlle Solvay and Others v. Région wallonne*, judgment of 16 February 2012, not yet reported, para. 24 (hereinafter referred to as *Solvay*).

The questions referred by both the Conseil d'Etat and the Constitutional Court were twofold.[16] First, the national courts inquired whether and to what extent consent or a permit granted by regional decree would escape the consultation and participation obligations imposed by the 1985 Environmental Impact Assessment Directive. Article 1(5) of that Directive states that the extensive consultation and participation requirements imposed on national legal orders do not apply to projects whose details are adopted by a specific act of national legislation. Since the legislative process itself inculcates particular participation mechanisms, the EIA Directive's consultation obligations would no longer be necessary to guarantee participative decision-making.[17] The Belgian courts inquired whether this would still be the case where a legislator merely rubberstamped an administrative consent without ensuring participation and consultation of its own.

Second, with regards to the extent that a rubberstamping decree would not escape the EIA Directive's consultation obligations, the national courts questioned how Article 10(a) of that Directive was to be interpreted. Article 10(a) had been included into the EIA Directive by Directive 2003/35/EC in implementation of Articles 9(2) and (4) of the Aarhus Convention. It required Member States to ensure that members of the public having a sufficient interest or maintaining the impairment of a (procedural) right enjoy access to a review procedure before a court of law or another independent or impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions in the EIA Directive. It was maintained that the Constitutional Court would not be competent directly to review whether the applicants' procedural participation obligations had been complied with.[18] To the extent that this was the case, both the Conseil and the Constitutional Court questioned how they should proceed in that regard as a matter of EU law.

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16 In *Boxus*, para. 21-34, the Walloon Region and the Belgian Government challenged the admissibility of the questions referred for a preliminary ruling as hypothetical or lacking sufficient factual and legal substantiation. The Court nevertheless dismissed these arguments and responded to the questions raised. Although the Advocate General reached the same conclusion, she nevertheless hinted that the Conseil could have awaited the Constitutional Court's decision on the matter before referring questions to the Court, see Opinion of Advocate General Sharpston in *Boxus*, para. 39.

17 See on that matter extensively Opinion of Advocate General Sharpston in *Boxus*, para. 58-62.

18 *Boxus*, para. 14 and 18.

3 The Court's Judgment

The Court extensively built upon its previous case law on the application of Article 1(5) EIA Directive.[19] It confirmed that two conditions have to be fulfilled in order for the Article 1(5) exception to apply. First, a project would have to be adopted by a specific legislative act that displays the same characteristics as administrative consent. It must in particular grant a particular developer a right to carry out a particularly defined project. An act is only specific if it refers to elements necessary to assess the environmental impact of the envisaged project.[20] Second, the objectives of the Directive, including that of supplying information, must be achieved through the legislative process itself.[21] This implies that at the time of adopting a project by means of a legislative act, the legislature must have sufficient information at its disposal in order for it to take a meaningful decision.[22] EU law does not however have an objection to the approval of a plan in more than one phase. The legislator can therefore take advantage of the information gathered during a previous administrative procedure.[23] A legislative act that merely ratifies a pre-existing administrative act by referring to overriding reasons of general interest, without a substantive legal process in which that information is considered by the members of the legislative body cannot be considered to be covered by the Article 1(5) EIA Directive exception.[24]

The Court subsequently clarified the role of national courts in ensuring the application of procedural guarantees incorporated in the EIA Directive. A competent national court should be empowered to assess whether or not the conditions of Article 1(5) have been complied with. That national court should be able to assess both the *content* of the legislative act adopted and of the entire legislative *process* which led to its adoption, in particular the preparatory documents and parliamentary debates.[25] According to the Advocate General, such an inquiry involves an evaluation of input, process and output and should focus on whether the legislative process functioned correctly and adequately.[26] The *input* stage establishes whether the information placed before the legislature was sufficiently detailed and informative to enable it to evaluate the likely environmental impact of the proposed project. *Process* refers to whether the appro-

19 Most notably Case C-435/97 *WWF and Others* [1999] ECR I-5613, para. 57-58 and Case C-287/98 *Linster* [2000] ECR I-6917, para. 52-54.
20 *Boxus*, para. 38.
21 *Boxus*, para. 36-37.
22 *Boxus*, para. 39 and 41.
23 *Boxus*, para. 44.
24 *Boxus*, para. 45.
25 *Boxus*, para. 48.
26 Opinion of Advocate General Sharpston to *Boxus*, para. 80.

priate procedure was respected and whether the preparation and discussion times were sufficient to warrant a plausible conclusion that the people's elected representatives were able to properly examine and debate the proposed project. The *output* investigation focuses on whether or not the resulting legislative measure, read in conjunction with supporting material to which it expressly refers, makes clear what is being authorised and any limitations or constraints that are being imposed.[27]

A national court must therefore be able to directly determine whether the project has already been pre-approved by an administrative authority or whether it was only approved by the legislative process itself.[28] In cases where consent has been adopted by an act which is not legislative in nature or by a legislative act which does not fulfil the conditions of Article 1(5) EIA Directive, national courts should, in particular, assess whether the specific obligations incorporated in the EIA directive have been respected in the regulatory process.[29] That obligation flows directly from Article 10(a) EIA Directive and Article 9(2) Aarhus Convention mandating the judicial review of consultation and participation processes. The Court confirmed that by virtue of their procedural autonomy, Member States retain a margin of discretion to implement the abovementioned provisions. It is for them in particular to determine which court or body is to have jurisdiction and what procedural rules are applicable in that respect.[30] At the same time however, the Court made clear that Member States' discretion only exists *in so far as* [Article 10(a) EIA Directive and Article 9(2) Aarhus Convention] *are complied with*.[31] That would not be the case if the mere fact that a project is adopted by a legislative act, which does not fulfil the conditions laid out in Article 1(5) would make it immune to any review procedure challenging its substantive and procedural legality. In that case, the guarantees incorporated in Article 10(a) EIA Directive and Article 9(2) Aarhus Convention would lose all *effectiveness*.[32] Any national court before which an action falling within its jurisdiction is brought, would therefore, as a matter of EU law, have the task of carrying out a substantive and procedural legality review of the adopted decision giving consent.

In the concrete circumstances of *Boxus*, the Court mixed both stages into a tailored answer. It held that if the Conseil d'Etat were to find that the decree of the Walloon Parliament does not satisfy the conditions laid down in Article 1(5) EIA Directive and if it turns out that under the applicable national rules, no court of law or independent and impartial body established by law has jurisdic-

27 Opinion of Advocate General Sharpston to *Boxus*, para. 84.
28 *Boxus*, para. 54.
29 *Boxus*, para. 51.
30 *Boxus*, para. 52.
31 *Boxus*,para. 52.
32 *Boxus*, para. 53.

tion to review the substantive or procedural validity of that decree, the latter must be regarded as incompatible with the requirements flowing from Article 9 of the Aarhus Convention and Article 10a EIA Directive. The Court subsequently imposed additional obligations on the national court. It gave the Conseil the mandate to disapply the validating legislative act[33] and continue its review of the administrative decision underlying the legislative validation.[34]

Responding to the Constitutional Court in the ensuing *Solvay* judgment, the Court of Justice confirmed its position in *Boxus*. Once again, it stated that a mere legal ratification of a pre-existing administrative act would not be covered by the exception in Article 1(5) EIA Directive.[35] If the Constitutional Court were unable to assess whether the Article 1(5) exception did apply to the Walloon decree, and if it consequentially transpired that no court of law or independent or impartial body would have jurisdiction to review the substantive and procedural validity of that decree, the Constitutional Court was ordered to disapply the decree as a matter of EU law.[36] On the basis of that answer, the Court appears to impose a two-pronged obligation on the Belgian Constitutional Court. First, the Constitutional Court could declare that it is competent to review the substantive and procedural validityof a rubberstamping decree, in compliance with the requirements imposed by the EIA Directive. In that case, the Constitutional Court should also assess whether or not the procedural provisions of the EIA Directive have been complied with. The Constitutional Court would thus have to interpret its review mandate as incorporating an assessment of the substantive and procedural legality of the ratifying decree. Second, it could also opt to disapply the decree without assessing its compatibility with the EIA Directive's obligations. In that situation, the object of annulment, the legislative decree, would no longer be present. This would then result in the Constitutional Court no longer having jurisdiction to rule on the matter. The Constitutional Court's declaration of lack of jurisdiction would then revive the Conseil d'Etat's jurisdiction to proceed with its assessment of the administrative act preceding legislative validation.[37]

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33 *Boxus*, para. 55.
34 *Boxus*, para. 57.
35 *Solvay*, para. 43.
36 *Solvay*, para. 51.
37 A third option understandably not addressed by the Court would enable the Constitutional Court directly to annul or declare unconstitutional the legislative decree on grounds of national constitutional law, ordering a subsequent continuation of the proceedings before the Conseil d'Etat. That option would seem feasible in accordance with Belgian constitutional law, see A. Alen & K. Muylle, *Handboek van het Belgisch Staatsrecht* (Mechelen: Kluwer 2011), 706-707. The Court's judgment imposes an additional obligation on the Constitutional Court, with which it should comply as a matter of EU law.

4 The Intrusive Precedence of Effective Judicial Protection

The *Boxus* judgment directly addresses and regulates the national jurisdictional divide between the Belgian Conseil d'Etat and the Constitutional Court as a matter of EU law. Cloaked in the language of the EIA Directive and the Aarhus Convention lies a particular approach to procedural law that has been substantiated in other recent judgments and that could be identified under the banner of *positive procedural obligations*. These positive obligations are commonly grounded in the principle[38] of effective judicial protection, but could equally be implied in the principle of national procedural autonomy mitigated by the conditions of equivalence and effectiveness.[39] The relationship between both approaches appears confusing in the Court's recent case law.[40] The Court's judgment in *Boxus* both clarifies and complicates that relationship by confirming the *precedence* of effective judicial protection over national procedural autonomy.

Both the Court and the Advocate General emphasised the importance of national procedural autonomy. In the words of the Advocate General, unless jurisdictional rules have been imposed by EU law, it is not for the Court to indicate *what rules* should apply in the Member States.[41] As the Court confirmed, Member States have some discretion when implementing the Aarhus Convention and the EIA Directive, in so far as the principles of equivalence and effectiveness have been complied with.[42] These principles or mitigating conditions of procedural autonomy demand that national procedural rules governing

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38 On that principle as part of a more general principle of effectiveness, see T. Tridimas, *The General Principles of EU Law* (Oxford: Oxford University Press, 2nd ed., 2006), 418-477 and M. Accetto &S. Zleptnig, 'The Principle of Effectiveness: Rethinking its Role in Community Law', 11 *European Public Law* (2005), 388-390. The principle of effective judicial protection has also been recognized as a fundamental right in Article 47 of the binding Charter of Fundamental Rights of the European Union, see J. Engström, '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', 4 *REALaw* (2011), 53.

39 On the scope of the principle of national procedural autonomy, see recently A. Arnull, 'The principle of effective judicial protection: an unruly horse?', 36 *ELR* (2011), p. 51 -70; 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in: P. Craig and G. De Búrca (Eds.), *The Evolution of EU law* (Oxford: Oxford University Press, 2nd ed., 2011), 407-438; P. Haapaniemi, 'Procedural Autonomy: A Misnomer?' in: L. Ervo *et al*. (Eds.), *The Europeanization of Procedural Law and New Challenges to a Fair Trial* (Groningen: Europa Law Publishing 2009), 89-90; M. Bobek, 'Why there is no principle of "procedural autonomy" of the Member States' in: H.-W. Micklitz & B. De Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States* (Antwerp: Intersentia 2012), 305-323.

40 S. Prechal & R. Widdershoven, note 2, 33; for an earlier reflection in that regard, W. Van Gerven, 'Of rights, remedies and procedures', 37 *Common Market Law Review* (2000), 501-537.

41 Opinion of Advocate General Sharpston to *Boxus*, para. 99.

42 *Boxus*, para. 52.

remedies for safeguarding an individual's rights under EU law are no less favourable than those governing similar domestic actions and must not render practically impossible or excessively difficult the exercise of rights conferred by Union law.[43] Both mitigating conditions essentially incorporate *negative* obligations.[44] To the extent that national rules do not allow EU law based claims to be lodged, these rules should be disapplied.[45] In the present case, a mere 'procedural autonomy' analysis would result in the Court stating that EU law precludes national rules limiting the scope of jurisdiction of a court of law to a mere constitutionality assessment of a national legislative text, if the application of that rule would result in rendering claims based on infringements of EU participation rights impossible or excessively difficult. Disapplying that national rule would then be leaving it up to the Member States to provide an adequate solution.

The so-called negative obligation as a matter of EU law, disapplication of the rule preventing equivalence or effectiveness, is not however as clear-cut as might appear at first sight. Any negative obligation implies a more or less profound transformation of national law and therefore requires *positive* action from the national legal order in order to comply with EU law requirements.[46] In cases where the Court states that time-limits render an action based on EU-law ineffective, the non-application of these time-limits often requires the legislative or judicial authorities in a Member State to adopt improved, more effective time limits.[47] Positive action in that respect does not appear as a matter of EU law, but remains incorporated in the national regulatory autonomy of a Member State. As a result, the Court mandates national courts simply to make their systems more compatible instead of directly saying what would be compatible. In *Boxus*, the Court could comfortably have ended its analysis here, allowing

43 See among others, Case 33/76 *Rewe* [1976] ECR 1989, para. 5; Case 45/76 *Comet* [1976] ECR 2043, para. 13; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para. 12; C-430/93 and C-431/93 *Van Schijndel* [1995] ECR I-4705, para. 17; C-201/02 *Wells* [2004] ECR I-723, para. 65; Case C-432/05 *Unibet* [2007] ECR I-2271, para. 39-43; and Joined Cases C-222/05 to C-225/05 *Van der Weerd and Others* [2007] ECR I-4233, para. 28; Case C-268/06 *Impact* [2008] ECR I-2483, para. 44; Case C-63/08 *Pontin* [2009] ECR I-10467, para. 43-44; Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini* [2010] ECR I-2213, para. 47-48. On the balancing nature of the equivalence and effectiveness requirements, S. Prechal, 'Community law in national courts: The lessons from Van Schijndel', 35 *CML Rev.* (1998), 690 referring to a procedural rule of reason.

44 See S. Prechal & R. Widdershoven, note 2, 39-40.

45 P. Van Cleynenbreugel, 'Judge-Made Standards of National Procedure in the Post-Lisbon Constitutional Framework', 37 *ELR* (2012), 92.

46 S. Prechal & R. Widdershoven, note 2, 41.

47 See for a classic example Case C-208/90 *Emmott* [1991] ECR I-4269, para. 23 for an application of the condition of effectiveness in that regard. See also M. Dougan, *National Remedies before the Court of Justice. Issues of Harmonisation and Differentation* (Oxford: Hart 2004), 274-284.

the national legal order to construct the national jurisdictional division of competences in accordance with EU law requirements.[48]

In particular instances however, the Court felt compelled directly to limit Member States' leeway. These instances include access to justice,[49] the ensuing availability of a particular remedy through which the infringement of an EU right could be addressed[50] and an adequate procedural framework guaranteeing that access to justice would not be frustrated.[51] As Advocate General Sharpston argued in the context of *Boxus*, 'in order to ensure that the objectives of access to justice are achieved, it must be possible for at least one court to entertain a challenge to a specific act of national legislation on the ground that it does not fall within the exclusion [...] of Article 1(5) of the EIA Directive'.[52]

A common justification for this more active judicial 'access to justice' approach in the fields of access to courts, remedies and procedural rules lay in the necessities of 'effective judicial protection' across the EU Member States. EU law 'would lose *all effectiveness*, if the mere fact that a project is adopted by a legislative act which does not fulfil the conditions [laid down in Article 1(5) EIA Directive] were to make it immune to any review procedure for challenging its substantive or procedural legality'.[53] The epithet 'all' is important in that respect. 'All effectiveness' refers not just to a procedural rule that renders the application of an EU right impossible or excessively difficult, it refers to a *systemic* ineffectiveness should the national rule rendering review of participation obligations remain in place.[54] Such a systemic concern warrants more direct intervention from the Court, such as the establishment or extension of a given remedy, or, as in *Boxus*, the modification of a national procedural rule to allow a remedy to remain an adequate EU law enforcement tool. As a result, the Court felt compelled to rule that 'any national court before which an action falling within its jurisdiction is brought, would have the task of carrying out the review

48 For an example of the Court doing so, see Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini* [2010] ECR I-2213, para. 62-66, allowing a Member State to introduce a mandatory out-of-court settlement system in addition to classical judicial review.

49 Case 222/84 *Johnston* [1986] ECR 1651, para. 17; Case 222/86 *Heylens* [1987] ECR 4097, para. 14 serve as the foundational cases in that regard. See also Joined Cases C-87/90 to C-89/90 *Verholen and Others* [1991] ECR I-3757, para. 24; Case C-13/01 *Safalero* [2003] ECR I-8679, para. 50.

50 For an overview, W. van Gerven, 'Toward a coherent constitutional system within the European Union', 2 *European Public Law* (1996), 96-98. A recent application in the field of remedies concerns Case C-268/06 *Impact* [2008] ECR I-2483, in which the Court referred to the notion of procedural disadvantages (para. 51) to extend the scope of an available remedy.

51 See on that matter P. Van Cleynenbreugel, 'Transforming Shields into Swords. The VEBIC judgment, adequate judicial protection standards and the emergence of procedural heteronomy in EU law', 18 *Maastricht Journal of European and Comparative Law* (2011), 531-539.

52 Opinion of Advocate General Sharpston in *Boxus*, para. 99.

53 *Boxus*, para. 53.

54 Cf. the reference to procedural disadvantages in Case C-268/06 *Impact*, note 50.

whether a legislative act falls within the scope of Article 1(5) EIA Directive'.[55] As a result, national courts are directly obliged to carry out this review as a matter of EU law. Since 'effective judicial protection' constitutes a directly valid extension of EU law itself, the scope of national procedural autonomy, a principle applied in the *absence* of EU law on the matter,[56] is limited.

As an extension of EU law itself, 'effective judicial protection' necessarily *precedes* any discussion on national procedural autonomy and mitigating conditions of equivalence and effectiveness. The Court establishes a particular obligation that needs to be translated into national legal orders as a matter of effective judicial protection. Although the Court does not always appear consistent in that regard and seems to place effective judicial protection and national procedural autonomy on an equal footing,[57] *Boxus*' reference to 'all effectiveness' demonstrates that some standards of what constitutes adequate necessarily precede the traditional analysis grounded in national procedural autonomy.[58] Despite once again relying on the condition of effectiveness,[59] the latter should not be construed as a mere mitigating autonomy condition. Effectiveness rather refers to minimum standards of adequate procedure required as a matter of EU law. The ability of at least one national court to assess whether or not a legislative act falls within the Article 1(5) exception and to disapply a validated legislative act constitutes such a standard. The 'autonomy' left to national legal orders in designing these rules would thus be confined to 'implementing' or 'transposing' the judicially-established procedural obligation into national law.[60] The Court thus *entitles* itself to carving out the minimum standards of adequateness on the organisation of national judicial review. In so doing, it directly aims to operationalise the EU's rule of law in the national procedural context.[61]

Boxus confirms this precedence. The judgment subsequently relies on that precedence to intervene even further in the national division of jurisdictional competences. The Court proposed the disapplication of the legislative act not

55 *Boxus*, para. 54-55.

56 See for that argument in the context of access to justice in environmental law matters, J. Jans & H. Vedder, note 8, 229.

57 S. Prechal & R. Widdershoven, note 2, 45, derive that argument from the Court's reference to effective judicial protection *in addition to* national procedural autonomy in Case C-12/08 *Mono Car Styling SA, in liquidation v. Dervis Odemis and Others* [2009] ECR I-6653, para. 49, in which the Court refers to among others Case C-13/01 *Safalero* [2003] ECR I-8679, para. 49-50. It could nevertheless be argued that the Court in *Safalero* hinted at the right to effective judicial protection's precedence over national procedural autonomy. In that case, it structured effective judicial protection requirements as additional limiting structures on national procedural autonomy claims.

58 *Boxus*, para. 53.

59 On the confusing scope of effectiveness, see J. Lindholm, *State Procedure and Union Rights. A Comparison of the European Union and the United States* (Stockholm: Iustus Forlag 2007), 127-149.

60 P. Van Cleynenbreugel, note 51, 542-544.

61 S. Prechal & R. Widdershoven, note 2, 46.

falling within the scope of the Article 1(5) exception, in order to allow the Conseil d'Etat to proceed with its review.[62] In so doing, the Court moved beyond the mere problem of 'access to justice' and expressed its opinion on how national procedure should be regulated. Although it did not directly and definitively determine the division of jurisdiction between the Conseil d'Etat and the Constitutional Court as a matter of Belgian law, it directly hinted at an adapted division of tasks imposed by EU law. Instead of merely stating that at least one national judge should be able to review compliance with the consultation and participation obligations reflected in the EIA Directive, it chose to clarify that national institutional choice itself by mandating the national judge to disapply national validating legislative acts. The Court's preference to 'disapply' national law resembles the strong worded claim to primacy evoked in the *Simmenthal* judgment.[63] In *Simmenthal* and its progeny, the Court mandated the disapplication of a particular national *procedural* rule.[64] Disapplication would have been *necessary and sufficient* to guarantee the effective application of EU law in the shadow of national procedural autonomy. *Boxus* on the contrary mandated the disapplication of a *substantive* legislative rule in order for the procedural framework to operate in conformity with EU law. Disapplication here constitutes a *necessary but insufficient* attribute to materialise the effective application of EU law. It directly supports the Court in enabling a positive procedural obligation to be implemented by national judges.

The precedence of effective judicial protection over national procedural autonomy reflected in *Boxus* does not however explain in what instances the Court should rely on effective judicial protection or national procedural autonomy arguments. It has been suggested that the Court relies on effective judicial protection arguments in cases where access to national courts is at stake. In other cases, a national procedural autonomy analysis would suffice.[65] *Boxus* essentially blurs that distinction. In *Boxus*, the applicants still had access to a court and could still apply to have the legislative measure annulled. At the same time however, the projected *scope* or *intensity* of judicial review was potentially in conflict with EU law. According to the abovementioned suggestion, *Boxus* should have been resolved by reference to national procedural autonomy

62 *Boxus*, para. 55 and 56.

63 Opinion, para. 101, footnote 41. Case 106/77 *Simmenthal* [1978] ECR 629. On the interaction between Simmenthal and national procedural autonomy, see also W.W. Geursen, 'Handhaving van het objectieve gemeenschapsrecht via het effectiviteitsbeginsel vs. subjectieve rechtsbescherming via het nationaalrechtelijke verbod op reformatio in peius', *NTER* (2009), 137-138.

64 See *Simmenthal*, para. 21. A recent example in that regard includes Case C-119/05 *Lucchini* [2007] ECR I-6199, para. 61.

65 J. Engström, note 38, 63. Other cases mainly refer to limitation rules, evidence rules etc. The distinction between EU and national competences would in that constellation reflect the interaction between EU remedies and complementary national remedies, see A. Adinolfi, 'The "Procedural Autonomy" of Member States and the Constraints stemming from the ECJ's case law: is judicial activism still necessary?' in: H. W. Micklitz & B. De Witte (Eds.), note 39, 298.

arguments. Although the Court does formally refer to national procedural autonomy, the actual interference with national procedural law as proposed in the judgment suggests an approach grounded in preceding effective judicial protection conditions. As a result, the distinction between effective judicial protection and national procedural autonomy grows increasingly vague and appears once again to be more interchangeable than ever.[66] From that perspective, *Boxus* seems to present an invitation for future judgments to impinge even more on national procedural competences.

5 Positive Procedural Obligations in Search for Constitutional Coherence

The judicial imposition of positive procedural obligations as a direct extension of EU law is not necessarily problematic or illegitimate.[67] In many instances, the Court basically restates EU law obligations already incorporated in secondary legislation.[68] *Boxus* is no exception in that regard. The Court interprets the obligation imposed on national legal orders by the EIA Directive to organise review proceedings into an obligation for national *judges* to effectuate that review, even in cases where national law would not allow for that review to take place. In so doing, the Court mainly expounds on EU law already reflected in the EIA Directive. More problematic however, is the Court's direct imposition of an additional, entirely judge-made, obligation on national judges mandating the disapplication of national legislative provisions. In those instances, a clear and concrete constitutional basis should support the Court's intervention in the national procedural realm.[69] *Boxus* demonstrates that the Court increasingly pays attention to outlining particular constitutional bases. Different constitutional bases would justify a variety of judicial intervention techniques and would tailor the scope and intensity of either effective judicial protection or national procedural autonomy claims to particular constitutional

66 That argument could also be read in Case C-286/06 *Impact* [2008] ECR I-2483, para. 47. See also J. Engström, note 38, 60.

67 For an argument that the Court should even take a more pro-active stance in particular sectors, see H.W. Micklitz, 'The ECJ between the individual and the Member States – A Plea for a judge-made European law on remedies' in: H. W. Micklitz & B. De Witte (Eds.), note 39, 392-400 for a proposal along economic, social and citizenship lines.

68 See Case C-439/08 *Vebic*, judgment of 7 December 2010, not yet reported, para. 64; Case C-69/10 *Samba Diouf*, judgment of 28 July 2011, not yet reported, para. 70 for recent examples.

69 That is at least the Court's well-established case law in relation to the constitutional necessity of a Treaty basis for legislative action at the EU level. Opinion 2/00, [2001] ECR I-9713, para. 5. See also Case C-166/07 *European Parliament v. Council* [2009] ECR I-7135, para. 42 for an expounding of that requirement. For background information, K. Bradley, 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in: P. Craig & G. De Búrca, note 39, 83-109.

provisions. This section examines the way in which that constitutional framework is taking shape, the extent to which *Boxus* contributes to its establishment and the remaining gaps and uncertainties in that regard.

The most general constitutional basis to justify positive procedural obligations can be found in Article 19(1) TEU. That provision mandates the Court of Justice to apply the law and orders the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Whilst it incorporates the general principle of effective judicial protection, the provision does not directly mandate the Court to take action in that regard.[70] Article 47 of the Charter of Fundamental Rights in the European Union (CFR) nevertheless complements Article 19 TEU by reflecting a more direct mandate. Article 47 CFR basically incorporates and extends[71] the 'fair trial' guarantees of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The European Court of Human Rights has not refrained from reading positive procedural obligations in that provision.[72] Although the ECHR is not yet binding on the European Union, the Charter is by virtue of Article 6(2) TEU.[73] Since the ECHR provides a direct basis for the interpretation of the Charter, the latter could provide the Court with a constitutional basis to impose positive obligations on national courts in ensuring the right to an effective judicial remedy.[74] It is therefore no surprise that the Charter presents a grateful opportunity for a Court prone to establish positive procedural obligations. In *DEB*, the Court directly relied on Article 47(3) CFR and on the case law of the European Court of Human Rights in relation to Article 6 ECHR to assess whether or not a legal person should be entitled to legal aid. It held that national legal orders could not per se exclude the granting of legal aid to legal

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70 Article 19(1) merely states that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, rather than referring to the Court guiding the Member States in that regard.

71 Charter of Fundamental Rights of the European Union, March 30, 2010, [2010] OJ C 83/02, 389. See *Text of the explanations of the Charter of Fundamental Rights of the European Union*, 2007 O.J. (C303), 17, at 30., directly referring to administrative law matters in addition to civil and criminal procedures covered by the ECHR.

72 For an introductory overview, see A. Mowbray, *The Development of Positive Obligations under the European Convention of Human Rights by the European Court of Human Rights*, (Oxford: Hart 2004), 97-125.

73 See Article 6(2) TEU holding that The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties; see in general J.P. Jacqué, 'The Accession of the European Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms', 48 *CML Rev.* (2011), 995-1023; see also T. Lock, 'EU accession to the ECHR: implications for the judicial review in Strasbourg', 35 *ELR* (2010), 797-798.

74 Depending on how far the scope of the Charter affects national law, see on that problem, P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', 39 *CML Rev.* (2002), 945-994 and S. Prechal, 'Competence Creep and General Principles of Law', 3 *REALaw* (2010), 9 and 20.

persons that do not serve a public interest.[75] The Charter thus provided a direct source of obligation for the Member States and confined their autonomy in that regard. A similar approach was taken in the *Chalkor* judgment. In that case, the Court relied on Article 47 CFR to assess the constitutionality of the supranational judicial review system in the field of competition law. The judgment unequivocally stated that the obligations reflected in Article 6 ECHR also pervade EU law through Article 47 CFR.[76] As a result, the Court considers itself backed by the ECHR when it interprets the Charter's provisions.

Boxus does not refer to the Charter or the ECHR at all. Instead it finds the existence of positive obligations in the right to judicial review reflected in the 1998 Aarhus Convention. That Convention, to which both the EU and all 27 Member States are parties,[77] directly refers to requirements of access to justice in Article 9. As all Members to the Convention are required to implement that provision, both the EU and its Member States have taken action to accommodate judicial review.[78] That also follows from Article 216(2) TFEU, which states that agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. The Court relied on these binding characteristics directly to infer positive obligations on Member States' legal systems even outside the scope of harmonised EU legislation.[79] The Court's judgment in *Lesoochranárske* is a case in point. In that judgment, the Court mandated national courts to 'interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives [of the Aarhus] convention and the objective of effective judicial protection of the rights conferred by European Union

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75 Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft*, judgment of 22 December 2010, not yet reported, para. 45 and 59; see also J. Engström, note 38, 61 on the potential role of Article 47 in future cases.

76 Case C-386/10 P *Chalkor AE Epexergasias Metallon v. European Commission*, judgment of 8 December 2011, not yet reported, para. 51.

77 See for an overview of Members, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en.

78 See at the EU level, Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] O.J. L 264, 13. Directive 2003/35/EEC, note 5 incorporates the Aarhus Convention's principles into particular harmonized fields of environmental law. In addition, national legal orders had to adopt measures of their own in areas not covered by these instruments.

79 In particular, Article 9(3) Aarhus Convention states that *[i]n addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.* As that provision mandates national systems to outline conditions for members of the public to have access, that provision cannot as such be read to incorporate specific requirements with which these conditions have to comply. The Court nevertheless read particular conditions into that provision in Case C-240/09 *Lesoochranárske zoskupenie*, judgment of 8 March 2011, not yet reported.

law'.[80] National courts had to entertain this interpretation as a matter of EU law in order to enable an environmental protection organisation to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.[81] EU law imposed such an obligation, even though the particular Aarhus Convention, Article 9(3), had no direct effect.[82] The Aarhus Convention therefore provides an additional constitutional foundation for the Court to identify new obligations. *Boxus* concerned Article 9(2), which imposes a direct obligation on Convention states to organise judicial review of the participation rights incorporated in the Convention.[83] As that provision itself incorporates specific obligations, it most certainly serves as a constitutional basis allowing the Court to impose particular obligations on national judges. Although the Court does not refer to the Charter in *Boxus*, the right to an effective judicial remedy or the principle of effective judicial protection incorporated therein could also be said to provide a general constitutional foundation in the light of which the Aarhus Convention should be interpreted. The Court's *Lesoochranárske* judgment at the very least seems to support that claim.

In addition to its reliance on an international instrument, *Boxus* referred to secondary Union legislation in support of the establishment of positive procedural obligations. In other recent cases, the Court has been equally eager to couple vague fundamental rights provisions to more concrete EU law provisions reflecting the more general obligations imposed on national legal orders. In *Samba Diouf*, the Court relied on Article 47 CFR as an interpretive aid to identify the scope of review against particular national asylum application decisions governed by Directive 2005/85/EC.[84] In the specific context of the harmonised asylum procedure, Article 47 CFR operationalised an otherwise vague Directive provision.[85] In *Vebic*, the Court interpreted competition law enforcement Regulation 1/2003 in such a way as incorporating an obligation for national competition authorities to participate against their own decisions. In that case, the Court did not directly refer to the Charter, but merely stated

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80 Case C-240/09 *Lesoochranárske zoskupenie*, judgment of 8 March 2011, not yet reported, para. 52.

81 Case C-240/09 *Lesoochranárske zoskupenie*, judgment of 8 March 2011, not yet reported, para. 52.

82 See J. Jans, 'Who is the Referee? Access to Justice in a Globalised Legal Order', 4 *REALaw* (2011), 85-97; J. Jans & H. Vedder refer to a 2003 Commission proposal to bring harmonization in these matters as politically dead, see note 8, 236.

83 See also Recital 11 Directive 2003/35/EEC, note 5, which directly grounds the scope of judicial review entertained at the national levels as a matter of EU law in the Articles 9(2) and (4) Aarhus Convention.

84 Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, O.J. 2005, L 326, 13. Case C-69/10 *Samba Diouf*, judgment of 28 July 2011, not yet reported, para. 45, 46 and 70.

85 Case C-69/10 *Samba Diouf*, judgment of 28 July 2011, not yet reported, para. 34 and 49.

that this obligation was necessary to effectively ensure that fundamental rights were observed at the national level.[86] The Court provided a 'constitutional' interpretation of EU law and read new obligations reflective of the Charter of Fundamental Rights into secondary EU law provisions. As a result of this interpretation, the scope of autonomy left to Member States is confined to the interpretation of these provisions. The Charter and the principle of effective judicial protection included therein indirectlyenable procedural obligations reflected in secondary Union legislation to be more readily transposed into national judicial practice. *Boxus* reflects a similar reasoning. The Court interpreted Article 10(a) EIA Directive in the light of Article 9(2) Aarhus Convention. From that interpretation, the Court derived a specific positive obligation enabling national judges to assess and potentially disapply a national legislative act. The Aarhus Convention indirectly provided a foundation allowing the Court to expound on the procedural obligations reflected in the EIA Directive.

Boxus firmly establishes the constitutional foundation status of Article 9(2) Aarhus Convention and equally confirms that the Court feels more comfortable identifying positive procedural obligations if and when secondary Union legislation outlines a basic procedural framework that requires implementation or transposition in the national legal orders. The following table highlights the different constitutional foundations identified and their impact on the scope of effective judicial protection and national procedural autonomy arguments:

Constitutional foundation	**Specific supporting foundations**	**National procedural autonomy**	**Effective judicial protection**
Article 19(1) TEU; Article 47 CFR	ECHR (*DEB*)	confined	preceding positive obligations
Article 47 CFR + secondary legislation	secondary Union legislation *(Vebic, Samba Diouf)*	confined	preceding positive obligations
specific international instruments (Article 216(2) TFEU)	Aarhus convention *(Lesoochranárske)*	confined	preceding positive obligations
specific international instrument + secondary legislation	Aarhus Convention and EIA Directive (*Boxus*)	confined	preceding positive obligations
Article 19(1) TEU in absence of direct EU intervention	'absence of intervention' test ? *(Rosado Santana, Inter Environnement Wallonie)*	basic principle	primacy trigger + embedded positive obligations

86 Case C-439/08 *Vebic*, judgment of 7 December 2010, not yet reported, para. 64.

The abovementioned table shows that the Court quite consistently[87] aims to ground its identification of positive procedural obligations in both constitutional and secondary Union law provisions. To the extent that a specific international instrument and/or secondary Union legislation containing a reference to effective judicial review can be found, the Court feels more ready to extend the scope of EU law by identifying positive procedural obligations confining the scope of national procedural autonomy. These obligations necessarily precede any discussion on procedural autonomy and equivalence or effectiveness considerations relied on in that regard. In the absence of specific international instruments or supporting secondary legislation, the Court does not however shy away from directly relying on the Charter to infer procedural obligations or to assess existing systems of judicial review. In those instances however, the Court implicitly relies on the provisions and case law surrounding the ECHR as an additional foundation to flesh out positive obligations reflected in the Charter. National procedural autonomy arguments only come into play when no EU procedural intervention could be detected or when all positive obligations inferred from EU law have already been complied with.

Whilst the abovementioned table demonstrates the wide variety of constitutional alternatives reflected in recent case law, it leaves two questions unanswered. The first question concerns the division of roles between the different types of effective judicial protection claims. It is unclear whether or not the Court chooses to rely on the Charter as a general source of procedural obligations only if no concrete international instrument and/or secondary legislation is available. On the one hand, the Court's references in *DEB* and *Chalkor* appear to suggest that this is the case. The total absence of references to the Charter in *Vebic*, *Lesoochranárske*and *Boxus* on the other hand do not however directly support that claim. Although it could be reasonably assumed that the Court relies on the most specific explication of fundamental rights in the context of a case, the actual extent of the Charter's reach in that regard remains uncertain.

The second question concerns the determination of concrete constitutional boundaries between effective judicial protection and national procedural autonomy arguments. Although *Boxus* demonstrated that the Court is willing to extend the scope and realm of its effective judicial protection obligations, national procedural autonomy played a subsidiary role in the Court's reasoning.[88] Some recent cases even grant a leading role to national procedural autonomy. In *Rosado Santana*, the Court referred to national procedural autonomy in a case on time limits governing proceedings against the outcome of competitions

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87 *Vebic* is an exception in that regard, as the Court only vaguely refers to fundamental rights in that respect. The Advocate General referred to the ECHR in his opinion, see Opinion of Advocate General Mengozzi in Case C-439/08 *Vebic*, judgment of 7 December 2010, not yet reported, para. 84.

88 *Boxus*, para. 52.

in the Andalusian civil service. Since the EU law provisions at stake in that case did not directly govern time limits, the Court delegated the matter to national procedural autonomy. It nevertheless concluded that should the application of the time limits result in the impossibility for a claimant to assert rights under EU law, the starting point of the time limit should be placed at a later stage.[89] In doing so, the Court also imposed a direct positive obligation on national legal orders. That obligation did not directly establish a new rule of national procedure, but mandated a modification in the scope of application of an existing procedural provision. In *Inter-Environnement Wallonie*, the Court adopted a similar obligation by mandating national judges to proceed in accordance with national law should the latter want to maintain the effects of an annulled administrative order.[90] In both instances, the Court refrained from directly relying on the principle of effective judicial protection. Rather, it embedded the establishment of procedural obligations in national procedural autonomy and its accompanying negative condition of effectiveness. These judgments demonstrate that national procedural autonomy presents an equally relevant attribute to impose positive procedural obligations in cases where a direct judicial protection trigger cannot be found in the panoply of constitutional bases.

The Court appears to ground its choice for national procedural autonomy or effective judicial protection arguments in an 'absence of EU intervention' framework. EU law does not directly pronounce the right to an effective remedy or establish particular rules of procedure, therefore national law continues to play a more significant role.[91] That test nevertheless remains problematic in its own way. It is unclear when EU law directly intervenes in the procedural realm and when it does not, especially since the scope of the Charter's right to effective judicial protection remains open to debate.[92] *Boxus* is only partially guiding in that respect. It emphasises that specific international instruments and/or secondary legislation enable the Court to impose more direct procedural obligations on national legal orders, such as the requirement for national judges to disapply a national law to allow the review of procedural guarantees in EU law. It does

89 Case C-177/10 *Francisco Javier Rosado Santana*, judgment of 8 September 2011, not yet reported, para. 97-99.

90 Case C-41/11 *Inter-Environnement Wallonie*, judgment of 28 February 2012, not yet reported, para. 56-57.

91 Case C-177/10 *Francisco Javier Rosado Santana*, judgment of 8 September 2011, not yet reported, para. 87; Case C-41/11 *Inter-Environnement Wallonie*, judgment of 28 February 2012, not yet reported, para. 42, stating that 'in the absence of provisions in that directive on the consequences of infringing the procedural provisions which it lays down, it is for the Member States to take, within the sphere of their competence, all the general or particular measures necessary to ensure [that EU procedural law requirements are complied with]'.

92 For a broad reading of the Charter's scope of application, see Opinion of Advocate General Kokott in Case C-17/10 *Toshiba Corporation and Others*, para. 103-106, arguing that the application of national competition law by an EU Member State is sufficient for the latter to be bound by the Charter.

not however explicate how precise or elaborate references included in those instruments need to be and why the Court continues to refer to national procedural autonomy in the judgment. The expanding set of constitutional bases justifying the creation of positive effective standards of judicial protection nevertheless appears to suggest that different constitutional bases reflect different standards of intervention in the national procedural realm.

6 Conclusion

Boxus complements recent Court judgments directly imposing *positive procedural obligations* on Member States. In particular, the judgmento-bliges national judges to assess whether a national legislative act falls within the exception of Article 1(5) EIA Directive. To the extent that it does not, EU law directly mandates national judges to disregard that national act and proceed with reviewing an underlying administrative act on its conformity with the procedural standards reflected in the EIA Directive. In so formulating the obligations, the Court expressly establishes that effective judicial protection requirements precede the traditional procedural autonomy arguments. Additionally, it demonstrates the importance of supporting constitutional foundations that co-determine the intensity of procedural standard-setting engaged in by the Court. At the same time however, *Boxus* leaves important issues unanswered, most notably the concrete criteria guiding the Court's absence of EU intervention test separating effective judicial protection from national procedural autonomy arguments.