

National Procedural Autonomy and General EU Law Limits

Rob Widdershoven*

Professor of European Administrative Law at Utrecht University

Abstract

This article examines the recent approach of the European Court of Justice of the EU towards the applicability of procedural national law in cases falling within the scope of Union law. It argues that the Court increasingly assesses such rules within the framework of the principle of effective judicial protection, as bindingly codified in Article 47 of the Charter of Fundamental Rights of the EU since December 2009. This test is gradually replacing the rather deferential test on the Rewe principles of equivalence and effectiveness and implies a further limitation of procedural autonomy of the Member States. The reason for the shift seems to be the necessity to coordinate the Court's case law on Article 47 CFR with the case law of the European Court of Human Rights on Article 6 ECHR, because this coordination requires the application of a similar standard by both European Courts. As a result, the importance of, in particular, the Rewe principle of effectiveness, has already decreased to a considerable extent and might decrease further in future. Nevertheless, it is not to be expected that this standard will be abolished completely. First, because it may provide an adequate standard for assessing procedural issues that are not related to effective judicial protection or Article 47 CFR. Secondly, because incidentally it may be used by the Court for modifying national procedural law with a view to the effective application of substantive EU rules.

I. Introduction

Although the EU legislator is increasingly Europeanising national procedural law in specific areas of law by means of secondary legislation,¹ the main general EU standards governing the applicability of national procedural law in other areas of law are still the *Rewe* principles of equivalence and ef-

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¹ See for an overview of relevant EU legislation, M. Eliantonio and E. Muir, 'Concluding Thoughts: Legitimacy Rationale and Extent of the Incidental Proceduralisation of EU Law' [2015] Review of European Administrative Law 177; S. Prechal, 'Europeanisation of National Administrative Law' in J.H. Jans, S. Prechal and R.J.G.M. Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 43-71, and the other contributions to this volume.

fectiveness and the EU principle of effective judicial protection.² Since the entry into force of the Lisbon Treaty in December 2009, the latter principle has been bindingly codified in Article 47 Charter of Fundamental Rights ('CFR'); it is implied in Article 19(1) TEU as well. The relation between, in particular, the principle of effectiveness and the principle of effective judicial protection has been rather unclear for a considerable time.³ However, in recent case law the Court has reconsidered and clarified this relation to some extent, as it increasingly assesses national procedural law in the light of the principle of effective judicial protection, instead of *Rewe* effectiveness. The assessment of national law on effective judicial protection is more stringent than the assessment on the effectiveness principle, leaving less procedural autonomy to the Member States. The main purpose of this article is to examine this relatively recent trend and to provide for guidance as regarding the possible Court's approach in future situations.⁴ Moreover, some remarks will be made about the relation between the *Rewe* principles and the principle of effective judicial protection on one hand and the EU legislative provisions Europeanising procedural rules in specific areas of law on the other.

Hereafter, the article will proceed as follow. First, an overview of the origin and content of the *Rewe* principles and the relation of these principles with the EU legislative provisions Europeanising procedural law is provided (section 2). Next, the principle of effective judicial protection is examined (section 3). This examination includes the origin, evolution and current foundation of the principle and its relationship with the EU legislative provision mentioned, but mainly concentrates on the growing importance of the principle and Article 47 CFR. Thereafter, it is analysed which role may still be left to the *Rewe* prin-

² Cf. for instance D. Curtin and K. Mortelmans, 'Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script' in D. Curtin and T. Heukels (eds), *Institutional Dynamics of European Integration. Essays in Honour of H.G. Schermers*, Vol. 2 (Nijhof 1994) 423-466; W. van Gerven, 'Of Rights, Remedies and Procedures' [2000] *Common Market Law Review* 501-506; M. Dougan, '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, OUP 2011) 407-438; P. Craig, *EU Administrative Law* (OUP 2012) 703-726; K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (Oxford 2014) 4.01-4.64; S. Prechal, 'Europeanisation of National Administrative Law' in J.H. Jans, S. Prechal and R.J. G.M. Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 39-71; B. Babunska, *Effective Judicial Protection and State Liability in EU Law. Implications for the Macedonian Judiciary* (Phd thesis Utrecht University 2019, <https://www.uu.nl/en/university-library/services/utrecht-university-repository>).

³ S. Prechal and R.J.G.M. Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' [2011] *Review of European Administrative Law* 31-50; J. Krommendijk, 'Is there light on the horizon? The distinction between "Rewe effectiveness" and the principle of effective judicial protection in Article 47 of the Charter after Orizzonte' [2016] *Common Market Law Review* 1395.

⁴ See in-depth on the constitutional implications of the trend, the contribution to this volume by Matteo Bonelli, 'Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature'.

ciples of equivalence and effectiveness (section 4). Section 5 summarizes most important findings.

2. Procedural autonomy and the *Rewe* principles

2.1. Origins and content

In the landmark case of *Rewe* (1977),⁵ the ECJ declared for the first time that, in the absence of EU rules governing the matter, it is for the domestic legal systems of the Member States to designate the courts having jurisdiction and to determine the procedural conditions governing the action at law intended to ensure the protection of the citizens' rights derived from EU law, provided that the requirements of equivalence and effectiveness are met.⁶ Nowadays, the ECJ connects the *Rewe* statement explicitly to the principle of procedural autonomy.⁷ The latter principle implies that, unless the EU has regulated otherwise, the exercise of Union law takes place within the framework of national procedural law. According to the equivalence principle, these rules cannot be less favourable than those governing similar domestic actions. In addition, on the ground of the principle of effectiveness these rules cannot render virtually impossible or excessively difficult the exercise of the rights or obligations conferred or imposed by EU law. Observance of both requirements is based on the principle of sincere cooperation of Article 4(3) TEU.⁸

⁵ Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* EU:C:1976:188.

⁶ As this article discusses procedural matters, the topic of the designated court is not taken aboard as well. In the case law the ECJ assesses the designated court normally within the *Rewe* framework in a similar way as it assesses procedural matters. See, for example, Case C-93/12 *ET Agrokonsulting-o4-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie' – Razplashatelna agentsia* EU:C:2013:432, and Case C-317 to 320/08 *Alassini* EU:C:2010:146. Note, however, that on the basis of the principle of primacy national judicial, quasi-judicial and administrative bodies should have the jurisdiction to disapply a rule of national law that is contrary to EU law. See Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979, and the case note of N. Lazzarini, “Jurisdiction of Statutory Bodies to Disapply National Law, or Nothing”, *Procedural Primacy taking over Procedural Autonomy* [2019] 1 *Review of European Administrative Law* 197.

⁷ F.i. Case C-93/12 *ET Agrokonsulting-o4-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie' – Razplashatelna agentsia* EU:C:2013:432; Case C-234/17 *XC and Others v General-prokuratur* EU:C:2018:853.

⁸ F.i. Case C-249/11 *Hristo Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti* EU:C:2012:608; Case C-93/12 *ET Agrokonsulting-o4-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie' – Razplashatelna agentsia* EU:C:2013:432; Case C-234/17 *XC and Others v Generalprokuratur* EU:C:2018:853. See on this legal base, A. Wallerman, ‘Towards an EU law doctrine on the exercise of discretion in national courts? The Member States’ self-imposed limits on national procedural autonomy’ [2016] *Common Law Market Review* 342.

The principle of procedural autonomy and the *Rewe* principles limiting the autonomy apply to both, national procedures for administrative decision-making and to adjudicatory procedures before the national courts.⁹ This article concentrates on the latter. The main focus of the *Rewe* principles is the effective application and enforcement of the substantive EU rules in question.¹⁰ As regards the principle of effectiveness this seems obvious, as it results from the definition of the principle. However, the equivalence principle contributes to this focus as well as it prohibits discrimination of EU claims. Depending on the content of the EU rules at stake, the test on the effectiveness principle can be favourable or detrimental for individuals. If these rules confer rights on individuals, the application of the principle is favourable, as the principle will strengthen observance of these rights. If the rules impose obligations, the principle may work against their interests. In this respect this principle limits, for instance, the application in EU cases of national legal principles or fundamental rights, offering more protection than their EU equivalents, if this additional protection may compromise the effective application of the rules in question.¹¹ In addition, together with the principle of dissuasiveness, the effectiveness principle provides the EU legal basis for the Member States' obligation to effectively enforce EU rules, an obligation which may go further than the obligation to enforce under national law.¹² In procedural matters, application of *Rewe* effectiveness is often but not always favourable for individuals.¹³

2.2. Principle of equivalence

In its case law, the ECJ has developed a two-step test for applying the equivalence principle.¹⁴ In the first step, it has to be assessed whether

⁹ Cf. Case C-349/07 *Sopropé - Organizações de Calçado Lda v Fazenda Pública* EU:C:2008:746, where the Court determines that the detailed application of the principle of the rights of defence by administrative authorities (f.i. the time limits for preparing the hearing) is a matter of national law, within the limits of the *Rewe* principles.

¹⁰ Cf. S. Prechal and R.J.G.M. Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' [2011] *Review of European Administrative Law* 31.

¹¹ Cf. Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107, and Case C-105/14 *Tarico* EU:C:2015:55, on the limitation of national fundamental rights. See Case C-205 to 215/82 *Deutsche Milchkontor* EU:C:1983:233; and Case C-383 to 385/06 *ESF* EU:C:2008:165, on the limitation of the national principle of legitimate expectations.

¹² See already Case C-68/88 *Commission of the European Communities v Hellenic Republic* [1989] EU:C:1989:339.

¹³ See for a case in which the application is detrimental to the judicial protection of an individual, Case C-2/08 *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpiclub Srl* EU:C:2009:506. See *infra* 4.2 for more details.

¹⁴ S. Prechal, 'Europeanisation of National Administrative Law' in J.H. Jans, S. Prechal and R.J.G.M. Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 50-51. See Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* EU:C:1998:577; Case C-63/08 *Virginie Pontin v T-Comalux SA* EU:C:2009:666; Case C-234/17 *XC and Others v Generalprokuratur* [2018] ECLI:EU:C:2018:853.

the EU claim in question is comparable with the alleged similar domestic claim, taking into account ‘the purpose, the cause of action and the essential characteristics’ of both claims (comparability test).¹⁵ Only if this test is passed the second step becomes relevant, within which it is tested whether the rules applicable to the EU claim are equivalent to those applied to the comparable domestic claim (equivalence in the strict sense). The latter test should be conducted objectively, in the abstract, taking into account the role played by those rules in the procedure as a whole, the conduct of that procedure and any special features of those rules.¹⁶

The two-step equivalence test has to be conducted by the national courts, if necessary, after referring a preliminary question to the ECJ. From its case law it is clear that the Court leaves the Member States considerable discretion as regards the test.¹⁷ Therefore, it is generally not very difficult to comply with the principle.¹⁸ In addition, the ECJ has determined that the Member States are not obliged to apply their most favourable national procedural rule to actions based on EU law.¹⁹ Finally, it is noted that the equivalence principle requires a comparison between the EU law action and the comparable domestic action, and does not apply internally to national actions available in the different disciplines of law. Therefore, the principle does not require that in national cases with an EU dimension the rules applicable to private law actions have to be applied in administrative law procedures as well.²⁰

¹⁵ F.i. Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* EU:C:1998:577; Case C-63/08 *Virginie Pontin v T-Comalux SA* EU:C:2009:666; Case C-93/12 *ET Agroconsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond ‘Zemedelie’ – Razplashtatelna agentsia* EU:C:2013:432; Case C-234/17 *XC and Others v Generalprokuratur* EU:C:2018:853.

¹⁶ See, for example, Case C-78/98 *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc* EU:C:2000:247; Case C-63/08 *Virginie Pontin v T-Comalux SA* EU:C:2009:666.

¹⁷ See, for example, Case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* EU:C:1998:401.

¹⁸ S. Prechal, ‘Europeanisation of National Administrative Law’ in J.H. Jans, S. Prechal and R.J.G.M. Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing, Groningen 2015) 51-52. Clear violations of the principle are scarce. See for examples Case 240/87 *C. Deville v Administration des impôts* EU:C:1988:349, and Case C-118/08 *Transportes Urbanos y Servicios Generales SAL v Administración del Estado* EU:C:2010:39.

¹⁹ Case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* EU:C:1998:401; Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* EU:C:1998:577; Case C-63/08 *Virginie Pontin v T-Comalux SA* EU:C:2009:666.

²⁰ Case C-69/14 *Dragos Constantin Târșia v Statul român and Serviciul Public Comunitar Regim Permise de Conducere și Immatriculare a Autovehiculelor* EU:C:2015:662; Case C-61/64 *Orizzonte Salute* EU:C:2015:655.

2.3. Principle of effectiveness

According to the effectiveness principle, national procedural law applicable to EU claims must not render virtually impossible or excessively difficult the exercise of EU rights. Observance of the effectiveness principle prevails above observance of equivalence.²¹ Thus, applying equivalent procedural rules in EU and purely domestic cases is not allowed if these rules are inconsistent with effectiveness. As regards the effectiveness principle, the Court applies two different kinds of tests.

First, in several cases the ECJ conducts a *direct test* on whether a national procedural rule renders virtually impossible or excessively difficult the exercise of an EU right. This test constituted the common approach until the introduction of the procedural rule of reason test in 1995 (the second test, see below), but nowadays is still applied, though less often. In most cases the direct test on effectiveness does not lead to the amendment or disqualification of the procedural rules concerned. From the combined reading of the cases of *Upjohn* and *Arcor*,²² it could for instance be derived that, up until quite recently,²³ the effectiveness principle allowed the national courts to apply their very divergent standards of judicial scrutiny – more in particular the marginal test on *Wednesbury* unreasonableness of the UK courts,²⁴ and the strict legality control of margins of interpretation exercised by the German courts²⁵ – in similar EU cases. Only inci-

²¹ See already Case C-199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* EU:C:1983:318.

²² Case C-120/97 *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others* EU:C:1999:14; Case C-55/06 *Arcor AG & Co. KG v Bundesrepublik Deutschland* EU:C:2008:244. See R.J.M.G. Widdershoven, 'The European Court of Justice and the Standard of Judicial Review' in Jurgen de Poorter *et al* (eds), *Judicial Review of Administrative Discretion in the Administrative State* (T.M.C. Asser Press – Springer 2019) 39-61, more in particular 41-44; M. Eliantonio, 'The Impact of EU Law on Access to Scientific Knowledge and the Standard of Review in National Environmental Litigation: A Story of Moving Targets and Vague Guidance' [2018] *European Energy and Environmental Law Review* 115, 117.

²³ As will be elaborated in section 3.5, the Court's approach on the intensity of national judicial scrutiny in EU cases is gradually changing.

²⁴ The UK standard of *Wednesbury unreasonableness* was set in Court of Appeal 7 November 1947, *Associated Provincial Picture Houses v Wednesbury Cooperation* [1948] 1 KB 223. According to it a court only intervenes if the administrative decision constitutes a misuse of power or is 'irrational', meaning that it is 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' (cf. Lord Diplock in *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] 1 AC 374). So, it refers to blatant or manifest errors. See for more details, K. Thompson, 'Administrative Law in the United Kingdom' in R. Seerden (ed), *Comparative Administrative Law. Administrative Law of the European Union, Its Member States and the United States* (Intersentia 2018) 246-253.

²⁵ See H. Pünder and A. Klafki, 'Administrative Law in Germany' in R. Seerden (ed), *Comparative Administrative Law. Administrative Law of the European Union, Its Member States and the United States* (Cambridge-Antwerp-Portland, Intersentia 2018) 88-90. According to German law indefinite legal terms such as 'public interest' or 'public safety' are fully reviewed by the courts. Moreover, only in exceptional cases the German courts recognize a 'margin of interpretation' (*Beurteilungsraum*), which is controlled with limited scrutiny.

dentally the direct test on *Rewe* effectiveness had repercussions for national procedural law. An example is provided by the case of *San Giorgio*.²⁶ In the case, the effective exercise by a company of its EU right to have certain charges to be repaid, was limited by national rules of evidence, which placed the burden of proof that the charges had not been passed to other persons on the company concerned and allowed written evidence only. According to the ECJ, these limitations made the exercise of the EU right of repayment excessively difficult or virtually impossible, and were inconsistent with the effectiveness principle. Another example is offered by the case of *Boiron*.²⁷ In this case it was impossible for the company to produce evidence substantiating a state aid claim, as it could not dispose of the relevant data, being in possession of the companies receiving the alleged state aid. To ensure compliance with the principle of effectiveness, the ECJ ordered the national court to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, and in particular the production by one of the parties or a third party of a particular document.

In 1995, the Court introduced a second test to assess observance of the effectiveness principle, namely the so-called *procedural rule of reason test*.²⁸ This test requires a balancing act between the importance of the national procedural provision limiting the exercise of Union law and the effective application of EU law. In doing so the national court should take into account ‘the role of the [national] provision in the procedure, its progress and its special features, viewed as a whole’ and ‘the basic principles of the domestic judicial system, such as the rights of defence, the principle of legal certainty and the proper conduct of procedure’.²⁹ In most cases the assessment boils down to whether the procedural provision can reasonably be justified by the basic principles mentioned, a question which in most cases is answered in the positive.

The procedural rule of reason test was, in fact, already applied in the *Rewe* case,³⁰ where the Court considered the application of (reasonable) fatal time limits not to be inconsistent with the effectiveness principle, as such time limits

²⁶ Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* EU:C:1983:318.

²⁷ Case C-526/04 *Laboratoires Boiron SA v Union de recouvrement des cotisations de sécurité sociale et d’allocations familiales (Urssaf) de Lyon*, assuming the rights and obligations of the *Agence centrale des organismes de sécurité sociale (ACOSS)* EU:C:2006:528. See for a more recent similar direct test on *Rewe* effectiveness with a similar outcome, Case C-437/13 *Unitrading Ltd v Staatssecretaris van Financiën* EU:C:2014:2318.

²⁸ Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* EU:C:1995:437; Case C-430 to 431/93 *Van Schijndel* EU:C:1995:441. The term ‘procedural rule of reason test’ is coined by S Prechal, ‘Community Law in National Courts: the Lessons from Van Schijndel’ [1998] *Common Market Law Review* 681.

²⁹ Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* EU:C:1995:437; Case C-430 to 431/93 *Van Schijndel* EU:C:1995:441.

³⁰ Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* EU:C:1976:188.

could be justified by the principle of legal certainty, a principle which protects both the interests of third parties and of the administrative authorities. In a similar vein, the Court decided in the case of *Kühne & Heitz* and subsequent case law, that administrative authorities are in principle not under an EU law obligation to review final administrative decisions being inconsistent with EU law, because non-revision is justified by the legal certainty principle.³¹ This line of reasoning was extended to final judicial judgments being contrary to Union law. As a matter of principle, such judgments do not have to be reviewed as well, as non-revision is justified by the principles of *res judicata* and legal certainty.³² The latter principles even prevail if the final judgment is possibly contrary to a fundamental CFR right, more in particular the principle of *ne bis in idem* (Art. 50 CFR).³³ It should, however, be noted that under exceptional circumstances application of the procedural rule of reason test may lead to obligatory review of final decisions or judgments, as the interest of the effective application of EU law outweighs the interest of legal certainty or of the principle of *res judicata*. These cases are examined in section 4.2.

Moreover, the procedural rule of reason test is applied by the Court in *Van Schijndel* and *Van der Weerd* to decide on the question whether national civil and administrative courts are allowed to apply their national restrictive provisions on *ex officio* application in EU cases.³⁴ In both cases the ECJ allowed the application, as the opposite, namely taking into consideration by the national court of its own motion of issues not put forward by the parties, could infringe the rights of defence and the proper conduct of proceedings and might lead to delays inherent in the examination of new pleas.³⁵

³¹ Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* EU:C:2004:17; Joined Cases C-392/04 and C-422/04 *1-21 Germany and Arcor* EU:2006:586; Case C-249/11 *Hristo Byankov v Glaven sekretar na Ministerstvo na vnatreshnite raboti* EU:C:2012:608. See for the current state of affairs, R. Ortley and R.J.G.M. Widdershoven, 'Judicial Protection' in J.H. Jans, S. Prechal and R.J.G.M. Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 389-396.

³² Case C-224/01 *Gerhard Köbler v Republik Österreich* EU:C:2003:513; Case C-234/04 *Kapferer* EU:C:2006:22; Case C-213/13 *Impresa Pizzarotti & C. SpA v Comune di Bari and Others* EU:C:2014:2067; Case C-69/14 *Dragos Constantin Târșia v Statul român and Serviciul Public Comunitar Regim Permisi de Conducere și Inmatriculare a Autovehiculelor* EU:C:2015:662.

³³ Case C-234/17 *XC and Others v Generalprokuratur* EU:C:2018:853.

³⁴ Case C-430/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* EU:C:1995:441; Joined Cases C-222/05 to 225/05 *Van der Weerd* EU:C:2007:318. In addition, in Case C-455/06 *Heemskerk BV and Firma Schaap v Produktschap Vee en Vlees* EU:C:2008:650, the Court ruled that national courts are (certainly) not under an obligation to apply EU law *ex officio* if this may lead to a *reformatio in peius*. According to the ECJ, within the procedural rule of reason test, the prohibition of *reformatio in peius* is justified by the principles of the rights of defence, legal certainty and legitimate expectations.

³⁵ Case C-222 to 225/05 *Van der Weerd* EU:C:2007:318, para. 38.

2.4. The Rewe requirements and regulatory Europeanisation of procedural law

As stated in section 1, in recent years the EU legislator is increasingly regulating aspects of adjudication by the national courts in specific areas of law by means of secondary Union law.³⁶ Due to national procedural autonomy only existing in the absence of EU rules governing the procedural matter at issue (section 2.1), this regulatory Europeanisation of procedural law obviously implies a diminishing of procedural autonomy. Procedural autonomy in itself does not limit the possibility to regulate aspects of national procedures and remedies in any way. Therefore, procedural autonomy does not constitute an EU *legal* principle,³⁷ as legal principles have the status of primary EU law and prevail above secondary Union rules. Procedural autonomy could perhaps better be labelled as a mere point of departure (from which the EU legislator may deviate).

In theory, EU regulatory interventions in procedural law, in specific areas of law, may be restricted by the three basic principles which limit the EU competence to regulate in general, the principles of conferral, subsidiarity and proportionality (Article 5 TEU). In practice these principles do not seem to constitute very serious obstacles against EU regulatory interferences with national procedural law.³⁸ As regards the principle of conferral, the specific TFEU legal base for establishing substantive rules in a certain area of law or the general legal base for harmonizing substantive law provided in Article 115 to 117

³⁶ For instance in Directive 2013/32/EU, on common procedures for granting and withdrawing international protection (recast), OJ 2013, L 180/60, prescribing in asylum cases f.i. a full and *ex nunc* examination of both facts and law by national courts of first instance; Directive 2003/35/EC, modifying Directives 85/337/EEC and 96/61/EC, in order to implement the Aarhus Convention provisions on wide access to justice in environmental matters for the 'public concerned' and NGO's, OJ 2003, L 156/17; Directive 2007/66/EC, on review procedures concerning the awards of public contracts. OJ 2007, L 335/31, prescribing the judicial remedies that should be available in the Member States in the area of public procurement. See for more details, the other contributions to this Special Issue.

³⁷ Cf. M. Bobek, 'Why there is no principle of "Procedural Autonomy" of the Member States' in B. de Witte and H. Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2011).

³⁸ Specific case law confirming this statement in relation to procedural rules does not exist. From the case law concerning arguably even more intrusive EU regulatory interferences with national enforcement it can be derived that the Court's assessment of the Article 5 TEU principles is rather deferential. Cf. Case C-240/90 *Federal Republic of Germany v Commission of the European Communities* EU:C:1992:408, where the Court recognized the EU competence to prescribe mandatory national imposition of strict administrative sanctions in agricultural matters on the basis of (now) Article 40(2) and Article 43(2) TFEU, and Case C-176/03 *Commission of the European Communities v Council of the European Union* EU:C:2005:542, in which the Court allowed a directive obliging the MS to employ criminal sanctions in respect of violations of specific EU environmental rules, to be based on (now) Article 191 and 192 TFEU, at least insofar these sanctions are necessary in order to ensure that these rules are fully effective.

TFEU can generally be used for regulating procedural matters as well.³⁹ In addition, the principles of subsidiarity and proportionality are easily fulfilled if the procedural rules arguably may be necessary for an effective and more or less uniform national application of the substantive rules in question. To avoid misunderstandings, the foregoing does not imply a (dis)approval of the growing EU regulatory interference with national procedural law. What is stated is that, if the EU legislator has established such rules, it is improbable that they will not 'survive' the Court's deferential test on Article 5 TEU. Whether, in what areas of law and in what detail the EU legislator should Europeanise national procedural law, is another question which is not discussed in this article.⁴⁰

If and insofar the EU legislator has laid down specific rules regarding procedural issues in a certain area of law, these rules prevail above national procedural rules. If the latter diverge from the EU prescribed rules this constitutes a direct conflict between national and EU law, as both regulate the same procedural issue in a different way.⁴¹ Such direct conflicts have to be solved by setting aside the inconsistent national rules on the basis of the principle of primacy.⁴² Moreover, one would expect the principles of equivalence and effectiveness to no longer be relevant. As regards equivalence, this expectation is correct. After all, the national courts should apply the EU rules prescribed and set aside diverging rules applicable in purely domestic cases, irrespective of whether they

³⁹ In Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* EU:C:1976:188, the Court itself refers to (now) Articles 115 to 117 TFEU, as a legal base for harmonizing procedural matters as well. Cf. D. Curtin and K. Mortelmans, 'Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script' in D. Curtin and T. Heukels (eds), *Institutional Dynamics of European Integration. Essays in Honour of H.G. Schermers*, Vol. 2 (Nijhof 1994) 434.

⁴⁰ See for my opinion, J.H. Jans, S. Prechal and R.J.G.M. Widdershoven, 'Summing up' in J. H. Jans, S. Prechal and R.J.G.M. Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing: Groningen 2015) 489-490. In short, the EU should only regulate procedural matters if really necessary to ensure the protection of substantive EU rights in a certain area of law. In general it may be presumed that national procedural law, which has proven its worth over the course of years, is adequate enough to be applied in EU cases as well.

⁴¹ Direct conflicts are to be distinguished from indirect conflicts, existing if national procedural law limits the application of EU law, which are solved by applying the *Rewe* principles of equivalence and effectiveness. Cf. R. Ortlep and M. Verhoeven, 'The principle of primacy versus the principle of national procedural autonomy' [2012] NALL 1; M.J.M. Verhoeven, *The Costanzo Obligation. The Obligations of National Administrative Authorities in the Case of Incompatibility between National Law and European Law* (Intersentia 2011) 79-107, with references.

⁴² Cf. Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* EU:C:2007:434, where the Court sets aside the *res judicata* of a national court decision on the basis of the primacy of Article 108 TFEU, because the national court applied a (pretence) competence to assess a state aid claim, while Article 108 TFEU reserves the competence to conduct this assessment exclusively for the Commission. See Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979, from which it can be derived that a conflict between a national rule excluding the jurisdiction to set aside national law contrary to EU law and the principle of primacy itself is considered a direct conflict which is solved by setting aside the national rule on the basis of (again) primacy.

would have discriminated EU claims or not. However, from *Trianel* it appears that the principle of effectiveness might still have some impact,⁴³ as it may strengthen the EU law prescribed procedural rules. In it the Court found the application of the strict German *Schutznorm* requirement in respect of the access to justice of NGOs in environmental matters to be inconsistent with both the Aarhus Directive objective of giving the public concerned wide access to the justice, and the principle of effectiveness. Apparently, the Aarhus Directive itself did not provide a sufficient reason for the judgment.

3. The principle of effective judicial protection

3.1. Origin, evolution and current foundation

The principle of effective judicial protection implies that individuals should be able to enforce all rights conferred on them by Union law before a court of law. The principle was recognized as a general principle of EU law in the seminal cases of *Johnston* and *Heylens*,⁴⁴ as it underlies the constitutional traditions common to the Member States and is also laid down in Article 6 and 13 ECHR. The principle applies both to the judicial protection offered by the national courts acting as *juge du droit commun* in EU cases, and to the judicial protection ensured by the Union courts. Moreover, the principle may have a composite nature, meaning that in cases of composite administration of EU law, observance of it is partly (within the limits of Article 263(4) TFEU) a matter for the Union courts and should, for the other part, be guaranteed by the national courts who are allowed or obliged to refer questions of interpretation and validity of Union law to the ECJ (Article 267 TFEU).⁴⁵ As a whole both judicial protection venues (should) offer – in the wordings of the ECJ – ‘a complete system of legal remedies in EU cases, necessary to respect the rule of law’.⁴⁶

⁴³ Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* EU:C:2011:289.

⁴⁴ Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206; Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* EU:C:1987:442.

⁴⁵ Case C-97/91 *Oleificio Borelli SpA v Commission of the European Communities* EU:C:1992:491; Case C-562/12 *Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007-2013 Seirekomitee MTÜ* EU:C:2014:2229.

⁴⁶ Cf. Case C-294/83 *Parti écologiste “Les Verts” v European Parliament* EU:C:1986:166, para. 23; Case C-50/00P *Unión de Pequeños Agricultores v Council of the European Union* EU:C:2002:462; Case C-583/11P *Inuit Tapiriit Kanatami and Others v Parliament and Council* EU:C:2013:625. Cf. K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (Oxford 2014) 1.03 and 1.04, and R. Ortlep and R.J.G.M. Widdershoven, ‘Judicial Protection’ in J.H. Jans, S. Prechal and R.J.G.M. Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 336-339.

With the entry into force of the Lisbon Treaty, the principle has acquired a written primary law status in two respects. First, the principle has been codified as a fundamental right in Article 47 CFR, stating that everyone whose rights and freedoms guaranteed by Union law are violated has the right to an effective remedy before a tribunal in compliance with the well-known requirements of independence, impartiality, fair trial et cetera. On the basis of Article 51(1) CFR, as interpreted by the ECJ in the case of *Åkerberg Fransson*. Article 47 CFR applies to national judicial protection in cases ‘within the scope of Union law’.⁴⁷ This wide category includes *inter alia* the implementation of specific rights and obligations prescribed by secondary or primary Union law, irrespective of whether the EU rules allow the Member States a wide discretion,⁴⁸ and the enforcement of such rights and obligations.⁴⁹ Moreover, the ECJ has not limited the scope of Article 47 CFR through a strict interpretation of the phrase ‘rights and freedoms guaranteed by Union law’.⁵⁰ If the case is within the scope of Union law, Article 47 CFR applies not only to possible violations of rights in a strict sense, but to the alleged unlawful imposition of obligations as well.⁵¹ A second written legal base for the principle of effective judicial protection is provided by Article 19(1) TEU, which requires the Member States to establish a system of legal remedies and procedures ensuring effective judicial protection in the fields covered by EU law. Article 19(1) TEU has a wider scope than Article 47 CFR, because, according to the Court, it does not require the particular case to be within the scope of Union law, but applies if national courts may be potentially called upon to apply or interpret Union law.⁵² As all national courts may

⁴⁷ Case C-617/10 *Åkerberg Fransson* EU:C:2013:105.

⁴⁸ Case C-403/16 *Soufiane El Hassani v Minister Spraw Zagranicznych* EU:C:2017:960.

⁴⁹ Also when the Union rules in question do not prescribe the national imposition of specific sanctions. See Case C-617/10 *Åkerberg Fransson* EU:C:2013:105; Case C-418/11 *Textdata Software* EU:C:2013:588, and in particular Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* EU:C:2017:373.

⁵⁰ See on this issue and the controversy regarding it between Advocate General Bobek on one hand (defending a strict interpretation in his Opinion in Case C-403/16 *Soufiane El Hassani v Minister Spraw Zagranicznych* EU:C:2017:960) and Advocates General Wathelet (Opinion in Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* EU:C:2017:2), Wahl (Opinion Case C-33/17 *Čepelník d.o.o. v Michael Vavti* EU:C:2018:311), and Prechal (in ‘The Court of Justice and Effective Judicial Protection: what has the Charter Changed’ in C Paulussen et al (eds), *Fundamental Rights in International and European Law. Private and Public Law Perspectives* (T.M.C. Asser Press 2016)), defending a wide interpretation, the contribution of Matteo Bonelli to this volume.

⁵¹ Case C-418/11 *Textdata Software* EU:C:2013:588; Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* EU:C:2017:373; Case C-403/16 *Soufiane El Hassani v Minister Spraw Zagranicznych* EU:C:2017:960.

⁵² Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* EU:C:2018:117, paras 29 and 40. See in-depth on the constitutional implications of this interpretation of Article 19(1) TEU for the judicial architecture in the EU legal order, the contribution of Matteo Bonelli to this volume.

potentially be confronted with cases with a EU dimension, Article 19(1) CFR seems to apply to the national judiciary as such.

In the case law of the ECJ, effective judicial protection has been linked to the rule of law since 1986.⁵³ This link has been reinforced by Article 19(1) TEU which, according to the ECJ, gives a concrete expression to the rule of law, stated in Article 2 TEU as one of the values on which the EU is founded.⁵⁴ Respect for the rule of law means that neither the EU institutions nor the Member States can avoid judicial review of the question whether the measures adopted by them are in conformity with EU law. The responsibility for ensuring this review in the EU legal order is with the CJEU and the national courts. As the focus of effective judicial protection is the rule of law, its application is, in principle, always favourable for individuals. In this respect the principle clearly differs from the *Rewe* principle of effectiveness.

Hereafter I will concentrate on the principle of effective judicial protection and Article 47 CFR, which will be used interchangeably. Both, the principle and Article 47 CFR do not constitute unfettered prerogatives which cannot not be limited or regulated in any way. In the pre-CFR era, the ECJ applied a (unwritten) judge-made limitation clause.⁵⁵ Nowadays, under the regime of Article 47 CFR, limitations are assessed under the written general CFR limitation clause of Article 52(1) CFR. Both clauses are similar, although the written clause may be a bit stricter, in particular because it explicitly requires that limitations are ‘provided for by law’. The judge-made and written limitation clauses resemble the procedural rule of reason test, conducted by the Court when assessing the effectiveness principle (section 2.3). However, the test on both clauses is more elaborate and demanding than the mild balancing act required by the latter.⁵⁶ While for the latter test it suffices that the national procedural rule limiting the application of EU right is justified by a general principle of law, such as legal certainty and the rights of defence, both clauses require, besides the test on the availability of a legal base implied in Article 52(1) CFR only, an explicit assessment of whether a restriction respects the essential content of

⁵³ Case C-294/83 *Parti écologiste “Les Verts” v European Parliament* EU:C:1986:166; Case C-50/00P *Unión de Pequeños Agricultores v Council of the European Union* EU:C:2002:462. See K. Lenaerts, ‘The rule of law and the coherence of the judicial system of the European Union’ [2007] CMLRev 1625.

⁵⁴ Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117, paras 31-33; Case C-284/16 *Achmea* EU:C:2018:158, para. 36.

⁵⁵ See for this judge-made clause, Case C-317/08 to C-320/08 *Alassini* EU:C:2010:146, para. 63. Under it restrictions are permitted provided that they ‘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’.

⁵⁶ Cf. already S. Prechal and R.J.G.M. Widdershoven, ‘Redefining the Relationship between “Rewe-effectiveness” and Effective Judicial Protection’ [2011] Review of European Administrative Law 31.

the fundamental right restricted, of whether it pursues a legitimate interest and is appropriate and necessary in the light of the interests and, finally, of the proportionality *stricto sensu* of the restriction in the case at hand.⁵⁷

3.2. Effective judicial protection and regulatory Europeanisation of procedural law

As regards the relation between the principle of effective judicial protection and the regulatory harmonisation of national procedural law by means of secondary Union law, it should first be noted that both the principle and Article 47 CFR enjoy the status of primary EU law, and prevail above inconsistent rules of secondary law. If the latter are contrary to the principle or Article 47 CFR, the ECJ may declare them invalid or circumvent them in another way. This is apparent from the cases of *Siples* and *Kofisa Italy*,⁵⁸ where Article 244 of the old Customs Code was at stake, granting the *exclusive* power to suspend the implementation of customs decisions to the national customs *authorities*. The Court ruled that this provision could not limit the principle of effective judicial protection and that according to the principle the national court are competent to grant interim relief as well. Therefore, Article 244 did not limit the power of the court to suspend a customs decision. Insofar the principle of effective judicial protection provides for an important safeguard against over-enthusiastic attempts by the EU secondary legislator to restrict effective national judicial protection.

In recent case law Article 47 CFR is used in a more positive way, namely as a means of interpretation strengthening the judicial protection prescribed by secondary legislation or by international treaties with the same purpose. The former is, for instance, at stake in the case of *Gnandi*,⁵⁹ where the Court ruled that the appeal procedure in first instance against a decision rejecting an application for international protection and ordering the asylum seeker to return

⁵⁷ See Case C-73/16 *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy* EU:C:2017:725, for a textbook example of the application of the limitation clause of Article 52(1) CFR, in relation to the question whether a Member State is allowed to make the exercise of an effective remedy before the national court as guaranteed by Article 47 CFR conditional upon the obligation to first exhaust a national appeal possibility before an administrative authority.

⁵⁸ Case C-226/99 *Siples* EU:C:2001:14; Case C-1/99 *Kofisa Italia Srl v Ministero delle Finanze, Servizio della Riscossione dei Tributi - Concessione Provincia di Genova - San Paolo Riscossioni Genova SpA* EU:C:2001:10.

⁵⁹ Case C-181/16 *Sadikou Gnandi v Belgian State* EU:C:2018:465. See for a similar strengthening of an EU regulatory requirement by means of Article 47 CFR, Case C-585/16 *Serin Alheto v Zamestnik-predsedaťel na Darzhavna agentsia za bezhantsitsia* EU:C:2018:584, where the Court applies an Article 47 CFR consistent interpretation of the obligation of first instance courts to conduct a 'full ex nunc examination of both facts and point of law', prescribed by Article 46(3) Directive 2013/32.

should, on the basis of the Return Directive and Procedure Directive, read in conjunction with the principle of *refoulement* (Article 18 and 19(2) CFR) and Article 47 CFR, have suspensory effect pending the outcome of appeal. As regards the strengthening of international law provisions aiming at wider access to justice in environmental matters, the cases of *Brown Bear II* and *Protect* are relevant.⁶⁰ In both the Court applied an Article 47 CFR consistent interpretation of Article 9(3) of Aarhus Convention, thus realising effective access to the court for NGOs in situations wherein national law limited this access in multiple ways.

3.3. Positive effects of effective judicial protection

In its case law, the Court has applied the principle of effective judicial protection in respect of access to the court, the institutional (impartiality, independence) and procedural (fair trial, reasonable time) guarantees and the available judicial remedies, and it still does. In addition, the principle may have certain effects on the preceding administrative procedure, in particular because it implies an obligation on the part of the national authority to give reasons for its decisions.⁶¹ This obligation is connected to effective judicial protection in two ways. It guarantees that the person concerned is able to defend his or her rights under the best possible circumstances and it enables the Court to ascertain whether the factual and legal elements on which the decision is based were present. The ECJ's assessment of the principle has always been more stringent than the test on *Rewe* effectiveness. Perhaps the biggest difference in this regard is that the test on effective judicial protection may have positive effects, forcing the Member States and their courts to provide for access and remedies not existing in national law.⁶²

Positive effects as regards access may be the consequence of upholding the complete system of legal remedies within the EU legal order. In *Borelli and Liivimaa Lihaveis MTÜ* it was decided that the Member States, in order to guarantee such a complete system, are obliged to provide for access to the national court against national preparatory acts and decisions of a committee es-

⁶⁰ Case C-243/15 *Lesoochránárske zoskupenie VLK v Obvodný úrad Trenčín* EU:C:2016:838, Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* EU:C:2017:987, respectively.

⁶¹ Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206; Case C-300/11 *ZZ v Secretary of State for the Home Department* EU:C:2013:363.

⁶² S. Prechal, 'Europeanisation of National Administrative Law' in J.H. Jans, S. Prechal and R.J.G.M. Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 56; P. Craig, *EU Administrative Law* (Oxford, OUP 2012) 725-726; W. van Gerven, 'Of Rights, Remedies and Procedures' [2000] CMLRev 501; M. Dougan, '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* (OUP 2011) 407-438; A. Arnall, 'The principle of effective judicial protection in EU law: an unruly horse' [2011] ELRev 51.

established by two Member States respectively, although such access was not allowed under national law, because both decisions within the scope of Union law could not be contested before the Union courts.⁶³ Similar effects may occur in respect of standing of individuals before the national courts. In its case law the ECJ has ruled that, on the basis of principle of effective judicial protection, individuals are entitled to have access to the national courts if Union law confers rights on them (*'ubi Union jus, ibi national remedium'*).⁶⁴ Whether EU law confers rights on an individual depends on the personal scope of and the protection intended by the EU rules in question, which should be established on the basis of the substance of the EU rules in the light of their purpose. Depending on this analysis, the group of individuals having standing on the basis of EU law may be limited,⁶⁵ wide or very wide.⁶⁶ In particular in the area of environmental law, directives tend to confer rights on large groups of individuals.⁶⁷ All these individuals should be granted access to court, if necessary after setting aside more strict national standing requirements.

As regards remedies, it can be noted that in the case of *Unibet*,⁶⁸ the Court based the obligation for the Member States to provide in EU cases for immediate and provisional legal protection in a procedure for interim relief on the principle of effective judicial protection. In the same case, the ECJ conditionally prescribed the Member States to provide for a free-standing action against national legislation possibly inconsistent with EU law, at least as long as national law does not provide for equivalent and effective remedies by which the inconsistency may be raised indirectly as a preliminary issue.⁶⁹ Such remedy is, for instance, a procedure for judicial review directed at a decision implementing the national legislation in question. In addition, the Member States' obligation to organize

⁶³ Case C-97/91 *Oleificio Borelli SpA v Commission of the European Communities* EU:C:1992:491; Case C-562/12 *Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007-2013 Seirekomitee* EU:C:2014:2229, respectively.

⁶⁴ Cf. Case C-87 to 89/90 *Verholen* EU:C:1991:314; Case C-13/01 *Safalero Srl v Prefetto di Genova* EU:C:2003:447; Case C-174/02 *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën* EU:C:2005:10. Cf. R. Ortlep and R.J.G.M. Widdershoven, 'Judicial Protection' in J.H. Jans, S. Prechal and R.J.G.M. Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing, Groningen 2015) 375-379.

⁶⁵ Case C-216/02 *Österreichischer Zuchtverband für Ponys, Kleinpferde und Spezialrassen v Burgenländische Landesregierung* EU:C:2004:703.

⁶⁶ Case C-174/02 *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën* EU:C:2005:10 (wide access), Case C-257/07 *Janacek* EU:C:2008:447 (very wide access).

⁶⁷ Case C-257/07 *Janacek* EU:C:2008:447.

⁶⁸ Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* EU:C:2007:163, para. 77. See K. Lenaerts, 'The rule of law and the coherence of the judicial system of the European Union' [2007] CMLRev 1625.

⁶⁹ Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* EU:C:2007:163, para. 65.

the EU prescribed remedy of state liability for breaches of Union law is partly based on the principle of effective judicial protection as well.⁷⁰

3.4. Recent approach of the ECJ: Article 47 CFR comes first

From the fore-going it is clear that both the *Rewe* principle of effectiveness and the principle of effective judicial protection limit procedural autonomy, but also that both principles have a different focus and that interferences with national law on the basis of effective judicial protection can go further than on the basis of the effectiveness principle. Therefore, one would expect the ECJ to make a clear distinction between the assessment on both principles. In reality however, such a clear distinction was not made during a considerable time.⁷¹ In some cases the ECJ applied (and sometimes still applies) the effectiveness principle, although the issue at stake seems primarily connected to effective judicial protection.⁷² In other cases, it considers the requirement of judicial protection guaranteed by Article 47 CFR to be implied in the principle of effectiveness.⁷³ In again other cases the Court stated that the *Rewe* principles of equivalence and effectiveness ‘embody’ the general obligation of the Member States to ensure judicial protection of individual’s EU rights, thus suggesting that both principles were subsumed by effective judicial protection.⁷⁴

An important step towards more clarity was set in the case of *Alassini*,⁷⁵ where the ECJ made a distinction between the assessment on the *Rewe* principles on one hand, and on the principle of effective judicial protection, on the other. More specifically, the Court assessed the imposition of a mandatory out-of-court settlement procedure as a condition for admissibility of an action before the national court, as a limitation of effective judicial protection which was justified within the judge-made limitation clause (cf. section 3.1). In this respect, it referred to case law of the ECtHR.⁷⁶ In addition, the Court formulated, on the basis of *Rewe* effectiveness, several practical arrangements for the exercise of the settlement procedure, for instance, that the prior exhaustion of the procedure should not lead to a substantial delay in bringing a legal action

⁷⁰ Case C-6/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* EU:C:1991:428; Case C-46/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* EU:C:1996:79.

⁷¹ See on this conceptual confusion also the contribution of Matteo Bonelli to this volume.

⁷² See for a relatively recent example, Case C-437/13 *Unitrading Ltd v Staatssecretaris van Financiën* EU:C:2014:2318. In this case the Court assesses the non-disclosure of evidence to the parties in light of *Rewe* effectiveness, although the issue seems to be a matter of fair trial (and thus of Article 47(2) CFR).

⁷³ Case C-61/14 *Orizzonte Salute* EU:C:2015:665, para. 48.

⁷⁴ Case C-268/06 *Impact v Minister for Agriculture and Food and Others* EU:C:2008:223.

⁷⁵ Case C-317 to 320/08 *Alassini* EU:C:2010:146.

⁷⁶ More in particular *Fogarty v UK* App no 6289/97 (ECtHR, 21 November 2001).

and that it does not involve excessive costs. Why these arrangements were a matter of *Rewe* effectiveness and not of effective judicial protection was not really clear.

A next step was taken in the case of *DEB*,⁷⁷ where the Court explicitly reformulated a preliminary question about the right to legal assistance of legal persons, which was framed by the national court as a matter of *Rewe* effectiveness, in terms of effective judicial protection (Article 47(3) CFR). In the case the interpretation of the right to legal assistance of Article 47(3) CFR by the ECJ is clearly inspired by the case law of the ECtHR on the same right as part of Article 6(1) ECHR, to which the Court abundantly refers.⁷⁸ Therefore, it could be assumed that an important reason for the Court to reformulate the preliminary question in terms of effective judicial protection/Article 47 CFR, was the coordination of the ECJ case law on Article 47 CFR with the ECtHR case law on the corresponding ECHR right.⁷⁹

Recent ECJ's case law seems to confirm this assumption. From it, it appears that procedural issues, which are related in some way to effective judicial protection, are primarily and often exclusively tested in the light of Article 47 CFR. In this regard, it seems a rule of thumb that the Court assesses procedural issues in the light of Article 47 CFR if the ECtHR would assess the same issue in the light of Article 6 ECHR. The probable background of this practice seems indeed the necessity to coordinate the Court's case law concerning CFR rights with the ECtHR's case law concerning corresponding ECHR rights, an obligation prescribed by Article 52(3) CFR since 2009.⁸⁰ After all, such coordination requires the use of a similar assessment framework. Assessing such procedural issues in the light of *Rewe* effectiveness would be at odds with this coordination necessity, because the ECHR does not contain a fundamental right corresponding to *Rewe* effectiveness and the ECtHR does not apply such

⁷⁷ Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* EU:C:2010:811.

⁷⁸ *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979) and many others.

⁷⁹ Cf. S. Prechal and R.J.G.M. Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' [2011] *Review of European Administrative Law* 47.

⁸⁰ Note that Article 52(3) CFR allows Union law/the ECJ to provide a more extensive protection of corresponding CFR rights than the ECHR provides for. As yet, the ECJ applies an Article 6 ECHR consistent interpretation of Article 47 CFR (f.i. Case C-205/15 *Directia Generală Regională a Finanțelor Publice Brașov (DGRFP) v Vasile Toma and Biroul Executorului Judecătoresc Horatiu-Vasile Cruduleci* EU:C:2016:499) and has not used this possibility. However, the protection of Article 47 CFR and Article 6 ECHR may differ because of differences in scope. While the latter provision applies to the determination of civil rights and obligations and of criminal charges, thus excluding for instance tax decisions and admission and expulsion decisions in the area of migration law, these decisions may be protected by Article 47 CFR insofar they are within the scope of Union law. See for the exclusion of tax decisions from the scope of Article 6 ECHR, *Ferrazini v Italy* App no 44759/98 (ECtHR, 12 July 2000) and for the exclusion of admission and expulsion decisions, *Maaouia v France* App no 36952/98 (ECtHR, 5 October 2000).

concept either. Albeit, in recent case law the ECJ increasingly uses Article 47 CFR as a yardstick to limit procedural autonomy. As a consequence, the importance of the *Rewe* principles is decreasing, although they probably remain relevant to some extent (see section 4, below).

Procedural topics which were formerly assessed by the Court in the light of *Rewe* effectiveness, and nowadays in the light of Article 47 CFR are in the first place concerned with access to court. A good example is the application of fatal time limits for launching an appeal before a court. In the *Rewe* case itself, time limits were assessed in the light of the effectiveness principle, applying a procedural rule of reason test *avant la lettre* (see above, section 2.3). Nowadays the Court considers, in line with the ECtHR approach,⁸¹ time limits to be a limitation of the right of access to the court as guaranteed by Article 47 CFR, and assesses the question whether they can be applied in an Union case within the limitation clause of Article 52(1) CFR.⁸² Another access to justice issue, in respect of which a similar shift has taken place, is whether a Member State is allowed to make the exercise of an effective remedy before the national court conditional upon first exhausting a non-judicial pre-procedure, such as a settlement or mediation procedure or an appeal procedure before an administrative authority. While, as stated above, in *Alassini* this question was assessed in the light of both, effective judicial protection and *Rewe* effectiveness,⁸³ in the recent cases of *Puškár* and *Menini* the Court examines the question in the light of Article 47 CFR and the limitation clause of Article 52(1) CFR only.⁸⁴

Other topics which are primarily assessed in the light of Article 47 CFR relate to the fair trial requirement of Article 47(2) CFR. An example is provided by *Toma*,⁸⁵ where the ECJ, referring to relevant ECtHR case law, assesses the issue of unequal courts fees imposed on both parties in the light of the principle of equality of arms as part of the fair trial requirement. Another example offers the case of *ZZ*, in which the ECJ, again referring to the ECtHR

⁸¹ F.i. *Rodriguez Valin v Spain* App no 47792/99 (ECtHR, 10 July 2001), *Tricard v France* App no 40472/98 (ECtHR, 10 July 2007) See for other examples P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Cambridge, fifth edn, 2018) 552-553.

⁸² Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* EU:C:2017:987, paras 90 to 93. See for previous, less elaborated Court assessments of time limits within the framework of effective judicial protection, Case C-69/10 *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2011:524; Case C-418/11 *Textdata Software* EU:C:2013:588; Case C-19/13 *Ministero dell'Interno v Fastweb SpA* EU:C:2014:2194.

⁸³ Case C-317 to 320/08 *Alassini* EU:C:2010:146.

⁸⁴ Case C-73/16 *Puškár* EU:C:2013:725; Case C-75/16 *Menini* EU:C:2013:457.

⁸⁵ Case C-205/15 *Directia Generală Regională a Finanțelor Publice Brașov (DGRFP) v Vasile Toma and Biroul Executorului Judecătoresc Horatiu-Vasile Cruduleci* EU:C:2016:499, with reference to *Stankiewicz v Poland* App no 12957/99 (ECtHR, 6 April 2006).

case law,⁸⁶ examines the non-disclosure of certain evidence to one of the parties as a limitation of the adversarial principle implied in the fair trial requirement of Article 47(2) CFR.⁸⁷ Therefore, the non-disclosure should be justifiable within the limitation clause of Article 52(1) CFR. A similar approach was already applied by the Court in the case of *Varec*,⁸⁸ although in this pre-CFR case the non-disclosure of evidence to one of parties was obviously tested within the unwritten judge-made limitation clause (see section 3.1).

3.5. National judicial scrutiny

The procedural issue in respect of which the shift from *Rewe* effectiveness to Article 47 CFR has been most significant is the intensity of national judicial scrutiny of administrative decisions.⁸⁹ As stated above (section 2.3), the Court used to assess this matter within the framework of procedural autonomy, limited by the *Rewe* principles of equivalence and effectiveness, leaving much leeway to the national courts to apply their own, sometimes very different standards of judicial scrutiny.⁹⁰ In recent years, the ECJ increasingly examines national judicial scrutiny in the light of Article 47 CFR. This provision is far more demanding, leaving the national courts hardly any discretion in this regard. Article 47 CFR, however, does not require one single standard of scrutiny in all cases, as the precise level of intensity depends on the applicable EU rules in question. In the context of some EU rules Article 47 CFR demands a rather strict judicial scrutiny, in the context of others, judicial scrutiny has to be re-straint.

As regards asylum decisions, Article 47 CFR requires – according to the Court in *Samba Diouf*⁹¹ – a thorough review of the lawfulness of such decisions and in particular the merits of reasons on which they are based, there being no irrebuttable presumption as to the legality of those reasons. Although the ECJ

⁸⁶ *Ruiz Mateos v Spain* App no 12952/87 (ECtHR, 23 June 1993).

⁸⁷ Case C-300/11 *ZZ v Secretary of State for the Home Department* EU:C:2013:363.

⁸⁸ Case C-450/06 *Varec SA v Belgian State* EU:C:2008:91.

⁸⁹ See more extensive on this topic, R.J.M.G. Widdershoven, 'The European Court of Justice and the Standard of Judicial Review' in Jurgen de Poorter *et al* (eds), *Judicial Review of Administrative Discretion in the Administrative State* (T.M.C. Asser Press – Springer 2019) 39-61.

⁹⁰ Incidentally this 'autonomy approach' is still applied, in particular in Case C-71/14 *East Sussex County Council v Information Commissioner and Others* EU:C:2015:656, although it may be argued that its application in the case is less deferential than in the case law, mentioned in section 2.3. See in this respect M. Eliantonio and F. Grashof, 'Case C-71/14, East Sussex County Council v. Information Commissioner, Property Search Group, Local Government Association (Judgment of 6 October 2015) – Case Note' [2019] *Review of European Administrative Law* 35, and R.J.M.G. Widdershoven, 'The European Court of Justice and the Standard of Judicial Review' in Jurgen de Poorter *et al* (eds), *Judicial Review of Administrative Discretion in the Administrative State* (T.M.C. Asser Press – Springer 2019) 41-44.

⁹¹ Case C-69/10 *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2011:524.

does not refer to it, the judgment seems to be inspired by the ECtHR full jurisdiction requirement based on Article 6 ECHR.⁹² In this respect it seems no coincidence that the statement that judicial control cannot be limited by an 'irrebuttable presumption as to the legality' of the reasons of the decision contested can be found in ECtHR cases concerning full jurisdiction, such as *Chevol* and *Terra Woningen* as well.⁹³

In the area of cooperation between tax authorities, a cooperation based on mutual trust, Article 47 CFR allows the national courts a restraint scrutiny of information requests of other Member States only.⁹⁴ The reason for this restraint is that within the relevant legal framework the tax authorities of the requested Member State must in, in principle, trust that the information requested by the tax authorities of another Member State is necessary for the purpose of a tax investigation. Therefore, their verification of the information request is limited to the question whether the information sought by the authorities of the other Member State is not devoid of any foreseeable relevance to the investigation. Due to the limited verification right of the requested authorities, an Article 47 CFR consistent judicial scrutiny of the authorities' should be equally restrictive and must – according to the Court – be limited to 'merely verify that the information order is based on a sufficiently reasoned request concerning information that is not manifestly devoid of any foreseeable relevance'.⁹⁵ From this consideration it is clear that in the context of tax cooperation the ECJ does not leave any room for the national courts to apply a (possible) stricter judicial standard on the basis of national law. Procedural autonomy has vanished.

The latter occurs in the case of *Egenberger* as well.⁹⁶ The case concerned a tension between two fundamental rights, namely the right of workers not to be discriminated against on the ground of their religion and the right of churches to reject an application for employment on the ground of their autonomy, included in the freedom of religion. The question referred by a German court was whether judicial review, as regards the scope of the right of autonomy, should be deferential and limited to the plausibility of the viewpoint of the church in question – which is the point of view of the German Constitutional

⁹² P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Cambridge 2018) 543-545.

⁹³ *Chevol v France* App no 49636/99 (ECtHR, 13 February 2003); *Terra Woningen B.V. v The Netherlands* App no 20641/92 (ECtHR, 17 December 1996). To avoid misunderstandings, both cases are not about asylum law, but about the ECtHR concept of 'full jurisdiction', a concept that seems to be applied by the ECJ in *Samba Diouf* as well.

⁹⁴ Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* EU:C:2017:373.

⁹⁵ Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* EU:C:2017:373, para. 86.

⁹⁶ Case C-414/16 *Egenberger* EU:C:2018:257.

Court⁹⁷ – or whether it should go further than such a restricted control. In the judgment the ECJ refrains from explicitly ordering a specific intensity of judicial review (marginal, strict, plausibility control), arguably to avoid tensions with the German Constitutional Court, but at the same time prescribes the result to be achieved by the national court when applying an Article 47 CFR consistent judicial review of the question concerned. More in particular, the viewpoint of the church should be subject of effective judicial review by which it is *ensured* that religion constitutes indeed a genuine, legitimate and justified occupational requirement for the decision contested, as prescribed by Article 4(2) of Directive 2000/78. In the following considerations the ECJ clarifies in rather detail what these directive requirements entail in the case at hand. So, the judicial test, required by the Court, seems not to be deferential at all. Moreover, the Court does not make any reference to the principle of procedural autonomy.

Finally, a rather restraint judicial scrutiny by national courts is prescribed by the Court in *Fahimian*,⁹⁸ without, however, referring to Article 47 CFR. The case was about the judicial scrutiny of a national decision establishing that a third country national applying for a visa for the purpose of study, represents a threat to public security. According to the relevant directive, the decision involved complex evaluations of multiple factors, leaving national authorities a wide margin of discretion in taking it. Therefore, the Court allowed a restraint substantive review by the national court, focussing on the ‘absence of manifest errors’, only. On the other hand, possibly as a form of compensation for the limited substantive review, the Court prescribed the national court to conduct a strict procedural test. The national court had to consider whether the contested decision was based on a sufficiently solid factual basis, whether the authorities’ examination of the facts had been conducted carefully and impartially and whether the statement of reasons for the decision was sufficient to enable the court to ascertain whether the factual and legal elements on which the exercise of the power of assessment depends were present. The judgment confirms that in respect of judicial scrutiny procedural autonomy has disappeared. After all, the judgment does not leave any room for the national court to apply a possible stricter national standard of judicial review. Why the Court did not refer to Article 47 CFR is not clear. Possibly this can be explained by the preliminary question, which did not refer to Article 47 CFR either.

This case-to-case approach obviously raises the question how the Court’s case law will develop in future. Will it be extended to national acts within the scope of Union law in other policy areas or will the Court maintain procedural autonomy in those other areas? Arguably, the answer to this question may de-

⁹⁷ See for the view of the Constitutional Court (Bundesverfassungsgericht), the preliminary reference of the Bundesarbeitsgericht in *Egenberger* EU:C:2018:257, para. 31.

⁹⁸ Case C-544/15 *Sahar Fahimian v Bundesrepublik Deutschland* EU:C:2017:255.

pend on the extent to which the content of decisions in a certain area has been Europeanisation, leaving less leeway to national standards of scrutiny insofar the content is determined in more detail by EU law. What, however, is clear is that the Court is intensifying its grip on national judicial scrutiny on the basis of a contextual interpretation of Article 47 CFR, and that as a result procedural autonomy is diminishing.

3.6. Reflection

From the foregoing, it is clear that the shift from *Rewe* effectiveness to effective judicial protection and Article 47 CFR implies a serious limitation of national procedural autonomy. Application of the principle of effective judicial protection may force the Member States and/or their courts to provide for access and remedies not existing in national law. Limitations of Article 47 CFR are tested within the limitation clause of Article 52(1) CFR, a test which is more elaborate and demanding than the mild balancing test on procedural rule of reason required by *Rewe* effectiveness. National judicial scrutiny is increasingly tested on Article 47 CFR instead of *Rewe* effectiveness, leaving national courts hardly any discretion in this regard in some areas of law.

This limitation of procedural autonomy may be regretted but seems to a large extent, the consequence of Court's vision on the system of judicial protection in the EU legal order. According to it, providing effective judicial protection in EU cases, which is indeed essential for upholding the rule of law in the EU legal order, is a joint task of the EU Courts and the national courts. Within this 'complete system of legal remedies' the national courts have always acted as Union court (*juge du droit commun*), a mandate which has acquired a written primary law status in Article 19(1) TEU. Due to this mandate, it seems justified that the Court, in order to guarantee a complete system, can force the Member States and their courts to provide for access and remedies in EU cases not existing in national law. Moreover, it seems rather obvious that national courts acting as Union courts should comply with Article 47 CFR, a primary law provision which prevails above procedural autonomy. To a large extent the Article 47 CFR requirements are already binding for the Member States on the basis of (the case law of the ECtHR on) Article 6 ECHR, which is binding for the Court as well when interpreting Article 47 CFR. The only exception in this respect is the interference with the level of national judicial scrutiny on the basis of a contextual interpretation of Article 47 CFR, which is only remotely (*Samba Diouf*) or not at all connected to Article 6 ECHR. However, as of yet this case law is only concerned with decisions whose content is determined by EU law in rather detail, and insofar it seems defensible.

4. The future of the *Rewe* requirements

4.1. Principle of equivalence

The foregoing raises the question what the future for the *Rewe* requirements of equivalence and effectiveness will be. Will they become obsolete as a result of the increasing importance of Article 47 CFR, will they, as already suggested in Dutch literature,⁹⁹ be subsumed by Article 47 CFR completely, or will they maintain their own function as limiting requirements of procedural autonomy? In my opinion the most probable scenario is the latter, although the role of both principles will decrease to some extent.

In respect of the principle of equivalence a decrease of its importance results from the fact that the Court more often tests national procedural law in the light of Article 47 CFR.¹⁰⁰ After all, if and insofar it determines that the applicable national procedural rules are inconsistent with Article 47 CFR, they should be disappplied, irrespective of whether they may have infringed the equivalence principle as well. However, if the national procedural rules respect Article 47 CFR, the equivalence principle may still be relevant. After all, the fact that a procedural rule applied to an EU action is consistent with Article 47 CFR does in itself not imply that it may not be less favourable than the rule governing similar domestic actions. To give an example, a fatal time limit of for instance one month is in general consistent with Article 47 CFR. However, if this time limit is applied in EU cases, while in similar domestic cases a time limit of two month applies, application of the former is in breach with equivalence. Obviously, the foregoing applies as well to procedural rules which have no connection with Article 47 CFR at all.¹⁰¹

4.2. Effectiveness assessment through the procedural rule of reason test

As regards the principle of effectiveness, it is recalled that the Court applies two different tests, a direct test on whether a rule of national procedural law renders virtually impossible or excessively difficult the exercise of EU rights, and a balancing test on procedural rule of reason (section 2.3). Concerning the latter, the tendency in the Court's case law to assess procedural issues on observance with Article 47 CFR, if they are related to this fundamental

⁹⁹ H. Sevenster, 'Europeanisering in drie generaties: you ain't seen nothing yet?' in T. Barkhuysen *et al* (eds), *25 jaar Awb. In eenheid en verscheidenheid* (Kluwer 2019) 445.

¹⁰⁰ And as a result of the increasing regulatory interferences with procedural law by means of secondary Union law. See already section 2.4.

¹⁰¹ See for a random recent example, Case C-483/16 *Zsolt Sziber v ERSTE Bank Hungary Zrt* EU:C:2018:367.

right and would have been assessed by the ECtHR in the light of Article 6 and 13 ECHR (section 3.4), will logically result in a decrease of the procedural rule of reason. This decrease is already visible in respect of the application of fatal time limits in EU cases, which is no longer tested on procedural rule of reason, but in the light of Article 47 CFR.

This, however, will – to my expectation – not lead to the complete disappearance of the procedural rule of reason test, because procedural issues are not always related to effective judicial protection. For these non-related issues, the test still provides an adequate assessment framework to balance the interests of national procedural law against the effective application of EU law. After all, the framework requires a justification of the national procedural provisions in the light of *generally recognised principles of law*, such as the rights of defence and legal certainty, and may set some limits to the application of sometimes rather peculiar rules of national law, restricting the effective application of EU law in an excessive way. To identify the non-related issue, the ECtHR approach in respect of Article 6 ECHR may again provide for guidance. Insofar the ECtHR does not consider a procedural issue to be part of the right protected by this ECHR provision, the same applies to Article 47 CFR. More concrete, I foresee a continued relevance of the test in respect of two topics.

In the first place, the *ex officio* application of EU law by the national courts. The question to what extent the courts should apply EU law on their own motion is in general not a matter of effective judicial protection or Article 47 CFR. This is confirmed by the case law of the ECtHR where this issue has never been tested on the light of Article 6 ECHR. On the contrary, in its *Van Oosterwijck* judgment the ECtHR has ruled that the national courts are not obliged to assess even possible violations of ECHR rights and freedoms on their own motion.¹⁰² Obviously, the *ex officio* application of EU law is related to the effective application of EU law. Therefore, I expect the ECJ to continue its case law, set in *Van Schijndel* and *Van der Weerd*, and to assess the matter within the balancing framework provided by the procedural rule of reason test in future as well. In general, as observed in section 2.3, this test allows rather restrictive national rules on *ex officio* application as they are justified by the principle of the rights of defence and the proper conduct of procedure. However, as shown in the Court's judgment in *Peterbroeck*,¹⁰³ under exceptional circumstances, namely if the restricted possibility for the national court to raise a matter of its own motion is combined with the impossibility for the parties to raise the matter themselves before the court after an administrative complaint procedure, the restrictions on *ex officio* application are no longer sufficiently justified by these principles, and have to be set aside.

¹⁰² *Van Oosterwijck v Belgium* App no 7654/76 (ECtHR, 6 November 1980).

¹⁰³ Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* EU:C:1995:437.

A second topic which will probably continue to be assessed on procedural rule of reason is whether final administrative decisions or final courts' judgments, being inconsistent with EU law, have to be reviewed. This topic is in the case law of the ECJ and ECtHR never assessed in the framework of Article 47 CFR or Article 6 ECHR. This seems obvious as reviewing or non-reviewing final decisions or judgments is not a matter of effective judicial protection, as it does not relate to access to the court, fair trial or another sub-right protected by these provisions. To avoid possible misunderstanding, I am aware of the fact that reviewing a final judgment may be necessary to comply with the obligation of Article 46 ECHR to abide the judgments of the ECtHR. However, this obligation is not related to Article 6 ECHR. Moreover, complying with it does not necessarily mean that a final judgment should be reviewed, as the obligation can also be observed by other means, for instance, by compensation of damages. Albeit, to my expectation, the procedural rule of reason test will remain relevant for assessing the issue of reviewing final decisions and judgments contrary to Union law.¹⁰⁴

As has been noted above (section 2.3), the balancing framework provided by the test generally does not require final decisions or judgment contrary to Union law to be reviewed, as their non-revision is justified by the principles of legal certainty (decisions) and the related principle of *res judicata* (judgments). However, under exceptional circumstances where the non-revision limits the effectiveness of EU law in an excessive way, the test may lead to another outcome. As regards decisions, this occurred in *Byankov*,¹⁰⁵ which was concerned with the review of a final decision prohibiting *Byankov* from leaving Bulgaria on account of his failure to pay a private debt. The Court noted that the decision was inconsistent with the fundamental right of Article 21 TFEU to move and reside freely within the territory of the Member States, and that it had been adopted for an unlimited period, continuing to produce legal effects with regards to *Byankov* for eternity. Under these circumstances, non-revision of the decision could not reasonably be justified by legal certainty and was considered to be contrary to effectiveness. As regards final judgments, the ECJ applied a similar line of reasoning in *Olimpiclub*.¹⁰⁶ The case was concerned with the wide Italian application of the *res judicata* principle, according to which a final judgment in a tax case, which was contrary to the EU rules on value added tax, had binding authority in all subsequent judicial proceedings in respect of the same tax payer,

¹⁰⁴ In addition it can be noted that also recent case law applies the procedural rule of reason test in respect of reviewing final judgments, Cf. Case C-234/17 *XC and Others v Generalprokuratur* EU:C:2018:853.

¹⁰⁵ Case C-249/11 *Hristo Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti* EU:C:2012:608.

¹⁰⁶ Case C-2/08 *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpiclub Srl* EU:C:2009:506. See for a similar judgment, Case C-505/14 *Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen* EU:C:2015:742.

but related to different tax periods. As a result, the incorrect application of the VAT rules had to be repeated for each new tax year. According to the Court, such extensive obstacles to the effective application of the Union rules could not reasonably be justified in the interest of legal certainty. Therefore, it was inconsistent with the effectiveness principle.

4.3. Direct assessment of *Rewe* effectiveness

Finally, the future of the direct test of procedural rules on the *Rewe* effectiveness requirements of virtually impossible or excessively difficult is examined. In this regard, it is noted first that its relevance will already decrease to some extent insofar the Court nowadays assesses procedural issues, such as the intensity of judicial scrutiny, in the light of Article 47 CFR instead of *Rewe* effectiveness (see section 3.5, above). In addition, I would favour a further decrease of the direct test to the extent to which this test primarily relates to the effectiveness of the judicial protection itself and not so much to the effective application of substantive EU law. This would reduce the complexity of assessing national procedural law in light of EU law to some extent and – more important – would facilitate the obligatory coordination with the ECtHR.

In this regard, it is important to note that the requirement of ‘effectiveness’ is already included in the principle of *effective* judicial protection and Article 47 CFR. The same is true in respect of Article 6 ECHR. According to the ECtHR, this provision implies that the right of access to justice and the exercise of the other sub-rights guaranteed by the provision must not be theoretical or illusory, but practical and *effective*, if necessary by taking positive measures.¹⁰⁷ In the landmark case of *Airey* for instance, this resulted in an obligation for Ireland to provide for legal aid where the absence of such aid would make it impossible to ensure an effective remedy.¹⁰⁸ In the light of this effectiveness requirement, included in Article 6 ECHR, I would argue that the Court may (and should) assess some issues that are now directly tested on *Rewe* effectiveness, within the framework of Article 47 CFR (effective judicial protection). Good candidates are the procedural issues which were at stake in the cases of *San Giorgio* and *Boiron*, discussed in section 2.3.¹⁰⁹ It seems to me that both the reversal of the burden of proof in *San Giorgio* and ordering the necessary measures of inquiry in *Boiron*, were necessary for guaranteeing an effective remedy and fair trial in the cases at hand. Therefore, the same result could have been achieved by testing the procedural rules in question on *effective* judicial

¹⁰⁷ Cf. P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Cambridge 2018) 542-546, which devotes a separate section to the effectiveness principle as included in Article 6 ECHR.

¹⁰⁸ *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979).

¹⁰⁹ Case 199/82 *San Giorgio* EU:C:1983:318; Case C-526/04 *Laboratoires Boiron* EU:C:2006:528.

protection. As regards the reversal of proof in *San Giorgio*, this statement is more or less confirmed by the fact that in the area of sex discrimination, the ECJ based a similar reversal of the burden of proof in favour of the victim of discrimination on the principle of effective judicial protection.¹¹⁰ This line of reasoning does not apply to the *Trianel* situation, discussed in section 2.4. Nevertheless, I would argue that the Court may have come to the same result, namely guaranteeing the wide access to justice of NGOs provided for in the Aarhus Directive, by applying an Article 47 CFR consistent interpretation of the directive provisions in question. This would be in line with the approach in *Brown Bear II* and *Protect* (discussed in section 3.2),¹¹¹ in which the effective enforcement of similar provisions on access to justice of the Aarhus Convention was guaranteed by applying an Article 47 CFR consistent interpretation of the Convention as well.

If the Court proceeds the way suggested, most procedural issues that are nowadays directly tested on effectiveness will be subsumed by Article 47 CFR. However, it cannot be excluded that regarding some procedural topics, not related to Article 47 CFR, this test may, at least according to the Court, still be necessary to achieve a modification of national procedural or remedial rules, with a view to the effective application and enforcement of substantive EU law. Probably the best candidate is the amount of compensation which should be allowed under national law in order to constitute an effective remedy against violations of EU law. In its case law the Court has, for instance, ruled that, on the basis of *Rewe* effectiveness, this compensation should not concern actual loss only, but also loss of profit and interest.¹¹² Such a requirement cannot be based on Article 47 CFR and is indeed connected to the focus of *Rewe* effectiveness, the effective enforcement of EU rules (section 2.1). In addition, the direct test on *Rewe* effectiveness will remain the relevant Court's framework when assessing procedural rules for administrative decision-making. So, the direct test on *Rewe* effectiveness will not disappear completely.

¹¹⁰ F.i. Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* EU:C:1989:383, and Case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S* EU:C:1995:155. See R. Ortlep and R.J.G.M. Widdershoven, 'Judicial Protection' in J.H. Jans, S. Prechal and R.J.G.M. Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 406.

¹¹¹ Case C-243/15 *Lesoochranské zoskupenie VLK v Obvodný úrad Trenčín* EU:C:2016:838; Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirksheimatmannschaft Gmünd* EU:C:2017:987.

¹¹² Case C-445/06 *Danske Slagterier v Bundesrepublik Deutschland* EU:C:2009:178. See for more details on the amount of compensation required on the basis of *Rewe* effectiveness, K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (Oxford 2014) 4.52-4.54; B. Babunska, *Effective Judicial Protection and State Liability in EU Law. Implications for the Macedonian Judiciary* (Phd thesis Utrecht University 2019, <https://www.uu.nl/en/university-library/services/utrecht-university-repository>) Ch 2, section 2.6, and Ch 4, section 6.3.

5. Conclusion

This article has examined the Court's approach towards Member States' procedural autonomy in respect of national adjudication. From the examination it appears that the Court increasingly assesses the application of national procedural law in cases within the scope of Union law in the light of the principle of effective judicial protection and Article 47 CFR, at the same time reducing the importance of the *Rewe* principles of equivalence and effectiveness. In this regards, Article 47 CFR has become the primary framework for assessing procedural issues which relate to effective judicial protection in some way and would have been assessed by the ECtHR within the framework of Article 6 ECHR (section 3.4). The probable reason for this shift seems to be the necessity to coordinate the Court's case law concerning Article 47 CFR with the ECtHR's case law concerning the corresponding Article 6 ECHR, required by Article 52(3) CFR. As a result, procedural issues that were formerly assessed by the Court in the light of *Rewe* effectiveness, such as the application of fatal time limits (section 3.4) and the intensity of judicial scrutiny (section 3.5), are nowadays examined within the framework of Article 47 CFR. This shift towards Article 47 CFR implies a more stringent test of national procedural rules and reduces procedural autonomy. This, however, seems justified as being necessary to uphold the fundamental right of effective judicial protection and the rule of law in the EU legal order (section 3.6).

The growing importance of Article 47 CFR leads to a decrease of the importance of the *Rewe* principles. A similar decrease results from the growing regulatory Europeanisation of procedural law in specific areas of law through secondary Union rules, discussed in this volume. After all, if and insofar the EU legislator has laid such rules, they prevail above diverging rules of national procedural law irrespective of whether they are consistent with the *Rewe* principles or not (section 2.4). The growing Europeanisation does, however, not diminish the importance of Article 47 CFR. As the latter provision enjoys the status of primary Union law, it may set limits to regulatory procedural rules inconsistent with it. In addition, Article 47 CFR is used by the ECJ as a means of interpretation strengthening judicial protection prescribed by secondary Union law (section 3.2).

Insofar the EU legislator has not Europeanised procedural law and despite the growing importance of Article 47 CFR, the *Rewe* principles will maintain their own function as limiting requirements of national procedural autonomy. The principle of equivalence, because consistency of national procedural rules with Article 47 CFR does not imply that these rules are equivalent as well (section 4.1). In addition, both *Rewe* principles remain the relevant framework for procedural issues which do not relate to effective judicial protection and would not have been assessed by the ECtHR within the framework of Articles 6 ECHR (section 4.2). Therefore, in respect of effectiveness, the Court will probably continue to apply the procedural rule of reason test when assessing, in particular,

the *ex officio* application of EU law and the review of final administrative decisions and judgments contrary to Union law. In respect of the direct effectiveness test on virtually impossible or excessively difficult it is argued that, insofar it is applied with a view to the effectiveness of judicial protection itself, the test should be replaced by a test on effective judicial protection (section 4.3). This facilitates the coordination with the ECtHR case law, according to which the effectiveness of judicial protection is implied in Article 6 ECHR as well. The direct test on effectiveness is then reserved for assessing and possibly amending particular national procedural rules with a view to the effective application of the substantive EU law. Moreover, this test remains relevant for the Court's assessment of procedural rules regarding administrative decision-making.

The increasing importance of Article 47 CFR and the decrease of the importance of, in particular, *Rewe* effectiveness resulting from it, might reduce the complexity and unpredictability of the Court's case law on the limitation of national procedural autonomy to some extent. Then again, this shift raises new questions as well. Perhaps the most intriguing questions concern the topic of national judicial scrutiny (section 3.5). Will the Court extend the current case-to-case assessment of judicial scrutiny in the light of Article 47 CFR to other areas of EU law? Will it in other areas impose precise requirements as regards scrutiny as well or will it leave autonomy to the Member States? The future will tell.