

The role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions

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SUMMARY

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ABSTRACT

The complex features of the EU system of judicial protection and its effectiveness on the side of the individual have been raising over time more and more interest among scholars. Effective judicial protection is an essential element in all legal orders, in so far as it allows individuals to enforce their rights and obtain redress. The European Union is no exception. Conferring of an increasing number of rights liable to be claimed by individuals and being characterised by a rather complex system of legal remedies, construed upon a complementary role of the Court of Justice of the European Union and national courts, the EU faces an urgent need of finding a way to ensure effectiveness of judicial protection within its legal order. Against this background, the present contribution aims at addressing the consistency and the relevance of the EU general principle which should fulfil this need. The principle of effective of judicial protection was drawn by the Court of Justice from a fundamental right enshrined in the common constitutional principles of Member

States and protected by Articles 6 and 13 ECHR, as well as by Article 47 of the EU Charter of Fundamental Rights. As interpreted and applied by the Court, such principle is intended as imposing on both Member States and EU institutions an obligation to provide the claims with adequate procedural tools, against or beyond those provided, respectively, by national and EU law. The study offers an insight on the consistency of the principle with particular reference to its impact on national law, and proposes a reconstruction where its nature as expression of a fundamental right of the individual is enhanced. After having illustrated the sources and the scope of application of the principle in general terms, the analysis turns to its various applications, elaborated over time by the Court of Justice. The core part of the contribution offers a critical analysis of selected case-law of the Court of Justice, paying particular attention to the judicial scrutiny that the different applications of the principle may entail. The purpose is pointing out a certain evolution towards an approach where the principle of effective judicial protection seems to be intended by the Court as the source of a fundamental right of the individual, protected as such by the EU legal order. On these grounds, the conclusive remarks will point out the advantages and the challenges that this approach may imply, in terms of providing for adequate remedies for the individual while granting, at the same time, effectiveness of EU law and coherence within the different levels of judicial protection.

KEYWORDS

EU LEGAL ORDER – GENERAL PRINCIPLES – JUDICIAL PROTECTION – EFFECTIVENESS – FUNDAMENTAL RIGHTS

1. EFFECTIVE JUDICIAL PROTECTION

AS A GENERAL PRINCIPLE AND A FUNDAMENTAL RIGHT IN THE EU LEGAL ORDER

The right to an effective judicial protection is a fundamental right recognised at international level as well as by the majority of national legal orders, and an essential element of democratic accountability¹. This right refers to a broad concept which generally encompasses various core elements, including access to justice, the right to an effective remedy and the principles of fair trial and due process of law².

1 Solemn declarations of judicial protection as a core fundamental right may be found since the *Magna Charta Libertarum* of 1215 (“[40] Nulli vendemus, nulli negabimus, aut differemus rectum aut justiciam”) in almost all the constitutional texts based on the rule of law. For a comparative analysis, see CAPPELLETTI, GARTH, *Access to justice. A world survey*, Sijthoff & Noordhoff, Alphen aan den Rijn, 1978 and BYRNES (ed.), *The right to fair trial in international and comparative perspective*, Centre for Comparative and Public Law, Hong Kong, 1997.

2 Provisions variously related to one or more of those elements may be found in most of the human rights instruments existing at international level, and notably in Article 8 of the Universal Declaration of Human Rights, in Articles 2, 9 and 14 of the International Covenant

As such, the right to an effective judicial protection is recognised in the European Union by means of Article 47 of the Charter of Fundamental Rights of the European Union, which shall be regarded, in the light of Article 6(1) TEU as reworded by the Treaty of Lisbon, as a binding provision of primary law in the EU legal order³. Article 47 of the Charter is included in the chapter concerning “Justice” and provides for the “Right to an effective remedy and to a fair trial”. In particular, the first limb of Article 47 protects the right to an effective remedy of every individual whenever their rights and freedoms guaranteed by EU law are violated, as a result of a failing of one of the duties related to such rights on the part of a Member State, the institutions or another private party; the second limb guarantees the right to a fair trial and the principles of due process of law, including the requirement of reasonable length of proceedings; while the third limb establishes the right to be defended and the right to obtain legal aid, with reference to the need to ensure effective access to justice.

However, the Court of Justice of the European Union (hereinafter ‘Court of Justice’) has attributed special relevance to the right to an effective judicial protection, long before the adoption of the Charter in 2000⁴. The issue of effective judicial protection of the rights that the individual may derive from the EU legal order soon emerged in the jurisprudence of the Court of Justice, being regarded from an early stage as one of the constitutive elements of a community based on the rule of law, which the EU (at the time the European Community) ought to respect. While this approach was first established in relation to the need to ensure review of legality of measures adopted by the institutions⁵, it was with reference to the role of national courts – in providing for an adequate protection of rights conferred upon the individuals by EU law – that the Court of Justice accepted the principle of effective judicial control as a general principle of EU law: a principle “which must be taken into consideration in Community law”, as it “underlies the constitutional traditions common to the Member States and [...] is laid down in Articles 6 and 13 of the European Convention for the protection of human rights and fundamen-

on Civil and Political Rights and, at regional level, in Articles 6 and 13 of the European Convention on Human Rights as well as in Article 47 of the Charter of Fundamental Rights of the European Union. For an overview, FRANCONI (ed.), *Access to justice as a human right*, OUP, Oxford, 2007.

³ According to Article 6(1) TEU “the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties”.

⁴ The charter was drawn up by a convention consisting of a representative from each EU country and the European Commission, as well as members of the European Parliament and national parliaments. It was formally proclaimed in Nice on 7 December 2000 by the European Parliament, Council and Commission, before being amended and proclaimed a second time in December 2007, with the view of the entry into force of the Lisbon Treaty.

⁵ The seminal case was ECJ, *Les Verts v European Parliament*, case C-294/83, judgement of 23 April 1986, [1986] 1339.

tal freedoms”⁶. According to the Court, the requirement that individuals should enjoy the opportunity to obtain judicial protection of the rights they derive from EU law pertained to a fundamental right of the individual and thus reflected a general principle of EU law⁷. Drawn from the constitutional traditions common to the Member States⁸ and from Articles 6 and 13 of the European Convention for the protection of human rights and fundamental freedoms⁹ (hereinafter ‘ECHR’), the content of the principle has been determined over time by the Court of Justice through its interpretative function. To that extent, the Court would use as a basis

6 ECJ, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, case C-222/84, judgement of 15 May 1986, [1985] 1651, paragraphs 1 and 2. The case related to a litigation between Mrs. Johnston and the British police corps of the Royal Ulster Constabulary, with regard to an alleged sex discrimination against the applicant. Mrs. Johnston had lodged an application challenging the decision contending that she had suffered unlawful discrimination prohibited by the British Sex Discrimination Order. In the context of the proceedings, the Chief Constable had produced a certificate issued by the Secretary of State in which the Minister himself confirmed that the decision challenged was in accordance with the Sex Discrimination Act, since it had the purpose of safeguarding national security and protecting public safety and public order. The certificate signed by the Minister under British law had to be taken as a conclusive evidence and its content could not be challenged. In this respect, Mrs. Johnston argued that this was in contrast with certain provisions of the Equal Treatment Directive (*Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*); in particular, she assumed that national law on evidence procedure infringed the provision according to which all persons which considered themselves wronged by discrimination ought to be able to pursue their claims by judicial process.

7 In the *Johnston* case, cited above, the Court of Justice referred to the right to an effective judicial remedy, stating that the the EU Directive required a judicial control which reflected a general principle of law underlying the constitutional traditions common to the Member States. According to the Court, it was the same principle laid down in articles 6 and 13 of the ECHR, which must be taken into consideration in EU law. Interpreting the Directive in the light of this general principle, the Court ruled for the incompatibility of the challenged provision. The principle was subsequently re-affirmed in the same terms in all relevant case-law.

8 Among the common traditions of Member States, the right to an effective judicial protection is commonly intended as a fundamental right as it is linked to the principles of the rule of law. Obviously, there are differences as to its recognition and its content: it is either contained in an express provision of the Constitution (Article 19(4) of the German Constitution, or Section 24 of the Spanish Constitution), or derived from a group of provisions, relating to due process, independency and impartiality of the judiciary, rights of defence (see for example Articles 24, 111 and 113 of the Italian Constitution, and Articles 36 to 38 of the Constitution of the Czech Republic); or being regarded as a general principle, which informs the national legal order without being enshrined in a written constitution (as in the United Kingdom). For an overview, STORSKRUBB, ZILLER, *Access to justice in European comparative law*, in FRANCONI, *Access to justice as a human right*, cited above, 177 ff.

9 In the ECHR, which is the main instrument for the protection of human rights at regional level, the right to an effective judicial protection results from the combination of Articles 6 (1) and Article 13. Article 6(1) protects the principles of due process, whereas Article 13 is an enabling provision which provides for the right to an effective remedy in the context of the enjoyment of fundamental rights and freedoms protected by the substantial provisions of the Convention.

either the common principles enshrined in the constitutional orders of Member States, or it would refer to the specific content of Articles 6 or 13 of the ECHR, as interpreted by the case law of the European Court of Human Rights¹⁰ (hereinafter ‘ECtHR’). In general terms, the principle has been construed quite broadly as comprising: access to justice¹¹, including the right to judicial review and access to an effective remedy with reasonable time-limits¹²; the right to a fair trial and the principles of due process¹³, including the right to reasonable length of proceedings¹⁴; the right of defence¹⁵, including the right to evidence¹⁶ and the right to be represented¹⁷. The Court of Justice has always underlined the fact that effective judicial protection must be more than a mere formal possibility, as it must also be feasible in practical terms. Therefore, the concrete application of the principle often consisted in establishing the procedural rule which may in concrete serve as a means for strengthening judicial protection of the individual, as to render the EU system of legal remedies overall complete and effective: either at national level, when domestic courts exercise their competences for the enforcement of rights and rules derived from EU law¹⁸; or in a global perspective, in order to ensure a fruitful interaction between EU and national remedies¹⁹.

The general principle of effective judicial protection is not recognised in the terms referred to by the Court of Justice by any provision of the Treaties. The only provisions which partly deal with the principle are, on the one hand, Article 19(1) TEU, which refers to the horizontal dimension of the principle, establishing a duty upon Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law; the provision serves, in this sense, the

10 For an overview of ECtHR’s case-law on Article 6 and 13, see MILANO, SUDRE, *Le droit à un tribunal au sens de la Convention européenne des droits de l’homme*, Dalloz, Paris, 2006, or refer to the commentaries contained in HARRIS, O’BOYLE, BATES, BUCKLEY, *Law of the European Convention on Human Rights*, OUP, Oxford, 2009, WHITE, OVEY (eds.), *The European Convention of Human Rights*, 5th edn, OUP, Oxford, 2010, BARTOLE, DE SENA, ZAGREBELSKY (cur.), *Commentario breve alla Convenzione europea dei diritti dell’uomo*, Cedam, Padova, 2012.

11 ECJ, *Heylens*, case C-222/86, judgement of 15 October 1987, [1987] 4097, ECJ, *Oleificio Borelli SpA*, case C-97/91, judgement of 3 dicembre 1992, [1992] I-6313 and ECJ, *Safalero*, C-13/01, judgement of 11 settembre 2003, [2003] I-8679 .

12 ECJ, *Pontin*, case C-63/08, judgement of 29 October 2009, [2009] I-10467.

13 ECJ, *Ordre des barreaux francophones et germanophones*, case C-305/05, judgement of 26 June 2007, [2007] I-5305.

14 ECJ, *Baustahlgeewebe*, case C-185/95 P, judgement of 17 December 1998, [1998] I-8417.

15 ECJ, *Corus UK*, case C-199/99 P, judgement of 2 October 2003, [2003] I-11177.

16 ECJ, *Compagnie Maritime Belge*, joint cases C-395 and 396/96 P, judgement of 16 March 2000, [2000] I-1365.

17 ECJ, *Krombach*, case C-7/98, judgement of 28 March 2000, [2000] I-1935.

18 ECJ, *Peterbroeck*, case C-312/93, judgement of 14 December 1995, [1995] I-4599.

19 ECJ, *Jégo Quéré*, case C-263/02 P, judgement of 1 April 2004, [2004] I-3425.

main function of granting enforcement to rights and obligations deriving from EU law, rather than protecting a fundamental right of the individual. On the other hand, references to the need to ensure effective access to justice to the individuals are contained in some provisions concerning the action of the EU in the field of judicial cooperation in civil matters, particularly Articles 67 and 81 TFEU.

On the contrary, the content and the scope of the principle of effective judicial protection has been widely acknowledged by secondary law, as a result of a mutual interaction between the EU legislator and the Court of Justice. While on some occasions, judicial trends of the Court of Justice were incorporated in secondary law²⁰, on other occasions it was the legislator the one who first established procedural guarantees and remedies for the individual to seek protection for the rights conferred by the legislative act, especially in sectors of EU law where there was a particular need of protection of sensitive categories of people (such as consumers²¹) or a particular need of harmonisation of standards of protection (for example public procurement legislation²²).

Even in the absence of an express recognition of the principle in primary or secondary law, the guarantee of the right to effective judicial protection, as a general principle of EU law, was able to enjoy from the beginning a 'constitutional' status²³. Firstly, as a major source of interpretation of EU primary and secondary law, as well as of national provisions which may be linked to the scope of application of EU law. Secondly, as a grounds for conducting review of legality of EU provisions of secondary law or national law implementing it. Thirdly, as a principle binding on both EU institutions and Member States, meant to be observed in the context of the remedies before the Court of Justice as well as remedies before national courts for the enforcement of rights derived from (or connected to) EU law, as to render the system of legal remedies available for the individual within the EU legal order overall complete and effective.

20 A notable example is the Free Movement Directive (*Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*), which enshrines in its Article 31 some "Procedural safeguards" already established by the Court of Justice in its earlier case-law, providing for every person "access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health".

21 See for example *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*.

22 See for example *Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts*.

23 TRIDIMAS, *The general principles of EU law*, OUP, Oxford, 2007, 4.

2. THE ROLE OF NATIONAL COURTS IN THE EU DECENTRALISED SYSTEM OF JUDICIAL PROTECTION

The EU general principle of effective judicial protection is bound to be applied within a decentralised system of remedies, based on the complementary cooperation of the Court of Justice and the national judge²⁴. In fact, while the Court of Justice dictates the principles to be followed in order to ensure the individuals an effective protection of their rights, a system based on a significant decentralisation of the judicial protection instructs in first place the national judge to construe national remedies efficiently, so as to make claims of European citizens available and effective.

Long before the entry into force of the Treaty of Lisbon, which formalised this structure in the wordings of Article 19 TEU, the Court of Justice had developed a role for the national judicial systems as part of a supranational EU judicial system, as to secure enforcement of EU law at national level²⁵. The system was conceived on the basis of a quite wise separation of functions, where the Court of Justice was charged with a number of specific tasks under the Treaties²⁶, while national courts were first in line to enforce and apply EU law within the Member States, where appropriate after obtaining a preliminary ruling from the Court of Justice itself²⁷. As a result, two levels of judicial protection were provided for, characterised by the fact of having a different scope and of being basically independent one from the other.

Ever since *Van Gend en Loos*²⁸ the Court has consistently held that EU law creates rights which national courts must protect, upon the duty of sincere cooper-

24 A consistent study on the subject shall be found in SCHERMERS, WAELBROECK, *Judicial protection in the European Union*, 7th edn, Kluwer Law International, The Hague, 2006.

25 In its seminal judgement ECJ, *Costa v. ENEL*, case 6/64, judgement of 15 July 1964, [1964] 1129, the Court held that the Treaty (former TEC) had created “its own legal system which [...] became an integral part of the legal systems of the Member States and which their courts are bound to apply” (paragraph 7). See in this regard ADINOLFI, *L'applicazione delle norme comunitarie da parte dei giudici nazionali* (2008) *Dir. Un. Eur.* 617 ff.

26 Without going into details, it may be recalled that the main competences of the Court of Justice refer in broad terms to the control over the validity of EU acts (action for annulment, Article 263 TFEU and plea of illegality, Article 277 TFEU), the rulling upon failures to act by the institutions under EU law (action for failure to act, Article 265 TFEU), as well as to the civil liability of EU institutions (action for damages, Article 340 TFEU) and to the control over the infringements of EU law by the Member States (infringement action, Article 258 TFEU). These are the so-called direct competences, which refer to actions which can be directly brought before the Court, even by individuals at certain conditions.

27 The preliminary reference procedure, established in Article 267 TFEU, allows the Court of Justice to exercise an indirect competence, aimed at ensuring the correct and uniform application and interpretation of EU law in all Member States and exercise a control over the validity of acts of institutions through the cooperation of national courts. This mechanism implies that where a national court is in doubt about the interpretation or validity of an EU provision, it may – and sometimes must – ask the Court of Justice for advice.

28 ECJ, *Van Gend en Loos*, case 26/62, judgement of 5 February 1963, [1963] 3.

ation set out in Article 4(3) TEU and the principles which rule the effectiveness of EU law in the national legal systems. The judicial authorities of the Member States were soon entrusted with the responsibility to ensure that EU law was applied and enforced in the national legal system and that no measures were taken which could jeopardise the attainment of the objectives of the Treaties. This appeared since the beginning a natural solution, as the *effet utile* of EU law implies not only that EU law must itself be applied, but also that national law is made in implementation of EU obligations: the result is that often national law contains elements of EU law, or implies a connection with EU law – and inevitably such national law would come before national courts. Accordingly, the obligation placed upon national courts to provide for “remedies sufficient to ensure effective legal protection in the fields covered by Union law”, as it is today established by Article 19(1) TEU, was inherent in the doctrine of direct effect, holding Member States responsible to ensure effective judicial control as regards respect and enforcement for the rights conferred by EU law upon individuals and compliance with relevant EU provisions and with national legislation intended to give effect to them.

In the absence of general provisions on remedies and procedures imposed by EU law on Member States, a general rule was framed so that national courts should fulfil their duty to grant effectiveness to EU law and judicial protection to individuals in the fields covered by EU law in accordance to their domestic legal procedures, remedies and sanctions. Early in its case law the Court of Justice ruled that national legal systems should determine the procedural conditions governing actions and remedies intended to grant legal protection of the interests of a person adversely affected by an infringement of EU law: such a rule was enshrined in the principle of procedural autonomy, which was based on the assumption that national remedies and procedures were basically sufficient and adequate for granting the enforcement of EU law and the protection of rights conferred upon individuals²⁹.

As this reconstruction implied the risk that in such a system the rights which individuals may derive from EU law would differ from one Member State to another, the Court of Justice soon started to interfere with national procedures and remedies, establishing certain limits to the principle of procedural autonomy: national legal order ought to comply with the principle of equivalence, or non-discrimination, on one side³⁰; as well as with the principle of effectiveness, or

29 The seminal judgement where this principle was first established is ECJ, *Rewe*, case 33/76, judgement of 16 December 1976, [1976] 1989.

30 The principle of equivalence is a specific application of the broader principle of non-discrimination, imposing an obligation upon Member States to provide for equivalent remedies in case of infringement of EU law as in case of infringement of national law. In other words, the same procedural treatment must be given to claims based on EU law as is given to similar claims based on national law. Of course it is first necessary to properly identify similar actions and the procedural rules applying to them: the principle does not imply necessarily that actions

practical possibility, on the other side³¹. In the light of these two principles, the Court of Justice started assessing the compatibility of national legal norms on procedural and jurisdictional issues which had the effect of causing a prejudice to the enforcement or rights and obligations derived from EU law. Over time, the approach of the Court on procedural autonomy has yielded from an abstract test to a stronger insistence on the effectiveness principle, which had a deeper and deeper influence on national procedural remedies: on some occasions by requiring the importance of the EU right to be weighed against the scope and purpose of the national rule³²; and on other occasions by adopting a case by case approach, which could ensure the effectiveness of the relevant EU rule involved with the result of prevailing over important national principles³³. This affected a range of national remedies and procedural and jurisdictional conditions, such as domestic time limits and limitation periods, rules of evidence and the burden of proof, *locus standi* rules, national conditions for reparation of loss and damage and many other remedies and sanctions; sometimes leading national courts to have great difficulties adapting existing rules³⁴.

The notable development in the application of the limits to the principle of procedural autonomy, with particular reference to the effectiveness clause,

based on EU law always should benefit from the most favourable procedural regime to be found in national law; it only implies that comparable claims should be treated equally, prohibiting straightforward discrimination based on the origin of the claim (national or European). Interesting applications of this principle may be found for example in ECJ, *Saldanha*, case C-122/96, judgement of 2 October 1997, [1997] I-5336 and ECJ, *Transportes Urbanos*, case C-118/08, judgement of 26 January 2010, [2010] I-0635.

31 The effectiveness principle derives from the general duty of cooperation contained in Article 4 TEU, and it implies that the conditions set out in national law could not be so framed as to render virtually impossible or excessively difficult the exercise of rights conferred by EU law. When assessing the respect of the effectiveness principle, the Court of Justice takes into account the role of the national provision in the whole national procedural system, in order to grant a balance between effectiveness of EU law and the principles which rule national procedural autonomy: see in that regard, for example, ECJ, *Van Schijndel*, joint cases C-430 and 431/93, judgement of 14 December 1995, [1995] I-4705.

32 As it happened with reference to national time-limits (see for example ECJ, *Emmott*, case C-208/90, judgement of 25 July 1991, [1991] I-4269).

33 Such as the principle of *res judicata* (see in this regard ECJ, *Fallimento Olimpiclub*, case C-2/08, judgement of 3 September 2009, [2009] I-7501).

34 The most peculiar applications of the limits of equivalence and effectiveness attracted great interest among the scholars, raising a debate which instensified over time on whether Member States could still be regarded as possessing procedural autonomy, or rather this principle was bound to be overruled. See, in this regard, HIMSWORTH, *Things fall apart: the harmonisation of Community judicial procedural protection revisited* (1997) *Eur. Law. Rev.* 291 ff., KAKOURIS, *Do the member states possess procedural 'autonomy'?* (1997) *Com. Mar. Law. Rev.*, 1389 ff., BIONDI, *The European Court of Justice and certain national procedural limitations: not such a tough relationship* (1999) *Com. Mar. Law. Rev.* 1271 ff., DOUGAN, *National remedies before the Court of Justice: issues of harmonisation and differentiation*, Hart Publishing, Oxford, 2004, ARNULL, *The principle of effective judicial protection in EU law: an unruly horse* (2011) *Eur. Law. Rev.* 51 ff.

shows the close connection existing between the effective protection of the rights of the individual and the effective enforcement of EU law: the obligation placed upon national courts, intended as a means for ensuring effectiveness of EU law at national level, turned out to be an indirect instrument for granting judicial protection to individuals, whose concern for their rights constitutes an important additional form of enforcement of EU law.

This aspect, in whose regard the preliminary reference procedure plays an important role³⁵, represents a core element of the role of national courts in the EU legal order from the point of view of the judicial protection of the individual: accordingly, national courts actually became the ‘natural forum’³⁶ where individuals should seek for judicial protection of their interests in situations where the enforcement of EU law is involved, whenever their rights of freedoms are violated as a result of a failing of one of the duties generated by such rights on the part of another private party, a Member State or even the EU institutions³⁷.

35 Despite the features which make the preliminary reference procedure a mechanism of cooperation between judges rather than a remedy for the individual, long established case-law of the Court of Justice addressed this instrument as an indirect remedy which could fill the gaps left by the set of legal remedies available to the individual. In the Court’s view, the entitlement of individuals to have their rights protected is mostly guaranteed, whenever EU law is involved, through the preliminary reference procedure, as it provides individuals with indirect access to the Court of Justice whenever other direct avenues are precluded. This approach, which was partially confirmed even by the ECtHR in a recent judgement on access to justice and due process of law (ECtHR, *Ullens de Schooten v Belgium*, No. 3989/07 and 38353/07, judgement of 20 September 2011) led to some important developments: the Court of Justice soon maintained that the effectiveness of the preliminary reference procedure should not be prejudiced by any national rule, even of a procedural nature, which has the effect of restricting the powers of the national judge to raise a preliminary question to the Court of Justice (see ECJ, *Mecanarte*, case C-348/89, judgement of 27 June 1991, [1991] I-3277, and, more recently, CJEU, *Melki*, joint cases C-188 and 189/10, judgement of 22 June 2010, [2010] I-5667 and CJEU, *Elchinov*, case C-173/09, judgement of 5 October 2010, [2010] I-8889); also, the Court ruled that the principle of State liability for the breach of EU law may also apply when claiming responsibility of the national judges who disregard the duty imposed upon them by Article 267 TFEU (the principle was first affirmed in ECJ, *Köbler*, case C-224/01, judgement of 30 September 2003, [2003] I-10239 and then re-affirmed in ECJ, *Traghetti del Mediterraneo*, case C-173/03, judgement of 13 June 2006, [2006] I-5177 and, more recently, in the context of an infringement procedure in CJEU, *Italy v. Commission*, case C-379/10, judgement of 24 November 2011, not yet published).

36 TESAURO, *The effectiveness of judicial protection and the co-operation between the Court of Justice and National Courts*, in *Festschrift til Ole Due: Liber Amicorum*, Gad, Copenhagen, 1999, 355 ff.

37 With regard to the latter, see ECJ, *UPA*, case C-50/00 P, judgement of 25 July 2002, [2002] I-6677 and ECJ, *Jégo-Quéré*, case C-263/02 P, cited above.

3. THE IMPACT OF THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION ON NATIONAL RULES

As a general principle binding upon EU institutions as well as upon Member States, the principle of effective judicial protection has been increasingly applied both in its vertical and in its horizontal dimension. In the first sense, it was used as a parameter to conform proceedings before the ECJ to the various fundamental rights which constitute its essence³⁸, as well as to render the whole set of legal remedies available to the individual in the EU legal order overall complete and effective³⁹. In the second sense, it was used as a basis for judging national legal norms on remedies and procedures in order to ensure a correct enforcement of rights and obligations arising from EU law with respect to individuals. It is in this latter application that the principle showed its potential, producing a notable impact on national procedural rules as well as on the obligations placed upon national courts, and limiting procedural autonomy far beyond the common limits of equivalence and effectiveness.

A brief clarification on this point appears necessary, as the difference existing between the equivalence and effectiveness test and the effective judicial protection test is at the core of the reconstruction which follows. Both the mentioned tests have as their object the conformity to EU law of national procedural rules, which are established under a competence which exclusively pertains to Member States; however, they move from a different starting point. According to procedural autonomy, national rules are, in principle, neutral with respect to EU law, as they become significant only as a means for the enforcement of EU provisions at national level; therefore, they may be deemed incompatible with EU law only in the event that they fail to grant such enforcement: this is the case where the provisions concerned do not comply with the principles of equivalence or effectiveness as interpreted by the Court. Conversely, the same procedural rules, even without representing an obstacle to the enforcement of EU law before national courts, may be still regarded as a substantive infringement of the principle of effective judicial protection, when their application determines a restriction to one of the rights enshrined in the principle: such restriction shall be regarded as unlawful, unless it can be justified by objective and legitimate reasons.

In fact, the limits to procedural autonomy and the principle of effective judicial protection have a different scope: the former are intended to avoid obstacles to the correct enforcement of EU law, and the rights and obligations derived from its provisions; while the latter is rather intended to ensure respect of a general rule of law, reflecting a fundamental right of the individual. Accordingly, the

38 See for example ECJ, *Masdar*, case C-47/07 P, judgement of 16 December 2008, [2008] I-9761 and CJEU, *Deutsche Post AG*, joint cases C-463/10 P and C-475/10 P, judgement of 13 October 2011, not yet published.

39 See for example ECJ, *Der Grüne Punkt*, case C-385/07 P, judgement of 16 July 2009, [2009] I-6155.

principle of effective judicial protection shall find application irrespective of its effects on EU law, even in the event that the justification for the limitation caused by a national procedural rule were based upon an EU-based interest.

This difference in perspective affects the test itself: with regard to procedural autonomy, the test consists in principle in the abstract control on equivalence and effectiveness, and Member States should be generally entrusted with quite a wide margin of discretion; on the contrary, the test on effective judicial protection is ruled by a human rights-based approach, and consists in a balance between the right of the individual and the justification laid down for that particular provision under the principles of necessity and proportionality⁴⁰.

This reconstruction is also supported by case-law of the Court of Justice: in the judgement issued in the case *Alassini*⁴¹, the Court applied separately the test of procedural autonomy and the test of effective judicial protection, reaching opposite solutions with respect to the compatibility of the same national procedural rule. The case concerned an Italian legislation under which an attempt to achieve an out-of-court settlement was a mandatory condition for the admissibility before the courts of actions in certain disputes between providers and end-users under the EU Universal Service Directive⁴². The references were submitted in the context of four disputes brought by a number consumers against certain mobile companies, regarding alleged breaches of the contracts binding the parties. In all actions brought by the applicants in the proceedings before the referring court, the defendants had argued by way of a preliminary objection that under Italian law the actions were inadmissible because the applicants had not first initiated the mandatory attempt to reach a settlement of the dispute before the competent body. In order to assess whether the establishment of a mandatory settlement procedure as a condition for the admissibility of actions before the courts was to be considered compatible with the right to effective judicial protection, the Court of Justice tested the respect of both the limits of procedural autonomy (equivalence and effectiveness) and of the principle of effective judicial protection⁴³. While founding, in principle, no violation of the principles of equivalence and effectiveness, provided that certain conditions were respected⁴⁴,

40 As “it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed”. This approach, first established in landmark case *Hauer*, case 44/79, judgment of 13 December 1979, [1979] 3727, was often referred to also with regard to the principle of effective judicial protection.

41 CJEU, *Alassini*, joint cases C-317 to 320/08, judgement of 18 March 2010, [2010] I-2213.

42 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services.

43 CJEU, *Alassini*, cited above, paragraph 47.

44 CJEU, *Alassini*, cited above, paragraphs 50 to 60.

the Court conversely recognised the existence of a restriction to the principle of effective judicial protection, maintaining that national legislation introduced an additional step for access to the courts which might prejudice judicial protection of the individuals. Such a restriction was nevertheless found admissible in the light of the principles of necessity and proportionality⁴⁵.

Unfortunately, the differences which have just been outlined, that may appear so sharp in abstract terms, are often faint in the case-law of the Court of Justice. The concrete application of the principle of effective judicial protection could not avoid in quite a number of cases producing an interaction with the limits of equivalence and effectiveness: as a result, the principle has been applied in different ways, being the test, on some occasions, very similar to that of procedural autonomy, while following, on other occasions, the different path of a human rights-based approach, with different results in terms of protection of the individual and impact on national procedural rules. This reconstruction is supported by the analysis which has been conducted on relevant case-law of the Court of Justice, where it was possible to identify, with respect to the role and consistency of the principle of effective judicial protection, four co-existing main approaches of the Court of Justice, which shall be briefly outlined as follows.

A first approach regards the principle of effective judicial protection merely as an additional means for ensuring the *effet utile* of EU law in Member States. As such, the principle is not used in order to protect a fundamental right of the individual, but rather to grant a minimum standard of effectiveness of EU law at national level, and as a ground to strengthen the limits of equivalence and effectiveness against procedural autonomy. A notable example of this approach may be found in the *Unibet* case⁴⁶, where the Court of Justice referred to the general principle of effective judicial protection as a parameter for determining the content of the principles of equivalence and effectiveness. The facts of the case may be summarised as follows. Unibet was an English company offering gaming and betting services on the web. In November 2003, it had purchased advertising space in a number of different Swedish media with a view to promoting its gaming services on the internet. However, in accordance with the Swedish law on

45 CJEU, *Alassini*, cited above, paragraph 63. According to the Italian Government, the aim of the national provisions at issue was the quicker and less expensive settlement of disputes relating to electronic communications and a lightening of the burden on the court system, representing legitimate objectives in the general interest. Those objectives were shared also by EU law, since the directive itself fostered the provision of alternative mechanisms for the out-of-court settlement of consumer disputes so as to reduce the cost of settling consumer disputes and the duration of the procedure. According to the Court of Justice, the imposition of an out-of-court settlement procedure such as that provided for under the national legislation at issue, did not seem – in the light of the detailed rules for the operation of that procedure – disproportionate in relation to the objectives pursued: no less restrictive alternative to the implementation of a mandatory procedure existed, since the introduction of a merely optional out-of-court settlement procedure would not be as efficient in achieving those objectives.

46 ECJ, *Unibet*, case C-432/05, judgement of 13 March 2007, [2007] I-2271.

lotteries, all activities relating to games in which the possibility of gain is based on chance, such as betting, bingo games, slot machines and roulette machines, required an administrative licence issued by the competent authorities at local or national level; without this licence, it was not permitted, in commercial operations or otherwise for gain, to promote participation in unlawful lotteries organised domestically or in lotteries organised abroad. In accordance to this law, the Swedish State took a number of measures, including obtaining injunctions and commencing criminal proceedings, against those media which had agreed to provide Unibet with advertising space. No administrative action or criminal proceedings were brought against Unibet, which, before being addressed by any measure, brought an action against the Swedish State claiming its right, pursuant to Article 56 TFEU (freedom to provide services), to promote its gaming and betting services in Sweden, and claiming damages suffered as a result of that prohibition on promotion as well as interim relief for the measures and sanctions applied by Sweden to its media partners. However, all claims were bound to be rejected in the absence of a specific legal relationship between Unibet and the Swedish State, as seeking for an abstract review of a legislative provision was not admissible under Swedish law. Doubting on the compatibility of this interpretation of national law with EU law, the Swedish judge referred to the Court of Justice, asking in essence whether the principle of effective judicial protection of an individual's rights under EU law required it to be possible to bring a free-standing action for an examination as to whether national provisions are compatible with the EU freedom to provide services, considering that there were other legal remedies which permitted the question of compatibility to be determined as a preliminary issue. The Court moved from the consideration that the need to ensure effective judicial protection, read in the light of the principle of procedural autonomy and its limits, is not intended as to create new remedies in the national courts to ensure the observance of EU law, other than those already laid down by national law; this would be the case "only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law"⁴⁷. Accordingly, the content of the principle of effective judicial protection should essentially consist in imposing on national courts an obligation "to interpret the procedural rules governing actions brought before them [...] in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective [...] of ensuring effective judicial protection of an individual's rights under Community law"⁴⁸. The test on the respect of the right to effective judicial protection was therefore modelled on the application of the principles of equivalence and effectiveness, as to ensure a minimum standard of protection under which

⁴⁷ ECJ, *Unibet*, cited above, paragraph 41.

⁴⁸ ECJ, *Unibet*, cited above, paragraph 44.

national procedural rules should not preclude *any* reasonable opportunity for the individuals to claim their rights derived from EU law at national level⁴⁹.

A different interpretation of the principle of effective judicial protection results from the analysis of certain cases where the Court of Justice applied the principle on a case-by-case basis, in the light of a need to provide for a special protection to the rights of the individual, by virtue of the specific circumstances of the claim or considering the particular features of the sector of EU law involved. Two judgements may be recalled as examples of this approach.

*Impact*⁵⁰ is a case where the application of the principle of effective judicial protection was very much influenced by the specific circumstances of the claim. The judgement arose from a preliminary reference which was made in proceedings brought by the Irish trade union Impact, acting on behalf of Irish civil servants, against the government departments where these servants were employed. The litigation concerned conditions applied to fixed-term workers which, according to Impact, were discriminatory in nature with respect to the conditions applicable to permanent workers and so incompatible with certain provisions of a EU Directive⁵¹. Among other grounds of review, Impact had claimed that national law infringed the principle of effective judicial protection: national law implementing (late) the EU Directive, while transposing incorrectly some of its provisions, had created a special Commissioner but had limited its jurisdiction to adjudicating on complaints based on domestic law; as a result, individuals could not directly rely upon provisions of the Directive before this Commissioner, even if they were unconditional and sufficiently precise (meaning that they had direct effect), but they could only bring a proceedings before the ordinary judge, but with higher costs and obstacles to bring the action. The alleged violation in the specific case was due to the fact that some of the claims brought by the

49 Specifically, the fact that Swedish law did not provide for a self-standing action seeking primarily to dispute the compatibility of a national provision with EU law did not infringe the principle according to the Court, provided that the principles of equivalence and effectiveness were observed in the domestic system of judicial remedies by virtue of the existence of other rules. The Court found no violation of the equivalence principle, since Swedish law did not provide for such a free-standing action, regardless of whether the higher-ranking legal rule to be complied with was a national rule or a EU rule (paragraph 48); neither it found violation of the effectiveness principle, because of the existence of other remedies for the purpose of challenging the validity of the provision under EU law, particularly the possibility to file a claim for damages before the ordinary courts, where Unibet would have the opportunity to dispute the compatibility of those provisions with EU law (paragraph 53). Considering all the above, the Court of Justice maintained that Unibet had legal remedies available which ensured effective judicial protection of its rights under EU law. A different solution would be required only if, on the contrary, Unibet had been forced to undergo administrative or criminal proceedings (and any penalties that may result) as the sole form of legal remedy for disputing the compatibility of the national provision at issue with EU law.

50 ECJ, *Impact*, case C-268/06, judgement of 15 April 2008, [2008] I-2483.

51 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

applicants were based upon situations which took place in the period between the deadline for transposing the directive and the date on which the transposing legislation entered into force: as a result, according to national law, they should have brought at the same time an action before the Commissioner based on national implementing legislation, and a separate action before an ordinary court, in order to assert the rights which they could derive directly from the EU Directive for the period preceding the date on which the national implementing legislation entered into force. In this case, the Court of Justice linked the principle of effective judicial protection to the responsibility of national courts under article 4 TEU to provide for the legal protection which individuals may derive from provisions of EU law and to ensure that those rules are fully effective⁵². Stressing the importance of effectiveness of judicial protection of rights derived from EU law allowed the Court to consider that in this case the existence of a remedy available to the individual to invoke provisions of the EU Directive was not sufficient. The Court therefore suggested the opportunity of extending the special Commissioner's jurisdiction, as to avoid that individuals in the situation of the complainants would suffer from procedural disadvantages, in terms, *inter alia*, of cost, duration and respect of the rules of representation, that would render excessively difficult the exercise of their rights.

This approach is likely to be adopted by the Court of Justice also in cases where in special fields of EU law more or less detailed procedural guarantees are provided for by the applicable legislation, as a result of a choice of legislative policy. The *Boxus* case⁵³ concerns the sector of environmental law, which is a field where a standard of judicial protection, aimed at establishing procedural rights which ensure the participation of individuals in the definition of policies which may have an impact on the environment, is imposed at international level⁵⁴ and then transposed in EU law. The case originated in the course of proceedings brought by persons living near Liège-Bierset and Brussels South Charleroi airports and the Brussels to Charleroi railway line against the *Région Wallonne* (Walloon Region). The applicants had challenged before the *Conseil d'État* a series of authorisations adopted by the competent administrative authorities concerning the carrying out of works or the operation of installations in connec-

52 ECJ, *Impact*, cited above, paragraphs 42 and 43.

53 CJEU, *Boxus*, joint cases C-128, 131, 134 and 135/09, judgement of 18 October 2011, not yet published.

54 In particular by the United Nations Economic Commission for Europe (UNECE) *Convention on access to information, public participation in decision-making and access to justice in environmental matters*, signed at Aarhus in 1998. All Member States are part of the Convention, which was officially ratified by the EU in 2005. The Convention lays down a set of basic rules to promote citizens' involvement in environmental matters and improve enforcement of environmental law. In particular, it grants public access to environmental information, provides for participation in environmental decision-making, and allows the public to seek judicial redress when environmental law is infringed.

tion with those airports and transport links to them. While those actions were pending before the *Conseil d'État*, a Decree of the Walloon Parliament of 17 July 2008, which is a legislative act adopted by the Walloon Parliament and approved by the government of the Walloon Region, 'ratified' those authorisations, meaning that they validated them on the basis of 'overriding reasons in the general interest'. After the issue of the Decree, the applicants argued that, since an act of a legislative nature had replaced the contested administrative acts and that legislative act could be challenged only before the *Cour constitutionnelle*, the effect of the adoption of the abovementioned decree deprived the *Conseil d'État* of jurisdiction and deprived them of their interest in the annulment of the administrative acts. According to the applicants, the only possible action against that legislative act, which would be an action for annulment before the *Cour constitutionnelle*, did not comply with their rights to be heard, inasmuch as the *Cour constitutionnelle* had only a limited power of review, and was therefore unable to assess compliance with all the provisions of national environmental law, and of the applicable procedural rules. The claim was based upon some provisions of a EU Directive on 'Environmental Impact Assessment' (EIA)⁵⁵, interpreted in the light of the principles embedded in the Aarhus Convention, according to which each person having sufficient interest should have access to a review procedure before a court or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission affecting the rights conferred upon them by the Convention itself. The preliminary reference raised by the national court essentially concerned the question whether Article 9 of the Aarhus Convention and certain provisions of the EIA Directive were compatible with the choice to implement a project by a legislative act against which, under national law, no substantial review procedure was available. In this case, in order to ensure the procedural rights granted to individuals, the Court found it necessary to entrust any national court of the power of exercising a review on the legislative act contested by the applicants, although this power was *not* envisaged by national law⁵⁶.

55 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, which requires Member States to carry out assessments of the environmental impact of certain public and private projects before they are allowed to go ahead. The aim of the Environmental Impact Assessment process is to ensure that projects which are likely to have a significant effect on the environment are assessed in advance so that people are aware of what those effects are likely to be.

56 According to the Court of Justice "Article 9 of the Aarhus Convention and Article 10 of Directive 85/337 would lose all effectiveness if the mere fact that a project is adopted by a legislative act [...] were to make it immune to any review procedure for challenging its substantive or procedural legality within the meaning of those provisions" (paragraph 53). The Court therefore did not hesitate to draw the conclusion that "if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous paragraph and, as the case may be, drawing the necessary conclusions by disapplying that legislative act" (paragraph 55).

This solution shows that the existence of an EU legislative provision granting certain procedural rights to individuals may expand the impact of the principle of effective judicial protection on national procedural law: in such cases, the application of the principle, whose content is autonomously determined by the Court, may go to the extent of requiring the existence in each Member State of a remedy able to grant the specific standard of protection imposed by EU law.

The cases examined so far represent applications of the principle of effective judicial protection which appears mainly linked to the effectiveness of EU law: in other words, they reflect the principle embedded in art. 19(1) TEU, under which the obligation to ensure effective remedies is placed upon national courts as a means to grant effectiveness of EU law – or rights and obligations originated from such law – at national level. This reconstruction stays steady irrespective of the impact that the principle may have on national rules: either a simple limit, beyond equivalence and effectiveness, to national procedural autonomy, or a means for granting success to the specific claim of the individual or the effectiveness of an specific rule of procedural nature which may be derived from EU law. Even when the test is more penetrating and may have a more relevant impact on national rules, with the possible consequence of improving the level of judicial protection of the individual, the principle serves mainly the effectiveness of EU law⁵⁷ and is far from being applied as pertaining to a fundamental right of the individual – not to mention the fact that in those cases where the Court of Justice chooses a case-by-case approach, this entails the risk of undermining legal certainty.

However, in a number of recent judgements where the principle of effective judicial protection was applied, the Court appeared to be more committed to grant effectiveness of the right of the individual to judicial protection as such, rather than linking its reasoning to the effectiveness of EU law. In such cases, the application of the principle was linked to a fundamental right and implied a balance between competing interests.

In this respect, different situations may be outlined, variously affecting the consistency of the principle.

The first scenario relates to a conflict between a right derived from EU law opposed to a national procedural rule which has the effect of denying it. This situation occurred in the *DEB* case⁵⁸, which concerned the compatibility with the principle of effective judicial protection of a national rule granting legal aid to legal persons and entities only in such cases where the failure to pursue or defend the action would run counter to the public interest. The issue was raised by a company seeking to bring an action to establish that Germany had incurred in

57 E.g. freedom to provide services in the *Unibet* case, equal treatment directive in the *Impact* case, EIA directive in the *Boxus* case.

58 CJEU, *DEB*, case C-279/09, judgement of 22 December 2010, [2010] I-13849.

State liability under EU law⁵⁹. Being uncertain on whether the refusal of legal aid to DEB for the pursuit of an action seeking to establish State liability under EU law was consistent with the principles of that law, the national appeal court raised a preliminary reference to the Court of Justice. The object of the reference was, in a nutshell, whether the fact that a legal person was unable to qualify for legal aid rendered the exercise of its rights impossible in practice and precluded its right of access to a court. The Court solved the question on the basis of the right of a legal person to effective access to justice and interpreted the principle of effective judicial protection in the light of the scope of application and the wording of Article 47 of the Charter, taken in conjunction with the constitutional traditions of Member States and ECtHR's case-law on Article 6 ECHR. In the absence of a common principle, from all these provisions the Court drew, adopting a "constitutional" approach, some criteria on how the right to be granted legal aid to have effective access to justice might be extracted and interpreted: leaving to the national court the duty "to ascertain whether the conditions for granting legal aid constituted a limitation on the right of access to the courts undermining the very core of that right, whether they pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve"⁶⁰; and establishing at the same time some criteria which could be taken into consideration in the light of this assessment⁶¹.

The second scenario may refer, conversely, to a case where a right related to judicial protection granted by national law has the effect of limiting the effectiveness of EU law. An interesting example is the recent case *Belvedere Costruzioni*⁶². The case concerned an Italian legislation adopted in 2010⁶³, under which proceedings that had been pending before the Central Tax Court (Commissione

59 In particular, the company was seeking reparation from Germany for the delay in the transposition of certain directives concerning common rules for the internal market in natural gas, intended to make non-discriminatory access to the national gas networks possible (*Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC*). DEB submitted that, as a result of that delay, it was unable to obtain access to the gas networks of the German network operators and was therefore obliged to forgo profits amounting to approximately EUR 3.7 thousand million under contracts with suppliers for the supply of gas. Owing to its lack of income and assets, DEB – which had no employees or creditors – was unable to make the necessary advance payment of court costs required by German procedural law, nor to pay for representation by a lawyer, whose instruction was compulsory in the main proceedings. However, the German Court had refused to grant legal aid on the ground that the conditions laid down in the German procedural code were not satisfied.

60 CJEU, *DEB*, cited above, paragraph 60.

61 CJEU, *DEB*, cited above, paragraphs 61–62.

62 CJEU, *Belvedere Costruzioni*, case C-500/10, judgement of 29 March 2012, not yet published.

63 Decree-Law No 40/2010 of 25 March 2010, converted, with amendments, into Law No 73/2010 of 22 May 2010.

Tributaria Centrale) for more than 10 years at the date of its entry into force, were bound to be concluded without an examination of the appeal where the State tax authorities had been unsuccessful at first and second instance. This provision was introduced with the view to reducing the length of tax proceedings and thus observing the principle that judgement must be given within a reasonable time, within the meaning of Article 6 ECHR. According to this legislation, proceedings pending were automatically concluded, including the tax litigation concerned in the specific case. This would have the consequence of rendering the decision of the court of second instance final and binding, and the debt claimed by the tax authorities extinguished, but would result at the same time in a breach of some EU directives on VAT as interpreted by the Court of Justice. In essence, this was a case where a procedural rule aimed at granting the right of the individual to a reasonable length of proceedings would prejudice the correct application of EU law. In its judgement, following a preliminary reference of the national court judging on the merits, the Court of Justice maintained that the effectiveness of EU law on VAT could not be interpreted as running “counter to compliance with the principle that judgement should be given within a reasonable time, which, under the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, must be observed by the Member States when they implement European Union law, and must also be observed under Article 6(1) of the ECHR”⁶⁴. The Court of Justice thus ascertained that the limit imposed to the effectiveness of EU law should be justified in the light of the need to ensure the right of the individual, with due respect of the principles of necessity and proportionality⁶⁵.

A third scenario may be envisaged in situations where applicable EU law is neutral with respect to effective judicial protection and the principle is applied as to offer an interpretation of domestic law on remedies and procedure capable of ensuring a fair level of judicial protection to the parties in the main proceedings. The judgement of the Court in *Lindner*⁶⁶ shall be referred to as an example. The case originated from a litigation between a Czech bank and Mr. Lindner, a German national, who was required to pay arrears on the mortgage loan which was granted pursuant to a contract between the parties. At the time when the contract was concluded, Mr Lindner was deemed to be domiciled in Czech Republic. The bank had brought the action before the ‘court with general jurisdiction over the

64 CJEU, *Belvedere Costruzioni*, cited above, paragraph 23.

65 In fact, Italian law prescribed the conclusion solely of tax proceedings which, at the date of the entry into force of that provision, had lasted for more than 10 years since the application at first instance was made, and that it pursued the objective, as is apparent from its very wording, of remedying the breach of the reasonable time requirement in Article 6(1) of the ECHR. In the light of these considerations, the Court considered the Italian rule “an exceptional provision”, of a specific and limited nature, which did not create significant differences in the way in which taxable persons are treated as a whole (paragraphs 26–27).

66 CJEU, *Lindner*, case C-327/10, judgement of 17 November 2011, not yet published.

defendant', as to say the court were Mr. Lindner was domiciled. However, when the payment order was adopted by the national court, Mr. Lindner was not staying at any of the addresses known to the referring court. Unable to establish any other place of residence for the defendant in the Czech Republic, the court, in application of the national procedural law, considered the applicant to be a person whose domicile was unknown and assigned to him a guardian *ad litem*. Among other issues, related to the interpretation of certain provisions on jurisdiction contained in a EU Regulation⁶⁷, the court referred to the Court of Justice the question whether a provision of national law of a Member State enabling proceedings to be brought against persons whose domicile was unknown would be precluded by EU law, as it entailed the risk of a prejudice to the defendant's rights. In this case, the Court of Justice applied the principle of effective judicial protection with the view to ensuring a fair balance between the rights of the applicant and those of the defendant. The Court moved from a fundamental rights perspective, referring several times to the guarantees connected to effective judicial protection as subjective rights of the parties which need protection: the right of the applicant to bring proceedings, the right of defence of the defendant, and even a general right to effective judicial protection⁶⁸. According to the Court, "the requirement that the rights of the defence be observed, as laid down also in Article 47 of the Charter of Fundamental Rights of the European Union, must be implemented in conjunction with respect for the right of the applicant to bring proceedings before a court in order to determine the merits of its claim"⁶⁹. In the light of this consideration, the Court held that a court having jurisdiction might reasonably continue proceedings, in the case where it has not been established that the defendant has been enabled to receive the document instituting the proceedings, only if all necessary steps have been taken to ensure that the defendant can defend his interests. Even if the possibility of taking further steps in the proceedings without the defendant's knowledge, by means of notification of the action served on a guardian *ad litem* appointed by the court, constitutes a restriction of the defendant's rights of defence, that restriction may, however, be justified in the light of an applicant's right to effective protection, given that, in the absence of such proceedings, that right would be meaningless⁷⁰. In that respect, the Court of Justice pointed out that "in contrast to the situation of the defendant, who, when deprived of the opportunity to defend himself effectively, will have the opportunity to ensure respect for the rights of the defence by opposing recognition of the judgement issued against him, the applicant runs the risk of being deprived of all

67 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

68 CJEU, *Lindner*, cited above, paragraphs 45, 49 and 53 respectively.

69 CJEU, *Lindner*, cited above, paragraphs 49–50.

70 CJEU, *Lindner*, cited above, paragraph 53.

possibility of recourse”⁷¹. According to the Court, such solution would avoid “situations of denial of justice”, which constitutes an “objective of public interest”⁷².

4. CONCLUSIVE REMARKS: CURRENT ISSUES AND FUTURE PERSPECTIVES

As the proposed case-law analysis tried to illustrate, the approach of the Court of Justice in interpreting and applying the general principle of effective judicial protection when judging national law on remedies and procedures may consistently vary, depending upon the specific circumstances of the case and the result that the Court is willing to achieve. Therefore, the consistency of the principle of effective judicial protection, as well as its impact on national rules, remains quite a complex issue.

Case-law shows in fact how effectiveness of judicial protection may at the same time be intended by the Court as a means to ensure *effet utile* of EU law, as a ground to strengthen EU procedural rights or as a tool to ensure protection to subjective rights of the individual – implying different consequences as to how this can affect the role of national courts and the application of domestic rules on remedies and procedure.

Nonetheless, a certain evolution of the judicial trend of the Court of Justice on this matter towards a more defined human rights-based approach may be inferred from certain recent decisions which have been commented. This is the case where the Court derives from the principle subjective rights pertaining to the individual, whose protection requires a *positive* role of national courts, while interpreting and applying domestic law on procedure and remedies. Accordingly, effective judicial protection becomes more than a general principle informing the EU legal order, to be *observed* by both Member States and EU institutions, rather turning into a peculiar source of self-standing rights which need to be *protected* and granted effectiveness by the Court itself and by national courts within the field of application of EU law⁷³.

71 CJEU, *Lindner*, cited above, paragraph 54.

72 CJEU, *Lindner*, cited above, paragraph 53.

73 It must be noted that such qualification of the principle entails some theoretical issues, in the light of the distinction traced in EU law between ‘rights’ and ‘principles’. As clarified in the explanation to Article 52(5) of the Charter, “according to that distinction, subjective rights shall be respected, whereas principles shall be observed [...]. Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union’s institutions or Member States authorities”. An interesting analysis referred to the right to a hearing, concerning its function in the EU legal order and the varying degrees of judicial scrutiny that it may entail, is to be found in TRIDIMAS, *The general principles of EU law*, cited above. More generally, on the position of the individual with respect to general principles, see ARNULL, *The general principles of EEC law and*

On the one hand, such evolution would ideally lead to the application of a test which appears more consistent with the need to ensure a balance between the fundamental rights linked to the principles of effective judicial protection and due process of law, on one side, and the competing EU or national interests, on the other side. This approach, typically characterising a fundamental rights perspective, would grant more coherence and legal certainty, also avoiding further ambiguity in terminology.

On the other hand, as recent case-law shows, the interest of the Court of Justice in ensuring effectiveness of EU law – even when this may lead to the detriment of the fundamental rights enshrined in the principle of effective judicial protection and conferred to the benefit of other subjects – might give rise to delicate issues of coordination with respect to both ECtHR and national jurisprudence.

First, with regard to coordination between the Court of Justice and the ECtHR, it is interesting to note how the two courts reached opposite conclusion with respect to the compatibility with the requirements of effective judicial protection of certain national laws implementing the EU Asylum Directive⁷⁴, which provided for an accelerated procedure to examine asylum application, granting low standards of protection as to the applicant's right to defence, participation in the proceedings and review of legality. The Court of Justice, in its judgement in the case *Samba Diouf*⁷⁵: regarded such national provisions as overall compatible with the principle of effective judicial protection, as the restrictions they may entail were proportionate to the legitimate aim pursued⁷⁶; whereas the ECtHR ruled in a later judgement for their incompatibility with Article 13 ECHR, taken in conjunction with Article 3: according to the Strasbourg Court, although pursuing the legitimate objective of rendering faster judgements, the limitation imposed on the applicant's right to judicial review by the procedure on accelerated treatment of applications to international protection were disproportionate and incompatible to the right to an effective remedy, as they had the effect of depriving applicants from the enjoyment of basic procedural guarantees⁷⁷.

Secondly, referring to a potential conflict between the principle of effective judicial protection as interpreted by the Court of Justice and right to effective judicial

the individual, Leicester, University Press, Leicester, 1990, GAJA, *Identifying the status of general principles of European Community law*, in *Scritti in onore di G.F. Mancini*, II, Giuffrè, Milano, 1998, 445 ff. and BERNITZ, NERGELIUS (eds.), *General principles of European Community law*, Kluwer Law International, The Hague, 2000.

74 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

75 CJEU, *Samba Diouf*, case C-69/10, judgement of 28 July 2011, not yet published.

76 Which was “to ensure that unfounded or inadmissible applications for asylum are processed more quickly, in order that applications submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently” (CJEU, *Samba Diouf*, cited above, paragraph 65).

77 ECtHR, *I. M. v France*, No. 9152/09, judgement of 2 February 2012.

protection as it may be interpreted by national courts, an interesting case which is worth to recall is *Chartry*⁷⁸. The case concerned a tax litigation between Mr. Chartry and the Belgian tax authority. Mr. Chartry claimed for an interpretation of national tax law, while the administration claimed for the opposite interpretation. At some point in the course of the proceedings, the legislator had adopted a law which supported the interpretation given by the administration for reasons of public interests, and which was intended to have effect also on pending proceedings. This fact obviously affected individuals' rights of defence in pending proceedings; still, the Belgian constitutional court maintained that since the national law was pursuing an objective of general interest, this restriction of the individuals' right of defence was justified and proportionate. Not convinced of such an interpretation, the national court before which Mr. Chartry had brought his action had referred to the Court of Justice, to ask whether this retroactive law was compatible with the EU right to an effective judicial protection. Before the fact that the case concerned a purely internal situation, which had no connection with EU law, the Court had to reject the reference, as obviously the application of the EU general principle of effective judicial protection is limited to situations which fall within the field of application of EU law. The case nonetheless appears interesting, if one starts wondering how the Court would have ruled the question, if the claim of Mr. Chartry were based on EU tax law and the reference had been admissible: presumably, a conflict could arise between the interpretation given by a national constitutional court to the right to an effective remedy and the content of the EU principle of effective judicial protection.

Indeed these are challenges which would need to be faced if the EU general principle of effective judicial protection were to be applied as a self-standing right, likely to be claimed by the individual as such – in the field of application of EU law – both before the Court of Justice and before national courts. Still, this would appear a coherent solution, which would value the principle of effective judicial protection as a means to ensure individuals' rights in the EU legal order as a whole, also in the light of the pressing calls for a more prominent role of the Court of Justice for the protection of human rights within the field of application of EU law⁷⁹.

78 CJEU, *Chartry*, case C-457/09, order of 1 March 2011, not yet published.

79 See, in this regard the joint communication from Presidents Costa and Skouris, issued after the meeting of 17 January 2011 of the delegations from the ECtHR and the Court of Justice of the European Union, concerning the application of the Charter of Fundamental Rights of the European Union and the accession of the European Union to the ECHR. Full text of the communication is available at http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf.

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