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## EU asylum procedures and the right to an effective remedy

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## 4 | The EU right to an effective remedy and related procedural rights and principles

This chapter will address the scope of application and the general content and meaning of the EU right to an effective remedy. Furthermore it will introduce the procedural rights included in or linked to this right, such as the right to a fair trial, the principle of effectiveness and the right to good administration as well as the specific rights they encompass (sections 4.3-4.4). These EU rights and principles will be used in this study in order to build a set of EU standards for the themes discussed in Chapters 6 to 10. This chapter also establishes which are the specific sources of international law inspiring these EU procedural rights.

The Court of Justice has so far only recognised Articles 6 and 13 ECHR as sources of inspiration for the EU right to effective judicial protection. However it is argued in this chapter that in the asylum context also the ECtHR's case-law regarding substantive provisions such as the prohibition of *refoulement* and provisions regarding the exhaustion of domestic remedies should be considered relevant for the development of EU procedural rights. Furthermore expectedly other provisions of international law, which also include a right to an effective remedy or a right to a fair hearing, such as Articles 2 (3) and 14 ICCPR and Article 3 CAT will serve as sources of inspiration for EU fundamental rights.<sup>1</sup>

Before introducing the EU rights to effective judicial protection and the right to good administration two important issues will be addressed. Section 4.1 concerns the potential impact of EU procedural rights on national procedural systems. It shows that the Court of Justice's case-law regarding EU procedural rights, in particular the right to effective judicial protection, has considerably limited what is often called the principle of procedural autonomy of the Member States. It may therefore be expected that the EU right to an effective remedy will limit the Member States discretion to design their asylum procedures.

Section 4.2 addresses the interrelationship between the different EU procedural rights. It contends that all EU procedural rights discussed in this study are interlinked. Therefore it is sometimes difficult to establish which procedural right should be applied to a certain procedural issue. The EU Courts do not give clear guidance in this respect. It is argued however that it is not necessary

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<sup>1</sup> It was argued in sections 3.2.4 and 3.2.5 that the ICCPR and the CAT should be considered sources of inspiration for EU fundamental rights in the asylum context.

for the purpose of this study to define the exact relationship between the EU procedural rights discussed in this chapter. With regard to each of the themes addressed in Chapters 6 to 10 the EU Courts' relevant case-law will be examined, irrespective of the procedural right applied by these courts. EU procedural rights are thus treated as a category of rights, which overlap and complement each other.

It will finally be explained in section 4.5 that three 'basic notions' emerge from the Court of Justice's as well as the ECtHR's case-law regarding procedural rights. These notions will be used as a tool to analyse the case-law examined in the thematic chapters and to develop a set of EU procedural standards for the procedural topics discussed in some of the thematic chapters:

- 1 When assessing whether EU procedural rights have been infringed (often) interests must be balanced against each other
- 2 When determining whether a procedure should be considered fair, regard should be had to all aspects and instances of this procedure: the overall fairness of a procedure must be examined
- 3 The subject matter of the procedure influences the level of procedural protection which must be offered to the applicant.

#### 4.1 LIMITATIONS TO THE PROCEDURAL AUTONOMY OF THE MEMBER STATES

The Court of Justice when assessing national procedural rules which are not governed by EU law takes national procedural autonomy as a starting point<sup>2</sup> by considering that: 'in the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.'<sup>3</sup> The idea which is underlying the principle of national procedural autonomy is consistent with the principle of subsidiarity and recognises that 'national procedural rules may reflect deep-seated cultural and ethical values and should not be lightly set aside'.<sup>4</sup> Indeed sometimes the EU Courts seem to be reluctant to impose obligations on Member States with regard to procedural guarantees or remedies. The Court of Justice for example refrained from imposing the conditions for granting interim protection on the national level, when compat-

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2 Accetto & Zlepzig 2005, p 396. The Court of Justice has explicitly referred to the principle of procedural autonomy in Case C-201/02, *Wells* [2004], para 67, Case C-212/04, *Adeneler* [2006], para 95 and Case C-314/09, *Strabag and Others* [2010], para 34.

3 See for example Case C-115/09, *Trianel Kohlekraftwerk Lünen* [2011], para 43.

4 Arnulf 2011, p 52. See also Accetto & Zlepzig 2005, p 395 and Delicostopoulos 2003, p 603.

ibility of national law with EU law is concerned. It did so only for cases before the national courts in which the legality of EU law is contested.<sup>5</sup>

Much has been written on the principle of national procedural autonomy and it is not feasible to give an extensive overview of relevant literature in this section.<sup>6</sup> However it should be noted here that there seems to be a broad consensus between scholars that as a result of the Court of Justice's case-law the national procedural autonomy of the Member States is in practice considerably limited. This limitation is the result of the important role of national legal systems to implement and enforce EU law.<sup>7</sup> According to Trstenjak and Beysen 'the concept of procedural autonomy of the Member States does not imply the existence of a general principle of EU law, according to which each Member State has the right to preserve a nucleus of national procedural rules with regard to the enforcement of rights derived from EU law'.<sup>8</sup> Schwartze states that 'notwithstanding national autonomy, the need for equity and effectiveness has led to considerable Community influence on national administrative law and procedure'.<sup>9</sup> The national procedural framework for the enforcement of EU law must comply with several EU rights and principles such as the EU right to an effective remedy, the right to a fair trial, the principle of effectiveness and the right to good administration. These rights and principles will be discussed in the next sections of this chapter.

Traditionally it is thought that the principle of effectiveness must be balanced against the national procedural autonomy of the State.<sup>10</sup> Some authors however suggest that EU procedural rights have become hierarchically superior to that of national procedural autonomy.<sup>11</sup> Haapaniemi suggests that 'to speak about national procedural autonomy is, [...] at least today, much more about lipservice than reality'.<sup>12</sup> Kakouris even argues that procedural autonomy does not exist at all and that national procedural rules have become ancillary EU law. He states that national procedural law is there to serve EU Law. 'Its provisions only apply insofar as they contribute to the effective application of Community law. Where they do not they must be set aside'. According to Kakouris therefore there is no question of balancing the principle of effectiveness against the procedural autonomy of the Member States.<sup>13</sup> In his view

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5 See further Chapter 6 on the right to remain. Anagnostaras states that the fact that two separate regimes of interim protection exist seems to be a concession to the national procedural autonomy principle in an area where that may be of little practical importance to the legal interests of individuals due to the existence of domestic law principles that correspond generally to the Community law mandates. Anagnostaras 2008, p 597.

6 See for an overview Accetto & Zlepzig 2005, pp 395-397.

7 Accetto & Zlepzig 2005, p 394.

8 Trstenjak & Beysen 2011, pp 98-99.

9 Schwartze 2004, p 87.

10 Accetto & Zlepzig 2005, pp 397 and 401.

11 Arnall 2011, p 68. See also Accetto & Zlepzig 2005, p 397.

12 See for an overview Accetto & Zlepzig 2005, pp 395-397.

13 Kakouris 1997, pp 1390 and 1408.

the Member States only have institutional autonomy, freedom in organising their legal system, the jurisdictional hierarchy of the courts and the division of competence between and amongst the courts.<sup>14</sup>

This study contains numerous examples of cases in which the Court of Justice has limited the Member States discretion to design their national procedures. In its judgment in *Factortame* for example, which is discussed in Chapter 6, the Court of Justice held that the national court should be able to grant interim relief if this is necessary to ensure the effectiveness of a judgment on the existence of the rights claimed under EU law. This applies even if the court does not have the power to grant interim relief under national law.<sup>15</sup> In Chapter 8 it is explained that any requirement of proof which has the effect of making it virtually impossible or excessively difficult to exercise a right granted by EU law would be incompatible with EU law. In *Danfoss* and other cases the Court of Justice made clear that the principle of effectiveness requires a shift of the burden of proof from one party to the other if this is necessary to ensure the effectiveness of EU law.<sup>16</sup>

In the field of asylum procedures the Procedures Directive limits the procedural autonomy of the Member States. It was even decided that EU legislation should in the longer term lead to a common asylum procedure.<sup>17</sup> However as the directive does not address every aspect of asylum procedures and contains many possibilities for exceptions to the main rules and many vague norms, it leaves the Member States plenty of room to design their own asylum procedure. It also follows from the directive's preamble that Member States have discretion in organising their asylum system and legal remedies.<sup>18</sup> This study shows that EU procedural rights and principles will potentially set considerable additional requirements for national asylum procedures and will thus further limit the Member States' discretion in laying down national procedural rules. The principle approach taken in this study is that national procedural rules should ensure the effectiveness of the right to asylum and the prohibition of *refoulement*. In the absence of requirements set by the Procedures Directive the Member States are free to decide how they comply with that duty as long as they do so. This approach thus resembles the approach taken by Kakouris.

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14 Kakouris 1997, pp 1394 and 1411.

15 Case C-213/89, *Factortame* [1990]. See section 6.3.1.1.

16 See section 8.3.1.

17 Presidency Conclusions of the Tampere European Council 15-16 October 1999 (SN 200/99), paras 14-15.

18 See for example recital 11, which states that 'the organisation of the processing of applications for asylum should be left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in this Directive'. See also Case C-69/10, *Samba Diouf* [2011], paras 29-30.

A first sign that the Court of Justice is, also in asylum cases, willing to limit national procedural autonomy in favour of the EU right to an effective remedy is the judgment in *Samba Diouf*.<sup>19</sup> In this judgment the Court of Justice held that the intensity of judicial review in asylum cases falls within the scope of the EU right to an effective remedy.<sup>20</sup> Furthermore it held that the time-limit for lodging an appeal in an accelerated procedure should be set aside should that time-limit prove, in a given situation, to be insufficient in view of the circumstances.<sup>21</sup> Van Cleynenbreugel writes that the Court of Justice

thus directly interferes with Member States' discretion to adapt their national systems in conformity with newly identified EU adequate judicial protection requirements. In so doing, *Samba Diouf* challenges the classic division of procedural competences between the EU and its Member States.<sup>22</sup>

#### 4.2 THE LINK BETWEEN EU PROCEDURAL RIGHTS AND PRINCIPLES

The right to an effective remedy encompasses several rights and principles such as the right to a fair trial the right to access to court and the principles of equality of arms and adversarial proceedings. Furthermore procedural guarantees are offered by the right to good administration which in its turn encompasses several rights and obligations such as the right to be heard and the obligation to state reasons. All these rights and principles will be separately addressed in the next sections. Finally the Court of Justice has also derived procedural guarantees directly from the principle of full effectiveness of EU law, such as with regard to the burden of proof in equal pay cases.<sup>23</sup>

In their case-law the EU Courts have addressed the same procedural issues under different EU procedural rights.<sup>24</sup> An example is the Court of Justice's case-law with regard to the right to interim relief. In *Factortame* the Court held that the national court should be able to grant interim relief in order to ensure *full effectiveness of Community law*<sup>25</sup> while in *Unibet* it based the requirement to grant interim relief on the *principle of effective judicial protection*<sup>26</sup>. The Court

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19 See also Van Cleynenbreugel 2012, pp 344-345.

20 See also Widdershoven 2011, under para 3.

21 Case C-69/10, *Samba Diouf* [2011], para 68.

22 Van Cleynenbreugel 2012, p 337.

23 Case C-109/88, *Danfoss* [1998]. See further section 8.3.1.

24 In some cases it is not entirely clear which principle is used by the Court of Justice, mainly because it uses different terminology for the same principle. Sometimes the Court uses the words 'effective protection of fundamental rights' (Case C-340/89, *Vlassopoulou* [1991]), 'the legal protection which persons derive from the direct effect of provisions of Community law' (Case C-213/89, *Factortame* [1990]) or 'requirements of sufficiently effective protection' (Case C-136/03, *Dörr and Únal* [2005]).

25 Case C-213/89, *Factortame*, [1990], para 21.

26 Case C-432/05, *Unibet* [2007], para 83. See also Prechal & Widdershoven 2011, p 33.

of Justice usually does not explain its choice to apply a certain EU procedural right or principle. Therefore the exact relationship between certain EU principles, in particular between the right to effective judicial protection and the principle of effectiveness has remained unclear.<sup>27</sup>

*The right to an effective remedy and the principle of effectiveness*

In literature different views can be found on the relationship between right to effective judicial protection and the principle of effectiveness. Some consider the right to effective judicial protection to be only one feature of the overarching obligation on the Member States stemming from the principle of effectiveness.<sup>28</sup> Others see the principle of effective judicial protection as the overarching principle of which effectiveness is one aspect.<sup>29</sup>

In the judgment in *Impact* the Court of Justice explains the relationship between 1) the principle that rules of EU law must be fully effective, 2) the right to effective judicial protection and 3) the principles of equivalence and effectiveness:

It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective [..].

In that regard, it is important to note that the principle of effective judicial protection is a general principle of Community law [..].

The Court has consistently held that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law [..].

The Member States, however, are responsible for ensuring that those rights are effectively protected in each case [..]

On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively

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27 See also Oliver 2011, p 2038 and Prechal & Widdershoven 2011, p 39.

28 Accetto & Zlepnič 2005, p 388. According to Prechal and Shelkopyas it can in general be said that the principle of effective judicial protection expands the 'old' principle of effectiveness. Prechal & Shelkopyas 2004, p 591.

29 Accetto & Zlepnič 2005, p 385. Haapaniemi 2009, pp 108-109. He states that the principle of effective judicial protection is a cardinal principle, whereas the principles of effectiveness and equivalence, under the *Rewe* jurisprudence, can be seen as sub principles of it.' See also the opinion of A.G. Trstenjak in Case C-411/10, *NS v Secretary of State for the Home Department*, para 161.



difficult the exercise of rights conferred by Community law (principle of effectiveness) [..].

Those requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law.

A failure to comply with those requirements at Community level is – just like a failure to comply with them as regards the definition of detailed procedural rules – liable to undermine the principle of effective judicial protection.<sup>30</sup>

From these considerations it may be derived that the overarching principle is the principle that EU rules should be fully effective in the national legal order. This principle seeks to protect the interests of the EU. It is based on the direct effect of EU law and promotes the effective enforcement of EU law in national courts.<sup>31</sup> It entails among others that Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.<sup>32</sup> This follows from Article 4(3) TEU (the principle of sincere cooperation) which requires the Member States to

take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

The right to effective judicial protection follows from the principle of full effectiveness of EU law. Article 4 (3) TEU requires national courts and tribunals to apply EU law in full and to protect the rights it confers on individuals.<sup>33</sup> The national procedural rules governing actions for safeguarding an indi-

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30 Case C-268/06, *Impact* [2008], paras 42-48.

31 The Court of Justice has ruled that 'the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible. The possibility of obtaining redress from the Member State is particularly indispensable where [...] the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law'. Case C-6/90, *Francovich* [1991], paras 33-34.

32 See for example Case C-104/10, *Kelly* [2001], para 33. According to the Court this follows from Art 4 (3) TEU.

33 Case C-312/93, *Peterbroeck* [1995], para 12. See also Trstenjak & Beysen 2011, p 97.

vidual's rights under EU law before the national courts must comply with the principles of effectiveness and equivalence. Other case-law however implies another relationship between the the right to effective judicial protection and the principles of effectiveness and equivalence. In *Mono Car Styling* for example Court of Justice seems to suggest that national rules on an individual's standing and legal interest in bringing proceedings must be tested against both the principle of effectiveness and effective judicial protection.<sup>34</sup> Prechal and Widdershoven argue that this is the right approach. They point at the different purposes of the principle of effectiveness and the right to an effective remedy. The principle of effectiveness aims to guarantee the effective application of substantive EU law, while the right to an effective remedy 'is intimately linked to the right of access to court and, ultimately, to the idea of the "Rechtsstaat"'.<sup>35</sup> While those two interests may overlap, this is not necessarily the case.<sup>36</sup> Prechal and Widdershoven contend that the test applied under the principle of effectiveness is less demanding than that applied under the right to an effective remedy.<sup>37</sup>

*The EU right to an effective remedy and the right to good administration*

It follows from the case-law of the EU courts that the specific rights following from the right to an effective remedy, the right to a fair trial and the right to good administration interrelate, overlap and complement each other. According to the EU courts for example the rights of the defence and the right to good administration are intertwined or complementary. The Charter has codified the right to be heard and the right of access to the file, often regarded to be rights of the defence under the right to good administration.<sup>38</sup> In the *Modjadedines* case the CFI addressed the close relation between the right to a fair hearing and the obligation to state of reasons and the right to effective judicial protection:

It is appropriate to begin by examining, together, the pleas alleging infringement of the right to a fair hearing, infringement of the obligation to state reasons and infringement of the right to effective judicial protection, which are closely linked. First, the safeguarding of the right to a fair hearing helps to ensure that the right to effective judicial protection is exercised properly. Second, there is a close link between the right to an effective judicial remedy and the obligation to state reasons. As held in settled case-law, the Community institutions' obligation under Article

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34 Case C-12/08, *Mono Car Styling* [2009], paras 47-49.

35 Prechal & Widdershoven 2011, p 50. See also p 45.

36 Prechal & Widdershoven 2011, p 42. The principle of effectiveness may for example require the imposition of sanctions on individuals or the recovery of illegal State aid. In the field of asylum procedures it is hard to imagine a situation in which the effective enforcement of EU law is not in the interest of the individual asylum applicant.

37 Prechal & Widdershoven 2011, pp 39-40.

38 Barbier de La Serre 2006, pp 234-236.

253 EC to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the lawfulness of the decision and the persons concerned to know the reasons for the measure adopted so that they can defend their rights and ascertain whether or not the decision is well founded [...] Thus, the parties concerned can make genuine use of their right to a judicial remedy only if they have precise knowledge of the content of and the reasons for the act in question [...].<sup>39</sup>

For the purpose of this study it is not necessary to define the exact relationship between all relevant EU procedural rights and principles. It is sufficient to note that all these principles set requirements for national proceedings. In the following thematic chapters all relevant case-law with regard to certain procedural topics will be assessed, regardless which right or principle was used by the EU Court. The right to an effective remedy, the principle of effectiveness and related procedural rights are taken as a category of procedural norms.<sup>40</sup>

#### *Provisions of international law inspiring EU procedural rights*

Like the EU procedural rights, the procedural rights guaranteed by international law which inspire the interpretation of those EU right also overlap and complement each other. Provisions of international law which may inspire the interpretation of EU procedural rights in the context of CEAS could be divided into four categories: (1) provisions guaranteeing the right to an effective remedy, (2) provisions regarding the right to a fair trial, (3) substantive provisions, in particular those containing a prohibition of *refoulement*, of which the effective protection requires certain procedural guarantees and finally provisions aimed at ensuring the subsidiary role of human rights mechanisms (4). The ECtHR, like the Court of Justice, addresses the same procedural issues under different provisions. The obligation of a rigorous scrutiny of a risk of *refoulement* for example has been derived from both Article 3 ECHR and Article 13 ECHR. The use of secret information has been addressed under the right to family life guaranteed by Article 8 ECHR as well as several procedural rights (Articles 5 (4), 6 and 13 ECHR).<sup>41</sup> The ECtHR usually does not explain in its judgments why it addresses a procedural issue under a certain provision. For these reasons the procedural rights recognised by the ECHR as well as other treaties are for the purpose of this study (like procedural rights recognised by EU law) considered to be one category of procedural rights which are all interlinked. In the thematic chapters the relevant case-law and views of the supervising bodies with regard to each theme is taken into account, irrespective which provision was applied.

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39 Case T-228/02, *Organization des Modhahedines du peuple d'Iran v Council* [2006].

40 See also Accetto & Zlepzig 2005, p 385.

41 See section 10.3.

### 4.3 THE EU RIGHT TO AN EFFECTIVE REMEDY

Article 47 of the Charter states: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article'. Furthermore according to Article 19 (1) TEU: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'<sup>42</sup> These articles codify the general principle of effective judicial protection which has been considered a principle of EU law and a fundamental right by the Court of Justice.<sup>43</sup> According to the Court of Justice the right to an effective remedy<sup>44</sup> reflects a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 ECHR.<sup>45</sup>

It follows from the text of Article 47 of the Charter and the case-law of the Court of Justice that the EU right to an effective remedy comprises the right to a fair trial.<sup>46</sup> Article 47 states:

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

The objective of the right to an effective remedy is to secure for the individual effective protection of the (fundamental) rights granted by EU law.<sup>47</sup> The Court of Justice has held that it is particularly important for judicial protection to be effective, when the measures challenged by the individual have serious consequences.<sup>48</sup>

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42 Haapaniemi states that this provision gives a solid legal basis to interfere, under EU law, with national law of remedies and therefore, cures the problem that such a firm basis for intervention that was missing before. Haapaniemi 2009, p 120.

43 See Case T-111/96, *ITT Promedia v Commission* [1998], para 60 (the right of access to the Court), Case C-105/03, *Pupino* [2005] para 58 and Case C-305/05, *Ordre des barreaux francophones et germanophones* [2007] para 29 (the right to a fair trial) and Case C-28/05, *Dokter* [2006], para 75 (rights of the defence).

44 The Court uses different terminology for the same principle such as 'the right to an effective judicial remedy' (Case 222/84, *Johnston* [1986]), 'the principle of effective judicial control' (Case C-185/97, *Cootte* [1998]), 'the requirement for judicial review' (Case C-459/99, *MRAX* [2002]) or the requirement of judicial control (Case C-269/99, *Kühne* [2001]).

45 Case 222/86, *UNECTEF v Heylens and others* [1987], para 14.

46 The Court of Justice often refers to the right to a fair trial guaranteed by Art 6 ECHR when applying the principle of effective judicial protection.

47 Case 222/86, *UNECTEF v Heylens and others* [1987] and Case C-340/89, *Vlassopoulou* [1991].

48 Case C-229/05 P, *PKK/KNK v Council* [2006], para 110.

#### 4.3.1 Provisions of international law inspiring the EU right to an effective remedy

The (case-law concerning) various provisions of international law may inspire the EU right to an effective remedy and fair trial in the context of CEAS. Obviously these are provisions containing a right to an effective remedy or a right to a fair trial. Furthermore the procedural guarantees derived from the principle that the prohibition of *refoulement* and other substantive rights should be effectively protected and those derived from the subsidiary role of human rights mechanisms should be considered sources of inspiration. In the following sections the procedural requirements following from these sources of inspiration will be further elaborated on.

##### *The right to an effective remedy*

Article 13 ECHR and Article 2 (3) ICCPR require State parties to provide an effective remedy to any person whose rights included in the Convention and the Covenant respectively are violated.<sup>49</sup> The Committee against Torture has derived a right to an effective remedy from Article 3 CAT.<sup>50</sup> According to the ECtHR the right to an effective remedy serves two purposes. The first is comparable to the objective of the EU principle of effective judicial protection: to secure for the individual effective protection of the rights granted by the treaties concerned.<sup>51</sup> Secondly the right to an effective remedy aims to preserve the subsidiary nature of the treaty system.<sup>52</sup> It gives direct expression to the States' obligation to protect human rights first and foremost within their own legal system.<sup>53</sup>

##### *The right to a fair trial*

Article 6 (1) ECHR and Article 14 (1) ICCPR guarantee the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. The right to a fair trial is intended to secure the interests of the parties

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49 Art 5 (4) ECHR and Art 9 (4) ICCPR require judicial review of detention measures. Article 5 (4) ECHR provides a *lex specialis* in relation to Art 13 ECHR. Sometimes an Art 5 (4) ECHR procedure should be attended by the same guarantees as those required under Art 6 ECHR. Such procedure must always have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. Art 5 (4) ECHR and Art 9 (4) ICCPR only play a minor role in this study. Therefore the specific requirements set by these provisions will not further be addressed.

50 See ComAT 20 May 2005, *Agiza v Sweden*, no 233/2003.

51 See ECtHR (GC) 26 October 2000, *Kudla v Poland*, no 30210/96, para 152.

52 See for example ECtHR 5 February 2002, *Conka v Belgium*, no 51564/99, para 33.

53 ECtHR (GC) 26 October 2000, *Kudla v Poland*, no 30210/96, para 152 and ECtHR (GC) 10 May 2001, *Z and others v UK*, no 29392/95, para 103, where the ECtHR emphasised that Art 13 takes on a crucial function in ensuring the supervisory role of the ECtHR.

and those of the proper administration of justice.<sup>54</sup> According to the ECtHR the right to a fair trial holds a prominent place in a democratic society.<sup>55</sup>

*Effectiveness of the prohibition of refoulement and other substantive rights*

Not only under EU law, but also under international law, procedural safeguards have been derived from the principle that substantive rights must be effectively protected. Procedural safeguards may be derived from the principle that the prohibition of *refoulement* laid down in Article 33 Refugee Convention must be effectively protected.<sup>56</sup> Hathaway for example states that ‘a fair assessment of refugee status is the indispensable means by which to vindicate Convention rights’.<sup>57</sup> The EXCOM and UNHCR have developed procedural guidelines which seek to promote the fair determination of refugee status. These may inspire the EU procedural rights and principles in the asylum context.

The Committee against Torture has applied the principle of effectiveness to the principle of *non-refoulement* by recognising that Article 3 CAT entails a right to an effective remedy. In *Agiza v Sweden* the Committee against Torture observed

that the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory.[...] In the Committee’s view, in order to reinforce the protection of the norm in question and understanding the Convention consistently, the prohibition on refoulement contained in article 3 should be interpreted the same way to encompass a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof. [...]The nature of refoulement is such, however, that an allegation of breach of that article relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise.<sup>58</sup>

The ECtHR has derived procedural guarantees directly from Article 3 ECHR. The clearest example of the application of the principle of effectiveness can

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54 ECtHR 27 January 1997, *Nideröst-Huber v Switzerland*, no 18990/91, para 30. According to HRC General Comment No 32 (2007), CCPR/C/GC/32, para 1 sub 2, Art 14 ICCPR ‘aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights’.

55 ECtHR 9 October 1979, *Airey v Ireland*, no 6289/73, para 24.

56 See for example EXCOM Conclusion no 71 ((XLIV), 1993, para (i) which *reiterates* the importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection.

57 Hathaway 2005, p 630. See also Wouters 2009, pp 164-165, Goodwin Gill & McAdam 2007, pp 530-531, Boeles 1997, pp 66-69.

58 ComAT 20 May 2005, *Agiza v Sweden*, no 233/2003.

be found in *Jabari v Turkey*. In this case the complainant was denied any scrutiny of the factual basis of her fears about being removed to Iran, because she failed to comply with the requirement to submit her asylum application within five days of her arrival in Turkey. The Court considered that the automatic and mechanical application of this time-limit for submitting an asylum application was 'at variance with the protection of the fundamental value embodied in Article 3 of the Convention'.<sup>59</sup>

The ECtHR has also derived procedural rules from other substantial provisions of the Convention, notably Article 8 ECHR on the right to private and family life. An important procedural issue addressed under Article 8 ECHR is the use of secret evidence in the context of measures affecting national security.<sup>60</sup> In asylum cases similar procedural issues as those addressed under Article 8 may arise.<sup>61</sup> The case-law concerning the procedural safeguards which follow from Article 8 should therefore also be considered relevant in asylum cases.<sup>62</sup>

#### *The subsidiary role of human rights mechanisms*

It is first and foremost up to the State Parties, including their national courts, to guarantee the rights included in international human rights treaties.<sup>63</sup> The ECtHR, Human Rights Committee and Committee against Torture cannot be regarded as courts of fourth instance; they only play a subsidiary role. As President Costa stated in 2011 in his statement concerning requests for interim measures:

[T]he Court is not an appeal tribunal from the asylum and immigration tribunals of Europe, any more than it is a court of criminal appeal in respect of criminal convictions. Where national immigration and asylum procedures carry out their own proper assessment of risk and are seen to operate fairly and with respect for human rights, the Court should only be required to intervene in truly exceptional cases.<sup>64</sup>

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59 ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 40. See also ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, para 115.

60 See for example ECtHR 8 June 2006, *Lupsa v Romania*, no 10337/04 and ECtHR 6 December 2007, *Liu and Liu v Russia*, no 42086/05. See further Chapter 10 on the use of secret information.

61 Chapter 10 will discuss the use of secret information. In this context references will be made to ECtHR's case-law regarding the right to adversarial proceeding under Art 8 ECHR.

62 The procedural requirements for Art 3 ECHR cases are normally stricter than those for Art 8 ECHR cases. See ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93, para 150.

63 The ECtHR states that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. ECtHR (GC) 28 July 1999, *Selmouni v France*, no 25803/94, para 74.

64 Statement Issued by the President of the ECtHR concerning Requests for Interim Measures (Rule 39 of the Rules of Court), 11 February 2011, available at [www.echr.coe.int](http://www.echr.coe.int).

It follows from this subsidiary role that national authorities must provide for effective remedies against expulsion measures.<sup>65</sup> These remedies must be exhausted by applicants before they turn to the ECtHR or the UN Committees.<sup>66</sup> This means in general that the complainant must have appealed until the highest national authority and that the complaint must have been made before the national authority at least in substance.<sup>67</sup> Only the ineffectiveness of the domestic remedy,<sup>68</sup> the fact that this remedy was bound to fail<sup>69</sup> or the particular circumstances of the case may absolve a person from the obligation to exhaust domestic remedies. In the light of their assessment whether domestic remedies have been exhausted the ECtHR and UN Committees thus regularly examine the effectiveness of those remedies. Their case-law with regard to the requirement to exhaust domestic remedies in asylum cases is therefore relevant in order to discover what procedural guarantees are necessary in such cases.

Secondly it may be argued that it follows from the subsidiary role of supervising bodies that the way in which those bodies assess claims under the substantive provisions of the treaties is indicative for the way in which the national courts should assess such claims. In particular it is contended that the scope and intensity of judicial review performed by national courts should not be more limited than the review performed by the supervising bodies. Spijkerboer argues with regard to the ECtHR that in asylum cases national authorities 'should operate in such a way as to ensure that the national remedy provides scrutiny of at least as good a quality as that provided by the Court'.<sup>70</sup> The same may be true for the scrutiny applied by the Human Rights Committee or Committee against Torture. For this reason the case-law under Article 3 ECHR, Article 7 ICCPR and Article 3 CAT will be used as a source of inspiration for the EU right to effective judicial protection, in particular when assessing its meaning and content for the scope and intensity of judicial review by national courts in asylum cases in Chapter 9.

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65 See for example ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 286-287.

66 Art 35 (1) ECHR, Art 2 and 5 (2) (b) of the Optional Protocol to the ICCPR and Art 22 (5) (b) CAT.

67 ECtHR (GC) 16 September 1996, *Akdivar v Turkey*, no 21893/93, para 66. HRC 28 April 2009, *Moses Solo Tarlue v Canada*, no 1551/2007, para 7.5. See for application of this rule in an asylum case: ECtHR 19 February 1998, *Bahaddar v the Netherlands*, no 25894/94.

68 The requirement to exhaust domestic remedies is applied by the ECtHR while making due allowance for the context of the case and with some degree of flexibility and without excessive formalism. ECtHR (GC) 28 July 1999, *Selmouni v France*, no 25803/94, para 77. See also HRC 5 April 1995, *Griffin v Spain*, no 493/1992, para 6.1 and ComAT 9 June 1995, *Parot v Spain*, no 6/1990, para 6.1.

69 See for example ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 50, HRC 28 April 2008, *Lnenicka v Czech Republic*, no 1484/2006, para 6.3 and ComAT 22 February 1996, *R.K. v Canada*, no 42/1996, para 7.2.

70 Spijkerboer 2009-II, p 52.



#### 4.3.2 Application to asylum cases

The scope of application of the EU right to an effective remedy and the right to a fair trial is broader than the same rights guaranteed by international treaties. The right to an effective remedy and the right to a fair trial recognised by the ECHR and other treaties do inspire the Court of Justice when applying the EU right to an effective remedy and fair trial in all cases falling within the scope of EU law.<sup>71</sup> This means that indirectly, via EU law, the scope of application of the right to a fair trial recognised under international law is extended. Most important for the purpose of this study is that, even in asylum cases, the EU right to an effective remedy and a fair trial may be inspired by the ECtHR's case-law concerning Article 6 ECHR. It would not make sense if in migration cases the EU right to a fair trial is inspired by Article 6 ECHR, but not by the ECHR's case-law in which this provision is interpreted. Widdershoven argues that the Court of Justice in the asylum case of *Samba Diouf* indeed (implicitly) interpreted the EU right to an effective remedy in the light of the ECtHR's case-law under Article 6 which requires a court or tribunal to have full jurisdiction.<sup>72</sup>

#### *Asylum procedures must comply with the EU right to a fair trial*

The EU right to a fair trial applies to all claims under EU law, including asylum cases. The explanations with Article 47 of the Charter state:

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law. Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.<sup>73</sup>

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71 Case C-327/02, *Panayotova* [2004], para 27, a migration case in which the Court considered 'that Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law, and that this principle of effective judicial protection constitutes a general principle which stems from the constitutional traditions common to the Member States and is enshrined by the [ECHR] in Articles 6 and 13 of the Convention.' See Peers & Rogers 2006, pp 120-121.

72 Widdershoven 2011, para 4. It should furthermore be noted that some important rights following from Article 6, such as the right of *access* to a remedy and the right to legal assistance have also been brought within the scope of Art 13 ECHR by the ECtHR. See ECtHR 10 January 2012, *G.R. v the Netherlands*, no 22251/07, para 49-50 and ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 151.

73 See the Explanations relating to the Charter of Fundamental Rights, OJ 14 December 2007, C 303/17. See also Ward, who writes that the Court of Justice has never applied the existence of a civil right or obligation or criminal charge as a threshold to the application of the right of access to an effective judicial remedy. The EC right thus appears to extend to all forms of administrative decision making. What Community law requires is 'effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provision of Community law'. Ward 2007, p 174.

Articles 6 ECHR and Article 14 ICCPR are limited to cases which concern the determination of a person's civil rights and obligations or any criminal charge.<sup>74</sup> Both the ECtHR and the Human Rights Committee ruled that the right to a fair trial does not apply to proceedings concerning the entry, stay and deportation of aliens.<sup>75</sup>

*No need for an arguable claim*

The EU right to an effective remedy has a broader scope of application than the right to an effective remedy guaranteed by Article 13 ECHR, Article 2 (3) ICCPR and Article 3 CAT, because it does not require an 'arguable claim' of a violation of an EU fundamental right. The EU right to an effective remedy implies the right to effective judicial scrutiny of the decisions of the EU Institutions<sup>76</sup> or national authorities<sup>77</sup> taken pursuant to the applicable provisions of EU law. Article 39 PD shows that the EU right to an effective remedy applies also to asylum claims which were rejected as inadmissible or manifestly unfounded.

The right to an effective remedy guaranteed by Article 13 ECHR and Article 2 (3) ICCPR can only be invoked in conjunction with one of the substantive rights included in those treaties.<sup>78</sup> There must be an *arguable claim* of a treaty violation.<sup>79</sup> Both the ECtHR and the Human Rights Committee recognised that a State party cannot be reasonably required to make an effective remedy available no matter how unmeritorious a claim of such violation may be.<sup>80</sup> Also the scope of application of the right to an effective remedy

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74 The applicability of the right to a fair trial guaranteed in Art 14 ICCPR is limited to 'rights and obligations in a suit at law'.

75 They referred to the fact that a provision exists which contains guarantees specifically concerning proceedings for the expulsion of aliens (Art 1 of Protocol 7 ECHR and Art 13 ICCPR) and considered that the States thus clearly intimated their intention not to include such proceedings within the scope of Artt 6 (1) ECHR and 14 ICCPR. ECtHR (GC) 5 October 2000, *Maaouia v France*, no 39652/98, para 40, HRC 4 April 2007, *Ernst Zundel v Canada*, no 1341/2005, para 6.8 and HRC 28 April 2009, *Moses Solo Tartue v Canada*, no 1551/2007, para 7.8.

76 Case T-228/02, *Organization des Modhahedines du peuple d'Iran v Council* [2006], para 110.

77 Case C-226/99, *Siples* [2001], para 17 and Case C-327/02, *Panayotova* [2004], para 27.

78 Van Dijk a.o 2006, p 998. According to the ECtHR, Art 13 guarantees the availability at national level of a remedy 'to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order'. ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 48.

79 See with regard to the ECHR Spijkerboer 2009-II, p 50. The HRC has considered that the right to an effective remedy would be void, if it were not available where a violation of the Covenant had not yet been established. See HRC 19 September 2003, *George Kazantzis v Cyprus*, no 972/2001, para 6.6.

80 ECtHR (Plen) 27 April 1988, *Boyle and Rice v the United Kingdom*, no 9659/82, para 52 and HRC 19 September 2003, *George Kazantzis v Cyprus*, no 972/2001, para 6.6.

under Article 3 CAT is limited, namely to a 'plausible allegation' of a violation of Article 3 CAT.<sup>81</sup>

*Only applicable to decisions with legal effect*

The EU right to an effective remedy does not apply where the contested decision is without legal effect and therefore not capable of infringing any rights guaranteed by EU law.<sup>82</sup> Furthermore the Court of Justice held in *Samba Diouf* specifically with regard to asylum procedures that decisions that are preparatory to the decision on the substance or decisions pertaining to the organisation of the procedure are not covered by the right to an effective remedy laid down in Article 39 PD.<sup>83</sup> In that case it concerned the decision to process an asylum claim in an accelerated procedure. The Court considered that it follows from the EU right to effective judicial protection that asylum applicants should be able to effectively challenge the reasons for the decision to accelerate the procedure in the context of the appeal against the decision to reject the asylum application.<sup>84</sup>

#### 4.3.3 Effectiveness

According to the Court of Justice's case-law EU law requires 'that national legislation does not undermine the right to effective judicial protection'.<sup>85</sup> In its case-law the Court of Justice has tested national procedural rules, including technical rules which affect the accessibility of a remedy, against the principle of effectiveness. This principle prohibits national procedural rules which render virtually impossible or excessively difficult the exercise of rights conferred by EU law.<sup>86</sup> The principle of effectiveness seeks to ensure the effective enforcement of EU law in national courts. As Accetto and Zleptnig state:

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81 ComAT 20 May 2005, *Agiza v Sweden*, no 233/2003, para 13.7. The ComAT has not explained when an allegation or claim is plausible. Wouters p 517.

82 Case T-276/02, *Forum 187 v Commission* [2003], para 50.

83 Case C-69/10, *Samba Diouf* [2011], para 43.

84 Case C-69/10, *Samba Diouf* [2011], para 58.

85 See for example Case C-87/90, *Verholen* [1991], para 24, Case C-13/01, *Safalero* [2003], para 50 and Case C-12/08, *Mono Car Styling* [2009] para 49.

86 The standard consideration used by the Court of Justice is: 'In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).' Case 33/76, *Rewe* [1976], para 5 and Case C-13/01, *Safalero* [2003], para 49.

Effectiveness may [...] be eroded by specific substantive and procedural hurdles at the national level that are not immediately apparent: subtle procedural rules, administrative practices adopted by national authorities, or systemic failures in the institutional set-up of authorities in charge of ensuring the proper application of Community law.<sup>87</sup>

When assessing whether a national procedural rule renders the exercise of an EU right excessively difficult 'a comprehensive review in which all particularities of national legal systems must be taken into account' is required.<sup>88</sup> The Court of Justice considered:

Each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.<sup>89</sup>

The Court of Justice has assessed many types of national procedural rules in the light of the principle of effectiveness. In Chapters 6 to 10 the content and meaning of the principle with regard to certain procedural issues in the context of CEAS will be examined.

#### *Effectiveness of remedies under international law*

The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant.<sup>90</sup> The remedy concerned must be able to prevent the alleged violation or its continuation, or to provide adequate redress for any violation that had already occurred.<sup>91</sup> Article 13 does not go so far as to require any particular form of remedy.<sup>92</sup> The Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under Article 13.<sup>93</sup> In cases concerning the expulsion of asylum applicants the ECtHR's main concern is whether effective guarantees exist that protect the applicant

87 Accetto & Zlepzig 2005, p 376.

88 Trstenjak & Beysen 2011, p 102.

89 See for example Case C-312/93, *Peterbroeck* [1995], para 14 and Case C-276/01, *Steffensen* [2003], para 66.

90 See for example ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, para 122.

91 ECtHR (GC) 26 October 2000, *Kudla v Poland*, no 30210/96, para 158, ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 48. Van Dijk ao 2006, p 1006.

92 ECtHR, 30 October 1991, *Vilvarajah and others v the United Kingdom*, nos 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 122.

93 See for example ECtHR (GC) 10 May 2001, *Z and others v the United Kingdom*, no 29392/95, para 163.

against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled.<sup>94</sup>

The obligation to exhaust domestic remedies is limited to making use of those remedies which can be considered effective and available.<sup>95</sup> The requirement of effectiveness for domestic remedies under the requirement to exhaust domestic remedies and the right to an effective remedy are very similar. This follows most clearly from the ECtHR's case-law, which states that Article 35 has 'a close affinity' with Article 13 ECHR.<sup>96</sup> The ECtHR's case-law on Articles 35 (1) and 13 ECHR run to a certain extent parallel.<sup>97</sup> In order to be considered effective domestic remedies must offer sufficient safeguards.<sup>98</sup> The ECtHR has for example held under Article 35 (1) ECHR that the domestic remedy must be accessible for the person concerned<sup>99</sup> and that the remedy must have automatic suspensive effect in case of a claim of a risk of *refoulement*.<sup>100</sup>

#### 4.3.4 Institutions responsible for providing effective remedies

It is the national courts which need to provide natural or legal persons with an effective remedy against a decision by the EU Institutions or national authorities taken pursuant to the applicable provisions of EU law.<sup>101</sup> Therefore 'it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.'<sup>102</sup> The Court of Justice held that the principle of effective judicial protection 'affords

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94 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 286.

95 ECtHR (GC) 28 July 1999, *Selmouni v France*, no 25803/94, para 75. For the ICCPR see for example HRC 26 August 2004, *Madafferi v Australia*, no 1011/2001, para 8.4. Art 22 (5) (b) CAT provides that the requirement to exhaust domestic remedies shall not apply where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of the Convention. See also Nowak & McArthur 2008, p 796.

96 See for example ECtHR (GC) 28 July 1999, *Selmouni v France*, no 25803/94, para 74.

97 Spijkerboer 2009, p 51, Harris, O' Boyle & Warbrick 2009, p 562. In some cases the preliminary objection regarding the alleged non exhaustion of domestic remedies and the complaint of a violation of Art 13 ECHR are assessed together by the ECtHR. See for example ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 336-337. Arguably a clear parallel also exists between the right to an effective remedy and the obligation to exhaust domestic remedies included in the ICCPR and CAT.

98 ECtHR 23 October 2008, *Soldatenko v Ukraine*, no 2440/07, para 49.

99 ECtHR 8 January 2004, *Sardinas Albo v Italy*, no 56271/00.

100 ECtHR (Adm) 20 September 2007, *Sultani v France*, no 45223/05, para 51. According to the HRC the fact that a remedy must be effective and available entails that procedural guarantees for a fair and public hearing by a competent, independent and impartial tribunal must be scrupulously observed. HRC 1 November 1985, *Arzuaga Gilboa v Uruguay*, no 147/1983

101 See section 2.5.

102 Case C-50/00, *Union de Pequeños* [2002], para 41.

an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction'.<sup>103</sup>

The EU right to an effective remedy provides broader protection than Article 13, Article 2 (3) ICCPR and Article 3 CAT. These provisions require an effective remedy before an independent and impartial authority, which does not need to be a judicial authority.<sup>104</sup> Both Article 6 (1) ECHR and Article 14 (1) ICCPR do require a fair trial before an independent and impartial court or tribunal.

#### *Criteria court or tribunal*

When examining whether a national body can be regarded a court or tribunal the Court of Justice takes several factors into account, such as whether the body concerned is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes* and whether it applies rules of law. Furthermore a court or tribunal is independent and impartial.<sup>105</sup>

The factors used by the ECtHR and the Human Rights Committee in order to establish whether a national body should be considered a court or tribunal are similar to those used by the Court of Justice.<sup>106</sup> Article 6 (1) ECHR furthermore demands that the court or tribunal have 'full jurisdiction'. This means that it must be able to quash the challenged decision in all respects, on questions of fact and law.<sup>107</sup>

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103 Case C-69/10, *Samba Diouf* [2011], para 69.

104 See for example ECtHR 11 January 2007, *Musa e.a. v Bulgaria*, no 61259/00, HRC 10 November 2006, *Alzery v Sweden*, no 1416/2005, para 11.8. Art 13 ECHR speaks of a 'national authority', Art 2 (3) requires a competent judicial, administrative or legislative authority, or any other competent authority provided for by the legal system of the State. The ComAT decided in *Agiza v Sweden*, 20 May 2005, no 233/2003, para 13.7 that the review required under Art 3 CAT can be provided by a judicial or independent administrative authority.

105 See for example Case C-506/04, *Wilson* [2006], paras 47-53.

106 Whether a body can be regarded as independent depends on 'the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence'. The requirement of impartiality entails that the court or tribunal be subjectively free of personal prejudice or bias and that it be impartial from an objective viewpoint. ECtHR (GC) 6 May 2003, *Kleyn and others v the Netherlands*, nos 39343/98, 39651/98, 43147/98 and 46664/99, paras 190-191. See with regard to Art 14 ICCPR for example: HRC 10 November 1993, *Oló Bahamonde v Equatorial Guinea*, no 468/1991, para 9.4 and HRC 3 November 2008, *Castedo v Spain*, no 1122/2002, paras 9.5-9.8 and General Comment No 32 (2007), CCPR/C/GC/32, para III, sub 19-21.

107 See for example ECtHR 28 September 1995, *Schmautzer v Austria*, no 15523/89, para 36. See further Chapter 9 on judicial review of the establishment and qualification of the facts.

#### 4.3.5 Effect in the national legal order

What needs to be done if a national procedural rule does not comply with EU right to an effective remedy? First of all the national court should try to interpret national procedural rules in conformity with EU rules.<sup>108</sup> This may avoid a breach of the right to effective judicial protection. The Court considered in *Unibet*:

[I]t is for the national courts 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.<sup>109</sup>

If consistent interpretation is not possible a national procedural rule which breaches the EU right to effective judicial protection should be set aside.<sup>110</sup>

##### *No new remedies?*

An important question is whether EU law requires a Member State to introduce new remedies, if no effective remedy is available. The Court of Justice's judgment in *Rewe-Handelsgesellschaft Nord v Hauptzollamt Kiel* suggested that the Court is of the opinion that no such requirement exists. The Court considered that 'the EC-Treaty was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law'.<sup>111</sup>

For a long time it remained uncertain whether Member States could be obliged to introduce new remedies under EU law. Several judgments seemed to undermine the no new remedies statement in *Rewe*.<sup>112</sup> In *Unibet* the Court finally made clear that Member States are exceptionally required to create new national remedies if this is necessary to ensure the EU fundamental right to effective judicial protection.<sup>113</sup> This right thus entails negative as well as positive obligations.<sup>114</sup> In *Unibet* the Court considered:

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108 Haapaniemi 2009, pp 96-97. Arnulf 2011, p 55.

109 Case C-432/05, *Unibet* [2007], para 44. See also Case C-50/00, *Union de Pequeños* [2002], para 42 and Case C-69/10, *Samba Diouf* [2011], para 60.

110 Haapaniemi 2009, pp 96-97. He states: 'Only if it is not possible to attain the conformity of national law with EU law by virtue of consistent interpretation, the national court can set aside a national provision conflicting with it.'

111 Case 158/80, *Rewe-Handelsgesellschaft Nord v Hauptzollamt Kiel* [1981], para 6.

112 Craig & de Búrca 2003, pp 237-238. They refer amongst others to the *Factortame* case (see further section 6.3.1.1). Groussot refers to Case C-424/99, *Commission v Austria* [2001], paras 39-47 and Case C-97/91, *Borelli* [1991], para 13. Groussot 2006, p 338.

113 Arnulf 2011, p 56, Haapaniemi 2009, pp 107-108 and Trstenjak & Beysen 2011, pp 105-106.

114 Prechal & Widdershoven 2011, pp 41-42.

Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law [...]. It would be otherwise 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 [...].<sup>115</sup>

Applicants cannot insist on a particular remedy where alternative remedies exist in the national legal system, which comply with the principles of effectiveness and equivalence.<sup>116</sup>

#### 4.3.6 The right of access to a court or tribunal

Article 19 (1) EU Treaty and Article 39 PD require the *existence* of an effective remedy before national courts, but do not explicitly demand that such remedy is accessible for the individual. It should however be derived from Article 47 of the Charter and the Court of Justice's case-law that the EU right to an effective remedy includes a right of *access* to such a remedy.<sup>117</sup> Article 47 requires that free legal aid be provided when necessary to ensure effective access to justice.<sup>118</sup> This implies that the remedy required by Article 47 should be accessible. In *DEB* the Court of Justice explicitly mentioned 'the right of access to the courts'.<sup>119</sup> In *Union de Pequeños* the Court ruled that, in accordance with the principle of sincere cooperation,

national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.<sup>120</sup>

Furthermore the Court of Justice has ruled in several cases that national procedural rules limiting access to a remedy were contrary to the principle

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115 Case C-432/05, *Unibet* [2007], paras 40-41.

116 Case C-69/10, *Samba Diouf* [2011], para 54, Case C-432/05, *Unibet* [2007], para 65 and Case C-326/96, *Levez* [1998], para 53. See also on this issue Arnulf 2011, p 58-62.

117 See also Dougan 2004, p 4-5.

118 See also Case C-279/09, *DEB* [2010], para 29, where the Court of Justice considered that the question referred, concerned the right of a legal person to effective access to justice and, accordingly, in the context of EU law, concerned the principle of effective judicial protection.

119 Case C-279/09, *DEB* [2010], para 60.

120 Case C-50/00, *Union de Pequeños* [2002], para 42.



of effectiveness as they rendered the right to an effective remedy virtually impossible or excessively difficult.<sup>121</sup>

#### *Access to court under international law*

It also follows from the sources of inspiration for the interpretation of the EU right to an effective remedy that access to court should be guaranteed. The ECtHR and the Human Rights Committee have ruled that the remedy required by Article 13 ECHR<sup>122</sup> and Article 2 (3) ICCPR must be accessible for the individual.<sup>123</sup> According to the ECtHR this means in particular that the exercise of the remedy must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.<sup>124</sup> This follows from the fact that the remedy required by Article 13 must be effective in practice as well as in law. Furthermore both Article 6 (1) and Article 14 ICCPR include a right of access to court.<sup>125</sup> According to the ECtHR this implies for example that free legal assistance should be granted to a person if, without the assistance of a lawyer, this person would not be able to present her case properly and satisfactorily before the court.<sup>126</sup> It also prohibits that access to a court is blocked because of short time-limits for lodging the appeal<sup>127</sup> or procedural rules which amount to excessive formalism.<sup>128</sup>

#### 4.3.7 The right to equality of arms and adversarial proceedings

The principle of equality of arms and the right to adversarial proceedings are often linked to each other and to other elements of the right to a fair trial or the right to an effective remedy such as the right of the defence, the right to

121 See eg Case C-459/99, *MRAX* [2002], paras 102-103, where the Court held that the requirement for judicial review of the refusal of a residence permit or the decision to expel by a national authority would be rendered largely ineffective if entitlement to this remedy were excluded in the absence of an identity document or visa or where one of those documents has expired. See also Case C-78/98, *Preston and Fletcher* [2000] and Case C-255/00, *Grundig Italiana* [2002], in which the Court held that national time-limits for bringing proceedings were contrary to EU law.

122 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 318.

123 The HRC ruled that Art 2 (3) ICCPR requires State parties to ensure that individuals have accessible, effective and enforceable remedies to uphold the rights protected by the Covenant. HRC 16 August 2007, *Kimouche v Algeria*, no 1328/2004, para 7.10 and HRC 19 September 2003, *George Kazantzis v Cyprus*, no 972/2001, para 6.6.

124 Van Dijk a.o. 2006, p 1006. See for example ECtHR 12 April 2005, *Shamayev and others v Georgia and Russia*, no 36378/02, para 447.

125 ECtHR (Plen) 21 February 1975, *Golder v the United Kingdom*, no 4451/70 and HRC 10 November 1993, *Oló Bahamonde v Equatorial Guinea*, no 468/1991, para 9.4. See also HRC General Comment No 32 (2007), CCPR/C/GC/32, para II sub 9.

126 ECtHR 9 October 1979, *Airey v Ireland*, no 6289/73, para 24.

127 ECtHR 28 October 1998, *Pérez de Rada Cavanilles v Spain*, no 28090/95.

128 See for example ECtHR 28 June 2005, *Zednik v Czech Republic*, no 74328/01, para 29.

be heard or the duty to give reasons for a decision.<sup>129</sup> The principle of equality of arms and the right to adversarial proceedings are also guaranteed by the right to a fair hearing or fair trial included in Article 6 ECHR and Article 14 ICCPR. Chapter 10 discusses the meaning of the principle of equality of arms and the right to adversarial proceedings in cases where the (asylum) decision is based on secret evidence. Here some general remarks will be made concerning these rights

*The right to equality of arms*

The Court of Justice has recognised the principle of equality of arms as a general principle of EU law.<sup>130</sup> Although this EU principle is based on Article 6 ECHR, which only applies to procedures before courts, it seems to apply also to administrative proceedings.<sup>131</sup> The Court of Justice has derived procedural guarantees from this principle, in particular in competition cases. These rights often relate to the right of access to the file. The Court held for example that the principle presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission.<sup>132</sup> In its case-law the Court has not provided a clear definition of the principle of equality of arms.

According to Article 6 ECHR and Article 14 ICCPR the right to equality of arms requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent.<sup>133</sup> According to the Human Rights Committee this principle implies that the parties to the proceedings must have adequate time and facilities for the preparation of their arguments, which, in turn, requires access to the documents necessary to prepare such arguments.<sup>134</sup>

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129 See for example Case T-36/91, *Imperial Chemical Industries v Commission* [1995].

130 See for example Case T-30/91, *Solvay v Commission* [1995] and Case C-341/04, *Eurofood IFSC* [2006], paras 65-66.

131 See for example Case C-63/01, *Evans* [2003], paras 74-78, where the Court of Justice held that the principle of effectiveness may require national authorities to grant legal assistance to persons because of their less advantageous position in which they find themselves vis-à-vis the decision-making authority and the conditions under which they are able to submit their comments on matters that may be used against them. Case T-9/99, *HFB and others v Commission* [2002], para 330 and Case T-232/00, *Chef Revival USA v OHIM* [2002], para 42, where it concerned translation of documents in the administrative phase before an EU Institution.

132 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 93.

133 ECtHR 27 October 1993, *Dombo beher v the Netherlands*, no 14448/88, para 33. See with regard to the ICCPR: HRC 28 July 1989, *Moraël v France*, no 207/86, para 9.3. and General Comment No 32 (2007), CCPR/C/GC/32, para II, sub 8 and 13.

134 See for example HRC 20 August 2004, *Perterer v Austria*, no 1015/2001, para 10.6

*The right to adversarial proceedings*

Closely linked to the principle of equality of arms is the right to adversarial or *inter partes* proceedings. The Court of Justice has referred also to this right particularly in competition cases. The adversarial principle means, as a rule, that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court.<sup>135</sup> It also requires that in proceedings before (EU) courts, the parties be appraised of and be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings.<sup>136</sup>

These requirements are very similar to those following from the right to adversarial proceedings means guaranteed by Articles 6 ECHR and Article 14 ICCPR.<sup>137</sup> Also the right to an effective remedy guaranteed by Article 13 ECHR includes the right to adversarial proceedings.<sup>138</sup>

#### 4.4 THE EU RIGHT TO GOOD ADMINISTRATION

Article 41 of the Charter includes the right to have his or her affairs handled impartially, fairly and within a reasonable time (the right to good administration). This right includes amongst others the right to be heard, the right of access to the file and the duty to state reasons for a decision. Kaňska mentions that this provision is the first official attempt at a positive definition of the meaning of 'good administration'.<sup>139</sup> Part of the rights of Article 41 of the Charter are based on rights which were already included in the former EC Treaty (the duty to state reasons, the right to reparation of damages and the right to write the institutions). However, Article 41 is mainly inspired by the case-law of the EU Courts.<sup>140</sup> The EU principle of good administration is an umbrella principle which comprises more rights and obligations than those included in Article 41 of the Charter, such as the duty of care<sup>141</sup> and the right to transparency other than the right of access to the file.<sup>142</sup>

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135 Case C-450/06, *Varec* [2008], para 47.

136 Case C-89/08 P, *Commission v Ireland and others* [2009], para 56.

137 According to the ECtHR this right requires in principle, the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision. ECtHR (GC) 22 January 1996, *Lobo Machado v Portugal*, no 15764/89, para 31. See also HRC 28 July 1989, *Moraël v France*, no 207/1986, para 9.3 and General Comment No 32 (2007), CCPR/C/GC/32, para II.

138 See ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, para 137.

139 Kaňska 2004, p 303. See also Dutheil de la Rochère 2008, p 168.

140 Kaňska 2004, pp 303-304.

141 See for example Joined Cases T-3/00 and T-337/04, *Pitsiorias v Council and ECB* [2007], para 163 where it is stated that the principle of sound administration entails that the competent institution is under a duty to examine carefully and impartially all the relevant aspects of the individual case.

142 Kaňska 2004, pp 305 and 322-323, Dutheil de la Rochère 2008, p 169.

*Applicability to national administrative proceedings*

It follows from the text of Article 41 that it does not apply to pure national administrative proceedings. However the Court of Justice does impose procedural obligations for the administrative phase on the Member States.<sup>143</sup> It requires amongst others that national authorities state the reasons for their decisions and that persons adversely affected by a decision be heard during the administrative phase. A.G. Kokott wrote in an opinion of 2009 that for that reason 'Article 41 of the Charter of Fundamental Rights does not just contain rules of good administration by the institutions but documents a general principle of law, which authorities of the Member States too must observe when applying Community law'.<sup>144</sup> Some aspects of the principle of good administration are codified in the Procedures Directive. Article 8 (2) PD for example contains a duty for the decision-making authorities to conduct an appropriate examination of the asylum claim. This could be regarded as a codification of the duty of care. Article 16 (1) PD guarantees the applicant's lawyer's access to the applicant's file.

Several rights included in Article 41 of the Charter play a role in this study. In the following sections the right to be heard and the duty to state reasons will be introduced more in detail.

#### 4.4.1 Provisions of international law inspiring the EU right to good administration

Although according to its text Article 13 ECHR only applies to proceedings before an independent and impartial authority, the ECtHR has also derived guarantees for administrative proceedings from this provision. In *M.S.S. v Belgium and Greece* the ECtHR concluded that Article 13 ECHR had been violated amongst others as a result of the deficiencies in the Greek authorities' examination of the applicant's asylum request (insufficient information about the asylum procedure, difficult access to the asylum procedure, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid and excessively lengthy delays in receiving a decision). Furthermore it took into account the risk the applicant faced of being returned to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy.<sup>145</sup>

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143 Kaňska 2004, p 309, Dutheil de la Rochère 2008, p 170.

144 Opinion of A.G. Kokott with Case C-75/08, *Mellor* [2009], para 33.

145 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 301-320. See also ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, paras 111-117.

Arguably also the case-law regarding Article 6 ECHR and Article 14 ICCPR may inspire the EU right to good administration laid down.<sup>146</sup> As was mentioned in section 4.3.7 the Court of Justice for example seems to apply the principle of equality of arms to the administrative phase.

#### 4.4.2 The right to be heard

According to Article 41 of the Charter the right to good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.<sup>147</sup> The right to be heard (also seen as part of the rights of the defence) is not only applicable to decisions by EU Institutions, but also to decisions taken by national authorities.<sup>148</sup> It may be assumed that the EU Courts' case-law regarding the right to be heard on decisions by EU Institutions is also relevant for the interpretation of the right to be heard in the national context. This case-law will therefore be briefly discussed in this section.

According to the standing case-law of the EU Courts the right to be heard is, in all proceedings initiated against a person which are able to culminate in a measure adversely affecting that person, a fundamental principle of EU law.<sup>149</sup> The right to be heard must be guaranteed even in absence of any rules governing the procedure in question<sup>150</sup> or where legislation existed, but did not take sufficient account of that right.<sup>151</sup> A violation of the right to be heard will only lead to the annulment of the contested decision if, in the absence of this irregularity, the procedure could have led to a different decision.<sup>152</sup>

The right to be heard requires that the addressees of decisions which significantly affect their interests be placed in a position in which they may effectively make known their views on the evidence on which the decision is based<sup>153</sup> and the relevant facts and circumstances.<sup>154</sup> This implies that

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146 See also Kaňska 2004, p 306, who states that 'the right to good administration, as expressed by the Charter, mirrors the principles of fair trial (or due process) guaranteed by the Convention'.

147 Schwartz mentions that the right to be heard is probably the most important principle of administrative procedure. Schwartz 2004, p 91.

148 C-28/05, *Dokter* [2006], paras 74. This case concerned a decision by national authorities to impose measures on breeders in order to control foot-and-mouth disease on their holdings. See also Reichel 2008, p 266.

149 See for example Case C-28/05, *Dokter* [2006], para 74. A.G. Bot stated in para 32 of his opinion in Case C-277/11, *M v Minister for Justice, Equality and Law Reform Ireland* that the right to be heard also applies to asylum procedures.

150 See for example Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 91 and Joined cases C-379/08 and C-380/08, *ERG and Others* [2010], para 55.

151 Craig 2006, p 519.

152 Case T-372/00, *Campolargo v Commission* [2002], para 39.

153 See for example Case C-28/05, *Dokter* [2006], para 74 and Case C-32/95P, *Commission v Lisrestal and others* [1996], para 21.

the parties concerned must be informed of the evidence adduced against them<sup>155</sup> or that a draft decision is submitted to this party.<sup>156</sup> According to the EU Courts' settled case-law the right of access to the file is one of the procedural safeguards which ensure that the right to be heard can be exercised effectively.<sup>157</sup> The right of every person to have access to his or her file is laid down in Article 41 (2) of the Charter.

The safeguarding of the right to be heard in the context of the administrative procedure itself is to be distinguished from that resulting from the right to an effective judicial remedy against the act having adverse effects which may be adopted at the end of that procedure.<sup>158</sup> The party must generally be able to exercise the right to be heard before the administrative decision is adopted<sup>159</sup> and a reasonable period should be afforded to effectively put forward his views.<sup>160</sup> The Court of Justice considered in *Hercules Chemicals NV* that an infringement of the right to be heard had not been remedied by the mere fact that access to the relevant files was made possible after the decision, in particular during the judicial proceedings relating to an action in which annulment of the contested decision is sought.<sup>161</sup>

The right to be heard 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 constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.<sup>162</sup> The EU Courts have for example accepted that the right to be heard may be restricted in the context of measures against foot and mouth disease<sup>163</sup> and decisions to freeze funds of persons

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154 Case C-269/90, *Technische Universität München* [1991], para 25 and Case C-458/98 P, *Industrie des Poudres Sphériques v Council* [2000], para 99.

155 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 93. Case C-32/95P, *Commission v Lisrestal and others* [1996], para 41. See also T-49/88, *Al-Jubail Fertilizer v Council* [1991], para 17.

156 Case C-462/98 P, *Mediocruso v Commission* [2000], para 42. The right to be heard does not extend to the final decision which an administrative authority intends to adopt. See for example Case T-262/09, *Safariland v OHIM* [2011], para 80.

157 See for example Case T-170/06, *Alrosa v Commission* [2007], para 197. It also follows from this judgment that the relevant documents should be made accessible to the party concerned at a moment where the right to be heard can still be exercised. See para 201. See also Kaňska 2004, p 318.

158 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 94 and Case T-372/00, *Campolargo v Commission* [2002], para 36.

159 See for example Case C-269/90, *Technische Universität München* [1991], para 25, Joined cases C-379/08 and C-380/08, *ERG and Others* [2010], paras 54-56 and Case C-28/05, *Dokter* [2006], para 74.

160 Case C-462/98 P, *Mediocruso v Commission* [2000], para 38.

161 Case C-51/92 P, *Hercules Chemicals v Commission* [1999], paras 78-79. See also section 4.5.2.

162 Case C-28/05, *Dokter* [2006], para 75.

163 Case C-28/05, *Dokter* [2006], para 76.

groups or entities identified as being involved in terrorist acts.<sup>164</sup> In such cases the authorities who took the decision may be obliged to hear this party as soon as possible after the adoption of the decision<sup>165</sup> or in subsequent proceedings.<sup>166</sup>

The right to be heard will play a significant role in Chapter 7 on the asylum applicant's right to be heard on his asylum motives and Chapter 10 on the use of secret information.

#### 4.4.3 The duty to state reasons

According to Article 296 TFEU<sup>167</sup> and Article 41 (2) of the Charter the bodies of the EU have the obligation to state reasons for their legal acts or decisions. The Court of Justice regards this obligation as an essential procedural requirement,<sup>168</sup> which may be derogated from only for compelling reasons.<sup>169</sup> The plea of absence of or inadequate statement of reasons is a plea involving a matter of public policy which may, and even must, be raised by the EU judiciary of its own motion.<sup>170</sup>

Article 296 TFEU and Article 41 (2) of the Charter are directed towards the Institutions of the EU. It follows however from the case-law of the Court of Justice that the duty to state reasons also applies to the national authorities taking a decision on the basis of EU legislation.<sup>171</sup> The duty of national authorities to state reasons is also laid down in Article 9 PD.

The Court of Justice has not ruled whether the requirements under the duty to state reasons are the same for national authorities and EU Institutions.<sup>172</sup> However, it may be assumed that the Courts' case-law under Article 296 TFEU and Article 41 of the Charter is relevant for the interpretation of the duty to state reasons in the national context. This is supported by the fact that

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164 The Court stated that an initial measure to freeze funds must be able to benefit from a surprise effect and to be applied with immediate effect. Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 127. See also Case C-111/02 P *Parliament v Reynolds* [2004], paras 57-60.

165 See for example Case T-211/98, *F v Commission* [2000], para 34.

166 Case C-28/05, *Dokter* [2006], para 76, and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 130.

167 Art 253 of the former EC Treaty.

168 Case C-17/99, *France v Commission* [2001], para 35.

169 See for example Case T-390/08, *Bank Melli Iran v Council* [2009], para 80.

170 Case C-89/08 P, *Commission v Ireland and Others* [2009], para 34.

171 Case 222/86, *UNECTEF v Heylens and others* [1987], para 15 and Case C-239/05, *BVBA Management, Training en Consultancy* [2007], para 36. Reichel states that *Heylens* shows the function of the principle of good administration as 'a vehicle to strengthen private parties' possibilities to bring about an effective application of their Community rights before national authorities'. Reichel 2008, p 265.

172 See Reichel 2008, pp 265-267.

several EU measures seem to have codified the case-law of the EU Courts regarding the EU Institutions' duty to state reasons in EU legislation containing requirements for national authorities.<sup>173</sup>

The duty to state reasons is closely connected to the right to an effective remedy.<sup>174</sup> This right can only be effectively exercised if the person concerned knows the reasons underlying the negative decision.<sup>175</sup> Compliance with the obligation to state reasons is all the more important, if the party concerned is not afforded the opportunity to be heard before the adoption of the initial decision. In that situation the obligation to state reasons constitutes the sole safeguard enabling the party concerned, especially after the adoption of that decision, to make effective use of the legal remedies available to it to challenge the lawfulness of that decision.<sup>176</sup> Furthermore the statement of reasons must enable the court to review the decision.<sup>177</sup> Finally the statement of reasons serves transparency and may raise the quality of decision-making.<sup>178</sup>

The duty to state reasons must ensure that the party concerned can defend an EU right under the best possible conditions and that this person has the possibility to decide with a full knowledge of the relevant facts whether there is any point in his applying to the court.<sup>179</sup> The statement of reasons for a decision required by Article 296 TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the EU institution which adopted the measure in question.<sup>180</sup> Reasons of a general, stereotype nature, which do not contain any specific information

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173 See for example Art 30 of 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

174 See also section 4.2.

175 Ponce writes: 'The record and the reasons stated are similar to the black box in planes, but in relation to administrative procedures: a place where everybody (including the judge in event of controls) can check what has happened, what was well done, and what was overlooked, or done badly.' Ponce 2005, p 574.

176 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 140 and Case T-237/00, *Reynolds v Parliament* [2004], para 95.

177 The statement of reasons must enable the EU judicature to exercise its power of review. See Case T-111/96, *ITT Promedia v Commission* [1998], Joined Cases T-110/03, T-150/03 and T-405/03, *Sison v Council* [2005], para 59 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 89. See Kaňska 2004, p 320.

178 See also Reichel 2008, p 252 and A.G. Kokott's opinion with Case C-75/08, *Mellor* [2009]: 'The giving of reasons is not exclusively in the interest of the citizen, moreover: it also effects an initial self-check on the part of the administration and can pacify relations with the citizen, since if the reasons are convincing they put an end to existing conflicts and prevent superfluous legal disputes.'

179 Case 222/86, *UNECTEF v Heylens and others* [1987] para 15 and Case C-70/95, *Sodemare* [1997], para 19.

180 Case C-41/00 P, *Interporc v Commission* [2003], para 55.



relating to the case at issue do not suffice.<sup>181</sup> The EU institutions are not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their case<sup>182</sup> nor on all the relevant facts and points of law.<sup>183</sup> It is sufficient if they set out the facts and legal considerations having decisive importance in the context of the decision.<sup>184</sup> This includes the factual and legal elements which provide the legal basis which have led to the adoption of the decision<sup>185</sup> and the assessment of the essential complaints made by the parties.<sup>186</sup>

The requirements under the duty to state reasons vary according to the circumstances of the case. In *France v Commission* the Court of Justice stated that the duty to state reasons

must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.<sup>187</sup>

The degree of precision of the statement of the reasons for a decision must moreover be weighed against practical realities and the time and technical facilities available for making the decision.<sup>188</sup>

The statement of reasons must be notified to the person concerned, as far as possible, at the same time as the act adversely affecting him, or as swift as possible after the decision has been taken.<sup>189</sup> According to the CFI the failure to state the reasons of a decision cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceeding before the judicature.<sup>190</sup> The possibility of remedying the total absence of a statement of reasons after an action has been brought would prejudice the rights of the defence because the applicant would have only the reply in which to set out his pleas contesting the reasons which he would not know until after

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181 Case T-132/03, *Casini v Commission* [2005], para 35.

182 Case T-111/96, *ITT Promedia v Commission* [1998], para 79 and Case T-387/94, *Asia Motor France v Commission* [1996], para 104.

183 Joined Cases T-110/03, T-150/03 and T-405/03, *Sison v Council* [2005], para 59.

184 Case T-111/96, *ITT Promedia v Commission* [1998], para 79 and Case T-387/94, *Asia Motor France v Commission* [1996], para 104.

185 Joined Cases T-346/02 and T-347/02, *Cableuropa and others v Commission* [2003], para 232.

186 Joined Cases T-371/94 and T-394/94, *British Airways and British Midland Airways v Commission* [1998], para 64.

187 Case C-17/99, *France v Commission*, para 36 and Case T-70/05, *Evropaiki Dynamiki v EMSA* [2010], para 171. See also Reichel 2008, p 253.

188 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 141 and Case T-237/00, *Reynolds v Parliament* [2004], para 102.

189 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 336.

190 See for example Case T-390/08, *Bank Melli Iran v Council* [2009], para 80 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 139.

he had lodged his application. The principle of equality of the parties before the EU judicature would accordingly be adversely affected.<sup>191</sup>

The EU duty to state reasons plays an important role in Chapter 10 of this study on the use of secret information.

#### 4.5 THREE BASIC NOTIONS

For the purpose of this study a large number of judgements of the Court of Justice's and the ECtHR was assessed. It is contended here that from this case-law three what could be called 'basic notions' emerge:

- 1 When assessing whether EU procedural rights have been infringed (often) interests must be balanced against each other
- 2 When determining whether a procedure should be considered fair, regard should be had to all aspects and instances of this procedure: the overall fairness of a procedure must be examined
- 3 The subject matter of the procedure influences the level of procedural protection which must be offered to the applicant.

These notions seem to play a role in many of the cases in which procedural rules are tested against procedural rights and principles. Therefore they may be helpful on the one hand to explain some of the choices made by the Court of Justice and the ECtHR and on the other hand to predict these courts' approach in new situations. These notions will therefore be used as a tool to analyse the case-law examined in the thematic chapters and to develop a set of EU procedural standards for the procedural topics discussed in those chapters. The three 'basic notions' will be further explained in this section.

##### 4.5.1 Balancing of interests

The EU Courts have recognised that Member States are allowed to limit EU procedural rights, such as the right to an effective remedy, the right to be heard or the duty to state reasons. In that situation often the interest of the party concerned must be balanced against the interests of the State or other parties

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191 Case T-253/04, *KONGRA-GEL and others v Council* [2008], para 101, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 139, 165 and Case T-132/03, *Casini v Commission* [2005], para 33. The last mentioned case the Court admits however that 'insuffisance initiale de la motivation puisse être palliée par des précisions complémentaires apportées, même en cours d'instance, lorsque, avant l'introduction de son recours, l'intéressé disposait déjà d'éléments constituant un début de motivation.' In Case T-237/00, *Reynolds v Parliament* [2004], para 97 and 101, the Court stated however that this applies only in exceptional cases.

in such limitations. The right of access to court for example may be limited by the imposition of time-limits for bringing proceedings in the interest of legal certainty.<sup>192</sup> The right to be heard of one company may be limited in order to ensure the right of protection of business secrets of another company.<sup>193</sup> The State's interest to assess an asylum claim as quick as possible in order to remove persons who have no right to stay may result in lesser procedural guarantees for the applicant.<sup>194</sup>

The Court of Justice has held that in the assessment of the effectiveness of national procedural rules 'the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.'<sup>195</sup> The Court examines which aim is underlying the national procedural rule which limits a party's procedural right. Often these underlying aims, such as legal certainty, are also recognised as EU general principles. The Court then strikes a balance between this underlying aim of the national procedural rule on the one hand and the need for effectiveness on the other.<sup>196</sup> Some authors call this the "procedural rule of reason" test.<sup>197</sup>

The procedural rule of reason test has been criticised because it leads to a lack of predictability and legal certainty, as it is applied on a case by case basis. Using case-law as guidelines is therefore complicated.<sup>198</sup> Haapaniemi remarks that in its case-law the Court of Justice has not in every case where it applied the principles of effectiveness and equivalence repeated the procedural rule of reason test, but has referred to it from time to time. He states however that 'reconciliation of the interests the national provision represents and the exigencies of EU law are at any rate intrinsic in the Rewe/Comet jurisprudence' also without any explicit reference to the balancing test.<sup>199</sup> Prechal and Widdershoven argue that the balancing test performed by the Court of Justice under the principle of effectiveness is less intense than that applied when the EU right to an effective remedy is at stake.<sup>200</sup>

#### *Balancing of interests in the ECtHR's case-law*

The ECtHR has held with regard to Article 13 ECHR that the context in which an alleged violation occurs may entail inherent limitations on the conceivable

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192 See for example Case C-63/08, *Pontin* [2008], para 48.

193 See for example Case C-450/06, *Varec* [2008], para 51 and Case C-438/04, *Mobistar* [2006], para 40. See also Schwartz 2004, p 96.

194 Case C-69/10, *Samba Diouf* [2011], para 65.

195 Case C-312/93, *Peterbroeck* [1995], para 14.

196 Engström 2008, p 68. See also Trstenjak & Beysen 2011, p 103.

197 Engström 2008, p 68. Prechal & Shelkopyas 2004, p 593.

198 Engström 2008, p 71. See also Prechal & Shelkopyas 2004, p 593.

199 Haapaniemi 2009, p 98.

200 Prechal & Widdershoven 2011, p 43-44.

remedy.<sup>201</sup> The ECtHR has for example accepted limitations to the right to an effective remedy in circumstances where national security considerations did not permit the divulging of certain sensitive information.<sup>202</sup> Furthermore the right to a court guaranteed by Article 6 ECHR, of which the right of access is one aspect, is not absolute. It is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. Lastly, such limitations will not be compatible with Article 6 (1) if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim pursued.<sup>203</sup> Furthermore the right to a public hearing may in exceptional circumstances be dispensed with.<sup>204</sup> Finally the ECtHR has recognised that the right to adversarial proceedings may be limited for example in order to preserve the fundamental rights of another individual or to safeguard an important public interest, which justifies a limitation of this right.<sup>205</sup>

#### 4.5.2 Assessing the overall fairness of a procedure

Asylum procedures and other procedures usually consist of several phases, for example an administrative phase, an appeal phase and a higher appeal phase. Within those phases several procedural steps may be taken. The administrative phase of an asylum procedure for example may consist of several interviews with the asylum applicant, the gathering of additional evidence or information, contacts between the applicant and his lawyer and taking the decision. Generally shortcomings in one phase or step of the procedure may be compensated or repaired in another step or phase of the same procedure or even in a subsequent procedure. Shortcomings in the assessment of evidence during the administrative phase may for example be repaired by a full judicial review of the facts. In such a situation a violation of a procedural right or

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201 ECtHR (GC) 26 October 2000, *Kudla v Poland*, no 30210/96, para 151.

202 ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99. See also HRC 15 June 2004, *Ahani v Canada*, no 1051/2002, where the HRC considered that in the circumstances of national security involved, it was not persuaded that the process was unfair to the author. See further section 10.3.3.

203 See for example ECtHR 15 February 2000, *Garcia Manibardo v Spain*, no 38695/97, para 36 and ECtHR 10 July 1998, *Tinnelly & sons v the United Kingdom*, no 20390/92 and 21322/92, para 72. See also HRC General Comment No 32 (2007), CCPR/C/GC/32, para II, sub 9.

204 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 41 and ECtHR (GC) 11 July 2002, *Göç v Turkey*, no 36590/97, para 47.

205 See for example ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45.

principle may be prevented. It is therefore the fairness of a procedure as a whole which should be assessed.

The Court of Justice has considered in cases where it assesses national procedural rules in the light of the principle of effectiveness that:

each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.<sup>206</sup>

This implies that the fairness of a national procedural rule should not be assessed in a vacuum but in the context of the national procedure as a whole.<sup>207</sup> Recital 27 of the Preamble of the Procedures Directive reflects this case-law, while stating that the effectiveness of a national remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.<sup>208</sup>

#### *Overall fairness in the ECtHR's case-law*

According to the ECtHR 'even if a single remedy does not by itself entirely satisfy the requirements under Article 13, the aggregate of remedies provided for under domestic law may do so'.<sup>209</sup> Furthermore the ECtHR has explicitly considered under Article 6 that it 'always tries to take into account the "proceedings as a whole" before deciding whether or not there has been a violation of the Convention in respect of a specific episode'.<sup>210</sup> Guarantees offered in one instance of the procedure may justify lesser safeguards in further instances. Article 6 applies to appeal and cassation procedures. In its assessment of the fairness of such proceedings, the ECtHR takes into account the guarantees offered in first instance proceedings.<sup>211</sup> Furthermore the possibility exists that a higher or the highest tribunal may, in certain circumstances, make

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206 See for example Case C-63/01, *Evans* [2003], para 46 and Case C-312/93, *Peterbroeck* [1995], para 14.

207 See also Accetto & Zlepzig 2005, p 391, who state that the Court of Justice confirmed in *Evans* that the negative impact of a national procedural provision on the application of EU law must be analysed in the light of the domestic judicial system as a whole.

208 Recital 27 Preamble PD.

209 See for example ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 289 and ECtHR 26 March 1987, *Leander v Sweden*, no 9248/81, para 84.

210 ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, para 164. See also ECtHR 13 October 2009, *Salontaji-Drobnjak v Serbia*, no 36500/05, para 128 and ECtHR 25 October 1995, *Bryan v the United Kingdom*, no 19178/91, paras 45-46 and Harris, O' Boyle & Warbrick 2009, p 246.

211 According to the ECtHR 'the manner in which Article 6 applies to courts of appeal or of cassation must depend on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted in the domestic legal order and the court of cassation's role in them.' See for example ECtHR 22 March 2007, *Sialkowska v Poland*, no 8932/05, para 104.

reparation for an initial violation of Article 6 ECHR. Such a violation cannot be remedied in a later stage of the procedure if any prejudice suffered in the meantime has become irreversible.<sup>212</sup> On the other hand, the ECtHR may rule that domestic proceedings had been unfair 'because of the cumulative effect of various procedural defects'. In such a situation each defect, taken alone, would not have convinced the ECtHR that the proceedings were unfair, but their coexistence is the factor that leads to a finding of a violation of Article 6.<sup>213</sup>

*No possible reparation for procedural flaws*

It is however also possible that a procedural rule or practice on its own amounts to a violation of a procedural right or principle. The CFI has for example held that a violation of the right to be heard during the administrative procedure cannot be repaired during the appeal phase.<sup>214</sup> In *Hercules Chemicals* the Court of Justice considered that the disclosure during the appeal phase of relevant documents underlying a Commission decision to impose a fine or penalty, cannot remedy a breach of the rights of the defence caused by the non-disclosure of those documents during the administrative phase.<sup>215</sup> The Court stated:

Although belated disclosure of documents in the file allows the undertaking that has support of the forms of order it is seeking, it does not put the undertaking back into the situation it would have been in if it had been able to rely on those documents in presenting its written and oral observations to the Commission.<sup>216</sup>

Furthermore procedural rules which effectively block access to a court or tribunal often in themselves violate the right to effective judicial protection or fair trial.<sup>217</sup>

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212 ECtHR 14 June 2011, *Mercieca and others v Malta*, no 21974/07, para 49.

213 ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, para 165.

214 Case T-253/04, *KONGRA-GEL and others v Council* [2008], para 101 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 139.

215 Case C-51/92 P, *Hercules Chemicals v Commission*. paras 77-79.

216 Case C-51/92 P, *Hercules Chemicals v Commission*. para 79.

217 See for example Case 222/84, *Johnston* [1986] and ECtHR 28 October 1998, *Pérez de Rada Cavanilles v Spain*, no 28090/95, where the ECtHR held that the particularly strict application of a procedural rule by the domestic courts deprived the applicant of the right of access to a court.

### 4.5.3 The subject matter of the procedure

When assessing procedural matters the Court of Justice and the ECtHR often take the individual circumstances of the case into account.<sup>218</sup> Factors which may influence the level of procedural protection which should be granted are amongst others the nature of the rights claimed by the applicant and the personal circumstances of the applicant. Arguably the required level of procedural protection depends on the interests at stake for the party concerned. Furthermore the characteristics of the person concerned may require more or less procedural guarantees. As a result one must be careful not to apply judgments of the EU Courts and the ECtHR mechanically to other fields of (EU) law.<sup>219</sup>

Asylum cases have a few characteristics which distinguish them from most other cases falling within the scope of EU law. These relate first of all to the fundamental and even absolute nature of the rights claimed and secondly to the special and often vulnerable situation in which asylum applicants find themselves. The Court should take these characteristics into account when interpreting the Procedures Directive and assessing national procedural rules in the light of EU procedural rights and principles. Also other factors may influence the level of procedural guarantees offered. Both the Court of Justice and the ECtHR have for example accepted that the level of discretion left to the decision-making authorities determines the standard of judicial review which is required.<sup>220</sup>

#### 4.5.3.1 The nature of the rights claimed

As opposed to State aid, mergers or agriculture, asylum is not an economic, but very much a human rights issue, in which the absolute EU prohibition of *refoulement* and the right to asylum play a crucial role. The fact that the principle of *non-refoulement* is absolute will potentially play an important role in

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218 Barbier de la Serre states for example that the rights of the defence will be acknowledged and or increased in their intensity: where (i) the institution enjoys a wide margin of appreciation, (ii) the party's participation may contribute substantially to the overall quality of the decision; (iii) the procedure concerns a field in which the institution enjoys strong investigative powers; (iv) the decision to be taken involves an appreciation of the party's behaviour and/or could be injurious to that party's reputation; (v) the exercise of the rights of the defence entails no excessive material costs; and to a lesser extent (vi) failure to exercise the rights of the defence would entail significant moral costs. Barbier de la Serre 2006, pp 248-249.

219 In Case C-473/00, *Cofidis* [2002], para 37 the Court of Justice stated that the *Rewe* and *Palmisani* decisions cited by Cofidis and the French Government were merely the result of assessments on a case by case basis, taking account of each case's own factual and legal context as a whole, which cannot be applied mechanically in fields other than those in which they were made.

220 See further Chapter 9 on judicial review of the establishment and qualification of the facts

cases regarding procedural guarantees for asylum applicants. A lack of procedural guarantees or the balancing of interests may never lead to a violation of this principle. Therefore, it is not unlikely that in asylum cases the Court of Justice will require more procedural guarantees than in cases involving fundamental rights, which allow for derogations and demand a balance of interests.<sup>221</sup> The Court of Justice has held that the assessment of the extent of the risk of *refoulement* 'must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union'.<sup>222</sup> The fundamental nature of the right to asylum, although not absolute, will potentially also require high procedural standards.<sup>223</sup>

The Court of Justice has also shown in its case-law regarding other fields of EU law that it takes into account what is at stake for an individual when deciding on the effectiveness of national procedural rules. In *Visciano* for example the Court of Justice took into account, when assessing a time-limit set by national law in the light of the principle of effectiveness that the case concerned a claim for payment of salary. According to the Court such claims are by their very nature, of great importance to the individual concerned.<sup>224</sup> The Court of Justice also held that the duty to state reasons must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.<sup>225</sup>

The same approach can be found in the case-law of the ECtHR. This court has considered that the scope of the obligation to provide an effective remedy under Article 13 ECHR varies according to the nature of the applicant's complaint under the Convention.<sup>226</sup> The absolute nature of the right safeguarded under Article 3 has implications for Article 13 ECtHR.<sup>227</sup> It held that 'in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises', the effectiveness of a remedy within the meaning

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221 Staffans states that the vast interests embedded in asylum procedures on the side of the State as well as the applicant require real, objective and effective possibilities for review and remedy. Staffans 2010, pp 273-297.

222 Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 90.

223 See also the opinion of A.G. Bot in Case C-277/11, *M v Minister for Justice, Equality and Law Reform Ireland*, para 43.

224 Case C-69/08, *Visciano* [2009], para 44. See also Case C-28/05, *Dokter* [2006], para 74.

225 Case C-17/99, *France v Commission*, para 36 and Case T-70/05, *Evropaiki Dynamiki v EMSA*, para 171.

226 According to the ECtHR the scope of the obligation under Art 13 varies according to the nature of the applicant's complaint under the Convention. See ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, para 136.

227 See for example ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 288.



of Article 13 imperatively requires close scrutiny by a national authority, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and access to a remedy with automatic suspensive effect.<sup>228</sup> The Human Rights Committee considered in *Ahani v Canada* that 'where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture.'<sup>229</sup> When assessing the fairness of the proceedings under Article 6 ECHR the ECtHR also takes into account what is at stake for the person concerned. The Court allows greater latitude when dealing with civil cases than when dealing with criminal cases.<sup>230</sup> In several cases in which the right to adversarial proceedings was limited as a result of the use of secret evidence the Court stressed the need for procedural safeguards while referring to the serious consequences of the contested decision for the applicant.<sup>231</sup>

#### 4.5.3.2 Special vulnerability of the person concerned

Apart from the nature of the rights claimed, also specific circumstances in asylum cases may require more procedural guarantees than in other cases governed by EU law. Many asylum applicants do not speak the language of the Member State, are not familiar with the legal system in the Member State and do not have any resources to pay for legal aid. Therefore interpreters, information on the asylum procedure or free legal aid may be essential in order to guarantee a fair asylum procedure.<sup>232</sup> According to the UNHCR Handbook:

It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application

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228 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 293.

229 HRC 15 June 2004, *Ahani v Canada*, no 1051/2002, para 10.6. See also HRC 19 August 1997, *Vincente et al. v Colombia*, no 612/1995 where the Committee considered in the context of the requirement to exhaust domestic remedies ex Art 5 (2) (b), of the Optional Protocol that, if the alleged offence is particularly serious, as in the case of violations of basic human rights, in particular the right to life, purely administrative and disciplinary remedies cannot be considered adequate and effective. Joseph states that this consideration applies also to allegations of torture, cruel, inhuman or degrading treatment or punishment given the grave nature of such abuses. Joseph & others 2006, p 66.

230 See for example ECtHR 27 October 1993, *Dombo beheer v the Netherlands*, no 14448/88, para 32.

231 ECtHR 24 April 2007, *Matyjek v Poland*, no 38184/03, para 59, ECtHR 31 October 2006, *Aksoy v Turkey*, no 59741/00, para 27 and ECtHR 19 October 2010, *Özpinar v Turkey*, no 20999/04, para 78.

232 See for example ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 304-311, 319.

should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs.<sup>233</sup>

Furthermore most asylum applicants have no documents or other proof to substantiate their asylum claim. The assessment of their asylum claim consists for the largest part of an examination of the credibility of their asylum account.<sup>234</sup> Finally certain groups of specifically vulnerable asylum applicants are in need of extra procedural safeguards.<sup>235</sup> This applies for example to (unaccompanied) minor asylum applicants.<sup>236</sup> Victims of torture may be afraid to speak freely to the authorities of the State of refuge.<sup>237</sup> Asylum applicants may have psychological or physical problems, which impede a normal examination of their case.<sup>238</sup> These circumstances may require for example that the burden of proof normally incumbent upon the applicant be lightened, or 'different techniques of examination' be used by the authorities.<sup>239</sup>

The Court of Justice takes into account the personal circumstances of the party concerned when assessing national procedural rules in the light of the principle of effectiveness. In several consumer law cases the Court concluded for example that national courts must assess the fairness of a contract term of their own motion in order to ensure consumer protection envisaged by the relevant directive. It had regard to the fact that the consumer may be unaware of his rights or may encounter difficulties in enforcing them. The Court considered:

In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of

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233 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979 (reedited in 1992) (UNHCR Handbook), para 190. See with regard to children also ComRC General Comment No 6 (2005), CRC/GC/2005/6, para 1, 68 and General Comment No 12 (2009), CRC/C/GC/12, para 123. The ECtHR considered in ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 251 that asylum applicants constitute 'a particularly underprivileged and vulnerable population group in need of special protection'.

234 UNHCR Handbook, para 196. See further Chapter 8.5.

235 Note that Art 17 RCD and Art 20 (3) QD mention as vulnerable persons: minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

236 According to recital 14 Preamble PD 'specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability.'

237 UNHCR Handbook, para 198.

238 UNHCR Handbook, para 207.

239 UNHCR Handbook, paras 207 and 210.

the law, will not challenge the term pleaded against him on the grounds that it is unfair.<sup>240</sup>

Trstenjak and Beysen state that the Court of Justice resorted to ‘a consumer-oriented interpretation’ of the concepts of procedural and remedial autonomy of the Member States. ‘By emphasizing the weak position of the consumer the ECJ implicitly raised the effectiveness threshold which national procedural rules for the enforcement of rights under the consumer protection directives must meet.’<sup>241</sup>

In *Pontin* the Court considered that a 15-day period for bringing an action for nullity of a dismissal and reinstatement of a pregnant woman, must be regarded as being particularly short and appeared to infringe the principles of effectiveness ‘in view inter alia of the situation in which a woman finds herself at the start of her pregnancy’. It also took into account that it would be ‘very difficult for a female worker dismissed during her pregnancy to obtain proper advice and, if appropriate, prepare and bring an action within the 15-day period’.<sup>242</sup>

The Court of Justice generally assesses in the abstract whether a procedural rule, taken into account the rights claimed by the party concerned and the specific features of the procedure, is reasonable and proportionate. The Court of Justice has made clear however that the application in a particular case of a procedural rule, which was generally considered reasonable and proportionate, may violate the EU right to an effective remedy. In *Samba Diouf* for example the Court of Justice considered a time-limit of fifteen days to bring an appeal against the rejection of the asylum application in the accelerated procedure sufficient in the light of the EU right to an effective remedy. The Court did not exclude however that, while a time-limit may be considered reasonable in general, it may be insufficient in the individual circumstances of the case. Whether this is the case, is up to the national court to decide.<sup>243</sup>

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240 See for example Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores* [2000], para 26.

241 Trstenjak & Beysen 2011, p 121.

242 Case C-63/08, *Pontin* [2008], paras 62 and 65.

243 Case C-69/10, *Samba Diouf* [2011], paras 66-68. See also Case C-349/07, *Sopropé* [2008], para 44.

