‘A Spectre is Haunting Kirchberg’ – The Spectre of Article 47: The CJEU Case Law on the Finality of Judicial Decisions and on the **Ex Officio Application of EU Law**

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'A Spectre is Haunting Kirchberg' – The Spectre of Article 47: The CJEU Case Law on the Finality of Judicial Decisions and on the *Ex Officio* Application of EU Law

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The rules on finality of judicial decisions and those on the power or duty for courts to raise *ex officio* points of law which have not been invoked by the parties aim to strike what each legal system perceives as a fair balance between opposing interests, those of legality on the one hand, and of legal certainty and procedural fairness, on the other. These rules have been subject to the scrutiny of the Court of Justice both before and after the entry into force of the Charter. This chapter examines the case law on these issues and considers how the principle of effective judicial protection, and the right to an effective remedy enshrined in Article 47 of the Charter, have been used by the CJEU. The analysis shows that the case law has been based on the duty of sincere cooperation, as well as the principles of equivalence and effectiveness, with Article 47 and the principle of effective judicial protection remaining almost entirely in the background. This chapter explores the possible reasons for the absence of Article 47 in the case law of the Court and reflects on whether Article 47 would have provided an added value for litigants.

I. Introduction

The rules on the finality of judicial decisions – which are present in national legal systems[1] as well as the EU legal order[2] – serve to strike a balance between two competing imperatives: that of legality, which would hold unlawful decisions to be ideally

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[1] See further, CW Backes and M Eliantonio, *Casebook Judicial Review of Administrative Action* (Hart Publishing, 2019) ch 7, s 7.6; See also A Turmo, 'National res judicata in the European Union: Revisiting the tension between the temptation of effectiveness and the acknowledgement of domestic procedural law' (2021) 58 *Common Market Law Review* 361.

[2] On this and the relevant case law, K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (Oxford University Press, 2015) 854.

revocable by an authority or reviewable by a court indefinitely, and that of legal certainty, which requires that legal relationships between citizens and administration be definitively settled at a certain point. The question of where to strike the balance between legality and legal certainty assumes a whole new dimension in the context of the EU legal order, since rules limiting the re-opening of a final administrative decision or a judicial decision which has acquired the status of *res judicata*, prevent the correct application of EU law and might even be considered a threat to the primacy of EU law.

Similarly, rules on the power or duty for courts to raise *ex officio* points of law which have not been invoked by the parties exist in both the national and EU legal orders.[3] These aim to balance, on the one hand, the need to uphold 'objective legality', protecting collective interests (when, eg, rules of public policy are at stake), or upholding the imperative to deliver a sound judgment irrespective of the capacities and actions of individual litigants or their legal counsels, considerations which would all speak in favour of broad *ex officio* powers for courts. In the context of the EU legal system, the need for courts to apply EU law *ex officio* may also be regarded as being linked to the need to ensure the effective application of EU law. On the other hand, considerations of procedural fairness (linked to the need to ensure the 'party disposition' principle in a dispute) as well as procedural economy would seem to limit the *ex officio* powers of judges.

Already since the *Rewe* ruling,[4] the CJEU has been seized on several occasions by national courts with questions concerning rules on the finality of administrative and judicial decisions as well as rules on the obligation to raise *ex officio* rules of EU law which the parties have not relied on. As will be shown in this chapter, one common denominator of these cases is that, in the view of the Court, none of the imperatives protected by the rules is absolute: a fair balance between, on the one hand, the need to preserve legal certainty and procedural fairness and efficiency, and, on the other, to ensure that the primacy and correct application of EU law needs to be stricken by national rules and national courts.

The chapter will review the case law on these issues and consider how the principle of effective judicial protection, and the right to an effective remedy enshrined in Article 47 of the Charter, have been used by the CJEU.[5] The analysis will be carried

[3] See further, CW Backes and M Eliantonio (n 1) ch 5, s 5.6; See also A Östlund, *Effectiveness versus Procedural Protection – Tensions triggered by the EU law mandate of ex officio review* (Nomos, 2019).

[4] Case C-33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* EU:C:1976:188.

[5] It should be noted that this chapter will not cover the case law on the rules concerning the need to re-open final administrative decisions. While these rules are conceptually similar to those concerning the finality of rulings and the duty to re-open rulings which have become *res judicata*, and they do raise similar concerns to the latter in terms of balancing legality with legal certainty, they are less relevant for the purposes of the present analysis which is concerned with effective *judicial* protection and the right to an effective judicial remedy. For a thorough analysis of the case law (from the 2004 *Kühne & Heitz* to the 2012 *Byankov* rulings), see the overview in J Jans, S Prechal and R Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing, 2015) 389; Suffice here to note that, in all of the relevant rulings, no mention is made of either the principle of effective judicial protection or of Art 47 EUCFR. This is certainly due to the 'age' of the case law, most of which (and certainly this is the case for *Kühne & Heitz*, the foundational ruling) was handed down before the Charter became binding. Furthermore, considering that the rules at stake are rules

out diachronically to reveal potential paths or inconsistencies in the evolution of the case law. It will be shown that the case law has been grounded on the duty of sincere cooperation, as well as the principles of equivalence and effectiveness, with Article 47 and the principle of effective judicial protection being nothing more than a 'spectre'. Finally the chapter will reflect on whether Article 47 would have provided an added value for litigants and provide recommendations on changes to be sought in the case law of the CJEU.

II. Re-Opening Final Judicial Decisions: Procedural Autonomy Limited by Equivalence and Effectiveness

A. The Principle of National Procedural Autonomy as the Default Position

The Court of Justice was confronted for the first time with rules on *res judicata* in *Kapferer*.[6] This case involved a dispute between a consumer domiciled in Austria and a trader domiciled in Germany. The consumer had appealed to an Austrian court which declared that it had jurisdiction on the basis of the applicable EU law provisions,[7] a circumstance which was contested by the German trader. The Austrian court had declared itself competent, but this decision had not been challenged by the German trader who had also won the case on the merits. The consumer appealed this ruling. While the decision on jurisdiction had become final, the Court of Appeal wondered if it could reconsider it because it seemed to violate EU law.

In this case, the Court of Justice first recalled

> the importance, both for the Community legal order and national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question.[8]

It then continued by stating that EU law does not require national courts to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of EU law, but domestic rules on the issue must comply with the principles of equivalence and of effectiveness.[9]

applicable before administrative authorities rather than rules of court procedure it seems rather straightforward that Art 47 did not play any role (and – it can be argued – does not have the potential to play a role) as it is meant to guarantee an effective remedy 'before a tribunal'.

[6] Case C-234/04 *Kapferer* EU:C:2006:178.

[7] Council Reg (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1, Art 15.

[8] See also A Tizzano and B Gencarelli, 'Union Law and final decisions of national courts in the recent case law of the Court of Justice' in A Arnull, C Barnard, M Dougan and E Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing, 2011) 267–80, 268.

[9] See *Kapferer* (n 6) paras 21–22.

As a consequence, the Court in this case did not create a European remedy. This point of departure was kept in all subsequent case law.[10]

For example, in *Hochtief*, the Court departed from the principle of national procedural autonomy and reiterated its default point on the basis of which, if a power to re-open a final judicial decision exists in national law, it must be exercised with respect to an EU claim. If this power does not exist, EU law does not require the creation of such a remedy. The Court left it to the national court

> to determine whether Hungarian procedural rules include the possibility of reversing a judgment which has acquired the force of *res judicata*, for the purpose of rendering the situation arising from that judgment compatible with an earlier judicial decision which has become final where both the court which delivered that judgment and the parties to the case leading to that judgment were already aware of that earlier decision. If that were the case […] that possibility should, in accordance with the principles of equivalence and effectiveness, in the same circumstances, prevail in order to render the situation compatible with an earlier judgment of the Court.[11]

This is also the case if the national court before which the initial litigation took place had not, or inaccurately, applied EU law as established in the response of the ECJ to a preliminary reference. Similarly, in *Telecom Italia*, the Court stated that a national court is not required to bypass the principle of *res judicata* in order to ensure that a certain interpretation of EU law given in a preliminary ruling be respected in a subsequent litigation.[12] This is because national courts have, in any case, an obligation to interpret national law, in as far as possible, in line with EU law.

B. Limitations Imposed by the Principle of Equivalence

As mentioned above, according to the CJEU, an obligation to reopen a final judicial decision might result from the principle of equivalence, in particular where national law offers the opportunity to bypass the *res judicata* nature of the decision under certain circumstances.

A clear enunciation of the applicability of principle of equivalence to these situations can be found in the *Impresa Pizzarotti* ruling. Here the Court stated that

> if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue in the main proceedings is brought back into line with the EU legislation on public works contracts.[13]

[10] Case C-213/13 *Impresa Pizzarotti* EU:C:2014:2067, para 59, quoting the earlier case law on this point.
[11] Case C-620/17 *Hochtief* EU:C:2019:630, para 63.
[12] Case C-34/19 *Telecom Italia* EU:C:2020:148.
[13] ibid, para 62; For another application of the principle of equivalence, see also Case C-40/08 *Asturcom* EU:C:2009:615.

In this case, Italian law provided for an opportunity to limit the *res judicata* of an incorrect judicial decision under certain circumstances in purely domestic cases. Therefore, the national court was considered – on the ground of the principle of equivalence – obliged to use this possibility under the same circumstances if the judicial decision is contrary to EU law.

However, as in earlier case law concerning equivalence,[14] the Court was seized on questions of how to assess the principle of equivalence for the purposes of considering two actions to be 'equivalent'.

In *Tarsia*, the Court gave indications on how to assess if there is a similar action for the purposes of establishing a possible violation of the principle of equivalence. In particular, the Court held that

> [I]t follows that the principle of equivalence does not preclude a situation where there is no possibility for a national court to revise a final decision of a court or tribunal made in the course of civil proceedings when that decision is found to be incompatible with an interpretation of EU law upheld by the Court after the date on which that decision became final, even though such a possibility does exist as regards final decisions of a court or tribunal incompatible with EU law made in the course of administrative proceedings.[15]

Hence, according to the Court, there is no 'inter-jurisdictional' equivalence for the purposes of rules on *res judicata*. If the re-opening of a final judicial decision is possible under certain conditions in administrative proceedings, the principle of equivalence does not require re-opening in civil proceedings.[16]

A further explanation on how to assess if there is a similar action was provided in *XC*. Here the Court explained that

> a national court is not required to extend to infringements of EU law, in particular to infringements of the fundamental rights guaranteed in Art. 50 [of the Charter of Fundamental Rights] and Art. 54 [of the Convention implementing the Schengen Agreement], a remedy under national law permitting, only in the event of infringements of the ECHR or one of the protocols thereto, the rehearing of criminal proceedings closed by a national decision having the force of *res judicata*.[17]

Hence, there is also no 'inter-right' equivalence for the purposes of rules on *res judicata*. If re-opening a final judicial decision is possible under certain conditions for infringements of the ECHR, the principle of equivalence does not require re-opening in respect of violations of EU law.[18]

[14] See eg Case C-261/95 *Palmisani* EU:C:1997:351; Case C-147/01 *Weber's Wine World* EU:C:2003:533; Case C-78/98 *Preston* EU:C:2000:247; Case C-63/08 *Pontin SA* EU:C:2009:666.

[15] Case C-69/14 *Târșia* EU:C:2015:662, para 35.

[16] Further on this, see K Sowery, 'Equivalent treatment of Union rights under national procedural law: *Târsia*' (2016) 53 *Common Market Law Review* 1705, 1722.

[17] Case C-234/17 *XC* EU:C:2018:853, para 59.

[18] For critical remarks on this, Z Varga, 'Retrial and principles of effectiveness and equivalence in case of violation of the ECHR and of the Charter: *XC*' (2019) 56 *Common Market Law Review* 1673, 1690, 1694 where the author concludes that 'neither the choice of the actions to be compared, nor the comparison of these actions are completely coherent with earlier case law'.

Finally, in *Călin*, the Court reiterated that the appropriate first benchmark to assess national rules on *res judicata* is the principle of equivalence, but left it to the national court to determine whether it had been violated.[19] In this case, Romanian law provided for a procedure for requesting the revision of final judicial decisions which prove to be contrary to EU law, subject to a limitation period of one month, which ran from the date of notification of the judgment in respect of which revision is sought. As the Court of Justice concluded that it was not clear if there was an appropriate comparator to this mechanism for purely national claims, it left the assessment of the principle of equivalence to the national level.

C. Limitations Imposed by the Principle of Effectiveness

The fact that the principle of *res judicata* and national procedural autonomy in general prevail does not imply that every procedural national rule will be considered acceptable, even if the test of equivalence is met. Certain national systems might be too restrictive to comply with the principle of effectiveness.

Fallimento Olimpiclub gives indications on how the principle of effectiveness is to be assessed. According to the Court, 'account must be taken, where appropriate, of the principles which form the basis of the national judicial system concerned, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of proceedings'.[20]

In this case, national law prevented a judicial decision that had acquired the force of *res judicata* from being called into question also 'in the context of judicial scrutiny of another decision taken by the relevant tax authority in respect of the same taxpayer or taxable person, but relating to a different tax year'.[21] In the assessment of the Court,

> if the principle of *res judicata* were to be applied in that manner, the effect would be that, if ever the judicial decision that had become final were based on an interpretation of the Community rules concerning abusive practice in the field of VAT which was at odds with Community law, those rules would continue to be misapplied for each new tax year, without it being possible to rectify the interpretation.[22]

In the view of the Court 'such extensive obstacles to the effective application of the Community rules on VAT cannot reasonably be regarded as justified in the interests of legal certainty and must therefore be considered to be contrary to the principle of effectiveness'.[23]

[19] Case C-676/17 *Călin* EU:C:2019:700.
[20] Case C-2/08 *Fallimento Olimpiclub Srl* EU:C:2009:506.
[21] ibid, para 29.
[22] ibid, para 30.
[23] ibid, para 31.

The 2020 *Cabinet de avocat UR* case provided the CJEU with an opportunity to confirm this approach.[24] The referring court indicated that the rules on *res judicata* would prevent it from taking into account the correct interpretation of EU legislation on VAT, so that the interpretation of EU law provided in the *res judicata* ruling would have to continue to apply for later fiscal years. As in *Fallimento Olimpiclub* the Court concluded against that such 'extensive obstacles' to the application of the EU rules on VAT were contrary to the principle of effectiveness.[25]

In *Tarsia*, the same test as *Fallimento Olimpiclub* was applied by the Court, but the conclusion was that the principle of effectiveness was not violated.[26] However, the Court recalled that State liability is an avenue in cases where a national court of last instance violated EU law, on the basis of the *Köbler* remedy.[27] This reminder has become standard in the recent case law on the matter.[28]

In *Finanmadrid*, instead, the principle of effectiveness was considered as violated.[29] The case concerned a rule of Spanish civil procedure which prevented the national court ruling on the enforcement of an order for payment from assessing, on its own motion, whether a term was unfair. This limitation arose from the authority of *res judicata* granted to the decisions of court registrars who were competent to hear applications for such orders, but not to assess the fairness of contract terms. The result of the application of the rule, in the view of the Court, was that it could be excessively difficult, or impossible, to ensure that consumers obtain the protection conferred upon them by EU law. As in *Fallimento Olimpiclub*, the rules on *res judicata* applicable in this case were quite restrictive. The system in fact provided that a *res judicata* ruling could be adopted without adversarial proceedings, which could quite seriously impinge on a consumer's rights.

The *Călin* ruling mentioned above is another case in which the rules were considered too restrictive to comply with the principle of effectiveness. In this case, the Romanian system provided that an action for revision of a ruling which was *res judicata* had a time limit of one month. With respect to the time limit in itself, the Court held that 'the length of the time limit for bringing the action for revision at issue in the main proceedings does not appear, in itself, liable to make it in practice impossible or excessively difficult to submit a request for revision of a final judgment'.[30]

However, the one-month time limit for bringing an action for revision started running from the publication of the ruling in the Romanian Official Journal. Although the ruling which had become *res judicata* was delivered on 12 December 2016, it was not published in the Official Journal until 23 May 2017. The national court applied the limitation period provided for in the initial ruling in order to find that the action for

[24] Case C-424/19 *Cabinet de avocat UR* EU:C:2020:581.
[25] ibid, para 33.
[26] See *Târşia* (n 15).
[27] For critical remarks on this point, see Sowery (n 16) 1720.
[28] See, eg *XC* (n 17) para 58; See also *Hochtief* (n 11) para 64; See *Călin* (n 19) para 56; See also *Telecom Italia* (n 12) paras 67–69.
[29] Case C-49/14 *Finanmadrid* EU:C:2016:98.
[30] See (n 19) para 49.

revision brought by the applicant was time-barred, even though that ruling had not yet been published by the time the time limit had expired.

In this case, the court considered that the principle of effectiveness was violated. The reason seems to be grounded in the fact that, in the specific circumstances of the case, the application of the time limit in question gravely violated the notion of legal certainty and the rule of law, as the person concerned was not officially aware of the ruling because it had not been published according to the appropriate modalities.

A further intrusion into the rules on *res judicata* on the grounds of the principle of effectiveness is provided in the *Vueling* ruling.[31] In this case, the Criminal Chamber of the French *Cour de Cassation* found that Vueling had committed fraud in obtaining E-101 certificates from the Spanish authorities for its flight and cabin crew members operating out of Paris airport. In subsequent litigation, a French lower civil law court and the Social Chamber of the *Cour de Cassation* both had doubts concerning the compatibility of the judgment of the Criminal Chamber with EU law. However, in principle they were both bound by the *res judicata* nature of the ruling of the Criminal Chamber. The Court of Justice confirmed that the Criminal Chamber had indeed adopted a ruling in violation of EU law and went to on to determine whether the French rules on *res judicata*, preventing the court seized of the subsequent litigation from departing from the ruling adopted by the Criminal Chamber, were in violation of the principle of effectiveness. The Court concluded that French rules prevented the civil courts from calling into question the findings of fact and legal classifications made by the criminal courts in breach of EU law, and that this incorrect application of EU law would persist through all later litigation concerning the same facts. According to the ECJ, this effect of *res judicata* goes beyond what could 'reasonably be justified by the principle of legal certainty'.[32]

D. The *Lucchini* Case and its Follow-Up

The decisions of national courts relating to state aid disputes have been – at least in the beginning – subject to a separate regime due to the competence of the Commission in this area. Indeed only the Commission can rule on the compatibility of state aid with the Treaty, which is why Member States are required to notify the Commission of new aid. The role of national courts is therefore confined to the question of whether a national measure constitutes state aid which must be notified to the Commission. The Court of Justice was confronted with a situation in which the national court had, by a

[31] Joined Cases C-370/17 and C-37/18 *Vueling* EU:C:2020:260.

[32] ibid, para 96; It should be noted that while there is some similarity between the situations at stake in *Fallimento Olimpiclub* and *Vueling*, in that the determination of certain facts and their legal interpretation would be binding in future litigation, there are also quite clear – and possibly more crucial – differences; Further on this, see Turmo (n 1) 377–78, who argued that, in *Vueling*, the incursion into national procedural autonomy in the name of effectiveness seems even more intense than in *Fallimento Olimpiclub.*

decision having the force of *res judicata*, disregarded the Union rules relating to state aid. The authority of *res judicata* thus constituted an obstacle to the recovery of aid paid in violation of EU law.

In the *Lucchini* judgment of 2007, the Court ruled very clearly that a national provision concerning the authority of *res judicata* could not stand in the way of recovery of the aid.[33] To justify this solution, the Court of Justice relied on the doctrine of the primacy of EU law.[34] The solution chosen by the Court of Justice in this case seems to be motivated by a number of factors. First of all, the Court was confronted with a final national judgment on a question over which the Commission had sole competence. Secondly, the Commission had already delivered its decision on the compatibility of the aid with EU law. The subsequent national decision ordering the disbursal of aid therefore disregarded EU law entirely. As has been argued, what seems to have prompted the Court of Justice to go beyond the need to respect the doctrine of *res judicata* is 'the number of manifest errors or the condemnable passivity, to say the least, of the Italian authorities, national administrations and civil jurisdictions; and even, above all, the "ingenuity" of the claimant who was the beneficiary of the illegal aid'.[35]

Subsequently, the Court of Justice had the opportunity to specify more explicitly that it is because of the exclusive competence of the Commission in matters of state aid control that the authority of *res judicata* should be set aside.[36] Especially when the question of the extension of the *Lucchini* case law to hypotheses other than the reimbursement of state aid was raised, the Court considered that 'that judgment concerned a highly specific situation, in which the matters at issue were principles governing the division of powers between the Member States and the Community in the area of state aid, the Commission of the European Communities having exclusive competence to assess the compatibility with the common market of a national state aid measure'.[37]

This was the case in the *Fallimento Olimpiclub* ruling mentioned above. This case involved VAT fraud. Seized by the tax authorities, the national courts had for certain tax years considered that there was no fraud. For the following years, the administration had again appealed to the courts, which then considered that there was fraud, but the authority of *res judicata* in the previous cases stood in the way of the conviction of the taxpayers. The financial nature of the case had probably led the national court to draw a parallel with the state aid dispute. Nevertheless, the Court distinguished *Lucchini* from its common approach, and limited it to the state aid field.[38]

[33] Case C-119/05 *Lucchini* EU:C:2007:434.

[34] The ruling has been considered by several commentators as a very profound incursion into national procedural autonomy; See, eg P Bříza, 'Lucchini SpA – is There Anything Left of Res Judicata Principle?' (2008) 27 *Civil Justice Quarterly* 40; G Raiti, 'The crisis of civil res judicata in the EC legal system' (2008) 13 *Zeitschrift für Zivilprozess international* 23; P Nebbia, 'Do the rules on State aids have a life of their own? National procedural autonomy and effectiveness in the *Lucchini* case' (2008) 33 *European Law Review* 427.

[35] See Tizzano and Gencarelli (n 8) 275; Along the same lines, see Turmo (n 1) 372–73.

[36] See, eg Case C-586/18 P *Buonotourist Srl v Commission* EU:C:2020:152, para 95.

[37] See Fallimento Olimpiclub (n 20) para 25.

[38] Further on the possibility to reconcile *Lucchini* with *Fallimento Olimpiclub*, A Kornezov, '*Res judicata* of national judgments incompatible with EU law: Time for a major rethink?' (2014) 51 *Common Market Law Review* 809.

The *Klausner Holz* judgment of 2015 confirmed this approach, but the Court of Justice linked the *Lucchini* line of case law to the principle of effectiveness without spotlighting primacy.[39] In this case, a German Land had contracted timber at a particularly favourable price to the applicant company. However, the Land had not delivered all the quantities of timber which it had agreed to and ultimately terminated the contract. The company appealed to the courts asking them to find that the contracts were still in force and won. Subsequently, the company again appealed to the court to obtain compensation for the damage caused by the non-performance of the contract. The Land raised as a defence that these contracts constituted state aid which had not been notified to the European Commission. It was this second case which was the subject of the preliminary question before the Court of Justice. Unlike *Lucchini*, the question posed in *Klausner Holz* thus concerned the *extent* of the authority of *res judicata*, as the second case concerned the same parties, but did not have the same subject matter or the same cause. Furthermore, the situation differed from *Lucchini* as doubts over the compatibility of the aid with the internal market had not yet been resolved by the Commission. Therefore, there was no Commission decision being directly disregarded as it had been the case in *Lucchini*.

Nevertheless, the Court of Justice concluded that

> a national rule which prevents the national court from drawing all the consequences of a breach of the third sentence of Article 108(3) TFEU because of a decision of a national court, which is *res judicata*, given in a dispute which does not have the same subject-matter and which did not concern the State aid characteristics of the contracts at issue must be regarded as being incompatible with the principle of effectiveness. A significant obstacle to the effective application of EU law and, in particular, a principle as fundamental as that of the control of State aid cannot be justified either by the principle of *res judicata* or by the principle of legal certainty.[40]

E. Interim Conclusion

The case law of the Court on the rules concerning the reopening of judicial decisions having acquired the force of *res judicata* remains anchored to the principle of national procedural autonomy, as limited by the principles of equivalence and effectiveness. The point of departure is that EU law does not unconditionally require the re-opening of final judicial decisions, even where there has been a misinterpretation or misapplication of EU law.[41] *Res judicata* and the principle of legal certainty will have to give way to EU legality and the effective application of EU law only where the principle of equivalence or effectiveness so require, an assessment which national courts are called to make on a case-by-case basis and following the guidance of the CJEU arising from earlier case law.

[39] Case C-505/14 *Klausner Holz* EU:C:2015:742.

[40] ibid, para 45.

[41] Turmo (n 1) 364, speaks in this respect of a 'measured approach' on the part of the CJEU, though one which is not always sufficiently clear or explicit, nor always mindful of the potential impact.

The table below shows the principles which have been at the basis of the rulings of the CJEU examined above.

Table 1 Case law on the duty to re-open final judicial decisions and corresponding principles grounding the reasoning of the CJEU

Rulings	**Principles mentioned**
Kapferer (2006)	Sincere cooperation; (implicitly) equivalence
Lucchini (2007)	Primacy; (implicitly) sincere cooperation
Fallimento Olimpiclub (2009)	Principle of effectiveness
Asturcom (2009)	Principles of equivalence and effectiveness (solved on basis of equivalence)
Commission v Slovakia (2010)	Sincere cooperation; (implicitly) equivalence
Impresa Pizzarotti (2014)	Principles of equivalence and effectiveness (solved on basis of equivalence)
Târşia (2015)	Principles of equivalence and effectiveness
Klausner Holz (2015)	Principle of effectiveness
Finanmadrid (2016)	Principles of equivalence and effectiveness (solved on basis of effectiveness)
XC (2018)	Principles of equivalence and effectiveness
Hochtief (2019)	Principles of equivalence and effectiveness
Călin (2019)	Principles of equivalence and effectiveness
Telecom Italia (2020)	Principles of equivalence and effectiveness
Cabinet de avocat UR (2020)	Principle of effectiveness
Vueling (2020)	Principle of effectiveness

It can be seen that, in order to justify the importance attached to the authority of *res judicata* and the possible re-examination of a judicial decision taken in violation of the law of the Union, the Court of Justice did not engage with Article 47 of the Charter, either to justify the questioning of the *res judicata* (because of the possible violation right to an effective remedy) nor to justify when it is not called into question (so as to ensure legal certainty).

It is also important to note that the national courts did not often ground their preliminary questions on Article 47 of the Charter. Only a few of the referring courts have referred to Article 47 of the Charter, but went no further than mentioning it.[42] The Court of Justice did not engage in the argument at all, and only in one case did it mention briefly not having received sufficiently clear information from the national court to engage with the argument based on the possible violation of Article 47.[43] Furthermore, in *XC*, the Court does not mention Article 47, but briefly recalls the

[42] This was the case in the *Târşia*, *Finanmadrid*, *Călin*, and *Cabinet de avocat* UR rulings.
[43] See *Finanmadrid* (n 29) para 57.

notion of effective judicial protection, which – in the Court's view – is guaranteed under the current EU constitutional framework.[44]

What can also be observed is that the question of the re-opening of *res judicata* rulings of the national courts initially arose before the Court of Justice before the entry into force of the Charter. It is therefore to be imagined that, also after the entry into force of the Charter, the Court stuck to its pre-Lisbon line of reasoning without any new arguments based on Article 47 of the Charter, because it did not see any need or added value in the engagement of the Charter, especially as national courts did not seem to seek this engagement.

The ensuing question is however whether the Court *should* have engaged more with Article 47, and whether this could have delivered different results or a different balance to be struck between legality (and the effective application of EU law) and legal certainty.

The question here is whether Article 47 would afford individuals more or broader protection than that they would end up having if a national rule was tested under the principle of effectiveness. Kornezov argues that 'if national law rules out, as a matter of principle, any possibility whatsoever of granting retrial on the basis of a judgment of the Court which has revealed the incompatibility of a national judgment with EU law, it may run counter to the right to effective judicial protection proclaimed in Article 47 of the Charter'.[45] This is certainly the case, but it is highly likely that such procedural rules would not have passed the test of effectiveness either, as they would render 'impossible in practice' the exercise of rights granted by EU law.

An interesting perspective of the possible added value of Article 47 can be offered in the situation in *XC*. The referring court only grounded the question on the principle of effectiveness, and the judgment contains only a passing reference to the notion of effective judicial protection, by stating (without further argumentation) that 'the constitutional framework guarantees everyone the opportunity to obtain the effective protection of rights conferred by the EU legal order before a national decision with the force of *res judicata* even comes into existence'.[46]

However, the test of effectiveness was relatively easily dismissed by the Court through the observation that the parties 'were fully able to plead an infringement of [the relevant EU law] provisions and that [the competent] courts considered those complaints'. If the threshold of effectiveness (for the purposes of testing whether national rules on *res judicata* do not render the exercise of EU rights overly burdensome) is met through the mere existence of national courts hearing claims under EU law, it can surely be maintained that the right to an effective remedy requires somewhat more from national rules. If the opposite were true, the test would in essence be rendered nugatory as there is no doubt that in all Member States courts have the competence to hear claims under EU law. This does not however mean that an 'effective' judicial protection of EU rights is thereby ensured, or at least that it is automatically ensured so that no re-opening of final judicial decision might ever be necessary. Therefore, if the

[44] See *XC* (n 17) para 46; see also Varga (n 18) 1684, who defines this as a 'bold statement'.

[45] See Kornezov (n 38) 837, who also considers those thresholds too vague and advocates an EU-wide system of re-opening similar to that set up by the Court with respect to state liability.

[46] See *XC* (n 17) para 46.

test of effectiveness is interpreted as narrowly as in *XC*, it is certainly conceivable that Article 47 could offer litigants an enhanced level of protection beyond what the *Rewe* effectiveness test can offer.

III. Raising Points of EU Law *Ex Officio*

A. The 'Rule': *Peterbroeck* and *van Schiijndel*

The question of the power or duty for national courts to raise *ex officio* points of EU law first came to the attention of the CJEU in *Verholen*.[47] While in this case the CJEU acknowledged the existence of a *right* for national courts to consider Community law points of their own motion, the thornier question, which was answered in *Peterbroeck*[48] and *van Schijndel*,[49] is whether national courts are under a general legal *duty* to examine the existence of an EU law rule of their own motion.[50]

In both cases, the CJEU first ruled that 'where, by virtue of domestic law, courts or tribunals must raise of their own motion points of law based upon binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned'.[51] It grounded this obligation on the *Rewe* principle of equivalence.

Then it went further and considered whether national courts are also under an obligation to apply EU law of their own motion where national law simply allows for such application. The Court answered in the affirmative on the basis of the principle of sincere cooperation, a consideration later repeated in *Kraaijeveld* as well.[52]

Finally, the Court considered the situation in which national courts are prevented from raising *ex officio* points which have not been raised by the parties. With respect to this scenario, the Court departed from the principle of national procedural autonomy, as limited by equivalence and effectiveness. The ECJ then proceeded to elaborate on how the question of the excessive difficulty or impossibility of exercising EU rights would need to be addressed under the test of effectiveness. In particular, in the view of the Court,

> 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

[47] Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and others v Sociale Verzekeringsbank Amsterdam* EU:C:1991:314; This has also been reiterated more recently in a case concerning public procurement in Case C-927/19 *Klaipėdos regiono atliekų tvarkymo centras* EU:C:2021:700.

[48] Case C-312/93 *Peterbroeck* EU:C:1995:437.

[49] Joined Cases C-430/93 and C-431/93 *van Schijndel* EU:C:1995:441.

[50] See further Jans, Prechal and Widdershoven (n 5) 413; See Östlund (n 3) 169 with further discussion on the seemingly contradictory outcomes of these two cases, which were decided on the same day.

[51] See *Van Schijndel* (n 49) para 13.

[52] Case C-72/95 *Kraaijeveld* EU:C:1996:404, para 58.

> 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.[53]

The Court thus did not establish an unconditional duty for national courts to go beyond the ambit of the dispute as set by the parties, but national courts are obliged – on a case-by-case basis – to consider whether their own national procedural rules limiting their *ex officio* powers comply with the principle of effectiveness under the guise of the 'procedural rule of reason' and assess whether they consequently have to raise points of EU law *ex officio*.[54]

Without quoting either *Van Schijndel* or applying the 'procedural rule of reason' in those terms, the 2018 *Sporting Odds* case brought the limitations to *ex officio* powers of national courts again in the spotlight and it did so with a clear link to Article 47 of the Charter.[55] In this case, a British company had offered online betting in Hungary without the necessary concession. After an investigation, the Hungarian tax authorities proceeded to impose a fine. At stake was, in the view of the referring court, Hungarian legislation which did not provide a possibility for national courts to review *ex officio* the proportionality of measures restricting the freedom to provide services, which might be regarded as too restrictive to comply with Article 47.

The Court did in substance replicate what it had held over a decade ago in *van Schijndel* and did not create a general duty for national courts to raise *ex officio* points of EU law, as this would entail – in the view of the Court – that national courts would have 'to substitute themselves for [administrative] authorities in setting out' the grounds on which they base their measures. Possibly because the question from the referring court was framed exclusively around Article 47 of the Charter, the ruling is, however, a missed opportunity to clarify the relationship between Article 47, on the one hand, and the *Rewe* principle of effectiveness on the other.

B. The Exceptions: EU Law as a Matter of Public Policy

The point of departure is that EU law does not generally require national courts to use *ex officio* powers to consider points of EU law which have not been raised by the parties. The next question is whether EU law can be considered a matter of public policy, which would in and of itself trigger the use of *ex officio* powers conferred on courts by national law.

In the *van der Weerd* case, the CJEU confirmed that a national court is not required, on the basis of the principle of equivalence to raise of its own motion points of law based on binding Union rules which have not been raised by the parties if it is not authorised to do so under national law in respect of similar rules of national law.[56] In the same case

[53] See *Van Schijndel* (n 48) para 19.

[54] This term was coined in S Prechal, 'Community Law in National Courts: The Lesson from *Van Schijndel*' (1998) 35 *Common Market Law Review* 681.

[55] Case C-3/17 *Sporting Odds* EU:C:2018:130.

[56] Joined Cases C-222/05 and C-225/05 *van der Weerd* EU:C:2007:318.

the Court also confirmed that EU law does not per se have a 'public policy status' and should not – just because a rule qualifies as EU law – be applied by national courts of their own motion under the public policy *ex officio* powers of a national court.[57] This approach was confirmed more recently in the 2016 *Benallal* case,[58] where the Court stated that

> where, in accordance with the applicable national law, a plea alleging infringement of national law raised for the first time before the national court hearing an appeal on a point of law is admissible only if that plea is based on public policy, a plea alleging infringement of the right to be heard, as guaranteed by EU law, raised for the first time before that same court, must be held to be admissible if that right, as guaranteed by national law, satisfies the conditions required by national law for it to be classified as a plea based on public policy, this being a matter for the referring court to determine.[59]

However, there are certain provisions of EU law for which the Court has made an exception. They relate to the field of consumer protection. The seminal case in this line of case law is *Océano*.[60] In this case, the ECJ ruled that the protection provided for consumers by the Unfair Contract Terms Directive[61] entails that a national court must be able to determine of its own motion whether a term of a contract before it is unfair, and that, therefore, the court in question must have the power to raise points of EU law of its own motion if that is necessary to protect a consumer.

Interestingly, in this case, no specific legal tool was used by the Court to reach this conclusion, and the ruling only refers to the need to ensure 'effective protection' to consumers as required by the Directive. On this basis, the Court held that the power of national courts to determine, of their own motion, that the jurisdiction clause in a consumer contract amounted to an unfair term, was necessary to protect consumers against unfair terms in consumer contracts. As it has been considered, 'rather than analysing national rules on *ex officio* application wholly from the standpoint of national procedural autonomy and testing their compliance with the principles of equivalence and effectiveness, the Court appears to frame this particular line of case law primarily in the context of the full effectiveness of Union law'.[62]

The same reasoning was followed in a long line of case law concerning the same policy area where national rules on *ex officio* powers were not tested against the 'procedural rule of reason', but simply declared in breach of EU law because they stood in the way of the system of protection set out by the measures of EU secondary law in the field

[57] Further on this case, J Engström, 'National Courts' Obligation to Apply Community Law Ex Officio – The Court Showing new Respect for Party Autonomy and National Procedural Autonomy?' (2008) 1 *Review of European Administrative Law* 67; RH Lauwaars, 'The Application of Community Law by National Courts *ex Officio*' (2008) 31 *Fordham International Law Journal* 1161.

[58] Case C-161/15 *Benallal v Belgian State* EU:C:2016:175.

[59] ibid, para 35.

[60] Joined Cases C-240/98 to C-244/98 *Océano* EU:C:2000:346.

[61] Council Dir 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

[62] Lenaerts (n 2); H Schebesta, 'Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom' (2010) 18 *European Review of Private Law* 847, who holds along the same lines that 'almost all cases were decided on the basis of an exclusively teleological rationale […], which effectiveness acted as a standard instead of the balancing/contextualized approach'.

of consumer protection.[63] The *van der Weerd* case too, which denied to EU law – in general – a public policy status such as to trigger *ex officio* powers of national courts, confirmed that consumer policy is 'beyond' the test of effectiveness, and is rooted in the special system of protection set up by the relevant EU secondary law rules.[64]

More recently, however, greater emphasis seems to be placed by the Court on the principle of effectiveness even within litigation on consumer protection policy. For example, in the *Faber* case, the Court has held that it is on the basis of the principle of effectiveness that a national court must 'determine whether the purchaser may be classified as a consumer, even if the purchaser has not expressly claimed to have that status, as soon as that court has at its disposal the matters of law and of fact that are necessary for that purpose or may have them at its disposal simply by making a request for clarification'.[65]

Finally, a line of case law in the field of consumer protection which seems to have emerged in 2018 timidly starts to link the duty of national courts to raise *ex officio* points of EU law to the requirements of effective judicial protection and Article 47 of the Charter. However, this does not seem to be done in a coherent or particularly clear fashion, especially with respect to the – albeit somewhat blurred – distinction between the principle of effectiveness and the right to an effective remedy. So, for example, in *Profi Credit Polska* the Court argued that national rules had to be tested against the principle of equivalence and the right to an effective remedy, leaving the principle of effectiveness out of the picture entirely.[66] In *Kancelaria Medius SA* the Court held instead that national procedural rules had to be tested against the principles of equivalence and effectiveness, as well as against the requirements of Article 47. However, the Court went on to assess the relevant rule against the threshold of whether the rule at stake made 'the application of EU law impossible or excessively difficult' thereby conflating the requirements of effective judicial protection with those of effectiveness.[67]

The second line of exceptions relates to competition law. In *Eco Swiss*, the Court ruled on the possibility for a national civil court, reviewing an arbitration award, to annul the award because it infringed EU competition law rules, although an argument to this effect had not been raised in the arbitration proceedings.[68] Under Dutch law, a civil court could raise a point of law on its own motion and consequently annul an

[63] See Case C-473/00 *Cofidis* EU:C:2002:705; Case C-168/05 *Mostaza Claro* EU:C:2006:675; C-429/05 *Rampion and Godard,* EU:C:2007:575; C-243/08 *Pannon* EU:C:2009:350; Case C-137/08 *Pénzügyi Lízing* EU:C:2010:659; Case C-76/10 *Pohotovosť* EU:C:2010:685; See also Engstrröm (n 57) 67–89.

[64] See *van der Weerd* (n 56) para 40.

[65] Case C-497/13 *Faber* EU:C:2015:357, para 46; See along the same lines Case C-618/10 *Banco Español de Crédito* EU:C:2012:349; Case C-397/11 *Jőrös* EU:C:2013:340; Case C-472/11 *Banif Plus Bank Zrt* EU:C:2013:88 (where Art 47 EUCFR is mentioned in passing); Case C-377/14 *Radlinger* EU:C:2016:283; Case C-147/16 *Karel de Grote* EU:C:2018:320.

[66] Case C-176/17 *Profi Credit Polska* EU:C:2018:711.

[67] Case C-495/19 *Kancelaria Medius* EU:C:2020:431, para 34.

[68] Case C-126/97 *Eco Swiss NV* EU:C:1999:269.

arbitration award only on limited grounds, amongst which was the fact that the award was contrary to public policy. The referring court, however, pointed out that under national law the non-application of EU competition law was not regarded as a public policy argument. It considered that the competition law regime was an overriding interest of fundamental importance for the completion of the tasks of the EU and therefore the relevant rule at stake (currently Article 101 TFEU) had to be considered as a matter of public policy.[69] While this latter point was not completely made clear by the Court in *Eco Swiss*, it was later stated in unequivocal terms in *Manfredi*, where the Court held that 'Articles 81 EC and 82 EC are a matter of public policy which must be automatically applied by national courts'.[70] In these cases too, no mention was made of the principle of effectiveness or the procedural rule of reason, and the argument of the Court is fully based on the role and importance of EU competition rules.

C. *Ex Officio* Application of EU Law to the Detriment of the Applicant

The picture is completed by the *Heemskerk* case where a Dutch court asked whether EU law could be raised *ex officio* by national courts to the detriment of an individual, despite the prohibition – applicable in Dutch law – of *reformatio in peius*. Referring to the 'the rights of the defence, legal certainty and protection of legitimate expectations' and weighing them against the effective application of EU law, the Court answered in the negative.[71]

While this seemed a settled question for good, the Court was prompted to take a fresh look at the question, and to do so in connection with Article 47 of the Charter, in *Online Games*.[72] In this case, Austrian tax authorities had seized equipment and imposed fines on two companies registered in other EU Member States, whose gaming machines in Austria ran contrary to the national monopoly on games of chance. According to Austrian law, it was possible for courts hearing the case to examine of their own motion the facts which may constitute administrative offences, and this, according to the referring court, could affect the impartiality of the court, the role of which could be confused with that of the body responsible for the prosecution.

While in *Heemskerk* the *ex officio* powers of national courts – to the detriment of individuals (and the rights conferred upon them by EU law) – had been connected to the prohibition of *reformatio in peius*, in *Online Games* the perceived risk was a possible

[69] For a further discussion of the outcome and consequences of this case, especially with regard to the public policy argument, see AP Komninos, 'Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV*, Judgment of 1 June 1999, Full Court' (2000) 37 *Common Market Law Review* 459; S Prechal and N Shelkoplyas, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond' (2004) 12 *European Review of Private Law* 589.

[70] Joined Cases C-295/04, C-296/04, C-297/04 and C-298/04 *Manfredi* EU:C:2006:461, para 36.

[71] Case C-455/06 *Heemskerk* EU:C:2008:650.

[72] Case C-685/15 *Online Games* EU:C:2017:452.

violation of Article 47 of the Charter, read in the light of Article 6 of the ECHR, from the perspective of the independence and impartiality of the adjudicating body. Rather unsurprisingly, the Court concluded that, on the basis of the elements submitted in respect of the relevant Austrian legislation,

> there is no reason to consider that such a procedural system is such as to give rise to doubts as to the impartiality of the national court, in so far as that court is required to investigate the case before it, not in order to support the prosecution, but to establish the truth. Moreover, that system is based, in essence, on the idea that the court is not only the arbiter of a dispute between the parties but represents the general interest of society. It is in the pursuit of that interest that the national court will also have to examine the justification for legislation which restricts a fundamental freedom of the Union within the meaning of the Court's case-law.[73]

Hence, no violation of Article 47 of the Charter could be detected.

D. Interim Conclusion

From an analysis of the judgments mentioned above, it seems that, on the one hand, as made clear by the ECJ in *Verholen*, national courts are allowed to raise *ex officio* points of EU law not put forward by the parties. On the other, with regard to the duty of national courts to examine the conformity of national law with EU law of their own motion, three different situations may arise.

Firstly, a national court may be *under an obligation* to raise points of national law of its own motion: where this is the case, then, on the basis of the principle of equivalence, it is also under an obligation to apply EU law of its own motion. Secondly, a national court *may have discretion* as to whether to raise points of national law of its own motion: in such circumstances, the national court must apply EU law of its own motion pursuant to the principle of sincere cooperation. Finally, it may be that a national court *is not able* to raise points of national law of its own motion: in such cases, in order to test national procedural rules, the principle of effectiveness is the guiding factor, and the intrinsic nature, the aim and the purpose of the rule, and its application to the set of circumstances of the concrete case all have to be analysed.

Furthermore, the determination of whether a national rule preventing a national court from raising points of EU law of its own motion should or should not be considered in violation of EU law, has to take into account the aim and the importance of the EU law provision in question. In competition and consumer protection policy, the CJEU has gone beyond the test of effectiveness, by setting an unconditional duty for national courts to raise EU law *ex officio*.

The table below shows the principles which have been at the basis of the rulings of the CJEU examined above.

[73] ibid, para 64.

Table 2 Case law on the duty to raise ex officio points of EU law and corresponding principles grounding the reasoning of the CJEU

Ruling	Principles mentioned
Peterbroeck (1995)	Sincere cooperation; principles of equivalence and effectiveness
van Schijndel (1995)	Sincere cooperation; principles of equivalence and effectiveness
Kraaijeveld (1996)	Sincere cooperation
Eco Swiss (1999)	Role of provision of EU law at stake
Océano (2000)	Full effectiveness of EU law
Cofidis (2002)	Full effectiveness of EU law
Mostaza Claro (2006)	Full effectiveness of EU law
Manfredi (2006)	Role of provision of EU law at stake
Rampion (2007)	Full effectiveness of EU law
van der Weerd (2007)	Principles of equivalence and effectiveness (solved on basis of equivalence)
Heemskerk (2008)	Full effectiveness of EU law
Pannon (2009)	Full effectiveness of EU law
Pénzügyi Lízing (2010)	Full effectiveness of EU law
Pohotovosť (2010)	Full effectiveness of EU law
Banco Español de Crédito (2012)	Principle of effectiveness
Jőrös (2013)	Principle of effectiveness
Banif Plus Bank Zrt (2013)	Principle of effectiveness (Article 47 Charter mentioned)
Faber (2015)	Principle of effectiveness
Benallal (2016)	Principles of equivalence and effectiveness (solved on basis of equivalence)
Radlinger (2016)	Principle of effectiveness
Online Games (2017)	Article 47 Charter
Sporting Odds (2018)	Article 47 Charter
Karel de Grote (2018)	Principle of effectiveness
Profit Credit Polska (2018)	Principle of equivalence; Article 47 Charter
Kancelaria Medius (2020)	Principles of equivalence and effectiveness; Article 47 Charter

As it can be observed, as for rules on *res judicata*, also in this case the foundational case law was handed down before the Charter, which explains the lack of engagement with it. *Sporting Odd* was instead entirely framed around Article 47, and the Court did not venture back to its earlier case law in its reply to the referring Court. The question which arises in this respect is whether engagement with Article 47 has raised the level of protection for individuals in this context. The question should be answered

here in the negative. On the contrary, the way in which the referring court framed the questions made it easy for the CJEU to answer that Article 47 does not require an unconditional duty to raise points of EU law *ex officio*. Article 47 did not therefore serve to further nuance or move away from the procedural rule of reason set up through the *Rewe* effectiveness test to raise the level of protection for applicants, but merely set a very minimum threshold which admittedly does not add anything in terms of guidance for national courts as to how to assess their own national rules for compliance with EU law.

The same conclusion can be reached with respect to scenario in *Online Games* where the Court could have had the opportunity to engage with the potential of Article 47 to be used as a 'shield' when EU law is invoked against an applicant. However, as the question was framed around the issue of the impartiality of national courts when using *ex officio* powers, the Court did not get the chance to establish clear criteria as to how national courts are to balance legality and effective application of EU law with procedural fairness through the use of Article 47.

Finally, with respect to the consumer protection line of case law, it should be highlighted that Article 6 of the Unfair Terms Directive and similar provisions of other consumer protection pieces of legislation indirectly largely cover the issue of *ex officio* application of EU law to the benefit of the consumer. From this perspective it made sense that, at least in the early case law, the Court simply referred to the need to ensure the full effectiveness of EU law: as the field was harmonised, and the rules provided extensive protection to individuals deriving rights from EU law, nothing else (including the principle of effectiveness) beyond the relevant EU legislation was necessary to ensure that adequate protection be provided before national courts.

More recently, the *Rewe* effectiveness formula seems to have permeated the case law of the CJEU more intensely. Nevertheless, this argument has invariably been 'inserted' within the broader picture of the harmonisation of secondary rules which form the basis of the system of protection ensured by EU law to consumers. Furthermore, mentions of Article 47 have not been overly helpful in understanding the added value of these references. For both instances (*Rewe* effectiveness and Article 47), it is doubtful whether they have actually changed anything in the end result or the reasoning of the court. At the same time, it should be stressed that, precisely because of the extent of harmonisation reached in this field, it is equally doubtful whether it is possible to extend these conclusions to any field outside that of consumer protection.[74]

IV. Conclusions

This chapter has analysed the case law of the CJEU on national procedural rules concerning the duty to re-open final judicial decisions, as well as the duty to raise *ex officio* points of EU law which the parties have not relied on. Both sets of rules are

[74] See Östlund (n 3) 213; See also Case C-49/14 *Finanmadrid* EU:C:2016:98, Opinion of AG Szpunar, paras 90–97, where he argued that EU secondary law rules provide in the field of consumer protection a higher level of protection than that afforded by Art 47.

meant to strike a balance between competing imperatives in national legal systems. What the examination of the case law of the CJEU has shown is that the Court does not – in general –favour one value over the other, but aims to find a fair compromise, even at the expense of the primacy and effective application of EU law. What can also be observed is that this balance has been struck largely through the principles of equivalence and effectiveness, with Article 47 of the Charter remaining mostly in the background.

The boundaries between the principle of effectiveness, on the one hand, and the principle of effective judicial protection and the right to an effective remedy under Article 47, on the other, have more generally been blurred in the case law of the CJEU and been the subject to much academic debate.[75] Nevertheless, the doctrine is quite clear in that the tests under the two principles are different, and Article 47 might require more than what is expected of national procedural rules under the principle of effectiveness.[76] There is also increasing clarity in that more and more procedural areas, which used to be tested under the principles of equivalence and effectiveness, are nowadays tested primarily under Article 47.[77]

This increased prominence of Article 47 that is shown in other chapters of this book does not emerge with respect to the case law on the rules examined in this chapter.

As discussed above, with respect to rules concerning the duty to raise points of EU law *ex officio*, being prompted by national courts, case law seems to have moved to a somewhat increased attention towards Article 47. Engagement with Article 47 did not, however, raise protection for applicants nor qualify or modify the *van Schijndel* formula in any way. At the same time, it can be argued that the case law did not need particular adjustments, since 'overly' restrictive *ex officio* rules would appear on the radar of the procedural rule of reason (as they did in *Peterbroeck*) and consequently fall foul of EU law without the need to engage Article 47. *Ex officio* rules in the field of consumer protection also do not seem to profit from a possible substantive engagement with Article 47, as secondary EU law already provides such a high level of protection that Article 47 would not deliver any additional protection to applicants.

A different conclusion is reached with respect to the rules on the possibility of raising *ex officio* points of EU law against the applicant. In this respect, it can be argued that, where national procedural rules would allow for such scenarios, the potential for Article 47 is still underexplored, since current case law does not provide any guidance at all on the role of Article 47 to resist the application of EU law before national courts.

[75] S Prechal and R Widdershoven, 'Redefining the Relationship between "*Rewe*-effectiveness" and Effective Judicial Protection' (2011) 4 *Review of European Administrative Law* 31; J Krommendijk, 'Is there light on the horizon? The distinction between "*Rewe* effectiveness" and the principle of effective judicial protection in Article 47 of the Charter after Orizzonte' (2016) 53 *Common Market Law Review* 1395; M Eliantonio and E Muir, 'The principle of effectiveness: under strain?' (2019) 12 *Review of European Administrative Law* 255.

[76] See R Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12 *Review of European Administrative Law* 5, who argues that, unlike the principle of effectiveness, 'the test on effective judicial protection may have positive effects, forcing the Member States and their courts to provide for access and remedies not existing in national law'.

[77] Widdershoven (n 76) 23, who refers to rules on time limits.

Finally, with respect to rules on *res judicata*, national courts have not been helpful in prompting the Court to engage with Article 47, which has remained very much in the background of even the more recent case law. While most national rules in this area might just as well be tested under the principle of effectiveness or Article 47 with the same results, there may be some potential for an added value in the use of Article 47 as a threshold to assess when re-opening of judicial decisions is needed under EU law, especially if the Court sticks to a restrictive interpretation of the principle of effectiveness.