The Influence of the ECJ's Case Law On Time Limits in The Italian, German And English Administrative Legal Systems: A Comparative Analysis

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1. Introduction

All legal systems provide for rules that set out time frames for the possibility of challenging the administrative action before a court. Albeit in different ways, it is a perceived necessity in all legal systems to lay down limitation periods, at the expiry of which an individual is barred from bringing a claim against the administrative action. These rules have a 'stabilizing effect'[1] for the legal system and also guarantee legal certainty. They ensure that, after a certain period of time, the legal positions of the individuals and the public authorities can, in principle, be deemed final.[2]

However, this system presupposes that the complainant is given sufficient time for orientation: thus, all legal systems aim to provide time limits which are not perceived as being too short. In addition, time limits should not be applied to the detriment of an applicant who was not in a position to bring a complaint in time. Consequently, all legal systems provide for some mechanisms that allow administrative courts to admit a late claim whenever the applicant succeeds in demonstrating that he could not comply with the prescribed time limit because of factors outside his control.

The European Court of Justice (ECJ) reviewed national measures which set out time limits with a view to checking whether they satisfied the principle of effective judicial protection. In this regard, the case law of the ECJ has evolved from the initial '*Rewe/Comet* deference' towards national limitation periods,[3] to the '*Emmott*

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[1] E. Schmidt-Aßmann & L. Harings, 'Access to Justice and Fundamental Rights', ERPL (1997): 543.

[2] Please note that the impossibility of challenging an administrative decision before a court might not preclude the possibility for the administrative authorities to withdraw that decision. These rules fall outside the scope of this article.

[3] Case 45/76, *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043; Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989. In both cases, the ECJ held that the imposition by a Member State of a reasonable time limit for initiating legal proceedings to challenge a decision cannot be considered to make reliance on Community law virtually impossible or excessively difficult.

Eliantonio, Mariolina. 'The Influence of the ECJ's Case Law on Time Limits in the Italian, German and English Administrative Legal Systems: A Comparative Analysis'. *European Public Law* 15, no. 4 (2009): 615–652.

aggressiveness',[4] to a retreat from its own position,[5] and, finally, to a more balanced approach, in which the establishment of reasonable limitation periods for bringing proceedings is considered as an application of the fundamental principle of legal certainty and is not objectionable *per se*. It does become objectionable when a national time limit is less favourable than one governing similar actions of a domestic nature, or makes it impossible or excessively difficult in practice to exercise Community rights which national courts have a duty to protect.

In particular, the ECJ's approach seems to be that a national limitation period is in breach of the principle of effective judicial protection whenever it deprives the parties concerned of any remedies before the national courts, or when it excessively restricts the possibility of exercising a right conferred by Community law. There is no violation of the principle of effectiveness where the national rule merely limits the time period during which an action may be filed and where this limitation cannot be considered as being unreasonably restrictive.[6] A 'reasonable' limitation period, however, might have to be disapplied when the defendant's conduct has deprived the applicant of the possibility of bringing a timely claim.[7] It is therefore for the national courts, as part of the Community system of judicial protection, to weigh national limitation periods (and their 'reasonableness' and importance for the principle of legal certainty) against the need to respect the principles of equivalence and effectiveness.[8]

This jurisprudential position may have an impact on national procedural rules which provide for unobjectionable time limits, after which an individual loses his right to challenge the administrative action. Following the ECJ's case law, where the circumstances of the case so require, that is, where the individual would be deprived of any possibility of protecting the rights that he derives from EC law, or where the exercise of such rights would be unreasonably restricted, or, finally, where the time limit discriminates between actions based upon EC law and similar domestic actions, such a time limit would have to be set aside by the administrative courts.

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[4] Case C-208/90, *Theresa Emmott v. Minister for Social Welfare and Attorney General* [1991] ECR I-4269. In this case the ECJ held that the national authorities of a Member State were not entitled to rely upon national procedural rules relating to time limits for bringing proceedings in cases based upon a directive so long as the Member State in question had not properly transposed that directive into its domestic legal system.

[5] Case C-410/92, *Elsie Rita Johnson v. Chief Adjudication Officer (Johnson No. 2)* [1994] ECR I-5483; case C-338/91, *H. Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-5475. In particular, the ECJ held that the situation in these cases was different from the situation in *Emmott*, because, while in *Emmott* the time limit had prevented the applicant from initiating proceedings, the time limits in these cases only limited the period prior to the bringing of a claim in respect of which the arrears of benefit may be claimed. See also Case C-90/94, *Haahr Petroleum Ltd v. Åbenrå Havn and others* [1997] ECR I-4085; Case C-242/95, *GT-Link A/S v. De Danske Statsbaner (DSB)* [1997] ECR I-4449; joined cases C-114-115/95, *Texaco A/S v. Middelfart Havn* and *Olieselskabet Danmark amba v. Trafikministerie, and others* [1997] ECR I-4263. In these cases, the ECJ tried to limit the scope of the *Emmott* ruling by distinguishing the direct applicability of the Treaty and the direct effect of directives, thereby suggesting that the *Emmott* principle was grounded in the specific characteristics of directives. This implied that *Emmott* could not be extended to other types of Community provisions that can confer rights upon individuals.

[6] A. Ward, *Judicial Review and the Rights of Private Parties in EC Law,* 2nd edn (Oxford, 2007), 113.

[7] Case C-326/96, *B.S. Levez v. T.H. Jennings (Harlow Pools) Ltd* [1998] ECR I-7835; Case C-327/00, *Santex S.p.A. v. Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke S.p.A., Artsana S.p.A. and Fater S.p.A.* [2003] ECR I-1877.

[8] Rightly, Ward points out that this solution begs for several questions, such as 'what yardsticks will be used to determine if a time-limit is "reasonable"? In what circumstances will "conduct" of the party against whom enforcement of EC law is sought be considered to have amounted to "discouragement"?'. See Ward (2007), 114.

The aim of this article is to assess the influence of this case law in the Italian, German and English systems of administrative justice. In particular, the national rules on time limits are reviewed. Thereafter, the abstract compliance of the relevant national rules with the standards of protection set out by the ECJ is evaluated. Furthermore, the application of these standards by the national administrative courts is analysed. Where relevant, reference is made to the requirement of fair trial as set out in Article 6 of the European Convention on Human Rights (ECHR) and to the European Court of Human Rights (ECtHR)'s case law.

2. Italian Law

2.1. The Italian rules on time limits for bringing a claim before an administrative court

In the Italian legal system, the time limit for submitting an application for review to the Regional Administrative Courts is sixty days from the date on which the administrative decision was notified to the addressee(s), or from the date on which the decision was published, or from the date on which it is apparent that the person concerned became fully aware of it (Article 21(1) of Law of 6 December 1971, No. 1034,[9] 'TAR Law').[10]

An application for review submitted after the sixty-day time limit is considered to be *irricevibile* and the question of *irricevibilitá* may be raised ex officio by the court before examining the merits of the claim.

If the decision is not challenged within this time frame, a claim can no longer be brought and the decision acquires the peculiar characteristic of *inoppugnabilitá*.[11] The *inoppugnabilitá* is the state of an administrative decision in which the decision can no longer be challenged before a court. In other words, the state of *inoppugnabilitá* implies the preclusion from any claim initiated by the addressee(s) of an administrative decision.[12] The regime of *inoppugnabilitá* of administrative decisions is generally seen as a guarantee

[9] Law of 6 Dec. 1971, No. 1034, GU of 13 Dec. 1971, No. 314.

[10] In general on time limits in the Italian system of administrative justice, see F.G. Scoca, *Giustizia amministrativa,* 2nd edn (Torino, 2006), 255 ff. A. Travi, *Lezioni di giustizia amministrativa,* 7th edn (Torino, 2006), 245–246; A. Sandulli, *Diritto Processuale Amministrativo* (Milano, 2007), 181–182; F. Caringella, *Giustizia amministrativa,* 3rd edn (Napoli, 2003), 586–587.

[11] On the concept of *inoppugnabilitá*, see M. Bracci, 'L'atto amministrativo inoppugnabile ed i limiti all'esame del giudice civile', in *Studi in onore di Federico Cammeo,* vol. I (Padova, 1933), 151; E. Cannada Bartoli, 'L'inoppugnabilitá dei provvedimenti amministrativi', *Riv. trim. dir. pubbl.* (1962): 22; M.S. Giannini, 'Atto amministrativo', in *Enc. Dir.*, vol. IV (Milano, 1959), 157; P. Stella Richter, *L'inoppugnabilitá* (Milano, 1970); G. Arezzo di Trafiletti, 'Natura, condizione e casi di inoppugnabilitá e disapplicazione degli atti amministrativi', *Nuova rass.* (1985): 445; more recently, D. Trebastoni, 'La disapplicazione nel processo amministrativo', *Foro Amm.* (2000): 1119; M. Antonioli, 'Inoppugnabilitá e disapplicabilitá degli atti amministrativi', *Riv. it. dir. pubbl. com.* (1999): 1376.

[12] The *inoppugnabilitá* of an administrative decision, however, does not limit the powers of the administration vis-à-vis the decision: the administrative decision, albeit *inoppugnabile*, may still be annulled or revoked by the competent authorities. Bracci, the first author who dealt with the concept of *inoppugnabilitá*, pointed out the existence of three different degrees on whose basis it can be assessed how 'definitive' an administrative decision is. The first, lowest degree may pertain to an act that can no longer be the subject matter of administrative review proceedings, but can still be challenged before a court; the second degree may pertain to an act that can be the subject matter of neither administrative review proceedings nor a judicial claim but can still be revoked or annulled by the public administration; the third degree is of an act that no longer be modified, revoked or annulled, by either the administration or the courts. See Bracci (1933), 149.

of the effectiveness of the action of the public authorities, because it allows the administration to operate speedily without being exposed for too long to the risk of individuals challenging its decisions.[13] Furthermore, the *inoppugnabilitá* is perceived as being intrinsic to the need of legal certainty, because it provides for a clear time frame within which a decision may be challenged: at the expiry of this period, individuals know that they can no longer attack the decision.[14]

It has been argued that the concept of *inoppugnabilitá* is a consequence of an uneven relationship between citizens and the public administration,[15] and it contributes to strengthen the position of the public administration in such a way that its decisions may no longer be attacked.[16] However, it has also been considered that there is a close relationship between the regime of *inoppugnabilitá* and the structure of the Italian system of administrative justice, as a system based essentially upon the review of legality of administrative decisions and on the power of annulment of the courts.[17]

The regime of *inoppugnabilitá* of administrative decisions in the Italian legal system is generally not subject to exceptions. However, the system does provide for a mechanism that 'mitigates' the strict consequences of the short time limit provided for in Article 21(1) TAR Law – namely, the power of administrative courts to consider an application that was brought after the expiry of the time limit because of an excusable mistake as timely (*rimessione in termini per errore scusabile*).[18]

This legal institution, created in the last part of the 19th century for cases in which a claim was brought before the wrong judicial authority, was later codified in Article 34 TAR Law, pursuant to which, in the case of an excusable mistake, the court may consider a late application as timely. This provision may be applied exclusively in cases in which the applicant failed to comply with the time limit because of an excusable mistake. A mistake is considered excusable when its occurrence did not depend on the fault of the applicant.

The case law has established some situations in which the mistake may be considered excusable, such as: (1) the absence of jurisprudential precedents or the presence of uncertain jurisprudential trends on the matter; (2) the ambiguous conduct or indications on the part of the public authorities; (3) the ambiguity in the text of the contested administrative decision; (4) the obscurities or ambiguities concerning the legislative text upon which the decision was adopted; and (5) the uncertainty as to the time limit within

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[13] Giannini (1959), 157.

[14] Antonioli (1999), 1384.

[15] C. Leone, 'Diritto comunitario e atti amministrativi nazionali', *Riv. it. dir. pubbl. com.* (2000): 1183; Antonioli (1999), 1382.

[16] Stella Richter (1970), 202.

[17] Leone (2000), 1184; Antonioli (1999), 1382.

[18] Because of its jurisprudential origin and its uncertain boundaries, this institution has never been the subject matter of a systematic analysis. However, for a review of its origin, development and current application, see E. Riva Crugnola, *'Errore III) Errore scusabile – dir. proc. amm.'*, in *Enc. Giur.*, vol. XIII (Roma, 1994) and further references contained therein.

which the administrative decision can be challenged or the uncertainty regarding the authority before which the measure can be challenged.[19]

The possibility of having a late claim admitted in the case of an excusable mistake is a benefit that may be granted by the court when the applicant, notwithstanding the lateness of the claim, has been procedurally active and has brought an action which, as far as the other prerequisites are concerned, is admissible.

2.2. Assessment of the compliance of the administrative procedural system with the ECJ's judgments

As set forth above, in the ECJ's view, it is for national courts, as part of the Community system of judicial protection, to weigh national limitation periods (and their importance for the principle of legal certainty) against the need to respect the principles of equivalence and effectiveness. This jurisprudential position could have an impact on the Italian legal system, which, as shown above, provides for an unobjectionable time limit of sixty days after which an individual loses his right to challenge an administrative decision.

While some scholars have highlighted that the regime of *inoppugnabilità* is intrinsic in the system of administrative justice and can be considered as a way of guaranteeing legal certainty,[20] the ECJ's case law on time limits initiated a wide debate on the 'destiny' of the sixty-day time limit and the regime of *inoppugnabilitá* of decisions not challenged within this time frame.[21]

On the one hand, some scholars,[22] the Constitutional Court[23] and the Council of State[24] have considered the time limit of sixty days to be adequate to protect the interests of individuals. On the other, following the ECJ's case law, where the circumstances of the case so require, that is, where the individual would be deprived of any possibility of

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[19] Caringella (2003), 587; Scoca (2006), 257; Travi (2006), 246; Sandulli (2007), 181–182. See, e.g., Cons. Stato, Sez. V, Judgment of 23 May 2006, No. 3043, *Foro amm. CDS*, 2006, 5 1443; Cons. Stato, Sez. IV, Judgment of 29 Oct. 2002, No. 5947, *Foro amm. CDS*, 2002, 2397; Cons. Stato, Sez. V, Judgment of 8 Oct. 2002, No. 5315, *Foro amm. CDS*, 2002, 2432; Cons. Stato, Sez. IV, Judgment of 13 Sep. 2001, No. 4791, *Foro Amm.*, 2001, 9; Cons. Stato, Sez. V, Judgment of 28 Aug. 2001, No. 4526, *Foro Amm.*, 2001, 2042; Cons. Stato, Sez. V, Judgment of 3 Mar. 2001, No. 1231, *Foro Amm.*, 2001, 478; Cons. Stato, Sez. IV, Judgment of 30 Jan. 2001, No. 313, *Foro Amm.*, 2001, 1; Cons. Stato, Sez. VI, Judgment of 24 Oct. 2000, No. 5714, *Foro Amm.*, 2000, 10; Cons. Stato, Sez. IV, Judgment of 20 Jun. 1994, No. 522, *Foro Amm.*, 1994, 1403; Cons. Stato, Sez. IV, Judgment of 20 Apr. 1993, No. 436, *Foro Amm.*, 1993, 689.

[20] G. Cocco, 'Incompatibilitá comunitaria degli atti amministrativi. Coordinate teoriche e applicazioni pratiche', *Riv. it. dir. pubbl. com.* (2001): 452.

[21] G. Greco, 'L'effettivitá della giustizia amministrativa italiana nel quadro del diritto europeo', *Riv. it. dir. pubbl. com.* (1996): 803; E. M. Barbieri, 'Norme comunitarie self-executing e decorrenza dei termini di prescrizione e decadenza', *Riv. it. dir. pubbl. com.* (1995): 74; F. Astone, *Integrazione giuridica europea e giustizia amministrativa* (Napoli, 1999), 279; A. Gatto, 'I poteri del giudice amministrativo rispetto a provvedimenti individuali e concreti contrastanti con il diritto comunitario', *Riv. it. dir. pubbl. com.* (2002): 1438; G. Cocco, 'L'insostenibile leggerezza del diritto italiano', *Riv. it. dir. pubbl. com.* (1996): 636. The author claims that setting aside the Italian time limits when EC rights are at issue would create a discriminatory regime between situations covered by EC law and purely domestic situations.

[22] L. Daniele, 'L'effettivitá della giustizia amministrativa nell'applicazione del diritto comunitario europeo', *Riv. it. dir. pubbl. com.* (1996): 1389. While arguing in favour of the adequacy of the Italian limitation periods, the author refers to the ruling in *Rewe*, in which the thirty-day limitation period of German administrative law was considered by ECJ to be in compliance with the principle of effectiveness. See also M. Gnes, 'Giudice amministrativo e diritto comunitario', *Riv. trim. dir. pubbl.* (1999): 372.

[23] Corte Cost., Judgment of 4 Jul. 1979, No. 56, *Giur. cost.*, 1979, I, 533.

[24] E.g., Cons. Stato, Sez. VI, Judgment of 15 Dec. 1981, No. 762, *Foro Amm.*, 1981, issue 12.

protecting the rights that he derives from EC law, or where the exercise of such rights would be unreasonably restricted, or, finally, where the time limit discriminates between actions based upon EC law and similar domestic actions, even a reasonable time limit would have to be set aside by the administrative courts.

However, it can be argued that the Italian legal system already provides a solution for situations in which the exercise of the rights that individuals derive from EC law has been rendered excessively difficult or impossible in practice. Indeed, as described above, Italian administrative courts are vested with the power to consider an application that was brought after the expiry of the time limit because of an excusable mistake as timely: in this sense, the Italian legal system seems to comply with the European standards, because national courts may make use of this mechanism and would not need to use more aggressive methods, such as the disapplication of the rule that provides for the sixty-day unobjectionable time limit.

It has been argued that using this technique would ensure a high degree of flexibility of the system and, at the same time, provide an adequate protection of EC rights: the national court would, indeed, balance the values at issue in the situation under examination and would be able to admit late claims based upon both EC law and national law, whenever it considers that the applicant's failure to comply with the time limit was in practice impaired by external circumstances.[25] In this way, the rigidity of the time limit may be reconciled with the necessity to guarantee compliance with the ECJ's case law and an effective judicial protection of EC rights.[26]

However, from the case law of the Italian administrative courts, it appears that this balancing exercise has not always been carried out when EC rights have been at issue. In fact, it could even be argued that the case law of the Italian administrative courts on time limits and EC rights has somehow followed the ECJ's evolution from invasiveness, to deference and, finally, to a more balanced approach. The following section deals with cases, concerning EC rights, in which the Italian administrative courts had to tackle the issue of the disapplication of the national time limits in order to allow a claim against an administrative decision that had already become *inoppugnabile*.

2.3. Application of the standards set out in the ECJ's judgments by the administrative courts in cases dealing with 'European matters'

In a case concerning a claim against a planning permission brought by a member of the Municipal Council of Milan and an association of citizens, the Regional Administrative Court of Lombardia decided to admit an application filed after the expiry of the sixty-day time limit.[27]

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[25] Astone (1999), 280.
[26] Barbieri (1995), 85.
[27] T.A.R. Lombardia Milano, Sez. I, Judgment of 2 Apr. 1993, No. 260, *T.A.R.*, 1993, I, 1747.

The applicants were challenging a planning permission issued by the Municipality pursuant to the town planning project and its subsequent amendments. In their claim, the applicants made several references to the alleged unlawfulness of not only the planning permission, but also the town planning act. From a national law perspective, the court decided not to admit the part of the claim concerning the town-planning act, because it concerned a decision that had become *inoppugnabile*.

However, the court went on to argue that the controversy in question was also partially governed by European law, and hence it was of the opinion that the Community profile also had to be examined. In particular, the applicants claimed that their constitutional right to health should have been taken into account when the Municipality enacted the town planning act. Moreover, they added that the town planning act was in breach of Directive No. 85/337/EEC,[28] because it had been enacted without carrying out an assessment of the environmental effects of the building project.

Faced with these circumstances, the court held that, because the applicants' right to health had its source in EC law, too, this right had to be protected by setting aside the procedural rules concerning time limits. In particular, the court considered that, when a constitutional right is also protected in the European legal system, it acquires the connotation of a 'Community-constitutional' right which must be adequately protected by national courts. Consequently, the court concluded that it had a duty to protect the applicants' 'Community-constitutional' right, regardless of the fact that the decision allegedly violating this right could no longer be challenged before a court because of the expiry of the time limit.

The Italian court seemed to have overcome the hurdle of the *inoppugnabilitá* of the contested administrative decision (i.e. the town planning act) by making reference to the principle of loyal cooperation set forth in Article 10 EC, and to the supremacy of Community law. However, the court did not refer to the equivalence and effectiveness criteria in order to assess the compliance of the national procedural rule setting out the time limit with EC law. On the contrary, it simply considered the limitation period in question to be very short and held that failure to comply with short time limits cannot render a violation of a right stemming from EC law lawful, and hence the time limit had to be set aside.[29]

The Regional Administrative Court of Veneto reached a similar conclusion in an order for reference to the ECJ.[30] In this case the court held that, even though the applicant's claim was out of time, it nevertheless had to be admitted, because the contested decision could still be subject to disapplication by the public authorities.

In this case, too, the court adopted quite an aggressive attitude towards the limitation period in question and failed to assess whether the time limit rendered the exercise of the applicant's rights excessively difficult or impossible in practice. Instead, the court

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[28] Council Directive 85/337/EEC of 27 Jun. 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175/40.

[29] For a criticism to this reasoning, see Cocco (1996), 637.

[30] T.A.R. Veneto, Sez. I, Judgment of 10 Jun. 1991, No. 432, *T.A.R.*, 1991, I, 2944.

simply stated that, although the contested administrative decision was in principle able to prejudice the applicant's legal sphere and should, therefore, have been challenged within the sixty-day time limit, the claim did not have to be regarded as out of time. The court's reasoning was based upon the fact that, since the measure in question required implementing measures, the actual prejudice would only arise upon enactment of an implementing administrative decision.

A few years later, the Regional Administrative Court of Toscana adopted a more deferent approach towards the sixty-day time limit.[31] In this case the applicants had challenged a decision of denial to issue a certificate that was necessary for the access to the award of public housing, on the grounds that this denial was against the principle of non-discrimination. The respondent argued that, because the contested decision was a mere consequence of an earlier act and that, for this reason, the administration had no discretion regarding the issuing of this certificate, the claim was late, because it should have been brought against the earlier act.

The court upheld the respondent's argument and was of the opinion that the supremacy of EC law over national law does not oblige national courts to set aside the domestic provisions setting out limitation periods. Consequently, it refused to admit the late claim. In this case, too, there is no reference to the principle of equivalence and effectiveness, but merely to the supremacy of EC law, which, in the Italian court's view, did not require it to by-pass the time limit provided by the law.

A few days before the ECJ delivered its ruling on the Italian limitation period at issue in *Santex*, the Council of State issued a judgment on the same subject matter.[32] This ruling is interesting because, for the first time, the Council of State carried out an analysis of the compliance of the Italian rules on time limits with EC law. The case concerned an appeal against a judgment of the Regional Administrative Court of Lombardia, which had admitted a late claim against a clause of a notice of invitation to tender.[33] Having assessed that the disputed clause had the effect of directly infringing the applicant's legal position, the Council of State declared that the claim was inadmissible, because it had been brought outside the time limit.[34]

However, the court went on to say that, because the applicant's rights had their source in EC law, it was necessary to analyse the question of the compliance with EC law of the limitation period of sixty days for bringing a claim against a clause of a notice of invitation to tender which had the effect of directly infringing the individuals' legal positions. In this context, the court carried out an analysis of the compliance of this time limit with the principle of equivalence and effectiveness, also in the light of the principle of legal certainty and of the stability of legal relationships. Taking these principles into account, the Council of State reached the conclusion that the time limit provided for by

[31] T.A.R. Toscana, Sez. II, Judgment of 20 Mar. 1996, No. 156, *T.A.R.*, 1996, I, 1973.
[32] Cons. Stato, Sez. V, Judgment of 10 Jan. 2003, No. 35, *Foro amm. CDS*, 2003, 99.
[33] T.A.R. Lombardia Milano, Sez. I, Judgment of 31 May 2000, No. 3831, *Ragiusan*, 2000, 197 145.
[34] On the concept of clauses that have the effect of directly infringing the applicant's right, see below in this section.

the Italian legal system was in compliance with EC law and with the principle of effective judicial protection as delineated in the ECJ's case law.

As far as the principle of equivalence is concerned, the court held that the Italian legal system makes no difference between claims based upon EC law and those based upon domestic law and that the sixty-day time limit applies equally to both situations. In relation to the effectiveness principle, the court considered the sixty-day time limit adequate to protect the legal positions of individuals. In particular, the court argued that individuals have enough time to bring an application for review before an administrative court and that failure to comply with this time frame is due to the negligence of individuals and not to a dysfunctional or inadequate system.

Finally, the court analysed the time limit in question with regard to the power of administrative courts to consider applications brought before them after the expiry of the time limit because of an excusable mistake as timely. The Council of State considered that, although in cases where this benefit is granted the time limit is bypassed, the benefit can only be granted where some requirements are met. In the court's view, in the case under examination, the disputed clause could not be considered as being unclear, and the administration had not acted in such a way as to generate a situation of uncertainty concerning the rights of the applicant. Hence, the benefit of admitting the late claim could not be granted.

The issue of time limits in the Italian system of administrative justice became also the subject matter of the *Santex* litigation, which directly involved the ECJ. In a preliminary question coming from the Regional Administrative Court of Lombardia,[35] the question arose as to the compliance with EC law of a limitation period for an application against an allegedly unlawful notice of invitation to tender issued in the procedure for the award of a public works contract.[36]

This case must be inserted in a jurisprudential landscape that appears to be very confused and controversial. The main issue concerns the time limits for applications for review of clauses of notices of invitation to tender issued in procedures for the awarding of public works contracts. With regard to these measure, the Italian administrative case law distinguished between clauses which have the effect of directly infringing the individual's legal position[37] and clauses whose capacity to infringe the individual's legal position manifests itself only with a subsequent act (e.g., with the decision of exclusion

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[35] T.A.R. Lombardia, Sez. III, Order of 8 Aug. 2000, No. 234, *Riv. it. dir. pubbl. com.* (2000): 1166, annotated by Leone (2000); *Urb. e app.,* 2000, 1243, annotated by A. Crisafulli, 'Disapplicazione di bando di gara: tra Corte di Giustizia e giurisdizione esclusiva'.

[36] Case C-327/00, *Santex S.p.A. v. Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke S.p.A., Artsana S.p.A. and Fater S.p.A.* [2003] ECR I-1877.

[37] Generally, the clauses that have been considered as having the effect of directly infringing the individuals' legal positions are those that set out subjective requirements for the tenderers and may, therefore, prevent an individual from participating in the tender procedure. However, for a long time there had been no agreement in the case law as to which clauses have the effect of directly infringing the individuals' legal positions. This matter has now been settled by the Plenary Meeting of the Council of State with Judgment of 29 Jan. 2003 No. 1. In this judgment, the Council of State held that individuals must challenge the clauses of a notice of invitation to tender within the ordinary sixty days time limit only where these clauses set out the subjective requirements for the participation in the tender. Cons. Stato, Ad. Plen., Judgment of 29 Jan. 2003, No. 1, *Foro amm. CDS*, 2003, 66.

from the participation in the tender, or with the decision to award the tender to another participant).[38] The first type of clauses must be challenged within the ordinary time limit of sixty days,[39] in contrast, the second type can be challenged together with the subsequent act within the time limit provided for in relation to the subsequent act itself.[40]

The Regional Administrative Court of Lombardia did not follow this trend and admitted late claims against clauses of notices of invitation to tender, which, according to the settled case law, should have been challenged within the sixty-day time limit and were, instead, being challenged together with the decision of exclusion from the participation in the tender.[41] The Council of State, however, refused to uphold these decisions and held that the clauses of a notice of invitation to tender which have the effect of directly infringing the individuals' legal positions must be subject to a timely claim by the individual whose right of access to the tender procedure has allegedly been harmed.[42]

The order for reference of the Regional Administrative Court of Lombardia must be viewed against this background: having received a refusal from the Council of State to uphold its approach in relation to late claims against clauses of notices of invitation to tender, the court changed perspective – it tackled the problem no longer from a national law, but from a European law perspective.

The central point made by the Regional Administrative Court in the order for reference to the ECJ is that, firstly, in the notice of invitation to tender there was a clause which did probably limit the applicant's right of access to the tendering procedure, and, secondly, *the conduct of the contracting authority* rendered the exercise of the rights conferred by Community law impossible or excessively difficult on the tenderer harmed by this clause.

For the Italian legal system, the ECJ's answer in *Santex* is important for at least two reasons: first, because the ECJ considered that the sixty-day time limit provided for by Article 21(1) TAR Law is abstractly reasonable to ensure an effective judicial protection of EC rights, also in the light of the principle of legal certainty; secondly, because the court made it clear that national courts have both the power and the duty to set aside

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[38] These clauses generally concern the criteria according to which the contract is awarded, the judging commission is composed, etc. In relation to these clauses, the prejudice to the applicant's legal sphere only occurs when a decision of exclusion is adopted.

[39] T.A.R. Sardegna Cagliari, Judgment of 12 Mar. 1999, No. 261, *Giur. merito*, 2000, 423; T.A.R. Veneto, Sez. I, Judgment of 22 Jan. 1990, No. 1, *T.A.R.*, 1990, I, 1073; Cons. Stato, Sez. V, Judgment of 24 Oct. 2001, No. 5602, *Foro Amm.*, 2001, 2821; Cons. Stato, Sez. VI, Judgment of 22 Jan. 2001, No. 192, *Giust. civ.*, 2001, I, 1689; Cons. Stato, Sez. V, Judgment of 23 May 2000, No. 2990, *Foro Amm.*, 2000, 1757.

[40] Cons. Stato, Sez. VI, Judgment of 10 Feb. 2000, No. 707, *Foro Amm.*, 2000, 512; Cons. Stato, Sez. V, Judgment of 29 Jan. 1999, No. 90, *Foro Amm.*, 1999, 97; Cons. Stato, Sez. V, Judgment of 3 Sep. 1998, No. 591, *Foro Amm.*, 1998, 2350; Cons. Stato, Sez. VI, Judgment of 6 Oct. 1999, No. 1326, *Foro Amm.*, 1999, 2102.

[41] T.A.R. Lombardia Milano, Sez. III, Judgment of 2 Apr. 1997, No. 354, *Urb. e app.*, 1997, 1138, annotated by A. Crisafulli, 'Disapplicabile il bando di gara in contrasto con norme sovraordinate'; T.A.R. Lombardia Milano, Sez. III, Judgment of 5 Jun. 1997, No. 900, *Urb. e app.*, 1997, 1140, annotated by Crisafulli (1997); T.A.R. Lombardia Milano, Sez. III, Judgment of 5 May 1998, No. 922, *Foro Amm.*, 1998, 2452, annotated by I. Zingales, 'Disapplicazione da parte del giudice amministrativo di prescrizioni regolamentari dei bandi di gara contrastanti con normativa primaria e con il principio di proporzionalità'.

[42] Cons. Stato, Sez. IV, Judgment of 27 Aug. 1998, No. 568, *Urb. e app.*, 1999, 530, annotated by A. Crisafulli, 'Condizioni per la disapplicazione dell'atto della P.A.'.

this time limit whenever they consider that the public authorities have, by their conduct, created such a state of uncertainty as to render impossible or excessively difficult for individuals to exercise the rights they derive from EC law.[43]

In a later judgment, the Council of State seemed to apply the principles set out by the ECJ in *Santex* when adjudicating on another late claim against a clause of a notice of invitation to tender.[44] In particular, the court recalled the ruling contained in *Santex*, and especially the ECJ's opinion on the sixty-day time limit in terms of reasonableness and adequacy to comply with the principle of effective judicial protection. The Council of State then pointed out the fact that, in *Santex*, the conduct of the public authorities had contributed to create uncertainty on the interpretation of a clause of the notice of invitation to tender, and this situation rendered excessively difficult the exercise of the EC rights in question.

The Council of State applied this principle to the situation under examination and concluded that the public authorities had not acted in such a way as to generate a situation of uncertainty. Hence, the *Santex* principle did not fit the case at issue, and the applicant's late claim was not admitted.

Other rulings by the Italian administrative courts have shown the same approach, and it seems now settled that, in order for an applicant to have his late claim admitted, he must show that the administration has, by its conduct, somehow contributed to the delay in the initiation of the proceedings.[45]

2.4. Conclusion

The analysis carried out above shows that the Italian legal system seems to be in compliance with the case law of the ECJ on time limits. In *Santex*, the ECJ itself considered that the time limit of sixty days for bringing an action for the judicial review of administrative action is not, in itself, likely to render virtually impossible or excessively difficult the exercise of any rights which individuals derive from Community law.[46]

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[43] Also in the Italian scholarly debate it has been argued that *Santex* is a further confirmation of the court's balanced approach in relation to time limits, and its willingness to entrust national courts with the assessment of whether a national limitation period is, in the concrete circumstances of the case, in violation of the principle of effectiveness. See M. Giovannelli, 'Commento a Santex' *Urb. e app.,* (2003): 656. Along the same line, M. P. Chiti, 'L'invaliditá degli atti amministrativi per violazione di disposizioni comunitarie e il relativo regime processuale', *Dir. amm.* (2003): 687.

[44] Cons. Stato, Sez. VI, Judgment of 22 Mar. 2004, No. 1459, *Foro amm. CDS*, 2004, 926.

[45] See, e.g., Cons. Stato, Sez. IV, Judgment of 30 Mar. 2005, No. 579, *Dir. proc. amm.* (2005): 1107, annotated by S. Valaguzza, 'Sulla impossibilità di disapplicare provvedimenti amministrativi per contrasto col diritto europeo: l'incompatibilità comunitaria tra violazione di legge ed eccesso di potere'. See also T.A.R. Lombardia Brescia, Judgment of 6 May 2003, No. 500, *Foro amm. TAR*, 2003, 1514; T.A.R. Calabria Reggio Calabria, Judgment of 20 Jul. 2007, No. 741, unpublished; T.A.R. Trentino-Alto Adige Trento, Judgment of 13 Dec. 2007, No. 193, unpublished; T.A.R. Umbria, Judgment of 12 May 2005, No. 273, unpublished, in which the court considered that the administration, by its conduct, has rendered the possibility of bringing a timely claim excessively difficult, and, in application of the *Santex* ruling, set aside Art. 21(1) TAR Law. Interestingly, even if the court could have achieved the same result by using its 'national' power to admit late claims because of an excusable mistake, it decided to use its '*Simmenthal* power' to disapply the national rule on time limits. The same outcome can be detected in T.A.R. Trentino-Alto Adige Bolzano, Judgment of 19 Apr. 2005, No. 140, unpublished.

[46] *Santex*, para. 55.

However, in many judgments, the ECJ also pointed out that a perfectly lawful limitation period may, under certain circumstances, be in breach of EC law when it renders the exercise of EC rights excessively difficult or impossible in practice. The Italian courts, entrusted by the ECJ with assessing the compliance of the national time limits with the principle of effectiveness, have not always carried out this balancing exercise. Nevertheless, the latest development of the case law does show an increasing willingness on the part of the courts to examine the adequacy of the sixty-day limitation period in the concrete circumstances of the cases upon which they have to adjudicate. Consequently, it can be argued that the ECJ's case law has influenced the Italian administrative courts, in that they have, more recently in particular, assessed the compliance of the procedural rules on time limits with the principle of effective judicial protection.

When looking at the relevant procedural rules, however, it can also be argued that the Italian legal system already provides a 'national' solution for situations in which the time limit rendered the exercise of rights stemming from EC law excessively difficult or impossible in practice, namely, the power of administrative courts to consider an application that was brought before them after the expiry of the time limit because of an excusable mistake as timely.[47] Indeed, whenever it appears from the circumstances of the case under examination that an individual's claim based upon EC law was late because of objective and justifiable difficulties, this claim may be admitted without the need to set Article 21(1) TAR Law aside.[48]

It has been argued that the ECJ's answer to the Regional Administrative Court of Lombardia's question in *Santex* seems, for the Italian reader, to be a *déjà-vu* with regard to the power of administrative courts to admit a late claim in case of an excusable mistake.[49] Indeed, the administrative courts have admitted late claims in very similar circumstances to those in question in *Santex*, and in particular in those cases in which the conduct of the public authorities had created a situation of uncertainty around the applicant's legal position.[50]

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[47] G. Biagioni, 'Norme processuali e principio di effettivitá: ulteriori sviluppi nella giurisprudenza comunitaria', *Dir. Un. Eur.* (2004): 201. The author sees the *Santex* case as missed opportunity for the referring court to just interpret the Italian rules in a 'Europe-friendly' way.

[48] This institution has always been interpreted very broadly by the administrative courts, because it is considered as an instrument for the admission of claims that are not brought on time for unpredictable (hence uncodifiable) circumstances. See Riva Crugnola (1994), 4.

[49] C. Leone, 'Disapplicabilitá dell'atto amministrativo in contrasto con la disciplina comunitaria? Finalmente una parola chiara da parte della Corte di giustizia', *Riv. it. dir. pubbl. com.* (2003): 911. Cintioli argues that, if the national court had presented, in the preliminary question, the possibility for the court to admit late claims in case of an excusable mistake, the ECJ would probably have considered it as a way (already provided for in the national legal system) to ensure an effective judicial protection of EC rights. See F. Cintioli, 'Giurisdizione amministrativa e disapplicazione dell'atto amministrativo', *Dir. amm.* (2003): 117. For a contrary opinion, see Chiti (2003), 696. The author argues that, with *Santex*, the ECJ introduced a derogation to the normal regime of time limits that is broader than the scope of the benefit of admitting a late claim in case of an excusable mistake.

[50] See, e.g., T.A.R. Toscana Firenze, Sez. II, Judgment of 31 May 2002, No. 1155, *Foro amm. TAR*, 2002, 1583; Cons. Stato, Sez. V, Judgment of 24 May 1996, No. 604, *Foro Amm.*, 1996, 1566; Cons. Stato, Sez. VI, Judgment of 18 Nov. 1977, No. 860, *Foro it.*, 1978, III, 519.

This solution seems to be adequate to the European standards on time limits, because it ensures the judicial protection of EC rights whenever their exercise has been hampered by the conduct of the public authorities, as was the case in *Santex*, or by other circumstances such as uncertainties in the case law or obscurities in the legislative texts. Moreover, with this solution, the Italian legal system is able to reconcile the need to ensure an effective judicial protection with the principle of legal certainty and the very structure of the system of administrative justice.

3. German Law

3.1. The German rules on time limits for bringing a claim before an administrative court

The German legal system[51] provides for a strict time limit for filing an *Anfechtungsklage* (action for annulment) or a *Verpflichtungsklage* (petition for the issuance of an administrative measure) before the administrative courts.

A *Verpflichtungsklage* must be filed within thirty days of the day on which the applicant became aware of the authorities' refusal to issue the requested decision. Similarly, an *Anfechtungsklage* must be filed within thirty days of the date on which the administrative authority decided on the objection filed by the plaintiff against the contested administrative decision (§ 74 *Verwaltungsgerichtsordnung* – VwGO).[52] In cases in which, pursuant to § 68 VwGO,[53] no objection procedure takes place, the time limit starts running from the date on which the decision was notified to the addressee(s).

Non-compliance with this deadline removes the possibility of a remedy. In other words, if the period expires, the action is rejected on grounds of inadmissibility (*Unzulässigkeit*). This time limit is to be seen as an *Ausschlussfrist*, that is, a deadline that does not affect the applicant's right but prevents him from judicially protecting his right.

If a decision is not challenged within this time frame, a claim can no longer be brought: the decision becomes final (*endgültig*), and it is considered as *unanfechtbar*. The *Unanfechtbarkeit* is the state of an administrative decision in which the decision can no longer be challenged before a court. In other words, this state implies the preclusion of

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[51] For a brief description, in English, of the system of time limits in German administrative courts, see Singh M.P. Singh, *German Administrative Law in Common Law Perspective,* 2nd edn (Berlin, 2001), 124; W. Leisner, 'Legal Protection against the State in the Federal Republic of Germany', in *Administrative Law: The Problem of Justice,* ed. A. Piras (Milano, 1997), 197.

[52] On § 74 VwGO in general, see F. Kopp & W. Schenke, *Verwaltungsgerichtsordnung – Kommentar,* 14th edn (München, 2005), 880; F. Hufen, *Verwaltungsprozessrecht,* 6th edn (München, 2005), 292; W. Schenke, *Verwaltungsprozessrecht,* 7th edn (Heidelberg, 2000), 219; E. Eyermann, *Verwaltungsgerichtsordnung: Kommentar,* 10th edn (München, 1998), 539; K. Redeker & H. J. von Oertzen, *Verwaltungsgerichtsordnung: Kommentar,* 13th edn (Stuttgart, 2000), 536 with further references contained therein.

[53] Pursuant to this provision, the objection procedure does not take place where this is provided for in the law or where (1) the decision was issued by a supreme Federal authority or a supreme *Land* authority, unless the objection procedure is considered necessary by the law and (2) a third party is aggrieved for the first time by an administrative decision on an objection.

any claim initiated by the addressee(s) of an administrative decision.[54] When the administrative act becomes *unanfechtbar*, it also acquires the quality of *formelle Bestandkraft*.

The regime of time limits in the German legal system is generally not subject to exceptions. There are, however, some mechanisms that 'mitigate' the strict consequences of the expiry of the short time limit provided for in § 74 VwGO.

Firstly, pursuant to § 58 VwGO, time does not begin to run unless the administrative measure or the decision on the objection clearly states the legal remedy, the court with which such remedy lies, the seat of the court and the time limit for the remedy.[55] If either no statement or a wrong or ambiguous statement is given, an individual can file the action within a period of one year from the day on which he became aware of the administrative decision in question or of the decision on the objection procedure (*Rechtsbehelfsbelehrung*). Furthermore, the one-year time limit does not apply if the individual is prevented from filing an action either by an act of God or because of an incorrect statement in the administrative act or in the decision on the objection regarding the fact that no legal remedy was available.

The rationale underlying this legal institution can be seen in the idea that individuals should not be deprived of judicial protection because of their impossibility of knowing what the modalities for filing a claim are. It has an 'objective' nature, since it applies regardless of the applicant's situation. In other words, it is irrelevant whether the possibilities and the requirements for bringing a claim were, in effect, unknown to the individual concerned, or whether the administration's incorrect or ambiguous statements concerning the remedy were actually causally linked to the applicant's failure or delay in filing a claim.[56]

As a further protection of the individual, the German legal system provides for another mechanism to admit claims brought after the time limit provided for in § 74 VwGO. Pursuant to § 60 VwGO, delay in filing an action may be condoned by the court concerned, if, for no fault of his own, the plaintiff is prevented from approaching the court within the prescribed time limit (*Wiedereinsetzung in den vorigen Stand*).[57]

The rationale of this institution lies in the need for the legal system to ensure that the expiry of the deadline does not create a disadvantage for the applicant, when the delay in bringing the claim was not due to the applicant's fault.[58] The Constitutional Court itself stressed that the *Wiedereinsetzung in den vorigen Stand* tries to find an

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[54] However, an *unanfechtbar* administrative act may still, under certain circumstances, be subject to withdrawal (*Rücknahme*) (§ 48 *Verwaltungsverfahrensgesetz* – VwVfG) and revocation (*Widerruf*) (§ 49 VwVfG) by the administrative authority that issued the measure. When an administrative act is illegal (*rechtswidrig*) one speaks of withdrawal, whereas when an administrative act is legal (*rechtmäßig*) one speaks of revocation.

[55] On § 58 VwGO in general, see Kopp & Schenke (2005), 687; Eyermann (1998), 430; Redeker & von Oertzen (2000), 401 with further references contained therein.

[56] Kopp & Schenke (2005), 687.

[57] On § 60 VwGO in general, see Kopp & Schenke (2005), 698; Hufen (2005), 87; Eyermann (1998), 439; Redeker & von Oertzen (2000), 412 with further references contained therein.

[58] BVerfG, Decision of 2 Jul. 1974, *BVerfGE*, 38, 35; BVerfG, Decision of 20 Apr. 1982, *BVerfGE*, 60, 253.

equitable compromise between the need for the judicial protection of individuals and the principle of legal certainty.[59]

Because of its very nature, however, this institution may be applied exclusively in the cases in which the applicant's failure to comply with the time limit is causally linked to his excusable behaviour. According to the case law, a *Wiedereinsetzung in den vorigen Stand* may be granted in cases when there is: (1) a mistake concerning the form or the content of the administrative decision or the decision on the objection; (2) a long absence from the living place; (3) failure to speak the German language; (4) misconduct of the public authorities; (5) serious sickness; (6) a delay of the postal services, etcetera.[60]

In case the requirements of § 60 VwGO are met, the applicant must file the action along with an application for condonation of delay within two weeks of the removal of the hindrance. The application must be substantiated by the facts and evidence making a prima facie case for condonation. The delay may be condoned even without a formal separate application if the reasons for delay have been clearly given in the action. The decision to condone the delay is final, but a refusal to condone is subject to appeal. After one year, the action for condonation may no longer be submitted, unless there are reasons attributable to *force majeure* for doing so.

3.2. Assessment of the compliance of the administrative procedural system with the ECJ's judgments

As set forth above, in the ECJ's view, it is for national courts, as part of the Community system of judicial protection, to weigh the national limitation period (and its importance for the principle of legal certainty) against the need to respect the principles of equivalence and effectiveness. This jurisprudential position could have an impact on the German legal system, which, as shown above, provides for an unobjectionable time limit of thirty days after which an individual loses his right to challenge an administrative decision or the refusal by the authorities to issue a decision.

Preliminarily, it is important to point out that, in *Rewe*, the ECJ itself had the opportunity to review a German provision governing a limitation period.[61] In particular, the rule in question was § 70 VwGO, which provides for a one-month time limit for filing an objection before the administrative authorities. In this case, the ECJ considered the one-month time limit as 'adequate' to protect the rights stemming from EC law. Given the outcome of *Rewe*, it has been argued that, although the judgment of the ECJ concerned the one-month time limit provided for the objection procedure, it can reasonably be concluded that, in principle, the one-month time limit for filing a claim

[59] BVerfG, Decision of 5 Feb. 1980, *BVerfGE*, 53, 148.
[60] Hufen (2005), 88; Redeker & von Oertzen (2000), 415 with references to the case law.
[61] Case 33/76, *Rewe-Zentralfinanz eG & Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

before an administrative court is also in compliance with the principle of effective judicial protection.[62]

Notwithstanding the ruling in *Rewe*, while the existence of time limits for filing a claim has been considered by the Federal Constitutional Court to be in absolute compliance with Article 19 IV of the German Constitution[63] and to serve the interests of legal certainty and the efficiency of the system of administrative justice,[64] the ECJ's case law on time limits opened a debate on the 'destiny' of the thirty-day time limit and the regime of *Unanfechtbarkeit* and *Bestandkraft* of decisions not challenged with this time frame.[65]

In particular, the ruling contained in *Emmott* and the ECJ's opinion that, in cases where an individual derives rights from an unimplemented directive, national time limits should not start running until the day on which the Member State concerned correctly implements the directive in question was the subject matter of a wide scholarly discussion.[66] The outcome of the case was, indeed, criticized as putting in question '*elementare rechtsstaatliche Prinzipien*',[67] as well as sweeping away the institution of *Bestandkraft* and as contradicting one of the basic principles upon which the German system of administrative justice is based.[68]

More generally, however, when analysing the national rules, German scholars seemed to support the opinion that the one-month time limit is justified in the light of the principle of legal certainty and does not render the exercise of EC rights impossible or extremely difficult.[69] Hence, it was mainly considered that § 74 VwGO does not present any problems vis-à-vis the ECJ's case law on time limits.[70]

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[62] T. Dünchheim, *Verwaltungsprozessrecht unter Europäischem Einfluss* (Berlin, 2003), 179; D. Ehlers, *Die Europäisierung des Verwaltungsprozessrechts* (Köln, 1999), 76.

[63] BVerfG, Decision of 17 Mar. 1959, *BVerfGE*, 9, 194; BVerfG, Decision of 12 Jan. 1960, *BVerfGE*, 10, 264; BVerfG, Decision of 17 Dec. 1969, *BVerfGE*, 27, 297; BVerfG, Decision of 20 Apr. 1982, *BVerfGE*, 60, 253.

[64] BVerfG, Decision of 20 Apr. 1982, *BVerfGE*, 60, 253.

[65] K. Stern, 'Die Einwirkung des Europäischen Gemeinschaftsrechts auf die Verwaltungsgerichtsbarkeit', *JuS* (1998): 771; Ehlers (1999), 76; H.W. Rengeling, *Rechtsschutz in der Europäischen Union: Durchsetzung des Gemeinschaftsrechts vor europäischen und deutschen Gerichten* (München, 1994), 543; Dünchheim (2003), 178; M. Burgi, *Verwaltungsprozess und Europarecht* (München, 1996), 65; S. Müller-Franken, 'Gemeinschaftsrechtliche Fristenhemmung, richtlinienkonforme Auslegung und Bestandkraft von Verwaltungsakten', *DVBl* (1998): 759; F. Schoch, *Die Europäisierung des verwaltungsgerichtlichen Rechtsschutzes* (Berlin, 2000), 43.

[66] Burgi (1996), 65; J. Gundel, 'Keine Durchbrechung nationaler Verfahrensfristen zugunsten von Rechten aus nicht umgesetzten EG-Richtlinien', *NVwZ* (1998): 910; Ehlers (1999), 77; F. Schoch, E. Schmidt-Aßmann & R. Pietzner, *Verwaltungsgerichtsordnung: Kommentar,* 14th edn (München 2004), 3.

[67] Kopp and Schenke (2005), 882.

[68] Schoch, Schmidt-Aßmann & Pietzner (2004), 3; H. Stadie, 'Unmittelbare Wirkung von EG-Richtlinien und Bestandkraft von Verwaltungsakten', *NVwZ* (1994): 435. In order to explain what grave consequences the ruling in *Emmott* may have on the German administrative procedural system, the author draws an interesting parallel with the situation of an administrative measure based upon a law that is later declared unconstitutional. In particular, the author points out that, pursuant to § 79(2) of *Bundesverfassungsgerichtsgesetz*, even in cases of a declaration of unconstitutionality of a law, the decisions that are based upon that law, and that have become *unanfechtbar*, can no longer be challenged. Therefore, in the author's view, the embracement of the *Emmott* doctrine would lead to the conclusion that measures taken in violation of EC law would be granted a more favourable treatment in terms of judicial protection than those taken in violation of the Constitution (at 436).

[69] Burgi (1996), 779.

[70] Rengeling (1994), 543; Dünchheim (2003), 200; V. Götz, 'Europarechtliche Vorgaben für das Verwaltungsprozessrecht', *DVBl* (2002): 5; D. Ehlers, 'Die Europäisierung des Verwaltungsprozessrechts', *DVBl* (2004): 1446; F. Schoch, 'Die Europäisierung des Verwaltungsprozessrechts', in *Festgabe 50 Jahre Bundesverwaltungsgericht,* ed. E. Schmidt-Aßmann, D. Sellner & G. Hirsch (Köln, 2003), 520.

However, it seems necessary to examine whether, in the light of the ECJ's case law, the relevant rules of German law ensure that the exercise of rights stemming from EC law is not rendered impossible or extremely difficult. As stated above, it flows from the ECJ's case law that, where the circumstances of the case so require – that is, where the individual would be deprived of any possibility of protecting the rights that he derives from EC law, or where the exercise of such rights would be unreasonably restricted, or, finally, where the time limit discriminates between actions based upon EC law and similar domestic actions – such a time limit would have to be set aside by the administrative courts.

However, looking at the German rules, it can be argued that there is no need to set § 74 VwGO aside, since the system already provides for some mechanisms that allow an effective judicial protection. While the time limit for filing a claim is in principle thirty days, it is nevertheless possible for the courts, under certain circumstances, to allow claims brought after the expiry of this limitation period.

Firstly, pursuant to § 58 VwGO, it is possible to bring a claim within a period of one year if the contested administrative act or the decision on the objection does not clearly state the legal remedy, the court with which such remedy lies, the seat of the court, or the time limit for the remedy. Furthermore, delay in filing an action may be condoned by the concerned court if, for no fault of his own, the plaintiff is prevented from approaching the court within the prescribed time limit (§ 60 VwGO).

It can, therefore, be argued that the principle of effectiveness and the standards set out by the ECJ are complied with, because the system allows individuals to protect their rights adequately.[71] Indeed, it gives individuals a longer period of time in cases where they have not been made aware of the conditions under which to bring a claim; furthermore, it allows the courts to have some flexibility in admitting late claims when the applicant can demonstrate that the delay in filing the claim cannot be attributed to him.

As far as the courts' reaction to the ECJ's case law on national limitation periods is concerned, it seems that, in some cases, applicants tried to rely upon *Emmott* in order to support their late claims. However, the courts did not seem to uphold these arguments, mainly in the light of the post-*Emmott* case law of the ECJ and of the ECJ's effort to reduce *Emmott* to an exceptional case. The following section analyses this case law.

3.3. Application of the standards set out in the ECJ's judgments by the administrative courts in cases dealing with 'European matters'

The cases in which German time limits were put into question by applicants relying upon the ECJ's case law, are all to be set against the same background, namely, the

[71] Burgi (1996), 65; A. Oexle, *Das Rechtsinstitut der materiellen Präklusion in den Zulassungsverfahren des Umwelt- und Baurechts: unter besonderer Berücksichtigung des europäischen Gemeinschaftsrechts und des Verfassungsrechts* (Berlin, 2001), 68.

non- (or, rather, incorrect) implementation of Directive No. 93/118/EC[72] in the German legal system. In particular, although the deadline for implementing the act was set for 31 December 1993, the provisions of the directive in question had been implemented at Federal level,[73] but not yet at *Land* level. The litigation arose in cases in which the applicants were subject to fees relating to meat hygiene, which were calculated pursuant to a *Land* provision and were higher than they would have been if the relevant European provisions had been followed.

The first case concerns a claim against these fees raised in Rheinland-Pfalz. Against the measure imposing the fee, the applicant filed an objection before the administrative authorities. After the objection was rejected, a claim was brought before the *Verwaltungsgericht* (VG) of Koblenz.[74] The court was of the opinion that the contested measure could no longer be challenged because it had already become *bestandkräftig*.

Subsequently, the applicant brought an action before the *Oberverwaltungsgericht* (OVG) of Rheinland-Pfalz,[75] in order to obtain leave from the court to lodge an appeal against the decision of the lower court.[76] Before the OVG, the applicant put forward the argument that, since the measure in question breached the provisions of an incorrectly implemented directive, the ECJ's ruling in *Emmott* should have been applied, and, therefore, the claim should have been admitted.

However, the OVG of Rheinland-Pfalz did not uphold this argument. In particular, it started by recalling the facts and the ruling of the ECJ in *Emmott* and held that the principle set out by the ECJ in this case could not be applied to the situation in question. In the opinion of the OVG of Rheinland-Pfalz, the '*Emmott*-style suspension of time limits'[77] could not be applied because the outcome of the case decided by the ECJ had been strongly determined by the particular circumstances of the claim and could not be generalized. In order to support its views, the German court then considered the post-*Emmott* judgments on limitation periods and concluded that, according to the latest case law of the ECJ, time limits can only be suspended if they do not comply with the principle of equivalence and effectiveness.

In the light of this jurisprudential position, the OVG of Rheinland-Pfalz held that these principles had, in the case at issue, been complied with, since the applicant was in no way prevented or impeded from filing a claim within the prescribed time limit. On the contrary, the facts showed that the applicant had, indeed, filed an application for review of a part of the contested decision: in the court's view, therefore, the applicant

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[72] Council Directive 93/118/EEC of 22 Dec. 1993 amending Directive 85/73/EEC on the financing of health inspections and controls of fresh meat and poultry meat [1993] OJ L 340/15.

[73] Namely, through an amendment of the so-called *Fleischhygienegesetz*, Law of 3 Juni 1900, RGBl., 1900, 547.

[74] VG Koblenz, Judgment of 7 Aug. 1997 – 5 K 2681/96.KO, unpublished.

[75] OVG Rheinland-Pfalz, Decision of 12 May 1998 – 12 A 12501/97, *NVwZ* (1998): 198.

[76] Pursuant to § 124 (2) VwGO, appeals before an OVG against judgments of a VG are only admissible if: (1) there are serious doubts about the correctness of the judgment of the lower court; (2) the case involves special factual or legal difficulties; (3) the case is of fundamental importance; (4) the judgment of the lower court deviates from a decision, *inter alia,* of the Federal Constitutional Court or the Federal Administrative Court and rests on such deviation; (5) a procedural failure underlying the opinion of the lower court is claimed upon which the judgment may be based.

[77] In the German legal academic debate and in the courts' language this concept is known as *Emmott'sche Fristenhemmung*.

could have brought a claim against the totality of the measure in question, and argued that the latter was to be annulled because of its non-compliance with EC law. Thus, according to the OVG of Rheinland-Pfalz, the request of leave to lodge an appeal against the decision of the VG of Koblenz could not be granted.

Another, quite similar set of cases took place in Mecklenburg-Vorpommern. The applicant was a slaughterhouse on which the German *Land* authorities had imposed the fee concerning meat hygiene described above. Almost three years after it had been notified of the administrative measure, the company filed an objection and, after it was rejected on grounds of inadmissibility, brought an action for annulment.

Before the VG of Greifswald, the administration put forward the argument that the measures contested had acquired *Bestandkraft*, since they had not been challenged within the prescribed time limit. The German court, however, admitted the claim and held that, notwithstanding the expiry of the time limit, the measures in question could still be challenged.[78] In particular, the VG of Greifswald was of the opinion that the ruling in *Emmott* could be applied to the case in question, because the contested measure was in breach of an incorrectly implemented directive.

The defendant administrative authority appealed this judgment before the OVG of Mecklenburg-Vorpommern.[79] Unlike the lower court, the OVG of Mecklenburg-Vorpommern was of the opinion that the measure in question could no longer be subject to judicial review because of the expiry of the time limit for the objection procedure provided for in § 70 VwGO.

Moreover, the OVG of Mecklenburg-Vorpommern, recalling the judgment of the OVG of Rheinland-Pfalz analysed above, maintained that the '*Emmott*-style suspension of time limits' could not be applied in the case in question because the applicant had had the possibility of initiating the objection procedure on time. Consequently, the OVG of Mecklenburg-Vorpommern quashed the decision of the VG of Greifswald and did not grant leave for revision to the company.[80]

The applicant company subsequently brought a complaint to the *Bundesverwaltungsgericht* (BVerwG)[81] against the decision of the OVG of Mecklenburg-Vorpommern to reject its request for leave for revision.[82] For these purposes, it had to demonstrate sufficiently why the revision proceedings were, in its view, necessary for the case at issue. Before the BVerwG, the applicant argued that it was necessary for the highest German administrative court to consider whether, in the light of the ruling contained in *Emmott*, the running of the limitation period should have been suspended, given that the contested fee was in breach of a directive that had not been properly implemented.

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[78] VG Greifswald, Judgment of 18 Feb. 1998 – 3 A 1196/97, unpublished.

[79] OVG Mecklenburg-Vorpommern, Judgment of 28 May 1999 – 1 L 111/98, *NJ*, 2000, 105.

[80] Pursuant to § 132 (2) VwGO, leave for revision by the BVerwG of judgments of an OVG may be granted only (1) if the case is of fundamental importance; (2) the judgment departs from a decision of, *inter alia*, the Federal Administrative Court or the Federal Constitutional Court and rests on this departure or (3) a procedural failure underlying the opinion of the OVG is claimed, upon which the judgment may be based.

[81] Pursuant to § 133 (1) VwGO, the denial of leave for revision is open to challenge by means of a complaint before the Federal Administrative Court.

[82] BVerwG, Decision of 4 Oct. 1999 – 1 B 55/99, *NVwZ* (2000): 193.

Faced with this argument, the BVerwG recalled the ruling in *Emmott*, and, as in the case of the OVG of Rheinland-Pfalz analysed above, it stressed that the ECJ had, itself, justified the outcome of this case with the particular circumstances at issue. The BVerwG then went on to analyse the subsequent case law of the ECJ and the subsequent, more balanced, position of the ECJ on national limitation periods.

In the BVerwG's view, the application of the later jurisprudence, and, in particular, of the principle of effectiveness, to the case in question, led to the conclusion that the exercise of the rights stemming from EC law had not been rendered impossible or excessively difficult. Indeed, at the time in which the contested measure was issued, the applicant was in a position to challenge the act, and, in the course of the objection procedure, could have put forward an argument based upon the violation of the Federal law that had implemented the directive, or of EC law, by *Land* law. On these grounds, the applicant's request of revision was dismissed.

A third set of cases took place in Hessen. The claim concerns, like the others analysed above, an application for review of a measure of taxation imposed on a slaughterhouse and relating to activities which may have an impact of the hygienic conditions of meat. Almost one year from the notification of the measure, the applicant filed an objection against the tax. After its objection was rejected, it filed an action for annulment. The VG of Kassel, however, did not uphold its claim on the grounds that it did not comply with the prescribed time limit. Against this judgment, the slaughterhouse brought an appeal before the *Verwaltungsgerichtshof* (VGH) of Hessen.[83]

Although the applicant argued that the ruling in *Emmott* should have been applied to the case at issue because, as in the case of Ms. Emmott, the applicant was subject to an administrative measure taken in violation of EC law (more precisely, of an incorrectly implemented directive), the defendant contested this position. In particular, it considered that the scope of *Emmott* had been restricted by the ECJ itself, and was, therefore, in the light of the later case law, applicable only to cases in which the exercise of a right derived from EC law had been rendered impossible or excessively difficult by the time limit.

The VGH of Hessen supported the defendant's argument, and held that, while the claim had been brought outside the prescribed limitation period, the '*Emmott*-style suspension of time limits', could not, in the case in question, prevent the act from becoming *bestandkräftig*.

The VGH recalled the development of the case law on national limitation periods, from aggressiveness to deference to a balanced approach, pursuant to which time limits are acceptable if they comply with the principles of effectiveness and equivalence. Having reviewed the German limitation periods against these two principles, the German court concluded the German rules respect the EC standards, and, consequently, rejected the applicant's appeal.

Finally, another case was brought with the same modalities (i.e. notification to a company of the fee on meat hygiene, rejection of the objection against the measure on

[83] VGH Hessen, Judgment of 18 Aug. 1999 – 5 UE 2660/98, *UPR*, 2000, 198.

grounds of inadmissibility and subsequent application for judicial review) in Bayern.[84] Before the VG of Würzburg, the applicant sought the annulment of the measure imposing the fee, arguing, *inter alia*, that, on the basis of *Emmott*, the claim should have been admitted by the competent administrative authorities that decided on the objection procedure.

The VG of Würzburg did not support this view and, mentioning the judgments of the OVG of Rheinland-Pfalz and the OVG of Mecklenburg-Vorpommern, held that the principle set out in *Emmott* could not find application in the case at issue. In particular, the German court started by recalling the ECJ's ruling in *Rewe* and, when analysing the outcome of *Emmott*, it stressed that the latter case needed to be read with the help of the interpretation given to it by the ECJ itself in subsequent rulings.

In this regard, the VG of Würzburg noted that the ECJ never confirmed the principle established in *Emmott* in its later judgments and that it had actually progressively retreated from the position that it had originally taken. Extensively recalling the post-*Emmott* case law and the evolution of the ECJ's position on national limitation periods, the court applied the criteria of equivalence and effectiveness to the one-month time limit provided for in § 70 VwGO, in order to assess whether it was in compliance with the principle of effective judicial protection.

As in the other cases reviewed above, the VG of Würzburg concluded that the applicant had, at the moment in which the contested measure was notified to it, been in a position to file a timely objection and argue the violation of the relevant EC and Federal provisions by the *Land* rule pursuant to which the fee had been issued. Moreover, according to the court, in the case in question, the behaviour of the administrative authorities had not made it more cumbersome for the applicant to protect its rights judicially, and, hence, also from this point of view, no breach of the principle of effective judicial protection could be detected. On these grounds, the applicant's late claim was rejected.

3.4. Conclusion

The analysis carried out above shows that, while the earlier and more aggressive case law of the ECJ seems to have created some panic in the German academic circles, to the point that it was feared that the whole idea of *Bestandkraft* of administrative acts would collapse,[85] the German courts seemed to have adopted a more balanced approach. They rightly considered *Emmott* as a step in the case law of the ECJ, and saw this ruling in the context of the later cases concerning national limitation periods. Indeed, in almost all of the cases reviewed above, the analysis of the courts led to the same conclusion: the applicant did not find himself in the extreme circumstances of Ms. Emmott, and, since the exercise of EC rights had not been rendered excessively difficult or impossible by

[84] VG Würzburg, Judgment of 12 Jul. 1999 – W 8 K 97.1595, unpublished.

[85] According to Stadie, the function of the *Bestandkraft* (i.e., to protect legal certainty) is so essential that it applies also vis-à-vis unconstitutional provisions. See Stadie (1994), 430.

the national provisions on time limits, national law did not have to be set aside.[86] Thus, it can be argued that the ECJ's case law has influenced the German administrative courts, in that they have assessed the compliance of the procedural rules on time limits with the principle of effective judicial protection.

When looking at the relevant procedural rules, however, it can also be argued that there is no need to set § 74 VwGO aside, since the system already provides a 'national' solution for situations in which the time limit has rendered the exercise of rights stemming from EC law excessively difficult or impossible in practice. Indeed, apart from the protection granted through the institution of the *Rechtsbehelfsbelehrung*, pursuant to § 60 VwGO, late claims may be admitted where the delay in filing the claim was not due to the applicant's fault. This solution seems to be adequate with regard to the European standards on time limits because it ensures the judicial protection of EC rights for cases in which individuals were prevented from bringing a timely claim through no fault of their own.[87]

While it has been argued that the criteria for the *Wiedereinsetzung* should not be less strict for claims based upon EC law than for merely domestic claims,[88] it seems clear that, with this system, individuals have the possibility of protecting their rights even after the expiry of the one-month deadline. This possibility, coupled with the institution of the *Rechtsbehelfsbelehrung*, ensures an effective judicial protection against the acts of public authorities. Therefore, it can be argued that the system is in compliance with the relevant ECJ's case law and, more generally, in compliance with the principle of effective judicial protection.

4. English Law

4.1. The English rules on time limits for bringing a claim for judicial review

Under English law,[89] a claim for judicial review must be made 'promptly and in any event within three months after the grounds to make the claim first arose' (Rule 54.5(1) of Part 54 of the Civil Procedure Rules – CPR). The starting point is, therefore, a three-month limitation period.[90] However, the courts have emphasized that a claim can be

[86] Clearly in these terms, see also VGH Bayern, Judgment of 14 Feb. 2002 – 4 ZB 01.167, unpublished. Please note that the same conclusion has been reached also with regard to the time limits provided for the filing of an objection. See, e.g., VGH Hessen, Judgment of 18 Aug. 1999 – 5 UE 2660/98, *UPR*, 2000, 198.

[87] Gundel, indeed, argues that, according to German law, Ms Emmott's claim would have been doubtlessly admissible on the basis of the *Wiedereinsetzung in den vorigen Stand*, since the applicant was late in filing the claim because of the conduct of the administrative authorities. Gundel (1998), 912. Kopp argues that, in order to comply with the European standards, there is no need to set § 74 VwGO aside, because the legal system already provides a solution for cases of claims brought after the statutory time limit, namely the institution of the *Wiedereinsetzung*. See Kopp & Schenke (2005), 883.

[88] Rengeling (1994), 543.

[89] In general, on the rules on time limits, see C. Lewis, *Judicial Remedies in Public Law,* 3rd edn (London, 2004), 312 ff; P.F. Cane, *Administrative Law,* 4th edn (Oxford, 2004), 114 ff; P. Craig, *Administrative Law,* 6th edn (London, 2008), 904 and 926 ff; M. Beloff, 'Time, Time, Time It's on my Side, Yes it is', in *The Golden Metwand and the Crooked Cord,* ed. C. Forsyth & I. Hare (Oxford, 1998), 267.

[90] *R. (Al Veg Ltd) v. Hounslow London Borough Council* [2003] EWHC 3112 (Admin), [2004] LLR 268, in which it was held that 'a useful starting point is that when judicial review claims are brought within the prescribed three months period, there is a rebuttable presumption that they have been brought promptly' (para. 40).

considered as being out of time if it has not been made promptly even when it is within the three-month period.[91] Consequently, permission may be refused on grounds of delay even where the applicant has filed the claim within three months of the decision, if, based upon the facts, the court considers that the application was not made promptly.[92] Factors that may be taken into account in relation to promptness include, for example, whether the applicant gave prior warning of his intention to challenge the decision,[93] or whether a period of time has elapsed between the taking of the decision and its communication to the applicant. Cases in which third parties (for example, the beneficiary of a planning permission) are likely to have committed themselves to expenditures on the basis of the decision in dispute are cases in which, according to English law, there is a particular need to pay due regard to the injunction to act 'promptly'.[94]

Failure to comply with the three-month time limit (or the court's determination that the application was not made promptly) implies the refusal of permission to go to the substantive hearing on the claim.[95] However, the delay in filing a claim may not be fatal for the application if the court considers that there is 'good reason' for extending the time. This power was formerly specifically provided for in the rules governing time limits for bringing a judicial review claim; now, the power is contained in the general powers of the courts to extend time (Rule 3.1(2)(a) CPR).

There is no statutory definition of 'good reason', and the court's decision mainly depends on the facts of the case and the extent to which the court regards the actions taken by the applicant as reasonable under the circumstances.[96] In general, it can be said that the delay may be considered excusable if it results from factors outside the applicant's or his advisors' control.[97]

For example, it has been considered that an applicant who has not been informed that a decision has been taken has good reason for the delay, so long as he moves

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[91] Very critical on this point are Gordon and Rogers, who argue that the language of (then) applicable provisions on time limits (Order 53 of the Supreme Court Rules) and their reference to the three months limitation period is deceptive, because it may 'lull one into a false sense of security'. See R. Gordon & H. Rogers, 'Justice Denied? Delay in Judicial Review Proceedings', *NLJ* (1989): 1128.

[92] In *Re Friends of the Earth Ltd* [1988] JPL 93, a challenge to the grant of planning permission for a power station was held not to have been made promptly even though (by one day) within the three-month period. See also *R. v. Westminster City Council, ex p. Hilditch* [1990] COD 434; *R. v. The Independent Television Commission, ex p. TVNi Ltd and TVS Television Ltd*, The Times, 30 Dec. 1991; *R. v. Bath City Council, ex p. Crombie* [1995] COD 283. For this aspect, see A. Lindsay, 'Delay in Judicial Review Cases: A Conundrum Solved?', *PL* (1995): 421 ff.

[93] *Re Friends of the Earth Ltd* [1988] JPL 93; *R. v. Department of Transport, ex p. Presvac Engineering Ltd*, The Times, 10 Jul. 1991.

[94] See *R. v. The Independent Television Commission, ex p. TVNi Ltd*, The Times, 30 Dec. 1991, where it was stated that the courts are generally reluctant to intervene in a way which would adversely affect market dealings undertaken in good faith. See also *R. v. Secretary of State for Trade and Industry, ex p. Greenpeace Ltd* [1998] COD 59.

[95] In English judicial review proceedings, before a claim is fully reviewed, it must pass the permission stage (Rule 54.4 CPR).

[96] Lewis (2004), 322. For a survey of the reasons that have been put forward to explain delays, see R. Leipner, 'What is a "Good Reason" for Extending Time?' *JR* (1996): 212.

[97] In this respect, Cane argues that the fact that there are no clear criteria for the courts' discretion to extend time creates too much uncertainty. Cane (2004), 115.

expeditiously once he is aware of the decision.[98] Moreover, it has been repeatedly held that the delay in filing a claim should not be held against the claimant if the latter has behaved reasonably and sensibly, as long as no prejudice is caused by the delay.[99] The importance of the point of law in discussion and, more generally, of the issue in question[100] and the time taken to obtain legal aid[101] were all held to constitute good reasons to extend the time. However, it should be pointed out that none of these reasons automatically result in time being extended.

Therefore, if the court considers that an application was made promptly, permission will be given; in the opposite case, it will be refused, unless the court considers that there is good reason for extending the time. However, even if the court considers that there is good reason, permission may still be refused on grounds of 'undue delay'. The concept of undue delay is to be found in section 31(6) of the Supreme Court Act 1981.

This provision states that where the court considers that there has been undue delay in filing a claim for judicial review, it can refuse to grant permission for the claim or may refuse any remedy sought by the claimant if it considers that the granting of the remedy 'would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration'.

The interaction of this provision with Rule 4(1) of Order 53 of the Supreme Court Rules[102] has caused a great deal of difficulty. These two provisions are not easy to reconcile because, section 31(7) of the Supreme Court Act states that subsection (6) must be considered without prejudice to any act or rule of court which has the effect of limiting the time within which an application for judicial review may be made. However, Rule 4(3) of Order 53 provides that the preceding paragraphs 'are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made'.

This problem, defined as '*circulus inexetricabilis*',[103] was analysed by the Court of Appeal in *Jackson*, in which it was held that, where the claim is not made promptly, or within three months, there is objectively 'undue delay' for the purposes of section 31(6) of the Supreme Court Act, even though the court may be satisfied that that there is good reason for failing to act promptly.[104] It then becomes a matter for the court's discretion as to whether to refuse permission for the claim.

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[98] *R. v. Secretary of State for the Home Department, ex p. Ruddock* [1987] 1 WLR 1482; *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement Ltd* [1995] 1 WLR 386; *R. v. Department of Transport, ex p. Presvac Engineering Ltd*, The Times, 10 Jul. 1991; *R. v. Greenwich London Borough Council Shadow Education Committee, ex p. Governors of John Ball Primary School and others*, The Times, 16 Nov. 1989; *R. v. Licensing Authority, ex p. Novartis Pharmaceuticals Ltd* [2000] COD 232.

[99] *R. v. Commissioner for Local Administration, ex p. Croydon London Borough Council* [1989] 1 All ER 1033; *R. v. Durham County Council, ex p. Huddleston* [2000] 1 WLR 1484.

[100] *R. v. Secretary of State for the Home Department, ex p. Ruddock* [1987] 1 WLR 1482; *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement Ltd* [1995] 1 WLR 386.

[101] In *R. v. Stratford-on-Avon District Council, ex p. Jackson* [1985] 1 WLR 1319 the applicant justified his delay by showing that he was waiting for a decision from the Legal Aid Board; see also *R. v. Wareham Magistrates' Court ex p. Seldon* [1988] 1 WLR 825; *R. v. Surrey Coroner, ex p. Wright* [1997] QB 786.

[102] I.e., the predecessor of Rule 54.5 CPR.

[103] *R. v. Dairy Produce Quota Tribunal for England and Wales, ex p. Caswell* [1989] 1 WLR 1089 (at 1094F).

[104] *R. v. Stratford-on-Avon District Council, ex p. Jackson* [1985] 1 WLR 1319.

In *Caswell*,[105] the House of Lords confirmed the approach to delay that was adopted by the Court of Appeal in *Jackson* and upheld some general tests, namely:

(1) at the permission stage, the court must refuse permission if the application is not made promptly or within three months at the latest, unless the applicant shows good reason, in which case the court may grant an extension;
(2) even if the court would otherwise have granted an extension, it may still refuse permission if it is of the opinion that the granting of the remedy would be likely to cause substantial hardship to, or to substantially prejudice the rights of any individual, or would be detrimental to good administration;
(3) notwithstanding the grant of permission, the court still retains the discretion to refuse the substantive remedy at the substantive hearing if undue delay is shown.

However, although Lord Goff plainly found that, even if the court was willing to extend the period at the permission stage, it could – in principle – nonetheless refuse to grant permission on the basis of hardship, prejudice or detriment, he observed that a court would rarely have the necessary material to consider these issues at the permission stage. In practice, therefore, if good reason is shown, the court will normally grant permission, and allow the question of hardship, prejudice or detriment to be argued at the substantive hearing.[106]

It follows from this analysis that even where a court has been persuaded to extend the period and grant permission, the court can still consider the issues of hardship, prejudice and detriment to good administration under section 31(6) of the Supreme Court Act at the substantive hearing.

In *ex p. A*, it was, however, also made clear that, at the substantive hearing, the question of whether permission ought to have been refused or not ought not to be reopened. At that point, the court should opt to refuse the *remedy* under section 31(6)(b) of the Supreme Court Act.[107] In other words, if, in granting permission, the court rules that an extension of time should be granted, this decision ought to be considered as final at the substantive hearing, and no question of promptness or good reason should be raised thereafter. Thus, before the court hearing the substantive application, it cannot be argued that permission should not have been granted. At the substantive stage, however, notwithstanding a binding finding of promptness or good reason for extending the time at

[105] In *Caswell*, the applicants were farmers who had been allocated insufficient milk quotas by the Dairy Produce Quota Tribunal. They waited more than two years before applying under Order 53 of the Supreme Court Rules. At the substantive hearing, it was held that it would be prejudicial to good administration to grant the remedy, because it would involve the reopening of the decision itself, which would lead to other applications to reopen similar decisions concerning the allocation of quotas over a number of years. *R. v. Dairy Produce Quota Tribunal for England and Wales, ex p. Caswell* [1989] 1 WLR 1089.

[106] Lewis (2004), 326.

[107] *R. v. Criminal Injuries Compensation Board, ex p. A* [1999] 2 AC 330. On *ex p. A* and the issues it leaves unresolved, see M. Fordham, 'Delay: The "Good Reason" at the Substantive Hearing', *JR* (1997): 208.

the permission stage, the court can still examine the question of undue delay in deciding what remedy, if any, to grant the applicant.[108]

Finally, in *Lichfield*, it was pointed out that, where promptness has been considered at the permission stage, it is – in principle – not open to a court to consider this issue at the substantive hearing. However, at the substantive hearing, the court could do so, by way of undue delay, where:

(1) the court hearing the initial application has expressly so indicated;
(2) new and relevant material is introduced at the substantive hearing;
(3) if, exceptionally, the issues, as developed at the substantive hearing, cast the aspect of promptness in a new light; or
(4) where the first court has overlooked a relevant matter.[109]

As discussed above, where there is undue delay, it is for the court to decide whether hardship or prejudice to third parties, or detriment to good administration will lead to the denial of permission or of remedy. When trying to provide a definition for these criteria, it seems particularly difficult to define what is meant by the term 'detriment to good administration'. The case law indicates that mere inconvenience is not enough; there must be foreseeable positive harm to good administration and affirmative evidence of detriment, or at least evidence from which detriment can be inferred.[110] One example of detriment to good administration is provided by *Caswell*, in which the remedy was refused on a delayed application because it would have required the reopening of a decision concerning the allocation of milk quotas for several past years with great administrative complications. Another example concerned a late challenge to a land reclamation scheme which might have caused heavy financial losses.[111]

Permission or remedy may also be refused where it would cause substantial hardship or prejudice to the rights of other individuals.[112] An example of such prejudice may be found in the context of planning permissions, in cases in which the recipient has relied upon the permission and has entered into contracts with third parties to carry out the construction works. Where the quashing of the permission would lead to further costs

[108] *R. (Wilkinson) v. Chief Constable of West Yorkshire* [2002] EWHC 2353 (Admin).

[109] *R. (Lichfield Securities Ltd) v. Lichfield District Council* [2001] EWCA Civ 304, [2001] 3 PLR 33 (para. 34).

[110] *O'Reilly v. Mackman* [1983] 2 AC 237 (at 280H-281A). In *Caswell*, Lord Goff considered that, for the purposes of assessing whether the granting of the relief would be detrimental to good administration, what should be taken into account is the interest 'in a regular flow of consistent decisions, made and published with reasonable dispatch; in citizens knowing where they stand, and how they can order their affairs in the light of the relevant decisions, Matters of particular importance, apart from the length of time itself, will be the extent of the effect of the relevant decision, and the impact which would be felt were it to be reopened'. *R. v. Dairy Produce Quota Tribunal for England and Wales, ex p. Caswell* [1989] 1 WLR 1089.

[111] *R. v. Swale Borough Council, ex p. Royal Society for the Protection of Birds*, The Times, 11 Apr. 1990. See also *R. v. Bradford Metropolitan Borough Council, ex p. Sikander Ali* [1994] ELR 299, where the detriment to good administration was seen in the possible disruption of the school allocation system.

[112] As far as prejudice and hardship to third parties are concerned, see *R. v. Secretary of State for Trade and Industry, ex p. Greenpeace Ltd* [1998] COD 59, where it was considered that admitting the claim would have created a serious financial damage to licensees who had incurred in expenses on the basis of the decision granting them licenses; see also *R. v. North West Leicestershire District Council, ex p. Moses (No. 2)* [2000] All ER (D) 526, concerning third parties who have incurred in substantial expenditures in reliance on a planning permission.

and prejudice the economic position of the interested parties, the courts may refuse to grant permission or remedy.[113]

4.2. Assessment of the compliance of the administrative procedural system with the ECJ's and the ECtHR's judgments

As set forth above, in the ECJ's view, it is for national courts, as part of the Community system of judicial protection, to weigh a national limitation period (and its importance for the principle of legal certainty) against the need to respect the principles of equivalence and effectiveness. This jurisprudential position could have an impact on the English legal system, which, as shown above, provides for a time limit of three months after which an individual, in principle, loses his right to bring a claim for judicial review.

This time limit has been considered as being justified by the need for the legal position of public authorities to be firmly settled at the earliest opportunity. As Lord Diplock stated in *O'Reilly v. Mackman*:

> the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer than is absolutely necessary in fairness to the person affected by the decision.[114]

As far as the scholarly debate is concerned, it has been argued that the time limit provided for by Rule 54.5 CPR may be too short to ensure an adequate protection for the rights of citizens.[115] However, the view has also been expressed that the ECJ would be unlikely to consider the three-month time limit as unduly restrictive, especially in the light of the two-month time limit provided for actions for annulment (Article 230 EC).[116]

While the three-month time limit can be deemed as adequate to ensure an effective judicial protection, it does, nevertheless, seem necessary to examine whether, in the light of the ECJ's case law, the relevant rules of English law ensure that the exercise of rights stemming from EC law is not rendered impossible or extremely difficult. Indeed, as stated above, it flows from the ECJ's case law that, where the circumstances of the case so require – that is, where the individual would be deprived of any possibility of protecting the rights which he derives from EC law, or where the exercise of such rights would be unreasonably restricted, or, finally, where the time limit discriminates between actions based upon EC law and similar domestic actions – even a reasonable time limit would have to be set aside by the national courts.

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[113] Lewis (2004), 395.

[114] *O'Reilly v. Mackman* [1983] 2 AC 237 (at 280H-281A).

[115] Cane (2004), 114. For a different opinion, see A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law,* 14th edn (Harlow, 2007), 777; J. Steiner, *Enforcing EC Law* (London, 1995), 76 ff and also the Law Commission, Report No. 226, *Administrative Law: Judicial Review and Statutory Appeals* (London, 1994), para. 5.25.

[116] M. Brealey & M. Hoskins, *Remedies in EC Law: Law and Practice in the English and EC Courts,* 2nd edn (London, 1998), 313; C. Lewis, *Remedies and the Enforcement of European Community Law* (London, 1996), 97; R. Gordon, *EC Law in Judicial Review* (Oxford, 2007), 90.

However, looking at the English rules, it can be argued that there is no need to set Rule 54.5(1) CPR aside, since the system already provides for some mechanisms to allow an effective judicial protection. Indeed, while the time limit for filing a claim is, in principle, three months, it is nevertheless possible for the courts, under certain circumstances, to allow claims that have been brought after the expiry of this limitation period.

In particular, the courts are empowered to admit late claims where the applicant can show that there is 'good reason' for the delay. It can, therefore, be argued that the principle of effectiveness and the standards of protection set out by the ECJ are complied with, because the system allows individuals to protect their rights adequately. Indeed, it allows the court to have some flexibility in admitting late claims when the applicant can demonstrate that the delay in filing the claim is to be attributed to factors outside his control.

However, if the three-month time limit to commence proceedings, subject to the discretion to extend the time, cannot be considered as violating the principle of effectiveness, the requirement of 'promptness' may fall foul of EC law. Indeed, it is up to the national courts to decide whether an application, although brought within a fixed time limit, has been brought 'promptly'. This requirement, which grants the courts a relatively wide discretion to refuse permission to certain claims, may impair an effective judicial protection of rights derived from EC law.[117]

While the ECJ itself never commented on the English rules in question,[118] the discussion of the adequacy of this limitation period, together with the requirement of 'promptness', was the subject matter of a claim brought before the European Court of Human Rights.[119] The case concerned a claim for judicial review brought against an administrative decision which had declared legitimate the activities that were carried out in the applicants' neighbour's warehouse, and were causing an alleged nuisance to the applicant himself and to his family. In all instances, the claim had been considered as delayed and, consequently, permission had been refused. The applicants then brought a claim to the ECtHR, and argued that Rule 4(1) of Order 53 of the Supreme Court Rules was in violation of Article 6 ECHR. In particular, the applicants maintained that they had been deprived of access to a court as a consequence of the discretion allowed to the courts in refusing judicial review claims.

The court did not accept this argument and held that:

> in so far as the applicants impugn the strict application of the promptness requirement in that it restricted their right of access to a court, the court observes that the requirement was a proportionate measure taken in pursuit of a legitimate aim. The applicants were not denied access to a court *ab initio*. They failed to satisfy a strict procedural requirement which served a public interest purpose, namely, the need to avoid prejudice being caused to third parties who may have altered their situation on the strength of administrative decisions.

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[117] Gordon (2007), 91.

[118] Noted by R. Gordon, *Judicial Review: Law and Procedure,* 2nd edn (London, 1996), 47. Carney argues that a preliminary reference to the ECJ is this respect seems desirable. See D. Carney, 'The Timing Rules in Judicial Review and the Practical Difficulties they cause Environmental Interest Groups: The Need for Reform', *Env LR.* (2006): 278.

[119] Case *Lam v. the United Kingdom* (App. 41671/98), Admissibility decision of 5 Jul. 2001, unpublished.

Consequently, it can be concluded that the English rules on time limits are not in breach of Article 6 ECHR.

As far as the courts' reaction to the ECJ's case law on national limitation periods is concerned, it seems that, while reliance on *Emmott* was attempted, the national courts carried out the balancing exercise promoted by the ECJ, and the requirement of promptness was, on several occasions, subject to scrutiny for compliance both with EC law and Article 6 ECHR. The following section analyses the position of English courts with regard to the rules concerning time limits in judicial review claims.

4.3. Application of the standards set out in the ECJ's judgments by the administrative courts in cases dealing with 'European matters'

The analysis of the case law shows that the English courts were very clear in confining *Emmott* to the case in which a Member State has not transposed a directive and, additionally, following the path opened by the ECJ, in treating this ruling as an exception justified by the particular circumstances of the case, which, therefore, does not – in principle – allow for any derogation from the normal rules concerning time limits.[120]

For example, in the *Eurotunnel* case, the Queen's Bench Division made it clear that an applicant could not rely upon *Emmott* in circumstances other than that of a challenge based upon an unimplemented directive.[121] The case concerned the applicant companies' challenge to several measures by which some directives had been implemented in the United Kingdom. Given that the claim was brought after the three-month time limit, the companies tried to argue that the claim should nonetheless be admitted because there were, in their view, good reasons for extending the time.

The court was neither of the opinion that such good reasons could be sufficiently shown in the case in question, nor did it accept the applicants' reliance on *Emmott* in order to by-pass the time limit. In particular, the court observed that *Emmott* had to be regarded as an exception to the rule of the national procedural autonomy, and that this ruling only applies in cases in which, unlike the situation in question, a Member State failed to fully and correctly transpose a directive into national law. The court, therefore, concluded that, given the difference in the situations of the applicants, *Emmott* had no relevance for the case and, consequently, provided no reason to disregard the provision of English law concerning time limits.

Apart from the debate concerning the possible reliance on *Emmott*, the English courts were also faced with the crucial question concerning time limits, namely, whether the three-month limitation period and the requirement of promptness are to be considered as being in compliance with EC law and the principle of effective judicial protection.

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[120] Before the ECJ ruled in the *Emmott* case, it seemed almost unthinkable for English courts that a decision of the European Court could interfere with procedural rules concerning time limits. See *R. v. Ministry of Agriculture, Fisheries and Food, ex p. Bostock* [1991] 1 CMLR 681.

[121] *R. v. Customs and Excise Commissioners, ex p. Eurotunnel Plc* [1995] COD 291.

In *Matra Communications*, the Court of Appeal held that a requirement (contained in a national provision giving effect to an EC directive) that proceedings be brought 'promptly and in any event within three months' was not contrary to EC law.[122] This case concerned a claim for damages brought by a French company. The claim was based upon the alleged damage arising from a measure issued by the Home Office, which established some requirements for the participation in a tender procedure. The claimant argued that these requirements were in breach of primary and secondary EC law provisions, in particular of Directive No. 89/665/EEC concerning public procurement rules.[123]

The court at first instance found that the action could not proceed further since the claim had been brought outside the time limit provided for the domestic measure implementing the directive, which reproduced *verbatim* Rule 54.5 CPR. The claimant, however, argued that this domestic provision had to be set aside because it was in breach of the principle of effective judicial protection. This argument was not upheld in any of the instances adjudicating on this case.

The Court of Appeal, in particular, recalled the stand of the ECJ's case law on domestic remedies and its reliance on the principle of national procedural autonomy, subject to the principles of equivalence and effectiveness. It then moved on to evaluate whether the three-month time limit and the requirement of promptness were in compliance with the latter two principles. While the court did not find a comparable claim in domestic law,[124] it concluded that the rule at issue could not be held to be in violation of the principle of effectiveness since it did not, in its view, render the exercise of Community rights excessively difficult or impossible in practice.

That the English rules on time limits are in compliance with the principle of effectiveness was also upheld in a subsequent case which dealt with a claim brought against the competent authorities' failure to carry out an environmental assessment pursuant to the national rules implementing Community law.[125] Faced with a late claim, the Queen's Bench Division first considered that there were no good reasons for extending the time and then went on to discuss the applicant's contention that, when EC law is in question, courts have to admit late claims and have no discretion to reject them on grounds of delay. The court did not accept this argument and held that the ECJ acknowledged that reasonable time limits could be imposed on Community law claims in the interests of legal certainty. Consequently, on the basis of the ECJ's case law and of the ruling in *Eurotunnel*, the English court considered that the three-month time limit, and the discretion

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[122] *Matra Communications SAS v. Home Office* [1999] 1 WLR 1646.

[123] Council Directive 89/665/EEC of 21 Dec. 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395/33.

[124] Although the time limit provision at issue is the same, the Court of Appeal denied that a comparable rule would be Rule 4(1) of Order 53 of the Supreme Court Rules. However, this finding does not change the end result, since in both cases the principle of equivalence would not be violated.

[125] Council Directive 85/337/EEC of 27 Jun. 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175/40.

allowed to the courts to extend the time for good reason, had to be considered as being reasonable, and, therefore, in compliance with EC law.[126]

4.4. The requirement of 'promptness' scrutinized for its compliance with EC and ECHR law in cases involving purely domestic situations

Some very recent cases combined the EC perspective with the ECHR perspective, especially in relation to the requirement of promptness, and seemed to suggest that, despite the purely national nature of the right at issue, Rule 54.5 CPR may, nevertheless, fall foul of EC law. As far as the compliance with the ECHR is concerned, some doubts were raised with regard to the compatibility of this provision with Article 6 ECHR. However, in other instances, the courts concluded that, in the light of the ECJ's case law and the ECtHR's ruling in *Lam*, Rule 54.5 CPR ensures an adequate protection of citizens' rights.

The first case which illustrates this perspective is *Burkett*.[127] The applicant filed a claim against a resolution passed by the administrative authorities authorizing the granting of planning permissions. Both the Queen's Bench Division and the Court of Appeal refused to grant permission to the claim on the grounds that it did not comply with the prescribed time limits. The House of Lords did not agree with this view and allowed the claim purely on the wording of Rule 54.5 CPR. However, Lord Steyn raised some doubts as to whether 'the obligation to apply "promptly" is sufficiently certain to comply with European Community law and the European Convention for the Protection of Human Rights and Fundamental Freedoms', and whether 'the requirement of promptitude, read with the "three-month" limit, is not productive of unnecessary uncertainty and practical difficulty'.[128] These worries were also shared by Lord Hope. In particular, he considered the word 'promptly' to be imprecise, and stressed that the provision made no reference to any criteria by which the question of whether the test has been satisfied or not can be judged. However, he argued that Scottish judicial review rules could be used as an interpretive aid: he explained that, under Scots law, there is no specific time limit for the making of an application; however, no Scottish authority supports the proposition that mere delay (or, to follow the language used by Rule 54.5(1) CPR, a mere failure to act 'promptly') is sufficient for a claim to be barred at the permission stage. It has never been held that mere delay will cause an application to be rejected if it is not proven that there has been acquiescence on the part of the applicant, or that there would be prejudice on the side of the defendant. He, therefore, concluded that, if the obligation to act 'promptly' is, without any qualifications, too uncertain to satisfy the requirements of Article 6 ECHR, it does become adequately specified

[126] *R. v. London Borough of Hammersmith and Fulham, ex p. CPRE London Branch* [2000] Env L Rev 532.
[127] *R. (Burkett) v. Hammersmith and Fulham London Borough Council* [2002] UKHL 23, [2003] 1 WLR 1593.
[128] *Burkett*, para. 53.

if the concepts of acquiescence and prejudice are taken into account. If read in this 'Convention-friendly' way, Rule 54.5 CPR should not be deemed as being incompatible with Article 6 ECHR.

The question as to whether the requirement of promptitude is not in compliance with EC and ECHR law was, however, not resolved by the House of Lords, as the judges only expressed their *doubts* on this compatibility, but did not take any clear position in this respect. This position was taken up in a later judgment, in which the Court of Appeal, faced with an attempt to challenge the requirement of promptitude on the basis of the ruling in *Burkett* held that 'the question whether the obligation [to act promptly] is contrary to the Convention or to Community law was not resolved by the House of Lords'.[129] Thus:

> unless and until the issue is resolved adversely to the rule, the obligation to file the claim form promptly remains a feature of English law […] and the presence of the word 'promptly' in the rule should not be ignored. Those who seek to challenge the lawfulness of planning permissions should not assume, whether as a delaying tactic or for other reason, that they can defer filing their claim form until near the end of the three-month period in the expectation that the word 'promptly' in the rule is a dead letter.[130]

In a subsequent case concerning a claim against two measures issued by a local planning authority, the Administrative Court endorsed this position completely, and raised no further points in this respect.[131]

However, these three cases all seem to overlook the fact that these doubts, at least those concerning the compatibility of Rule 54.5 CPR with Article 6 ECHR, had already been solved by the Strasbourg court itself in the *Lam* case discussed above. This circumstance was clearly stated in *Elliott*,[132] *I-CD Publishing Ltd*,[133] *A1 Veg*,[134] and, more recently, in *Hardy*,[135] in which it was made clear that *Burkett* had not taken the ruling in *Lam* into account; that, consequently, the promptness requirement should not be considered to be in breach of Article 6 ECHR; and that, as a result, 'the requirement for a claimant to issue proceedings "promptly" remains'.[136] Thus, as has been noted, 'it seems unlikely that any challenge to the need to act "promptly" on the basis of uncertainty would be likely to succeed'.[137]

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[129] *R. (Young) v. Oxford City Council* [2002] EWCA Civ 990, [2002] 3 PLR 86.

[130] *Young*, para. 38.

[131] *R. (Michael Geoffrey Lynes and Sadie Lynes) v. West Berkshire District Council* [2002] EWHC 1828 (Admin), [2003] JPL 1137.

[132] *R. (Elliott) v. The Electoral Commission* [2003] EWHC 395 (Admin).

[133] *R. (I - CD Publishing Ltd) v. Office of the Deputy Prime Minister* [2003] EWHC 1761 (Admin).

[134] *R. (A1 Veg Ltd) v. Hounslow London Borough Council* [2003] EWHC 3112 (Admin), [2004] LLR.

[135] *Hardy v. Pembrokeshire County Council and Pembrokeshire Coast National Park Authority* [2006] EWCA Civ 240.

[136] *A1 Veg*, para. 40. Very recently, however, doubts were still expressed on the compatibility of the requirement of promptitude in the light of Lord Steyn's speech in *Burkett*. See *R. (Hampson) v. Wigan Metropolitan Borough Council* [2005] EWHC 1656 (Admin), [2005] All ER (D) 383.

[137] R. Taylor, 'Time Flies Like the Wind: Some Issues that *Burkett* Did Not Address', *JR* (2005): 250.

4.5. Conclusion

As shown in the analysis carried out above, the most prominent feature of judicial review claims in the English legal system is that they are required to be initiated promptly. At the permission stage, should the court find that the claim has not been brought promptly, it can refuse permission if there is no good reason for extending time or if the combined effect of delay and the likely hardship, prejudice or detriment justifies the dismissal of the claim.

A claimant who has failed to bring proceedings promptly requires an extension of time, which will be granted by the court at the permission stage if the court is satisfied that there is good reason for extending the time. Even if the court recognizes that there is good reason for extending the time, it may refuse permission to the claim if the claim is likely to cause hardship or prejudice to third parties or detriment to good administration. Once permission is given, it cannot be subject to review at the substantive hearing: however, hardship, prejudice and detriment can still be considered for the purposes of denying the remedy sought by the applicant.

As discussed above, applicants have tried to rely upon the ECJ's case law in order to by-pass these rules, but their attempts have been unsuccessful. Nevertheless, it can be argued that the ECJ's case law has influenced the English courts, in that the courts have assessed the compliance of the procedural rules on time limits with the principle of effective judicial protection, as demanded by the ECJ itself.

The ECtHR explicitly commented on the English system of time limits and found that it was not in breach of Article 6 ECHR. After some hesitation, the English courts seemed to have endorsed this solution and to have accepted the ECtHR's ruling. As far as the compliance with the ECJ's case law and the principle of effective judicial protection are concerned, it can be argued that the requirement of promptness is too undefined and allows an excessively broad discretion to the courts to refuse permission to a claim.[138] Therefore, although the three-month time limit is likely to comply with EC law, the same cannot be said of the promptness requirement.

However, it is submitted that while the requirements set forth in Rule 54.5 CPR may be likely to create some uncertainty, the prejudice that individuals may derive from it is mitigated by the courts' wide discretion to extend the time for good reason.[139] Moreover, as Lord Hope pointed out in *Burkett*, the requirement of promptness may be fleshed out and clarified by using the concepts of acquiescence and prejudice.[140] The powers of the courts to extend the time for good reason, together with a 'Europe-friendly' interpretation of the requirement of promptness, could then be regarded as

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[138] A. Samuels, 'Permission for Judicial Review Out of Time: An Overview', *JR* (2002): 219.

[139] For a case in which the courts found that there was good reason for extending the time in a claim based upon EC law, see *R. v. Ministry of Agriculture, Fisheries and Food, ex p. Bostock* [1991] 1 CMLR 681.

[140] A slightly different, but comparable perspective is put forward by Lewis, who argues that the requirement of 'promptness' does not in itself render the provisions on time limits in breach of EC law, provided that national courts would not apply, in each concrete case, the time limit in a way that made it impossible in practice for applicants to enforce their Community law rights. See Lewis (1996), 97.

being sufficient to ensure compliance with the principle of effective judicial protection as elaborated by the ECJ's case law.

5. Comparative Conclusion

All legal systems analysed above provide for unobjectionable time limits within which individuals are allowed to challenge the administrative action. Their length varies from thirty days to three months, and they start running from the moment in which the applicant became aware of the administration's position or, for the English legal system, the moment in which the grounds for the claim first arose. All legal systems attach fatal consequences to the non-compliance with the prescribed time limits, consisting in the inadmissibility of the claim. The existence of these rules is perceived as a fundamental corollary of the rule of law, essential for the smooth functioning of the public administration and for the security of legal relationships.

The ECJ never objected to this need: on the contrary, it has held throughout its case law that rules on time limits are not in breach of EC law and are to be considered as a necessary reflection of the principle of legal certainty. However, the ECJ has held that, while Member States are free to set time limits for the review of the administrative action, the exercise of the rights that individuals derive from Community law should not be discriminated against by way of time limits that are shorter or subject to stricter requirements than those applicable to claims brought under national law. Furthermore, the ECJ insists that the enforcement of EC rights in national courts should not be rendered impossible or excessively difficult by rules that deprive the parties concerned of any remedies before national courts, or that unreasonably restrict the time period during which an action may be filed.

All three legal systems analysed comply with these two requirements: indeed, none of the rules on time limits discriminate between actions brought for the enforcement of Community law and actions brought under purely domestic law. Furthermore, on the one hand, the time limits can be considered reasonable and not too short for the purposes of ensuring an effective judicial protection of Community rights and, on the other, the three legal systems all provide for some mechanisms that grant the courts a certain degree of flexibility to by-pass the time limits. These mechanisms are, in all three legal systems, activated where the applicant successfully demonstrates that the delay in bringing his claim is not attributable to a fault of his own. The only rule that may appear somewhat problematical from the perspective of the principle of effective judicial protection is the requirement, provided by English law, that claims for judicial review be brought 'promptly'.

In the light of the above, one can conclude that the national courts, when faced with claims for the enforcement of EC law, should apply the national rules on time limits, and, should the claim have been brought outside the time limit, declare the action inadmissible or, if the applicant proves that his non-compliance with the limitation period

is due to circumstances outside his control, admit the claim on the basis of the relevant national rules. When reviewing claims for 'promptness', the English courts should adopt a 'Europe-friendly' interpretation of this requirement and refuse permission to a claim only where there has been clear acquiescence on the part of the applicant, or where admitting the claim would bring prejudice to third parties.

From the analysis carried out above, it appears that the national courts have generally come to this conclusion and have decided not to set aside the national rules on time limits: the latter were reviewed and considered in compliance with the principles of equivalence and effectiveness. Only in Italy did the administrative courts decide in some cases to by-pass the national limitation periods in claims based upon EC law: however, the rulings may be traced back to the period in which the ECJ was itself very aggressive towards time limits and may be justified by the echo that *Emmott* produced in the legal circles. While a review of the rulings of Italian courts shows a changing attitude which resembles that of the ECJ (i.e. from aggressiveness, to deference, to a more balanced approach towards national limitation periods), the German and English courts seem to have shown a relatively balanced attitude all along and have not used their disapplication powers to admit late claims based upon EC law.

More generally, it can be concluded that, in the context of the issue of time limits, the ECJ's case law has prompted the administrative courts of the three legal systems to review the national time limits against the principles of equivalence and effectiveness, as prescribed by the ECJ itself. Indeed, the national courts, entrusted by the ECJ to assess in each concrete case the compliance of national time limits with the European standards, seem to have adequately carried out this task so far.

Despite the ECJ's intervention, however, the national rules on time limits remain still different. The time limits themselves range from thirty days in Germany to three months in England, and all systems provide for some mitigation mechanisms that allow claims that are brought outside the prescribed period.[141] The ECJ's case law has merely imposed the scrutiny of national courts on the equivalence and effectiveness requirements and, for the rest, has in principle accepted reasonable limitation periods. Since the rules on time limits that have been analysed have always been considered as being, in principle, reasonable, no major legislative or jurisprudential change can be detected in any of the legal systems. The relevant rules were, before the ECJ's intervention, comparable, but, to some extent, different; after the European intervention, the differences (albeit small) have remained unchanged.

Unlike in Italy and Germany, where the debate on time limits did not touch upon the standards of protection provided in the ECHR, in England the courts have questioned whether the requirement that claims for judicial review be brought 'promptly'

[141] The English legal system does contain a peculiarity vis-à-vis the two other set of rules, namely the requirement of 'promptness', but, it is submitted that this rule does not affect the argument that the relevant rules display, in general, quite a high degree of similarity.

complies with the principle of effective judicial protection and Article 6 ECHR. The English courts have, however, accepted the ECtHR's ruling in *Lam* and concluded that the right to fair trial is not breached by the promptness requirement.

Summarizing table: Time limits for challenging the administrative action before a court.

Summarizing Table: Time Limits for Challenging the Administrative Action Before a Court

ECJ CASE LAW

Time limits are not objectionable per se. Rules on time limits should be set aside by the national courts if they do not comply with the principle of equivalence and the principle of effectiveness.

National rules

	Italy	**Germany**	**England**
Section 1			
Time limit to file a claim?	Yes	Yes	Yes
How long?	Sixty days	Thirty days	Promptly and in any event within three months
Since when?	Notification, publication or applicant's knowledge of the decision	Applicant's knowledge of rejection of request or of decision on objection procedure	Moment in which the grounds first arose
Consequences of non-compliance	Decision becomes *inoppugnabile* and claim is declared *irricevibile*	Decision becomes *unanfechtbar* and claim is declared *unzulässig*	Permission is refused
Mitigation mechanisms	*Rimessione in termini per errore scusabile* (power of the court to admit claims brought outside the time limit for an excusable mistake)	(1) *Rechtsbehelfsbelehrung* (time does not start running until enough information on remedies is given to the applicant); (2) *Wiedereinsetzung in den vorigen Stand* (condonation of delay not dependent on applicant's fault)	Extension of time for 'good reason' *unless* undue delay (that is, granting permission would bring detriment to good administration or prejudice to third parties)
Section 2			
Time limit considered in compliance with the Constitution	Yes	Yes	N/A
Debate on time limits because of ECJ's case law	Yes	Yes	Little

(Continued)

	Italy	**Germany**	**England**
Assessment of adequacy of time limits in abstracto	Yes	Yes	Yes for three-month time limit; yes in a Europe-friendly interpretation for requirement of promptness
Assessment of adequacy of time limit when special cases	Yes	Yes	Yes
Section 3			
Courts set aside national time limits	Yes	No	No
Courts carried out balancing exercise	Yes	Yes	Yes
Section 4			
Assessment of national rules	In compliance (that is, time limits long enough and adequate mitigation mechanisms)	In compliance (that is, time limits long enough and adequate mitigation mechanisms)	
Assessment of courts' approach	Initially aggressive, then deferent, now balanced	Balanced	
Courts set aside national time limits in domestic cases			No, but doubts on 'promptness' were raised (also with regard to Article 6 ECHR)
Section 5			
Assessment of national rules			In compliance (that is, time limits long enough and adequate mitigation mechanisms) *provided* that 'promptness' is interpreted in a Europe-friendly way
Assessment of courts' approach			Balanced, then critical on 'promptness' but receptive to ECtHR's ruling