REMEDIES FOR BREACH OF EU LAW REVISITED

Edmond J Safra Lecture Theatre, King's College London, 18 June 2010

10.00am The principle of effective judicial protection in EU law
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Introduction

I will say a few words this morning about the effect of the principle of effective judicial protection on the ECJ, but I intend to concentrate on its effect on the national courts of the Member States. In that context, it is used by the ECJ to help identify the steps such courts must take to protect the rights enjoyed by private parties under Union law.

The exercise is rarely an easy one for either the ECJ or the national courts because it requires the imperatives of Union law to be reconciled with procedural rules which may reflect deep-seated national cultural and ethical values.

The Court initially trod warily, showing deference to national procedural autonomy and repeatedly urging the Union legislature to take action to harmonise national procedural rules. Even today, Union legislation on remedies remains piecemeal in nature.[1]

Apparently frustrated by the legislature's inaction, the Court in time began to adopt a more interventionist stance. This was perhaps exemplified most clearly by *Emmott*,[2] *Factortame*[3] and *Francovich*[4] in the early 90s, where the Court gave priority to the

[1] For the Court's attempts to create administrative law remedies out of Union legislation on environmental protection, see Case C-237/07 *Janecek* [2008] ECR I-6221 (right to have an action plan drawn up); Case C-75/08 *Mellor*, judgment of 30 April 2009 (right to reasons); Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*, judgment of 15 October 2009 (right of access to a review procedure).
[2] Case C–208/90, [1991] ECR I–4269.
[3] Case C-213/89, [1990] ECR I-2433.
[4] Joined Cases C–6/90 and C–9/90, [1991] ECR I–5357.

need to reduce disparities between the Member States and ensure the effective protection of Union law rights.

A key decision during that period was *Johnston* v. *Chief Constable of the Royal Ulster Constabulary*.[5] That case involved a directive on equal treatment for men and women. The directive required Member States to take the steps necessary to enable the victims of discrimination "to pursue their claims by judicial process…"

In its judgment, the Court said that this requirement of judicial control reflected 'a general principle of law which underlies the constitutional traditions common to the Member States'. It was a principle that was also enshrined in the ECHR.

General principles belong to the primary law of the Union[6] and are now described by the Court as having 'constitutional status'.[7] They must therefore be applied not just by national courts when dealing with cases that fall within the scope of the Treaties but also by the Union Courts.

Thus, in *Kadi*[8] the Court found that the manner in which the contested regulation was adopted – which failed to respect the claimants' right to be heard - led to an infringement of the principle of effective judicial protection, because it prevented the Court from reviewing the substantive lawfulness of the regulation.

However, it seems that the principle of effective judicial protection may be overridden by the language of the Treaties.[9] Thus, in *Jégo-Quéré*[10] the Court said that annulment proceedings 'should not on any view be available' in the circumstances of that case, even if it could be shown that no alternative remedy was available to the applicant in the national courts.

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[5] Case 222/84, [1986] ECR 1651.
[6] See Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council* [2008] ECR I-6351, para 308.
[7] See Case C-101/08 *Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and Others, Bertelsmann AG and Others*, judgment of 15 October 2009, para [63]; Case C-174/08 *NCC Construction Danmark A/S v Skatteministeriet*, judgment of 29 October 2009, para [42].
[8] See paras 351- 352.
[9] By contrast, the general principles of legal certainty and the rule of law were used to justify a *contra legem* interpretation of the Treaty in *Foto-Frost*, *Les Verts* and *Chernobyl*.
[10] Case C-263/02 P [2004] ECR I-3425, paras 33-34.

The Court's enthusiasm for interfering with national procedural autonomy in the name of the effective protection of Community law rights eventually began to wane. Its decision in *Emmott*[11] in particular suggested that it had started to overreach itself.

The Court held in that case that a Member State could not rely on a national limitation period as a defence to a claim by an individual based on a directive unless and until the directive had been properly implemented. The ruling had the effect of exposing a Member State to claims dating back many years, even if it had done its best to implement the directive properly and its default had only recently come to light.

In a series of cases decided in the 1990s culminating in *Fantask*,[12] the Court sidelined *Emmott* and made it clear that Member States could in principle rely on national limitation periods where claims were brought against them under directives which had not been correctly implemented.

The marginalization of the *Emmott* doctrine was symptomatic of a reassessment by the Court of the importance of national procedural autonomy and heralded the start of a new phase in its case law. That new phase is characterized by greater restraint on the part of the Court, though, as we shall see, there is iron inside the velvet glove.

Basic principles

Perhaps the most comprehensive modern summary of the basic position is contained in the *Unibet* case of 2007.[13]

The Court began by underlining the status of the principle of effective judicial protection as a general principle of Union law. In addition to the sources mentioned

[11] Case C–208/90, [1991] ECR I–4269.
[12] Case C–188/95, *Fantask and Others* v. *Industriministeriet*,[1997] ECR I–6783.
[13] Case C-432/05 [2007] ECR I-2271.

in *Johnston*, it noted that it was 'reaffirmed' in Article 47 of the Charter of Fundamental Rights (right to an effective remedy and a fair trial).[14]

Under the principle of sincere cooperation (see now Article 4(3) TEU), it was for the Member States to ensure judicial protection of an individual's rights under Union law.

In the absence of Union rules, it was for national law to designate the competent courts and lay down the procedural rules applicable.

Union law did not create new remedies in the national courts unless it was 'apparent… that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under [Union] law.'

It was for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.

The procedural rules laid down had to satisfy the principles of equivalence and effectiveness. This meant that the rules governing actions to protect an individual's rights under Union law should be no less favourable than those governing similar domestic actions. Moreover, they must not make it 'practically impossible or excessively difficult' to exercise rights conferred by Union law.

It was for national courts to interpret their procedural rules in such a way as to enable them to be implemented in a way which contributed to the effective protection of an individual's rights under Union law.

The Unibet *case*

I now turn to the way in which some of those principles have been applied in recent case law of the Court.

[14] On effective judicial protection and fundamental rights, see also Case C-349/07 *Sopropé* [2009] 2 CMLR 5.

In *Unibet* itself, the applicants were British and Maltese internet betting companies who had attempted to promote their businesses in Sweden through advertisements in the press.

Their attempts had been met by legal action by the Swedish authorities against the newspapers concerned for infringement of Swedish gaming law.

The applicants brought proceedings in the Swedish courts for interim and declaratory relief and damages. A reference was eventually made to the ECJ.

The referring court's first question asked whether national law had to permit a free-standing action for review of a national provision's compatibility with the EC Treaty where other legal remedies allowed that question to be examined.

The answer to that question was essentially no. The Court took the view that the relevant Swedish rules satisfied the principles of equivalence and effectiveness.

- ⇒ Swedish law did not provide for a free-standing action for the review of national provisions, regardless of the origin – national or Union - of the superior rule with which they were said to be incompatible.
- ⇒ Moreover, Swedish law did permit the compatibility issue to be raised in proceedings before the ordinary courts or the administrative courts by way of preliminary issue.
- ⇒ In such proceedings, the competent court would be required to disapply the contested provisions if it took the view that they conflicted with a higher-ranking legal rule, again regardless of that rule's origin.

Swedish law also made provision for various indirect legal remedies which could be used to challenge the compatibility of national legislation with Union law.

- ⇒ For example, this could be done in the context of a claim for damages.
- ⇒ The issue could also be raised in an application for judicial review of a refusal to grant the applicants an exception from the prohibition laid down in the Swedish gaming legislation.

The Supreme Court had pointed out that, if the applicants ignored Swedish gaming law and proceedings were brought against them by the national authorities, they would be able to challenge the compatibility of the national provisions with Union law in the national courts.

The Court agreed with AG Sharpston that this was not enough. In the absence of other remedies, effective judicial protection would not be secured if an applicant could only test the legality of a national rule by breaking it first.

On the question of interim relief, the applicants had been thwarted in the national courts because their application for a declaration had been found to be inadmissible. Was that outcome compatible with Union law?

The Court said that, where there was uncertainty about the admissibility of proceedings to protect rights derived from Union law, interim relief had to be available.

However, interim relief did not have to be available in the context of an application that was inadmissible, unless Union law cast doubt on its inadmissibility.

Where an action was admissible, interim relief had to be available where necessary to ensure the full effectiveness of the national court's final judgment.

The Court added that the criteria to be applied by a national court in deciding to grant interim relief were those laid down by national law.

- ⇒ It thereby dealt with a question put to it in *Factortame* back in 1989 but left unanswered in that case. The response given in *Unibet* confirmed the correctness of the approach taken by the House of Lords in *Factortame*, where in granting interim relief the House applied the guidelines laid down in *American Cyanimid*.

The Impact *case*

The existence in the national system of alternative remedies which might have been used by the claimant caused rather more difficulty in *Impact v Minister for Agriculture and Food.*[15] This was a reference by an Irish court on the interpretation of the framework agreement on fixed-term work annexed to Directive 1999/70.

That directive was transposed into Irish law by an Act of Parliament adopted in 2003, just over two years after the expiry of the deadline for its implementation. The 2003 Act gave jurisdiction to hear complaints to a Rights Commissioner, from whom appeal lay to the Labour Court.

The applicant, a trade union, brought a claim on behalf of members employed in various government departments for periods which straddled the date of entry into force of the 2003 Act.

Neither the Rights Commissioner nor the Labour Court had jurisdiction under national law to hear claims based on directly effective provisions of Union law. However, there were alternative remedies available to individual employees before the ordinary courts. Did Union law require the Rights Commissioner or Labour Court to hear claims based directly on the directive?

The Court declared that a claim based on an infringement of the 2003 Act and a claim based directly on the directive had to be regarded as covered by the same form of action: although their legal basis was formally distinct, both sought the protection of the same rights. These derived from Union law, namely the 1999 directive and the framework agreement.

The jurisdiction of the Rights Commissioner and the Labour Court was not compulsory. None the less, the Court said that individuals should be able to seek protection of rights derived directly from the directive before the same courts if splitting their action into separate claims would lead to unacceptable procedural complications. It was for the national court to assess whether this was so.

[15] Cf Case C-63/08 *Pontin* [2010] 2 CMLR 2; Case C-78/98 *Preston v Woverhampton Healthcare NHS Trust* [2000] ECR I-3201; Case C-326/96 *Levez v Jennings* [1998] ECR I-7835.

This meant that the Court had to answer the referring court's second question, which asked whether Clauses 4(1) and 5(1) of the framework agreement were directly effective. The Court held for the first time that its case law on the direct effect of directives applied to framework agreements implemented by Council directive, of which the Court said they were 'an integral component.'

It went on to find that Clause 4(1) had direct effect, but that Clause 5(1) did not. The latter provision was concerned with preventing abuse arising from the use of successive fixed-term contracts. It gave Member States a discretion to choose from a range of alternative methods for preventing such abuse. The Court concluded that this made it insufficiently precise to produce direct effect.[16]

The third question referred in *Impact* also concerned Clause 5(1). The referring court wanted to know whether it precluded a Member State, acting as an employer, from renewing a fixed-term employment contract for up to eight years shortly before the national implementing legislation entered into force.

AG Kokott said that, if Clause 5(1) did not have direct effect, the answer to that question had to be no. The Court took a different approach.

It said that Member States were required by Article 4(3) TEU and the third paragraph of Article 288 TFEU, as well as the directive itself, to take any appropriate measure to achieve the objective of preventing the abusive use of fixed-term contracts.

That obligation would be rendered ineffective if a Member State, acting as an employer, were permitted to renew contracts for an unusually long term in the period between the expiry of the deadline for implementation and the entry into force of the national implementing legislation.

This would deprive the individuals affected of the benefit of that legislation for an unreasonably long time. Public authorities were not therefore entitled to behave in this way.

[16] Cf *Duncombe v Department for Education and Skills* (the European Schools case) [2010] 2 CMLR 14; *Bleuse v MBT Transport Ltd* [2008] IRLR 264.

The duty of courts to raise issues that have not been pleaded

The more measured approach to the principle of effective judicial protection now adopted by the Court is clearly evident in a series of cases dealing with the right of national courts to raise issues of their own motion.

The essential issue in such cases is whether national restrictions on that right are overridden by the principle of effective judicial protection where the effect of such restrictions would be to exclude the application of Union law.

The issue came to the fore in two cases decided in the mid-90s on the same day, *Peterbroeck* v. *Belgian State*[17]and *van Schijndel and van Veen* v. *SPF*.[18]
In the first case, the Court found that a procedural rule affecting the power of national courts to raise issues of their own motion was incompatible with Union law, but in the second it came to the opposite conclusion.

Advocate General Jacobs said that it would be going further than was necessary to ensure effective judicial protection to insist that national procedural rules should always give way to Union law. This would

> "unduly subvert established principles underlying the legal systems of the Member States."[19]

Although some divergence in the way Community law was applied might result, this was

> "a consequence of the variety of the national legal systems themselves".[20]

The *van Schijndel* and *Peterbroeck* cases were hard to reconcile, but the latter now seems out of line with the developing trend of the case law.

[17] Case C–312/93, [1995] ECR I–4599.
[18] Joined Cases C–430/93 and C–431/93, [1995] ECR I–4705.
[19] Supra note 65, para 27 of his Opinion.
[20] Ibid., para 38 of his Opinion.

The *van der Weerd* case[21] again raised the compatibility with Community law of national provisions restricting the right of courts to raise issues of their own motion. The Court followed *van Schijndel* and held that provisions such as those at issue in the main action were compatible with Union law.

The Court said that *Peterbroeck* could

> "be distinguished by circumstances peculiar to the dispute, which led to the applicant in the main proceedings being deprived of the opportunity to rely effectively on the incompatibility of a domestic provision with Community law…"[22]

Advocate General Maduro, whose Opinion was followed by the Court, declared:

> "the principle of effectiveness does not impose a duty on national courts to raise a plea based on Community law of their own motion, even when the plea would concern a provision of fundamental importance to the Community legal order."[23]

It simply required national law to give the parties "a genuine opportunity to raise a plea based on Community law before a national court."[24]

The issue arose in a novel way in *Heemskerk and Schaap v Productschap Vee en Vlees*,[25] a reference by a Dutch court. The context was a challenge by two exporters to an attempt by a national authority to recover part of an export refund paid to them under Union legislation.

[21] Joined Cases C-222/05, C-223/05, C-224/05 and C-225/05, [2007] ECR I- 4233.
[22] Para 40.
[23] Para 29 of his Opinion.
[24] Ibid.
[25] Case C-455/06, judgment of 25 November 2008.

The referring court took the view that the national authority might have made a mistake in interpreting that legislation and that the amount it was seeking to recover was too low.

Dutch administrative law contained a principle prohibiting *reformatio in pejus*, which meant that an individual litigant could not be placed in a worse position than he would have been in if he had not brought the action. The referring court asked the ECJ whether national courts were required to consider questions of Union law of their own motion even where the result would be to infringe that principle.

The Court disagreed with AG Bot on this point and said that the answer to the referring court's question was no. Such a requirement would be contrary to the principles of respect for the rights of the defence, legal certainty and protection of legitimate expectations.

A similarly restrained approach was evident in *Asturcom*,[26] a reference by a Spanish court concerning the enforcement of an arbitration award made in a consumer dispute.

The consumer concerned had not played any part in the arbitration proceedings, nor had she challenged the arbitration award after it was made, with the result that it had become final.

The question was whether a national court asked to enforce the award was required to examine of its own motion whether the contract the consumer had entered into was unfair for the purposes of the directive [93/13] on unfair terms in consumer contracts.

In previous case law on that directive, the Court had recognised the relatively weak position of the consumer vis-à-vis the seller or supplier. Here, however, the Court underlined the importance of the principle of res judicata. It thought the consumer had had a reasonable opportunity to challenge the arbitration award. It therefore

[26] Case C-40/08, judgment of 6 October 2009.

concluded that the national court was not required to compensate for the ‘total inertia’ of the consumer.

However, while the principle of effectiveness was satisfied, the Court found a potential infringement of the principle of equivalence. This was because, under Spanish law, a court asked to enforce an arbitration award could assess of its own motion whether an arbitration clause in a consumer contract was compatible with national rules of public policy. The relevant provision of the directive had to be treated as having the same status as such rules.