

EU LAW RIGHTS AND NATIONAL REMEDIES: AN UNEASY PARTNERSHIP?

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Abstract: This article focuses on the European Union (EU) Court of justice and its relationship within the sphere of national remedies. It considers whether the time has come for the EU institutions to harmonise EU remedies, so that individuals will be able to have access to the same remedy when an EU right has been breached. It evaluates the current path of the EU court in trying to achieve a balance between securing a member state's autonomy to create its own remedies, and its procedural rules for accessing those remedies. This would be balanced with enforcing EU law across all member states and also securing effective judicial protection of EU rights, so that all individuals will have adequate remedies available in their member states.

The current flaw is that EU rights vary across the member states, because of the lack of harmonisation in the area of remedies, since member states have varying legal systems with different levels of protection afforded to EU rights. The lack of EU wide remedies has led the EU Court to interfere within the remedial autonomy of a member state, in order to protect EU rights. This article explores the implications of the EU Court's direct interference within the national sphere of remedies and procedural rules when protecting EU rights.

Keywords: Effectiveness, EU Court of Justice, Procedural Rules, EU Rights, Remedies, EU Member States.

Introduction

2013 has been officially named 'The European year of Citizens' by the European Union (EU), twenty years after the concept of EU citizenship was introduced by the Maastricht Treaty of 1993. It is a year in which the EU institutions will be promoting the benefits which the EU has brought to its citizens and highlighting their central role in EU decision making.

This article focuses on the particular benefits, the rights enforceable within the national legal system, which the EU has conferred upon the EU citizens. It considers how the EU rule of national procedural and remedial autonomy can potentially dilute these EU rights, because this rule allow search of the EU member states (MS) to decide the remedies to be conferred and the procedures to be followed for the protection of EU rights within the national legal systems. This can lead to the value of EU rights actually varying across the member states. This can mean that without EU wide remedies the protection of EU rights can be rendered ineffective at national level. This is because national procedural rules may be restrictive in accessing a remedy and the remedies may be

inadequate in compensating the claimant for the loss sustained. This problem would be prevalent throughout the member states at varying levels thus seriously undermining EU rights. This ultimately leads to an uneasy partnership between EU rights and national remedies.

Against the background of solving the 'problem' of national remedies, it emerges as no mere mechanical exercise. There has been a lack of legislative measures introduced to harmonize remedies by the EU institutions. This has led the EU Court to intervene within the sphere of remedies to protect EU rights. The EU Court of Justice would have to try and secure a balance, whereby individual rights are sufficiently protected and EU law is enforced; balanced with respecting the national remedial autonomy (NRA) and national procedural autonomy (NPA) of a member state. NPA and NRA allow the Member State to maintain its own remedial system, to create and distribute its own remedies, to secure EU rights and to have procedural rules in place to access a remedy. An individual's right would be seriously undermined if it was not possible in procedural terms to access the court and obtain a remedy for those rights.

An examination of EU Court case law in this area reveals four periods of differing judicial intervention into the national remedial and procedural rules. Its 'First Generation' case law is characterized by the EU court establishing supremacy of EU law over national law. The 'Second Generation' case law concerns the scope of national remedial autonomy and the guiding principles of *Rewe* [1976] and *Comet* [1976], set out by the EU, which are an EU standard of effective judicial protection. The Courts 'Third Generation' case law is a more interventionist approach in the sphere of remedies, by which the EU Court seeks to lay down uniform EU rules. The 'Fourth Generation' rights are characterized by selective deference, where the EU court is being more selective when making more radical interventions of its own in the sphere of NRA (Drake 2006, 845-846).

Origins: 'First Generation' case law

The *Van Gend en Loos* [1963] established that 'independently of the legislation of member states, [European Union] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage' (*Van Gend En Loos*[1963] paragraph 3). Consequently, it was clear that EU derived rights could form the basis for national litigation, but the EU Court failed to shed light on the content and meaning of such rights.

However, it remained unclear whether their individual EU right would include an entitlement of remedies; the EU Court appeared reluctant to develop individual rights' protection in that direction.

This is because there was simply no need to ponder that issue, because it did not arise. The reason being was the EU Court was not asked to deal with the issue by the national courts. The early interest being in the ability to invoke EU rights, rather than an examination of the effectiveness of those rights at national level. The EU Court wanted the enforcement of EU law across the member states. The problem is that for a 'right' to be meaningful it has to have a corresponding remedy, without a remedy there is no 'right'. Viewed from this angle, an EU right is restricted to a mere invocation entitlement. The indifference shown with respect to the content of EU rights, worked to the detriment of individuals. Individuals would be able to invoke their right but may not be able to receive a remedy unless one was actually provided for under EU law. However, despite this weakness, with EU rights remaining reduced to mere invocation entitlement, there is at least a sufficiently harmonious and balanced relationship between the content and the enforcement of such rights. This is in line with the EU Courts' duty of attaining the uniform application of EU law within the member states (Eilmansberger2004, 1202).

Ironing out the flaw: 'Second Generation' case law

The EU Court now turned its attention to the relationship between EU rights and remedies, realising that the mere invocation entitlement is insufficient in protecting EU rights. The EU Court emphasised that rights and remedies must co-exist, otherwise the benefit of EU rights is undermined. The EU Court developed its second generation of case law which focused more strongly on the link between the adequate protection of individual rights and the availability of appropriate remedies.

In *Heylens*[1987]the EU Court stated 'the existence of a remedy ... is essential in order to secure an individual's right' (*Heylens* [1987] paragraph 14),highlighting the point that EU rights would be of no significance if there was no remedy available for the claimant's loss or damage.

The *Comet* case confirms the national remedial autonomy principle that, in the absence of conferral of a specific EU remedy to accompany an EU right, it is left for the domestic legal system of each member state to lay down procedural rules governing the actions intended to enforce the rights which individuals derive from EU law. In this case, the EU Court confirms that the EU decentralises the system of enforcement to national level where EU law is mainly applied by national authorities and adjudicated upon by national courts according to the rules of national remedial law.

However, in order to ensure a minimum degree of uniformity in the enforcement of EU law and to guarantee the '*effet utile*' of EU law (Tridimas2006, 421) in the case of *Comet* the EU Court did assert

that this was not an absolute rule and there would be circumstances when EU intervention into national remedial rules would be necessary. Here it established the principle of equivalence, stipulating that 'claims based on EU law must be subject to the rules which are no less favourable than those governing similar claims based on national law' (*Comet* [1976] paragraph 14).

Further inroads into national remedial autonomy were revealed in *Rewe* where the EU Court suggested an EU principle of effectiveness requiring that all national authorities must secure effective remedies to protect EU rights: it must not be 'excessively difficult or impossible for an individual to exercise his right to obtain a remedy' (*Rewe* [1976] paragraph 19).

These principles mean that as long as national law provided a remedy similar to that provided for a breach of a similar national rule and did not make it impossible in practice to exercise EU rights, that remedy would be lawful under EU law.

The principle of equivalence ensures that EU rights receive the same protection as domestic ones. The notion of discrimination provides legitimacy for the Courts intervention into the field of remedies. If national law guarantees a certain level of protection to domestic rights, they should be extended to EU rights as well. However, there will be times when the national equivalent remedy will be ineffective. The principle also integrates EU law into the national legal systems of remedies. It perceives EU rights not emanating from a separate legal order but as being an integral part of the national legal system. These principles would be a catalyst for greater intervention by the EU Court with the potential goal of setting EU wide remedies and procedures for gaining those remedies.

These principles of equivalence and effective remedies should be adhered to when setting procedural rules and issuing remedies and therefore demonstrates a more interventionist approach by the EU Court. Through these principles the EU Court has been setting reference points and minimum standards. The national rules have to comply with these standards and in cases in which the national remedies fall below the level of protection which the EU Court deems acceptable, the intervention by the EU Court into the national sphere of remedies is triggered and the diminishing of the NRA rule begins.

However, deciding whether a national remedy (or other procedural rule) is either 'equivalent' to a domestic right or effective enough is fraught with difficulties. The content of rights can be ambiguous and it is a National Court that has the difficult task of defining ambiguous EU rights,

which can inevitably lead to a breach of the principles of effectiveness and equivalence. National Courts should be invoking an Article 267 preliminary reference procedure (PRP) to seek guidance from the EU Court when they are unclear about the scope and adequacy of the right.

Intervention into national remedies – a step too far? ‘Third Generation’ case law

The guiding principles of *Rewe* and *Comet* are powerful offensive weapons for securing the better protection of EU rights, yet they left gaps in protection which prompted the EU Court to adopt a more radical approach within the sphere of remedies.

In *Rewe* the EU Court stipulated that the principles of equivalence and effectiveness did not demand that ‘new remedies were intended to be created ... to ensure the observance of EU law’ (*Rewe* [1976] paragraph 12). This exposes a problem: if there is no duty to create a remedy at national level, EU law rights may be left unprotected in circumstances where there is no remedy for the equivalent national right.

However, exceptions to the no new remedies principle were soon to follow in a period which saw the EU Court at its most interventionist within the national sphere of remedies. This can be seen in the EU Court’s changing language from the *Rewe* and *Comet* guidelines (in which national rules cannot render the exercise of EU rights virtually impossible or excessively difficult—a lower threshold of scrutiny), to a more positive obligation upon the national courts to guarantee the effective protection of rights derived from EU law. This first arose in *Factortame* [1990], where the EU Court stipulated that national rules acting as a barrier to an effective remedy may need to be ignored (*Factortame* [1990] paragraph 22). This exposes the fine line between ignoring an existing national procedural rule and the creation of a new remedy.

In *Factortame* the duty was on the UK court to allow the invocation of the EU right of non-discrimination (so that Spanish fishermen could fish in British waters). The EU Court stipulated that interim relief must be granted pending the final judgment on the matter by the House of Lords, otherwise it would undermine the effective judicial protection of the EU right in question (*Factortame* [1990] paragraph 58). The consequences of this ruling were that the English Courts were required to apply what was admittedly an existing remedy (interim relief), but in an exceptional situation (against a government minister) to secure that person’s right. The immediate result of the application of the ruling was that EU law rights would be treated more favourably than those based in domestic law, because the interim relief in question (an injunction) was not available against

government ministers for alleged breaches of national law (Steiner and Woods 2009,190).

It seemed that *Factortame* was an isolated case. Even though there was no creation of a new remedy, just a dis-application of the rule in question, the case did show the fine line between the dis-application of rules and the creation of new remedies. It seemed that the 'no new remedies' principle was still intact.

The basis of the EU Court's reasoning came from the *Simmenthal* [1978] judgment, which demanded 'the enforcement of EU laws from their date of entry into force' (*Simmenthal* [1977] paragraph 14), and from TEU Article 4 (3), which obligates member states to ensure the legal protection of rights conferred by EU law. The EU Court stated that: 'national legislative or judicial practice which might impair temporarily, the full force and effect of EU rules must be set aside' (*Factortame* [1990] paragraph 14). It also firmly identified the need for the uniform application of EU law to trump the autonomy of national judicial authorities. The EU Court in *Factortame* made no express ruling on whether EU law required national judges to formulate new remedies to protect EU law rights when none existed for equivalent rights under national law. It appears that the judgment only requires the national court to use existing remedies available under national law, albeit novel in situations, in order to protect rights claimed under EU law.

Legal certainty would have been better protected if the EU Court had given clearer guidance on the circumstances in which EU law will require national judges to adjust national remedies in order to give effective protection to EU law rights. *Factortame* was a missed opportunity by the EU to push its review of the national remedies and procedural rules. However, the Court did emphasise that rights should not be undermined by national rules (*Factortame* [1977] paragraph 20).

Before *Factortame* the EU was reluctant to interfere with the procedural rules and remedies laid down by the national authorities. However, *Factortame* saw a shift of the Court's approach to interfere when necessary to try and ensure the effectiveness of EU law, because the Court recognised the gaps in protection offered by *Rewe* and *Comet* and therefore had to intervene to ensure effective protection of EU rights.

This shows that it would be necessary and very beneficial to have EU wide remedies, because the gaps in protection left behind in *Rewe* and *Comet* mean that, where there is no national remedy provided for an EU right; the EU Court would have to intervene to try and secure EU rights, not only

by precluding national laws at times but even to the extent of creating new remedies. As Van Gerven asserted: 'the need for harmonised legal remedies is inherent in the concept of uniformity: in the absence of sufficiently harmonised legal remedies, uniform rights cannot be adequately secured throughout the EU' (Van Gerven 1995, 682).

Post *Factortame*: securing individual rights

Cases since *Factortame* confirm that the EU has turned its approach to intervening within the national remedial framework when a national rule precludes individuals relying on their EU rights as in *Factortame*. In *Metallgesellschaft* [1998] the EU Court held that the discriminatory rule which prevented the claimants from attaining compensation (restitution) had to be withdrawn, resulting in their right to restitution. Although restitution was not a remedy unknown to the English legal system, the national court argued that restitution might not be available in these circumstances; however the EU Court disregarded this argument. This case was significant because the EU was not concerned about whether the remedy would have been available at national level, which it would not have been. This contradicts the respect for the national remedial and procedural autonomy. In this case the court was focussing on the substantive EU right. The Court here seemed less concerned with assessing the effectiveness of national remedies and more with ensuring the effectiveness of the EU right itself (Tridimas 2006, 423).

Clarification at last

In *Unibet* [2007], to determine whether the Swedish law on lottery was compatible with EU law, the national court enquired specifically about the scope of the principle of effective judicial protection and whether EU law required a member state's legal order to provide a self-standing action for a declaration that a provision of its national law conflicted with EU law, and whether in waiting for the determination, interim relief must be granted.

The EU Court, confirming the cases of *Rewe* and *Comet* held that the principle of effective judicial protection for the EU rights conferred on individuals is a general principle of EU law. Accordingly, the principle of effective judicial protection of an individual's rights under EU law must be interpreted as requiring it to be possible in the legal order of the member state for interim relief to be granted until the national court has given a ruling on whether national provisions are compatible with EU law, where the grant of such relief is necessary to ensure the full effectiveness of the judgment to be given on the existence of such rights (*Unibet* [2007], paragraph 39). The EU Court also investigated the possibility that a national legal system may have to develop a self-standing cause of action to

challenge the compatibility of national law with EU law if it is the only way to safe guard an EU right. (*Unibet* [2007], paragraphs 37-38). Therefore, the Court makes a bold statement on the obligation to create a new remedy when it transpires that this is the only possible way to enforce EU rights. It is a natural consequence of the effectiveness principle. This has developed progressively into a mechanism of judicial control on the national remedial system.

The effect of the *Factortame* ruling was that national courts were required to provide real and effective protection when EU law is at stake, if necessary by setting aside any excessively restrictive criteria that govern its application. Occasionally this duty may require the conferral of an existing remedy in novel circumstances (i.e. in situations where it would normally be denied to individuals bringing the same action on purely domestic grounds).

The *Unibet* ruling seems to take effectiveness a step further, because the EU Court states explicitly that there are authorised exceptions to the general rule of EU rights being dependent for their effectiveness on the national remedial autonomy of a member state. The implication is now that the duty goes beyond that suggested in *Factortame*; the creative application of existing national remedies, to require the creation of a totally new remedy when this constitutes the only solution to guarantee an effective measure of judicial protection for an EU right.

However, the impact of *Unibet* should not be overstated, as it is likely to be rare for existing national remedies, properly applied, to be ineffective. In most cases it will be possible to interpret effectiveness in such a way as to enforce its requirements within the general remedial framework prescribed by national law (Anagnostaras2007, 735). As in *Factortame*, the national remedial framework could even be adjusted to allow for the application of existing remedies in novel situations, rather than the creation of entirely new remedies. That said, the principle of effective judicial protection ensures that, in the absence of national law remedies, EU rights are subject to protection before the national courts. Following *Unibet*, the EU Court proved willing to go to the extreme of demanding the creation of new remedies when existing national remedies are falling below the standard required to protect individual rights. This does not mean the demise of the national remedial autonomy rule, as this rule will be used as a starting point to assess the adequacy of existing domestic remedies. The EU Court has a very fine line to tread between excessive judicial activism and the need to ensure that EU rights are protected effectively. Without the EU Court of Justice's intervention into the national sphere of remedies there would have been occasions where EU rights were seriously undermined. The EU Court's intervention has helped to address this

deficiency.

The balancing approach: the 'Fourth Generation' case law

The EU Court has been, in some cases, keen to support National Procedural Autonomy and move away from its far reaching intervention. The 'Fourth Generation' case law sees the EU Court showing greater deference to the national rules, with the suggestion that the principle of effectiveness of EU law had to be balanced against the principle of legal certainty in the application of national rules. This would mean that legal rules must be clear and precise so individuals can know their rights. Therefore, the EU Court now uses a balancing test. This was formulated in the twin cases of *Van Schijndel* [1995] and *Peterbroeck* [1993].

In *Van Schijndel*, rather than emphasising effectiveness the EU Court stated that:

a national procedural provision which renders the application of a EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances (*Van Schijndel* [1995], paragraph 19).

This judgment means that the impact of the national rule must be analysed on the facts of each case, to see whether EU law rights are rendered excessively difficult taking into account the legal certainty of the MS.

Both *Van Schijndel* and *Peterbroeck* presented challenges to procedural principles preventing the national court from raising issues of EU law of its own motion. In *Van Schijndel* during the Court proceedings the plaintiffs were trying to raise new arguments in the case based on EU law and the litigants were not permitted to introduce new legal arguments, unless pleaded at the outset. This is because under Dutch law all legal arguments need a new factual enquiry. This meant that the Dutch Court could not raise the EU issue of its own motion. The EU Court held that the Dutch law was not incompatible with EU law.

In *Peterbroeck*, a statute of limitation barred claims made after the expiration of a 60 day time limit. When the litigants tried to rely on EU rights after the expiration of the time limit the statute of limitation prevented the litigants from asserting, and the national court from considering of its own motion, EU claims. The EU Court held that the exercise of the EU law right had been rendered

excessively difficult.

The EU Court reached opposite results in the two cases. In *Van Schijndel* the EU Court found the challenged procedural rule justified on the ground that it 'safeguards the rights of the defence and ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in the examination of new pleas' (*Van Schijndel* [1995], paragraph 21). The EU Court was therefore taking into account the legal certainty of national procedural rules in that case.

In *Peterbroeck*, the Court found the 60-day time limit not unreasonable, but held that the expiry of the 60 day time limit prevented the national court and any other higher court from raising EU law issues of its own motion and if appropriate make a reference.

The two cases may be distinguished on the ground that the *Van Schijndel* rule applied in a situation where the Dutch court had the opportunity to raise an EU law issue of their own motion, but could not raise the issue because doing so would distort legal certainty. The EU Court accepted this. In *Peterbroeck*, on the other hand, the litigants' failure to raise the issue within the time limit prevented the national courts from addressing the issue altogether. This meant that the time limit effectively barred the applicant from ultimately relying on his EU right. There was no danger to legal certainty had the time limit been set aside. The EU Court thus recognised that the EU right in question had been rendered 'excessively difficult'.

It is important that national courts have the ability to raise EU law issues of their own motion because it enhances the effective application of EU law. However, some commentators have criticized the Court for overly intruding into the national realm by 'looking to achieve a result which is "correct" as a matter of EU law, rather than simply to resolving the dispute between the parties' (Hoskins 1996, 142-143).

The 'balancing test' suggests that the EU Court reconciles the tension between the principle of NPA and the need to ensure the effective protection of EU law rights. However, the problem in emphasising the importance of the facts of each case it creates much legal uncertainty. Ironically, in attempting to achieve legal certainty the EU Court actually produces more uncertainty. This means that the balancing test can undermine effective judicial protection of individual rights because of the legal uncertainty it conjures for individuals.

However, concerning *Van Schijndel*, AG Jacobs stated 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' (*Van Schijndel* [1995], opinion of AG Jacobs, paragraph 27). This would 'unduly subvert established principles underlying the legal systems of the MS' (*Van Schijndel* [1995], opinion of AG Jacobs, paragraph 27), although some divergence in the way of Union law would occur because of 'a consequence of a variety of the national legal systems themselves' (*Van Schijndel* [1995] opinion of AG Jacobs, paragraph 38).

It seems that Jacobs does support this balancing test, because it respects the principle of NP. By looking at cases separately, taking account of legal certainty and the special features of the case. By intervening to safeguard EU rights at the expense of the national procedural framework of a member state would, in fact, be detrimental to individuals because it may undermine the legal certainty in those cases, such as *Factortame*, where the decision effectively meant that EU law rights would be treated more favourably than those based in domestic law. However, he does support that some harmonisation is necessary because of the varying legal systems of the member states and the problems that can occur within them.

Conclusion

The EU Court has had an audacious journey in the sphere of remedies. From the EU's inception the EU Court took a minimal role with remedies whilst establishing the supremacy principle. The lack of intervention by the EU institutions to legislate and produce harmonising measures for remedies, to make them more effective, and to reduce the problems the EU court would experience later, meant that the member states were left to decide for themselves what remedies and procedural rules should be put in place. This inherently meant that rights across the member states would ultimately be protected with varying degrees because of their different legal systems. This did not safeguard EU rights. The minimum standard of protection offered to EU rights, in the form effectiveness and equivalence, also left gaps in the protection of rights when there was no duty to create a remedy. EU rights would therefore be left unprotected in circumstances where there is no remedy for the equivalent national right.

However, the principle of effectiveness has led the EU Court to intervene to protect EU rights, as in *Factortame*, with the existing procedural rule being revoked and the granting of interim relief. This was an ambitious move from the EU Court, which left a bold statement on national courts that remedies may have to be created where none existed to ensure the protection of individual rights.

However, nothing was certain until the EU Court took another bold step forward by requiring new remedies to be created to ensure effective protection of EU rights in *Unibet*.

The effectiveness principle thus had been elevated to a higher status since the early days of *Rewe* and *Comet* and is now an effective mechanism for judicial control on the remedial system. However, since the formulation of the balancing test, it seems that the EU Court is more concerned with protecting EU rights, whilst respecting the national remedial and procedural autonomy of a member state, than the previous extremes of either neglecting altogether to safeguard the effectiveness and uniform application of EU law, or overriding domestic concerns such as legal certainty.

If legislative measures had been introduced to harmonise both the procedural rules and the remedies of member states, this may have created problems by interfering with the local, political, social and cultural preferences that are embodied in the national systems of judicial protection.

It may have been better for legislative measures to be introduced in this area by the EU institutions, so that there are EU wide remedies in place. This would result in a more harmonious legal order, whereby EU remedies would be consistent across the member states. It would also respect the NPA of a member state, because the balancing approach could still be used on a case by case basis to ensure that procedural rules do not breach the effectiveness principle. This would be better in striking a fairer balance between respecting the NPA of a member state and securing effective EU rights.

This would be a far more efficient method of protecting people's rights and better than judicial harmonisation of NRA, whereby the EU Court only deals with remedial issues that have been brought before its attention through the PRP.

Note

This article has been extracted from a third year Dissertation (2011) and has since been slightly updated to include recent developments in this area.

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