UDC: 341(4-672EU)
Review paper
Receved December 20, 2022.
Accepted: December 29, 2022.
Corresponding author: veljko.milutinovic@gmail.com

THE RELATIONSHIP BETWEEN EFFET UTILE AND NATIONAL PROCEDURAL AUTONOMY UNDER EU LAW

dr Veljko Milutinović,
Associate Professor, Faculty of Business Studies and Law, University "Union-Nikola Tesla"; e-mail: veljko.milutinovic@gmail.com

Abstract:

This paper brings together two principles, i.e. alleged principles of EU law namely, effet utile of EU law and national procedural autonomy under EU law. For decades, these principles seemed to act as opposing forces: the first pulling toward closer EU integration and the harmonization of the EU legal order and the second pulling toward a more fragmented system of an EU as an amalgamation of national legal orders. Effet utile was developed by the Court of Justice of the European Union as a method of judicial harmonization. It served to plug the gaps left behind by EU legislation and national law, using the need for an effective application of primary EU law as a pretext for harmonizing national law or, rather, imposing new legal solutions derived from EU law itself. National procedural autonomy, while pulling towards decentralization, was similar in one key respect: it, too sought to plug the gaps in the EU system of law(s), by using national legal remedies and procedures to give effect to EU law in the national legal systems. The aim of this paper is to demonstrate that the two principles, while often opposed, are, indeed, inseparable and should be perceived as a single guiding philosophy in trying to give effect to EU law in the national legal orders. The methodological difficulty arises in determining where and when, and on what basis, one principle ends and the other one begins. How much national autonomy should be allowed for effectiveness of EU law? When does effectiveness go beyond what is necessary in a decentralized, still largely national legal system? In order to raise and to try and respond to such questions we must aim at the root of the constitutional framework of EU law. This paper will try to raise the right questions, while leaving the answers to a much broader and longer debate.

Key words: EU law, effet utile, proportionality, subsidiarity, national procedural autonomy

INTRODUCTION

This article brings together two principles, or alleged principles of EU law namely, *effet utile* of EU law and national procedural autonomy under EU law. For decades, these principles seemed to act as opposing forces: the first pulling toward closer EU integration and the harmonization of the EU legal order and the second pulling toward a more fragmented system of an EU as an amalgamation of national legal orders.

For its part, *effet utile* (roughly translatable as useful effect) of EU law was developed by the Court of Justice of the European Union (CJEU) as a method of judicial harmonization. It served to plug the gaps left behind by EU legislation and national law, using the need for an effective application of primary EU law as a pretext for harmonizing national law or, rather, imposing new legal solutions derived from EU law itself. National procedural autonomy, while pulling towards decentralization, was similar in one key respect: it, too sought to plug the gaps in the EU system of law(s), by using national legal remedies and procedures to give effect to EU law in the national legal systems.

The aim of this paper is to demonstrate that the two principles, while often opposed, are, indeed, inseparable and should be perceived as a single guiding philosophy in trying to give effect to EU law in the national legal orders. The methodological difficulty arises in determining where and when, and on what basis, one principle ends and the other one begins.

1. COMPETENCE, SUBSIDIARITY AND PROPORTIONALITY

According to Article 5(3) of the EU Treaty:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The EU acts under enumerated powers and may not enact measures that lie beyond its sphere of competence."[1] Within its sphere of competence, if the competence is not exclusive, the Union may only act if it is best placed to do so, based on the scale of the

1 In the early days of the European Coal and Steal Community, the Court that ultimately became the CJEU has held, in the context of the ECSC Treaty, in Joined Cases 7/56 and 3 to 7/57, *Dinecke Algera v. Common Assembly of the European Coal and Steel Community* [1957-8] ECR 39:
The Treaty rests on a derogation of sovereignty consented by the Member States to supranational jurisdiction for an object strictly determined. The legal principle at the basis of the Treaty is a principle of limited competence. The Community is a legal person of public law and to this effect it has the necessary legal capacity to exercise its functions but only those.
This principle was also set out in Article 4(1) the original EEC Treaty, where it was stated that "each institution shall act within the limits of the powers conferred upon it by this Treaty." Today, Article 1(1) of the Treaty Establishing the European Union (EU Treaty) clearly provides:

problem and the likelihood that the envisaged solution would address it (principle of subsidiarity). Likewise, EU measures, both under exclusive and shared competence, must be limited to what is necessary to fulfil one or more objectives of EU law (principle of proportionality).[2] Thus, in adopting any measure, the EU must look out for competence (exclusive or shared), subsidiarity and proportionality.

Competence is usually relatively easy to establish, subject to some significant exceptions, which fall outside the scope of this paper. Exclusive and shared competences are listed in Articles 3 and 4 of the Treaty on the Functioning of the EU (TFEU). Although the wording remains relatively vague and open to divergent interpretation, it is no less vague that the enumeration of competences in most federal constitutions.

Subsidiarity is most closely related to the principles of *effet utile* and national procedural autonomy. It directly poses the question: should the particular issue be settled by EU or national law? One of the key answers to the question is found in *effet utile*, which establishes that the very effectiveness of existing EU law dictates the adoption of further EU law, either through legislation or, as is more often the case with this principle, through judicial interpretation of EU law vis-à-vis the national legal orders. In a way, *effet utile* arises as a secondary "activator" of EU law, once it has already been established that EU law must be "effective" is, indeed, adopted on the basis of exclusive competence or, if not, is compliant with the principle of subsidiarity.

Proportionality is also intimately linked to both *effet utile* and national procedural autonomy. It asks the question: is the EU measure necessary to give effect to a principle or a specific norm of EU law? One source of such necessity is *effet utile*. A countervailing lack of necessity is invoked when one calls upon the principle of national procedural autonomy, arguing that national law is best placed to address a certain issue.

2. EFFET UTILE

2.1. The Beginning of *Effet Utile*

Unlike enumerated competences, subsidiarity and proportionality, *effet utile* does not really have a specific normative basis in the EU Treaties. The closest approximation could, perhaps, be found in Article 4(3) of the EU Treaty, which provides:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.

2 Article 5(4) of the EU Treaty (post Lisbon) and the annexed Protocol on the application of the principles of subsidiarity and proportionality.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

As it is framed in the Treaty, sincere cooperation was envisaged more as a duty not to obstruct the implementation of EU law and to assist its implementation, rather than a duty to change laws to suit the needs of the EU. Arguably, the *spiritus movens* behind sincere cooperation and *effet utile* is similar or related. Still, *effet utile* takes matters at least one step further.

Effet utile was developed not through the Treaties but, rather, through an ever-expanding judicial interpretation of EU law. The key moment in this respect is the development of the twin principles of equivalence and effectiveness (of national measures implementing EU law), set out by the Court of Justice of the European Union in its seminal *Rewe-Zentralfinanz* judgment.[3] In the now famous paragraph 5 of the judgment, the Court has held:

…it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of [Union] law.

Accordingly, in the absence of [Union] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [Union] law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.

…

In the absence of … measures of harmonization the right conferred by [Union] law must be exercised before the national courts in accordance with the conditions laid down by national rules.

The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.

These are the now settled principles of equivalence and effectiveness of national procedures and remedies, in the context of application of EU law. National law should provide procedures and remedies that are no less effective than those that would be available for protection of national law rights. Through the notion that national measures must not "make it impossible in practice to exercise" EU law rights, the Court also introduced the seeds of *effet utile*.

These seemingly simple principles raise several problems in practice: what, exactly are national law rights equivalent to EU law rights? How difficult must it be to apply EU law so as to make it "impossible in practice"? What does "impossible in practice" even mean?

To make things even more complicated, the beginning of the above quote contains what is, perhaps, a statement to the effect that there is a national procedural autonomy.

3 Case 33/76, *Rewe-Zentralfinanz eG et Rewe-ZentralAG v. Landwirtschaftskammer fur das Saarland* [1976] ECR 1989.

"In the absence of [EU] rules on the subject," it is the Member states that determine the competent courts and procedural rules. More will be said about this principle in the second part of this paper. The key issue is determining the absence of EU law rules on any given subject.

2.2. The Real Meaning of *Effet Utile*

Rewe-Zentralfinanz may have seemed innocuous enough at the time of its adoption. After all, it was only fair that Member States should treat EU law claims no worse than national claims. Logically also, if the application of EU law is to mean anything, it must not be impossible.

The real bite of *effet utile*, as opposed to mere impossibility in practice, was demonstrated by the Court just two years later, in *Simmenthal*.[4] This was a situation where, under Italian law, a party that wished to prove the unconstitutionality of a legal provision due to its incompatibility with EU law had to have recourse to the Constitutional Court of the country. There was no discrimination: the same rule applied whether a norm was unconstitutional on domestic grounds or as a result of incompatibility with EU law. Likewise, putting aside a provision of national law was not *impossible*-it was merely reserved to the Constitutional Court.

The Court pronounced that such a state of affairs could not stand and that it is incumbent upon every national court to put aside a provision of national law in a case before it, if it infringes EU law, without having to wait for the Constitutional Court or similar high judicial instance.[5] Thus, impossibility in practice was disregarded and *effet utile* shone in its full light. The threshold for what was "impossible" was set rather low. Equivalence, likewise, was thrown out of the window, as the Court actually gave greater rights to parties claiming a breach of EU law than those enjoyed by parties claiming a breach of the national constitution.

The purpose of *Simmenthal* was, therefore, to greatly accelerate the application of EU law. There should be no more time lags between "ordinary" and supreme/constitutional courts. EU law became the law of the land, from the most humble justice of the peace, up to the most exalted judicial instance. If there was any doubt as to what this meant, the Court made it plain, in its 1990 judgment in F*actortame*[6] that even the then-famous English law constitutional rule that no court can set aside an act of Parliament, could not stand in the way of EU law. While English courts were not entitled to set aside national law in general, they had to do so if a national law was in conflict with primary EU law, the Court held.[7]

In these years of judicial activism, the Court cemented the position of *effet ultile* in the seminal 1983 *San Giorgio* judgment. In that case, the question was whether a national

4 Case 106/77, *Amministrazione delle finanze dello Stato v. Simmenthal* [1978] 629.
5 *Ibid*. paras 20-21.
6 C-213/89, *R v. Sec. of State for Transport, ex parte Factortame* [1990] ECR I-2433.
7 *Ibid*. para. 23 of the Grounds and the Judgment.

rule for restitution of unlawfully collected taxes that required the claimant to prove that he did not "pass on" the taxes to his clients was contrary to *effet utile*, if the taxes were reclaimed on the basis of EU law. The Court held that it was, and that the rule made EU law impossible to apply in practice. Again, like in *Simmenthal* and in *Factortame*, this was clear discrimination in favour of EU law: national claimants had to fulfil an evidentiary burden that EU law claimants did not.

Needless to say, the influence of the Court of Justice on national law went beyond merely bolstering EU law. In many or most cases, once a more favourable rule for a claimant was introduced under EU law, Member States felt that it no longer made sense to have less favourable rules for claimants applying under national law. *San Giorgio* was a case in point, proving the existence of an unreasonable rule: why should any victim of excessive taxation need to prove that he did not "pass on" the tax? Effectively, this system made a claim for restitution of unlawfully collected taxes into a claim for damages, where the claimant had to prove damage, which is much more onerous than proving unlawfully collected taxes. Still, it became quite evident that mere equivalence of procedures (for EU and national law) would not suffice, and that "impossible in practice" actually meant something more like "difficult in practice."

The *Factortame* saga gave birth to another principle of EU law that made *effet utile* an extremely powerful weapon for giving effect to EU law and even harmonizing national laws. In *Brasserie du Pecheur/Factortame*, a further clarification of *Factortame* was issued, in 1996. There the Court held that, regardless of the position under national law, a breach of a directly effective provision of the then EC Treaty (now supplanted by the Treaty on the Functioning of the European Union-TFEU) leads to a right to damages before the national courts.

The position of *effet utile* was solidified, arguably, in the *Courage* and *Manfredi* judgments, of 2001 and 2006 respectively. These cases concerned the application of EU competition law before national courts. In the first case,[8] the Court held:

The full effectiveness of Article [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[9]

Thus, the practical effect of the EU competition rules mandated that damages were available to victims of their breach, regardless of what national law had to say on this matter. *Manfredi* built on these premises and established that EU law contains minimal rights with regard to limitation periods, a minimal concept of damages to include actual damages and loss of profits, plus interest.[10] At the time of the judgment, none of this was set out under any act of EU law.

All of this is not to say that *effet utile* had grown without any limits, in just one direction. A significant, clear and yet somewhat unfair limitation of this principle is to be

8 Case C-453/99, *Courage v. Crehan* [2001] ECR I-6297.

9 *Ibid.* para. 26 of the Grounds.

10 Cases C-295 to C-298/04, *Manfredi et al. v. Lloyd Adriatico et al* [2006] ECR I-6619, paras 78 and 95.

found in the principle of *res judicata*. The Court has consistently refused to impose an obligation to reopen final national judgments where EU law was not, or was improperly applied, as, for example, in *Kühne & Heinz*.[11] The same applies to final arbitral awards, as was found in *Eco Swiss China*.[12] A significant exception to the *res judicata* principle, set out in the *Lucchini* judgment, is when a Member State judgment is directly opposed to a decision of the European Commission, e.g. to return unlawfully paid state aid.[13] Thus, badly decided cases do not need to be reopened, unless the Member State had directly contravened an EU decision. Claimants that wish to have their rights observed must ensure to do so before the judgment in their case becomes final.

3. NATIONAL PROCEDURAL AUTONOMY

3.1. An Attempted Definition

Authors writing on EU law often tend to mention national procedural autonomy. The notion is visible in any debate on actual and potential EU measures that affect the rules on liability, remedies and procedure that can be used before national courts in the enforcement of EU substantive law. Interestingly, most authors do not go to any length to elaborate this concept but usually mention it in passing, as if it were somehow implied or universally understood.[14]

Like the principle of *effet utile*, the roots of national procedural autonomy are found in the previously discussed judgment of Rewe-Zentralfinanz:

…in the absence of [Union] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [Union] law.[15]

This formulation has been repeated continuously by the Court in subsequent cases, including even the aforementioned *Courage* and *Manfredi*.[16] It is important to note, however, that the Court did not indicate—in *Rewe-Zentralfinanz* or any other judgment—that "the absence of Union rules" is a permanent condition. Indeed, the EU was and remains

11 Case C-453/00, *Kühne & Heinz NV v. Produkschap voor Pluimvee en Eiren* [2004] ECR I-837, para. 28.

12 Case C-126/97, *Eco Swiss China Time v. Benetton International* [1999] ECR I-3055, para. 48.

13 Case C-119/05, *Ministero dell'industria, del commercio e del artigianato v. Lucchini SpA* [2007] ECR I-6199, para. 63.

14 See, e.g. Chalmers, D, Hadjiemmanuil, C, Monti G. and Tomkins A, European Union Law (Cambridge, CUP, 2006), pp. 390-409, accepting that the Francovich line of case law represents a significant "erosion" of that principle; Craig and De Búrca mention the concept as a "basic principle", but then state that the Court emphasised "the responsibility of the Member State, where there are no relevant Community rules, for determining the procedural conditions under which Community rights are to be protected." Craig P. and De Búrca, G. EU Law: Text, Cases and Materials (3rd ed. Oxford, OUP, 2003), pp. 231-232 (emphasis added).

15 *Rewe-Zentralfinanz*, n 3 above para 5.

16 *Courage*, n 8 above, para 29; *Manfredi,* n 10 above, para 62.

able to regulate the issues of procedure and remedies for breach of EU law. In the case of *Courage* and *Manfredi,* a comprehensive Directive was adopted to harmonize some rules of procedure and remedies in the field of actions for damages for breach of EU competition law, partly based on the principles set out in these two judgments.[17]

This outcome was foreseen by the Court in Rewe-Zentralfinanz, as evidenced by the following paragraph:

Where necessary, Articles [115] to [117] and [352] of the Treaty enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the common market.

While the TFEU does not explicitly foresee EU rules on procedure and remedies (except the non-contractual liability of the Union, under Article 340(2)), it also does not prohibit the adoption of such rules. Therefore, it could be concluded that the Court in *Rewe-Zentralfinanz* was referring to a temporary state of affairs, where rules on procedure and remedies to be used are national ones, *pending* the adoption of EU rules, where necessary.

More recently, the Court gave in to the weight of scholarly repetition and mentioned the concept of "procedural autonomy of the Member States" explicitly in the 2004 judgment in *Delena Wells*.[18] Ever since, the idea that "national procedural autonomy" exists as an EU law term is not really in dispute.

The concept remains, however, notoriously difficult to define. One aspect of the concept is the general rule under public international law, that States are liable to implement international treaties using their own procedural rules and remedies (unless the international law in question concerns e.g. requirements of fair procedure, such as under Article 6 of the European Convention on Human Rights). In that sense, national procedural autonomy is nothing really new.

Having said that, the EU legal order is not a typical international legal order. Rather, it is a supranational legal order, where Member States act with limited sovereignty,[19] applying common rules that enjoy supremacy over national law, and which are often directly effective.

Therefore, one could couple the international law tradition with the *Rewe-Zentralfinanz* definition of "in the absence of Union rules" to produce a principle to the effect that national laws determine rules of procedure and remedies *until such time* as they are harmonized by the EU. This definition is supported by the aforementioned EU practice, of gradually extending principles from Court of Justice judgments into laws, e.g. directives.

17 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349/1).

18 Case C–201/02, *The Queen ex parte Delena Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I–723, para 70.

19 Case 6/64, *Flaminio Costa v E.N.E.L.* [1964] Eng. Spec. Ed. 585.

3.2. The Practical Meaning of National Procedural Autonomy

The difficulty with national procedural autonomy is that it is largely devoid of clear, enforceable, justiciable substance. Not only is there no mention of such a principle in the Treaty or pre-2004 Court of Justice case law, the idea that national law should somehow be 'autonomous' vis-à-vis EU law is not compatible with the EU legal order.

EU Member States are not autonomous entities of an EU superstate. Member State sovereignty is surrendered to the Union only "within limited fields."[20] While the Member States may abolish the Union, the Union cannot abolish the Member States. The Union does not grant the autonomy of the Member States; all of its competences are set out in an international treaty and it must act under the principle of conferred powers.[21] On the contrary, if anything, it is the Union's legal order that is autonomous vis-à-vis the Member States that confer powers on it, as it is the Member States that carry the popular sovereignty of their peoples.

Closer to the point, if Member States were autonomous parts of the Union, their 'autonomy' cannot be really defined. If a Member State is 'autonomous' in setting out procedures and remedies for applying EU law, how can the Court of Justice find, as it did in *Simmenthal* and in *Factortame,* that a national court of first instance can stop the application of a national statute, when this function is clearly attributed to the constitutional court and/or the legislature? Is a Member State 'autonomous' when the Court holds, as it did in *San Giorgio*, that there must be no presumption that overpaid taxes were "passed-on" by the plaintiff to his customers? Can there be any real 'autonomy' after the Court's ruling in *Manfredi*, stating that there can be no *a priori* limit on the amount of compensation awarded to victims of competition infringements and that, where damages are awarded, these must include interest? The Union has already legislated on issues of civil liability, remedies and procedure on several occasions, not least in the directives on unfair terms in consumer contracts,[22] product liability,[23] enforcement of intellectual property rights,[24] late payment in commercial transactions,[25] and many others. Therefore, one cannot argue

20 *Ibid*.

21 The late Judge of the Court of Justice Kakouris has noted that the lack of Kompetenz-Kompetenz distinguishes the Union legal system from that of a federal state: Kakouris, C. N. "Do the Member States Posses National Judicial Autonomy?" 34 CMLRev. (1997) 1389, at 1391. Note, however, that even in the United States, the federation operates under enumerated competences, while the individual States do not; see Amendment X to the U.S. Constitution and Cooley, T. M, *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* (Boston, Little, Brown & Co., 1927) pp. 9-10.

22 Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] L 95/29.

23 Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L10/29, as amended by Directive 99/34 (EC) of the Parliament and the Council amending Council Directive 85/374 etc. [1999] OJ L141/20.

24 Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004) [2004] OJ L 195/16.

25 Directive 2000/35/EC of the Parliament and the Council on combating late payments in commercial transactions [2000] OJ L200/35.

that because rules of procedure and remedies are concerned, the Union *cannot* adopt legislation. The argument does not hold even if it were toned-down to the effect that there is an inherently higher threshold of 'need' in order for the Union to be competent.

Accordingly, national procedural autonomy does not seem to be a workable principle for delineating powers between the EU and its Member States.

An attempt has been made, however, to make a similar delineation in the 1997 Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of Amsterdam. Point 7 of the aforesaid Protocol provides:

Regarding the nature and the extent of [Union] action, [Union] measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting [Union] law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, [Union] measures should provide Member States with alternative ways to achieve the objectives of the measures.

This too is an imperfect rule for dividing competences. What the provision above makes evident is that the Union is obliged not to excessively interfere with the legal orders of the Member States. EU law should also avoid going into too much detail, as it is impossible to foresee the daily needs of legislation and adjudication in all the Member States.

It must be noted that, when the Lisbon Treaty came into force, this protocol was replaced by a new protocol (Protocol 2 to the Treaty of Lisbon) under the same name. The article that was present in the protocol annexed to the Treaty of Amsterdam is entirely absent—it has not even been reproduced in a modified form. While the new protocol explains the procedure for applying the principles of subsidiarity and proportionality in detail, it is almost entirely silent with regard to the substance of those principles. Therefore, the abovementioned provision is not binding on the Union Institutions. Why this omission was made is not clear.

4. RECONCILING *EFFET UTILE* WITH NATIONAL PROCEDURAL AUTONOMY

The dismissal of national procedural autonomy as a clear demarcation of powers should not mean that there is no scope for national rules to govern a civil law action arising on the basis of EU law. What *Rewe-Zentralfinanz* and subsequent case law have shown is that 'in the absence of Union rules' and insofar as that is the case, national law must be deployed to fill in the gaps left behind by an incomplete system of legal protection, which is EU law.[26]

Accordingly, insofar as the Union has competence to legislate in a given field, national law is the 'default position' pending Union measures. Insofar as the Union does not have

26 In this direction Kakouris, n 21 above, pp. 1395-1396.

competence to legislate, national law remains the only applicable law,[27] not because of any division between substance on the one hand and procedure and remedies on the other but simply due to practical considerations. Whether an individual piece of Union legislation represents an 'excessive' interference with established principles of national law is another matter entirely and is, as stated above, relevant to the assessment of proportionality and subsidiarity.

Rather than thinking about national procedural autonomy and *effet utile* as two opposing forces, it may be more useful to think about how these two principles can work together. An argument could be made to the effect that they represent a single principle, that of necessity of EU intervention in civil cases, or the lack thereof.

In this respect, it is regrettable that Point 7 of the 1997 Protocol on the application of the principles of subsidiarity and proportionality has not survived in the Lisbon Treaty. Having said that, we further point out that there is nothing to prevent the Court of Justice and other courts, including national courts, from inferring such principles, using a teleological approach to interpreting EU law, as the Court of Justice often has done before.

Using the principles set out in the Protocol, one should leave as much room as possible for national rules, especially those that are well-established and systemic. When looking at whether to infer or adopt EU rules to regulate procedure and remedies, one may pose this series of questions:

- Does the national rule on procedure or remedies impede the effective application of EU law, by making it difficult in practice to protect EU rights?
- If so, is the rule in question a mere inconvenience, in which case it should be left alone, or is it a serious difficulty that would make the application of EU law impractical or improbable?
- If the latter, can the problem be addressed by negative action, by putting aside a national rule in cases such as the one before the court, or must a positive rule be introduced?
- If a positive rule must be introduced to remedy the serious difficulty, can this be done by a creative interpretation of existing EU law, or must new EU law rules be prescribed?

What the two principles have been working towards, in the opinion of the present author, from the very beginning, is the adoption of a common set of guidelines for EU and national courts to determine how to address national rules that impede the effective application of EU law. In this respect, *effet utile* can be said to subsume national procedural autonomy, as the latter is not really a free-standing, definable concept. Rather, national procedural autonomy arises as a negative test, when it is found that no changes to the national legal order are justified.

27 This is without prejudice, of course, to the adoption of legislation under Article 308 of the Treaty. Even this exceptional type of legislation must, however, be adopted in furtherance of an "objective of the Treaty.

The main difficulty, and it is, admittedly, a large one, is to determine *how much* of an impediment to EU law is *too much*. Or, alternatively, what level of interference with national law is excessive for the purposes of effectiveness of EU law. The Court of Justice has decided some obvious cases, such as *Factortame*, where the national rule basically made the application of EU law completely impossible, as national courts were simply not allowed to apply it to the case before them. The other end of the spectrum, where the Court has opined against changing national rules is more difficult to comprehend: why is it that the Court considers the rule of *res judicata* to be so sacrosanct as to enable many wrongful interpretations of EU law to go uncorrected?

In a sense, the system is self-correcting. A party that feels their EU rights are being violated should pursue the case to the court of last instance of the Member State in question, which is then obliged to submit an issue of interpretation of EU law to the Court of Justice, under Article 267(3) of the TFEU. If the highest national court refuses to do so unreasonably, the party may be able to claim compensation from the Member State under the rules set out in *Köbler.*[28] This, of course, raises the issue of efficiency and economy of proceedings but that is a matter for a different discussion. What the need to reach the highest court does show is that the EU, despite the enormous level of legal integration and precedent that has built up over the past seven decades, remains, in this respect, an international organization, dependent, to a large extent, on the good will of national courts to respect its norms. This should not be mistaken for any kind of autonomy: it is, indeed, Westphalian sovereignty in its most basic form.

CONCLUSION

The principles of *effet utile* and national procedural autonomy have developed in parallel, stemming largely from the Court of Justice's seminal judgment in *Rewe-Zentral-finanz* almost five decades ago. These five decades have seen a sort of push-and-pull effect between the Court of Justice and national legal systems, with the Court of Justice claiming ever more space for EU law, seemingly at the expense of national rules on procedure and remedies. To some extent, the Court was supported by the Council and the Parliament, which often strived to harmonize such rules.

After almost half a century, it may be worthwhile to rethink this issue. Perhaps we could combine these two elements of the same principle, having in mind the necessity of EU intervention in civil cases. This principle of necessity should be a balancing act, carefully considering the pros and cons of EU intervention. Special care should be taken not to impinge on national law when the impediment to the effectiveness of EU law is minor. The language of 'national procedural autonomy' should perhaps be avoided, as there is no clear autonomy to be defined, and the EU Member States are not autonomous entities created by the EU. Rather, the EU was created by the Member States.

28 Case C-224/01, *Gerhard Köbler v. Austria* [2003] ECR I-10239.

In the early days of the European Coal and Steal Community, the Court that ultimately became the CJEU has held, in the context of the ECSC Treaty, in Joined Cases 7/56 and 3 to 7/57, *Dinecke Algera v. Common Assembly of the European Coal and Steel Community* [1957-8] ECR 39:

The Treaty rests on a derogation of sovereignty consented by the Member States to supranational jurisdiction for an object strictly determined. The legal principle at the basis of the Treaty is a principle of limited competence. The Community is a legal person of public law and to this effect it has the necessary legal capacity to exercise its functions but only those.

This principle was also set out in Article 4(1) the original EEC Treaty, where it was stated that "each institution shall act within the limits of the powers conferred upon it by this Treaty." Today, Article 1(1) of the Treaty Establishing the European Union (EU Treaty) clearly provides:

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.

REFERENCES

Article 5(4) of the EU Treaty (post Lisbon) and the annexed Protocol on the application of the principles of subsidiarity and proportionality.

Case 33/76, *Rewe-Zentralfinanz eG et Rewe-ZentralAG v. Landwirtschaftskammer fur das Saarland* [1976] ECR 1989.

Case 106/77, *Amministrazione delle finanze dello Stato v. Simmenthal* [1978] 629.

Ibid. paras 20-21.

C-213/89, *R v. Sec. of State for Transport, ex parte Factortame* [1990] ECR I-2433.

Ibid. para. 23 of the Grounds and the Judgment.

Case C-453/99, *Courage v. Crehan* [2001] ECR I-6297.

Ibid. para. 26 of the Grounds.

Cases C-295 to C-298/04, *Manfredi et al. v. Lloyd Adriatico et al* [2006] ECR I-6619, paras 78 and 95.

Case C-453/00, *Kühne & Heinz NV v. Produkschap voor Pluimvee en Eiren* [2004] ECR I-837, para. 28.

Case C-126/97, *Eco Swiss China Time v. Benetton International* [1999] ECR I-3055, para. 48.

Case C-119/05, *Ministero dell'industria, del commercio e del artigianato v. Lucchini SpA* [2007] ECR I-6199, para. 63.

See, e.g. Chalmers, D, Hadjiemmanuil, C, Monti G. and Tomkins A, European Union Law (Cambridge, CUP, 2006), pp. 390-409, accepting that the Francovich line of case law represents a significant "erosion" of that principle; Craig and De Búrca mention the concept as a "basic principle", but then state that the Court emphasised "the responsibility of the Member State, where there are no relevant Community rules, for determining the procedural conditions under which Community rights are to

be protected." Craig P. and De Búrca, G. EU Law: Text, Cases and Materials (3rd ed. Oxford, OUP, 2003), pp. 231-232 (emphasis added).

Rewe-Zentralfinanz, n 3 above para 5.

Courage, n 8 above, para 29; *Manfredi,* n 10 above, para 62.

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349/1).

Case C–201/02, *The Queen ex parte Delena Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I–723, para 70.

Case 6/64, *Flaminio Costa v E.N.E.L.* [1964] Eng. Spec. Ed. 585.

Ibid.

The late Judge of the Court of Justice Kakouris has noted that the lack of Kompetenz-Kompetenz distinguishes the Union legal system from that of a federal state: Kakouris, C. N. "Do the Member States Posses National Judicial Autonomy?" 34 CMLRev. (1997) 1389, at 1391. Note, however, that even in the United States, the federation operates under enumerated competences, while the individual States do not; see Amendment X to the U.S. Constitution and Cooley, T. M, *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* (Boston, Little, Brown & Co., 1927) pp. 9-10.

Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] L 95/29.

Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L10/29, as amended by Directive 99/34 (EC) of the Parliament and the Council amending Council Directive 85/374 etc. [1999] OJ L141/20.

Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004) [2004] OJ L 195/16.

Directive 2000/35/EC of the Parliament and the Council on combating late payments in commercial transactions [2000] OJ L200/35.

In this direction Kakouris, n 21 above, pp. 1395-1396.

This is without prejudice, of course, to the adoption of legislation under Article 308 of the Treaty. Even this exceptional type of legislation must, however, be adopted in furtherance of an "objective of the Treaty.

Case C-224/01, *Gerhard Köbler v. Austria* [2003] ECR I-10239.