

# Remedies as an EU law concept

14<sup>th</sup> ANNUAL CONFERENCE OF THE GCLC  
Brussels, 31 January 2019

Takis Tridimas

Professor of European Law, King's College London;

College of Europe, Bruges

Barrister, Matrix Chambers

[takistridimas@matrixlaw.co.uk](mailto:takistridimas@matrixlaw.co.uk)

## What is a remedy?

- A common law intrusion into EU law
- No Treaty recognition until Lisbon: Article 19(2) TEU
- Remedies as a corollary to rights
- Remedies as a means of enforcement
- The two provide contrasting aspects of EU law as a force empowering the citizen and as an authority exercising imperium

## Remedies as a corollary to rights

- They are primarily judicial remedies
- They are judge-made: the law of remedies has been developed first and foremost by the ECJ
- The driver for its development has been the principle of effectiveness which has had a transformative effect: C-6 and C-9/90 *Francovich* [1991] ECR I-5357
- In EU law, the law of remedies is concretised constitutional law
- Linked to the right to judicial protection

## Rights and remedies

- Right: a condition or status recognized to a person by law, e.g. the right not to be discriminated on grounds of race or nationality; A right may be express or implied, substantive or procedural in nature.
- Remedy: the means of redress and enforcement of the right in the event that it is violated, e.g. a right to bring an action for compensation or judicial review. A remedy may also be express or implied.
- The two are closely connected but not necessarily coterminous.

## Rights and remedies

- EU law tends to provide for rights but not for remedies
- The following possibilities exist (these apply both to rights and/or remedies against public authorities and private parties):
- 1) **Express recognition of rights but no reference to remedies:** the EU provides for a right but is silent on the remedy (e.g. the right of establishment or the principle of non discrimination *FII litigation*, C-362/12 etc). In this case, the principles of effectiveness and equivalence apply.

- 33/76 *Rewe* [1976] ECR 1989 and 45/76 *Comet* [1976] ECR 2043
- In the absence of EU rules, it is for each Member State to designate the courts having jurisdiction and lay down the rules governing actions intended to ensure the protection of rights conferred by EU law. Such national rules, however, must comply with two conditions:
  - (a) they must not be less favourable than those governing similar domestic actions (requirement of equivalence or non-discrimination); and
  - (b) they must not render the exercise of EU rights virtually impossible or excessively difficult (requirement of effectiveness).

- 2) **Legislative silence**: the EU imposes a requirement or prescribes a standard without making any reference to civil remedies (e.g. product quality standards; capital requirements; Market Abuse Regulation; Mortgage Credit Directive, Articles 12, 14, 16-18).
- Here, the question arises whether there is an implied right to enforce that obligation and, if so, what the remedy might be (see e.g. C-253/00 *Munoz Cia SA* [2002] but these questions tend to be conflated).
- The principles of effectiveness and equivalence apply also in this case.

- 3) EU law makes general reference to national remedies: (See e.g. Prospectus Directive).
- 4) EU law provides for a specific remedy. Within this category, EU law may provide expressly for:
  - (a) the consequences of illegality: e.g. nullity: Art 101 TFEU; free movement of persons: regulation No 492/11, art. 7(4) (nullity of collective or individual labour agreements which lay down or authorise discriminatory conditions in respect of workers who are nationals of the other Member States); Framework Directive on equality, Article 16(b); Unfair terms directive, Article 6(1) ('not binding');



- (b) **right to compensation**  
Directive 2014/104 on competition law damages;  
Credit rating agencies Regulation, Art 35(a);
- (c) **a more or less specific obligation to provide for effective remedies**  
Payment Services Directive 2015/2366, arts 73 et seq; 89 et seq; MiFiD II on the suitability doctrine)
- (d) **procedural rights**  
i.e. a standing or burden of proof requirement (e.g. Framework Directive on Equality)

- The difference among the categories identified is less clear cut than it might appear; a degree of hybridity is always present as, even where a specific remedy is provided, it may lack normative autonomy (CRA, Article 35a) or may be dependent on national rules pertaining to procedures and remedies
- Even the right to reparation for breach of EU law, the *communautaire* remedy *par excellence*, is subject to ‘the rules of national law concerning liability’ (C-160/14, *Ferreira*, para 50)

## Equivalence and effectiveness

- Reliance on those principles enables different models of national remedies to exist
- Brings to the fore different understanding of legal concepts (e.g. unjust enrichment; *FII* litigation)
- The mix between redress and preventative objectives may differ among national laws: Case C-174/12, *Hirrmann v Immofinanz AG*; Case C-604/11, *Genil v Bankinter SA*

## Article 19(1) TEU

- ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’ (Article 19(1), sub-paragraph 2)
- Calls on national legal systems to fill the remedial gap left by EU law (cf C-263/02 P *Commission v Jégo Quéré* [2004] ECR I-3425)
- It has a wider scope of application than the Charter but its substantive content is informed by Article 47 of the Charter Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, EU:C:2018:117; Case C-216/18 PPU *LM*, EU:C:2018:586
- Imposes obligations of institutional design
- It is closely linked to the rule of law and the values of Article 2 TEU

## The transformative principle of effectiveness

- The multiple faces of effectiveness:
- It is a principle of interpretation
- It is closely linked to the right to effective judicial protection
- It governs remedies
- It governs the enforcement of EU law

## Interpretation

- It favours a liberal construction of the provisions of the founding Treaties so as to ensure their *effet utile*; provides the rationale for broad interpretation of rights (see e.g. in relation to equality, C-303/06 *Coleman v Attridge Law*, EU:C:2008:415, para 51)

## Remedial effectiveness

- It requires national laws to provide effective remedies for the protection of EU rights (see now Article 19(1) TEU)

## Enforcement of EU law

- Obligation to provide for effective, proportionate and dissuasive penalties for breach of EU law.
- This obligation may flow from a specific provision of EU requiring Member States to introduce penalties or, in the absence thereof, from the duty of cooperation laid down in Article 4(3) TEU: Case 68/88 *Commission v Greece* [1989] ECR I-2965, paras 23–24; Joined Cases C-378, C-391 and C-403/02 *Criminal Proceedings against Berlusconi, Adelchi, dell’Utri and Others*, judgment of 3 May 2005

## Enforcement of EU law

- Effectiveness here becomes a tool of federalism and may threaten constitutional guarantees or lead to a lesser protection of individual rights than that which might be derived from the national constitutions:  
*Taricco*, Case C-105/14, EU:C:2015:555; *M.A.S.*, Case C-42/17, EU:C:2017:936



## Enforcement of EU law

- Remedies as a means of enforcing EU obligations against private parties: More emphasis placed in recent case law
- Require agency power; ECJ's role to determine legality of public action
- Bias in favour of a public model of enforcement
- Financial supervision: the new competition law?

## Conclusions

- Decentralisation; hybridity and constitutionalism
- The implications of the Charter
- From rights protection to effective enforcement of obligations
- Public versus private enforcement of EU law