NATIONAL REMEDIES FOR BREACH OF EU LAW

INTRODUCTION

- *Van Gend en Loos, 1963:* ECJ recognised principle of direct effect as pillar of Community legal order.
  - Hence, EU law itself (without requiring MS implementation) imposes not just obligations, but also confers rights on individuals.
  - Rationale: need for effectiveness of EU law. Aim is to maintain legal order which is separate from MS laws, but still need nat courts to enforce effectiveness.
- **BUT** direct effect in itself does not ensure full effectiveness of EU law.
  - While Treaty has lots to say about breaches of EU law by EU institutions, it is largely silent on remedies when MS/national authorities are the ones breaching EU law.
  - But can’t just leave it to MS to decide on procedure for individual challenge of breach by MS/nat authorities, since MSs have no interest in highlighting their own failures. So ECJ had to develop body of principles.
- **Sources of authority**
  - **TREATY**
    - **Today, art 19(1) TEU:** MSs will provide remedies sufficient to ensure effective judicial protection in fields covered by EU law (codification of ECJ jurisprudence). This is new (Lisbon!)
    - **Art 47 Charter:** where one’s rights guaranteed under EU law are violated, he has right to effective remedy before a tribunal.
    - But beyond these broad provisions, EU law does not lay down general scheme of substantive/procedural law governing national remedies
  - ECJ jurisprudence = 2 main issues
    - **Generally** - development of applicable principles to provision of remedies before nat courts
    - **Specifically** - introduction of specific, uniform remedy of state liability (*Francovich*)

DEVELOPMENT OF APPLICABLE PRINCIPLES

- Jurisprudence fluctuates between 2 extremes: either allowing MSs full procedural autonomy, or trying to get at full effectiveness of EU law (as dictated by ECJ)

PHASE ONE - MS autonomy

- ECJ said that it is for MSs’ domestic legal systems to determine procedural rules under which EU rights were protected (principle of national procedural autonomy), but SUBJECT TO the principles of non-discrimination and practical possibility.
- **JURISPRUDENCE:**
  - *Rewe Zentralfinanz* (inspections), 1976: question of lawfulness of charges/payments made by companies. German court made prelim ref to CJEU, which held they were unlawful. But German national law had imposed time limit to reclaim payment - already expired. Nat court then made prelim ref on whether national rules should stand in light of effectiveness of EU law - ECJ allowed them to stand!
  - **ECJ** held that pursuant to what is now art 4(3) TEU - principle of sincere cooperation, in absence of EU legislation, it is nat legal systems which are tasked with ensuring protection of indivs’ EU rights, subject to principles of equivalence and practical possibility.
EU Remedies

★ Rewe v Hza Kiel (butter buying cruises), 1981: Treaty not intended to require MSs to create new remedies to accommodate claims based on EU law.

• Even recently, ECJ still says there’s no such obligation to create new remedies - Unibet, 2007:
  ★ UK based online betting company. Swedish govt tried to block advertising by Unibet, in line with the strict gambling and lottery legislation in Sweden. Swedish law did not allow for U to get declaratory judgment against the Swedish national authorities - Swedish sup court asked if this was unlawful.
  ★ ECJ reiterated that there is no need to create new remedies in national courts, to ensure compliance with EU law. It is only if national legal system does not provide any remedy at all that there is a need to create new remedies!
  ★ “it would be otherwise only if it were apparent from the overall scheme of the national legal system in qn that no legal remedy existed which made it possible to ensure, even indirectly, respect for an indiv’s right under Community law”

• NB: what if MSs want to go further in imposing penalties on indivs for breach of EU law?
  ★ Sagulo, 1977: penalties must not be disproportionate to offence, and must not constitute obstacle to exercise of fundamental EU rights. (can impose reasonable penalties for infringing admin requirements on EU residence permits).
  ★ Von Colson, 1984: discrimination during job application, and claimant only got partial reimbursement. ECJ held that full implementation of Directive did not require specific form of sanction, but must be so as to guarantee real and effective judicial protection. Cannot be purely nominal

PHASE TWO - effectiveness of EU law

• ECJ started focusing on need to provide effective remedy for breach of EU rights instead!
• Earlier, the principle of practical possibility (Rewe above) was a minimum protection. But ECJ started emphasising principles of effectiveness and adequacy:
  ★ Not just whether national rules make exercise of EU right virtually impossible, but whether it makes it excessively difficult.
  ★ Premised on the principle of sincere cooperation in art 4(3) TEU (ex art 5 EEC)
• Von Colson, 1984: female job applicant turned down cos of her sex. Under German implementation legislation of the equal treatment directive, she could only request indemnity for the positive interests (eg. Postage/travel expenses).
  ★ ECJ “rediscovered” that principle of procedural autonomy should NOT be used to undermine the effectiveness of EU law. National autonomy cannot be so that it renders the EU instrument completely ineffective = companies not deterred from discriminating if they only have to make small reimbursements.
  ★ Hence, found German law overstepped the limit, and ECJ had to intervene to give full effectiveness to EU law!
  ★ Principle of effectiveness is STRONGER than that of practical possibility. Johnston v Chief Constable of the RUC, 1986 (and other cases) confirmed that the stronger requirement was not limited to specific field of sex discrimination law - general principle!

• SUBSEQUENT JURISPRUDENCE:
  ★ Dekker, 1990: A sought damages before Dutch courts against employer who didn’t employ her cos of pregnancy. ECJ cited Von Colson and held that nat legislation’s requirement of “fault” by ER/allowance of defence of justification undermined the Directive.
  → further dilution of principle of national procedural autonomy, esp cos no discrimination between domestic and EU situations here. Exercise of EU right not rendered impossible either
• Factortame litigation illustrated the tension between the 2 propositions:
  ★ That no new remedies have to be created (phase one)
  ★ Principle of effectiveness (phase two)
  → Factortame (I), 1990:
  ← Question: if UK national procedure does not allow for interim relief for proceedings regarding acts of Parl, what does EU law say about this? Most commentators thought that ECJ would give preference to national procedural autonomy, because this was a rule of constitutional law. But...
EU Remedies

★ ECJ gave general conclusion: any national legal provision, or legislative/admin/judicial practice, which might impair the effectiveness of EU law (principle of effectiveness, not just practical possibility!) even temporarily are incompatible with requirements of Community law.

★ This is so for national rules preventing nat courts from doing what might be necessary to set aside national legislation precluding (however temporarily) Community rules from having full force and effect ➔ nat rule precluded granting of interim relief, to ensure full effectiveness of judgement on rights granted by EC law.

★ Hence, nat court must set aside the rule - **avoiding impression that UK court is creating new legal remedy (would be directly contrary to earlier pronouncements. Rather, emphasising that UK court is only setting aside conflicting nat rules.

★ Highwater mark of principle of effectiveness!

PHASE THREE - tension between effectiveness and procedural autonomy

• Jurisprudence is scattered. But 2 basic starting points:
  ★ This area is based entirely on case law! (no EU legislation as yet)
  ★ Underlying issues are all the same - prelim ref on whether the particular national procedural rule/principle contravenes the effectiveness of EU law?
• Note that after Marshall II, Emmott and Factortame, ECJ seemed to retreat slightly.
• We can adopt either of two approaches in analysing the case law!
  1. **Chronological approach**
     ★ Saying that there was phase of judicial activism in the early 1990s (see Francovich)
     ★ Then followed by period of selective deference to national autonomy
  2. **Overall balancing approach**
     ★ The earlier “activist” rulings can sometimes be explained on the basis of their particular facts.
     ★ Hence, must look to the particular circumstances of each case - how the importance of each EU right is weighed against the scope and purpose of the national rule.
     ★ This seems to be the approach the ECJ has adopted - more case/fact-based.
     ★ For instance:
       ✴ Factortame: it was obvious that UK’s reform of the Merchant Shipping Act violated EU law, hence ECJ placed greater weight on principle of effectiveness
       ✴ In Von Colson, the breach was also obvious cos companies given practically a free ticket to violate/discriminate as much as they like

• Specific areas of case law:
  ← I) Domestic prohibitions on unjust enrichment
     ★ ECJ recognised early on that many MSs recognise principle prohibiting unjust enrichment.
     ★ Hence, national rules upholding this principle against unjust enrichment will not contravene principle of effectiveness (Just, 1980)
     ★ eg. Where trader overpays tariff, but sells products on having factored higher tariff into consumers’ purchase price - principle of UE allows nat authorities to say that govt will only refund what trader couldn’t price into selling price.
     ★ But even in such a straightforward area, there is diverging opinion.
     ★ Cotter, 1991: national rule on unjust enrichment was set aside to give full effect to principle of non-discrimination, in field of social security entitlements.
     ★ cf Comateb, 1997: in field of recovering unlawfully levied charges, national rule was allowed to stand.
  ← II) **National rules on time-limits
     ★ ECJ usually holds that imposition of reasonable time limit for taking legal proceedings to challenge national authorities’ decision does NOT in itself make exercise of EU right virtually impossible/excessively difficult (Rewe, 1976)
     ★ Pontin, 2009: question whether 15 day time limit was unreasonable. ECJ reiterated that it is compatible with EC law to lay down reasonable time limits, in interests of legal certainty. It is for MS to determine limit, considering complexity of legislation, public and private interests, number of people affected etc. It is for national courts to rule on national law (assess criteria and decide whether to set aside nat rules), not ECJ!