Remedies in the National Courts

Craig and De Burca, EU Law, Chapter 9

- ECJ has developed ‘effectiveness of EC law’ as a legal principle, as well as ‘effective judicial protection’ as a fundamental right, drawing on ECHR
- Nothing in EU Treaties or legislation governs substantial or procedural law on remedies for enforcement of EC law.
- ECJ’s early attitude: National autonomy meant that national courts (NCs) should apply EC law in accordance with procedures/rules of national law. New national remedies did not generally have to be created for enforcement of EC law. Two qualifications were that (1) National procedures should be applied to EC law & national law in the same way (equivalence) i.e. remedies and forms of actions that are available under national law should also be available to ensure observance of EC law, wherever the national court deems EC law capable of domestic enforcement; and (2) national procedures should not render the exercise of EC rights impossible in practice (practical possibility).
- ECJ later attitude: Based on art 10 EC, ECJ required a strong and generally applicable rule that EC laws be given adequate and effective domestic enforcement. Sometimes ECJ even specified the type of remedy that should be available (e.g. in Francovich).
- While national procedural and remedial autonomy and competence remain important, the qualifications of effectiveness and equivalence have been powerful qualifications. The courts have been required to disapply national laws wherever necessary to give effect to EC law.

- Von Colson added the principles of adequacy and effectiveness of national remedies to principles of practical possibility and equivalency, and to the requirement of ‘proportionality of penalties for breach of EC law’ (Sagulo)
- Factortame demonstrated that the principle of effectiveness requires that a national measure preventing the enforcement of an EC law be disapplied, with the result that the grant of a remedy may be given in circumstances where to do so has previously been impossible under English law.
  o In the first phase of development (cases like Dekker, Factortame I, Emmott, and Marshall II) the ECJ took a robust attitude to effectiveness principle e.g. in Marshall II two national rules on remedies (ceiling of damages and jurisdictional rule on power to award interest) both had to be disapplied.
  o In second phase there was a partial judicial retreat, with Steenhorst Neerings failing to follow Emmott despite v similar facts and Johnson II confining Emmott to exceptional circumstances of the case. In Sutton the ECJ limited the application of the adequacy principle to remedies for sex discrimination (established in Marshall II). It accepted that damages ceilings might be permissible.
 However no general retreat from principles of adequate and effective protection. In Metallgesellschaft & Hoechst the ECJ further eroded the ‘no new remedies’ rule by saying that restitution was the appropriate remedy in a particular case, even though English law didn’t normally allow it in those circumstances. Cases like Courage follow this type of ruling.

• In all of this the ECJ is always having to ask itself whether a particular national rule could undermine a community right. It has to then balance the principles of adequacy and effectiveness on the one hand, and national procedural and remedial autonomy on the other.

• There has also been development of the equivalence principle. It has been held in various cases like Edis v Ministero delle Finanze that time limits for actions which are not the most favourable within the national system are still acceptable, provided that they apply to domestic and EC law actions equally.

• ECJ has traditionally said that it is for national courts to determine equivalence, but it has sometimes intervened to indicate that it doesn’t consider a national rule as complying with the principle. Some argue that the equivalence principle is best placed to ensure equality of EC and national laws, whereas effectiveness discriminates in favour of EC over national laws.

• There have been several cases in which specific remedies have been demanded of national courts by ECJ to ensure compliance with the principles of effectiveness, adequacy etc e.g. Factortame I on interim relief, Heylens on JR, Courage on damages. Most significant though is requirement of state liability for breach of EC law in Francovich.
  o The conditions for liability have been expanded on and stated in several judgments, esp. Brasserie du Pecheur.
  o Standard of liability: sufficiently serious breaches (which may or may not imply ‘fault’)

• Craig’s Conclusions:

⇒ Craig & de Burca’s Summary of National Remedies & EC Law:
  1.) While early ECJ case law emphasized the autonomy & primary responsibility of the national legal system in the absence of C harmonization of remedies, this approach has yielded over time to a stronger insistence on the effectiveness of C law & on effective judicial protection as a fundamental right.

  2.) Certain strands of case law (mostly where ECJ focuses on a substantive EC law right which is usually specified in EC legislation) seem to require more specific national remedies to be available, many other cases continue to emphasize the primary responsibility of the national legal system, subject only to the principles of equivalence & effectiveness.

  3.) Over time, the Court has developed a detailed balancing approach, requiring the importance of the C right to be weighed against the scope & purpose of the national rule, taking into account all the circumstances of the case. Although it