

National Courts and the Enforcement of EU Law

Questionnaire Topic 1 - FIDE XXIX Congress, The Hague, 2020

Prof. Michael Dougan (University of Liverpool)¹

Introduction

This topic addresses the role of national courts in the enforcement of EU law within the Member States. As a matter of EU law, that role is defined by a series of fundamental doctrines which together lie at the very heart of the Union legal order and its relationship with the national legal systems:

- the principle of **consistent interpretation**, obliging national judges to avoid direct conflicts between Union and national law by construing all existing domestic law (as far as possible) in conformity with any relevant provisions of Union law;²
- the principle of **direct effect**, whereby provisions of Union law which are sufficiently clear, precise and unconditional may (in principle) act as a direct source of legally cognisable rights and obligations before the national courts;³
- the principle of **supremacy**, whereby national judges must (in principle) disapply any provisions of domestic law that conflict with directly effective provisions of Union law, in situations where such incompatibility cannot be avoided or resolved through the medium of consistent interpretation;⁴
- the principles of **effective judicial protection**, guaranteeing that rights and obligations deriving from Union law can be adequately enforced in practice through the channels provided for under the domestic legal system – including, e.g. basic guarantees concerning the right of access to the courts,⁵ e.g. common Union law standards governing the provision of remedies such as interim relief and compensatory damages,⁶ e.g. Union law limits to national procedural autonomy based on the principles of equivalence and effectiveness;⁷
- the system of **preliminary references**, allowing national courts and tribunals to maintain an open and effective dialogue with the Court of Justice of the European Union on all

¹ m.dougan@liverpool.ac.uk

² E.g. Case C-106/89, *Marleasing*, EU:C:1990:395; Joined Cases C-397/01 to C-403/01, *Pfeiffer*, EU:C:2004:584; Case C-384/17, *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya*, EU:C:2018:810.

³ Case 26/62, *van Gend en Loos*, EU:C:1963:1.

⁴ Case 6/64, *Costa v Enel*, EU:C:1964:34.

⁵ E.g. Case 222/84, *Johnston*, EU:C:1986:206.

⁶ E.g. Case C-213/89, *Factortame*, EU:C:1990:257; Joined Cases C-6/90 & C-9/90, *Francovich*, EU:C:1991:428.

⁷ E.g. Case 33/76, *Rewe-Zentralfinanz*, EU:C:1976:188; Case 45/76, *Comet*, EU:C:1976:191.

matters concerning the interpretation and / or validity of Union law within the domestic legal systems of the Member States.⁸

It is important, in these introductory remarks, to recall two further points about the role of national courts in the enforcement of Union law.

First, it goes without saying that this topic is already very well established in EU law and scholarship. An enormous amount of attention has been paid to issues such as: the potential for provisions of unimplemented directives to produce direct effects against private individuals; the willingness of national supreme courts to impose limits upon the potential supremacy of Union law on grounds derived from domestic constitutional norms; and the conditions under which Member States may incur liability to make reparation to individuals for losses caused by a breach of Union law (to name but a few).⁹ It is not the purpose of this FIDE initiative to rehearse such well known principles and examples. Instead, we will seek to focus on some of the more novel issues and questions, surrounding the role of national courts in the enforcement of Union law, which have arisen in the recent EU caselaw and scholarship.

Second, even focusing on a relatively small selection of contemporary questions, the topic remains potentially very broad in scope. After all, issues concerning the role of national courts in the enforcement of Union law can arise in myriad different contexts and, moreover, vary significantly across the various domestic legal systems. For example: Union law itself often draws important distinctions between whether a given norm is to be enforced against the Member State or another public authority; or instead against a purely private individual.¹⁰ Similarly: there may be significant differences towards the enforcement of Union law as between civil, administrative or criminal proceedings.¹¹ In their responses to each question, national rapporteurs are encouraged to focus on the development of overarching Union law doctrines, while highlighting any important contextual differences that may arise as a matter of EU and / or domestic law.

Against that background, we have chosen 6 questions relating to specific issues or problems arising within the doctrines of direct effect, supremacy, effective judicial protection and preliminary references. However, we are conscious that it remains important also to identify, disseminate and discuss other emerging problems or trends within our chosen field of investigation. The questionnaire therefore ends with a 7th question: a more open-ended invitation to share additional national examples of potentially important and / or novel developments in the general legal principles governing the enforcement of Union law across the domestic courts of the Member States.

⁸ Article 267 TFEU.

⁹ See, e.g. A Dashwood, M Dougan, M Ross, E Spaventa and D Wyatt, *Wyatt and Dashwood's European Union Law* (6th ed, 2011, Hart Publishing) Chs 7-9.

¹⁰ As with the enforcement of unimplemented directives, e.g. Case C-91/92, *Faccini Dori*, EU:C:1994:292.

¹¹ As with the limits imposed by Union law upon the duty of consistent interpretation, which are stricter in the case of criminal than civil or administrative proceedings, e.g. Joined Cases C-387/02, C-391/02 & C-403/02, *Berlusconi*, EU:C:2005:270.

A. Principle of Direct Effect

There is a longstanding debate about the potential for Union law to generate direct effect against or in relations between individuals. That debate has traditionally centred on the direct effect of unimplemented directives, where national courts continue to press the CJEU for clarification of its rule that such measures cannot in themselves be enforced against private parties.¹²

More recently, however, attention has focused on the potential for the general principles of Union law and / or the Charter of Fundamental Rights to be directly enforceable against or in relations between individuals. In that regard, many of the key cases involving “horizontal effects” for the general principles and / or the Charter have in fact still hinged upon a public law question, i.e. the disapplication of national legislation whose incompatibility with Union law could not be resolved by means of the principle of consistent interpretation (albeit that such disapplication is to occur within the context of a civil dispute between two private parties, rather than an administrative challenge involving a relevant public authority).¹³

Nevertheless, some of the CJEU’s most recent judgments have been formulated in potentially much broader terms – suggesting that (at least certain) general principles and / or Charter provisions are to be considered directly binding upon individuals even where the latter’s conduct derives entirely from the exercise of private autonomy.¹⁴ If so, that would mark an important development in Union law: the recognition of general principles of Union private (as opposed to constitutional or administrative) law and / or the potential imposition of fundamental rights obligations directly upon and between private parties.

Question 1: *What are the main trends, noteworthy exceptions and / or key examples under national case law of attempts to enforce the general principles of Union law and / or the Charter of Fundamental Rights in such a way as to impose obligations directly upon private parties? Do such examples generally involve challenges to the legality or compatibility of public law acts, albeit raised in the context of civil proceedings between individuals? Or are there also examples of situations where the allegedly unlawful or incompatible conduct derives entirely from the exercise of private autonomy and without any underpinning basis in national legislation?*

B. Principle of Supremacy

Many Member States have encountered problems with the full and unconditional incorporation into their national constitutional systems of the principle of the supremacy of

¹² E.g. Case C-122/17, *Smith*, EU:C:2018:631.

¹³ E.g. Case C-144/04, *Mangold*, EU:C:2005:709; Case C-555/07, *Kücükdeveci*, EU:C:2010:21; Case C-68/17, *IR v JQ*, EU:C:2018:696.

¹⁴ E.g. Case C-476/11, *HK Danmark*, EU:C:2013:590; Case C-359/16, *Altun*, EU:C:2018:63; Case C-414/16, *Egenberger*, EU:C:2018:257; Joined Cases C-569/16 & C-570/16, *Bauer and Willmeroth*, EU:C:2018:871; Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, EU:C:2018:874.

Union law as traditionally articulated in the caselaw of the CJEU. In particular, various national supreme courts insist upon retaining the competence to qualify or even reject the supremacy of Union law by reference to essentially domestic constitutional principles such as respect for fundamental rights, for the limits of Union competence or for national identity.¹⁵

For its part, the CJEU has sought to avoid or resolve some such potential conflicts by recognising that the full force and effect of the principle of supremacy may in fact be balanced against (and if necessary limited by) other fundamental legal considerations, though as a matter of Union law itself and without recourse to any alternative domestic constitutional law doctrines. Consider, for example, respect for the fundamental principle of legal certainty (often raised in disputes about the correct publication of Union measures);¹⁶ the possible need to avoid a damaging legal vacuum threatening the interests of consumers or the environment;¹⁷ or the principles of legality and non-retroactivity in the definition of criminal offences and penalties.¹⁸

Question 2: *What are the main trends, noteworthy exceptions and / or key examples of the national courts interpreting, applying or otherwise engaging directly with the CJEU's emergent doctrine about balancing the principle of supremacy against other competing principles of Union law itself? It would be particularly interesting to know of examples where the national judges may have explicitly discussed (compared, contrasted, endorsed or resisted) the CJEU's approach under Union law, relative to some alternative domestic constitutional principle or standard of judicial review capable of acting as a direct grounds for rejecting the principle of supremacy for Union law.*

Moreover, it is arguable that a similar phenomenon has emerged in the judicial interpretation and enforcement of various Union legislative regimes which provide for the mutual recognition of national decisions based on the premise of mutual trust between Member States. Certain national courts have expressed reservations about the full enforcement of such Union legislation, on the grounds that it could be incompatible, e.g. with fundamental rights standards under their own domestic constitutional system. Again, the CJEU has sought to avoid or resolve any direct conflict with the national courts by recognising that the obligation of mutual recognition / the presumption of mutual trust must be balanced against (and if necessary limited by) other fundamental principles of Union law itself, e.g. such as respect for the Charter of Fundamental Rights.¹⁹ Once more, the

¹⁵ A prominent recent example being the ruling of the Danish Supreme Court in Case 15/2014, *Ajos*, Judgment of 6 December 2016.

¹⁶ E.g. Case C-108/01, *Asda Stores*, EU:C:2003:296; Case C-161/06, *Skoma-Lux*, EU:C:2007:773; Case C-345/06, *Heinrich*, EU:C:2009:140.

¹⁷ E.g. Case C-409/06, *Winner Wetten*, EU:C:2010:503; Case C-379/15, *Association France Nature Environnement*, EU:C:2016:603.

¹⁸ E.g. Case C-42/17, *MAS and MB*, EU:C:2017:936 (concerning the implications of the previous ruling in Case C-105/14, *Taricco*, EU:C:2015:555).

¹⁹ The operation of the European Arrest Warrant provides a prominent example: see, e.g. Joined Cases C-404/15 & C-659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198; Case C-220/18 PPU, *ML*, EU:C:2018:589.

supremacy and thereby full domestic enforcement of Union legislation is effectively qualified by reference to competing, but essentially internalised, considerations of Union law.

Question 3: *What are the main trends, noteworthy exceptions and / or key examples of the national courts interpreting, applying or otherwise engaging directly with the CJEU's emergent doctrine about balancing the obligation of mutual recognition / the presumption of mutual trust against other competing principles of Union law itself? It would be particularly interesting to know of examples where the national judges may have explicitly discussed (compared, contrasted, endorsed or resisted) the CJEU's approach under Union law, relative to some alternative domestic constitutional principle or standard of judicial review capable of acting as a direct grounds for rejecting the principle of supremacy for Union law.*

NB) Question 4 concerns challenges to the effective enforcement of Union law raised specifically by alleged threats to the judicial independence of the competent national courts and tribunals. However, Question 4 is aimed primarily at uncovering examples of how alleged problems of judicial independence might arise and impact upon the effective enforcement of Union law within one and the same national legal system. Examples of where such threats / problems arise in one Member State, but lead to concerns about the effective enforcement of obligations based on mutual recognition / mutual trust in another Member State, should be dealt with here under Question 3.²⁰

C. Effective Judicial Protection

Another important development in the basic principles underpinning the effective enforcement of Union law concerns the guarantee that rights and obligations derived from the Treaties will be enforced by national courts and tribunals that satisfy the fundamental requirements of judicial independence inherent in Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights.

In particular, as the CJEU held in *Associação Sindical dos Juizes Portugueses*, the existence of effective judicial review designed to ensure compliance with Union law is the essence of the rule of law; every Member State must therefore ensure that, in the fields covered by Union law, its courts and tribunals meet the requirements of effective judicial protection. Maintaining judicial independence is essential for those purposes: the relevant court or tribunal must exercise its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.²¹

²⁰ E.g. in the context of the European Arrest Warrant, this would include Case C-216/18 PPU, *LM*, EU:C:2018:586.

²¹ Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, especially paras 36, 37, 41 and 44.

Those principles are being further developed in the context of disputes involving Member States where judicial independence, and with it the effective enforcement of Union law within the national territory, is alleged to be under serious and systematic threat.²² However, it would be valuable to investigate just how far and in what specific ways the principle of judicial independence might be coming under pressure across the Union as a whole.

Question 4: *Have any specific concerns arisen, within your national legal system, about the judicial independence of your national courts and tribunals, in accordance with Article 47 of the Charter of Fundamental Rights and the relevant CJEU caselaw, such as potentially to impact upon your Member State's obligation to ensure the effective enforcement of Union law?*

NB) Such trends / examples should concern alleged problems with judicial independence, and their potential impact upon the effective enforcement of Union law, within one and the same national legal system. Trends / examples that concern alleged problems with judicial independence in another Member State, and their impact upon the effective enforcement of Union law within your own jurisdiction (e.g. based on obligations of mutual recognition / mutual trust) should be dealt with under Question 3.²³

Looking at the requirements of effective judicial protection more broadly, there is a vast caselaw and literature on the principles which govern how provisions of Union law are enforced within the national legal system, not merely in the abstract, but in practice: for example, when it comes to Member State liability to make reparation under the *Francovich* principle;²⁴ the liability of private parties in damages pursuant to caselaw such as *Courage v Crehan*;²⁵ the power / duty of national courts to raise points of Union law of their own volition;²⁶ or the full force of national rules on *res judicata*, admissibility of evidence, access to legal aid etc.²⁷

In this context, crucial questions often arise about national rules on access to the courts, in particular, those imposing requirements about the standing of individuals and other private actors to bring legal actions for the enforcement of Union measures. For example: national law might seek to restrict the potential class of beneficiaries entitled to be considered as rightholders who are entitled to initiate legal action before the national courts for the enforcement of particular measures derived from Union law. Similarly: national law could define those situations in which private individuals are entitled to seek the judicial

²² E.g. Case C-619/18 R, *Commission v Poland*, Order of 17 December 2018, EU:C:2018:1021.

²³ E.g. in the case of the European Arrest Warrant, disputes such as Case C-216/18 PPU, *LM*, EU:C:2018:586.

²⁴ Joined Cases C-6/90 & C-9/90, *Francovich*, EU:C:1991:428.

²⁵ Case C-453/99, *Courage v Crehan*, EU:C:2001:465.

²⁶ An issue which has arisen particularly in relation to the Unfair Contract Terms Directive, e.g. Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial*, EU:C:2000:346; Case C-473/00, *Cofidis*, EU:C:2002:705; Case C-168/05, *Mostaza Claro*, EU:C:2006:675.

²⁷ E.g. Case C-234/04, *Kapferer*, EU:C:2006:178; Case C-276/01, *Steffensen*, EU:C:2003:228; Case C-279/09, *DEB*, EU:C:2010:811.

enforcement of Union measures concerned essentially with the protection of collective public interests (e.g. in fields such as environmental law); or instead where legal capacity to pursue the enforcement of Union law is to be reserved exclusively to a competent public authority. Or again: national law might regulate those situations in which third parties (such as representative organisations) are to be recognised as competent to bring legal actions for the enforcement of essentially private rights (e.g. in fields such as employment or consumer law).

Of course, specific acts of Union legislation might provide direct answers to such questions, e.g. by providing a detailed definition of the class of intended beneficiaries or by making explicit provision about the possibility of collective actions. In many situations, however, the interaction between national rules on standing (on the one hand) and the effective enforcement of Union law (on the other hand) must be determined by reference to more general principles of Union law and / or existing precedents established by the CJEU in its caselaw.²⁸

Question 5: *What are the main trends, noteworthy exceptions and / or key examples of how the CJEU's caselaw on effective judicial protection in general, and access to the courts in particular, impacts upon existing domestic rules concerning standing for the enforcement of Union measures before the national courts, e.g. by broadening (or restricting) the definition of the class of beneficiaries entitled to bring legal actions for the protection of their own interests; e.g. by broadening (or restricting) the standing of private actors to enforce Union law in the general or public interest; e.g. by broadening (or restricting) the capacity of third parties to bring legal actions for the enforcement of private rights?*

D. Preliminary References

Another cornerstone of relations between the Union and national legal orders is, of course, the system of preliminary references between the CJEU (on the one hand) and Member State courts and tribunals (on the other hand) – a system whose fundamental importance is repeatedly stressed by the Court of Justice as central to the autonomy of the Union legal system, the effective enforcement of Union measures and the judicial protection of Union law rights.²⁹

Nevertheless, concerns sometimes arise about the willingness of superior national courts to respect their obligation under Article 267 TFEU to make appropriate references to the CJEU. Litigants have therefore looked for alternative means of securing compliance: for example,

²⁸ Issues of national standing requirements or restrictions have arisen in a wide variety of cases before the CJEU, e.g. consider rulings such as Case C-97/96, *Daihatsu Deutschland*, EU:C:1997:581; Case C-350/96, *Clean Car Autoservice*, EU:C:1998:205; Case C-253/00, *Muñoz*, EU:C:2002:497; Case C-201/02, *Delena Wells*, EU:C:2004:12; Case C-511/03, *Ten Kate Holding*, EU:C:2005:625; Case C-432/05, *Unibet*, EU:C:2007:163; Case C-54/07, *Firma Feryn*, EU:C:2008:397; Case C-12/08, *Mono Car Styling*, EU:C:2009:466; Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening*, EU:C:2009:631; Case C-420/11, *Leth*, EU:C:2013:166; Case C-81/12, *ACCEPT*, EU:C:2013:275.

²⁹ E.g. Opinion 1/09, *European and Community Patents Court*, ECLI:EU:C:2011:123; Opinion 2/13, *Accession to ECHR*, ECLI:EU:C:2014:2454; Case C-284/16, *Achmea*, ECLI:C:2018:158.

by claiming damages against the Member State, based on an alleged failure to refer, in accordance with the *Köbler* caselaw,³⁰ or bringing an action before the European Court of Human Rights for an alleged breach of Article 6 of the ECHR (including insufficient or inadequate reasons to justify a refusal to refer).³¹ Such developments raise interesting questions, e.g. about how far and in what ways the system of judicial dialogue under Article 267 TFEU is being transformed from an inter-institutional mechanism of judicial dialogue, into an individual right recognised and protected as such under Union, national and / or ECHR law.

Question 6: *What are the main trends, noteworthy exceptions and / or key examples within the national legal system of alleged or established refusals by a superior court to comply with its obligation to refer a matter of Union law to the CJEU under Article 267 TFEU? Particularly in situations where a litigant has subsequently sought redress against the refusal to refer as a matter of Union, national and / or ECHR law?*

E. Other important or novel developments and trends

Question 7: *Thinking about the key doctrines (consistent interpretation, direct effect, supremacy, effective judicial protection, preliminary references) listed in the introduction above: are there any specific examples you would like to share, not already covered in your response to this questionnaire, which appear particularly important for the enforcement of Union law before the national courts – in particular, by suggesting the emergence of new issues, challenges or trends which may be of general interest across the Member States?*

³⁰ Case C-224/01, *Köbler*, EU:C:2003:513. Note subsequent important rulings on judicial liability (in respect of refusals to refer or otherwise), e.g. Case C-173/03, *Traghetti del Mediterraneo*, EU:C:2006:391; Case C-160/14, *Ferreira da Silva e Brito*, EU:C:2015:565; Case C-168/15, *Tomášová*, EU:C:2016:602.

³¹ See, e.g. Case Nos 3989/07 and 38353/07, *Ullens de Schooten and Rezabek v Belgium*, Judgments of 20 September 2011; Case No 65542/12, *Stichting Mothers of Srebrenica v the Netherlands*, Judgment of 27 June 2013; Case No 17120/09, *Dhahbi v Italy*, Judgment of 8 April 2014; Case No 38369/09, *Schipani v Italy*, Judgment of 21 July 2015; Case No 55385/14, *Baydar v The Netherlands*, Judgment of 24 April 2018.