ÜNNEPI KÖTET

DR. BODNÁR LÁSZLÓ
EGYETEMI TANÁR

70. SZÜLETÉSNAPJÁRA

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KATALIN GOMBOS*

The Levels and Steps of the Judicial Protection Arising from the European Law

„To me, fair friend, you never can be old,
For as you were, when first your eye I ey'd,
Such seems your beauty still. Three winters cold
Have from the forests shook three summers' pride,
Three beauteous springs to yellow autumn turn'd
In process of the seasons have I seen,
Three April perfumes in three hot Junes burn'd,
Since first I saw you fresh, which yet are green.
Ah! yet doth beauty, like a dial-hand,
Steal from his figure and no pace perceiv'd;
So your sweet hue, which methinks still doth stand,
Hath motion and mine eye may be deceiv'd:
For fear of which, hear this, thou age unbred;
Ere you were born, was beauty's summer dead."

(Shakespeare: SONNET 104)

The instruments of the judicial protection consist of the "fakes", which can legally provide a legal protection. The instruments of legal protection are really various. Examining the question by involving the European Union law, a matrix can be created – from the experiences of the practice – in which these instruments can be placed as a mosaic. In this system there are levels and steps; between the levels bridges can be created, so by the application of the "passarelle-clause" the passage and interaction are provided between the units. On the first level (the level of the European Union) of the instruments can be found the direct instruments of the EU or the instruments derived from it. For example the doctrines and the general legal principles. On the second level (the national level) can be found the units derived from the EU law, created by the EU tribunals, but – as these cases are not subjected to the jurisdiction of the EU tribunals – their application is expected from national judges. The connection between these two levels – and at the same time this is also the organizer principle of the second level – is provided by the loyalty clause.

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I. An original Passarelle Clause: the loyalty clause

The obligation of loyal cooperation is extended to every organ of the state, so also to the tribunals.[1] If the execution of the EU law is a task of a national institution or a member state, according to the loyal cooperation clause, the national institution or member state has to act and cooperate in a way that provides that the rules of the article 4 paragraph 3 of the TEU can be efficiently applied. The loyal cooperation clause demands the national tribunals to observe the EU law. This is also true for the cases, where the parties do not refer directly to the EU law. The principle of loyal cooperation demands that – whether *ex officio*[2] – the national tribunals recognise and apply the regulations of the EU law. Even if there is no explicit legal regulation, that cannot obstruct the application of the general principles, especially not the ones that are applicable to the judicial cooperation between national tribunals and the European Court of Justice. It is respective to the loyal cooperation the possibility to initiate the preliminary ruling procedure[3] in the cases of interpretation or validity of the EU law in front of tribunals where there is no possibility for remedy according to the national law, the obligation of submission. It is important because the unified application of the EU law demands the submission of the preliminary ruling procedure if the supreme national court's practice is contrary to the practice of the tribunals of the EU.

II. Doctrines

The loyal cooperation clause obliges member states for example to interpret the national law considering the EU law and the directives. As a fundamental principle, in a wider aspect, we can state that the doctrines[4] and general principles created by the European Court of Justice have a significant role in the field of judicial protection in the EU. The practice of the European Court of Justice in order to create an efficient judicial protection, in the subject of the relation between the national law and the EU law, stated that the EU law is an autonomous legal system, and at the same time pointed at the specialities of EU law,[5] that can be considered as doctrines, from the point of judicial protection primary, widely applicable legal principles. To provide the legitimation of the EU legal system, the Court has created several doctrines. These doctrines: the direct applicability of EU law, its direct effect in the national legal systems, the interpretation doctrine (or the indirect effect), its primary status to national law, its supremacy or primacy, and it is needed to add the principle of primarity interpretation. These doctrines are the fundamental pillars of the EU law as a system.

[1] VON BOGDANDY, ARMIN: *„Artikel 10" en Grabitz, E./Hilf, M., Das Recht der Europäischen Union.* C. H. Beck, München, 2005. p. 19.

[2] This is one of the fundamental principles of the judicial protection.

[3] This is the second fundamental principle resulting from the loyalty clause.

[4] By doctrines we mean the primary legal principles that serve as basic points, basic values during the decisions of certain legal questions.

[5] BERKE BARNA: *Az Európai közösségi jogrend strukturális elveiről.* In: Ius privatum – ius commune Europae. Liber Amicorum Studia Ferenc Mádl Dedicata. ELTE ÁJK Nemzetközi Magánjogi Tanszék, Budapest, 2001.

1. Direct effect

Among the doctrines, the direct effect has a significant importance in the field of judicial protection. The direct effect has direct consequences on the legal relations.[6] The direct effect makes it possible that the EU regulations automatically make part of national systems, and are the part of the national systems. In ensures the unique and total application of EU law in every member state. It makes the individuals subjected to the EU law, creating them rights and obligations. It strengthens the judicial protection of the individuals by making it possible to address in cases concerning the EU law to national courts.[7]

The directives deserve a special importance, because through the dogmatical problems, a clear cross–section can be created concerning the questions of the methods of judicial protection. If the implementation of the directive is "missed", the direct effect can be interpreted as a protection–type automatic sanction, obviously in the vertical, state–individual relations. There is a question: it is the same, if the directive is applicable to horizontal relation, in which state organs do not participate? The answer 'no' was first given in the *Marshall* case[8], but we can also mention the judgment of the *Pfeiffer* case[9] [10]. The statement of the horizontal direct effect of directives has not happened – probably the Court will also avoid this question in the future, referring to dogmatical reasons – because with this recognition the difference between regulation and directive would disappear. However we can see that the Court has given a direction in the *Faccini Dori* case[11], from which two possibly applicable methods can provide the protection in horizontal relations.

2. Indirect effect or interpretation doctrine

The doctrine of an "interpretation adequate to the guideline" appeared in the judgment in the case *Von Colson* and *Kamann*[12] – and according to this principle the national court has to interpret the EU law too when it applies the national law – became

[6] TOTH, AKOS.: *The Oxford Encyclopedia of European Community Law. Volume I. Institutional Law.* Clarendon, Oxford, 1990. p. 550.

[7] The latter category is called in the legal literature dual vigilance, with a regard to that partly the European Union's organs watch out for the enforcement of the EU law (infringement proceedings), partly the citizens of a given member state can protest at their own courts against the abuse of their rights ensured by the EU law.

[8] 152/84. M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) [1986] ECR 00723. 46, 49. para

[9] Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV. Joined cases C-397/01 to C-403/01. [2004] ECR I-08835.

[10] We have to note that the negative position were defined by many people as a "women denial", that can mean "no, but maybe yes".

[11] C-91/92. Paola Faccini Dori v Recreb Srl. [1994] ECR I-03325.

[12] 14/83. Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen [1984] ECR 01891.

deeper in the judgment of the *Marleasing* case,[13] it gave an obvious solution of protection by declaring the principle of the indirect effect, and at the same time strengthened the law and order in the EU. The case law has previously accepted this effect by other methods. The judgment in the case Simmenthal[14] made it to the task of the national courts to assure the real emergence of EU law, that in the necessary case they would not apply the national rule which is against the EU law, without waiting the abrogation or the annihilation of the rule. The judgment in the *Fratelli Constanzo* case[15] shows the other side, when it makes it obligatory to apply from office the regulations of the guidelines if the regulations of national law are contrarious to it. The objective is the same: in order to ensure an efficient judicial protection, the assurance of the adequate application of the EU law is needed. The case law about the interpretation adequate to the guidelines and the possibility of the omission of national law are evasions that come from the denial of the guidelines' horizontal direct effect.

3. Primacy of interpretation

One of the important methods of the judicial protection is the interpretation which different from the national traditions. It is especially true in situations, when the application of the autonomous interpretation, the principle of *effet utile* is needed, or in order to search for the meaning of the EU law comparative jurisprudence, the comparison of the different lingiustic expressions is needed for reasons of protection. The Court often uses the interpretation activity to ensure the legal protection. Because of this doctrinal importance it is justified to declare – similarly to the principle of the primacy of the application of EU law – the principle of primacy interpretation. This principle means that in cases where the EU law is involved, during the interpretation of the applied regulation the EU interpretation has a primary status to the national interpretation. The principle of primary interpretation can be a method of judicial protection because by the application of the interpretation techniques of EU courts means that first, it obliges the national courts to apply the EU interpretation to a case where EU law is involved in a case where the regulation was created to regulate the national circumstances and it provides that it can be applicable to circumstances across the borders, second, if there is more than one way of interpretation, in order to assure the effective remedy of EU law, it has to be interprets to ensure the aim of legal protection. Evidently of course, the latter effect cannot substitute legal predicates, so the primacy of interpretation cannot create rights.[16] The primacy of interpretation is closely related to the indirect effect (the doctrine of interpretation) the principle, which states that the national courts must interpret national law according to the formulation and

[13] C-106/89. Marleasing SA v. La Comercial Internacional de Alimentacion SA. [1990] ECR I- 04135. 8. para.
[14] 106/77. Amministrazione delle Finanze dello Stato v Simmenthal SpA. [1978] ECR 00629. 21. para.
[15] 103/88. Fratelli Costanzo SpA v Comune di Milano [1989] ECR I-01839.
[16] C-445/07. P. and C-455/07. P. Commission of the European Communities v Ente per le Ville Vesuviane (C-445/07 P) and Ente per le Ville Vesuviane v Commission of the European Communities (C-455/07 P) [2009] ECR I-07993. 65. para.

objectives of the EU norm.[17] The obligation of interpretation in harmony with the objectives of EU law concerns the entirety of national laws, the constraints are the general legal principles, especially the principle of legal certainty, in the sense that such an obligation cannot serve as the basis of *contra legem* interpretation of national law. [18]

III. General principles

The general principles of law bind strongly to the founding treaties, especially to its spirit, but also play a separate, independent role in particular in the case law European Court of Justice. The general principles can fit into the context of EU law in several ways. First you can refer to them as the assistants of the interpretation. EU law, including the national law which is giving effect to the obligations arising from EU law, has to be interpreted in a manner to avoid any conflict with the general principles of law. Secondly, to the general principles states and also individuals can refer to the annulation process, as the legal basis of the action.[19] Similarly there is a method to challenge the failure of act from the part of EU institutions, bodies and offices.[20] It is also possible to refer to the general principles of law in case of claiming the deficiency of a member state's proceeding, if the litigation concerns the rights or obligations deriving from EU law and whether a legal or an administrative act is concerned. Finally, general principles of law can be invoked in cases of compensation claims brought against the Union. In order to create the unity of concepts, the general principles cannot be identified with the principles of the EU internal market that are expressed *expressis verbis* in the contracts. These include the principles of free movement of goods, persons, capital and services or the principle of prohibition of discrimination based on sex or on nationality.

IV. The Passarelle Clause: the system of procedures in order to create an efficient legal protection

The European Court of Justice has stated several time that the individuals are entitled to an efficient judicial protection. The possibility to address the court is an important element of the legal community. The EU legal system provides it by creating with the TFEU the complete system of actions and procedures, that together, completing each

[17] 14/83. (12. footnote)

[18] Kiriaki Angelidaki and Others v Organismos Nomarchiakis Autodioikisis Rethymnis (C-378/07), Charikleia Giannoudi v Dimos Geropotamou (C-379/07) and Georgios Karabousanos and Sofoklis Michopoulos v Dimos Geropotamou (C-380/07). Joined cases C-378/07 to C-380/07. [2009] ECR I-03071.199. para., C□12/08. Mono Car Styling SA, in liquidation v Dervis Odemis and Others [2009] ECR I-06653. 61. para.

[19] Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities. Joined cases C-402/05 P and C-415/05 P. [2008] ECR I-06351.

[20] Accoring to the article 265 of the TFEU in the case of an omission procedure.

other and with a regard to each other assure an efficient protection. The jurisprudence of the European Court of Justice lists includes in this toolbar the insurance of the protection of EU rights by national courts.[21] With this there is a bridge between the remedies in a wide sense. Because of the doctrines created by the European Court of Justice the individuals have the possibility to validate their claims based directly on EU law at national tribunals.[22] Since the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights has the same legal value as the Treaties, contested the article 6 paragraph 1 of the Treaty on European Union. The article 47 of the Charter of Fundamental Rights *expressis verbis* establishes the principle of effective judicial protection. Because of the principle of effective judicial protection and remedies, the substantive rules can be derived directly from the EU law, but EU procedural rules typically are not associated with the possibility of enforcing claims. From this it follows, that if the individual wants to enforce their EU rights at a national court he must adapt to the procedural rules of national law,[23] and he can only indicates the EU rules as substantive legal basis. This principle is the national procedural autonomy of the validation of claims based on EU law. It means that in the absence of EU law, the procedural rules concern the national law.[24]

1. The principle of equivalence of procedures

The principle of equivalence of procedures means that for similar claims similar conditions for validation must be provided. The claims are similar if they have similar objectives and theory of case. Two typical situations can be distinguished, which is fundamentally different from the standard of the European Court of Justice. If the claims based on national or EU law are regulated by the same procedural rules, so the national rules do not make the validation of EU claims less favourable, technically only the rules governing the validation should be taken note, and there can only be a problem if during the validation of claims on different base there was a difference between the nature of procedural rules. Another typical case is when the enforcement of similar claims based on national law or EU law are regulated by different procedural rules. In these cases the requirement of equivalence of procedures can be achieved if according to different approaches we compare the different rules, and we draw a conclusion from that, whether the principle of equivalence has a deficit.[25]

[21] C-445/07. P. and C-455/07. P. (16 footnote) 66. para.

[22] More about the question of remedies: DOUGAN, MICHAEL: *National remedies before the Court of Justice. Issues of harmonisation and differentiation.* Hart, Oxford, 2004.

[23] BLUTMAN LÁSZLÓ: *A közösségi jogon alapuló igények érvényesítése a belső jogban.* Európai jog 2004/3. p. 12.

[24] C-439/08. Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW. [2010] ECR 2010 I-12471. 63–64. para.

[25] Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten. Joined cases C-430/93 and C-431/93. [1995] ECR I-04705. 19. para., C-326/96. B.S. Levez v T.H. Jennings (Harlow Pools) Ltd. [1998] ECR I-07835. 51. para., C-472/99. Clean Car Autoservice GmbH v Stadt Wien and Republik Österreich [2001] ECR I-9687.

2. The principle of effectiveness

Another aspect is the principle of the effectiveness of EU law. As a starting point it can be stated that national procedural conditions cannot make it impossible to validate EU claims.[26] In a subsequent, more detailed terms it appears that they cannot make the validation impossible or extremely difficult.[27]

V. Steps from the toolbar of national protection

1. Principles of interpretation

In the toolbar of national tribunals in the EU based protection there is a sequence that can be applied on a basis of a cascading principle. The first steps of the national toolbar of protection are the interpretation principles, which are the following: the interpretation of EU law with specific methods,[28] the doctrine of interpretation and in particular the primacy of interpretation.[29] In the first step the application of the previously described principles is important because if with the interpretation of the norm by EU means, with the application of the doctrine of interpretation, or with the application of the principle of primacy of interpretation the objectives of the norm can be reached, to avoid any further complications this is the most obvious and suitable tool of protection that should be used. Compared to this, it is only the next step to set aside the application of national law in the case of compatibility problems between the national and EU rules,[30] or if none of them is an option, the individual to repair his

[26] 130/79. Express Dairy Foods Limited v Intervention Board for Agricultural Produce. [1980] ECR 01887. 12. para.

[27] C-432/05. Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern [2007] ECR I-02271. 43. para., J. van der Weerd and Others (C-222/05), H. de Rooy sr. and H. de Rooy jr. (C-223/05), Maatschap H. en J. van 't Oever and Others (C-224/05) and B. J. van Middendorp (C-225/05) v Minister van Landbouw, Natuur en Voedselkwaliteit. Joined cases C-222/05 to C-225/05. [2007] ECR I-04233. 28. para., 45/76. Comet BV v Produktschap voor Siergewassen. [1976] ECR 02043. 12–16. para., 68/79. Hans Just I/S v Danish Ministry for Fiscal Affairs [1980] ECR 00501. 25. para., 199/82. Amministrazione delle Finanze dello Stato v SpA San Giorgio [1983] ECR 3595. 14. para., Les Fils de Jules Bianco SA és J. Girard Fils SA v Directeur général des douanes et droits indirects. Joined cases 331/85, 376/85 and 378/85. [1988] ECR 01099. 12. para., 104/86. Commission of the European Communities v Italian Republic [1988] ECR 01799. 7. para., Léa Jorion, née Jeunehomme, and Société anonyme d'étude et de gestion immobilière 'EGI' v Belgian State. Joined cases 123 and 330/87. [1988] ECR 04517, 189/87. Athanasios Kalfelis v. Banque Schröder, Münchmeyer, Hengst & Co. and others. [1988] ECR 05565. 17. para., Andrea Francovich and Danila Bonifaci and others v Italian Republic. Joined cases C-6/90 and C-9/90. [1991] ECR I-05357. 42., 43. para., C-96/91. Commission of the European Communities v Kingdom of Spain [1992] ECR I-3789. 12. para., C-312/93. Peterbroeck, Van Campenhout & Cie SCS v Belgian State. [1995] ECR I-04599. 12. para.

[28] See more detailed GOMBOS KATALIN: *A jogértelmezés jelentősége a közösségi jogban - avagy az értelmezési elsődlegesség elvéről*. Európai jog 2010/2.

[29] C-241/06. Lämmerzahl GmbH v Freie Hansestadt Bremen. [2007] ECR I-08415. 62. para., C-327/00. Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia [2003] ECR I-1877. 62., 63. para.

[30] C-241/06. Lämmerzahl (29 footnote) 63. para., C-327/00. Santex (29 footnote) 64. para.

damaged rights deriving from the EU law – in the case of the presence of the circumstances established by the case law – the question of the liability of the member state. We can conclude to this cascading rule from several judgments of the European Court of Justice in connection with the correlation of the effective remedies.[31]

2. The *Simmenthal* principle

The national court must ensure during the litigation the full effectiveness of EU law, which may lead to – if necessary – ignoring national law, which forms an obstacle. Every national court that acts in its competence it has an obligation to – as an organ of a member state – apply the EU law and protect the EU rights of individuals, not taking into consideration the application of the national regulation, whether it's antecedent or ulterior to EU law, that are contrarious to EU law.[32] Any regulation of national law or legislative or administrative act or jurisprudence that reduces the effectiveness of EU law is not compatible with the requirements of the nature of the EU law.[33] A situation like that would arise if the solution of the conflict in the case of contradiction between the EU regulation and the ulterior national law was not confined to a court authorised to apply the EU law but to an authority that has at its proper discretionary jurisdiction, even if the obstacle of the full effectiveness of the EU law would be temporary.[34] Therefore the national court can put aside a national rule without having to apply or having to wait for the annulation of the national rule contrarious to the EU law whether it is done by a legislatory[35] or a constitutional[36] way.[37]

3. Liability for damages

The judgment in the case of *Francovich and others*[38] declared the principle of protection that – if the objective of the directive cannot be reached through interpretation – the member state is obliged to reimburse the damages of the citizens

[31] C-253/00. Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd. [2002] ECR I□7289. 28. para., C-443/03. Götz Leffler v Berlin Chemie AG. [2005] ECR I□09611. 51. para.

[32] 106/77. (14. footnote) 16., 21. para., Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others. Joined cases C-46/93 and C-48/93. [1996] ECR I-01029. 19. para.

[33] 106/77. (14. footnote) 22. para., Brasserie du Pêcheur and Factortame (32 footnote) 20. para

[34] 106/77. (14. footnote) 23. para., C-409/06. Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim. [2010] ECR I-0801553-57. para.

[35] The abrogation of a national rule, accepting new rules.

[36] The destruction of a national rule through the control of the Constitutional Court.

[37] 106/77. (14 footnote) 24. para., C-314/08. Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu [2009] ECR I-11049. 81. para., Criminal proceedings against Michel Debus. Joined cases C-13/91 and C-113/91. [1992] ECR I-3617. 32. para., C-119/05. Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA, formerly Lucchini Siderurgica SpA. [2007] ECR I-6199. 61. para., C-115/08. Land Oberösterreich v ČEZ as. [2009] ECR I-10265. 138. para.

[38] Andrea Francovich and Danila Bonifaci and others v Italian Republic (27. footnote).

resulting from the failure of transposition within the delay or from the incorrect transposition. The integrity of EU rules is endangered and the protection of rights weakens, if the damages are refused in cases when the offense is due to the member state, and the obligation becomes stronger when the enforcement of these rights depends on the activity of the state, so the citizens – because of the absence of this activity – cannot refer to their rights at national courts. The judgment in the case of *Brasserie du pêcheur and Factortame*[39] has even acknowledged this responsibility of the state, when the infringement is due to the national legislator, while in the case *Köbler*[40] it stated the same for the jurisdiction. In the judgment in the case of *Commission vs Italy*[41] the Court decided that the legislator state has a responsibility if it has not modified an act, that was declared contrary to the EU law according to the Italian tribunals.

4. Remedy

By remedies, in the Hungarian legal system, we mean primarily the appeal, or at most extraordinary remedies, the revision and review. This remedy is not the same with the concept used in the interpreting practice of the European Court of Justice, which again underlines the need for the EU's autonomous interpretation. The remedy in a broad sense includes the creation and application of all legal means that can redress the damaged right. In the practice of the European Court of Justice, the question of the broad interpretation of the concept of remedy has arisen in the cases of public administration decisions. With this the remedy has a new meaning, to ensure the new remedies for individuals in the case of infringement of the EU law; they can have a right to judicial protection in the case of a direct infringement of a principle or doctrine of the EU law. For the guarantee of a EU right's effective protection it is necessary that the interested parties can exercise this right under the best conditions and to have the possibility to address to court. In the case that a national act disposes a remedy not at the court, it does not necessarily satisfy the criteria of the right to an appropriate and effective remedy. In the sense of EU law, the possibility to address to court can be ensured by a juridical organ that is competent both in the factual and legal elements.

5. The possibility of judicial review on the basis of EU law

The application of the principle of the equivalence and effectiveness of the procedures' consequence is that not only a national substantive or procedural rule is excluded or modified in the procedures based on EU rights, but it can transform the nature of procedures, can create new judicial powers, or even new forms of remedies. The requirement that a member state must make it possible for an individual to enforce

[39] Brasserie du Pêcheur and Factortame (32. footnote).
[40] C-224/01. Gerhard Köbler v Republik Österreich [2003] ECR I-10239.
[41] C-129/00. Commission of the European Communities v Italian Republic [2003] ECR I-14637.

his rights based on EU law comes from the direct effect of EU rules[42], and even it can be named as the procedural consequence of the direct effect. [43] The effectiveness of the EU law presupposes that the claims based on EU law may be invoked at national courts. This question raise a new problem, the problem of the not exercised powers of national courts, that means that we are looking for the answer that how deep can national courts can act to protect the individual in order that the EU law can be effectively enforced. One of the sub-part in the case of infringements based on EU law is the creation of the opportunity to judicial review in order to ensure the effective protection, even if national rules do not give this opportunity and the legal harmonisation in the EU does not regulate the procedural rules of the enforcement of these claims. The seed of this principle appeared with the acceptance of the principle of the natural truth and the right to be heard in the case *Transocean Marine Paint.*[44] In another case later, in the case of *Johnston,* the Court declared the right to a procedure regulated by formal rules, and the enforceability of claims based on this right. [45] Technically, from the motivation we can read the right to an effective judicial control and the right to have a proper trial, which is compatible with the EU law. The principle of judicial review of administrative decisions is explicitly explained in the case *UNECTEF v. Heylens.*[46]

6. Specific judicial review on the basis of EU law: the retrial of the case

From the Court's practice a special new legal remedy also appears to be forming. If from the contrary application to the EU law the individual has a violation of his rights, in case of the presence of some conditions concerning the national procedural rules, it can be imagined that the repairment of the violation would happen through the retrial of the case. Indeed, if the infringement is the incorrect application of national law it is evident that the infringement should be repaired by a remedy. From the principle of the equivalence of the procedures follows that the legal situation cannot be different in cases where the infringement is caused due to the incorrect application of EU law. However, with regard to the principle of legal security this option is not a remedy without any limits. According to the principle of legal certainty the EU law does not demand that the administrational organ revoke the administrative decision after the reasonable delay or after the exhaustion of remedies.[47] The questioning of the legal

[42] 158/80. Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel. [1981] ECR 01805. 5. para., 45/76. 45/76. Comet (27 footnote) 13-16. para., C-312/93. Peterbroeck, (27. footnote) 12. para., C-453/99. Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others [2001] ECR I-06297. 29. para., C-467/01. Ministero delle Finanze v Eribrand SpA. [2003] ECR I-6471. 62. para., C-13/01. Safalero Srl v Prefetto di Genova [2003] ECR I-08679. 49. para.

[43] BLUTMAN (23. footnote) 15. p.

[44] 17/74. Transocean Marine Paint Association v Commission of the European Communities [1974] ECR 01063, this principle was repeated: 85/76. Hoffmann-La Roche & Co. AG v Commission of the European Communities [1979] ECR 00461.

[45] 222/84. Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 01651.

[46] 222/86. Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others [1987] ECR 04097.

[47] C-453/00. Kühne & Heitz NV v Productschap voor Pluimvee en Eieren [2004] ECR I 00837. 24. para.

administrative acts with legal consequence without time limits can be dangerous to the legal certainty. [48] In the judgment in the case of *Kühne & Heitz*, the Court stated that the relevant administrative organ to make a public administrative decision has the obligation to review the decision and if four conditions are present has to withdraw it. First, if on the basis of the national law the competent administrative authority has power to withdraw the decision. Second, if the decision in question has become final as a result of a judgment of a national court adjudicating at last instance. Third, the judgment already mentioned – with regard to the Court's following case law – is based on the misinterpretation of the EU law, that was accepted without going to the Court for a preliminary ruling procedure under the conditions laid down in the article 267 of the TFEU. Fourth the concerned person after he became aware of the above mentioned case law addressed to the administrative organ.[49]

There are authors[50] who said that the judgments in the case of *Kühne & Heitz*, case of *Köbler*[51] and case of *Commission vs Italy*[52] are the "charters of judicial responsibility", that suggests that the broadening of the future possibility of the infringement's defence mechanism is possible, with the regard to certain limits concerning the rule of law.[53] As a restriction we should keep in mind that the Court has always respected the rule of *res iudicata*, substantive binding force as a principle characterising a constitutional state, so the European Union considers too this principle as its own.

7. Transformation of the nature of the processes

The requirement that the Member State must make it possible for the individual to enforce the claims based on EU law comes from the direct effect of EU rules.[54] Therefore, in cases where the particular national procedural rules do not allow the use of certain legal institutions, with the transformation of the nature of the procedures it might be possible to consider them directly on the basis of EU law. For example, we can mention the modification of the extent and nature of judicial review in cases concerned by EU law. In the case when the remedy against administrative acts is limited to the legality of these acts, the competent authority's interference must make it possible from

[48] See through the way of analogy: C-310/97. P. Commission of the European Communities v AssiDomän Kraft Products AB, Iggesunds Bruk AB, Korsnäs AB, MoDo Paper AB, Södra Cell AB, Stora Kopparbergs Bergslags AB and Svenska Cellulosa AB. [1999] ECR I-05363. 61. para.

[49] C-453/00. Kühne & Heitz (47 footnote) 28. para.

[50] MARTÍN RODRÍGUEZ, PABLO J.: *La revisión de los actos administrativos firmes: ¿Un nuevo instrumento de garantía de la primacia y efectividad del derecho comunitario? Comentario a la sentencia del TJCE de 13 de enero de 2004, C-453/00, Kühne & Heitz.* Revista General de Derecho Europeo 2004/October.

[51] C-224/01. Gerhard Köbler (40. footnote).

[52] C-129/00. (41. footnote).

[53] i-21 Germany GmbH (C-392/04) and Arcor AG & Co. KG (C-422/04) v Bundesrepublik Deutschland. Joined cases C-392/04 and C-422/04. [2006] ECR I-8559. 51., 52. para.

[54] The consequences of direct effect: 158/80. Rewe-Handelsgesellschaft (42. footnote), 45/76. Comet (27. footnote), C-312/93. Peterbroeck, (27. footnote), C-453/99. Courage (42. footnote). C-467/01. Eribrand (42. footnote), C-13/01. (42. footnote).

the investigation of facts and circumstances – including the facts justifying the proposed measures – after the final decision.[55] So, the applicable rules of procedure must be capable to remedy the deficiencies of the remedies.[56]

8. Provisional measures

Often we are faced with situations when in the case of the enforcement of claims based on EU law there is a special interest that a change in the original situation at the beginning of the litigation should not occur during the litigation, especially in cases when a threat of damage caused by national rule, national measure is present. In such cases it can be a question that for how far can the powers of the national court be exceeded in the absence of EU harmonisation, if the enforcement based on EU law tries to obtain the objectives above. According to the case law of the Court, the principle of effectiveness of the EU law requires that the national courts have the right to make provisional measures based on EU law in order to ensure the full protection.[57] One of the biggest obstacles of enforcement is the prolongation of litigation. With the lapse of time sometimes infringements cannot be avoided, unnecessary damage can take place, as a response to them the provisional measure can be an adequate solution. One type of provisional measure, is the preserving the present situation measure[58], or the new situation creator measure.[59] It can be present in forms of a suspending a legal EU act and preserving the legal situation, or suspending a legal EU act and creating a new situation.[60]

[55] The Queen v Secretary of State for the Home Department, ex parte Mann Singh Shingara (C-65/95) and ex parte Abbas Radiom (C-111/95) Joined cases C-65/95 and C-111/95. [1997] ECR I-03343. 34., 37. para.
[56] 98/79. Josette Pecastaing v. Belgian State [1980] ECR 00691. 15., 20. para.
[57] C-226/99. Siples Srl, in liquidation v Ministero delle Finanze and Servizio della Riscossione dei Tributi - Concessione Provincia di Genova - San Paolo Riscossioni Genova SpA. [2001] ECR I-00277. 19. para.
[58] Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn. Joined cases C-143/88 and C-92/89. [1991] ECR I-00415.
[59] C-465/93. Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft. [1995] ECR I-03761.
[60] Such a thing can happen as a temporary exemption from the limitations of EU law.