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# Načela nacionalnega procesnega prava v skrajšanih postopkih in načelo učinkovitosti evropskega prava

JOSÉ CARAMELO GOMES

**Povzetek**

Ta prispevek predstavlja meje uporabnosti nacionalnih postopkovnih pravil za izvajanje prava Evropske unije s strani nacionalnih sodišč na splošno in evropskega postopka v sporih majhne vrednosti v podrobnosti. Obravnava več načel Sodišča Evropske unije, kot so načelo institucionalne in procesne avtonomije držav članic, načelo enakosti in načelo učinkovitosti, prikazan pa je tudi možen razvoj sodne prakse o vrednosti in veljavnosti nacionalne zakonodaje, nezdružljive z zakonodajo Evropske unije.

**Ključne besede:** • evropski postopek v sporih majhne vrednosti • Sodišče EU • sodna praksa • neposredna uporaba • načelo institucionalne in procesne avtonomije države članice • načelo enakosti • načelo učinkovitosti • *ex propriu motu* • *res iudicata*

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# Principles of National Procedural Law in Summary Procedures and the Principle of Effectiveness of the European Law

JOSÉ CARAMELO GOMES

**Abstract**

This paper presents the limits to the applicability of national procedural rules to the enforcement of European Union law by national courts in general and the European Small Claims Procedure in particular. It discusses several Court of Justice of the European Union principles, such as the principle of the institutional and procedural autonomy of the Member States, the principle of equivalence and the principle of effectiveness and points to the probable evolution of the case-law on the value and validity of national law incompatible with the European Union law.

**Keywords:** • European small claims procedure • Court of Justice of the EU • case-law • direct applicability • principle of the institutional and procedural autonomy of the Member States • principle of equivalence • principle of effectiveness • *ex propriu motu* • *res iudicata*

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## 1. Introduction

The Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007[1] established the European Small Claims Procedure in national jurisdictions. Although containing some detailed rules of procedure, the fact is that these rules are not exhaustive. In fact, Article 19 of the Regulation stipulates that »Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted«. The governance of this procedure by national procedural law is limited in two different ways: the first results from the first sentence of Article 19 of the Regulation. The second results from the case-law of the Court of Justice of the European Union (*ex* European Court of Justice; hereinafter referred to as »Court«).

European Union Law has come a long way in the past six decades, most of it under the steering of the Court (Arnull, 1999). This role of the Court was not to be expected, at first sight, when looking to the institutional framework established by the Treaties in 1957. There was, nonetheless, a set of rules (Articles 219, 164 and 177 (Barav, 1989: 390) that, on a closer look contained all the necessary ingredients for the Court to assume the steering wheel: mandatory and sole jurisdiction to interpret the Treaties and the power to work together with national courts. This power included the ability to solely interpret the rules about its own competence and the Court has, for the past decades, used it extensively, especially in preliminary rulings cases (Bengoetxea, 1993).

Legal doctrine in general acknowledges the *Van Gend en Loos* judgement[2] as the founding case for the European Union legal order (Chevalier Boulouis, 1990). Whilst accepting the relevance of the direct applicability principle, we think that the specific nature of the European Communities (EC; now EU) legal order was declared by the Court in a different case, only a couple of months later, in the *Da Costa* judgement,[3] where the Court was required to answer roughly the same question of the *Van Gend en Loos* case: can individuals and companies rely on Article 12 of the European Economic Community (EEC) Treaty against the national authorities and, if so, do national courts have the power or duty to enforce it?

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[1] UL L 199, 31.7.2007, p. 1–22.

[2] NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26/62 [1963] ECR 1.

[3] Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration, Joined Cases 28-30/62 [1963] ECR 31.

Rather than answer this question for the second time, the Court »redrafted« it, considering that what was at issue was in fact the nature and effects of its own rulings (Caramelo Gomes, 2009). This, at the time, was actually a matter of first impression and the Court ruled that the existence of a previous Court ruling on a matter waives the need (whilst not precluding the power[4]) for requests of national courts for subsequent preliminary rulings on it: »The obligation imposed by the third paragraph of Article 177, of the EEC Treaty, now Article 267 of the Treaty on the functioning of the European Union[5] (TFEU), upon national courts or tribunals of last instance may be deprived of its purpose by reason of the authority of an interpretation already given by the Court under Article 177 in those cases in which the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.«[6]

This ruling, in our view, emulates the effect of binding precedent of the common law (Gomes, 2009) systems and some more clarification from the Court would be welcome. Unfortunately, the issue of the effects of the Court's rulings is not exactly a best-seller amongst the national courts, so the number of Court judgments in this matter is quite limited, *CILFIT*[7] and *Dior*[8] being the most significant. Both judgments have added little to the first case: in *CILFIT* the Court ruled that »Although the third paragraph of Article 177 of the EEC Treaty unreservedly requires national courts or tribunals against whose decisions there is no judicial remedy under national law to refer to the Court every question of interpretation raised before them, the authority of an interpretation already given by the Court may however deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case or where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.«[9] and in the Dior case that »a court against whose decisions there is no remedy under national law, as is the case with both the Benelux Court of Justice and the

[4] »Article 177 always allows a national court or tribunal, if it considers it appropriate, to refer questions of interpretation to the Court again even if they have already formed the subject of a preliminary ruling in a similar case« (para. 31).
[5] OJ C 83, 30.3.2010, p. 47–199.
[6] Ibid.
[7] Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, Case 283/81 [1982] ECR 3415.
[8] Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV, Case C-337/95 [1997] ECR I-6013.
[9] Case 283/81 – Cilfit.

Hoge Raad der Nederlanden, must make a reference to the Court of Justice under the third paragraph of Article 177 of the Treaty. However, that obligation loses its purpose and is thus emptied of its substance when the question raised is substantially the same as a question which has already been the subject of a preliminary ruling in the same national proceedings«.[10]

Because of the nature and effects of its judgments, the Court rulings often create or reveal general principles of EU law. The first principle thus revealed was, of course, the principle of the direct applicability in the above mentioned case *Van Gend en Loos*. Given the nature of the European integration and the principle of proportionality (inserted in the Treaties from the beginning), as well as the specificity of the »law making« process by the Court (Boulouis, 1975), the building of the principle of law from the case description must respect what is called restrictive interpretation. The consequence is that the building up of the general principle may take years or decades, as requests for »widening« preliminary rulings (Colin, 1966) arrive in Luxembourg.[11]

A good example of such process is the building up of the principle of the direct applicability of EU law. It all started with the *Van Gend en Loos* case back in 1963 when the Court declared that, under some circumstances and if some requirements were fulfilled, as to the characteristics of the rule, the provisions of the EEC Treaty could be summoned and applied by national courts. These circumstances limited the scope of the principle and from the *Van Gend en Loos* case one could only harvest the possibility of enforcement of the Treaties' provisions in favour of citizens and companies against the Member States, i.e., such rules would only be applicable in vertical litigation. Further developments occurred in the early seventies with the judgment in the *Grad* case,[12] as to the direct applicability of decisions of the European Communities Institutions, in the mid seventies with the judgment in the *Defrenne* case[13] and the enlargement of the principle to horizontal litigation in case of Treaty provisions, the *Van Duyn*[14] judgment and the vertical litigation concerning non implemented Directive provisions and in the mid eighties, with some contradictory case-law as to the enforcement of provisions of non implemented Directives in horizontal litigation [against, *Marshal*[15] of 1986, in favour (although limited to the protection of workers in the case of transfer

[10] Case 337/95 – Dior.
[11] This is one of the reasons to the use of the expression »in the current state of Community law.«
[12] Franz Grad v Finanzamt Traunstein, Case 9/70 [1970] ECR 825.
[13] Gabrielle Defrenne v Belgian State, Case 80/70 [1976] ECR 445.
[14] Yvonne van Duyn v Home Office, Case 41/74 [1974] ECR 1337.
[15] M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching), Case 152/84 [1986] ECR 723.

of undertakings' Directive) *Wendelboe*[16] and *Danmols Inventar*[17] of 1985.] The direct applicability of the non implemented directives saga continues to this day (after almost 50 years), as, at least apparently, conflicting rulings have been issued by the Court even in 2010.[18]

In any case, the Court is responsible for laying down the fundamental principles of EU law *Pescatore* (Pescatore, 1981) once called the *acquis formel* of the European Community law: direct applicability and supremacy (or precedence), among others. These two principles are the starting point for the subject we will be discussing in this article. In fact, because of the direct applicability (or direct effect) of the EC (now EU) law, national courts are in charge of applying European law (Barav, 1983). They do so, in the absence of European rules of procedure and jurisdictional competence, in compliance to their own national law: this is the content of the principle of the institutional and procedural autonomy of the Member States (PIPA).

## 2. The principle of the institutional and procedural autonomy of the Member States

The principle of the institutional and procedural autonomy of the Member States (PIPA) was first enounced by the Court in its judgments of 16th of December 1976 in the cases *Comet*[19] and *Rewe*:[20] »In the absence of any relevant community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of community law (…).« This ruling is quite consistent throughout the last decades in the case-law, with the Court using almost precisely the same phrasing in its judgments: for instance, in its 26th of October 2006 judgment in the case *Mostaza Claro*,[21] the Court ruled that »According to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a

[16] Knud Wendelboe and others v L.J. Music ApS, in liquidation, Case 19/83 [1985] ECR 457.
[17] Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar, in liquidation, Case 105/84 [1985] ECR 2639.
[18] See, in favour of the direct effect case Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueir, Case C-40/08, [2009] ECR I-9579 and against, Francesca Sorge v Poste Italiane SpA, Case C-98/09 [2010] ECR I-0000.
[19] Comet BV v Produktschap voor Siergewassen, Case 45/76 [1976] ECR 2043.
[20] Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, Case 120/78 [1976] ECR 649.
[21] Elisa María Mostaza Claro v Centro Móvil Milenium SL, Case C-168/05 [2006] ECR I-10421 .

matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States (…).«

From the very beginning the Court realized that some boundaries to this principle had to be drawn. There are, of course, a great number of good reasons for the caution the Court adopted. The imagination of Member States have showed in creating national procedural law capable of denying, on procedural groundings, the safeguarding of the right individuals claim under substantive EU law, is enormous: discriminating procedural laws,[22] evidence law and presumptions,[23] delays of prescription[24] and caducity[25] and jurisdictional powers in general.[26] In the 1976 judgments the Court added to the quotation above that it would be so »(…) provided that such rules are not less favourable than those governing the same right of action on an internal matter«.[27] This, of course, is a consequence of the principle of the non-discrimination, sometimes also called principle of the national treatment (which itself is a consequence of the equality principle) established in the Article 7 of the EC Treaty at the time and now included in the TFEU in Article 18. Again, as it happens with the general of PIPA, the case-law is quite consistent over the years and we find a very similar phrasing in the *Mostaza Claro*, as the Court add to the quotation above the first requirement to admit the use of national law to govern the procedure: »(…) provided that they are not less favourable than those governing similar domestic situations«.[28] This limit is today known as the principle of equivalence.

The second limit to PIPA is also consistent in the case-law. Back in 1976 the Court added to the quotations of the judgments above that the national rules of procedure could not apply if »(…) those rules made it impossible in practice to exercise rights which the national courts have a duty to protect«.[29] In the 2006 judgment the Court ruled that national rules will apply provided that »(…) they do not render impossible in practice or excessively difficult the

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[22] Amministrazione delle Finanze v Srl Meridionale Industria Salumi, Fratelli Vasanelli and Fratelli Ultrocchi, Joined Cases 66, 127 and 128/79 [1980] ECR 1237.
[23] See Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary, Case 222/84 [1986] ECR 1651. See also Amministrazione delle Finanze dello Stato v SpA San Giorgio, Case 199/82 [1983] ECR 3595.
[24] Deutsche Milchkontor GmbH and others v Federal Republic of Germany, Joined Cases 205-215/82 [1983] ECR 2633.
[25] Cofidis SA v Jean-Louis Fredout, Case C-473/00 [2002] ECR I-10875.
[26] Peterbroeck, Van Campenhout & Cie SCS v Belgian State, Case C-312/93 [1995] ECR I- I-04599.
[27] Case 45/76 – Comet and case 120/78 – Rewe.
[28] Case C-168/05 – Mostaza Claro.
[29] Case 45/76 – Comet and case 120/78 – Rewe.

exercise of rights conferred by the Community legal order«.[30] This limit is known today as the principle of effectiveness, although this is not its first designation under EU law: the underlying concepts or requirements, the right to a process which comprises the full range of safeguards, arose in Advocate General Marco *Darmon's* Opinion of 28th of January 1986 in the case 222/84[31] under the expression »*droit au juge*«.

## 3. The principle of equivalence

The early story of the principle of equivalence is worth telling, as it is a good example of the, unfortunately common, cat and mouse game between the EU law and the Member States.

One of the questions a Danish court addressed the Court in the *Hans Just*[32] case aimed to learn if the repercussion in the price of goods of taxes illegally perceived was compatible with Community law. The main reason for this concern was the possible situation of unjustified enrichment that could happen otherwise. The Court considered this argument to be valid and ruled that the repercussion of taxes could be taken into account. The *Hans Just* judgment was delivered in 1980 and opened the door to the non reimbursement of national taxes levied in breach of EC law, if the value had been passed to another subject. Italy took advantage of this possibility and enacted legislation[33] refusing the right to reimbursement in case of passing of the charge that was presumed in case the goods had been transferred. This presumption could only be set aside by documentary evidence.

The Court, called to rule about the compatibility of EU law with such provisions in the case *San Giorgio*,[34] ruled that »Any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law is incompatible with community law, even if repayment of a substantial number of, or even all, the national taxes, charges and duties levied in breach of community law is subject to the same restrictive conditions«.

It must be noticed that the Italian rules fully comply with the requirements of the principle of the non discrimination (today known as the principle of equivalence): they would apply both to the reimbursement of taxes levied in

[30] Case C-168/05 – Mostaza Claro.
[31] Case 222/84 – Johnston.
[32] Hans Just I/S v Danish Ministry for Fiscal Affairs, Case 68/79 [1980] ECR 501.
[33] Article 10 of the Decree-Law No 430 of 10 of July 1982.
[34] Case 199/82 – San Giorgio.

breach of national or EU law. The rules were considered incompatible with EU law in a different ground that today would be called the principle of effectiveness.

## 4. The principle of effectiveness

As seen before, the principle of effectiveness has been named »*droit au juge*« by the Advocate General Darmon in his Opinion in the *Johnston* case.[35] Latter, in 1991, *Ami Barav*, who was *référendaire* for Mr. Darmon at the time of the delivery of the Opinion, following the work started on his PhD thesis (Barav, 1983), called it »*La plénitude de compétence du juge national*« (Barav, 1991). Whatever name or expression, the fact is that this principle is, in our view, the European Union expression of the principle of the effective judicial protection inherent to the rule of law. Some peculiarities may arise in the European Union formulation, given the share of sovereign power between Member States and the European Union and the conflict of laws that may appear, but the general and basic concept stays the same: the right to an efficient and exhaustive judicial protection, especially when litigating against the public authorities.

The so called *plénitude de compétence du juge national* is found quite clearly, as *Barav* (Barav, 1983; Barav 1991) points out, in the *Simmenthal* case: »A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.«[36] These powers of national courts mean, for instance, that »The principle of effective judicial control (…) does not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purpose of protecting public safety are satisfied to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts«.[37]

Another problem that may arise from national procedural law that may conflict with the requirements of the principle of effectiveness is the lack of

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[35] Case 222/84 – Johnston.
[36] Amministrazione delle Finanze dello Stato v Simmenthal SpA, Case 106/77 [1978] ECR 629 (para. 24).
[37] Case 222/84 – Johnston (para. 21).

procedural means. That was the issue in the *Factortame* case,[38] as there was no remedy available under national law to support the claim for interim relief against an act of the British Parliament. After the remarkable judgment of 10th of March 1989 by the Divisional Court of the Queen's Bench Division, whereby the interim relief was granted, latter appealed at the Court of Appeal and set aside, the House of Lords addressed, by judgment of 18th of May 1989, the Court a request for a preliminary ruling so to understand if, in the absence of the power to grant interim relief against an act of Parliament under national law, such power was granted by Community law. Although poorly grounded, as the particularly accurate and clear questions of the House of Lords were redrafted and the focus of the problem diverted, the final result was in favour of the power of granting interim relief against the act of the Parliament. This was only one of the early occurrences of what we may call the Court »remedy making power« (Caramelo Gomes, 2009)[39] and certainly worth mentioning is the case-law about the Member States liability for breach of EU law.

The state liability principle was applied to the non implantation of Directives with the *Francovich* case[40] back in 1991. Welcomed and cheered in general, the truth is that this ruling was, at first (still is by many) misunderstood: many authors considered that it established a principle of the state liability for breach of provisions without direct effect of non implemented Directives. In fact, additional rulings have demonstrated that this interpretation was wrong: it is precisely the opposite - the breached provisions must be able to be applied (Caramelo Gomes, 2006), fulfilling the inconditionality and clarity requirements laid by the Court case-law on the direct effect.

The principle of the state liability was extended to the breach of EC law authored by the national legislative bodies, either by action or default, with the ruling in *Brasserie du Pecheur*.[41] it was at stake the maintenance of the Law about the purity of the beer by the German Parliament and the enacting of the Fishing Vessels Registration Act by the British Parliament. In this judgement the Court ruled:

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[38] The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others, Case C-213/89 [1990] ECR I-2433.

[39] Other similar in nature occurrences were, for instance, 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-1029, about the member-state liability for the breach of EU law by an action or omission of national Parliament and Gerhard Köbler v Republik Österreich, Case C-224/01 [2003] ECR I-10239, about the member-state liability for breach of EU law by the national courts.

[40] Andrea Francovich and Danila Bonifaci and others v Italian Republic, Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357.

[41] Joined Cases C-46/93 and C-48/93 – Brasserie Du Pecheur.

> »The principle that Member States are obliged to make good loss or damage caused to individuals by breaches of Community law for which they can be held responsible is applicable where the national legislature was responsible for the breaches.
>
> That principle, which is inherent in the system of the Treaty, holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach, and, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied, the obligation to make good damage enshrined in that principle cannot depend on domestic rules as to the division of powers between constitutional authorities«.

Finally, with the *Köbler*[42] ruling the Court extended the principle of state liability for breach of EU law to those breaches authored by national courts in a crystal clear statement:

> »The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable when the alleged infringement stems from a decision of a court adjudicating at last instance.
>
> That principle, inherent in the system of the Treaty, applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach«.

Insofar as the breach of EU law is concerned one must notice that a violation of the EU law authored by a national court, especially a superior court, is the most serious violation of the EU law that a national authority may perform: the EU rule in breach will always be a Court judgement – either a judgement rendered in the very proceedings, at request of any other national court involved in the process, or a judgment rendered in a similar situation or, at the very least, the *CILFIT* judgment concerning the obligation to refer a preliminary ruling to the Court (Caramelo Gomes, 2009) or even, as we will see, the judgements requiring the national court to assess, on its own motion, the EU pertinent rules.

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[42] Case C-224/01.

### 4.1. *Ex propriu moto*

One of the strongest limits imposed by the principle of effectiveness to national procedural law and principles lays in the obligation for the national courts to raise, on their own motion, the question of the compatibility of a national rule with EU law. The matter of first impression is the *Fratelli Constanzo* case,[43] where the Court ruled that national authorities, courts included, are under the same obligation to apply the provisions of a Directive that was not lawfully and timely implemented: national authorities may not rely on the non implementation not to apply such rules. This obligation means that national authorities must, on their own motion, apply the pertinent Directive provisions when that is the case. This first impression is not, however, completely clear and, in any case, it has a very limited scope: only some provisions (those that according to the relevant Court case-law[44] may be relied upon by individuals in a court of law) of Directives are included.

This matter has, however, developed quite a lot and the second ruling on it, the *Peterbroeck* case,[45] presents a much wider scope: »Community law precludes application of a domestic procedural rule whose effect is to prevent the national court or tribunal, seized of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant (…).« There are several subsequent cases about this subject that have applied the *Peterbroeck* ruling: *Oceano*,[46] *Cofidis*,[47] *Eco Swiss*,[48] *Manfredi*[49] and *Asturcom*[50] among other.

### 4.2. *Res iudicata*

The breach of EU law may have consequences on the ability of a judgement of a national court to complete *res iudicata* effects. The Court has repeatedly stated that the breach of EU law does not conflict with the recognition of

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[43] Fratelli Costanzo SpA v Comune di Milano, Case 103/88 [1989] ECR 1839.
[44] Amongst many others, Case 41/74 – Van Duyn.
[45] Case C-312/93 – Peterbroeck.
[46] Océano Grupo Editorial SA v Roció Murciano Quintero, Joined Cases C-240/98 to C-244/98 [2000] ECR I-4941.
[47] Case C-473/00 – Cofidis.
[48] Eco Swiss China Time Ltd v Benetton International NV, Case C-126/97 [1999] ECR I-3055.
[49] Giuseppe Manfredi v Regione Puglia, Case C-308/97 [1998] ECR I-7685.
[50] Case C-40/08 – Asturcom.

such effects to a judgement in breach of EU law on the grounds of the principle of legal certainty. The statement, however, is often contradicted by the ruling.

That is not the case, for instance, of the first ruling of the Court determining that those effects could not be produced, in the judgement in *Lucchini* case.[51] In its judgement the Court had no doubts in declaring that »Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res iudicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final«.[52]

Differently, in *Olimpiclub*[53] the Court starts by proclaiming that the »Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of Community law on the part of the decision in question«. Nonetheless, the Court stated that »The rules implementing the principle of res judicata, which are a matter for the national legal order in accordance with the principle of the procedural autonomy of the Member States, must not, however, be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness)«. In conclusion, the Court ruled that »Community law precludes the application, in such circumstances, of a provision of national law which seeks to lay down the principle of res judicata, in a dispute concerning value added tax relating to a tax year for which no final judicial decision has yet been delivered, to the extent that it would prevent the national court seized of that dispute from taking into consideration the rules of Community law concerning abusive practice in the field of value added tax«.

A third ruling worth mentioning is *Asturcom*.[54] In this case the Court merged both its rulings about the power of a national court to assess of his own

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[51] Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA, Case C-119/05 [2007] ECR I-6199.
[52] Para. 63.
[53] Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpiclub Srl, Case C-2/08 [2009] ECR I-7501.
[54] Case C-40/08 – Asturcom.

motion the breach of EC law and the impossibility of producing *res iudicata* effects, limiting, however, the ruling by the principle of equivalence:

> »A national court or tribunal hearing an action for enforcement of an arbitration award which has become final and was made in the absence of the consumer is required, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature«.

The forth case we consider interesting in the matter of *res iudicata* is *Filipiak*,[55] although the expression (*res iudicata*) does not appear at all in the judgement. This was a preliminary ruling requested by a Polish court in 2008, concerning the refusal of the Polish tax authorities to grant Mr Filipiak entitlement to tax advantages in respect of the payment of social security and health insurance contributions in the tax year, in the case where the contributions were paid in a Member State other than the State of taxation, even though such tax advantages are granted to taxpayers whose contributions are paid in the Member State of taxation. The national rules opposed to Mr. Filipiak were considered unconstitutional by the Polish Constitutional Court but the effects of the judgement were limited in time. The national court asked the Court if such time limits ruled by the Constitutional Court in a bidding and final judgement were compatible with EC law and thus enforceable by it. Answering, the Court ruled that »It follows that, in a situation such as that of the applicant in the main proceedings, the deferral by the Trybunał Konstytucyjny of the date on which the provisions at issue will lose their binding force does not prevent the referring court from respecting the principle of the primacy of Community law and from declining to apply those provisions in the proceedings before it, if the court holds those provisions to be contrary to Community law«.

## 5. Conclusion – consequences of the requirements of the effective jurisdictional protection?

The million euro question arising from the recent case-law of the Court on the principle of effectiveness, especially the one about the powers of national courts to assess on their own motion breaches of EU law and the one

[55] Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu, Case C-314/08 [2009] ECR I-11049.

preventing *res iudicata* under some circumstances, is, in our view, the value of the national law incompatible with EU law.

This, of course, is not a new question. It has been asked to the Court several times in the past and, in most cases the answer was that national law incompatible with EU law is inapplicable.[56] The answer, however, is inconsistent with the recent developments. Some EU law provisions have been considered matter of public policy,[57] able to be applied by national courts on their own motion and its breach prevents national courts judgements of producing *res iudicata*, as seen above.

The Court has not yet, at least recently, ruled about this issue. Nonetheless, maybe it is time to recall recitals 17 and 18 of the three decades old *Simmenthal*[58] judgment:

> »17. Furthermore , in accordance with the principle of the precedence of Community law, the relationship between provisions of the treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but - in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with community provisions.
>
> 18. Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the treaty and would thus imperil the very foundations of the Community«.

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[56] See, among many others, the recent judgement of 22 June 2010, Aziz Melki, Joined Cases C-188/10 and C-189/10 [2010] ECR I-0000.
[57] Case C-308/97 – Manfredi, case C-126/97 – Eco Swiss and case C-40/08 – Asturcom.
[58] Case 106/77 – Simmenthal.

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