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Development and Critics of Effectiveness Principle in EU International Private Law

Desenvolvimento e Crítica do Princípio da Eficácia no Direito Privado Internacional da UE

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Abstract: The present work tries to give some important insights and thoughts on the principle of effectiveness in EU law according to European Court of Human Rights. It also gives light to difficulties and effectiveness' impact on private international law. It is also analyzed through the Charter of Fundamental Rights of the European Union and art. 47 as an access tool to justice, judicial protection and effectiveness of the whole Union system.

Keywords: Principle of Effectiveness. Private Enforcement. International Private Law. European Union Law. CJEU.

Resumo: O presente trabalho discute algumas ideias e faz reflexões importantes sobre o princípio da eficácia no direito da UE, de acordo com o Tribunal Europeu dos Direitos Humanos. Também dá luz às dificuldades e à eficácia do impacto no direito internacional privado. São também analisados, por meio da Carta dos Direitos Fundamentais da União Europeia e do artigo 47 como instrumento de acesso à justiça, a proteção judicial e a eficácia de todo o sistema da União.

Palavras-chave: Princípio da Eficácia. Aplicação Privada. Direito Internacional Privado. Direito da União Europeia. CJEU.

1 Introduction

The principle of effectiveness is an inescapable concept for understanding and justifying every legal system. This notion or principle has very uncertain boundaries and similar but substantially different points of view, often competing or interweaving. The formulas and concepts adopted in this regard are continually challenged. Legal rules

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must be able to assert them providing guarantees ensuring their execution. The characteristics of effectiveness in positive law are: a) on the one hand its derivation or promanation from the authority, the exponential organ of the society to which it refers; the exponential organ gives effect to positive law, or vigor, because this organ is inherent to a social body, of which it is an expression or representation; principle of effectiveness means then "effective inherent to a social body" of positive law. If the social inertia, assured by the exponential body, is lost, the positive right is no longer effective; b) on the other, its reference to the whole positive law, i.e. to the legal system considered in its entirety. This is because in a given legal system there can be a rule, nothing or a violated law. But the nullity as violation of norms, as well as the repeal of a single norm or of several norms together, does not affect legal system's validity as a whole (POILLOT, 2014).

This notion has been further clarified. Legal system validity is in dependence relationship with men real behavior. And it is within such a view that effectiveness on a territory and at a specific population is recognized as an indefectible character of the need for a new (state) legal system; that is, the only decisive element, i.e. effectiveness of the new order. In this perspective the principle of effectiveness determines not only the sphere of validity of the legal (state) systems but also the foundation of their validity.

> See: CJEU, C-587/17P, Belgium v. Commission of 30 January 2019, ECLI:EU:C:2019:821, published in the electronic Reports of the cases.

It is certainly true that with regard to this approach it has been critically observed that it assigns an excessive emphasis (BLUMANN, 2007; CUNIBERTI, 2008) and a logical overestimation of the principle of effectiveness. But it is also true that it was precisely thanks to the principle of effectiveness that it was affirmed in contemporary positivist thought. It is well highlighted in the expressions in virtue of which not reality must be subordinated to the concept but this to that. Law is only that which has had the scope of becoming and of imposing itself as a

positive right. The current life and effective vitality of law are therefore essential elements of stability and perpetuation over time.

We are well aware that law cannot be exhausted in its mere existence of fact. Its effectiveness must be qualified by the presence of recipients aware of belonging to a community that recognizes itself as such, as well as being provided with rules of government and specific guarantees aimed at enabling its implementation. And yet this government and these guarantees must operate steadily without interruption and according to criteria of publicity.

In this sense, the rules for being juridical must be part of a concrete and effective social organization in whose system must be systematically inserted and thanks to which they must be able to direct themselves and to reach immediately their recipients.

2 Effectivity of Law and Judicial Protection: a relationship difficult to define

We can speak of effectiveness with reference to the publicity dimension of supranational law, and this in relation to the work of Luxembourg judge and the procedural remedies provided for by the Treaties for violations deriving from Institutions behavior. According to a first meaning, the jurisprudence would indicate the relationship of correspondence between Union law understood in its general and abstract formulation, and the concrete content of the normative precept that can be found on the Court of Justice of the European Union (CJEU). In a second sense, then, the effectiveness would assume the contours of correspondence between substantial legal situations, attributed to individuals by norms originating from the Union, and legal juridical situations, always deriving from the same order and functional to the satisfaction of underlying interests. Again, in a final sense, effectiveness could be understood as relationship between CJEU decisions and social reality on which they are to affect.

To this perspective, which focuses attention on the role and significance that the effectiveness assumes within the EU framework, there is another, which takes more specifically account of the implementation of rules deriving from it within national legal systems and, consequently, the position not only of CJEU, but also of internal judges, protagonists of the decentralized application of Union law.

> See: CJEU, C.530/17 P, Azarov v. Commission of 19 December 2018, ECLI:EU:C:2018:1031, published in the electronic Reports of the cases.

And it is in this latter context more than in others that it is usual to distinguish between the criterion of effectiveness of the right tout court, and that of effectiveness of judicial protection. The first of the criteria considered is finalistically oriented towards the pursuit of the objective of ensuring uniformity in the interpretation and application of EU law in all national legal systems. The second, correlatively, aims to ensure that the interests underlying the legal-subjective positions attributed to individuals by rules originating from the Union legal system receive adequate satisfaction.

CJEU jurisprudence in the field of precautionary powers is often used to support this reconstruction, where Luxembourg judges have ended up enhancing, albeit on an interim basis, the need to protect individual positions to the detriment of those of effectiveness tout court. In fact, at the same time that CJEU grants national judge the power to take precautionary measures, not only positive and anticipatory effects, as occurred in Atlanta sentence of 8 November 1995 (BARAV, 2017), but also of mere suspension of internal act execution conforming to a Union Regulation whose validity has been questioned, as in joined cases: Zuckerfabrik of 21 February 1991 and in Factortame of 19 June 1990 inevitably ends up neutralizing, even if only partially productivity of the institutional act effects in question.

> See also in argument: CJEU, C-465/93, Atlanta of 9 November 1999, ECLI:EU:C:1999:369, I-03761; joined cases C-143/88 and C-92/89, Zuckerfabrik of 21 February 1991, ECLI:EU:C:1991:65,

> I-00415; C-213/89, Factortame of 19 June 1990, ECLI:EU:C:257, I-02433; C-22/10 P, Rewe-Zentral v. UAMI of 27 October 2010, ECLI:EU:C:2020:640, I-00235. C-32/14, ERSTE Bank Hungary Zrt v. Attila Sugàr, ECLI:EU:C:2015:63, published in the electronic Reports of the cases.

Not only the two principles in question would not always coincide in the concrete application of Union rules offered by judges, especially internal, but completely autonomous even on the conceptual level. The only meeting point between the two could be identified insofar as they both serve as parameters for assessing the suitability of internal procedural provisions to ensure the uniform application of EU law in national laws. In this sense, therefore, "the obligation of member states to ensure adequate protection of subjective situations of Community origin, other is not, therefore, in this respect, that the expression of their general obligation, to ensure compliance of legal systems internal to Community law".

> See: CJEU, C-536/11, Donau Chemie and others of 6 June 2013, ECLI:EU:C:2013:366, published in the electronic Reports of the cases. (PRECHAL; WIDDERSHOVEN, 2011; CADIET; HESS; REQUEJO ISIDRO, 2017; CARDONNEL; ROSAS; WAHL, 2012)

In fact, a distinction should be made between the hypotheses in which the private individual acts deriving from the Union and those in which the substantiated law derives its source from a rule of domestic law, which in turn is in contrast to a Union provision. In the first case, the two legal criteria in question would tend to coincide, summarizing within a single legal experience in which the effectiveness of the procedural rule applicable for the protection of the individual also involves the effectiveness of Union substantive law and its pre-eminence. In the second case, however, it could also be that the application of the national procedural rule, aimed at guaranteeing an individual effective judicial protection, conflicts with the useful effect of Union substantive norm.

Yet it could even be asserted that the principle of effective judicial protection is not only structurally distinct, but even hierarchically superior

to that of effectiveness in the strict sense. In other words, there would be a growing attention to individual's procedural prerogatives and to juridical-subjective positions of which he is the owner, more than to the valorisation of Union rules' useful effect considered in itself. It goes without saying that on the basis of this reconstruction, the criterion of judicial protection effectiveness could not be simply understood as instrumental to that of full EU law effectiveness, but rather as an autonomous principle, having as its specific objective the protection of the individual as such.

> See: CJEU, C-569/16, Bauer of 6 November 2018, ECLI:EU:C:2018, published in the electronic Reports of the cases.

On the other hand, it has been authoritatively claimed that the two principles relate to the instrumentality of effectiveness on judicial protection compared to that tout court, given that the basic concern of CJEU would be to ensure, in the first instance and above everything, "the useful effect" of EU law and its primacy. This means, translated in other terms, that the protection of the trial position of the individual would have a raison d'être as functional to the pursuit of the superior requirement of primacy of Union norms, attributing the substantial positions operated.

Finally, there are those who have also tried to reconstruct the relationship between the two principles in question, framing them as an articulated manifestation of a superior principle, that of loyal cooperation, from which they would descend, together with all the other general principles of the order of Union.

3 Effectivity of Law and Judicial Protection: two sides of the same coin?

In spite of the undoubted interest of all the superior authoritative reconstructions, and of others that are not re-proposed here because it is outside the terms of investigation in the strict sense, it is more useful to approach the question from a very different perspective.

More specifically, it does not seem absolutely essential to establish the exact relationship between law effectiveness law and judicial protection of individuals, or define which of the two principles prevails, in CJEU case law, as it is, two juridical criteria which, although conceptually distinct and autonomous, are still strongly interdependent, both on the structural and functional level. Emblematic of this approach is the pronunciation rendered by the CJEU case: C-61/14, Orizzonte Salute of 6 October 2015 (BOVIS, 2012) where it is noted that the application of Directive 89/665, with the aim of guaranteeing access to justice in the hypotheses of violation of Union rules on procurement, enhances the convergence between the needs underlying effectiveness and effective judicial protection, as per art. 47 Charter of the Fundamental Rights of the European Union (CFREU).

> See also: CJEU, C-61/14, Orizzonte Salute of 6 October 2015, ECLI:EU:C:2015:655, published in the electronic Reports of the cases (VON DER GROEBEN, SCHWARZE, HATJE, 2015).

It would make no sense, to hypothesise a European regulatory system, of which CJEU and national courts must guarantee effectiveness and uniformity of application, if the same would then be inadequate to meet the protection requirements of individual legal-subjective positions. Correlatively, it is not clear how a system could be abstractly configurable, which, by enhancing the need to protect legal positions of European derivation, did not involve, at the same time, an appropriate safeguard of law effectiveness on which those same legal positions based. It is as if, in other words, the Union law became "effective" only at the time and to the extent that the legal system, in particular the internal law, was able to guarantee, in "effective" terms, adequate protection for all individuals who drive it.

In light of this, apparently trivial, but in reality the only really probative, is law effectiveness and judicial protection of individuals, two sides of the same coin, carry out in relation to various sectors of material law involved.

An in-depth analysis of this profile is not possible here. We instead focus on two specific thematic areas only, congenial to reasoning clarification mentioned in the introduction, and relevant to individual positions protection before national authorities.

A broader examination should certainly go through ascertaining the adequacy of the system of procedural instruments available to individuals both in national and Union law. This coordinated system of protection, however, should be understood as unique and complete, as it is based on a continuous collaboration between national and Union judicial bodies (TRIDIMAS, 2013). This is a real multilevel system that, to use a suggestive and effective image, resembles the "communicating vessels", in which "the powers of national judges tend to expand in correspondence with (and to fill) gaps in Community judicial system" (TRIDIMAS, 2013).

Despite expectations, it is also a much less efficient and complete system than CJEU. And this not only because of the structural deficiencies of Union's system on judicial protection of individual rights, with all the consequent difficulties encountered by the individual in addressing the authorities the purpose of protecting their positions but also because of the interference of effectiveness criterion with further principles, which cohabit and inevitably affect them. This refers in particular to the principle of primacy, which operates on the protection mechanism, and to procedural autonomy, which is instead found downstream on the system itself.

> See: CJEU, C-234/17, XC and others of 24 October 2018, ECLI:EU:C:2018:853, published in the electronic Reports of the cases. (MASTROIANNI, PEZZA, 2015).

4 Effectiveness of Judicial Protection and Judgment

Another area in which the role of law effectiveness principle and its judicial protection is particularly evident in relation to national judgment and Union law with which it can oppose.

This is a thematic area in which, in reality, the enhancement of judicial protection effectiveness principle meets natural difficulties determined by the need to balance the needs with those referred to in the primacy of EU law, the procedural autonomy of member states and certainty of law. The protection of certainty on legal situations determined by jurisdictional measures that can no longer be challenged and become such according to the norms typically referable to national procedural systems can, in fact, collide with the correct, uniform and "effective" application of the right of European matrix and its judicial protection. The latter, in its turn, has in principle a position of primauté with respect to internal norms of a different content, even if definitive to provisions issued by judges of last degree or, in any case, no longer susceptible to appeal.

CJEU has in this regard adopted a rather cautious approach that, apart from the identification of a general and indiscriminately applicable rule, has from time to time highlighted the peculiar characteristics of the case under his attention and with this he found a balance between the legal criteria just mentioned. On the other hand, as has been pointed out, Union law imposes by jurisprudential way on national laws the obedience not to abstract correlations between substantive law and process, but the respect of of adequacy between needs and available forms of protection.

This has resulted in a full and complex jurisprudence, in which the effectiveness of judicial protection, in relation to procedural autonomy with which the internal legal systems grant definitiveness to measures passed in judgment undergoes some sensitive "deviations" from the ordinary system of application, determined by the peculiarities of the case.

Thus, according to the more linear functioning of procedural autonomy mechanism, national procedural law which indifferently damages both the criterion of effectiveness and equivalence must be disapplied.

The national procedural law in question is that attributing the finality of the thing judged to judgments no longer open to challenge, the mere violation of the criterion of effectiveness of law, which takes place when the judgment is in conflict with EU rules, will not be sufficient to

entail application of the provision in question. Now, avoiding widespread consideration of the relevant jurisprudence, it is sufficient to point out here, as a summary, that CJEU has unequivocally affirmed that "EU law does not require a national court to disapply internal procedural rules which attribute force judged by a judicial decision, even when that would allow a national situation to be remedied that would be contrary to that right".

> CJEU, C-213/13, Pizzarotti of 10 July 2014, ECLI:EU:C:2014:2067, published in the electronic Reports of the cases. See also: S. WEATHERILL, law and values in the EU, Oxford University Press, Oxford, 2016, p. 220ss.

This follows from the "importance, both in Union and national legal systems, of the principle of judge's intangibility. Indeed, in order to ensure both law stability and proper administration of justice, judicial decisions must become final after the exhaustion of available remedies or after the expiry of deadlines set for such appeals".

> See also: CJEU, C-234/04, Kapferer of 16 March 2006, ECLI:EU:C:2006:178, I-02585, par 20. C-526/08, Commission v. Luxembourg of 29 June 2010, ECLI:EU:C:2010:379, I-06151, par. 26. C-352/09 P, Thyssen KruppNirosta v. Commission of 29 March 2011, ECLI:EU:C:2011:191, I-02359, par. 123. (JAKAB; KOCHENOV, 2017; LENAERTS; MASELIS; GUTMAN, 2014)

On the other, when the criterion of equivalence comes into play, the rules on judgment may rather be questioned, thereby leading, but only as a consequence, the restoration of law effectiveness and its own judicial protection. The true point of equilibrium therefore becomes the equivalence and, consequently, the principle of effectiveness of judicial protection acquires value and importance. On the other hand, when Luxembourg courts state that the individual has the right to equal procedural treatment for the protection of legal situations which, although of a similar substantial content, derive their source in different legal systems, their effectiveness of judicial protection ends with becoming

a reflection of another founding criterion of the system, that is the equivalence of remedies.

Not by chance in Pizzarotti sentence, for example, CJEU noted that "if the applicable internal procedural rules provide for the possibility, under certain conditions, for the national court to return to a decision with a judicial authority, to make the situation compatible under national law, this possibility must be exercised, in accordance with the principles of equivalence and effectiveness, and provided that these conditions are fulfilled, in order to restore compliance of the situation at issue in the main proceedings with Union legislation on public works contracts (point 62 of sentence Pizzarotti).

Remember how the methodological approach just outlined is not new to CJEU. One thinks, for example, the i-21 Germany and Arcor sentence, where it was stated that if national rules of appeal oblige to withdraw the administrative act illegitimate by opposition to internal law, even if by now definitive act, when its maintenance it is simply unbearable, the same obligation must exist on equal terms in the presence of an administrative act not in conformity with Community law. Similarly, in the Asturcom Telecomunicaiones sentence, CJEU was able to point out that if the national court, given for the enforced execution of a definitive arbitration award, must automatically assess the opposition to the arbitration clause on the basis of which the award was issued with national rules of public policy, and must also rule out the abusive nature of that clause in the light of Directive 93/133.

> See in argument also: CJEU, C-392/04 and C-422/04, i-21 Germany and Arcor of 19 September 2006, ECLI:EU:C:2006:586, I-08559; C-40/08, Asturcom Telecomunicaciones of 6 October 2009, ECLI:EU:C:2009:615, I-09579; C-40/08, Asturcom Telecomunicaciones of 6 October 2009, ECLI:EU:C:2009:615, I-09579. (DEVENNEY; KENNY; KENNY, 2013)

It is evident that, Union jurisprudence is placed in the context and terms that supranational law imposes, that is application of its substantial precepts, according to the forms of protection given by the individual

national procedural systems, provided that these guarantee respect the rights conferred on individuals by Union rules. Although, therefore, the equivalence of remedies is the main "means" used, the last "end" to which the system tends to continue the effectiveness of judicial protection.

> CJEU, C-596/16, Di Puma of 20 March 2018, ECLI:EU:C:2018:192, published in the electronic Reports of the cases.

This emerges clearly in Kühne & Heitz, sentence, where CJEU, after reiterating that the principle of legal certainty is part of "general principles recognized by Community law" and that the definitive nature of an administrative decision acquired upon expiry of reasonable deadlines appeals or following the exhaustion of the means of judicial protection that contributes to this certainty, has specified that "Community law does not require that an administrative body be, in principle, obliged to re-examine an administrative decision which has acquired this definitive character".

> See: C-453/00, Kühne & Heitz of 13 January 2004, ECLI:EU:C:2004:17 I-00837.

In the same sentence, CJEU had the opportunity to point out that this eventuality could nevertheless give rise to certain specific, mandatory and stringent assumptions, to be understood as cumulative. First of all, the administrative body should have had, under national law and for similar cases, the power to return to the decision, which became definitive following a sentence pronounced by a national court which had ultimately ruled. Secondly, that judgment, in the light of CJEU case-law subsequent to the acquisition of finality, should have been based on a misinterpretation of Union law, adopted without CJEU being referred for preliminary rulings. Therefore, the position of those who, despite having diligently brought the judicial authority and experienced all the internal rulings, seems to have merited protection with a misinterpretation of Union law. It follows that the key to reading CJEU delivered it is possible when principles, both incompressible, of legal certainty and primacy of Community law, are weighted through the criterion of judicial protection

effectiveness, understood as an utility guarantee that is based on the right to those who diligently has operated for the achievement of the same.

5 Effectiveness as a Justification and Interpretation of Union Law Autonomy

It seems natural that the construction of union law rules as belonging to a real autonomous system with the characteristics of which it is possible to evaluate the crop and guarantee the effects on the basis of the principle of effectiveness. This effectiveness becomes at the same time an identifying parameter of the Community regulatory system and an interpretative criterion to guarantee its correct implementation.

In this reconstructive and evolutionary operation of Union system effectiveness a decisive role was played by CJEU as we have already foreseen, where it played an essential role in identifying the characteristics that qualify the union system, guaranteeing the continuity of the a process of European integration that has always highlighted signs of constant and particular vitality even in the most delicate political moments of European history. The Advocate General Tizzano had no hesitation in stating that no other Community institution has carried out such an incisive action as CJEU and determine in connoting the characteristics of the Community system in expressing an extraordinary acceleration in the evolution of this system and in addressing in absolutely unambiguous way the formation of the integration process (ACCETTO; ZLEPTNIG, 2005; CREMONA; 2018; CREMONA; THIES, 2014).

Despite the lack of an explicit general regulatory recognition of the principle of effectiveness in the various Treaties that have accompanied the evolution of EU system, it has made extensive use of it. So much so that there has been no hesitation in this regard in stating that according to the opinion of CJEU effectiveness is emerging as the driver of constitutional evolution of Union system (ANAGNOSTARAS, 2007; BECKER, 2007).

It is true that precise indications in favor of the use of the principle of effectiveness are clearly deductible from the obligation of states to

guarantee full and complete collaboration with the Union bodies in order to implement with adequate effectiveness the regulatory and decision-making determinations particular areas of Union bodies activities. And it is also true that in the provision referred to in the former art. 10 TEU (HATJE; TERHECHTE; MÜLLER-GRAFF, 2018; SCHWARZE *et al*., 2019) guarantees the achievement of objectives through a coordinated exercise of state institutions power according to the implementation of acts adopted by the Community bodies and that through the provision of the former art. 2 TEUs are committed to ensuring the effectiveness of union institutions mechanisms. It is equally true that attempts to explicitly introduce a true general principle of effectiveness in the Treaty of Lisbon have "failed" in this area.

This fact is not causal if one considers that the Union has characteristics that distinguish it and the more significant role that member states play in the implementation of principles and rules of substantive union law as well as in implementation of relevant regulations determinations. Consider the cases in which the Union is also endowed with executive powers, as is the case of competition. Even in such situations, the coercive power that may be necessary for implementation lies with the member states, which only have an apparatus that can operate in relation to natural or legal persons (HERLIN-KARNELL, 2007; DANOV; BECKER; BEAUMONT, 2013).

European integration and Union law therefore do not provoke the overcoming of nation state even with reference to the exclusive competences assigned to EU organs. The national state is rather inserted into a framework that is hardly attributable to traditional institutions, summarized in multilevel governance. It is a matter of specifying in this context the regime of cooperation between states and community bodies in order to combine the still unavoidable presence of the former with the effectiveness and legitimacy of the action of the latter. A cooperation in which states and the Union are no longer entirely sovereign. The union has no availability on the treaties established it. They remain in the exclusive determination of member states which continue to be the "owners" not as such, but subjects of international law. The Union is not even able to define its subjective scope according to autonomous citizenship criteria

and even less according to the territorial exercise of its powers depending on determinations and criteria adopted by member states.

6 Effectiveness Principle in Competition Union's Rules: the private enforcement

Always in order to guarantee adequate effectiveness for the functioning of European system, the jurisprudence has been oriented in legislation integration regarding the discipline of competition. In Regulation n. 1/2003 it is recognized that national courts play an essential role in the application of EU competition rules assuming a complementary role the competition authorities of member states in order to guarantee an effective and homogeneous application of Union law.

> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25. In the case C-17/10, Toshiba of 14 February 2012, (ECLI:EU:C:2012:552, published in the electronic Reports of the cases), both Advocate General Kokott and the CJEU have stated, inter alia, that Article 11(6) of Regulation 1/2003 contains a rule of procedure such that the national competition authorities are automatically deprived of their competences to apply Article 101 or 102 TFEU as soon as the EC initiates proceedings for the adoption of a decision under the Regulation 1/2003. This does not definitively preclude further proceedings in the application of national competition law. In the case C-360/09, Pfleiderer v. Bundeskartellamt of 14 June 2011, (ECLI:EU:C:2011:389, published in the electronic Reports of the cases) the CJEU interpreted art. 11 and 12 of Regulation 1/2003 in the context of national proceedings concerning access to the file of a proceeding on the imposition of a fine (including the leniency procedure documents) which was sought in order to prepare a civil action for damages in front of a German court. The CJEU stated that such access might be granted to: "[...] a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages" but on the basis of national law, with due consideration for the "interests protected by European

> Union law". This last judgment is of particular interest for the problem analysed in this article, as it clearly allows the EU Member States to retain their procedural provisions when applying Regulation 1/2003, even if it implies a different level of protection of the undertakings concerned. In the same spirit we notice also the case: C-536/11, Donau Chemie and others of 6 June 2013, (ECLI:EU:C:2013:366, published in the electronic Reports of the cases. (WOUTER, 2013; VANDENBORRE, 2013; MARQUIS; CISOTTA, 2015)

Contrary to what occurs the corresponding measures issued by national competition authorities, the acts adopted in this regard by the European Commission (EC) bind national courts in the context of judgments concerning the compensation of damages which in this way guarantee effectiveness. In other words, while national measures constitute only proof of the violation of competition law with simple presumption effects adopted by EC and fully established by national courts which cannot adopt judgments contrary to the determination adopted by EC even if contrary to the decision pronounced by a national judge of promo degree. These measures must be particularly effective to ensure full effectiveness according to Masterfoods and HB sentence, until they are canceled or evoked following the appeal in order to obtain the annulment of which the deadlines have not yet expired.

> See: C-344/98, Masterfoods and HB of 14 December 2000, ECLI:EU:C:2000:689, I-11369.

This encourages the private enforcement of EU competition law which cannot be efficiently monitored and enforced by competition authorities on their own.

> Commission staff working paper, White paper of Commission, SEC, 2011, 1385, par. 13.

And this logic also explains the jurisprudential tendency aimed at expanding the subjective scope of individuals and companies legitimized to act in the proceedings under examination. Precisely in order to prevent

the effectiveness of Union competition rules from being prejudiced or reduced, it has been recognized that the Community legislation directly and particularly extensively assigns the right to compensation for damages arising from breaches of articles 101 and 102 TFEU. In other words, it is EU law itself which, to ensure its effectiveness, gives anyone the right to claim compensation for damage suffered when there is a causal link between that damage and an agreement or prohibited practice.

> CJEU, C-295/04, Manfredi of 13 June 2006, ECLI:EU:C:2006:461, I-06619, par. 95.

In fact, the full and prohibition effectiveness would be questioned for anyone to claim compensation for the damage caused by a contract or behavior that could restrict or distort competition

> CJEU, C-453/99, Courage of 20 September 2001, ECLI:EU:C:2001:465, I-06297, par. 26. (THORSON, 2016)

Of this discipline, state systems must simply acknowledge and ensure complete implementation within their systems of judicial protection by virtue of methods and criteria set out above which allow national courts to perform those functions essential in the application of Community rules on competition aimed at protecting the structure and effectiveness of the competitive logic of the market as well as the related rights attributed to individuals.

> See: C-175/17, Belastingdienst v. Toeslagen of 26 September 2018, ECLI:EU:C:2018:776, published in the electronic Reports of the cases.

And it is the same principle of effectiveness that Union jurisprudence has used together with the principle of equivalence in order to indicate the criterion on the basis of which the amount of compensation in accordance with the further principles of legal orientation must be determined in concrete internal terms by each state from time to time applicable. In this sense, punitive damages can also be granted if they

can be recognized in similar actions based on domestic law, provided that such recognition does not result in unjust enrichment

> See: C-274/16, Flightright of 7 March 2017, ECLI:EU:C:2017:160; C-54/16, Vinyls Italia of 8 June 2017, ECLI:EU:C:2017:433; C-212/15, ENEFI of 9 November 2016, ECLI:EU:C:2016:841, above cited cases published in the electronic Reports of the cases. (KOMÁREK, 2007; AVBELJ; KOMÁREK, 2012)

It is still the principle of effectiveness that is further used by EU competition law in order to determine the attribution of jurisdiction to decide a particular case to one or more national authorities or to EC.

7 Principle of Effectiveness and Prohibition of Aid: the obligation to recover

The most significant expression of the principle of effective conferment to competition law concerns the interpretative criteria adopted and the application methods indicated by the jurisprudence regarding the prohibition of aid granted by states in favor of certain companies or productions.

This principle has had a specific and significant relevance regarding the recovery criteria of which EC has the power to dispose while leaving the state concerned to determine the amounts to be repaid and the means by which to obtain the return. This discretion of states is limited by their obligation to provide immediate and especially effective execution of this recovery according to Regulation n. 659/1999 and according to this obligation individual states must transform the recovery order adopted by EC in an enforceable title towards the beneficiary of the unlawful aid will have to deal with an act through which the unlawful aid is withdrawn and the other is added the restitution of sums paid in due time.

> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1-9.

It is precisely the principle of effectiveness that imposes these modalities. Neither in the opposite direction national provisions may be invoked, possibly impeding the full and complete operation of this mechanism. In this regard, the indications of CJEU are very clear: it did not hesitate to clarify the impossibility of invoking rules or practices of the state systems for not complying with the Community obligation to obtain reimbursement of unlawful aid. The only defense that a member state can object is that it is absolutely impossible to correctly implement the decision to repay the sums paid out.

> See: CJEU, C-492/17, Rittinger and others of 13 December 2018, ECLI:E:C:2018:1019, published in the electronic Reports of the cases. CJEU, C-5/89, Commission v. Germany of 20 September 1990, ECLI:EU:C:1990:320, I-03437, parr. 12 and 18.

On the other hand, according to the principle of effectiveness, state obligation arising from the ascertainment of illegitimacy of an aid to companies consists in the effective restoration of the status quo which is reached once the aid in question has been returned by the beneficiary. EC determinations, although formally directed at states, must mirror the effects of aid beneficiaries. Only in this way can we avoid nullifying the effectiveness of decisions issued by EC and deprive the beneficiary of the advantage which it had enjoyed on the market compared to its competitors and effectively reestablish the situation existing before the payment of the aid. Not even the Council can usefully adopt a measure aimed at compensating or using a provision aimed at reducing the effects of refunds to which the beneficiaries are required under the relevant decision adopted by the committee.

> See: C-110/02, Commission v. Council of 29 June 2004, ECLI:EU:C:2004:395, I-06333, par. 41-42.

The principle of effectiveness with regard to the repayment of aid unduly received by one or more undertakings with a view to replacing the existing situation was invoked in extremely strict terms in the very famous Aer Lingus case of 21 December 2016, where it has been clarified

that the obligation to repay cannot be limited to the subject by which the aid was granted. It is noted that requiring the beneficiary to return the aid to intermediary means assuming the risk that the recovered aid will be sold illegally for the benefit of other companies in the same economic sector or a different sector.

> In the same spirit see the precedent case: CJEU, C-348/93, Commission v. Italy of 4 April 1995, ECLI:EU:C:1995:95, I-00673, parr. 25-31. C-164/15 P, Commission v. Aer Lingus of 21 December 2016, ECLI:EU:C:2016:990, published in the electronic Reports of the cases.

It is known that this approach was not carried out by CJEU, which merely satisfied the principle of effectiveness by virtue of the deprivation of the final beneficiary from the advantage it gained by the unlawful aid. Instead, it was the principle of effectiveness that led to the view that it was not subject to the restitution regime to which state aid was received through its recapitalization when it was subsequently sold at the market price in which the unlawful aid it was obviously included. In this case, the real beneficiary and the restitute was rightly considered the person who provided for the recapitalization of the company by virtue of the unlawful aid and to whom the price of the transfer including the value of the aid provided was paid

> See: CJEU, C-277/00 of 29 April 2004, ECLI:EU:C:2004:238, I-03925, par. 80. (HANCHER; OTTERNANGER; SLOT, 2012)

8 Principle of Effectiveness and Union Freedoms – The Role and Function of Useful Effect

The principle of effectiveness emerged through an important interpretative criterion of EU law constituted by the principle of useful effect. Of this criterion Union jurisprudence has operated a very wide employment during the last few years precisely to guarantee complete realization and effectiveness to Union freedom as well as to integrate and

interpret the discipline of those matters which have progressively entered the scope of Union competences.

As far as the former are concerned, the Chen case is an example in which in order to guarantee the effectiveness right in every union citizen to move and reside freely within the territory of member states, there has been no hesitation in adopting an interpretation particularly restrictive of the limits and conditions that can be adopted by various national laws. It was stated on this occasion that this right has a fundamental value and must be interpreted extensively in order to guarantee its effectiveness which would otherwise be affected.

> CJEU, C-200/02, Zhu and Chen of 19 October 2004, ECLI:EU:C:2004:639, I-09925. (CARLIER, 2005; GAUTIER, 2003-2004; HOFSTÖTTER, 2005; KUNOY, 2006; TRYFONIDOU, 2005)

On the one hand, it has not been hesitant to state that the requirement required to make use of the residence right consisting in the availability of adequate resources in order not to constitute an excessive burden on host state public finances should not be understood as allowing such a state to demand the demonstration of provenance of these resources. On the other, it has been stated that this right of residence extends in favor of the lighting not only when they are borne by the citizen holder of the right of residence but also when the latter is dependent on the ascendants. And it is significant to note that this interpretation came as it was intended to guarantee the useful effect of the legislation in question. According to the same expressions used by CJEU the effectiveness of the right of residence of a minor necessarily implies that the child has the right to be accompanied by the person who guarantees the custody and that this person can stay with him in the host state during the stay.

In a similar vein, the criterion of useful effect was widely used when it was a question of interpreting EU provisions relating to the protection of the borrower with regard to his right to different information provided by the lender institution. Also on this occasion it is precisely the guarantee of protection effectiveness provided by the Union discipline

that led CJEU to affirm that effectiveness required an application aimed at preventing the right of withdrawal from the consumer's mortgage contract. In particular, it was the bank that had to bear the consequences of the negative effects related to risks incurred between the conclusion of the loan contract and the withdrawal whose flow could not be limited to the restitution of sums as well as the national law applicable to the contract in question.

> CJEU, C-350/03, Shulte of 25 October 2005, ECLI:EU:C:2005:637, I-0092. (GUTMAN, 2014)

The principle of effectiveness and the criterion of the useful effect operate in favor of a finalist interpretation of union treaties which also entailed integration and reciprocal conditioning between Union and state law according to balances that must be determined. In other words, just as the laws of member states have inspired the values, principles and same notions that characterize the union law, the latter must also be able to influence and derogate from the state discipline, although designated as applicable to a certain ratio or to some of its effects, when it limits or conditions its effective application and operation.

In this sense, the solution adopted in Laval and Rüffert cases concerns the effects of art. 3, par. 7 of the directive on the discipline of posting (96/71/ EC). This provision provides for a favorable treatment to workers and in particular aimed at avoiding the latters from downward competition in working conditions.

> See: C-341/05, Laval un Partneri of 18 December 2007, ECLI:EU:C:2007:809, I-11767. CJEU, C-346/06 Rüffert of 3 April 2008, ECLI:EU:C:2008:189, I-01989. (SACK, 2012)

Furthermore, it was stated that a provision cannot be interpreted as meaning that would allow host member state to make the provision of services on its territory subject to compliance with conditions of employment and occupation which go beyond imperative rules of minimum protection. Conditions would be created to prevent the services

offered by foreign companies in the host state from being hindered or made less competitive and would thus deprive Union's rules on the freedom to provide services and on the regulation of posting of beneficial effect.

9 Principle of Effectiveness and Useful Effect in the Interpretation of Union Rules of Private International Law

In the same logic when it came to assessing the scope of Union legislation introduced in the field of international private and procedural law, there was no hesitation in using the principle of effectiveness and useful effect both on the occasion of its development and application.

A particularly significant example concerns the conflict of laws relating to extra-contractual obligations (Regulation Rome II). The earliest elaboration of the text relating to law acts of fair competition, it has been inspired to promote the application of the country law in which competition relations or consumers collective interests are prejudiced or affected. Likewise, in non-contractual obligations relating to damages caused by restrictive competition relations, the choice is made in favor of the law of the state in whose market the restriction of competition has or could have effect.

This solution is certainly the most appropriate when the market affected by injuries caused by anti-competitive behavior is that of a single state. Less adequate become when the injuries spread over the territory of a number of member states. And it is in this perspective that the commission to correct this inadequacy had no hesitation to use the principle of effectiveness reserving itself to propose alternative solutions justified precisely by the need to preserve the effectiveness of the right of natural and legal persons to seek compensation from loss caused by an infringement of the competition rules (GUTMAN, 2014).

Precisely on the basis of this principle, it was decided to allow the injured party to choose to base his claims on the law applicable by the court of the domicile of the defendant on the sole condition that the

market of that member state is among those directly and substantially affected by restriction of competition. The same solution with some clarifications has been extended and adopted also with reference to cases of plurality of defendants before a single forum when there is a necessary litigation situation between them and the limitation of liability towards each of the defendants directly involved and substantially in member state's market which the trial was instituted against all the defendants by the judge. It was decided to strengthen the operational nature of competition rules, contributing to ensuring their effectiveness and in particular their useful effect.

On the other hand, it is always the principle of effectiveness that both Regulation Rome I are based on justifying the adequate importance they have reserved for the necessary application rules for an order different from the lex causae and not included in the lex fori for the purpose of regulating relevant aspects of the regulations applicable to contracts and/or non-contractual liability. It is precisely because of the special and particular imperativity of these norms within their own order that it is impossible to disregard their effectiveness and therefore it is necessary to provide for their application or at least take due account of them.

> Commission Regulation n. 593/2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6. See the next cases from the CJEU in argument: Verein für Konsumenteinformation v. Amazon EV Sàrl C-191/15 of 28 July 2016, ECLI:EU:C:2016:612; S. Kareda v. S. Benkò C-249/16 of 15 June 2017, ECLI:EU:C:2017:472; Höszig Kft v. Alstom Power Thermal services C-222/15 of 7 July 2015, ECLI:EU:C:2015:525; K Finanz v. Sparkassen Versicherung Ag. Wien Insurance group C-483/14 of 7 April 2016, ECLI:EU:C:2016:205; H. Lutz v. E. Bäuerle C-557/13 of 16 April 2015; Mühlleitner v. Ahmed Yusufi & Wadat Yusufi C-190/11 of 6 September 2012, ECLI:EU:C:2012:542. All the cited cases was published in the electronic Reports of the cases. (KRAMER, 2015; CALVO CARAVACA; CARRASCOSA GONZÁLEZ, 2017; BRAND; FISH, 2008; CARRUTHERS, 2012; OKOLI; ARISHE, 2012; KROLL-LUDWIGS, 2013; D'AVOUT, 2010; DANNEMANN; VOGENAUER, 2013; MCPARLAND, 2015; WAIS, 2017.

LIAKOPOULOS, 2018; MERKIN, 2013; BALLESTROS, 2014; BOELE-WOELKI *et al*., 2010) and II (WHINCOP; KEYES; POSNER, 2018; DICKINSON, 2010).

According to what art. 17 of Regulation Rome II it is possible to emphasize and take into account legal rules of an order of a third state with respect to lex causae and lex fori when these provisions have in some way represented the existence and relevance in the concrete case, precisely because of their essential effectiveness. And in terms even more incisive art. 9 of Regulation Rome I provides for the possibility that these provisions will be effective. Any eventuality that must be strictly guaranteed in both Regulations, even when these are necessary application rules of non-national origin and in particular of Union source (WHINCOP; KEYES; POSNER, 2018).

In this way the principle of effectiveness originally used in union context in matters of international civil procedural law extends its operations also to international private law (SCHOLTEN, 2017). Furthermore, the rationale is the same as the foundation of the first applications of 1968 Brussels Convention, which took effect on the entry into force of Regulation n. 44/2001 and 1215/2012

See: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, entry in force from 10 January 2015. See in argument the next cases from the CJEU: C-368/16, Assnes Havn v. Navigatos Management (UK) limited of 13 July 2017, ECLI:EU:C:2017:546; C-341/16, Hanssen Beleggingen v. Tanja Prast-Knippin of 5 October 2017, ECLI:EU:C:2017:738; C-230/15, Brite Strike Techonologies v. Strike Strike Tecnologies SA of 13 July 2016, ECLI:EU:C:2016:560; C-350/14, Lazar v. Allianz SpA of 10 December 2015, ECLI:EU:C.2015:802; C-536/13, Gazprom v. Lietuvos Respublika of 4 December 2014, ECLI:EU:C:2014:316; C-322/14, El Majdab of 21 May 2015, ECLI:EU:C:2015:334, all the above cited cases published in the electronic reports of the cases. C-70/15, Emmanuel Lebek v. Janusz Domino of 7 July 2016, ECLI:EU:C:2016:524; C-12/15, Universal Music

International Holding BV v. Michael Tètreault Shilling of 16 June 2016, ECLI:EU:C:2016:449; C-605/14, Virpi Kom v. Pekka Komu and Jelena Komu of 17 December 2015, ECLI:EU:C:2015:833; C-438/12, Irmengard Weber v. Mecthilde Weber of 3 April 2014, ECLI:EU:C:2014:212, the just cited cases published in the electronic Reports of the cases. In particular in this ultimate case the Court has declared that: "[...] Since the "jurisdiction of the Court first seized (could not be) be formally established [...] the Advocate General confirmed [...] that there was no lis pendens in operation in this case and proceedings in the Court second seized need not be stayed. He relied on dicta [...] to justify that it was inappropriate for it to stay proceedings pending before it [...] the justification for the "reliable assessment" this was premised on the fact that the Court first seized did not have jurisdiction and could not therefore either determine the question of lis pendens nor issue a judgment capable of recognition under Articles 35(1) and 45(1) [...]". We continue with the next cases: C-218/02, Lokman Emrek v. Vlado Sabranovic of 17 October 2013, ECLI:EU:C:2013:62, I-01241; C-190/11, Daniela Mühlleitner v. Ahmad Yusufi of 6 September 2012, ECLI:EU:C:2012:542, published in the electronic Reports of the cases. C-325/18 PPU, C.E. and N.E. of 19 September 2018, ECLI:EU:C:2018:739; C-595/17, Apple Sales International and others of 24 October 2018, ECLI:EU:C:2018:854; C-337/17, Fenikes of 4 October 2018, ECLI:EU:C:2018:805, all of them published in the electronic Reports of the cases.(NIELSEN, 2013; HAY, 2013; POHL, 2013; NUYTS, 2013; BERAUDO, 2013; STAUDINGER, 2010; RIJAVEC; JELINEK; BREHM, 2012; PULJKO, 2015; GASCÓN-INCHAUSTI, 2014; PAYAN, 2012; KÖHLER, 2017; BERAUDO, 2013; GRARD, 2013; BEAUMONT *et al*., 2017)

10 Principle of Effectiveness and Useful Effect in Union Rules on Jurisdiction and Recognition of Foreign Judgments

This is what was affirmed since the first interpretative sentences of 1968 Brussels Convention when it was not hesitant to observe that in order to guarantee greater certainty and effectiveness of the use of

jurisdictional criteria adopted in order to avoid conflicts of judges, one should be inspired at the beginning of the useful effect inserting and framing the related discipline in the broader regulatory union context. The convention in question had to be applied taking into account the criteria that are based on principles, notions, purposes and union law evolution in order to guarantee maximum effect to it. Useful was the autonomous interpretation of expressions employed a fortiori to Regulation n. 44/2001 in order to guarantee equality and uniformity of rights between member states and the persons concerned. And in this perspective we must also take into account the general principles of law of member states in terms of their effectiveness and that is in their effective operation beyond the different techniques employed in various legal systems. In other words, the solution must be sought in the sense of institutionalizing solutions already acquired in almost all countries.

> See also in argument: CJEU, C-440/97, Grupe Concorde of 28 September 1999, ECLI:EU:C:1999:456, I-06307. CJEU, C-814/79, Netherlands v. Rüffer of 16 December 1980, ECLI:EU:C:1980:291, I-03807, par. 14. CJEU, C-21/76, Handelskwekerij Bier v. Mines de Potasse of 30 November 1976, ECLI:EU:C:1976:166, I-01735. (LARSEN, 2017)

In this sense, effectiveness and its consequent interpretative principle of useful effect enhances national laws that favor their implementation and application according to uniform and equal criteria throughout the European judicial area and on the other, excluding any relevance to those provisions likely to compromise this uniformity. It is a question of ensuring legislation effectiveness by encouraging its application to enhance legal protection of persons residing in EU and avoid conflicting situations between judgments and judicial proceedings; legitimize the operation of European jurisdictional competence of civil and commercial judges and facilitate the decisions circulation in the widest conscience of the pursuit of objectives in the entire Union system.

> CJEU, C-380/17, K and B of 7 November 2018, ECLI:EU:C:2018:877; C-403/16, El Hassani of 13 December 2017,

> ECLI:EU:C:2017:960, above cited cases published in the electronic Reports of the cases. CJEU, C-131/86, United Kingdom v. Gubish Maschinenfabrik of 8 December 1988, ECLI:EU:C:1988:86, I-00905. (ENGEL, 2018)

Each discipline provision relating to the European judicial area must be valued in the light of the objectives it pursues, also taking into account the wider context of other regulations and principles of the union in which it belongs and of which it forms part. And in this logic the principle of effectiveness and in particular the criterion of useful effect has played an essential role.

No wonder that already in the recitals of Regulation n. 44/2001 it has been specified that in order to be effective, the rules on jurisdiction must present another degree of predictability and that, precisely in order to satisfy this requirement, the jurisprudence, for example, considered the application of the forum not conveniens criterion incompatible with the provisions in question. It has been affirmed that this criterion, precisely because it allows a large margin of appreciation by the judge flies at once in fact of a jurisdictional connection criterion, compromises the predictability of the competent forum and is incompatible with the aim of the convention which intends to set uniform and effective jurisdictional criteria.

> CJEU, C-288/92, Custom Made Commercial v. Stawa Metallbau of 29 June 1994, ECLI:EU:C:1994:268, I-02913.

On the other hand, the effectiveness of jurisdictional connection criteria indicated in the locus destined solutionis is admissible only if it is consistent with the principle of contractual proximity. In other words, its use is not possible when it is found that the indication of the locus destined solutionis has been formulated within the framework of the regulation of the contractual relationship in order to circumvent the formal requirements envisaged for the conventional choice of the forum. In the same logic it is only the effective proximity to the dispute and the better knowledge of the cause according to the actual availability of the evidence that justify the use of special forums in derogation from the

general criterion of exercise of jurisdiction in the choir of the domicile of the defendant. And in this logic we understand the reason why the rules derogating from the criterion of territorial jurisdiction of the domicile of the defendant cannot be interpreted extensively that goes beyond the cases specifically contemplated according to the actual needs that justify their use.

> See: CJEU, C-106/95, MSG v. Les Gravières Rhènanes of 20 February 1997, ECLI:EU:C:1997:70, I-00911, par. 31.CJEU, C-89/91, Shearson Lehmann Hutton v. TVB of 19 January 1993, ECLI:EU:C:1993:15, I-00139, parr. 14-16. C-168/02, Kronhofer of 10 June 2004, ECLI:EU:C:2004: 364, I-06009, par. 14.

11 Principle of Effectiveness and Guarantees in the Circulation of Judgments and Antitrust Law – A Combination of Difficult Coexistence?

It should be noted that the need to ensure increasingly effectiveness of the results pursued in the implementation of Community policies in the process of unification of international civil procedural law can cause certain drawbacks. At the Tampere Council in 1999, it was solemnly affirmed that mutual recognition of judicial decisions represents a fundamental pilier of the creation of an effective unitary judicial area within the Union. From this perspective, controls on foreign judgments have gradually been reduced in the new formulation of Regulation n. 44/2001 to eliminate in some subsequent regulations concerning specific matters any type of exequatur procedure. For example, Regulation n. 805/2004 (PÉROZ, 2005; D'AVOUT, 2006; SADLER, 2005) concerning the discipline of disputed credits provides for the possibility of adopting a real European enforcement order with immediate enforcement effects throughout the European judicial area even if the non-contestation of the claim depends on the defect of defendant's constitution.

> Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement

> Order for uncontested claims. CJEU: joined cases C-400/13 and C-408/13, Sophia Marie Nicole Sanders v. D. Verhagen and B. Huber v. M. Huber of 18 December 2014, ECLI:EU:C.2014:2361, published in the electronic Reports of the cases. CJEU, C-429/15, Danqua of 20 October 2016, ECLI:EU:C:2016:789, published in the electronic Reports of the cases.

With regard to the latter provisions, no declaration of enforceability is necessary in the framework of legal system in which the executive effects are to be asserted and it is possible to propose actions aimed at disregarding these effects. This is therefore the solution already accepted regarding the decisions on the return of minors pursuant to art. 40, n. 1, lett. (b) of Regulation 27 November 2003 n. 2.201/2003 concerning decisions in matrimonial matters and parental responsibility, whose exact scope has been clarified by union jurisprudence using the interpretative criterion of useful effect and purpose of better guaranteeing the effectiveness of Union law.

> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. A proposal for a revised Regulation was adopted by the European Commission on June 30, 2016. Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411. (STORME, 2012; VAN BALLEGOOI, 2015; CAAMIÑA DOMÍNGUEZ, 2011; CUNIBERTI, 2014; PFEIFFER, 2016; THÖNE, 2016; HAMED, TATSIANA, 2016). CJEU, C-195/08, Inga Rinau of 11 July 2008, ECLI:EU:C:2008:406, I-05271, parr. 80-83. (BROBERG; FENGER, 2014; BROBERG; FENGER, 2014)

It was considered that the exequatur procedures, even if simplified, were a means of delaying payments or the return of the unlawfully removed child to his habitual residence status which was intended to

guarantee immediacy and effectiveness even at the cost of sacrificing certain procedural rights and guarantees.

> CJEU, C-585/16, Alheto of 25 July 2018, ECLI:EU:C:2018:584, published in the electronic Reports of the cases.

Even with specific regard to the European enforcement order, having extended its operations also in respect of measures in absentia, the procedure under examination in fact forces the defendant to defend himself before the judge. The exequatur procedure is no longer considered a useful tool for the verification and promotion of principles of due process according to the indications of European Court of Human Rights (ECtHR) as we have seen in Pellegrini case of 20 July 2010 and in CJEU in Krombach case, but a constraint to be removed from the need for effectiveness and efficiency in the functioning of European judicial area and satisfaction of payments. And it is precisely in this respect that according to our opinion the efficiency and the right to a fair trial thus appear at last at first sight a two conflicting values and the policy choice made by European institutions has been to make efficiency to prevail

> CJEU, C-7/98, Krombach of 28 March 2000, ECLI:EU:C:2000:164, I-01935.(PÉROZ, 2005; D'AVOUT, 2006; SADLER, 2005). Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims. CJEU: joined cases C-400/13 and C-408/13, Sophia Marie Nicole Sanders v. D. Verhagen and B. Huber v. M. Huber of 18 December 2014, ECLI:EU:C:2014:2361; C-66/17, Chudać of 14 December 2017, ECLI:EU:C:2017:972, above published in the electronic Reports of the cases. CJEU, C-300/14, Imtech Marine Belgium of 17 December 2015, ECLI:EU:C:2015:825, par. 38, where the reference to the rights of defense is explicitly justified on the basis of art. 47 CFREU. See also: C-511/14, Pebros Servizi of 16 June 2016, ECLI:EU:C:2016:448, par. 25, C-484/15 Zulfikarpašić of 9 March 2017, ECLI:EU:C:2017:199, par. 48; C-289/17, Collect Inkasso of 28 February 2018, ECLI:EU:C:2018:133, parr. 36ss, all the ultimate cited cases published in the electronic Report of the cases.

Moreover, precisely in order to avoid the extreme consequences of this choice that could come to the point of stating that the Regulation of international private law in question represent a normative vehicle that allows to consolidate and amplify the effects of possible violations of the principles of due process even legitimacy can be challenged, and it has been observed that Union's legislation does not preclude the possibility of implementing any serious defects in the executive procedure of the foreigner provision that it was not possible to assert before the foreign judge.

Precisely because the executive procedure remains regulated by single national laws it is possible to assert those protection requirements that may otherwise be sacrificed by the elimination of the exequatur procedure and of the simplified and accelerated procedures envisaged for obtaining the European executive title.

Another example in which the principle of effectiveness tends to conflict with other union principles relating to procedural safeguards concerns the limitation period within which the right to compensation for damages caused by actions or behavior detrimental to competition must be asserted.

It has been observed, that if the limitation period and/or forfeiture must be understood from the day on which the agreement or anti-competitive behavior have occurred, it would make practically impossible the exercise of the action for damages. Especially if the deadline is a short limitation period and this deadline cannot be suspended.

On the other, it is asserted that there are precise requirements taken by the principle of certainty that do not allow the prescription of the action for compensation for damage when the subjects who have suffered it under ordinary diligence the effects were in condition both of being aware of the unlawfulness of the conduct and of the unjust damage caused by it.

And according to these circumstances, as has been observed, the absence of uniform solutions within the Union can constitute a serious obstacle to the effectiveness of rights guaranteed to the individual by the Treaty of Lisbon. There may be orders which, with an excessively

short limitation period, risk compromising the effectiveness of the whole system of private enforcement of the Union by depriving the injured party of the possibility of concrete protection while, conversely, other legal systems may be applicable.

> CJEU, C-150/17 P, European Union v. Kendrion of 13 December 2018, ECLI:EU:C:2018:1014, published in the electronic Reports of the cases.

Precisely in order to reconcile these opposing needs and different settings adopted in various national legal systems EC in the White Paper on the anti-trust actions of the EC antitrust rules of 2 April 2008 (IOANNIDOU, 2015; FLETCHER; HERLIN-KARNELL; MATERA, 2016) has highlighted that the relative solution cannot be left to the discipline of various national laws in inter alia conflicts with both the principle of effectiveness and legal certainty, creating a non-uniform treatment to the private enforcement of the Union.

> White Paper on damages actions for breach of the EC antitrust rules COM(2008) 165, 2.4.2008. from the CJEU in argument see the next cases: C-360/09, pfeeiderer of 14 June 2011, ECLI:EU:C:2011:389, I-05161; C-199/11, Ottis and others of 6 November 2012, ECLI:EU:C:2012:684, C-536/11, Donau Chemie of 6 June 2013, ECLI:EU:C:2013:366; C-557/12, Kone o 5 June 2014, ECLI:EU:C:2014:1317, cited in the electronic Reports of the cases.

It has thus been proposed that it is infringement that detects the purposes of limitation with the clarification that in case of continuous or repeated infringement the limitation period of 5 years begins to run only after the infringement has ceased and in any case the prescription period does not begin when the injured party has not been able to reasonably consider the infraction and the prejudice that has been caused to him.

It is also always excluded for the sake of certainty and effectiveness that the indicated 5-year term may be suspended for the entire duration of the sanction proceedings before the competent antitrust authority satisfy

the effectiveness of Union's private enforcement. It is envisaged that at least two years must elapse in order to mature the limitation period from the time when the assessment by the competent antitrust authorities of the infringement of the competition rules became final.

12 And in Case of Insolvency?

After the proposal of Regulation n. 2015/848 noting in particular the non inclusion of hybrid translation, but only an affirmative restriction according to recitals 33 and 34 that "the court is not required to open the insolvency proceedings", the court followed another path of thought through its case law as in the case: C-310/14, Nike European Operations Netherlands BV v. Sportland Oy of 10 December 2015, where CJEU states that: "[...] if a domestic court's rules of evidence were not sufficiently rigorous, which led, effectively, to a shifting of the burden of proof to the defendant in an avoidance claim, it would not be regarded as being in line with the principle of effectiveness together with that of equivalence, must be taken into account in any case […]".

> See in particular see the next cases: CJEU: C-649/13, Comitè d'enterprise de Mortel networks SA and others v. Cosme Rogeau liquidator of Nortel networks SA and Cosme Rogeau liquidator of Nortel networks SA v. Alan Robeau Bokm and others of 11 June 2015, ECLI:EU:C:2015:384. C-212/15, ENEFI v. DGRF of 9 November 2016, ECLI:EU:C:2016:841. C-195/15, SCI Senior Home v. Gemeinde Wedemark & Hannoversche Volksbank EG of 9 December 2016, ECLI:EU:C:2016:804. C-327/13, Burgo Group Spa v. Illochvona SA and J. Theetten of 24 October 2014, ECLI:EU:C:2014:2158. C-328/12, R. Schmid v. L. Hertel of 16 January 2014, ECLI:EU:C:2014:6. C-527/10, ERSTE Bank Hungary Nyrt v. Magyar Állam and others of 4 July 2012, ECLI:EU:C:2012:417. C-213/10, F-TEX SIA v. Lietuvos-Anglijos UAB of 25 May 2012, ECLI:EU:C:2012:215. C-251/12, Van Buggenhout and Ilse van de Mierop v. Banque Internationale à Luxembourg SA of 16 January 2014, ECLI:EU:C:2014:566. C-557/13, H. v. H.K. C-295/13 of 16 April 2015; H. Lutz v. E.

> Bäuerle of 11 June 2015, ECLI:EU:C:2015:2410. C-116/11, Bank Handlowy y Adamiak w Warszawie SA and PPHU "ADAX"/ Ryszard Adamiak v. Christianapol Sp. z.o.o. of 19 September 2013, ECLI:EU:C:2013:739, all the above cited cases published in the electronic Reports of the cases. C-444/07, MG Probud Gdynia sp. z.o.o., of 20 October 2011, ECLI:EU:C:2011:24, I-00417. C-396/09, Interedil Srl in liquidation v. Fallimento Interedil srl and Intesa gestione crediti SpA of 17 November 2011, ECLI:EU:C:2011:671, I-09915. C-112/10, Antwerpen Zaza Retail BV of 15 December 2011, ECLI:EU:C:2011:743, I-11525. C-191/10, D. Rastelli and C. Snc v. Jean-Charles Hidoux of 19 April 2012, ECLI:EU:C:2012:838, I-13209.Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. (LISANTI; SAUTONIE-LAGUIONIE, 2016; VAN HOE, 2014; WESSELS, 2013)

In this case the principle of effectiveness has been constructed under the effort to ensure that EU law actually takes effect in all member states and domestic private law or civil procedure is not able to be applied in a relationship or might be interpreted differently from what the parties in the relationship expected.

> In the same spirit see: CJEU, C-529/14, YARA Brunsbüttel GmbH v. Hauptzollamt Itzehoe of 17 December 2015, ECLI:EU:C:2015:836, not published. C-353/15, Leonmobili Srl, Gennaro Leone/Homag Holzbearbeitungssysteme GmbH and others of 24 May 2016, ECLI:EU:C:2014:354, not published. C-85/12, LBI hf v. Kepler Capital Markets SA and Frédéric Giraux of 24 October 2013, ECLI:EU:C:2013:697, published in the electronic Reports of the cases. C-111/08, SCT Industri AB i likvidation v. Alpenblume AB of 2 July 2009, ECLI:EU:C:2009:419, I-05655.

In particular with the judgment: C-157/13, Nickel & Goeldner spedition v. Kintra of 4 September 2014, CJEU held: "[...] that Regulation [...] must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under article 1(2)(b) of Regulation n. 44/2001, from the

application of that Regulation in so far as they come under bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of Regulation n. 1346/2000 [...]" (PAUNEN, 2011). CJEU thus in the notion of: "[...] action arising out of a procedure of insolvency and closely related to it", as elaborated by its previous case law, included an action where the insolvency administrator obtained the payment of a company's claim and declared insolvent on an international freight transport contract, from the moment that "that action found its foundation not in the insolvency of the undertaking, but in the contract previously concluded by the company itself with the defaulting counter party [...]". It referred to the concept of direct action against the administrator of an insolvent company with the ultimate aim of obtaining the payments made after the insolvency of the company itself: "[...] as such action, from the subject matter of the previous judgment, presupposes debtor's insolvency status, even if the action in question could have been practiced, in principle, independently of the opening of insolvency proceedings [...]". The main objective is the limitations on the recognition and enforcement of competition decisions, as well as the reference to public policy objections considered in its narrowest sense of the term, which must only concern violations of the principles of the due process and include the protection of fundamental rights as personal liberties.

13 Effectiveness as a Constitutive Principle and Dynamic Interpretation of EU Law

The evolution of principle of effectiveness has now been confirmed. In the first period it was adopted in order to legitimize the same juridical nature of Union's legal system in its affirmation as an autonomous system with respect to international and state law. Subsequently, the principle of effectiveness has acted as a guiding criterion for the interpretation of union law. It makes it possible to incorporate functional and teleological arguments and considers it essential to evaluate the negative repercussions of the (interpretative) decision discarded on the effectiveness of Union

law and/or on the achievement of its goals. It is a dynamic interpretative criterion that does not have regard to the literal tenor of the provision, a literal tenor that it is indeed about to overcome in order to ensure the effectiveness of the right of union to pursue a goal of Union's order and to avoid negative consequences on union provisions.

Through the principle of effectiveness we legitimize an interpretation and application of union law increasingly free from the parameters usually used internationally and in particular from the formation of founding treaties norms or from its meaning pressures used in Union law, a heteronomous and authoritative source with respect to the state systems and its direct recipients. One legitimizes a functional and dynamic-evolutionary interpretation that is particularly attentive to the concrete consequences to which it leads. The Treaty of Lisbon and the previous treaties are interpreted and applied as if they were the constitution of the Union as well as an international convention stipulated by independent and sovereign states. In a logic aimed at pursuing the aim of an ever closer union between peoples and the transformation (integration) of member states legal systems. Any contradictory interpretation is therefore avoided respecting however the principle of effectiveness, the useful effect and the most recurring argument used in this regard.

The principle of effectiveness also made it possible to complete the most correct balances of union law reciprocal integration and of particular state law into the criteria by which the sincere cooperation between member states and union institutions must be achieved both in terms of measures which must be adopted to ensure the fulfillment of obligations deriving from the Treaty or established in Union acts, both with reference to state measures by which states must refrain in order not to jeopardize the fulfillment of the Treaty of Lisbon objectives.

Precisely in the perspective of being effective, the obligation indicated above must be understood not only in the internationalistic meaning aimed at ensuring full and complete execution of union's internal legal system but above all of acting positively in order to guarantee the achievement of objectives of various acts adopted within the same union

institutions. States must take all the necessary measures to ensure the fulfillment of obligations deriving from the treaty or acts of institutions and refrain from any provision that could jeopardize the achievement of the aims of the treaty. Where Community rules are adopted for the achievement and objectives of the treaty, member states may not, outside the scope of the institutions, undertake commitments likely to affect those rules or to alter their effectiveness.

> See: CJEU, C-45/07, Commission v. Greece of 12 February 2009, ECLI:EU:C:2009:81, I-00701

It is a real obligation of result from which it derives for the states the duty to behave even in matters of belonging to the community and to refrain from intervening when such intervention may compromise the action or union goals.

> See: CJEU, C-30/72, Commission v. Italy of 8 February 1973, ECLI:EU:C:1973:16, I-00161.

In this sense, the principle of effectiveness appears to be destined to further evolve and increasingly characterize the development of Union in all sectors and aspects. The principle of effectiveness extensively used in competition regulation, as well as in connection with the freedom of consumer protection, extends equally in all other areas where the implementation of Union is at least in its current state of complete inauguration with respect to the objective of rendering the citizenship of Union effective.

14 Conclusion

Having raised the criterion of effective judicial protection to the rank of general principle of union legal system, and this primarily through CJEU jurisprudence to be given by Johnston pronunciation, i.e. before codification of art. 47 CFREU. Firstly, the effectiveness of judicial protection has become, like the other general legal system principles, a

parameter for assessing the legitimacy behavior of member states when they are implementing union rules. Secondly, and as a direct consequence of the superior importance, the classification of effective judicial protection in terms of general principle allowed CJEU to intervene directly on the single national legal systems, often impacting directly on the internal procedural rules of reference.

> See: CJEU, C-222/84, Johnston of 15 May 1986, ECLI:EU:C:1986:206, I-01651.

Moreover, the jurisprudence summarily described matters of responsibility and judgment to outline two further concepts. First of all, it has made it possible to highlight that, even in the two thematic areas chosen, where there is often no express reference to art. 47 CFREU, the criterion by which to attempt the reconciliation between the needs of principles not always coinciding in the content and in the main objectives to which they tend. The internal rules that give the final judgment to judicial decisions must be set aside if and to the extent that their strict application ends up precluding individuals from effectively accessing the instruments for effective protection of their rights, even in the context of remedies equivalence. Similarly, in terms of liability for damages, the violation of EU law by a member state determines the obligation of compensation incumbent on the latter against the individual, with the consequence that the protection of effective judicial protection coincides with the interest of the superior system to "react" against the hypothesis of incorrect application of its precepts. But there is more...

It is also interesting to note that the positivization of judicial protection effectivety has certainly contributed to a greater knowledge of the principle and its systematization, at least highlighting the equal dignity between the needs underlying individual rights and those related to the proper functioning of the legal system intended. However, the aforementioned jurisprudence, and in truth also another one on which we have not discussed, while attributing to the principle of effectiveness of judicial protection a leading position in the logic of argumentative incidence, does not seem to particularly enhance art. 47 CFREU and very

often does not even mention it explicitly. If this does not certainly mean to minimize its legal and conceptual scope, it can most probably mean only that the codification of the post-Lisbon situation has only crystallized a well-established jurisprudential practice, as has been emphasized, and nothing added to it except the greater knowledge of the principle that derives directly from its prediction in an ad hoc normative text.

> See: CJEU, C-C518/16, ZPT of 28 February 2017, ECLI:EU:C:2017:126; C-298/16, Ispas of 7 September 2017, ECLI:EU:C:2017:650, above cited cases published in the electronic Reports of the cases. (GROUSSOT; PETURSSON, 2015; SÁNCHEZ, 2012; TRIDIMAS, 2014; VON DER GROEBEN; SCHWARZE; HATJE, 2015; STERN; SACHS, 2016; PEERS, 2014; MEYER, 2014)

A concept, however, is certainly strengthened in the face of the new regulatory provision, i.e. that for which the effectiveness of judicial protection is the preferred tool through which to measure the effectiveness of the system as a whole; this means that the more efficient the means prepared by the national and Union's procedural systems in order to guarantee the satisfaction of the interests underlying the individual positions, the higher the degree of effectiveness of the whole system should be. Ultimately, the very effectiveness of a legal system, including that of the Union, is largely determined by the instruments through which the observance of its precepts by the subjects to whom it is directed is pursued. On the other, as has been noted, the atypical nature of Union's regulatory structure implies that the concept of effectiveness is enriched by a particular nuance linked to effectiveness. Hence, the system is effective insofar as it is able to "concretely" guarantee the pursuit of objectives contemplated by the Treaties and the satisfaction of interests that its rules attribute to individuals.

Now, a confirmation of this reconstruction is undoubtedly offered by the positivization of the principle of effective judicial protection, which took place with the entry into force of the Lisbon Treaty, which introduced the principle in question in articles 19, par. 1, lett. 2, of the Treaty on European Union (HARTKAMP; SIBURGH; DEVROE,

2017; LENAERTS; MASELIS; GUTMAN, 2014; WIERZBOWSKI; GUBRYNOWICZ, 2015; TÜRK, 2010; WOODS; WATSON, 2017; BARNARD; PEERS, 2017; BERRY; HOMEWOOD; BOGUSZ, 2013; CONWAY, 2015; NICOLA; DAVIES, 2017; USHERWOOD; PINDER, 2018; DA CRUZ VILAÇA, 2014), and art. 47 of CFREU (HOFFMEISTER, 2015). Their very existence is the striking proof of the link which the union legislature wished to establish between the general criterion of effectiveness of law and that of judicial protection: the legal system can be said to be truly effective when member states observe obligation to prepare the procedural tools necessary to protect its substantive rules, i.e. to ensure its correct application (ARNULL, 2011).

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