The impact of the EU law principle of effectiveness

Denis Edwards assesses the principle and the potential consequences for English public law

It is well-known that EU law does not establish a separate system of remedies for breach of EU law rights. Subject to one or two particular remedies which the member states must make available, such as the Francovich damages remedy for breach of EU law, it is left to domestic procedural law to specify the conditions for the enforcement of EU law. But this is subject to the twin principles of equivalence and effectiveness. The principle of equivalence means that domestic procedural law must operate in the same way for rights derived from domestic law and their EU law equivalents. For example, EU law does not permit domestic law to have different limitation periods for domestic law rights and similar EU law rights. In essence, domestic procedural law must not discriminate against EU law.

The principle of effectiveness first means that domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law. In practice, this means that national procedural rules must respect the principle of proportionality: they will be lawful as long as they do not hinder the operation of EU law so much that they cannot be justified.

Second, the principle of effectiveness requires national law to ensure the full effectiveness of EU law. It is often thought that this is limited to national procedural law, no doubt because the principle of effectiveness, along with the principle of equivalence, grew out of the ECJ’s case law on the interaction between EU law and national procedural law.

However, it is now clear that the principle of effectiveness can have a significant impact beyond procedural law, on the substantive law of the member states. This is not only through the doctrine of ‘direct effect’, by which EU law requires that domestic law give full effect to EU directives. Rather, it concerns minimum standards which domestic law must meet so as to be fit for purpose in fully protecting EU law rights.

These implications of the principle of effectiveness are brought into sharp focus in the recent Supreme Court decision in FII Test Claimants [2012] UKSC 19. The case concerned the rights of the taxpayers to recover ‘overpaid’ tax; that is, tax which they paid but which was later found to have been contrary to EU law.

English law eventually provided two remedies for repayment of unlawful taxes: a so-called Woolwich claim (after Woolwich Equitable Building Society v HMRC [1993] AC 70) and a distinct restitutionary claim based on mistake of law.

In FII, parliament had barred the Woolwich claim in a way that was compatible with EU law. However, the legislation barring the mistake of law claim breached the principle of effectiveness. Did this matter? Surely the principle of effectiveness was satisfied when domestic law provided the Woolwich claim? Or did the principle of effectiveness require domestic law to provide both remedies? In other words, did the EU law principle of effectiveness require a minimum standard that the English law of restitution had to satisfy to be compatible with EU law?

The Supreme Court divided on this question, which has now been referred to the CJEU under article 267 of the Treaty on the Functioning of the EU. In their judgments, however, the justices recognised the impact of the principle of effectiveness on substantive national rules.

Lord Sumption said that the EU law principle of effectiveness meant that “the substantive and procedural provisions of national law must be effective to protect EU law rights”. In his judgment in FII, Lord Reed observed that it seemed “idiosyncratic to describe the grounds of action available under domestic law as procedural rules”, but this was how EU law distinguished between rights derived from EU law and the national law by which effect is given to them.

Far-reaching implications

The acknowledgement that the principle of effectiveness is relevant for domestic substantive rules of law has some far-reaching implications.

On the one hand, where judicial review claims are brought against domestic decision makers exercising powers derived from EU law, the grounds for judicial review may be limited to those available in EU law. For example, when an asylum seeker challenges a Home Office decision to return him to another EU member state under the Dublin II Regulation, is the decision challengeable only on grounds for judicial review that EU law recognises? If so, then the decision may only be unlawful if it can be said to be ‘manifestly unfounded’, which is a higher standard for a claimant to reach than Wednesbury unreasonableness with “anxious scrutiny”. It may be said that only this higher threshold for judicial review ensures the full effectiveness of the Dublin II Regulation.

On the other hand, the principle of effectiveness can require domestic courts to engage in more intensive judicial review than is traditionally the case. For example, in many cases governed by EU environmental law, the CJEU arguably requires a court to reconsider the factual and evidential basis of a challenged decision, thus making judicial review more like an appeal than a ‘review’. But English courts don’t always adopt this approach (see R (Loader) v Secretary of State for Communities and Local Government [2011] EWHC 2010 (Admin)).

Depending on what the CJEU says in FII, the principle of effectiveness could entail certain minimum standards for judicial review in all cases where rights are derived from EU law.

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