

## **EFFET UTILE AND NATIONAL PRACTICE: IS THERE A ROOM FOR IMPROVEMENT?**

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### ABSTRACT

*Effet utile as a general principle of EU law is always “bound” on the dilemmas of the effective enforcement of EU law, more particularly, on the dilemmas of the judicial protection of EU-based rights through national and also EU remedies. This article is centered on three topics: first, on the concept of decentralized enforcement of EU law and meaning of the principle of effectiveness (effet utile) thereof; second, on the national practice of the effective enforcement of EU law from a standpoint of private parties; and, third, on a national practice of the preliminary reference procedure’s referrals in the context of national courts’ duty of loyal cooperation.*

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## 1. INTRODUCTION

*Effet utile* or the principle of effectiveness requires the effective protection of EU rights and the effective enforcement of EU law in national courts.<sup>1</sup> Thus in this article *effet utile* is used in its broadest meaning and above all in the context of the national judicial practice. Therefore, the “initial narrow definition” of the requirement of effectiveness that national rules must not render the exercise of Union rights virtually impossible or excessively difficult,<sup>2</sup> is mentioned merely as a starting point in a much broader discussion regarding national judicial practice while enforcing Union rights. After a decade of Slovene membership in the EU, the “activity of national courts” has to be critically assessed especially from a standpoint of private parties while claiming their EU rights on the “national level” of the judicial protection. The term “private parties” is in this article related to the concept of individual rights and it is thus used for analyzing the system of the judicial protection of both, natural and legal persons. In essence, the main concern of this article is the effective enforcement of EU law before national courts. I will endeavor to show that albeit national courts are without restraint applying EU law, the level of effective judicial protection of private parties’ EU-based rights in Slovenia must nevertheless be improved.

## 2. EFFET UTILE AND PRIVATE PARTIES’ JUDICIAL PROTECTION

There are two main means by which private parties can enforce EU norms, that is centrally and decentrally.<sup>3</sup> Centralized enforcement refers to the ability of private parties to bring an action before the EU’s own courts (the Court of Justice and General Court).<sup>4</sup> This was the primary method of enforcement envisaged by the Treaty of Rome,<sup>5</sup> however access of private parties to the EU courts has been and still is very limited. According to Article 263 TFEU, private parties can file annulment action under extremely strict *locus stan-*

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<sup>1</sup> Tridimas, T., *The General Principles of EU Law*, 2<sup>nd</sup> ed., Oxford University Press, 2006, p. 418.

<sup>2</sup> *Ibid.*, p. 423.

<sup>3</sup> Dougan, M., *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation*, Hart Publishing, Oregon, 2004, p. 2.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*; further: Tamm, D., *The History of the Court of Justice of the European Union Since its Origin*, in Rosas, A., et al., *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, T. M. C. Asser Press, 2012, p. 19.

*di* rules as they can challenge only the legality of acts addressed to them or which are of direct and individual concern to them or the legality of regulatory acts which are of direct concern to them, and do not entail implementing measures. Similarly, constrained conditions are also established under Article 265 TFEU, which provides an action for a wrongful failure to act of the EU institution. Since the plea of illegality (*exceptio illegalis*) as defined by Article 241 TFEU does not constitute an independent cause of action, it cannot be regarded as a relevant private party's (additional) legal remedy. Moreover, the infringement procedure provided for in Article 258 TFEU is strictly objective in nature, meaning that the ECJ decides (only) whether the breach of EU law alleged by the Commission has occurred or not.<sup>6</sup> The Commission's function is to ensure that Member States give effect to the Treaties and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing them to an end.<sup>7</sup> Consequently, the Commission's discretion on whether to bring an action against a Member State is very wide, which means that private parties cannot in no way force the Commission to bring an infringement case before the EU judiciary.<sup>8</sup> Thus infringement procedure cannot either be regarded as an effective private parties' remedy under EU law. Finally, although Union's liability system with damages actions against the EU set by Articles 268 and 340 TFEU is an important segment of private parties' judicial protection under EU law, a subsisting drawback lies in the fact that the only order available is the award for compensation for damage caused by a Union institution.<sup>9</sup> Moreover, private parties' "success rate" is very low, since out of many claims instituted under Article 340 (2) TFEU only few have actually resulted in an award of compensation.<sup>10</sup>

On the other hand, at the time of drafting of the Treaties of Rome the importance of adoption of Nicola Catalano's proposal inspired by Italian law that national courts should be able to submit questions of interpretation of (then) Community law to the ECJ in order to "secure uniformity" was not foreseen.<sup>11</sup> In other words, the "EU founding fathers" did not discern that the preliminary

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<sup>6</sup> Prete, L., Smulders, B., The Coming of Age of Infringement Proceedings, *Common Market Law Review*, Vol. 47, št. 1, 2010, p. 13.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, p. 15.

<sup>9</sup> Ward, A., *Judicial Review and the Rights of Private Parties in EU Law*, 2<sup>nd</sup> ed., Oxford University Press, Oxford, 2007, p. 368.

<sup>10</sup> *Ibid.*, p. 367; see also Aalto, P., *Public Liability in EU Law: Brasserie, Bergaderm and Beyond*, Hart Publishing, Oxford and Portland, Oregon, 2011, p. 148.

<sup>11</sup> Tamm, D., in Rosas, A., *et al.*, *op. cit.*, p. 19.

reference procedure would serve as principal procedure for private parties' judicial protection. Only through the usage of preliminary reference procedure the ECJ has started to cooperate with the courts of the Member States, which have thus become the ordinary courts in matters of Community (now EU) law. Therefore, on the decentralized level, the national courts have become "first-in-line EU courts", in most cases involving private parties as litigants.<sup>12</sup> Although not without its pitfalls, according to the EU judicial architecture the primary venue for private parties' judicial protection is (still) the decentralized level of the EU judicial system with the essential cooperation of national courts.

On this point it should be briefly recalled that the ECJ has involved the national courts and made them allies in the enforcement of Community (now EU) law, first on the basis of the principles of direct effect and supremacy of EU law.<sup>13</sup> This was the initial stage. A significant step further in the process of "Europeanization" of national courts was made with the establishment of the *effet utile* requirements. Even though in the early case law ECJ ruled that it was for the national legal system to determine the primary conditions under which rights granted by the EU (then EC) law were to be protected where no relevant rules of EU law existed, this principle of national autonomy was later on qualified by the dual requirement of equivalence and effectiveness.<sup>14</sup> The principle of equivalence requires that claims based on EU (then EC) law must be subject to rules which are no less favorable than those governing similar claims based on national law.<sup>15</sup> Due to effectiveness' condition, national rules must not render the exercise of Union (then Community) rights virtually impossible or excessively difficult.<sup>16</sup> Thus the requirement of effectiveness is a separate form and applies in addition to the requirement of equivalence as it "demands" from national courts the insurance that they give adequate effect to EU (then EC) law in cases arising before them.<sup>17</sup> This "simple formula has proven the most volatile weapon in the ECJ's armoury", since according to its jurisprudence the principle of effectiveness (*effet utile*) now encompasses a vast corpus of rules such as upon requirements of the private parties right to reparation in respect of losses suffered through a breach of EU law for which the Member

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<sup>12</sup> Claes, M., *The National Courts' Mandate in the European Constitution*, Hart Publishing, Oxford, 2006, p. 59.

<sup>13</sup> *Ibid.*, p. 41.

<sup>14</sup> Craig, P., de Burca, G., *EU Law: Text, Cases and Materials*, 5<sup>th</sup> ed., Oxford University Press, Oxford, 2011, p. 305-306.

<sup>15</sup> *Ibid.*

<sup>16</sup> Tridimas, T., *op. cit.*, p. 423.

<sup>17</sup> *Ibid.*, p. 422.

State can be held responsible; regarding effective interim protection of one's EU rights pending their final determination by a competent judicial authority or the recovery of charges levied in breach of EU rules by the Member States; the imposition of time-limits restricting the opportunity for claimants to assert their right before the national court or national rules limiting the back-payment of compensation or other financial benefits.<sup>18</sup>

Further on it must be emphasized, that after the Lisbon Treaty amendments, second paragraph of the Article 19 TEU explicitly stipulates that Member States must provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. This amendment is important as previously solely relevant Article 10 TEC (now third paragraph of the Article 4 TEU) far less stringently required from Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community and to abstain from any measure which could jeopardize the attainment of the objectives of this Treaty. According to this Lisbon Treaty amendment "duty of loyal cooperation" explicitly demands of Member States that on the decentralized level of the EU system of judicial protection (also) for private parties provide effective legal remedies in order to ensure legal protection of (granted) EU rights. This stipulation of the relevant ECJ's *effet utile* case law in second paragraph of the Article 19 TEU is moreover significant due to the structure of the relevant provision. If, on the one hand, the ECJ (and the other two Union courts) on the centralized level of the EU judicial enforcement should be considered as the principal head of EU judicial jurisdiction (first paragraph), on the other hand national courts on the decentralized level also form its inevitable counterpart (second paragraph). This is very important as Union Courts only exercise their jurisdiction in actions and proceedings enumerated in the treaties and in the acts adopted on the basis thereof.<sup>19</sup> The settlement of the disputes not falling under the scope of the treaties is therefore a matter for the courts of the Member States, as follows from Article 274 TFEU and also from Article 267 TFEU.<sup>20</sup>

Moreover, for a proper application of *effet utile* in practice it must be briefly recalled the importance of the ECJ' case law regarding the interpretation of the *fundamental right of effective judicial protection* as it derives from the common constitutional traditions of the Member States and Article 6 and 13 of the European Convention on Human Rights (hereafter ECHR). The fundamental

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<sup>18</sup> Dougan, M., National..., *op. cit.*, p. 27 and 32-33.

<sup>19</sup> Barents, R., The Court of Justice after the Treaty of Lisbon, *Common Market Law Review*, Vol. 47, 2010, p. 714.

<sup>20</sup> *Ibid.*

right of effective judicial protection has to be interpreted and applied as a duty in the hands of the courts to provide effective protection of the rights which individuals derive from EU law. Therefore, there is an evident nexus between the *effet utile*'s requirements and application of individual's right of effective judicial protection. More precisely, the right of the effective judicial protection and the principle of effectiveness of EU law often coincide as the effective remedy offered to the individual for the protection of his EU rights, contributes to enforcing the correct application and the enforcement of EU law.<sup>21</sup> The right to an effective judicial protection through the ECJ's application of Articles 6 and 13 ECHR and its further incorporation in Article 47 of the Charter of Fundamental Rights of the EU, is therefore individual's powerful tool in the context of claiming that national rule has the restrictive effect on (the enforcement) a particular (mainly substantive) EU right. Finally, although strictly speaking *effet utile*'s requirements are not (always) equivalent to a broader general duty of co-operation of national courts, the term *effet utile* in this article is nonetheless used in its general sense, encompassing all relevant ECJ's jurisprudence deriving from interpretation of Article 10 TEC, effectiveness principle and right to an effective judicial protection before the Union Courts.

As it follows from ECJ's case law, *general duties of cooperation imposed on the national courts* in their capacity as EU courts include: the duty to apply EU law and protect rights which it confers on individuals and to accordingly set aside any provision of national law which may conflict with it; the duty not to allow state authorities to rely on national laws which are inconsistent with directives which should have been implemented; the duty to interpret and apply national laws as far as possible so as to make them compatible with the requirements of EU law; the duty to give effective remedies for breach of EU law in the form of compensation; the duty to ensure that reparation of loss or damage sustained as a result of a violation of EU law by the Member State is adequate; the duty to apply EU law under the conditions, which are analogous to those applicable to infringements of national law of similar nature and importance; the duty to ensure the legal protection which persons derive from direct effect of the provisions of EU law; the duty to grant interim relief in order to protect rights which individuals derive from EU law; the duty to protect EU fundamental rights in the sphere of EU law; the duty to respect the jurisdiction of EU institutions and to avoid conflicting decisions; the duty to refer to the ECJ questions as to the validity of EU law and, the duty to raise questions of EU law of their own motion where national law provides the same duty or power.<sup>22</sup>

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<sup>21</sup> Claes, M., *op. cit.*, p. 138.

<sup>22</sup> See *ibid.*, p. 67.

### **3. DECENTRALIZED SYSTEM OF JUDICIAL PROTECTION AND NATIONAL COURTS**

As Slovenia has joined the EU on the 1<sup>st</sup> of May 2004, national courts have been practicing their “EU mandate” for almost ten years now. After a decade of this national practice it is high time to assess the private parties’ actual access to the effective enforcement of EU law on the national level as envisaged through the (“decentralized”) EU judicial protection system. Additionally, it must be analyzed if private parties in practice often claim that national procedural rules constrain their enforcement of EU law on the relevant national level.

At the outset, sector specific nature of EU law is also reflected in the final application of EU law by national courts. In other words, core EU fields of law which are intensively regulated on the EU level, logically represent most commonly disputed issues also before national administrative bodies and consequently before national courts. For example, in disputes regarding breaches of competition rules<sup>23</sup> or intellectual property rights<sup>24</sup>, national courts cannot obviate the application of relevant EU legal norms and subsequent vast corpus of ECJ and General Court’s case law. Similarly, this could be claimed for some other branches of EU administrative law regarding asylum procedure and immigration rights, claims for citizenship, taxation (indirect tax, excise duty) or environmental issues.<sup>25</sup> Moreover, next to competition protection office (Slovene Competition Protection Agency), some other relevant market regulators such as Securities Market Agency, Insurance Supervision Agency or The Slovene Institute of Auditors are deciding on different financial market structure issues that are intensively regulated or harmonized by various EU regulations and directives. Since their final decisions can be judicially reviewed before the Administrative Court on the first instance and before the Supreme Court acting as the court of appeal subsequent case law often includes direct referral to relevant EU law.

It should be stressed, that due to vast economic power of private parties as litigants in this “market structure” disputes, the quality of legal representation is generally very good and it instigates also better reasoning of the final judi-

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<sup>23</sup> See Supreme Court decisions G 7/2013, 3 December 2013; G 9/2012, 26 November 2013; G 47/2010, 11 June 2013.

<sup>24</sup> See Supreme Court decisions III Ips 68/2010, 11 October 2011; X Ips 420/2010, 12 September 2012; X Ips 221/2012, 12 September 2012.

<sup>25</sup> See Knez, R., *Analiza prakse uporabe prava EU v sodnih postopkih v Sloveniji*, v Zborniku: Dvajseto posvetovanje o aktualni problematiki s področja gospodarskega prava, Portorož, 2012, Pravna fakulteta Univerze v Mariboru, p. 105.

cial decisions which are applying EU law or are dealing with the enforcement of EU rights. In this context, Supreme Court's decision G 8/2009 should be mentioned in which the plaintiff claimed incompatibility of Article 62 of (national) Health Care and Health Insurance Act with Article 8(3) of First Council Directive 73/239/EEC of 24 July 1973<sup>26</sup> and with Articles 29 and 39 of Council Directive 92/49/EEC of 18 June 1992<sup>27</sup>. In the administrative procedure of judicial protection the plaintiff filed a legal action that the Insurance Supervision Agency's decision on a conditional withdrawal of authorization to perform the tasks of certified actuary should be abolished. In essence he claimed that he did not violate the rules of the actuarial profession since the (breached) national legislation (Article 62 of Health Care and Health Insurance Act) was incompatible with the relevant EU directives. He argued that the relevant directive's provisions had direct effect and this enabled him to disregard national law and to apply solely the relevant EU legal norm in his final expertise. It must be stressed that while adjudicating on the plaintiffs' claim, the ECJ in the course of action for a failure of a Member State to fulfil obligations (Article 258 TFEU) ruled that by transposing into national law incorrectly and incompletely First Council Directive,<sup>28</sup> the Republic of Slovenia failed to fulfil its obligations under Article 8(3) of Directive 73/239 and Articles 29 and 39 of Directive 92/49.<sup>29</sup> The Supreme Court confirmed the sufficiently clear, precise and unconditional nature of the disputed Article 8 of Directive 73/239 and Articles 29 and 39 of Directive 92/49 and consequently decided that the legal action was justified since the Insurance Supervision Agency had based its contested decision on the Article 62 of Health Care and Health Insurance Act and thus created an infringement of substantive law (erroneous application of substantive law).

On the other hand, in labor disputes private parties are as well increasingly arguing their claims on the relevant EU legal basis, especially due to the duty of consistent interpretation (principle of harmonious interpretation) or the obligation to interpret national law in conformity with directives in horizontal situations, thus involving two private parties before a domestic court.<sup>30</sup>

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<sup>26</sup> First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, OJ 1973 L 228, p. 3.

<sup>27</sup> Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC OJ 1992 L 228, p. 1.

<sup>28</sup> See Knez, R., Analiza prakse uporabe prava EU v Sloveniji – delovni in socialni spori, *Pravosodni bilten*, No. 1, XXXIV, 2013, p. 28.

<sup>29</sup> Case C-185/11, *European Commission v Republic of Slovenia*, not yet published.

<sup>30</sup> See Knez, R., Analiza prakse uporabe prava EU v Sloveniji – delovni in socialni spori, *op. cit.*, p. 28.



Moreover, in an important social security case, the Supreme Court has been dealing with the “delicate” question of the reimbursement of medical costs for hospital treatment in another Member State from the national health insurance system.<sup>31</sup> The case concerned a plaintiff’s claim over the rejection of reimbursement her costs for medical treatment in Italy by national Compulsory Health Insurance (the defendant). The Supreme Court granted the plaintiff’s revision and annulled the first and second instance courts’ decisions (and returned the case to the court of first instance for re-trial), by which the lower instance courts rejected the plaintiff’s claim. The Supreme Court put forward that ECJ’s case law must be considered as the health services provided for payment firmly fall within the provisions on the freedom to provide services. It further on stipulated that according to *acquis communautaire* in each case it has to be assessed whether hospital or outpatient (non-hospital) care is at issue, since the system which allows the insured individual to request from the national compulsory health insurance company the reimbursement of the cost of medical services carried out in another Member State of EU in accordance with the rules (and at the price) of the home country, in principle applies only to outpatient (non-hospital) health services. Therefore, Member States may require prior authorization for reimbursement from the national system of hospital treatment in another Member State. However, in the line of the reasoning Supreme Court refused to commence the preliminary reference procedure regarding compliance of relevant Health Care and Health Insurance Act and Compulsory Health Insurance Rules with TFEU with the argumentation that “*the scope of a preliminary ruling is limited exclusively to the EU law and does not cover national law as from the division of jurisdiction between the ECJ and the national courts of EU Member States it follows that the ECJ in the preliminary ruling proceedings cannot deal with the issues of national law.*”<sup>32</sup> However, this part of the decision is further analyzed and critically assessed in the subsequent heading of this article.

The sufficient corpus of case law (evident from the national jurisprudence database) leads to a conclusion that in the context of civil law disputes, private parties are commonly referring to different sources of EU “civil” law and subsequently to their EU rights. Since the policy of “EU civil justice” is primarily focused on the judicial cooperation in cross border litigation, private parties are primarily concerned with the effective enforcement of different legislative instruments such as for example regulation Brussels I or Brussels II,<sup>33</sup> that

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<sup>31</sup> See Supreme Court decision VIII Ips 295/2011, 4 December 2012.

<sup>32</sup> See par. 11, *op. cit.*

<sup>33</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, p. 1; Coun-

have been put in place at EU level over the last decade. From the perspective of harmonization of the Member States' national procedural law the establishment of two autonomous European civil procedures in. e. the European Small Claims Procedure and the European order for payment procedure is of particular importance.<sup>34</sup> Since the latter has been already "disputed" on the appellate stage before the High Courts it could be argued that private parties' awareness regarding the existence and effectiveness of this optional procedure is slowly growing.<sup>35</sup> An increasing trend of appeal cases concerning other EU instruments on judicial cooperation in civil matters also enables a conclusion on a satisfactory level of application of other relevant regulations in national judicial practice.<sup>36</sup> Furthermore, next to a significant number of cases regarding Brussels I regulation dealing with issues of recognition and enforcement of judgments given in another Member State,<sup>37</sup> the Slovene Supreme Court extensively ruled in a case III Ips 164/2009 on the proper *ratione temporis* application.<sup>38</sup> In another case, the Supreme Court was dealing with the scope and meaning of a disputed parties' prorogation agreement according to conditions set by the relevant Article 23 of Brussels I regulation.<sup>39</sup> In addition of the said regulation, case law on Brussels II regulation should be mentioned in the context of the second posed national preliminary question, as the High Court of

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cil 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, OJ L 338, p. 1.

<sup>34</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, p. 1; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399, p. 1.

<sup>35</sup> See High Court decisions VSK II Ip 200/2010, 21 May 2010 and VSK Cp 474/2009, 26 May 2009.

<sup>36</sup> See High Court decisions VSK II Ip 200/2010, 21 May 2010 and VSK II Ip 4333/2011, 23 November 2011 concerning 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, OJ L 143, p. 15; see also Supreme Court decision Cpg 2/2008, 5 October 2010; *regarding case-law on Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*, OJ L 174, p. 1, see for example Supreme Court decision II Ips 809/2007, 14 February 2008 and High Court decision VSK I Cp 1182/2005, 27 February 2007.

<sup>37</sup> See Supreme Court decisions Cp 16/2012 and 17/2012, 10 January 2013; Cp 7/2010, 31 January 2011; Cpg 5/2013, 10 September 2013; Cpg 1/2008, 15 April 2008; Cpg 3/2010, 6 July 2010; Cpg 4/2010, 13 July 2010; Cpg 5/2009, 9 March 2010; Cpg 5/2006, 26 February 2007 or Cp 22/2008, 15 January 2009.

<sup>38</sup> Supreme Court decision III Ips 164/2008, 3 February 2009.

<sup>39</sup> Supreme Court decision III Ips 54/2013, 17 December 2012.

Maribor commenced the preliminary reference procedure with regard of the scope of Article 20 (see subsequent heading of this Article).<sup>40</sup> Even though that in the context of private parties' "conflicts of law" disputes, correct application of regulations Rome I and Rome II is of crucial importance,<sup>41</sup> it is difficult to estimate their actual use in national judicial practice due to their rather recent entry into force.<sup>42</sup>

Finally, in the scope of EU criminal law, the Supreme Court has been dealing with some issues on "European arrest warrant" as the relevant framework decision<sup>43</sup> was implemented by the national "Cooperation in Criminal Matters with the Member States of the European Union Act".<sup>44</sup> Nevertheless, this partial "EU law immunity" in the judicial practice of national criminal courts might be changed with the Lisbon Treaty' de-pillarization and its further establishment of solid grounds for advanced harmonization of this field of law.

On the other hand, it must be emphasized that despite the satisfactory level of EU law application and its subsequent enforcement before national courts, private parties' objection regarding the breach of EU "principle of effectiveness" is not used in practice or is at least not recognized by national courts. For example, according to national case law data base, many national cases are dealing with issues of proper application and enforcement of EU law (such as questions dealing with direct effect, limits of duty of consistent interpretation, effect of directives' vertical and horizontal relations, etc.) while only one case is listed under the search form of the principle of effectiveness.<sup>45</sup> Moreover, this case has been in the earlier stage of the proceedings suspended because of the commencement of the preliminary ruling procedure and the ECJ in essence qualified the dispute as a subject matter of proper use of effectiveness principle. However, just one case accurately qualified as the dispute regarding effectiveness principle does

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<sup>40</sup> See High Court decision VSM III Cp 1836/2009, 13 October 2009; see also Supreme Court decision Cp 17/2008, 2 October 2008.

<sup>41</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, p. 6; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, p. 40.

<sup>42</sup> See Articles 28 and 29 of Rome I regulation and Articles 31 and 32 of Rome II regulation; with regard to *ratione temporis* application of Rome II regulation see also Supreme Court decision II Ips 1001/2007, 16 December 2010.

<sup>43</sup> 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190, p. 1.

<sup>44</sup> See Supreme Court decisions I Ips 123/2005, 19 May 2005; I Ips 174/2008, 15 May 2008; I Ips 336/2005, 3 November 2005; I Ips 226/2006, 13 July 2006.

<sup>45</sup> See Supreme Court decision X Ips 18/2013, 19 September 2013.

not prove that national rules never render the exercise of Union rights virtually impossible or excessively difficult. Quite the opposite. The above mentioned case reflects the actual limited knowledge of meaning and scope of *effet utile* principle in national judicial practice. It must be emphasized that it is high time to improve the actual level of private parties' awareness of their right to effective judicial protection in the scope of effective enforcement of their EU rights before national courts. On the other hand, national judges acting in their capacity of *iura novit curia* must more frequently "perceive" the actual objection of denial of effective enforcement of EU rights and act correspondingly.

A practice of claims on damages due to a breach of EU law must be further scrutinized as it serves as an example of discussed "reduced awareness" of claimable rights in the context of possible remedies under EU law. According to records from the national case law database thus far on the appellate stage before High Courts there has been no single case dealing with private party's claiming state's liability for damages due to the sufficiently serious breach of EU law. On this point it must be stressed that it is highly unlikely that Slovenia within 10 years of practicing its "duty of fulfilment of EU obligations" never breached EU law. As was previously discussed in the context of the "actuary case", already this particular actuary as an aggrieved party could have claimed damages for breach of EU law, since Slovenia failed to transpose correctly and sufficiently the relevant directives into national law. Moreover, although first instance courts decisions are not recorded in the case law database, it is highly unlikely that none of the parties never appealed before the High Court, especially since the subject matter on damages due to breach of EU law is a complex one and also distinctive from "classical" cases on state's liability under public liability regime in national law as stipulated in Article 26 of the Constitution of the Republic of Slovenia.<sup>46</sup> This lack of jurisprudence on "EU damages claims" against the state confirms that it is still much easier for private parties as litigants if "the relevant EU remedy" is incorporated in the form of a national legal remedy as it was done in the case of claiming liability for damages due to a breach of EU competition law. Pursuant to Article 62 of the Prevention of Restriction of Competition Act, the aggrieved party can sue for damages on this legal basis also for damages arising from violation of Article 101 and 102 TFEU.<sup>47</sup> In the context of this decentralized private enforce-

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<sup>46</sup> Everyone has the right to compensation for damage caused through unlawful actions in connection with the performance of any function or other activity by a person or body performing such function or activity under state authority, local community authority or as a bearer of public authority. – First paragraph of the Constitution of the Republic of Slovenia, *Official Gazette RS* No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

<sup>47</sup> Anyone violating, either deliberately or out of negligence, the provision of Articles 6 or 9 of this Act or Articles 101 or 102 of the Treaty on the Functioning of the European Union

ment of EU competition law, it seems that this explicit and additional “national” legal basis for bringing an action for damages arising from breach of EU competition law is from a standpoint of private parties’ effective enforcement of EU law very important. This argument is nevertheless further evidenced by the High Courts’ jurisprudence on damage liability due to violation of EU competition law.<sup>48</sup>

Last, but not the least, in this discussion on effective application and enforcement of EU law before national courts, the ECJ *Pelati* case has to be analyzed more precisely as this is the first national case dealing with effectiveness principle in national practice.<sup>49</sup> From the facts of the case it follows that in the taxation procedure in cases of mergers or divisions of companies, the Slovene tax authority rejected Pelati Ltd.’s (hereafter Pelati) application for the grant of tax advantages on the occasion of a division of an undertaking. The reason for rejection of Pelati’s application was the expiry of 30 days prescribed period in Article 363 of Law on Fiscal Procedure in which the Pelati should at least 30 days before the transformation envisaged had been carried out, timely apply for the grant of tax advantages. According to the disputed decision the relevant date of companies’ transformation was the date of subsequent recording of that operation in company register which had been done by competent register court. Pelati brought proceedings for the annulment of the tax authority decision in the Administrative Court and argued that the rejection of its application as being time-barred as a penalty for failure to observe 30-day time-limit laid down by national Law on Fiscal Procedure, was contrary to Article 11 of the Directive 90/434 which stipulated main reasons for refusing to apply this Directive where the merger, division, transfer of assets or exchange of shares operation had as its objective tax evasion or avoidance or resulted in a company refusal of benefits.<sup>50</sup> In short, Pelati argued that this exclusionary time-limit set by national law was contrary to EU law.

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shall be liable for any damages arising from such violation. If the damage was caused through violation of Articles 6 or 9 of this Act or Articles 101 or 102 of the Treaty on the Functioning of the European Union, the court is bound by the final decision determining the existence of violation rendered by the Office and the European Commission. This liability does not infringe upon the rights and obligations stipulated in Article 267 of the Treaty on the Functioning of the European – See first and second paragraph of Article 62 of Prevention of Restriction of Competition Act, ZPOMK-1, Official Gazette RS No. 36/08 with subsequent amendments.

<sup>48</sup> See High Courts decisions VSL I Cpg 229/2011, 18 October 2011; VSK Cpg 216/2012, 22 February 2013.

<sup>49</sup> Case C-603/10, *Pelati d.o.o. v Republika Slovenija*, not yet published.

<sup>50</sup> Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, OJ L 225, p. 1.

It is important to emphasize that the ECJ qualified the referred question for interpretation of the relevant Directive as a legal dilemma regarding temporal restrictions on the enforcement of EU law which concerns the proper application of the principle of effectiveness in practice.<sup>51</sup> Thus the ECJ in its ruling simply relied on previous case-law on time-limits in the context of analyzing the principle of effective judicial protection of the rights conferred on individuals by EU law. Finally, the ECJ held that although Article 11 of the Directive 90/434 should not be interpreted as precluding national legislation, such as that at issue in the main proceedings, it was nevertheless for the national court to ascertain whether the details of the implementation of that period, and more particularly the determination of its starting-point of the period, were sufficiently precise, clear and foreseeable to enable taxpayers to ascertain their rights and to ensure that they were in a position to enjoy the tax advantages provided for by that directive. The ECJ left the final decision on the proper final application of effectiveness' principle to the referring court, which nevertheless confirmed the disputed tax authority decision with argumentation that the starting point of the contested 30-day time-limit laid down by national Law on Fiscal Procedure was in no way contrary to the regime of tax advantages provided for by Directive 90/434. But, on the contrary, the Supreme Court in a revision (filed by Pelati for revision ground of erroneous application of substantive law) ruled that the contested regime was insufficiently precise and unclear and therefore decided that Pelati's application could not have been regarded as being time-barred.<sup>52</sup> In conceptual terms it is important that the Supreme Court raised the important points of EU law and emphasized the meaning of *effet utile* in national judicial practice.

#### **4. DUTY OF LOYAL COOPERATION OF NATIONAL COURTS AND PRELIMINARY REFERENCE PROCEDURE**

Even though the relationship between national courts and the ECJ under the preliminary ruling procedure, covered by Article 267 TFEU is strictly speaking not "considered" as a relevant issue in the context of the *effet utile*' application before national courts, it is nevertheless scrutinized from a standpoint of an actual implementation of private party's right to effective judicial protection within EU law. In the decentralized system of enforcement of EU law, the preliminary reference procedure is the only mechanism through which national courts and the ECJ can engage in a discourse on the appropriate reach

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<sup>51</sup> See the administrative court's question to the ECJ for a preliminary ruling, par. 14, C-603/10, *op. cit.*

<sup>52</sup> See Supreme Court decision X Ips 18/2013, 19 September 2013.

of EU law when it comes into conflict with national legal norms.<sup>53</sup> Moreover, under this mechanism, private parties are vested with the right to challenge the validity of EU measures in disputes unfolding at the domestic level.<sup>54</sup>

Within ten years of national courts' practice of their parallel "EU judicial mandate, five "referral" decisions had been made under the rules of Article 267 TFEU. Indeed, this is an adequate statistics, which enables a conclusion that domestic courts *per se* are not avoiding their duty to refer as stipulated in Article 267 TFEU and are therefore acting in the line of the »spirit of cooperation which must guide all relations between national courts and the ECJ«. <sup>55</sup> Next to *Pelati* case, Administrative court also commenced preliminary procedure in *Omejc* case, in essence concerning the precise meaning of "preventing of an on-the spot check" and the "concept of representative" as stipulated by the Regulation No. 796/2004.<sup>56</sup> Conceptually more interesting was the *Deticek* case in which ECJ in the urgent preliminary procedure ruled on the scope of Article 20 of Brussels II regulation since the High Court suspended the proceeding on the appellate review of a provisional measure regarding custody of the child, which was by (national) first instance court given to the mother although the Italian court had already previously decided to grant custody of the child provisionally to the father.<sup>57</sup> The ECJ decided in favor of narrow interpretation and thus firmly held that Article 20 of Brussels II regulation must be interpreted as not allowing a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment was declared enforceable in the territory of the former Member State. Whereas the ECJ's arguments in the *Deticek* case are on one hand very logical and convincing, it has to be at the same time emphasized that Italian court provisionally did not *de facto* entrust the daughter to the father but placed her (temporarily) to in the children's home of the Calasantian Sisters in Rome. Therefore, narrow interpretation of Article 20 of Brussels II regulation in the case at hand arguably did not determine the most suitable solution for the child. Lastly, the civil department of the Supreme Court referred two requests

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<sup>53</sup> Craig, P., de Burca, G., *EU Law...*, *op. cit.*, p. 442.

<sup>54</sup> Ward, A., *Judicial...*, *op. cit.*, p. 336.

<sup>55</sup> See par. 70, case C-210/06 *CARTESIO Oktató és Szolgáltató bt.* [2008] ECR I-09641.

<sup>56</sup> Case C-536/09 *Marija Omejc v Republika Slovenija* [2011] ECR I-5367.

<sup>57</sup> Case C-403/09 *PPU Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193.



for a preliminary ruling to the ECJ, while one of them is still pending.<sup>58</sup> In the *Grilc* case,<sup>59</sup> however, the Supreme Court sought for a very “technical” interpretation of the exact meaning of the procedure before the compensation body, dealing with insurance claims on civil liability in respect of the use of motor vehicles, concerning the subsequent claim for compensation before the national court. Therefore, it comes as no surprise that the ECJ with an explanation that the answer to the question referred for a preliminary ruling admitted no reasonable doubt, “methodologically” merely decided by reasoned order (not judgment) and very briefly explained the meaning of a stipulated Article 6 of the Directive 2000/26 EC.<sup>60</sup>

From the perspective of national courts’ duty of loyal cooperation are also very important the decisions in which national courts have not decided to suspend the national proceedings in order to commence the preliminary reference procedure but have decided themselves on the issues regarding application of EU law. As it has been previously discussed, one example is the Supreme Court’s decision in which the latter through delineation of the ECJ’s jurisdiction consequently decided not to refer the matter to the ECJ.<sup>61</sup> However, this Supreme Court’s approach must be critically assessed. The Supreme Court’s rather blunt argumentation that the ECJ is in its jurisdiction limited exclusively to addressing the legal issues regarding the interpretation or validity of EU law and therefore cannot rule either on the compliance of national regulation with EU law, nor on the validity of national rules, that are in the exclusive jurisdiction of national courts, is not quite in the line with vast corpus of ECJ’s jurisprudence concerning questions which fall outside the jurisdiction of the ECJ and all other exceptions to the obligation to refer.<sup>62</sup> Further on, it is well-established case law that ECJ would be the ultimate decider of its own jurisdiction<sup>63</sup> and that it

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<sup>58</sup> Case C-162/13 *Vnuk*.

<sup>59</sup> Case C-541/11 *Jožef Grilc v Slovensko zavarovalno združenje GIZ*, not yet published.

<sup>60</sup> »Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.« - See Article 99 of the Rules of Procedure of the Court of Justice, OJ L 265, p. 25.

<sup>61</sup> See Supreme Court decision VIII Ips 295/2011, 4 December 2012; see also this article, p. 9.

<sup>62</sup> More about most common exceptions to the obligation to refer such as if the question is not relevant, if doctrine of *acte éclairé* or doctrine *acte clair* can be applied, see for example Broberg, M., Fenger, N., *References to the European Court of Justice*, Oxford University Press, Oxford, 2010, p. 230.

<sup>63</sup> Case C-244/80 *Pasquale Foglia v Mariella Novello* [1981] ECR 3045; Craig, P., de Burca, G., *EU Law...*, *op. cit.*, p. 465.



strictly declines to rule on a reference for a preliminary ruling from a national court only where it is quite obvious that the interpretation of Community law that is sought is unrelated to the actual facts of the main action or to its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.<sup>64</sup> Therefore, a more cautious Supreme Court's approach would have been much more precise and legally correct. Indeed, it must be stressed that the Supreme Court further on in its reasoning of the case emphasized that national courts at the resolving of the collision between the national law and EU law should take into consideration the fundamental principles of EU law, the ECJ's case law and especially the requirements of principle of primacy. Still, this aforementioned vague Supreme Court's argumentation in which any kind of reference to the ECJ's jurisprudence is completely left out, from the perspective of the principle of legal certainty cannot serve as a proper private parties' guidance in the future disputes concerning accurate delineation of jurisdiction between national courts and the ECJ.

In this vein, the recent Constitutional Court's decision encompasses a completely different line of reasoning as it offers an expansive interpretation of the national courts' obligation to give reasons while adjudicating on issues concerning the (right) application of EU law and that refusal by a domestic court to grant a request for a preliminary reference referral may, in certain circumstances, infringe the fairness of proceedings.<sup>65</sup> This ruling thus represents an important "precedence" and sends a clear message to regular courts not to obviate their duty of loyal cooperation while acting as "union courts". The case concerned a dispute between National tax authority and a private party as plaintiff, which before the Administrative court claimed unlawful double taxation of a plot that he bought as a natural person. He argued that the plot had been bought for his private use only and thus could not be taxed also as a part of assets of his sole trader's business activity. Throughout the whole proceedings he claimed that the ECJ's case law on value-added tax should be considered, according to which a double taxation (such as in the case at hand) was precluded. The Supreme Court rejected the plaintiff's revision and thus confirmed the Administrative court's judgment on the rejection of the claim to annul the tax authority decision. In constitutional-complaint proceedings the plaintiff as complainant finally argued that the Supreme Court's short reasoning about inapplicability of the ECJ's case law at the case at hand due to the different factual and legal circumstances of the case could not be sufficient in

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<sup>64</sup> See par. 67, case C-210/06, *op. cit.*

<sup>65</sup> Constitutional Court decision Up-1056/11-15, 21 November 2013.

order to justify complete omission of any reasons why the commencement of the preliminary ruling procedure could not change his legal position.

The Constitutional Court confirmed that by contested omission the Supreme Court breached its obligation to give reasons and this also entailed a violation of complainant's right to judicial protection determined by the first paragraph of Article 23 of the Constitution. Most importantly, the Constitutional Court captured this difficulty, noting that national courts, in the specific context of the third paragraph of Article 267 TFEU, against whose decisions there is no remedy under national law and which refuse to refer to the Court of Justice a preliminary question on the interpretation of Community law that has been raised before them, are obliged to give reasons for their refusal in the light of the exceptions provided for in the case-law of ECJ. The Constitutional Court's thesis is in effect that both Article 23 of the Constitution and Article 6 of the ECHR<sup>66</sup> clearly impose an obligation on domestic courts to give reasons, in the light of the applicable law, for any decisions in which they refuse to refer a preliminary question, especially where the applicable law allows for such a refusal only on an exceptional basis. Thus by not taking into consideration, the complainant's argument on the relevance of the ECJ' case law or the corresponding need to commence the preliminary reference procedure while deciding on the revision, the Supreme Court violated the complainants' right to judicial protection determined by Article 23 of the Constitution.

## 5. CONCLUSION

The title of this article is rather axiomatic. Even though private parties' EU rights are effectively enforced (also) on the decentralized level of EU judicial system, more decisive and self-confident approach of national judges while adjudicating on dilemmas of proper enforcement of EU law would doubtlessly improve the current situation. The discussion on different aspects of national practice regarding effective judicial enforcement of EU law enables us to conclude on private parties' rather modest referral to the *effet utile*'s requirement while litigating before domestic courts. Moreover, albeit national judges are generally practicing their EU mandate quite "obediently", more in-depth and comprehensive approach on the issues of enforcement of EU law in the judgments would considerably improve the current state of the predictability of the outcomes of legal disputes. Therefore let us conclude that truly "intrusive" application of *effet utile* in national (judicial) practice is yet to come.

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<sup>66</sup> The Constitutional Court refers to the ECHR' case *Ullens de Schooten and Rezabek v. Belgium*, 3989/07 and 38353/07, 20 September 2011.

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