REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 1, NR. 2, 113-126, EUROPA LAW PUBLISHING © 2008

The Full Effect of Community Law – An Increasing Encroachment upon National Law and Principles

Jenny M. Davidson LL.M

Advocaat, Allen & Overy LLP, Amsterdam, The Netherlands

Abstract

On the basis of a recent judgment of the European Court of Justice, this contribution examines the scope of the duty to ensure the full effect of Community law and illustrates some of the problems that may arise within the legal orders of the Member States as a consequence of this duty.

1 Introduction

To what extent can Community law directly create competences for national administrative authorities and to which degree can (national) legal principles limit the full effect of Community law? In its judgment of 13 March 2008, Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and others* (hereafter *VNOSW*), the Court addressed these two fundamental questions within the context of the recovery of amounts unduly paid out of the European Social Fund ("ESF"). The judgment has shed some more light on the scope of the duty to ensure the full effect of Community law under Article 10 EC Treaty. This further clarity has, however, not removed the problems that this duty creates at national level. After a brief summary of the case, the conclusions of the Court and their implications for the legal orders of the Member States – in particular the Netherlands – will be discussed.

2 The *ESF* Case

In the course of 1998, the Dutch Ministry of Social Affairs and Employment ("SZW") granted subsidies under Regulation (EEC) 4253/88 ("ESF Regulation")[1] to a number of administrative authorities in the Netherlands.[2] Soon after, it was discovered that the projects subsidised

[1] Council Regulation (EEC) 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ [1988] L 374, p. 1.

[2] The legal basis being Council Regulation (EEC) 2082/93 of 20 July 1993 amending Regulation (EEC) 4253/88 laying down provisions for implementing Regulation (EEC) 2052/88 as regards coordination of the activities of the different Structural Funds between themselves

by the grants and the way they were carried out, were in conflict with the purpose and administrative requirements of the ESF Regulation. By decision of 12 March 2002 the European Commission accordingly reduced the assistance granted from the European Social Fund to the Netherlands on grounds that Article 23 of the ESF Regulation had been infringed.[3]

Although this decision was initially contested by the Dutch government,[4] between 2000 and 2003 SZW withdrew many of the original subsidy decisions, reset most grants at €0,- and, on the basis of provisions of the Dutch General Administrative Law Act ("GALA"), recovered the amounts paid. The recipients of the subsidies – mostly lower administrative authorities such as municipalities or independent authorities – protested this recuperation by appealing the 'recovery decisions' with SZW and later before the competent national administrative judges. Although most cases were eventually settled, three cases made it to the Dutch Council of State, who referred questions to the ECJ.[5]

The questions concerned two main issues. Firstly, the application of Community law in relation to Articles 10 and 249 EC Treaty. In particular the Council of State wished to know whether – and if so, on what basis – a Member State, or one of its administrative authorities, can derive a power directly – that is to say, without basis in national law – from a Regulation; and whether a Member State has any discretion in deciding whether to exercise such a power.[6] Secondly, the questions related to the application of legal principles, such as the protection of legitimate expectations and legal certainty.[7] Could, for example, the limiting effect of national legal principles on the effectiveness of Community law be more far-reaching than that of the general principles of Community law? A few additional questions addressed the relevance of the recipient being a public law person, the responsibility of the Member State attributing the grant for the failure to meet the subsidy obligations and the fact that the grant had already been repaid to the Community.[8]

---

and with the operations of the European Investment Bank and the other existing financial instruments OJ [1993] L 193, p. 20 in combination with a national ESF Regulation: *Regeling Europees Sociaal Fonds* (CBA nr. 1994/187).

3 Commission Decision C(2002) 970 of 12 March 2002

4 Case C-193/02 *Netherlands/Commission,* (removed from the register on 4 March 2003, after settlement).

5 Joined Cases C-383/06 to C-385/06 *VNOSW.*

6 Questions 1a, 1b and 2 in Cases C-383/06, C-384/06 and C-385/06; Question 7 in Case C-383/06.

7 Question 3 in Cases C-383/06, C-384/06 and C-385/06; Question 4a in Case C-383/06 (concerning the principles arising from Article 4:57(1) GALA) and Question 4 in Cases C-384/06 and C-385/06 (concerning the principles arising from Article4:49(1) GALA).

8 Question 4b in Case C-383/06; Question 5 in Cases C-384/06 and C-385/06; Question 6 in Case C-383/06.

3 The Creation of Competence

With respect to this first topic, the Court takes a bold, yet case-oriented position. It first determines, with reference to the direct applicability of Community regulations as laid down in Article 249 EC Treaty, that Article 23(1) of the ESF Regulation requires Member States to take the necessary measures to recover any amounts lost as a result of an irregularity or negligence.[9] Considering that any discretion in this matter would be inconsistent with the duty itself,[10] the Court then concludes that Article 23 of the ESF Regulation in fact requires Member States to recover, without there being any need for authority to do so under national law.[11] In other words, this means that where Community law contains a mandatory obligation for Member States to take action, national (in)competence cannot prevent this duty from being fulfilled. The full effect of Community law prevails over national rules of competence. How does this assertion stand in relation to previous case law?

The case law on direct effect has shown two diverging approaches up to now. In certain judgments, referred to as the *Rewe/Comet*-type case law, the affirmation of the duty to ensure full effect is accompanied by a reference to the boundaries that national law may impose. According to this line of case law, the obligation under Article 10 EC Treaty must be exercised 'within the limits' of a national court's jurisdiction and 'within the sphere' of an administrative authority's competence.[12] In other judgments, referred to as *Simmenthal*-type case law, the principle of full effect is considered to require that every national provision precluding the full effect of Community law, including procedural law, must remain unapplied. This last type of judgment forms an expression of the 'structural supremacy' of Community law.[13]

In the *ESF* judgment, the Court has clearly followed the line of the *Simmenthal*-type case law. However, in stead of a passive requirement to leave national conflicting law unapplied, the Court has stipulated an active requirement for Member States to perform their (undiscretionary) duties under Community law, regardless of national (in)competence. The reasoning

---

9 Joined Cases C-383/06 to C-385/06 *VNOSW*, paras. 35-37, with reference to Case C-271/01 *Coppi* [2004] ECR I-1029, para. 40)

10 Joined Cases C-383/06 to C-385/06 *VNOSW*, para. 38, with reference (by analogy) to Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, para. 22.

11 Joined Cases C-383/06 to C-385/06 *VNOSW*, para. 40.

12 See for courts: Case 106/77 *Amministrazione delle finanze dello Stato/Simmenthal* [1978] ECR 629, para. 24; and for administrative authorities: Case 8/88 *Germany/Commission* [1990] ECR I-2321, para. 13; Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paras. 20-22; Case C-201/02 *Wells* [2004] ECR I-723, para. 64; Case C-206/03 *SmithKline Beecham* [2005] ECR I-415, para. 57.

13 B. de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order', in: P. Craig, G de Búrca, *The Evolution of EU Law*, edition, Oxford 1999, p. 191.

that the Court follows to reach its conclusion also differs from the approach taken in previous cases. Whereas direct application is usually based upon the principle of loyal cooperation laid down in Article 10 EC Treaty, the Court now suffices by referring to Article 249 EC Treaty and the relevant provision of the ESF Regulation. Reference to relevant case law on direct effect is also missing.

This total absence of any reference to Article 10 EC Treaty is both peculiar and puzzling. Should we conclude that the principle to ensure the full effect of Community law is embedded into the Community legal order to such an extent that loyal cooperation is an intrinsic characteristic of Community law, without there being a need for Article 10?

Apart from this peculiarity, there is another, more important, aspect of the judgment to be remarked upon. The Court's conclusion only partly answers the questions posed by the Dutch Council of State. Although it is established that national competence is not necessary for Member States to give effect to Community law, it is not explicitly mentioned whether this obligation to apply Community law also *creates a competence* for the administrative authority in question. With respect to this question the Court's judgment leaves room for interpretation.

Under a broad interpretation of the judgment, one could reason that the Court, by requiring the exercise of a Community power without competence under national law, implicitly presupposes that Community law has a capacity to attribute competences directly to national authorities. After all: if an authority is obliged to apply, it is assumed to have such competence; and if national incompetence does not relieve the authority of the duty to apply, it must have been attributed the power to do so by Community law.[14] This would imply that competences of national authorities can exist on the basis of Community law alone, without any form of attribution at national level.

In a more general sense this fundamental interpretation of the judgment would entail a confirmation of the structural supremacy of Community law over national institutional law. Normally, the principle of national institutional autonomy should provide Member States with the freedom to determine how to give effect to Community law – including the liberty to attribute competence at national level. However, the *ESF* judgment suggests that when such provisions of national institutional law prevent Community law from being ensured, they must give way to the application of Community law. In this context one could therefore speak of a principle of *conditional* institutional autonomy, which only holds as long as Community law can be given full effect.

Such a reading would constitute a novella in view of preceding case law on direct effect. Indeed, the Court has previously stated that the observance and full effect of Community law must be ensured, if necessary by directly

[14] In his conclusion of 6 May 2008 in Case C-455/06, *Heemskerk and Schaap*, the A-G Bot implicitly appears to assume this position.

applying the Community law provisions.[15] However, never before has the Court explicitly mentioned that the competence to do so can be directly derived from Community law without national competence being necessary. To do so would form a clear break with the previous *Milchkontor* case law, which presumes that the effectuation of Community law is governed by national law.[16] Not to mention the fact that there would be far-going consequences for the constitutions of the Member States.

That the Court intended for such a break with consistent case law, with great significance for the legal orders of the Member States, seems unlikely. Several factors indicate that a more restrictive interpretation is called for.[17] Firstly, the case was treated by a small chamber, without a conclusion of an advocate-general. Secondly the answer of the Court is brief (merely six short paragraphs) and hardly motivated. One would expect an important change of direction in the case law of the Court to be taken more seriously and to be the result of rather more deliberation. The focus upon the direct applicability of Regulations in Article 249 and the specific duty to recover laid down in Article 23 of the ESF Regulation implies that this judgment is to be interpreted in a less fundamental manner.

This view is supported by the Court's choice of formulation in paragraph 40 of the judgment. In stead of establishing that Community law has a general capacity to create competences for national authorities, the Court considers the effect of only the duty to recover under Article 23 of the ESF Regulation. Also in view of the paragraphs preceding this conclusion, which examine in detail the responsibilities of the Member States with regard to the use of Structural Funds such as the ESF, a limited reading of the judgment seems appropriate. However, as this paper will show, the outcome of this judgment, even with such a restrictive interpretation, will have a large impact on the legal orders of the Member States, at least in The Netherlands.

4 The Role of (National) Legal Principles

With respect to this second topic, the Court takes a similar Community law-centric, yet case-specific approach, based primarily on the principle that the application of national law may not hinder the application or the effectiveness of Community law.[18] According to the Court this prin-

[15] See for example: Case 103/88 *Fratelli Costanzo/Comune di Milano* [1989] ECR 1839, para. 32-33 and Case C-224/97 *Ciola* [1999] ECR I-2517, para. 30.

[16] Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633.

[17] See also: M.J. Jacobs, W. den Ouden and N. Verheij, 'Bezint eer ge begint! Spraakmakende hofjurisprudentie over Europese subsidies', in: *Nederlands Tijdschrift voor Bestuursrecht* 2008, p. 162.

[18] According to the Court, the application of national law must also be non-discriminatory (there must be the same degree of care and criteria for both national and Community law),

ciple entails, firstly, that the national court in the main proceedings must, when it has before it an application to recover, implement the obligation of Article 23 of the ESF Regulation and, if need be, set aside or interpret a rule of national law which would prevent recovery, such as the GALA.[19] Secondly, it requires that the application of the GALA, which provides national administrative authorities with a discretionary power to recover sums unduly paid and allows the protection of legitimate expectations, must take the interests of the Community into consideration.[20]

The Court states that national law may, in principle, take into account the principles of legality, protection of legitimate expectations and legal certainty. However, only *so far as* they form part of the Community legal order and their application does not conflict with the full effect of Community law.[21] These Community legal principles are to be interpreted restrictively. Since the system of subsidies in the Community is based on compliance by the recipient with the conditions for the financial assistance, non compliance or a manifest infringement of such conditions by the recipient means they can no longer rely on the principles of protection of legitimate expectations & acquired rights.[22]

---

which means that national courts may have to refrain from applying, or interpret conflicting national rules. Joined Cases C-383/06 to C-385/06 *VNOSW*, paras. 48-50, with reference to Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paras. 21-23; Case C-443/03 *Leffler* [2005] ECR I-9611, para. 51 and Case C-158/06 *ROM-projecten* [2007] ECR I-5103, para. 23.

[19] Joined Cases C-383/06 to C-385/06 *VNOSW*, para. 51.

[20] Joined Cases C-383/06 to C-385/06 *VNOSW*, para. 55, with reference to Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, para. 32; Joined Cases C-80/99 to C-82/99 *Flemmer and others*[2001] ECR I-7211, para. 61; and Case C-336/00 *Huber* [2002] ECR I-7699, para 57.

[21] The Court refers to its case law in relation to the withdrawal of administrative measures and the recovery of sums wrongly paid by public authorities. Joined Cases C-383/06 to C-385/06 *VNOSW*, paras. 52-53, with reference to Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, para. 30; Joined Cases C-80/99 to C-82/99 *Flemmer and Others* [2001] ECR I-7211, para. 60; Case C-336/00 *Huber* [2002] ECR I-7699, para. 56; and Case C-158/06 *ROM-projecten* [2007] ECR I-5103, para. 24. It also reminds that where it concerns rules liable to have financial consequences, these principles must be observed all the more strictly. Joined Cases C-383/06 to C-385/06 *VNOSW*, para. 52, with reference to Case C-94/05 *Emsland-Stärke* [2006] ECR I-2619, para. 43; Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I-10211, para. 79; and Case C-158/06 *ROM-projecten* [2007] ECR I-5103, para. 26.

[22] Para. 56, with reference to Case T-142/97 *Branco/Commission* [1998] ECR II-3567 paras. 97 and 105 (an appeal was dismissed by the order in Case C-453/98 P *Branco/Commission* [1999] ECR I-8037), and Case T-182/96 *Partex/Commission* [1999] ECR II-2673, para. 190 (an appeal was dismissed by the order of 8 March 2001 in Case C-465/99 P, not published in the ECR) and case 67/84 *Sideradria/Commission* [1985] ECR 3983, para. 21.

The Court then leaves it for the national judge to asses whether – having regard to the conduct of both the recipient and the administrative authority – the principles of legal certainty and the protection of legitimate expectations, as they are understood in Community law, may legitimately be relied on as a defence against claims for repayment.[23] The fact that the recipient of the funds is a public-law person is irrelevant to the responsibility of Member States to recover under the ESF Regulation.[24] Moreover, the fact that the Community was repaid by the Member State does not, as such, dispense the latter from the obligation to recover such amounts.[25]

The Court's response confirms its observation in earlier cases such as *Stichting ROM-projecten,*[26] that only aspects of national procedural law that coincide with general principles of Community law are protected under the principle of procedural autonomy and may therefore limit the full effect of Community law.[27] This conditional validity of national principles, under the 'umbrella' of Community law principles, is in fact merely another expression of the principle that the application of national law may not hinder the application or the effectiveness of Community law. Only Community law principles, as an integral part of Community law, form a legitimate incursion upon the effect of other provisions of Community law.

More renewing is the interpretation of the *scope* of these Community principles. Given the narrow reading of the Court, these may well provide less protection for individuals than the national principles do. In the earlier cases of *Oelmühle* and *Huber,* the Court had emphasised the requirement that individuals must be in good faith in order to appeal to the principle of legal certainty.[28] In confirmation and expansion of these cases, the Court now adds that a recipient's failure to comply with the conditions of a grant can relatively easily lead to an invalidation of the right to rely upon the principles.[29] In light of this, the Court's stipulation that national legal principles can only be applied in so far as they coincide with the (more limited)

---

[23] Joined Cases C-383/06 to C-385/06 *VNOSW,* para. 57.

[24] Joined Cases C-383/06 to C-385/06 *VNOSW,* para. 54.

[25] Joined Cases C-383/06 to C-385/06 *VNOSW,* para. 58.

[26] Case C-158/06 *ROM-projecten* [2007] ECR I-5103.

[27] As also remarked prior to the *Stichting ROM-projecten* case by Prechal. See: S. Prechal, *Directives in EC Law,* 2nd completely revised edition, Oxford European Community Law Series, Oxford 2005.

[28] Case C-298/96 *Oelmühle Hamburg and Schmidt Söhne/Bundesanstalt für Landwirtschaft und Ernährung* [1998] ECR I-4767, para. 29 & Case C-336/00 *Huber* [2002] ECR I-7699.

[29] Every fact that does not comply with the conditions for the grant is considered an irregularity, so that a failure to fulfil the criteria is easily assumed. See: A.J.C. de Moor-van Vugt, 'Effectieve doorwerking van het gemeenschapsrecht in het kader van de rechtmatige besteding van EG-gelden', in: T. Barkhuysen, W. den Ouden and E. Steyger (eds.), *Europees recht effectueren. Algemeen bestuursrecht als instrument voor de effectieve uitvoering van EG recht,* Alphen aan den Rijn, 2007, p. 154.

Community legal principles seems questionable. Surely the effect of national principles protecting the individual against government action can only be removed, if there is a sufficient safeguard at Community level?

The Court's judgment leaves room for interpretation in this matter. On the one hand, it could be inferred, from the fact that the application of national legal principles is limited to situations where this would not limit the full effect of Community law, that the Court considers the level of protection of individuals under the Community legal principles to be sufficient. However, the wording of the Court suggests that it was not the creation of a minimal level of protection or individuals that was central to its partial limitation of national legal principles, but that it was rather the result of an appraisal of the interests of individuals against the rule that Community law should have full effect within the Member States.

At any rate, the motivation of the Court does not alter the fact that, based on this judgment, *all* national limits to Community law, including legal principles, are prohibited, at least with respect to the specific duty to recover laid down in Article 23 of the ESF Regulation.

5 The Effects of the Judgment

The questions put to the Court in the ESF case were considered of great importance in the Netherlands. Not only was there a need for more clarity on the scope of the duty to ensure full effect and the validity of national legal principles, but there was much concern about the possible outcome of the case. A broad interpretation of the full effect of Community law could have fundamental consequences for the Dutch legal system.

As it is, the judgment has partly confirmed these initial concerns. The obligation to recover unduly paid funds without a basis in national law, even if it does not directly create a competence for an administrative authority, is in clear violation of national law and principles and therefore forms a serious infringement of several constitutional principles in The Netherlands. The significance of this infraction becomes more evident after an explanation of the central role that the principle of legality plays within the Dutch legal order.

Like most Member States, The Netherlands is a constitutional state based on the rule of law. Government action is controlled by important constitutional principles such as legality, the recognition of fundamental rights and the balance of powers. Probably the most fundamental of Dutch constitutional tenets is that government action must be bound by the law.[30] This is referred to as the principle of legality.

[30] A.J.C. de Moor-Van Vugt and B.W.N. de Waard, *Administrative law*; in: J.M.J. Chorus, P.H.M. Gerver and E.H. Hondius (eds.), *Introduction to Dutch Law*, 4th rev. ed., Alphen aan de Rijn, 2005, p. 343.

The principle of legality ensures the (democratic) legitimacy of state action and plays a central role in the attribution and delegation of competences to Dutch administrative authorities. The delegation of power must be explicit and specific,[31] state authorities may only act according to the law and by virtue of the law.[32] This strict system of attribution and delegation concerns not only rule-making competences, but other public law acts of administrative authorities as well. The grant of subsidies, for example, requires an explicit legal basis.[33]

The type of law that can provide such a legal basis depends on the competence in question. Where state action imposes obligations upon citizens, limits citizens' rights or interferes otherwise with citizens' freedoms, there must be a clear basis for this in primary legislation.[34] The recovery of unduly paid funds clearly falls within this category. Whether Community law can function as the legal basis that Dutch law requires for the attribution of competence, is cause for much debate. Whereas some support the acceptance of a broad – Community – concept of legality, others doubt or refute the possibility of Community law forming a valid legal basis for state action.[35]

There are four main reservations put forward against a broad principle of legality. Firstly, the guarantee of democratic legitimacy and constitutional quality of actions towards citizens that is provided by primary national law is lacking in provisions of Community origin.[36] Secondly, the recognition of a Community Regulation as sufficient legal basis for the attribution and recovery of subsidies for all authorities in a Member State would be in conflict with the principle of institutional autonomy, as it deprives Member States of their freedom to incorporate Community law into their legal systems in the way they want.[37] Thirdly, the weaker status of the Community principle

[31] Ever since *Hoge Raad* 13 January 1879, W 4330 (*Meerenburg*).

[32] D.E. Comijs, *Europese structuurfondsen: uitvoering en handhaving in Nederland*, 1st edition, Deventer: Kluwer 1998, p. 106, with referece to H.D. van Wijk, W. Konijnebelt, R.M. van Male, *Hoofstukken van administratief recht*, 10th edition, Utrecht, 1997, p. 70.

[33] Article 4:23(1) GALA.

[34] The term 'primary legislation' refers to laws passed by Parliament. See: L.F.M. Besselink, H.R.B.M. Kummeling, R. de Lange, P. Mendelts, S. Prechal, *De Nederlandse grondwet en de Europese Unie*, 1st edition, Groningen 2002, p. 100, 121-122, Raad voor het openbaar bestuur, *Wijken of herrijken: nationaal bestuur en recht onder Europese invloed*, 1st edition, Den Haag 1998, p. 23 and D.E. Comijs, *Europese structuurfondsen: uitvoering en handhaving in Nederland*, 1st edition, Deventer: Kluwer 1998, p. 106, with referece to H.D. van Wijk, W. Konijnebelt, R.M. van Male, *Hoofstukken van administratief recht*, 10th edition, Utrecht, 1997, p. 70.

[35] Among others, Voermans is a supporter of a broader principle of legality, Jans e.a. belong to the second category.

[36] J.H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven, *Inleiding tot het Europees bestuursrecht*, 2nd edition, Ars Aequi Libri 2002.

[37] For example I.C. van der Vlies & R.J.G.M. Widdershoven, *De betekenis van de Nederlandse Grondwet binnen de Europese rechtsorde*, preadviezen voor de Vereniging voor de vergelij-

of legality must be compensated by a stronger enforcement of the principle of legality at national level. Absence of such protection would lead to the hollowing out of the principle of legality.[38]

A fourth argument put forward against the direct attribution of competence by Community law is the fact that Community law most often does not specify the exact national authority upon which the power is bestowed. Member States are expected to appoint the competent authority and bestow the necessary competence upon this authority in order for it to fulfil its Community task. Based on this characteristic of Community law, several authors have developed a theory of double attribution of power.[39] This accepts that Community law can create substantive competences for Member States to exercise, but stipulates that the formal attribution of such a competence to a specific national authority is governed by national law. Competences are thereby substantively based on Community law, but institutionally based on national law.[40] In the absence of the necessary institutional embedding, attribution of competence is considered not to have taken place.

This strict interpretation of the principle of legality is, however, not the only view taken in Dutch literature. According to some, the concept that a Community Regulation could form a sufficient legal basis for government intervention, as required by the Dutch principle of legality, is not as silly a thought as some suggest. Community measures can, even at present, form a direct source of exercise of power for national authorities.[41] Proof for

---

kende studie van het recht van België en Nederland, Deventer 1998, p. 31.

[38] I.C. van der Vlies & R.J.G.M. Widdershoven, *De betekenis van de Nederlandse Grondwet binnen de Europese rechtsorde*, preadviezen voor de Vereniging voor de vergelijkende studie van het recht van België en Nederland, Deventer 1998, p. 30-31 and W.J.M. Voermans, *Toedeling van bevoegdheid*, inaugural lecture Universiteit Leiden, Den Haag 2004.

[39] The original Dutch term is "dubbele bevoegdheidsgrondslag". See for example: J. H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven, *Europeanisation of Public Law*, 1st edition, Groningen: Europa Law Publishing 2007, p. 23-29; A.J.C. de Moor-van Vugt, 'Effectieve doorwerking van het gemeenschapsrecht in het kader van de rechtmatige besteding van EG-gelden', in: T. Barkhuysen, W. den Ouden and E. Steyger (eds.), *Europees recht effectueren. Algemeen bestuursrecht als instrument voor de effectieve uitvoering van EG recht*, Alhen aan den Rijn, 2007, p. 156; and J.R. van Angeren and W. den Ouden, *Subsidierecht en staatssteun* (VAR geschriften 134), Den Haag, 2005, p. 160 and following.

[40] Prechal confirms this view with respect to the Community competences of national courts. See: S. Prechal, 'National Courts in EU Judicial Structures', *Yearbook of European Law* 2006, nr. 25, p. 429-450, p. 442-443.

[41] See for example: W.J.M. Voermans, *Toedeling van bevoegdheid*, inaugural lecture Universiteit Leiden, Den Haag 2004, p. 33; D.E. Comijs, *Europese structuurfondsen: uitvoering en handhaving in Nederland*, 1st edition, Deventer: Kluwer 1998, p. 111-114; E. Steyger, 'Wringend recht. Doorwerking van het gemeenschapsrecht bezien vanuit het perspectief van de nationale overheid', in: E. Steyger e.a., *Europees recht en het Nederlandse bestuursrecht*,

this statement is found, among others, in the fact that in Dutch practice, a national authority is not always explicitly appointed as responsible for the application of each separate Regulation.[42]

Under this broader interpretation of the principle of legality, Community Regulations can be considered as legal provisions in the national sense. They can therefore, for instance, be considered as an adequate and, by Article 4:23 GALA, required, legal basis for the grant of Community subsidies. According to some, even Regulations that establish charges do not require a further national legal basis.[43] The desired democratic legitimacy for such actions that affect citizens is considered to be sufficiently provided at Community level.

Despite this support for a broader principle of legality, however, the existence of the 'Dutch debate' shows that in general, the possibility of direct attribution of competences to national authorities by Community law is not widely accepted.[44] In the present case, the Council of State has made clear that national law does not allow for the recovery of the sums unduly paid. The criteria of the relevant provision of the GALA have not been fulfilled and the national principles of legal certainty and the protection of legitimate expectations resist recovery. The Ministry of SZW can therefore not fulfil its duty to recover under Article 23 of the ESF Regulation without exceeding its national competences. On the basis of the *ESF* judgment, however, the Member State and its authorities are obliged to recover despite such national incompetence.

Assuming a strict principle of legality, this conclusion is problematic in two ways. Firstly, there is a total absence of any kind of national attribution or appointment. The competence of SZW to recover, following the judgment, would be (implicitly) fully based on Article 23 of the ESF Regulation. This Regulation does not specify the precise authorities responsible for recovery in each Member State. The attribution is therefore, secondly, not sufficiently explicit and specific, which is required under the Dutch principle of legality. Finally, the recovery of sums unduly paid imposes significant obligations upon citizens. The Dutch principle of legality requires such measures to be (democratically) legitimated in the form of primary national law, i.e. approved by the national Parliament. In view of these consequences, it is understandable that advocates of the strict principle of legality have many

preadvies VAR, VAR-reeks 116, Alphen aan den Rijn 1996, p. 23, 28; and A.J. Bok, *Subsidies*, Deventer: Kluwer 2002, p. 42.

42 W.J.M. Voermans, *Toedeling van bevoegdheid*, inaugural lecture Universiteit Leiden, Den Haag 2004, p. 32-33.

43 E. Steyger, 'Wringend recht. Doorwerking van het gemeenschapsrecht bezien vanuit het perspectief van de nationale overheid', in: E. Steyger e.a., *Europees recht en het Nederlandse bestuursrecht*, preadvies VAR, VAR-reeks 116, Alphen aan den Rijn 1996

44 J. H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven, *Inleiding tot het Europees bestuursrecht*, 2nd edition, Ars Aequi Libri 2002, p. 50.

hesitations towards accepting the Court's assertion that SZW must recover the sums unduly granted, even without national competence to do so.

The problematic nature of the judgment is supported by Dutch jurisprudence dating from before the *ESF* referral. In an earlier case concerning the recovery of interest in State Aid, the Council of State had denounced the possibility that such a competence could be derived from Community law in any form (Regulation, Decision or Treaty). This conclusion was believed to be so evident that it had not considered it necessary to refer questions to the ECJ.[45] In the build up to the ESF judgment there was therefore some hesitation towards the possibility of a positive answer to the questions put to the Court. In fact, it was considered remarkable that the Council of State had not deemed the direct derivation of competence *a priori* out of the question.[46]

The Dutch Supreme Court too has seen itself fit to conclude, without reference to the ECJ, that the duty to ensure full effect of Community law exists only *within* the scope of competences and jurisdiction as defined under national law.[47] The fact that the Netherlands' highest courts have considered the direct attribution of competence to national authorities as 'evidently impossible', to such an extent that referral of this question to the Court was not considered necessary, shows to what extent it would infringe the Dutch constitutional principle of legality.

The supporters of a broader principle of legality may see in the *ESF* judgment a confirmation of their belief that Community Regulations are indeed sufficient legal basis for administrative authorities to act. However, from a national constitutional standpoint it should be considered quite problematic that national authorities are according to the *ESF* judgment, obliged to set aside (constitutional) provisions of law that attribute their competences.[48]

These consequences of the *ESF* ruling are not limited to the Netherlands. Other Member States too, will have to accept the incursion upon their national constitutional systems. The problematic nature of the absolute supremacy of Community law in the light of the principle of legality is after all, although perhaps most urgent and obvious in the Netherlands, not a purely Dutch phenomenon. In fact, the constitutional systems of all EU Member States are based, at least to a certain extent, on the rule of law and

---

[45] ABRvS 11 January 2006, AB 2006, 208, with case note W. den Ouden.

[46] M.J. Jacobs and W. den Ouden, case annotion to the *ESF* referral judgments, in: LJN AY7176.

[47] Dutch Supreme Court (*Hoge Raad*) HR 21 March 2003, Eerste Kamer, Nr. C01/327HR. LJN-nummer: AE8462 (*Waterpakt*).

[48] See also: M. Bobek, 'Thou Shalt Have Two Masters; The Application of European Law by Administrative Authorities in the New Member States'; in: *Review of European Administrative Law*; vol. 1, nr. 1, 2008, p. 62-63; with reference to see, e. g. S. Prechal, *Directives in EC Law,* 2nd Ed. (Oxford, 2005), pp. 65-72.

the principle of legality.[49] Here, again, it may be remarked how peculiar it is that the Court chose to deal with such a constitutionally important case in a chamber of merely five judges and without a conclusion of an Advocate General.

6 Conclusion

The *ESF* case opens another chapter in the ongoing saga on the scope of the doctrine of the full effect of Community law. Previous case law has taught us that this duty, enshrined Article 10 EC Treaty, can have far reaching consequences.[50] Whether, and to what extent the full effect of Community law finds its limits in provisions of national procedural or institutional law, however, remains a subject of debate. It is doubtful that the ESF has clarified much in this respect.

As remarked above, the Court has formulated its answers to the preliminary questions in a rather case-specific manner, consistently referring to the particular duty to recover laid down in Article 23 of the ESF regulation. Only in respect to the admissibility of national legal principles does it come to a more general conclusion, providing more clarity on the validity of national legal principles and the scope of the Community principles of legal certainty and the protection of legitimate expectations.

As stated, the level of protection provided by these principles, as set out by the Court in *ESF*, is very limited. This is peculiar, given that the recovery of sums unduly paid imposes far going obligations upon individuals. While they can normally trust in having a certain level of protection under national law, this protection is absent – or at least lessened – when the recovery is based on Community law. By seemingly replacing the protection of individu-

[49] These principles are especially strongly framed in all post-dictatorial legal systems, such as Germany or the post-Communist new Member States. See: M. Bobek, 'Thou Shalt Have Two Masters; The Application of European Law by Administrative Authorities in the New Member States'; in: *Review of European Administrative Law*; vol. 1, nr. 1, 2008, p. 62; with reference to: (for Germany) the standard commentaries on Art. 20 (3) of the Basic Law – K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland. Band I: Grundbegriffe und Grundlagen des Staatsrecht, Strukturprinzipien der Verfassung (*München, 1977), p. 635; B. Schmidt-Bleibtreu, F. Klein, (eds.) *Kommentar zum Grundgesetz*. 10th Ed. (Neuwied/Berlin, 2004), p. 692 *et seq*. or E. Denninger, H. Ridder, H. Simon, E. Stein (eds.), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland*. Band 1. Art. 1 – 20. (Neuwied/Berlin, 1984), p. 1375; and (for the Czech Republic): the Czech Constitution, cf. Articles 2 (2) and 4 (4) of the Charter of Fundamental Rights and Basic Freedoms. From the standard commentaries, cf. e.g K. Klíma (ed.), Komentář k Ústavě a Listině [Commentary on the Constitution and the Charter] (Plzeň, 2005).

[50] It requires national law to be interpreted in accordance, and disapplied when in conflict with Community law. If necessary, it also requires the direct application of Community law.

als under national law with a weaker protection under Community principles, the *ESF* judgment may entail an erosion of the protection of individuals within the Community.

The judgment will also have far-going consequences for the principle of legality that is enshrined in the legal orders of most Member States. Whether one assumes a strict or a broader interpretation of this principle, the implementation of this judgment in practice will pose a challenge for the Member States. It will be interesting to see how the Dutch Council of State interprets and implements the Court's conclusions and whether it is indeed willing to set aside national provisions on competence and legal principles.