

Anna von Oettingen, *Effet utile und individuelle Rechte im Recht der Europaischen Union*. Baden-Baden: Nomos, 2010. 190 pages. ISBN: 978-3-8329-5153-1. EUR 48.

One of the most popular arguments employed by the ECJ when pushing forward its case law is the argument of "*effet utile*". In English, terms like "useful effect", "practical effect", "effectiveness" or also "efficacy" are used to describe this phenomenon. The book under review, a doctoral thesis supervised by Kadelbach and submitted to the Johann Wolfgang Goethe-Universität Frankfurt in 2009, undertakes to investigate, at least according to its title, the relationship between the *effet utile* argument and the creation of individual rights. This title is, however, somewhat misleading as it does not fully reflect the whole contents of the thesis. The relationship between the *effet utile* argument and individual rights is dealt with mainly in part 3 of the book, which makes up about half of the inquiry. In the first two parts, the author deals with *effet utile* as an argument used by international tribunals (part 1) and this international law-style argument used in EU law (part 2). In part 3, in contrast, the author undertakes to develop what she calls the "Community-specific" principle of effectiveness, which is thereby confronted with the principle of effectiveness as employed in general international law. This should, however, have been made clear already in the title.

As for part 1, the author identifies two different modes of the *effet utile* argument, the first meaning that a legal norm must not be interpreted in such a way that it has no practical effect whatsoever. In this vein, the ICJ in its famous *Corfu Channel* judgment held that it is a "generally accepted rule of interpretation" that a provision should not be "devoid of purport or effect" (ICJ Reports 1949, p. 24). This is called by the author "Wirksamkeitsgebot" ("command of effectiveness") (p. 27 et seq.). In contrast to this, the second mode means that an interpreter when confronted with two different options of interpretation has to choose, in case of doubt,

the interpretation that secures the practical effectiveness of a given norm. This is called "Nützlichkeitsgebot" ("command of usefulness") by the author and goes back to the Roman law principle "ut res magis valeat quam pereat" (p. 32 et seq.). The difference is that while under the first mode, the only alternative is that a norm may or may not have any effectiveness, under the second mode there may be various degrees of effectiveness (p. 35). The author takes the view that in terms of general international law, the "command of effectiveness" forms part of the *bona fides* principle, while the "command of usefulness" has a strong affiliation with the object and purpose principle, both to be found in Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT). However, the author rightly underlines that the "command of usefulness" operates differently from the object and purpose principle in so far as it comes into play only at a second stage, similar to the historical interpretation under Article 32 VCLT which is subsidiary in character.

These results are subsequently transposed to Community law in part 2 (p. 45 et seq.). Here, too, the author gives examples of the "command of effectiveness" and the "command of usefulness" (p. 47 et seq., 57 et seq.). With respect to the first category, a further differentiation is made between norms which are binding on the Community and those binding the Member States (p. 49 et seq.). In the present reviewer's opinion, however, it is very much open to doubt whether this first category should actually be brought into an international law context. As the author herself submits, the ECJ does not refer to public international law (p. 54). Furthermore, a rule of interpretation according to which a norm must not be construed in a manner which makes it completely futile can be equally found in national legal orders (p. 55). Therefore, it does not seem appropriate to deal with this first category in terms of general international law.

As for the "command of usefulness", the author again differentiates between norms that bind the Community (p. 58 et seq.) and norms that bind the Member States (p. 65 et seq.). The former primarily concern norms of competence (e.g. the ECJ's *AETR* case law) while the latter generally deal with norms of primary or secondary law. From the standpoint of the present reviewer, some of the examples given by the author should have been dealt with under the first mode ("command of effectiveness") rather than the second (e.g. p. 67, 75). A third category is added, namely norms that create not only objective obligations but benefit the individual ("individualbezogene Nutzwirkung", p. 77 et seq.). The present reviewer has some difficulties to understand in what respect this category differs from the cases dealt with in part 3 where the relationship between the *effet utile* principle and individual rights is scrutinized. The author comes to the conclusion that objective norms of primary law are interpreted mainly by reference to the content of the respective single norm while norms benefiting the individual (e.g. the fundamental freedoms) are interpreted by reference to the aims of the Treaties as a whole (Arts. 2 and 3 EC) (p. 91 et seq., 94 et seq.). This is hardly surprising since norms of competence are much more technical in nature and therefore less apt for being read in the context of the whole Treaty than substantive norms. As for the objective norms, the author takes the view that the ECJ does not transcend the requirements of effectiveness that are posed in other legal orders (p. 93), thereby contradicting the view that the ECJ sometimes overstretches the Community competences by use of *effet utile*. As for the norms related to the individual, she concludes that the aims of the EC Treaty have some dynamic potential. By referring to them, the range of interpretation to be used by the ECJ is augmented.

In part 3, finally, the author deals with well-known phenomena like direct effect of primary law (p. 101 et seq.), direct effect of directives (p. 129 et seq.) and Member State liability (p. 160 et seq.). On direct effect of primary law, the author takes the view that this principle is not solely based on the effective implementation of EU law, as many others hold. Rather, the protection of individual rights is seen as a second dogmatic pillar (p. 125). As for the direct effect of directives, the author does not follow the commonly held view that the *estoppel* argument which the ECJ adduced in the *Ratti* case (a Member State may not rely on its own failure to perform the obligations which the directive entails) should be regarded as being decisive (p. 141). Instead, and hardly surprisingly, it is the *effet utile* argument which was given already

in *Van Duyn*. Consequently, *effet utile* helps to implement subjective rights which otherwise would remain unimplemented (p. 156). It is this subjective rights-based concept of *effet utile* (“individualschützender *effet utile*”) which serves as an explanation for the fact that directives have direct effect only with regard to Member States, not *vis-à-vis* other individuals (p. 157). This is, however, not stringent: if it is true that *effet utile* helps to implement subjective rights, then the consequence would be that individual A should be allowed to claim a right under an unimplemented directive not only from Member State X but also from individual B. As for the principle of Member State liability, finally, the author again identifies a combined effect of protection of individual rights and of the Community interest to have Community law fully implemented (p. 172).

Seen as a whole, the thesis under review leaves a somewhat ambivalent impression. The author undoubtedly makes some good and valid points. Her style and citation apparatus are impeccable. However, the picture is blurred first by the fact that the thesis quite clearly falls apart into two pieces (part 1 and 2 on the one hand, part 3 on the other) which are not sufficiently interrelated. Furthermore, the line of arguing is, from the reviewer's standpoint, quite often too plain. The author depicts her own dogmatic concept which she deduces from a thorough analysis of the ECJ's jurisprudence. However, differing views in the literature are not always dealt with in the same thoroughness, so the book is – for a thesis – relatively short.

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