„Influence of EU Law on National Procedural Rules“

ETJN-Seminar on EU Institutional Law
16/17 June 2014, Ljubljana

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Outline

• **Procedural Rules = National Law** (no Comprehensive Harmonisation)

• **Principle of Non-Discrimination on Grounds of Nationality** (Fundamental Freedoms)

• **Right to Efficient Judicial Protection** (General Principle of EU Law and Art. 47 (1) European Charter)

• **Principle of Co-Operation** (Art. 4 (3) TFEU), together with Examples and Case Study
Procedural Law = National Law
(no Comprehensive Harmonisation)
Legal Basis for Harmonisation

• No legal Basis for comprehensive harmonisation of procedural law:
  – Harmonisation in Civil Matters: Article Art. 81 TFEU
  – Harmonisation in Criminal matters: Art. 82 TFEU

• Principle of attribution of powers
  – EU Powers restricted mainly to the mutual recognition of judgments and judicial decisions and to certain types of settlement procedures.

• Both framework decisions and directives require correct and unambiguous transposition into National Law.
Harmonisation in Civil Matters

- 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
Harmonisation in Criminal Matters

- Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings
- Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States
- Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties
- Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders,
- Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union
- Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions
- Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty
Procedural Law = National Law

• **Conclusion:** Procedural Law largely remains in the hands of the Member States.

• See Case 33/76 Rewe, para 5:
  
  – “Applying the principle of co-operation laid down in Art. 5 of the Treaty [now: Art. 4 para 3 TEU], it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.”

  – “In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law.”
Principle of Non-Discrimination on Grounds of Nationality
(Fundamental Freedoms)
Principle of Non-Discrimination

• Case C-20/92 Hubbard, para 14, 17 and 20:
  – „It must be held that the fact that a Member State requires security for costs to be given by a national of another Member State who, in his capacity as an executor, has brought an action before one of its courts, whilst its own nationals are not subject to such a requirement, constitutes discrimination on grounds of nationality contrary to Articles 59 and 60 EEC Treaty” [now: Art. 49 TFEU]
  – “The right to equal treatment laid down in Community law may not be made dependent on the existence of reciprocal agreements concluded by the Member States.”
  – “The fact that the substantive proceedings come under the law of succession does not justify excluding the application of the right to freedom to provide services enshrined in Community law.”
Principle of Non-Discrimination

• Case C-43/95 Data Delecta (Art. 18 TFEU), para 12, 13 and 22:
  – “It is settled case-law that, whilst, in the absence of Community legislation, it is for each Member State's legal system to lay down the detailed procedural rules governing legal proceedings for fully safeguarding the rights which individuals derive from Community law, that law nevertheless imposes limits on that competence [...]. Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law [...].
  – A national procedural rule, such as the one described above, is liable to affect the economic activity of traders from other Member States on the market of the State in question. ...
Although it is, as such, not intended to regulate an activity of a commercial nature, it has the effect of placing such traders in a less advantageous position than nationals of that State as regards access to its courts. Since Community law guarantees such traders free movement of goods and services in the common market, it is a corollary of those freedoms that they must be able, in order to resolve any disputes arising from their economic activities, to bring actions in the courts of a Member State in the same way as nationals of that State. [...] Accordingly, [...] the first paragraph of Article 6 of the Treaty precludes a Member State from requiring a legal person established in another Member State [...] to lodge security for the costs of those proceedings where no such requirement can be imposed on legal persons established in the first-mentioned State [...].”
Principle of Non-Discrimination

• Case C-398/92 Mund & Fenster, para 18-20:
  – “According to Paragraph 917(1) of the ZPO, seizure is to be authorized where it is reasonable to fear, in the light of the circumstances of the case, that enforcement of the subsequent judgment would otherwise be made impossible or substantially more difficult. By virtue of Paragraph 917(2), such difficulties are presumed from the mere fact that enforcement is to take place in a State other than the Federal Republic of Germany. [...] While such a presumption is justified where the subsequent judgment is to be enforced in the territory of a non-member country, it is not justified where enforcement is to take place in the territory of the Member States of the Community. All those States are Contracting Parties to the Brussels Convention whose territories may be regarded as forming a single entity.”
Effective Judicial Protection
Effective Judicial Protection

• Art. 47 (1) European Charter: Fundamental Right to an effective remedy:
  – “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”

• Art. 13 ECHR: Right to an effective Remedy
  – “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”
Effective Judicial Protection

• Art. 6 (1) TEU:
  – “[..] The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
  – The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application [...]”

• Cases 5/88 Wachauf and C-260/89 ERT:
  – “The requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law.”

• see also Art. 51 European Charter
Effective Judicial Protection

• Charter Explanations as to the interpretation of Art. 47.1:
  – “The first paragraph is based on Article 13 of the ECHR. However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court.” i.e. EVEN MORE EXTENSIVE PROTECTION UNDER EU PRIMARY LAW
  – “The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 Johnston). According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties [...]”
Effective Judicial Protection

• ECJ tends to mix the two sources and to use Art. 47 para 1 European Charter rather as a subsidiary argument.

• Case 432/05 Unibet, para 37:
  
  – „It is to be noted at the outset that, according to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice [...].“
Excursus: Further Procedural Rights

- e.g. Art. 47 (2) and (3) European Charter
  - Right to a fair trial, including the right of defence, the right to be heard before a court, the right to inspect and comment on the evidence and observations submitted [Art. 48 Presumption of innocence and right of defence in criminal matters regulated in Art. 48 European Charter]
  - Right to a fair and public hearing within a reasonable time by an independent and impartial tribunal
  - Right to legal aid

- Art. 48 European Charter
  - Presumption of innocence
  - right of defence
Co-Operation
(Art. 4 (3) TEU)
Co-Operation (Art. 4 (3) TEU)

• Dual Structure of Judicial Control:
  – European Courts: Application and Interpretation of European Law
  – National Courts: Application and Interpretation of national provisions

• Case 33/76 Rewe, para 5:
  – “Under the principle of cooperation laid down in Article 5 of the Treaty [now: Art. 4 (3) TEU], it is for the Member States to ensure the legal protection which individuals derive from the direct effect of Community law. In the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law.”
Co-Operation (Art. 4 (3) TEU)

• ...
  – “In that regard, the detailed procedural rules governing actions for safeguarding an individual’s rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).” [see also Case 312/93 Peterbroek, para 12]

• Case 432/05 Unibet, para 42:
  – “[..] Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection […].” [i.e. RIGHT TO EFFICIENT JUDICIAL CONTROL AS A SUBSIDIARY OR ADDITIONAL ARGUMENT, DUE TO CIRCUMSTANCES OF THE CASE]
Adequacy

• Case C-78/98 Preston, para 55/55 and 63:
  – “The principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar [...]. In order to determine whether the principle of equivalence has been complied with in the present case, the national court [...] must consider both the purpose and the essential characteristics of allegedly similar domestic actions [...].” [i.e. TWO-STEP APPROACH]
  – “In order to decide whether procedural rules are equivalent, it is necessary to verify objectively, in the abstract, whether the rules at issue are similar taking into account the role played by them in the procedure as a whole, as well as the operation of that procedure and any special features of the rules.” [i.e. COMPREHENSIVE APPROACH].
Adequacy

• Case C-261/95 Palmisani, para 33:
  – “In principle, it is for the national courts to ascertain whether the procedural rules [...] comply with the principle of equivalence.”

• Case C-23/96 Edis, para 36:
  – “Observance of the principle of equivalence implies, for its part, that the procedural rule at issue applies without distinction to actions alleging infringements of Community law and to those alleging infringements of national law, with respect to the same kind of charges or dues [...]. That principle cannot, however, be interpreted as obliging a Member State to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law.”
Efficiency

• Case C-430/93 van Schijndel, para 19:
  “For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration” [i.e. CASE-BY-CASE APPROACH, WEIGHING OF INTERESTS AND RESPECT FOR COLLIDING FUNDAMENTAL RIGHTS AND GENERAL PRINCIPLES OF NATIONAL/COMMUNITY LAW]
Efficiency

- Illustration: Case C-473/00 Cadifis, para 36/37:
  - “A procedural rule which prohibits the national court, on expiry of a limitation period [...] that a term sought to be enforced by a seller or supplier is unfair is therefore liable [...] to render application of the protection intended to be conferred on them by the Directive [93/13] excessively difficult.
  - That interpretation is not contradicted by the fact that [...] the Court has on several occasions ruled that limitation periods shorter than that at issue in the main proceedings are not incompatible with the protection of rights conferred on individuals by Community law [...]. The Rewe and Palmisani decisions [...] are thus merely the result of assessments on a case by case basis, taking account of each case's own factual and legal context as a whole, which cannot be applied mechanically in fields other than those in which they were made.”
Examples

• Application Deadlines
• Res Judicata
• Taking of Evidence
• Access to the Courts
• Density of Control
• Interim Measures
• Case Study: Case C-432/05 Unibet
Application deadlines etc.

• Case 33/76 Rewe, para 5:
  – “The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect. This is not the case where reasonable periods of limitation of actions are fixed. The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the taxpayer and the administration concerned.” [See also Case C-261/95 Palmisani, para 28]

• But see e.g. case 326/96 Levenz, para 35ff.; case C-327/00 Santex, para 53ff. and case C-427/00 Cadifis, para 34ff., where, due to the circumstances of the case at issue, time limits did not satisfy the principle of efficiency and could not be justified on the grounds of legal certainty.
Res Judicata

• Case 234/04 Kapferer, para 20/21:
  – “In that regard, attention should be drawn to the importance […] of the principle of res judicata. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question […]. Therefore, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue […].”

• But see Case 453/00 Kühne & Heitz, para 27, where the administrative body was put under an obligation to review its decision in order to take account of the interpretation given in the meantime by the ECJ.
Taking of Evidence

• Case C-19/82 San Giorgio, para 14:
  – “Any rules of evidence which have the effect of making it virtually impossible or excessively difficult to secure repayment of charges levied in breach of Community law are incompatible with Community law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence.”

• Settled case law
  – See cases C-331/85 Bianco, para 12, and C-441/98 Kapniki, para 36.
Access to the Courts

• Case C-222/86 Heylens, para 14:
  – “Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right.”

• Case also C-467/01 Eribrand, para 61:
  – “[...] the principle of effective judicial protection, which is a general principle of Community law [...] is essential in order to secure for the individual effective protection for his right. It is for the Member States to ensure effective judicial scrutiny of the observance of the applicable provisions of Community law.”
Access to the Courts

• Case C-158/80 Rewe, para 44:
  
  — “[...] Although the Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Court of Justice, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law. On the other hand the system of legal protection established by the Treaty, as set out in Article 177 [now: Art. 234 TFEU] in particular, implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law.”
Access to the Courts

• **Excursus:** **Wide notion** of an individual’s right granted under Community law:

• e.g. Case 237/07 Janacek, para 36, 38 and 42:
  
  - “The Court has consistently held that individuals are entitled, as against public bodies, to rely on the **provisions of a directive which are unconditional and sufficiently precise** [...]. Thus [...] whenever the failure to observe the **measures required by the directives which relate to air quality and drinking water, and which are designed to protect public health**, could endanger human health, **the persons concerned must be in a position to rely on the mandatory rules [...] and must be in a position to require the competent national authorities to draw up an action plan.” [i.e. even PUBLIC INTERESTS]
Access to the Courts

- Case C-435/97 WWF, para 69:
  - “Particularly where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration as a matter of Community law in determining whether the national legislature [...] had kept within the limits of its discretion set out in the directive [...].” [i.e. EVEN PROCEDURAL RIGHTS]

- e.g. Directives 96/91/EC and 2003/35/EC:
  - express provisions for legal standing of individuals and of recognized NGOs [i.e. EVEN REPRESENATIVE ACTION TO BE GRANTED]
Scope and Density of Control

• Case 430/93 van Schijndel, para 20/21:
  – “In the present case, the domestic law principle that in civil proceedings a court must or may raise points of its own motion is limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it.
  – That limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas.”
Scope and Density of Control

• Case 120/97 Upjohn, para 34/35:
  – “According to the Court's case-law, where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review [...]. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion [...].
  – Consequently, Community law does not require the Member States to establish a procedure for judicial review of national decisions revoking marketing authorisations, [...] which involves a more extensive review than that carried out by the Court in similar cases.”
Scope and Density of Control

• Case 222/86 Heylens, para 15:
  – “Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons. But where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.”
Interim Measures

• If granted to secure an individual’s right, see Case 213/89 Factortame, para 21/22:
  – “It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. [...] That interpretation is reinforced by the system established by Article 177 of the EEC Treaty [now: Art. 234 TFEU] whose effectiveness would be impaired if a national court [...] were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice.”
Interim Measures

• If granted **against a national measure based on Community Law**, see Case C-143/88 Zuckerfabrik Süderdithmarschen, summary:
  
  – “Art. 189 of the Treaty [now: rt. 249 TFEU] *does not preclude the power of national courts to suspend enforcement of an administrative measure based on a Community regulation*. In order for a national court to be entitled to grant such a suspension, it must entertain **serious doubts as to the validity of the Community measure** and [...] itself refer that question to the Court; there must be urgency in the sense that the applicant is **threatened with serious and irreparable damage**, and **due account must be taken of the interests of the Community [...]**”
Case Study:
Case C-432/05 Unibet
Thank you for your attention!