The principle of Procedural Autonomy of EU Member States and the impact of EU law on National Judicial Procedure

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SUMMARY

• I. The Regulatory Framework of reference
• II. Procedural autonomy and principles of equivalence and effectiveness
• III. Procedural autonomy and effective judicial protection
• IV. Procedural autonomy and preliminary reference procedure
Article 5 TEU: The Principle of conferral

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
Article 291 TFEU: Principle of indirect administration

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

Consequences:
A. Member States competence to implement EU law.
B. In a field of EU legislative competence, implementation falls under the Member States sphere of action.
NO LEGAL BASES FOR THE ADOPTION OF EU LEGISLATION ON PROCEDURAL MATTERS!!

A) Absence at present of a specific competence (no specific legal bases in the EU Treaties) for the adoption of EU legislative acts on procedural matters
B) No possibility to use the general legal bases concerning the approximation of such laws, regulations or administrative provisions of the Member States affecting the establishment or functioning of the internal: so neither Art. 115 TFEU nor Art. 114 TFEU can be used for this purpose, except in very exceptional cases.
AN EXCEPTIONAL CASE:
amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof (ex Art. 95, TEC, now Art. 114, TFEU)

- Having regard to the proposal from the Commission,
- Having regard to the opinion of the European Economic and Social Committee
- Having regard to the opinion of the Committee of the Regions
- Acting in accordance with the procedure laid down in Article 251 of the Treaty

Whereas:
Recital nr. 34 of Directive 2007/66/EC

(34) Since, for the reasons stated above, the objective of this Directive, namely improving the effectiveness of review procedures concerning the award of contracts falling within the scope of Directives 2004/18/EC and 2004/17/EC, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective, while respecting the principle of the procedural autonomy of the Member States.
THE CURRENT SITUATION

NO EU COMPETENCE OF AS FOR (JUDICIAL) PROCEDURE

Consequence: the so called "principle of procedural autonomy of the Member States"

Landmark Case 33-76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland, 16 December 1976

"...in the absence of community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law."
THE CURRENT SITUATION

NO EU COMPETENCE AS FOR (JUDICIAL) PROCEDURE

Consequence: the so called “principle of procedural autonomy of the Member States”

Case C-3/16, Aquino, 15 March 2017

“48 It should be recalled here that, according to settled case-law of the Court, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy...”
THE CURRENT SITUATION

NO EU COMPETENCE OF AS FOR (JUDICIAL) PROCEDURE

Consequence: the so called “principle of procedural autonomy of the Member States”

Case C-425/16, Raimund, 19 October 2017

“In that context, it must be borne in mind that, in accordance with the Court’s settled case-law, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State, in accordance with the principle of procedural autonomy, 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 EU law, the Member States having none the less responsibility for ensuring that those rights are effectively protected in each case”
The limits to MS procedural autonomy:

1) THE PRINCIPLE OF EQUIVALENCE

The equivalence criterion is based on the idea -put forward already in the Rewe decision- that procedures for actions aimed at guaranteeing the protection of rights of individuals provided for by EU norms cannot be less favourable than those used for similar actions in the domestic procedural system.
The limits to MS procedural autonomy:

1) THE PRINCIPLE OF EQUIVALENCE

Case C-326/96, Levez, 1 December 1998

“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 … the national court -which alone has direct knowledge of the procedural rules governing actions in the field ... must consider both the purpose and the essential characteristics of allegedly similar domestic actions”
The limits to MS procedural autonomy:

1) THE PRINCIPLE OF EQUVALENCE

WARNING!!

The equivalence principle cannot be interpreted as an obligation for the Member States to extend their most favourable national regime on (judicial) procedure to all actions based on EU law,

(See Case C-326/96, Levez, 1 December 1998, par. 42)
1) The Principle of Equivalence

Case C-161/15, Abdelhafid Bensada Benallalicy, 17 March 2016

“In accordance with the applicable national law, a plea alleging infringement of national law raised for the first time before the national court hearing an appeal on a point of law is admissible only if that plea is based on public policy”

“It is for the competent national court to examine whether the condition connected to the principle of equivalence is satisfied in the case before it. With more specific regard to the case in the main proceedings, it is for the national court to determine whether the right to be heard, as guaranteed by national law, satisfies the conditions required by national law for it to be classified as a matter of public policy”
The limits to MS procedural autonomy: 

1) THE PRINCIPLE OF EQUIVALENCE

WARNING!!!

Even in this case, where the principle of equivalence is about the conditions required by national law for a plea to be classified as a matter of public policy, it is for the national court to decide if it is so.

It does not matter if the plea can/could be qualified as such (as a matter of public policy) according to EU law!!! (see par. 33 ss. case C-161/15, Abdelhafid Bensada Benallalicy)
Further examples

ECJ, Dragoș Constantin Târșia, C-69/14, 6.10.2015

“35. It follows that the principle of equivalence does not preclude a situation where there is no possibility for a national court to revise a final decision of a court or tribunal made in the course of civil proceedings when that decision is found to be incompatible with an interpretation of EU law upheld by the Court after the date on which that decision became final, even though such a possibility does exist as regards final decisions of a court or tribunal incompatible with EU law made in the course of administrative proceedings.”
Further examples

ECJ, Câmpean, C-200/14, 30.06.2016, paras 55-56

“the principle of equivalence requires that actions based on an infringement of national law and similar actions based on an infringement of EU law be treated equally and not that there be equal treatment of national procedural rules applicable to proceedings of a different nature or applicable to proceedings falling within two different branches of law”
The limits to MS procedural autonomy: 2) THE PRINCIPLE OF EFFECTIVENESS

- the second Rewe criterion constitutes a real ‘obligation of result’ imposed on the Member States

- Effectiveness has to be understood as the ability to pursue the goal established by the norm of EU substantive law

- Effectiveness of EU substantive law has to be guaranteed at all times and by any means
2) THE PRINCIPLE OF EFFECTIVENESS

Landmark Case 33-76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland, 16 December 1976

... in the absence of community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.

The conditions laid down by the domestic norms should not make it “impossible in practice to exercise the rights which the national courts are obliged to protect”.
Case 199/82, Amministrazione delle Finanze dello Stato v SpA San Giorgio, 9 November 1983

“14. ... any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to community law would be incompatible with community law”.
The limits to MS procedural autonomy:

2) THE PRINCIPLE OF EFFECTIVENESS

Case C-326/96, B.S. Levez v T.H. Jennings (Harlow Pools) Ltd., 1 December 1998

27 ss. “In the present case, the order for reference states that Mrs Levez was late in bringing her claim because of the inaccurate information provided by her employer in December 1991 regarding the level of remuneration received by men performing like work to her own … to allow an employer to rely on a national rule such as the rule at issue would, in the circumstances of the case before the national court, would be manifestly incompatible with the principle of effectiveness … the application of the rule at issue is likely, in the circumstances of the present case, to make it virtually impossible or excessively difficult to obtain arrears of remuneration in respect of sex discrimination”.
RECAP: THE TWO LIMITS TO MS PROCEDURAL AUTONOMY:

Case C-3/16, Aquino, 15 March 2017

“It should be recalled here that, according to settled case-law of the Court, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy, on condition, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness)"
MS procedural autonomy and THE OBLIGATION OF CONSISTENT INTERPRETATION!!

Joined cases C-397/01 to C-403/01, Pfeiffer, 5 October 2004

“The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it”
MS procedural autonomy and the OBLIGATION OF CONSISTENT INTERPRETATION

• It is the duty to interpret the norm of EU law in accordance with the objective full effect that it pursues and in order to ensure full effect to the EU substantive law.

• It is a task that the national judge is not only obliged to accomplish but is further expected to accomplish in good faith, according to what can be inferred from the provision of Art. 4, third paragraph, TEU (principle of sincere cooperation)
The Principle of sincere cooperation
Article 4 (3) TEU

- Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

- The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

- The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.
What if consistent interpretation is not enough?  
The Simmenthal case-law

ECJ, 9.3.1978, Simmenthal, Case 35/76

“Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legal provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law“.
“21. 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 seised 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. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

22. That interpretation is reinforced by the system established by Article 177 of the EEC Treaty whose effectiveness would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice”. 
“23 Consequently, the reply to the question raised should be that Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule”
“33 Both that discretion and that obligation are an inherent part of the system of cooperation between the national courts and the Court of Justice established by Article 267 TFEU and of the functions of the court responsible for the application of EU law entrusted by that provision to the national courts.

34 As a consequence, where a national court before which a case is pending considers that a question concerning the interpretation or validity of EU law has arisen in that case, it has the discretion, or is under an obligation, to request a preliminary ruling from the Court of Justice, and national rules imposed by legislation or case-law cannot interfere with that discretion or that obligation”.

“35. In the present case, a provision of national law cannot prevent a chamber of a court of final instance faced with a question concerning the interpretation of Directive 89/665 from referring the matter to the Court of Justice for a preliminary ruling”.

“39. It should also be noted that the effectiveness of Article 267 TFEU would be impaired if the national court were prevented from forthwith applying EU law in accordance with the decision or the case-law of the Court (see, to that effect, judgment in Simmenthal, 106/77, EU:C:1978:49, paragraph 20)”.
“58 (...) a national rule in relation to limitation periods for criminal offences such as that laid down by the national provisions at issue (...) is liable to have an adverse effect on the fulfilment of the Member States’ obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify”.

C-105/14, Ivo Taricco, 8 September 2015
“The national court must give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Article 325(1) and (2) TFEU”
Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by European Union law.
Article 47 Charter of fundamental rights of the EU

Right to an effective remedy and to a fair trial

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.
“59. So far as concerns, lastly, Article 47 of the Charter, it is apparent from the Court’s case-law that that provision constitutes a reaffirmation of the principle of effective judicial protection, a general principle of European Union 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, signed at Rome on 4 November 1950 (see to that effect, inter alia, Case 222/84 Johnston [1986] ECR 1651, paragraph 18; Case C-432/05 Unibet [2007] ECR I-2271, paragraph 37; and Case C-334/12 RX-II Arango Jaramillo and Others v EIB [2013] ECR, paragraph 40)“. 
“61. Article 47 of the Charter of Fundamental Rights of the European Union, does not preclude a national rule of jurisdiction such as that in Article 133(1) of the Code of Administrative Procedure (Administrativnoprotsesualen kodeks), which results in conferring on a single court all disputes relating to decisions of a national authority responsible for the payment of agricultural support under the European Union common agricultural policy, provided that actions intended to ensure the safeguarding of the rights which individuals derive from European Union law are not conducted in less advantageous conditions than those provided for in respect of actions intended to protect the rights derived from any aid schemes for farmers established under national law, and that jurisdiction rule does not cause individuals procedural problems in terms, inter alia, of the duration of the proceedings, such as to render the exercise of the rights derived from European Union law excessively difficult, which it is for the referring court to ascertain”
“45 However, judicial review of compliance with the European Union legal order is ensured, as can be seen from Article 19(1) TEU, not only by the Court of Justice but also by the courts and tribunals of the Member States. The FEU Treaty has, by Articles 263 TFEU and 277 TFEU, on the one hand, and Article 267 TFEU, on the other, established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the European Union judicature” (judgments in Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, EU:C:2013:625, paragraphs 90 and 92, and Telefónica v Commission, C-274/12 P, EU:C:2013:852, paragraph 57)
National judges as decentralized EU judges

Opinion 1/09, Creation of a unified patent litigation system, 8.03.2011, para 69

“The national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed”
“99 As regards the role of the national courts and tribunals, referred to in paragraph 90 of this judgment, it must be recalled that the national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed (Opinion of the Court 1/09, paragraph 69).

100 It is therefore for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection (Unión de Pequeños Agricultores v Council, paragraph 41, and Commission v Jégo-Quéré, paragraph 31).

101 That obligation on the Member States was reaffirmed by the second subparagraph of Article 19(1) TEU, which states that Member States ‘shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law’.”
“102 In that regard, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to designate, with due observance of the requirements stemming from paragraphs 100 and 101 of this judgment and the principles of effectiveness and equivalence, the courts and tribunals with jurisdiction and to lay down the detailed procedural rules governing actions brought to safeguard rights which individuals derive from European Union law” (see, to that effect, inter alia, Case C-268/06 Impact [2008] ECR I-2483, paragraph 44 and the case-law cited; Case C-118/08 Transportes Urbanos y Servicios Generales [2010] ECR I-635, paragraph 31; and Joined Cases C-317/08 to C-320/08 Alassini and Others [2010] ECR I-2213, paragraphs 47 and 61).
“103 As regards the remedies which Member States must provide, while the FEU Treaty has made it possible in a number of instances for natural and legal persons to bring a direct action, where appropriate, before the Courts of the European Union, neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law (Case C-432/05 Unibet [2007] ECR I-2271, paragraph 40).

104 The position would be otherwise only if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully (see, to that effect, Unibet, paragraphs 41 and 64 and the case-law cited)”
“49 As regards persons who do not fulfil the requirements of the fourth paragraph of Article 263 TFEU for bringing an action before the Courts of the European Union, it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection (Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, EU:C:2013:625, paragraph 100 and the case-law cited).

50 That obligation on the Member States was reaffirmed by the second subparagraph of Article 19(1) TEU, which states that Member States ‘shall provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law’ (see judgment in Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, EU:C:2013:625, paragraph 101). That obligation also follows from Article 47 of the Charter as regards measures taken by the Member States to implement Union law within the meaning of Article 51(1) of the Charter”.
“176. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in van Gend & Loos, EU:C:1963:1, p. 12), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 67 and 83)”. 
1) Procedural autonomy disappears when the EU adopts legislative acts on the subject of procedure, thus advoking to itself the competence on procedural matters (no specific legal basis, though!).

2) Procedural autonomy of the Member States is subject to continuous interventions by the ECJ that, with its jurisprudence, has progressively outlined the limits of what has therefore been identified (Galetta, 2009) as a “functionalized procedural competence of the Member States”.

3) This competence is constrained by the limits that emerge from the two Rewe criteria of equal treatment and effectiveness, re-read in the light of the duty of consistent interpretation.
What if a national court cannot meet the requirements of effectiveness of EU substantive law, not even by ‘functionalizing’ the national procedural law by means of its consistent interpretation?

Duty for the national judge to “disapply”’ such national ‘procedural’ norms

Duty for the national legislator to remove from its legal order every legal provision that is incompatible with EU (substantive) law; even this provision concerns procedure/process.
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