



Max Planck Institute
LUXEMBOURG
for Procedural Law

Procedural Harmonisation by the ECJ

Procedural Autonomy and its Limits

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Outline

1. EU rights and national remedies
2. What does procedural autonomy mean?
3. Limits of autonomy
4. Harmonising impact: the view from the Member States
5. Concluding remarks

Harmonisation of national laws

- Traditional instruments/processes for facilitating internal market;
- National barriers to trade;
- But also: market's institutional, social and moral dimensions.

Role for EU legislator; **European Court of Justice** and private actors.

Limited EU legislative competence re procedure:
Art.5 TEU: Conferral, subsidiarity and proportionality.



EU rights and national remedies

Procedural rules in EU Treaties:

E.g., Art.267 TFEU on the preliminary reference procedure.

Procedural rules in EU legislation (Art 114 TEU):

E.g., Evidence regime in the Private Damages Directive.

European rules governing cross-border civil procedure (Art 81 TFEU):

E.g., Brussels I bis Regulation on jurisdiction, recognition and enforcement.



EU rights and national remedies

Decentralised enforcement of EU rights.

- Where EU has legislated = EU procedural rules apply;
- Existence of EU rights and absence of EU procedural rules = dispute resolution framework, procedures and remedial rules of Member States apply.

Also known as the procedural autonomy of the Member States.

What role for the ECJ?



Role of the ECJ

Procedural requirements in ECJ case law:

- **Limits to national procedural autonomy: equivalence and effectiveness.**
- Interpretation of EU legislation containing procedural rules.
- Fundamental rights protection.



Limits to procedural autonomy

Member States obliged to ensure full effectiveness of EU law:

- Art.4(3) TEU: principle of sincere cooperation
- General principles of EU law - primacy and direct effect of EU law;
- Art.47 CFR: effective judicial protection.

Yet, national rules may undermine effective application of EU law.



What does procedural autonomy mean?

Joined Cases C-51/71-54/71 *International Fruit Company*

- "...the Member States are obliged to take all appropriate measures...to ensure fulfilment of the [Treaty] obligations, it is for them to determine which institutions within the national system shall be empowered to adopt the said measures".



What does procedural autonomy mean?

C-3/16 *Aquino* - Rewe/Comet formula.

“...according to settled case-law of the Court, in the **absence of EU rules on the matter**, it is for the national legal order...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**)”.



Limits to procedural autonomy

1. EU rights but absence of EU procedural rules;
2. „obligation de résultat“ of EU legislation establishing EU rights;
3. Principles of equivalence and effectiveness;
4. Principle of effective judicial protection.



Obligation de résultat

Pursuit of goals established by substantive EU law rules -
an obligation of result on the Member States.



Principle of equivalence

National rules governing EU actions cannot be less **favourable than national rules governing similar domestic situations.**

Equality and non-discrimination – equal procedural treatment of claims based on EU and on national law.



Principle of effectiveness

National rules must not render “virtually impossible of excessively difficult”, the exercise of EU rights or the application of EU law.

Developed by ECJ in its case law - from “impossible” in Rewe to “virtually impossible” or “excessively difficult or impossible in practice”.



Application of equivalence and effectiveness

- Objective abstract verification...yet with reference to “the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts”;
- Rules of public policy => beyond settling private, subjective disputes, and integrate objective policy concerns;
- Discretion to decide what is excessively difficult or virtually impossible – balancing approach (*Van Schijndel*)?



Principle of effective judicial protection

Art.47 Charter of Fundamental Rights (fair trial and effective remedy)?

Art.47 as an additional limitation?

As yet, unclear approach by ECJ (e.g. *Agrokonsulting* and *Alassini* cases) – but increasing fundamental rights dimension.



Application of limitations

What types of national procedural rules are affected?

Time limits, evidence, burden of proof, party autonomy and *iura novit curia*, and *ex officio* powers/obligations of national judge.



Duarte Hueros – ex officio example

- EU law: Directive 1999/44/EC on consumer sales
- Car roof broken - consumer claimed rescission of contract and repayment of price paid;
- Spanish judge – “minor” problem – price reduction normal remedy, not what was claimed;
- Spanish law did not allow national judge to requalify claim – he could not award reduction – so what?
- Res judicata – consumer could not file new claim;
- No redress for consumer?



Duarte Hueros – ex officio

Spanish court asked ECJ:

Can national judge requalify the claim of its own motion (i.e. Ex officio)?

ECJ:

Yes, principle of effectiveness undermined by impossibility of new claim and of national judge to requalify

→ ex officio requalification must be possible to allow exercise of consumer rights under directive.



Duarte Hueros - consequences

In Spain:

- Some problems with national judges and procedural rules;
- Fragmentation of civil procedure – limited to one directive
 - EU law is sectoral; national civil procedure horizontal.

Other Member States:

- Only when similar rules as Spain;
- Member State-specific approach.



Wider context – harmonisation?

Different approaches to civil procedure

- Member States: horizontal;
- EU: sectoral.

Effect of sectoral requirements on horizontal frameworks?

- Fragmentation;
- No real or immediate harmonisation – requires adaption.



Limitations in practice

- Are Member States really ever “autonomous”?
- Divergent interventions of the ECJ in practice – depending on 1) area of EU regulation; 2) MS specificities – really harmonisation? Or tailor-made solutions?





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