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

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I. THE REGULATORY FRAMEWORK OF REFERENCE

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1. The Legal Framework of reference

- **Article 5 (2) TEU**: principle of conferral
- **Article 291 TFEU**: principle of indirect administration
- **Article 4 (3) TEU**: principle of sincere cooperation (and the *Simmenthal* mandate of the national judge)
- **Article 19 (1) TEU**: judicial system of the EU and remedial obligation of the Member States
- **Article 47 Charter of Fundamental Rights**: Right to an effective remedy
- **Article 267 TFEU**: preliminary reference procedure

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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**.

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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.

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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 (even less) Art. 114, TFEU can therefore be used for this purpose.

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NO LEGAL BASES FOR THE ADOPTION OF EU LEGISLATION ON PROCEDURAL MATTERS!!!

New Art. 298 TFUE

1. In carrying out their missions, **the institutions, bodies, offices and agencies of the Union** shall have the support of **an open, efficient and independent European administration**.

2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, **shall establish provisions to that end**.

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THE CURRENT SITUATION

NO EU COMPETENCE OF AS FOR (JUDICIAL and NON JUDICIAL) PROCEDURE for Member States:

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.*"

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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-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…".*

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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***"

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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**.

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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*"

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THE PRINCIPLE OF EQUIVALENCE

WARNING!!!

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

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

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The limits to MS procedural autonomy:
2) THE PRINCIPLE OF EFFECTIVNESS

- 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**

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THE PRINCIPLE OF EFFECTIVNESS

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".*

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THE PRINCIPLE OF EFFECTIVNESS

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".*

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THE PRINCIPLE OF EFFECTIVNESS

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***".

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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**)"

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MS procedural autonomy and THE DUTY OF CONSISTENT INTERPRETATION

THE DUTY OF CONSISTENT INTERPRETATION ALSO COMES INTO PLAY

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"*

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MS procedural autonomy and THE DUTY OF CONSISTENT INTERPRETATION

The requirement for national law to be interpreted in conformity with EU law (inherent in the system of the Treaty and aiming at ensuring **the full effectiveness of EU law) is an obligation for all national "PUBLIC BODIES" AND NOT JUST for (national) JUDGES!!!**

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MS procedural autonomy and THE DUTY OF CONSISTENT INTERPRETATION

- It is the duty to interpret the norm of EU law **in accordance with the objective** that it pursues and in order to ensure **full effect** to the EU substantive law.
- It is a task that the "national body" acting 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 (**see next slide**)

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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.

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The Simmenthal case-law

ECJ, 9.3.1978, *Simmenthal*, Case 106/77

"Every national court must, in a case within its jurisdiction, ***apply Community law in its entirety*** *and protect rights which the latter confers on individuals and must accordingly* ***set aside any provision of national law which may conflict with it,whether prior or subsequent to the Community rule****".*

"Any provision of a national legal system ***and any legislative, administrative or judicial practice which might impair the effectiveness*** *of Community law (….) are incompatible with those requirements which are the very essence of Community law*".

Judgment of the Court of 9 March 1978. Amministrazione delle Finanze dello Stato v Simmenthal SpA. Reference for a preliminary ruling: Pretura di Susa - Italy.

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The Fratelli Costanzo case-law
ECJ, 22.6.1989, Case 103/88

“ (….) **administrative authorities, including municipal authorities, are under the same obligation as a national court**”.

Judgment of the Court of 22 June 1989.
Fratelli Costanzo SpA v Comune di Milano.
Reference for a preliminary ruling: Tribunale amministrativo regionale della Lombardia - Italy.
Public works contracts - Abnormally low tenders - **Direct effect of directives in relation to administrative authorities**.
Case 103/88.

AS FOR JUDICIAL PROCEDURE

See also: art. 19 (1), 2 subpar. TEU

"Member States shall provide remedies sufficient to ensure **effective legal protection** in the fields covered by European Union law"

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AS FOR JUDICIAL PROCEDURE

See also: Art. 47 Charter of fundamental rights of the European Union

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".

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CJEU, 28 April 2015, *T & L Sugars Ltd*, C-456/13 P

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).

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"

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