

The Origins of the Proceduralisation of EU Law: a Grey Area of European Federalism

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Abstract

According to an enshrined formula, national courts are the ordinary courts applying Community law; by the same token, however, the principle of institutional and procedural autonomy is also asserted. There is therefore a gap between the assertion of the national court's European functions and this competence reserved for Member States. Historically, the European Community had no competence in procedural matters and yet, from the late 1960s onwards, some procedural standards can be found in secondary law. The situation has barely evolved since that time and, while the Union admittedly has procedural competence in matters concerning civil and criminal judicial co-operation, this is limited to cross-border trials; consequently, where national courts are called upon to apply an EU standard, the Union's legislature is not granted any explicit competence in the field of the national procedural law of the Member States. Therefore, the theory of implied competences should be used as the basis of this proceduralisation process. Although some explicit legal bases have yet to be exploited, they could be used in order to carry out the harmonisation of procedural law.

Introduction

Although the European Union ostensibly has no competence to harmonise national procedural rules, the proceduralisation process is a long-standing reality. This phenomenon is not only a topical example of the power dynamics within the European Union but also a manifestation of the engineering behind European federalism. Along with the system of indirect administration, the implementation of EU law rests with national bodies and particularly with national courts. This organic shortfall could have been a weakness. This is especially so because the Member States' institutional autonomy logically goes hand in hand with procedural autonomy, as national bodies implement the Union's norms by applying their own procedural rules.

Procedural rules are indeed essential to the effectiveness and efficiency of substantive rules. R.-J. Pothier, a great legal scholar in the latter days of France's *Ancien Régime*, had already defined procedure as 'the way in which we must

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bring legal actions; defend them; intervene in them; set up inquiries; give judgment; appeal against judgments; enforce judgments'.¹ It is generally one of the most ethnocentric branches of law, strongly marked by national traditions. Furthermore, it is not certain that all Member States will have exactly the same conception of what procedural matters cover. Thus, in French law, issues relating to evidence or limitation periods are at the crossroads of substantive and procedural rules; under English law, they are a matter for procedural law. Above all, procedural rules belong to what P. Roubier termed 'le droit régulateur' or regulatory law:

'the division between public and private law still leaves aside a great many branches of law, the purpose of which is to regulate the application of those other branches of law (*jus supra jura*), either by ensuring their sanction, or their completion, or even their application in space and time'.²

In a close but certainly more sophisticated fashion, H.L.A. Hart makes the distinction between primary and secondary rules. The former demand that those subject to the law perform or abstain from certain actions, while the latter establish how those subject to the law may repeal, alter and ensure the effectiveness of those primary rules.³ There are, according to Hart, three types of secondary rules: the rules of recognition, change and adjudication. Procedural rules are rules both of recognition (as they confer jurisdiction to the court) and of adjudication (as they serve in establishing whether a primary rule has been breached). The European Union is a legal system that produces a great many primary rules and therefore has secondary rules which allow it to adopt, alter and repeal primary rules. For the third category of secondary rules, however, it remains largely dependent on the legal systems of its Member States. This gap between the normative (produced by the Union) and organic (constituted by Member States) had to be filled in part, at the risk of putting the achievement of the European construct's aims in jeopardy. It is in acting to fill that gap that the Union's federalism has proved its strength.

It is widely known that, based on the principle of loyal cooperation and its corollary principle of effectiveness, together with the right to effective judicial protection, the Court of Justice took charge of the procedural law applicable before national courts.⁴ The phenomenon of proceduralisation by the Union's legislature is surely less well known, particularly owing to its spread in a great

¹ R.-J. Pothier, *Traité de la procédure civile et criminelle*, tome 14^{ème} (Paris: Siffrein 1821), p. 1.

² P. Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales* (Paris: Sirey 1946), p. 262.

³ H.L.A. Hart, *The Concept of Law*, 3rd edition (Oxford: Oxford University Press 2012), p. 79 and following.

⁴ This well-known aspect is briefly mentioned below, at section 2.1.2.

number of pieces of secondary legislation. It both complements and competes with the work done by the Court of Justice. As highlighted by Jans,⁵ this then raises the question of the consistency of the proceduralisation phenomenon, as well as its legitimacy. While this Special Issue only discusses the harmonisation of procedural rules before national courts, we find similar issues to those that may arise when looking at rules relating to administrative procedure⁶. Indeed, proceduralisation pursues the same aims as the Court of Justice: to guarantee the effectiveness and efficiency of EU law, as can be seen when considering the phenomenon over time (section 1). In spite of the obvious advantages of the proceduralisation trend for the Union, the basis of its competence to legislate in this area seems very uncertain (section 2).

I The Proceduralisation of EU Law Over Time

The phenomenon of the proceduralisation of Community law is not new. It dates back to the first few years of the European Economic Community, and not on an inconsiderable scale from the very beginning, though it remained focused on the right to legal remedies (section 1.1). It then related in particular, in the context of harmonising the internal market, to allowing challenges to be brought against the decisions made by national administrative authorities, particularly where an authorisation power had been conferred to those authorities under Community law. It was from the second half of the 1980s onwards, however, that proceduralisation really spread through the Community's various spheres of competence, with the effectiveness of legal actions brought before national courts as its objective (section 1.2).

1.1 Genesis: the Effectiveness of the Right to Legal Remedies

The first manifestation of the proceduralisation of secondary legislation can be found in the now famous Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.⁷ Under Article 6:

⁵ Cf. *supra* editorial.

⁶ See, e.g., ReNEUAL, 'Model rules on EU administrative procedure', Book I, *General provisions*, spec. p. 14 et s.

⁷ Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 56/850.

‘The person concerned shall be informed of the grounds of public policy, public security, or public health upon which the decision taken in his case is based, unless this is contrary to the interests of the security of the State involved’.

And under Article 8:

‘The person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration’.

Thus, many Regulations or Directives from the 1960s, 1970s and 1980s incidentally contain procedural provisions which, like the provisions of Directive 64/221/EEC, have a double purpose: firstly, to set obligations relative to the form of unilateral administrative acts in order to facilitate challenges to those same acts (section 1.1.1) and then to guarantee the existence of a right to legal remedies (section 1.1.2).

1.1.1 Formal Requirements of Administrative Acts

Formal requirements are related to the external presentation of acts and do not concern the enacting terms of an act. They derive from the requirement of transparency in administration, but are not unrelated to the possibility of bringing an action. These are obligations that were developed in the 1970s, particularly at the instigation of the Council of Europe.⁸

This is the case, first of all, for the requirement to state the grounds for administrative acts, or at least for unfavourable individual decisions. In making known to the addressees of the act the legal and factual grounds that form the basis of the act, this naturally makes it easier to challenge that act. The addressee can thus gauge more readily whether there are grounds for bringing an action, while the court hearing the action will be better able to give a ruling. It must also be recalled that, as early as 1957, the EEC Treaty itself imposed the same obligation with regard to all Community acts.⁹ This obligation is all the more interesting in that it was rare at that point in time for States to make provision for an obligation to state the grounds for administrative acts. It was developed further in the 1970s but was not a general obligation.¹⁰ In secondary legislation,

⁸ Resolution (77)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities.

⁹ Article 190 EEC, incorporated into Article 296, subparagraph 2, TFEU.

¹⁰ F. Schockweiler, *La motivation des décisions individuelles en droit national et en droit communautaire* [1989] *CDE*, p. 3; J. Schwarze, *European Administrative Law*, 2nd edition (London: Sweet & Maxwell 2006), p. 358.

the obligation is not enacted in isolation, being generally coupled with the obligation to make provision for remedies,¹¹ but most often with the other formal obligation which consists in stating the timeframes and the ways or means for redress.¹²

The latter obligation is likely to be more unusual than the obligation to state grounds. It is only imposed on Union acts on an ad hoc basis, and was only imposed in France by Decree n° 83-1025 of 28 November 1983 *concerning relations between the Administration and users of public services*.¹³ This is quite probably the influence of German law. Indeed, Germany's Administrative Procedure Act of 21 January 1960 already provided such an obligation.¹⁴ This appears all the more significant as, unlike the obligation to state grounds, it was not taken over by the Court of Justice. Indeed, while the Court of Justice made the obligation to state grounds for administrative decisions a general principle of law,¹⁵ the same did not apply to the obligation to state timeframes and the ways or means for redress.

Furthermore, the sanction for these two types of obligation is not the same. While neither secondary legislation nor the Court of Justice has decided the issue, it is possible to consider that the failure to state grounds for a national administrative act constitutes unlawfulness, as it does within the framework for actions for annulment under Article 263 TFEU. Conversely, it appears more logical to sanction failures to state timeframes and the ways to appeal through the unenforceability of those timeframes against citizens.

1.1.2 Obligations Relative to the Existence of a Remedy

In the 1960s and 1970s, many pieces of secondary legislation provided for the obligation to establish a remedy against national administrative decisions which dismissed or rejected applications based on EU law. The phrasing of that obligation is highly variable, even erratic. Some pieces of legislation provide that they must be challenged without stipulating the administrative

¹¹ As in Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

¹² Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers [1970] OJ L 42/1.

¹³ Décret du 28 novembre 1983 concernant les relations entre l'administration et les usagers.

¹⁴ C. Autexier, *Introduction au droit public allemand* (Paris: PUF 1997), p. 308.

¹⁵ Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others* [1987] ECR 4097.

or judicial nature of the ‘appeal’¹⁶ or ‘review’.¹⁷ This shows the taking into consideration of the procedural autonomy of Member States and especially of their respective specificities in proceedings challenging administrative decisions. Some give precedence to non-judicial methods while others, particularly France, are quite reticent on this point. Conversely, other pieces of secondary legislation expressly provide for such remedies to be of a judicial nature (‘a right to apply to the courts’).¹⁸ It does not seem possible to establish whether these variations are based on a particular rationale. It may simply be noted that the requirement for a judicial remedy was fairly rare prior to the enshrinement of a right of access to the courts by the Court of Justice. Many pieces of secondary legislation always include such an obligation but it must be remembered that, since the decision in *Johnston*,¹⁹ the same obligation falls to Member States in any event and it is now derived from Article 47 of the Charter of Fundamental Rights. This overlap between primary and secondary legislation surely demonstrates the significance attached by EU law to the possibility of challenging the administrative decisions made by national authorities.

Legislation relating to equality between men and women deserves particular attention. In the directives drafted from the second half of the 1970s onwards, proceduralisation is systematic in each piece of legislation adopted in this sphere by the Community.²⁰ It is therefore provided that, in the event of a breach of the principle of equality, victims have the right ‘to pursue their claims by judicial process’.²¹ In the French version, it is the right to act ‘par voie juridictionnelle’ or judicial process. The term ‘recours juridictionnel’ – judicial remedy – is not used. Indeed, in French semantics, the term ‘recours’ is specific to litigation

¹⁶ See e.g. Article 7, paragraph 2 of the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonization of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in the territory of the country: ‘The grounds for refusal of an application shall be stated. Appeals against such refusals may be made to the competent authorities in the Member State concerned, subject to the same conditions as to form and time limits as those governing claims for refunds made by taxable persons established in the same State’. (emphasis added) [1979] OJ L-331/11.

¹⁷ See e.g. Article 4 of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment: ‘A person who considers that his request for information has been unreasonably refused or ignored, or has been inadequately answered by a public authority, may seek a judicial or administrative review of the decision in accordance with the relevant national legal system’. Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment [1990] OJ L-158/56.

¹⁸ See e.g. Article 12 of the First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance. [1990] OJ L-158/56.

¹⁹ Case C-222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* 1986 [ECR], 1651.

²⁰ See E. Muir’s contribution in this Special Issue.

²¹ See e.g. Article 2 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L-45/19.

before administrative courts; litigation concerning equality between men and women is primarily litigation brought before the ordinary courts, hence the adoption of a generic phrasing in French. Aside from legislation relating to equality between men and women, until the late 1980s, the Community barely concerned itself with legal actions between private individuals, instead concerning itself essentially with remedies against administrative acts.

1.2 Development: the Effectiveness of Legal Actions

From the mid-1980s onwards, proceduralisation spread in order to bolster the effectiveness of subjective rights conferred by Community law and, thereby, legal actions brought on that basis. The main spheres of competence concerned were environmental protection, consumer protection, the fight against discrimination, and public procurement law.²² In each of these spheres, the effectiveness of substantive law calls for specific procedural rules.²³ The procedural rules concerned relate to the legal standing of NGOs (section 1.2.1), interim procedures (section 1.2.2), rules of evidence (section 1.2.3), and the court's powers (section 1.2.4).

1.2.1 The Legal Standing of NGOs

Both consumer protection and environmental protection constitute priority spheres for action on the part of associations. Historically, national laws were quite reticent with regard to legal actions brought by associations, insofar as they do not defend an individual interest but rather a collective interest, while legal interest is conceived as being personal.

In matters of consumer protection, for instance, Directive 98/27/EEC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests²⁴ opened injunctions to 'any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with'.²⁵

These qualified entities are not necessarily private associations – they may also be independent public bodies. A list of these entities is drawn up by the Commission on the basis of lists supplied by the Member States. The Directive also establishes the mutual recognition of the legal standing of those entities.

²² All these four areas of EU law are further addressed by specific articles in this Special Issue.

²³ See the various contributions in this Special Issue.

²⁴ See Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) [2009] OJ L-110/30.

²⁵ Article 3.

Thus, any body duly qualified to bring an action in a Member State shall have legal standing before the courts of another Member State. In each case, however, it falls to the national court to determine ‘their right to examine whether the purpose of the qualified entity justifies its taking action in a specific case’.²⁶

In matters of environmental protection, the implementation of the Aarhus Convention by Directive 2003/35/EC also resulted in provision being made for the access of associations to national courts.²⁷

This issue has more recently been tackled in Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.²⁸

1.2.2 Interim Procedures

In the introduction of effective summary proceedings, there was a surprising consonance between the Community legislature and the Court of Justice’s case law. Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts²⁹ established summary proceedings which could be considered revolutionary in light of what existed in some Member States, such as France.³⁰ National courts were recognised as having the power to suspend a public procurement procedure. Shortly thereafter, in the *Factortame/Zückerfabrik* cases,³¹ the Court of Justice imposed a duty on national courts to make summary proceedings available to litigants where their substantive proceedings are brought on the basis of Community law, irrespective of whether the validity of a national or a Community act is in question.

²⁶ Article 4.

²⁷ Article 3(7) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L-156/17.

²⁸ See the contribution of E. Muir in this Special Issue.

²⁹ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. [1989] OJ L-395/33. See also Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. [1992] OJ L-76/14.

³⁰ P. Terneyre, ‘L’émergence d’un recours contentieux du troisième type (commentaire de la loi n° 92-10 du 4 janvier 1993 relative aux recours en matière de passation de certains contrats et marchés de fournitures et de travaux)’ [1992] *ALD*, p. 82.

³¹ Case C-213/89 *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn* [1991] ECR I-415.

While this Directive and this case law are the most widely known, other pieces of secondary legislation have imposed procedural standards for summary proceedings. Thus Article 244 of Council Regulation (EEC) 2913/92 of 12 October 1992 establishing the Community Customs Code provides for a stay of execution.³² Consumer law also provides for summary proceedings.³³

1.2.3 The Burden of Proof

In some spheres, and especially in the fight against discrimination, the production of evidence is a fundamental aspect of the effectiveness of subjective rights. It was mainly in matters concerning equality between men and women that Community law developed original solutions intended to add flexibility to the *actori incumbit probatio* rule. In this area, case law in some ways preceded the legislature. In the *Bilka* decision, the Court ruled that

‘Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex’.³⁴

However, it was Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex which, under Article 4 (1), truly formalised the sharing of the burden of proof in anti-discrimination litigation.³⁵ This provision was adopted in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.³⁶ Although less widely known, it must be noted that, in consumer law, where an obligation to provide information is es-

³² Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1992] OJ L-302/1.

³³ See Article 2 of Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests. [1998] OJ L-166/51.

³⁴ Case 170/84 *Bilka – Kaufhaus GmbH v. Karin Weber von Hartz* [1986] ECR 1607, para. 31.

³⁵ ‘Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment’. Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1998] OJ L-14/6.

³⁶ See the contribution of E. Muir in this Special Issue.

established, a presumption mechanism may also be put in place by Member States.³⁷

In the area of competition law, the recent Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union also offers particularly interesting solutions.³⁸ In addition to guaranteeing a right of access to evidence for victims of anti-competitive practices, in the context of private enforcement actions, it facilitates the production of evidence by the applicant by recognising the effects of the decisions made by national competition authorities.³⁹

1.2.4 The Powers of National Courts

The effectiveness of judicial intervention very much depends on the powers conferred to judges under procedural rules. The protection of litigants' rights implies that the judge has powers adapted to the substantive rights invoked before the court.

In this area, consumer law has been a privileged field for the proceduralisation of EU law. Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising provides that the relevant administrative or judicial bodies may order the cessation of the misleading advertising or even prohibit it.⁴⁰ This proceduralisation of consumer law has developed considerably ever since.⁴¹

The Directives on public procurement have also detailed the powers available to national courts. While Directive 89/665/EEC had already given significant powers in light of what existed at the time under the national laws of the Member States, Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures

³⁷ See Article 11 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. [1997] *OJ L-144/19*.

³⁸ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] *OJ L-349/1*.

³⁹ See the contribution of M.J. Frese in this Special Issue.

⁴⁰ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] *OJ L-250/17*.

⁴¹ See the contribution of M. Tulibacka in this Special Issue.

concerning the award of public contracts⁴² gave unlimited jurisdiction to national courts.⁴³

In the areas of anti-discrimination and data protection, the Union's legislation has essentially been focused on the power of the courts to award damages or impose penalties. Those powers are exercised in conjunction with independent bodies.⁴⁴

While the proceduralisation trend is nothing new and not inconsiderable in terms of scale, it remains relatively scattered and erratic. We cannot ignore the fact that the Union's powers – just as those of the Community once were – are unclear in this field.

2 Foundations: Competence and Lack of Competence

The proceduralisation phenomenon is very real, but paradoxically the competence of the Union's legislature seems particularly uncertain. At first glance, the legislature would appear not to be competent (section 2.1), but it is possible nevertheless to identify the foundations or basis of its competence (section 2.2).

2.1 Lack of Competence

The European Union does not have express powers to set down rules for the procedures applicable before national courts; this means that the Union's legislature would not be authorised to set down rules in this area. This lack of competence may be a consequence of the model of federalism adopted by the European Union – the indirect administration from which the principle of institutional and procedural autonomy is derived. In such a model, only the Union's judicial power could then act in matters concerning the procedure applicable before national courts with reference to both the effectiveness of EU law and the right of access to the courts. The legislature's lack of competence would therefore not simply be a question of the vertical separation of powers (section 2.1.1), but would also be a question of the horizontal separation of powers (section 2.1.2).

⁴² Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 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. [2007] OJ L-335/31.

⁴³ See the contribution of R. Caranta in this Special Issue.

⁴⁴ See the contributions of E. Muir and of A. Galetta and P. De Hert in this Special Issue.

2.1.1 The Vertical Separation of Powers: the Principle of Institutional and Procedural Autonomy

The implementation of European Union law is the responsibility of Member States. This derives from the former Article 5 EEC, now contained in subparagraphs 2 and 3 of Article 4(3) EU. Member States must therefore put their various institutions at the service of the implementation of EU law – and national courts first and foremost, which are thus the ordinary courts of Community law. The corollary to this implementation obligation is the principle of institutional and procedural autonomy, which leaves Member States free to choose the procedures by which they will fulfil that obligation. According to a recurring phrase used by the Court of Justice,

‘it is for the domestic legal system of each Member State, in accordance with the principle of the procedural autonomy of the Member States, 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’.⁴⁵

This is not, for all that, truly a competence reserved for Member States, as this principle only comes into play ‘in the absence of EU rules governing the matter’. This phrasing therefore seems to imply that the European Union may be competent. In its decisions in *Rewe* and *Comet*, the Court prefaced that assertion with the following statement:

‘where necessary, Articles 100 to 102 and 235 of the Treaty enable appropriate measures to be taken to remedy differences between the provisions laid down by Law, regulation or administrative action in member states if they are likely to distort or harm the functioning of the Common Market’.⁴⁶

It has not, however, repeated such an assertion.

The Treaty of Lisbon arrived in turn to reinforce those same ambiguities. Under Article 19(1), subparagraph 2 EU, ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. Should this obligation on Member States be interpreted as a reservation of competence for their benefit? Even if so, that competence still depends on the objective of an effective legal protection, which limits the procedural

⁴⁵ See e.g. Case C-567-13 *Nóra Baczó and János István Vizsnyiczai v. Raiffeisen Bank Zrt* [2015] nyr, para. 41.

⁴⁶ Case 33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5.

autonomy of Member States. The Court of Justice itself complicated matters further by asserting in the *Inuit* decision that

‘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 (...). 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’.⁴⁷

It is a contradiction in terms to assert, in the first instance, that the purpose of Article 19 EU was not to create new remedies before national courts, only then to assert immediately thereafter that the principle of effective judicial protection only applies where the effectiveness of EU law is in question. In reality, however, this is the only way to respect the principle of the procedural autonomy of Member States *and* the principle of effective judicial protection: the latter therefore only comes into play on a subsidiary basis in the event of failure on the part of Member States. In the 1990s, Robert Kovar already considered that

‘while the Court recalls the principle of institutional autonomy, it also stresses that this autonomy is both residual and subordinate: residual because the Member States may only take action for as long as EU law does not provide otherwise; subordinate, as even where the institutions have not acted, member States are bound to ensure the effectiveness of EU law’.⁴⁸

Matters do not appear to have changed very much since then. The Union’s legislature could potentially be competent without knowing the legal basis on which it may act. It is not impossible to consider that these ambiguities allow the Court of Justice ultimately to keep the upper hand, primarily in remedying failures brought about by procedural autonomy.

2.1.2 Horizontal Separation: the Court of Justice as the Guardian of Effectiveness and the Right of Access to the Courts

Admittedly, the Community legislature acted before the Court of Justice in order to restrict the procedural autonomy of Member States. The

⁴⁷ Case 583/11 P *Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union* [2013] ECR, nyr, para. 104-105.

⁴⁸ R. Kovar, *Compétences des Communautés européennes*, J.-Cl. (Europe) fasc. 420, n. 113.

work done by the Court of Justice has nevertheless remained significant in the field.

From its decisions in *Rewe* and *Comet* onwards, it provided a framework for procedural autonomy by positing the principles of equivalence and effectiveness in the name of the effectiveness of EU law, on the basis of the former Article 5 EEC. According to those principles,

‘the detailed procedural rules governing actions for safeguarding an individual’s rights under EU 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 EU law (principle of effectiveness)’.⁴⁹

These limits apply in the absence of procedural harmonisation operated by secondary legislation.

It is impossible to overlook the Court’s judicial dynamism in the 1990s in the sphere of interim procedures⁵⁰ and Member State liability for breaches of EU law,⁵¹ which are based on the notion of effectiveness, Article 5 EEC and the right to effective judicial protection. In matters of summary proceedings, it ruled that national courts had to be able to order provisional measures in spite of their national law. Where the validity of an act of secondary legislation was in question, it established the conditions for obtaining such provisional measures.⁵² The assertion of the principle of State liability for breaches of EU law led the Court indirectly to require national laws to provide for legal action on grounds of State liability for acts and omissions of the national legislature or for infringements of Community law attributable to a Supreme Court.⁵³ Member States’ national laws generally did not provide for this type of legal action, or the existing actions were unsuitable.

⁴⁹ Case C-177/10 *Francisco Javier Rosado Santana v. Consejería de Justicia y Administración Pública de la Junta de Andalucía* [2011] ECR I-7907, para. 89.

⁵⁰ Case C-213/89 *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn* [1991] ECR I-415.

⁵¹ Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR I-5357.

⁵² Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*. However, where a national measure that is incompatible with EU law is in question, it refers to the principle of procedural autonomy: see Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern* [2007] ECR I-2271.

⁵³ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029; Case C-224/01 *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239.

In 1986, the Court of Justice identified the general principle of the right of access to the courts, in its decisions in *Parti écologiste Les Verts* and *Johnston*. This principle is now contained in Article 47 of the Charter of Fundamental Rights. This general principle of law (Article 47) ultimately removes all practical relevance from the great many provisions under secondary legislation enshrining the right to a judicial remedy. Furthermore, the Court of Justice used Article 47 of the Charter to impose new procedural standards on national courts. Thus, where the court identifies an unfair term of its own motion under Directive 93/13/EEC,⁵⁴

‘it is, as a general rule, required to inform the parties to the dispute of that fact and to invite each of them to set out their views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure’.⁵⁵

This example demonstrates that the use of Article 47 of the Charter allows the Court of Justice to impose procedural rules on national courts, the purpose of which is not necessarily the effectiveness of EU law, but rather litigants’ rights. These two requirements are, however, more often connected than they are separate.⁵⁶

In spite of this not inconsiderable role that the Court of Justice has awarded to itself, it must be concluded that the part played by the Union’s legislature has continued to grow within the proceduralisation process and further prospects may potentially be open to it.

2.2 Competences?

In the absence of any express Treaty provisions authorising the Union legislature to act in the procedural sphere, the theory of implied competences should be used as the basis of its already numerous actions (section 2.2.1). Although some explicit legal bases have yet to be exploited, they could be used in order to carry out the harmonisation of procedural law (section 2.2.2).

⁵⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. [1993] OJ L-95/29.

⁵⁵ Case C-472/11 *Banif Plus Bank Zrt c/ Csaba Csipai, Viktória Csipai* [2013] ECR, nyr, para. 31.

⁵⁶ The Court considered that ‘the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them. The fundamental right to an effective legal remedy would be infringed if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views’. Case C-437/13 *Unitrading Ltd v. Staatssecretaris van Financiën* [2014] ECR, nyr, para. 21.

2.2.1 Implied Competences

Most of the procedural standards laid down by the Union legislature can be found in a regulation or directive intended to harmonise substantive law. The main purpose of the law is generally not the harmonisation of procedural rules. The legal basis of proceduralisation therefore varies depending on the area concerned: the internal market, the environment, consumer protection, and anti-discrimination policy may all form the basis of competences for imposing procedural standards.

The same applied when it came to an act wholly devoted to procedural harmonisation. Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex was founded on the Community's competence in social policy matters. Council Directive 89/665/EEC of 21 December 1989⁵⁷ is itself founded – as are all Directives adopted in matters concerning public contracts at that time⁵⁸ – on the former Article 100 A EEC. More recently, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 – on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union – was adopted on that basis.⁵⁹ Like the former Article 100, Article 100A allowed the development of those Community competences more or less linked to the internal market, such as Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for a defective product.⁶⁰

The Union's competence in procedural matters therefore appears to be an implied competence, that is, a competence that is necessarily devolved to the Union insofar as the purpose of its exercise is to ensure the effectiveness of substantive rules laid down elsewhere. This reasoning is similar to that of the Court of Justice in the 2005 case of *Commission of the European Communities v. Council of the European Union*. In this case, while the Community has no competence in criminal matters, the Court of Justice considered that

‘the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating

⁵⁷ Council Directive 89/665/EEC of 21 December 1989[1] on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

⁵⁸ See e.g. Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

⁵⁹ See the contribution of M.J. Frese in this Special Issue.

⁶⁰ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L-210/29.

serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective'.⁶¹

The Treaty of Lisbon codified that line of reasoning in Article 83(2) TFEU.

Beyond the theory of implied competences, it is worth examining whether explicit legal bases could also be used.

2.2.2 Explicit Competences

In its 1976 decision in *Rewe*, the Court of Justice suggested that the former Article 235 EEC could be used. According to that provision,

'[i]f action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'.

It will be recalled that in the 1970s and 1980s, many Community policies were developed on that basis prior to being enshrined by an express Community competence, in particular its policies relating to economic and social cohesion or the environment.

Since the Treaty of Lisbon, the article has been phrased differently and its scope has broadened as it is no longer limited to the common market but applies more broadly with regard to 'the policies defined in the Treaties'. The conditions for adopting acts are, however, more restrictive: the European Parliament is no longer simply consulted; it must approve the act. Above all, it is expressly stipulated under Article 352 (3) TFEU that 'measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonization'. Procedural law does not, however, feature amongst those areas in which harmonisation is prohibited.

The usefulness of such a legal basis for harmonising procedural law nevertheless remains very uncertain. Where it is a matter of establishing procedural standards with a view to ensuring the effectiveness of legislation in a given area (as has been the case up until now), the method adopted – acting on the basis of the competences concerned – seems to have proved its worth and has not been disputed for the time being. Where it is a question of horizontal harmon-

⁶¹ Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 48.

isation, there is uncertainty as to whether such a proposition would pass the subsidiarity test. Symptomatically, Article 352 (2) TFEU states: 'Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article'. Above all, another legal basis could be used with a view to fulfilling a procedural harmonisation objective.

Under Article 81 TFEU:

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (...)

- a. the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
- b. the cross-border service of judicial and extrajudicial documents;
- c. the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- d. cooperation in the taking of evidence;
- e. effective access to justice;
- f. the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- g. the development of alternative methods of dispute settlement; (...)'.

While subparagraphs a), b), c), and d) obviously concern issues relating to conflicts of laws and jurisdiction and to transnational trials, the same cannot necessarily be said for subparagraphs e), f) and g). It may admittedly be considered that those aims only concern transnational lawsuits, namely those which are affected by an 'international' element.

However, such an interpretation is in no way inescapable. Indeed, subparagraph f) is particularly ambiguous. The phrase 'the compatibility of the rules on civil procedure applicable in the Member States', taken literally, seems absurd. Compatibility implies that two elements can exist simultaneously. National procedural rules are applicable in their respective legal systems: 'a court may apply foreign substantive law, but never foreign procedural law'.⁶² Consequently,

⁶² M. Storme, 'Rapport général introductif', in: M. Storme (Ed.), *Rapprochement du droit judiciaire de l'Union européenne* (Dordrecht: Martinus Nijhoff 1994), p. 3, and especially p. 9.

this phrase can only concern the potential development of procedural standards by the Union. Furthermore, the notion of ‘cross-border’ does not necessarily refer solely to legal situations affected by an international element. Thus, on the basis of Article 82(2) TFEU where this notion can be also found, the Union has harmonised some aspects of criminal procedure without restricting that harmonisation to transnational lawsuits.⁶³ The same approach could be taken in respect of certain civil procedure rules.

Administrative judicial procedure may also fall within the scope of Article 81 TFEU, at least in part. The Court of Justice, in the context of the law on conflicts of jurisdiction, gave an extensive definition of civil matters and considered that disputes between a public authority and a public person came under that definition, except ‘where the public authority acts in the exercise of its powers’.⁶⁴ This broad definition of civil matters thus serves to encompass a significant part of contractual and tortious liability litigation, but appears to exclude proceedings relating to unilateral acts which are, by their nature, the exercise of public authority. Lastly, it will be noted that since the Treaty of Lisbon, Article 197 TFEU gives the Union competence in the field of administrative co-operation, but excludes any harmonisation of the laws of the Member States.

While the proceduralisation of EU law is very real and potentially concerns all areas of competence in which the Union may set down primary rules, the basis of such action remains uncertain: the Union acts without any light being shed on the basis of its actions. This existentialism reflects the very nature of the body of rules produced. In so far as the approach is purely utilitarian – ensuring the effectiveness and efficiency of EU law – and that it does not rely on any clear-cut competence, this body of rules decidedly does not form a coherent whole but is instead made up of bits and pieces. It remains doubly sectorial: proceduralisation is aimed at implementing this or that substantive rule and only concerns certain aspects of procedural law. It remains to be seen whether the Union will be able to sustain what is ultimately a fairly erratic trend and think carefully and systematically about the type of procedural rules that it deems necessary to harmonise and how to link these with national legal systems. Procedure is not first and foremost a means to ensure the effectiveness of substantive law; it is primarily the main guarantee of individual rights. Pigeau, the leading French proceduralist after the revolutionary period, stated in what is admittedly rather bombastic fashion:

⁶³ See e.g., Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L-142/1; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L-315/57.

⁶⁴ Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol* [1976] ECR 1541, para. 4.

‘it is through procedure that laws come to the aid of the oppressed who call upon them: safeguarding our property, our lives, our honour and our freedom, it is procedure that guarantees them against persons acting in bad faith; it is through procedure that even the most insignificant person gets justice, even against the sovereign, when against his intentions, those supporting his rights take them too far; it is through procedure, in a word, that a barrier is erected against despotism, thus preventing the law from being subverted’.⁶⁵

⁶⁵ M. Pigeau, *La procédure civile des Tribunaux de France, démontrée par principes, et mise en action par des formules* (Paris: Laurens aîné 1819), p. iij-iv.