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The doctrine of effective judicial protection in CJEU case law

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Overview

1. Effective judicial protection in EU law
2. Principle of equivalence
3. Principle of effectiveness
4. Case study I: Asylum
5. Case study II: European Arrest Warrant
6. Case study III: Legal aid

Right to an effective remedy: pre-Lisbon

Right to an effective remedy = a general principle of EU Law:

“It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”. (Case 294/83 *Les Verts*, para 23)

It follows - a right to effective judicial protection:

- against measures of the EU institutions
- against MS measures

Effective remedy against MS measures

Case 222/84 *Johnston v Chief Constable of the RUC* (direct sex discrimination)

- A provision in Northern Irish sex discrimination legislation that courts had to accept as conclusive evidence a justification based on ‘safeguarding national security or of protecting public safety or public order’ as conclusive evidence amounted to an exclusion of judicial review and was contrary to the right to an effective remedy.

Effective remedy against MS measures

Case 222/86 *Heylens* (free movement of workers)

- A decision that a Belgian football trainer's licence was not equivalent to a French licence, so that a trainer could not work as a football trainer in France, was given without reasons and could not be challenged in the courts.
- CJEU: "Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right".

Right to an effective remedy post-Lisbon

Article 47 (1) CFR: 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.

Article 51 (1) CFR: The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and **to the Member States only when they are implementing Union law.**

Poll

Have you ever been confronted with Article 47 CFR in your judicial practice?

- 1) Yes
- 2) No

National procedural autonomy

- EU law rights are mostly enforced through national courts
- National courts apply national procedural law, such as
 - time limits
 - rules on standing
 - max. amount of damages that can be awarded
 - rules of evidence
 - appeals
 - and so on
- EU law respects national procedural autonomy, but there are **tensions with the aim of ensuring an equal application** of EU law in all EU MS
- **Limits therefore:**
 - principle of equivalence
 - principle of effectiveness

Principle of equivalence

Case 33/76 *Rewe Zentralfinanz*

- Applicant company had paid charges for inspections in connection with the importation of French apples to Germany
- Company is seeking to recover those charges as they had been levied contrary to EU law
- However: national time limit for contesting the charges (and thus claiming back the money) had passed

Court:

- In the absence of common rules, it is for national rules to determine the procedural conditions for actions at law ...
- ... provided that such conditions cannot be less favourable than those relating to similar actions of a domestic nature

Principle of equivalence

Equivalence therefore means:

- there must not be a less favourable procedure at national law for EU law claims compared with domestic claims (= a principle of non-discrimination)
 - AND it means that MS are not under an obligation to create new remedies
- Background: it is for the Union legislator to create new remedies, not for the Court

Principle of effectiveness

- Remedies available under national law must be 'effective'
 - this is potentially very intrusive
- *Case 14/83 von Colson and Kamann*
 - if a MS chooses to penalise breaches of the equal treatment directive then it must ensure that any compensation 'is effective and that it has deterrent effect'
- *Case C-177/88 Dekker*
 - refusal by an employer to employ a pregnant woman
 - under Dutch law: fault requirement
 - **Court:** a fault requirement for a claim for redress would undermine the Directive (i.e. national court cannot apply it)

Principle of effectiveness

Possible consequences:

- **procedural hurdles**, e.g. time-limits, may need to be disregarded (e.g. to give full effect to a directive – Case C-208/90 *Emmott*)
- **procedural bar on the amount of compensation** that can be awarded by a court may have to be disapplied (Case C-271/91 *Marshall II*)
- **remedies may need to be adjusted** so they can be granted against bodies otherwise immune from such remedies (e.g. in England no injunctions could be made against the Crown (=the state) until Case C-213/89 *Factortame*)

Principle of effectiveness

Current approach: context-specific and balancing the interests

Cases C-430 and 431/93 *van Schijndel*

- challenge to a compulsory pension fund
- argument: national court should have – on its own motion – considered compatibility of the national rule with EU competition law
- **Question to ECJ:**
 - must a national court consider questions of EU law even if none of the parties to the proceedings have raised them?
 - not the case under Dutch procedural law
- **ECJ recognised that in civil procedure the national courts are given a passive role**
 - and they are not required by EU law to raise of their own motion an issue concerning the breach of EU law where examination of that issue would oblige them to abandon their passive role assigned to them by national procedural law
- **What is decisive:** specific circumstances of the case

Poll

Do you think the CJEU's case law strikes the right balance between national procedural autonomy and the right to an effective remedy under EU law?

- 1) Yes
- 2) No

Case study I: asylum cases

Case C-562/13 *Abdida*:

- applicant with serious illness to be returned to a third country
 - danger that he may not receive appropriate medical treatment
 - in exceptional cases – where serious and irreparable harm would result – this may amount to a violation of Article 4 CFR (inhuman & degrading treatment)
- hence it follows *inter alia* from Art 47 CFR that an appeal must have suspensive effect

However:

Case C-239/14 *Tall*

- lack of suspensory effect an appeal against a decision to not further examine an application for asylum is compatible with Art 19 (2) and 47 CFR because that decision does not remove the applicant from the country

Case study II: European Arrest Warrant

Case C-648/20 PPU *PI*

- Framework Decision on the EAW to be interpreted in light of Article 47 CFR
- result: if both the national arrest warrant and the European Arrest Warrant are issued by a public prosecutor, then the principle of effective judicial protection requires that judicial review of either the EAW or the decision on which it is based must be possible **before** the EAW is executed.

Case C-414/20 PPU *MM*

- if under national procedural law in the requesting MS the issuing of an EAW cannot be challenged, then Art 47 CFR requires that a court called upon to give a ruling at a later stage must be able to carry out an indirect review of the conditions under which the EAW was issued

Case study III: legal aid

Case C-279/09 *DEB*

Does the right to an effective remedy imply a right to legal aid (to enforce EU-derived rights) for legal persons?

CJEU: this is for the national court to decide

Criteria:

“the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant’s capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts”.

**It's time
for
Q&A**



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