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PRINCIPLE OF EQUIVALENCE

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DEFINITION

Although it has evolved significantly in the ECJ case law, especially in the 1990s, the principle of equivalence in the context of EU law is still based on the fundamental idea – put forward in the Rewe decision of 1976 – that the protection within a national legal system of EU-law-based rights must not be less favourable than in the case of individual rights based on national law. The principle is closely related to the general principle of equal treatment and the prohibition of discrimination from which it is derived. It is also a well-known international law principle which, together with the principle of mutual recognition, serves as a cooperation-promoting instrument.

COMMENTARY

In order to promote cooperation at the international level in the best possible way, harmonization of national legislation would probably be the best instrument to be used, also within the framework of international trade organizations. The aim of harmonization would be to standardize legislation on an international basis. Nevertheless, full harmonization may not be achievable in practice or even desirable for legitimate reasons. Thus, in international law, the principles of mutual recognition and equivalence are normally used as cooperation-promoting instruments. This applies also within the framework of the World Trade Organization. An important threshold for achieving equivalence in this context is to define the regulatory objectives and, on this basis, to determine the level (such as the minimum level of protection) that national legislation/measures must achieve. This is the case also in the context of European Union (EU) law and the specific reason why the

Court of Justice of the European Union (ECJ) has, from the outset, referred together to the two criteria of equivalence and effectiveness.

More specifically, in the context of EU Law, the principle of equivalence requires Member States not to treat matters under EU law less favorably than purely domestic matters. This legal principle was developed by the ECJ when it became clear - especially in Comet (1976) - that there was an important first obstacle to the proper implementation of substantive (directly applicable) Community law: discrimination of Community law issues against similar, purely domestic issues as a consequence of the application of national (procedural law) regulations. Therefore, already in Rewe (1976) the ECJ clarified that similar situations may not be treated differently unless this unequal treatment is objectively justified, including when it is for the domestic legal system of Member States to identify the competent Courts and/or 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. Such "conditions", even if determined by national law of Member States, cannot be less favorable than those relating to similar actions of a "domestic nature" (Rewe, paragraphs 5-6). In EU Law, the principle of equivalence is thus closely linked to the general principle of equal treatment and the prohibition of discrimination derived therefrom.

The principle of equivalence is based on the key idea - set out in the Rewe decision (1976) - that the "instruments" (access to Courts and procedural conditions governing actions at law) for protecting the rights which individuals have as a consequence of the direct effect of EU law must not be "designed" less favorably than in the case of "domestic rights" provided for by national law. The difficulties involved here, however, have less to do with direct discrimination. The cases dealt with in the ECJ case-law are mostly cases of indirect discrimination where, for example, there are different procedural arrangements in national law, depending on whether national or Union law matters are affected. On the basis of the original "Rewe-formula", the content and meaning of the principle of equivalence have been progressively clarified in the ECJ case-law. The most important period in its development was during the Nineties. In the Levez case (1998) the ECJ set out a kind of decalogue on how national courts should apply the principle of equivalence by stating that: The principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of EU law or national law, where the purpose and cause of action are similar (Levez, paragraph 41). The principle of equivalence is not to be interpreted as requiring Member States to extend their most favorable rules to all actions brought in a certain field of law (Levez, paragraph 42). This means, as it is clearly stated for example in Târșia (2005), that it does not require equivalence of national procedural rules applicable to different types of proceedings such as - as in the dispute in the main proceedings in Târșia - civil proceedings on the one hand and administrative proceedings on the other (Târșia, paragraph 34). 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 different national law fields - must consider both the purpose and the essential characteristics of allegedly similar domestic actions (Levez, paragraph 43). whenever it falls to be determined whether a procedural rule of national law is less favorable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts (Levez, paragraph 44). In this respect, the ECJ later pointed out that the national court must also verify this "objectively, in the abstract" (Preston, 2000, paragraph 63).

To conclude, in the context of what has been identified as a kind of "EU judicial federalism" (Wells, 2017), the principle of equivalence is much more about how and to what extent the national and the EU level, via their courts, succeed in working together in a cooperative relationship. That's the reason why, to this end, the ECJ explicitly referred to the principle of sincere cooperation laid down in article 5 EEC (now art. 4, paragraph 3, TEU) already in its Rewe decision (paragraph 5).

The situation is fairly different in the United States' context where the kind of "judicial federalism" in which most issues of EU law are adjudicated in the Member State courts does not exist as such. In the US, there is what has been rather identified as "a network of lower federal courts" (Wells, 2017) adjudicating many federal law issues. More importantly, the US Supreme Court may review both federal and state decisions referring to federal law. That is the reason why, to my knowledge, a principle of equivalence such as the one we are dealing with in the international and EU law contest, has not been developed in the USA. Maybe if US state courts were the only courts dealing

with these issues apart from the US Supreme Court and the lower federal courts did not exist, there would be more room for the principle.

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This article is being reviewed by the Editors of the Dictionary.

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INSTITUTION DEFINITION

The principle of equivalence requires the same remedies and procedural rules to be available to claims based on European Union ('EU') law as are extended to analogous claims of a purely domestic nature. © EUR Lex