

THE CURRENT STATE OF NATIONAL PROCEDURAL AUTONOMY: A PRINCIPLE IN MOTION

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ABSTRACT

The principle of national procedural autonomy stipulates that Member states are free to set up their own (procedural) rules (and remedies therein) which govern the enforcement of EU law. However, Member states do not enjoy thorough autonomy in doing so, since they are (primarily) limited with the principle of effectiveness and the principle of equivalence. Because the array of procedural rules is vast and diversified throughout administrative, civil and criminal law, it comes as no surprise that the actual scope of procedural autonomy differs significantly from one issue to another. Academic discourse has occasionally tackled with the fractured scope of procedural autonomy, attempting to define the principle and its internal workings in various ways, while some authors have even gone so far as to deny its very existence. In this article, the author avoids the pursuit of a unified conceptualization of the subject-matter. Rather, the article fully embraces the fragmented reality of procedural autonomy and ascribes it to the particularities stemming from the demanding goals of procedural law. The article provides the reader with a brief, yet fairly concise descriptive presentation on the current state of play in regards to the understanding of the principle of national procedural autonomy and reinforces the need for pursuing a balanced approach to the principle and its limitations.

1. INTRODUCTION

EU law did (in principle) not preconceive a centralized mechanism for its own enforcement,¹ neither through unified rules of supranational procedure, nor

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¹ Enforcement should be understood as a subsection of EU law implementation. It refers to the final stage of implementing EU law, i.e. its usage afore a national authority in deciding on an individual's right or obligation. See: Harden I., What Future for the Centralized Enforcement of Community Law?, Current Legal Problems, Vol. 55 (1) 2002, p. 500.

through the establishment of specialized authorities.² This situation can be traced back to the EU's general lack of legislative competence to harmonize Member states' domestic procedural law.³ Instead of setting up a centralized system of enforcement, EU law procures realization by way of decentralized system of (private) enforcement.⁴ This provides the national authorities of Member states, including courts of law, with the burden of utilizing their domestic rules of procedure, be it civil, criminal or administrative, depending on the nature of the rights invoked. National procedural law must therefore accommodate the many (substantive) rights granted (by way of direct effect) on to individuals by EU law.⁵ The interplay of domestic procedural law and EU (substantive) law is thus inevitable, for there cannot be substance without form, nor can there be rights without means for attainment (remedies), a maxim eloquently expressed in the utterance and principle *ubi ius, ibi remedium*.⁶

It should come as no surprise that seldom discrepancies will arise. National procedural law will not always fit the narrative of EU law. It may either hinder

² Apart from certain exceptions to the contrary, where individuals can bring actions before the EU's own Courts. See: Dougan, M., *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation*, Hart Publishing, Oregon, 2004, p. 2.

³ The legislative competence of the EU is based on the principle of conferral, embedded in Article 5 of the Treaty on European Union (hereinafter: TEU). Since no express conferral of competence in the area of domestic procedural law can be found therein, the EU has sought to establish competence *via* implicit competence, most prominently by utilizing Article 114 of the Treaty on the Functioning of the European Union (hereinafter: TFEU), i.e. the general clause enabling adoption of measures necessary for the functioning of the internal market. However, this ground has been used only scarcely, in respect of the principle of subsidiarity and only a handful of legislation harmonising national procedural law exist. It is also necessary to distinguish the debated legislative competence from Article 81 TFEU (judicial cooperation in civil matters), which relates to matters of cross-border significance only, e.g. the *Brussels Regime*. Quasi-harmonisation has also taken place with the Court of Justice of the European Union's activism, precisely when dealing with cases that allured to the scope of procedural autonomy. All of the above incursions of EU law into national procedural law are sometimes referred to under the notion of *competence creep*. See also: Kramer X.E. et al., *Civil Litigation in a Globalising World*, Hague, 2012, pp. 164-168.

⁴ See: Dougan, M., 2004, *supra* n. 1, p. 3-4.

⁵ The notion of a 'right' is barely discussed in academic discourse on procedural autonomy and the same holds true for 'procedural law'. Usually, authors refer to rights of substantive law without consideration. However, it could be held lacklustre that EU rights guaranteeing recourse under national law, but leaving the particularities to the Member States, e.g. the right to appeal under the Recast Brussels Regulation, are left out of the discussion. At the same time, the very right/principle of effective judicial (legal) protection enshrined in Article 19 TEU and Article 47 of the EU Charter of Fundamental Rights, are more often than not discussed in the same realms as substantive rights.

⁶ See: Kilpatrick C., *The Future of Remedies in Europe*, Portland, 2000, p. 36.

the latter's enforcement by setting up difficult prerequisites for concerned individuals, e.g. brief preclusion periods for submitting a claim, or by rendering the enforcement of EU rights altogether impossible. If these undesired situations happen to come to fruition, then national law has to be altered and the obstacles it presented must be set aside. The Member state is thus not fully (or truly) *autonomous*⁷ in regards to setting up and exercising its procedural law with respect to the enforcement of EU law, even though the uncoded principle of national procedural autonomy stipulates to the contrary.

To elaborate, the Court of Justice of the European Union (hereinafter: CJEU) made clear in *Rewe* that as a matter of principle, *it is for the domestic legal system of each Member state to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which [individuals] derive from [EU] law, [in the absence of EU rules on this subject].*⁸ Because the *absence* of EU rules on said subject is the normal state of affairs, procedural autonomy is thereafter to be considered normal as well. However, as foreshadowed above, compromise has to be made if this autonomy does not equip an individual with a remedy proper.⁹ National procedural autonomy must at the very least be subjugated to the principle of effectiveness and the principle of equivalence. While the former provides that domestic procedure must not make the exercise of EU rights excessively difficult or impossible in practice, the latter prescribes that procedures designed or designated¹⁰ to

⁷ The word *autonomy* is defined as *the right of self-government*. See: Black's Law Dictionary 7th ed., St. Paul, 1999, p. 130.

⁸ Case 33-76 *Rewe-Zentralfinanz v Landwirtschaftskammer für das Saarland*, [1976] ECR 1989. In said case, the CJEU first defined the principle of national procedural autonomy together with the limits of effectiveness and equivalence in separate paragraphs. Nowadays, the two limitations are an inherent part of the notion, since they nearly always accompany the preceding definition in CJEU rulings.

⁹ A *remedy* is, for the purposes of this article, to be understood as *a course of action before a Court of law*, taking example from: Van Gerven W., Of Rights, Remedies and Procedures, *Common Market Law Review*, Vol. 33 (3) 2000, p. 502. The cited author elaborates that *rights*, meaning rights of (EU) substantive law, possess a *uniform content* throughout the EU, insofar as they are directly effective, while remedies are diversified following the plurality of Member states' domestic law. A remedy is thus not to be understood as *stricto sensu* remedies which enable *ex-post* redress of legality for concerned individuals. Sometimes procedural autonomy is simply referred to as *remedial* autonomy.

¹⁰ To elaborate, Member states do not usually set up an independent body of law to govern the enforcement of EU rights. Rather, they opt to designate among the existing domestic procedures one which would fit the EU narrative the most. In doing so, however, they might have chosen 'the wrong' procedure. The CJEU has aided national authorities in this respect by providing (albeit inconclusive) guidance. See for instance the ruling in Case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* [1998] ECR 4951, where the CJEU

govern the enforcement of EU law must not be less favorable than those relating to similar actions under domestic law (that relate to completely internal situations).

This article shall attempt to convey, that the boundaries of procedural autonomy, at least from the viewpoint of effectiveness, are far from settled and are subject to an ever evolving concept, in both case law and theory. The article is further bellow segmented in to several parts. The first acquaints the reader with fundamental quandaries in theory that are as of yet unexplained (III); this comes as no surprise, knowing that the concept of procedural autonomy is in constant fluctuation in CJEU case law (IV); said fluidity, in turn, produced drastically unsettled theorems (V); all while the new approach to procedural autonomy would seem to have struck an equilibrium of interests (VI). However, before said content, the reader is treated with a post-introductory section, providing further insight in to the necessities of the topic (II).

2. THE UNDERLYING ALGORITHM

The observed interrelationship between EU law and national procedural law is one of complexity and delicacy. Complex, since it (primarily) emanates from a juxtaposition of *indirect collision*, i.e. a confrontation between a substantive and a procedural norm, which in itself is a circumstance difficult to perceive, and delicate, since consideration must be made in dialectic manner, i.e. taking into account the various goals sought after by both national and EU law, whilst attempting to preserve the independent stature of procedure. To briefly ponder on the complexity matter; when dealing with collisions of EU law and national law, one is commonly faced with an instance of *direct collision*, that is to say, a confrontation among two provisions of substantive law, which contrast each other to the point of non-conformance. This kind of situation is easily discernible. A textbook example is a Member state's levying of monetary expenses in contrast to the rules on free circulation of goods in the internal market. On the other hand, a collision between a substantive norm and a procedural norm - an *indirect collision* - is harder to detect.¹¹ For example, the aforementioned prohibition on import duties and charges of equivalent effect will garnish a claim for a deprived individual to retrieve any such amount unjustly levied by

found that national rules pertaining to the repayment of indirect taxes are a suitable instrument to be used by individuals when claiming repayment for fees levied contrary to EU law, while general condition claims under civil law are not. There is also no duty for the national authority to always choose the most favourable national procedure.

¹¹ See: Verhoeven M., Ortlep R., The principle of primacy versus the principle of national procedural autonomy, Netherlands Administrative Law Library, Vol. 11 (4) 2012, p. 2-4.

the Member state. For these purposes, the individual will require a *remedy*, which will enable him to pursue restitution. This remedy, however, may be (un) intentionally designed in a way that practically nullifies the effectiveness of the right to restitution itself.¹²

Whether the aforementioned confrontation between national and EU law is found to be direct or indirect does not matter. What matters is, that following the principle of primacy *vis-à-vis* supremacy,¹³ such an incident is not tolerable and must be resolved. By this point in time, it is rather straightforward that a direct collision is to be resolved by way of setting aside the non-conforming national provision, inasmuch as consistent interpretation fails to resolve the issue beforehand. The effect of setting aside the non-conforming provisions is a result of the principle of primacy, yet this action merely creates a lacuna in national law, which must thereafter be sewn up. If the right stemming from EU law possesses such quality that it is capable of exerting direct effect, then this void will be instantaneously occupied by said right. The described occurrence is otherwise also referred to under the notion of substitutionary effect. Indeed, authors differ on the stance whether the principle of primacy and the principle of direct effect interplay according to the primacy or trigger model. The first of the two was just presented above. According to mentioned model, primacy is independent of any other principle, even the principle of consistent interpretation and serves the function of sustaining a consistent legal order between the EU and its Member states, wherein consistency is understood as a harmonious state, lacking any internal non-conformance.¹⁴ The primacy model thus provides for an exclusionary effect without much regard to how the created void

¹² For instance, the procedural rule will have set up a burden of proof on the concerned importer of goods, which stipulates that he must demonstrate to the seized authority that the eventual retail price, did not take into account the levied sum in advance. In essence, the concerned individual has to convince the authority, that he has not practically transferred the import charge onto the consumer, thereby availing himself of the financial burden. The Member state may attempt to legitimize this burden of proof by the falsehood rationale of preventing unjust enrichment in cases of restitution. Such an *onus* will prove excessively burdensome for the individual at hand and will render restitution practically impossible. In the provided example therefore, a prerequisite established under the guise of procedural law will confront the individual's substantive right and render it nearly impossible to attain. Such was the rationale given by the CJEU in Case C-199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1982] ECR 3595.

¹³ Anglophone commentators gravitate towards the usage of the word supremacy, whilst the nomenclature will rarely, if ever, make a distinction in a judgment's outcome, although Avbelj has identified the practical effects of proper differentiation in: Avbelj M., *Supremacy or Primacy of EU Law - (Why) Does it Matter?*, *European Law Journal*, Vol. 17 (6) 2011, pp. 744–763.

¹⁴ Leanerts K., *Of birds and hedges: the role of primacy in invoking norms of EU law*, *European Law Review*, Vol. 31 (3) 2006, p. 290.

in national law should be dealt with. On the other hand, the trigger model sees this exclusionary effect merely as a means to an end. Herein, the exclusion of national law is superseded by imminent substitution. The EU right which prompted the exclusion of inconsistent national law in the first place, later on replaces the very provision respectfully set aside. Indifferent of the model we choose to follow, the resulting effect will in the majority of cases be identical.¹⁵

The underlying algorithm is thus the following: when one incurs a collision between EU and national law, he or she must first endeavor to remove the deviance through the use of consistent interpretation (indirect effect); if interpreting the national provision would require a *contra legem* explanation, then a more stringent approach is required, namely setting aside (also termed *displaying*) the non-conforming provision altogether. The subsequent void will be filled accordingly – if the triggering EU provision is endowed with direct effect, then said provision will substitute national law; if it is directly effective, then the remaining national law, interpreted in accord with the principle of consistent interpretation, will usually be used to fill-in the gap.

Just when exactly a domestic *procedural* provision must undergo a *manipulation* by introducing it to the principle of consistent interpretation or just when exactly must the provision give way and be set aside due to the principle of primacy, is a matter of *ad hoc* evaluation. Each authority seized of resolving a matter or dispute before it, has to weigh-in and decide whether a domestic procedural rule defies the effectiveness of EU law (whether it hinders the enforcement of an EU right) and/or the principle equivalence. Without doubt the national authority may also refer a question for preliminary ruling under Article 267 TFEU (if all the conditions for referral are met) and stay the proceedings for the time being.¹⁶ On the other hand, the CJEU's plentiful case law regarding the scope and limits of national procedural autonomy will have already provided a strong guideline for the domestic court (or other authority), insomuch the matter has not previously been resolved with the significance of

¹⁵ See: Dougan M., When worlds collide! Competing Visions of the Relationship Between Direct Effect and Supremacy, *Common Market Law Review*, Vol.44 (4), 2007, pp. 931-936.

¹⁶ In case of referral, the CJEU is the one that effectively takes up the task of evaluating whether domestic law obstructs the enforcement of EU law. Verhoeven and Ortlep argue in this regard, that the CJEU case law potentially exerts a somewhat similar rationale to the one found in German law. Namely, the German legal system, as a federal order, encounters situations analogous to the ones of procedural autonomy in the EU, where federal and state provisions clash with one another. In line with the German praxis, primacy always takes precedence in cases of direct collision, while in cases of indirect collision, the starting point of the adjudicatory authority is the respect for autonomy. Only when direct collision produces an incompatibility equivalent to that of a direct collision, can the authority set aside the non-conforming (procedural) provision. See: Verhoeven M., Ortlep P., *supra*, n. 10.

acte éclairé. In any case, the national authority faced with the conundrum is primarily responsible for rendering the objectively correct decision as there is no express stipulation of deciding *in favorem* of EU law in such delicate situations.¹⁷

3. THE UNSUFFICIENTLY UNDERSTOOD BACKGROUND

While the presented reasoning in the introductory remarks (that we had dubbed with *algorithm*) certainly holds true for instances of direct collision, it remains fairly unknown to what extent it can be translated to circumstances surrounding indirect collision. This conclusion owes its cause to the undefined theoretical framework regarding national procedural autonomy. Whilst we may, without much hesitation, concede that procedural law can and should be subject to the demands of consistent interpretation, we cannot fully recognize the same concession elsewhere. For if we accept the exclusionary effect of an EU (substantive) right (which sets aside a provision of national procedural law, mind you) how then do we proceed from thereon forward? Certainly the (substantive) right cannot, on its own merit, substitute the procedural provision which has been set aside. Once the burdensome procedural provision has been disapplied, the substantive right is, from the holder's point of view, effectively hollowed.

It is of vital importance to provide the individual with a remedy by which he can procure said right. The *ultima ratio* solution to the described situation is the introduction of *de novo* remedies into the national legal order and thereby eliminating the generated lacuna.¹⁸ Devising procedural remedies anew is a

¹⁷ Ibid., p. 4. Irrespective of the foregoing text, a directly effective (substantive) right cannot absolutely trump a domestic procedural provision. For to do so, would create a new (EU) remedy. There is, in principle, no objection to the Member states for setting up remedies whose availability is (for instance) dependent upon the individual respecting timely periods for their invocation. See: Flynn L., When National Procedural Autonomy Meets the Effectiveness of Community Law, Can it Survive the Impact?, ERA Forum, Vol. 9 (2) 2008, p. 250. This was actually the crux of the *Rewe* ruling, where an individual was supposedly precluded from restitution. However, the principal acceptance is only permissible until it does not hinder EU law effectiveness, e.g. if the Member state were to set up particularly short periods in said aspect. See for example the *Manfredi* case where the CJEU reiterated this example: Case C-295/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA [2006] ECR 6619. The *Manfredi* case is also interesting for several other reasons, since the CJEU dealt with questions of punitive damages for breaches of competition law where national law had only allowed compensatory damages under certain conditions and decided that the full effectiveness of EU law must be respected.

¹⁸ A perhaps equally intruding situation lies not in the creation of *de novo* remedies as such, but in quashing fundamental principles of national law for the sake of enforcing EU law. The

highly controversial prospect, since it - at a fundamental level - constitutes an intrusion into the sovereignty of a Member state.¹⁹ To recapitulate, the Member states have not delegated competence in this area and hold dearly²⁰ to domestic law. Furthermore, the introduction of new remedies by the CJEU is in disparity with being a *negative legislator* at the very most. If the CJEU were to encumber a Member state with the duty of introducing a new remedy into its legal order, then it could very well overstep its boundaries. Regardless, it seems that the CJEU has done just that, in a selected number of cases.²¹

In the following subtitle attention shall be directed to the indicated conundrum surrounding the substitutionary effect of newly created (judge-made) remedies.

3.1. THE CREATION OF DE NOVO REMEDIES

At the outset, it must be expressed, that the erosion of domestic procedure will only seldom be so intense, that it will require the setting aside of a procedural provision altogether. Mostly, a consistent interpretation of the provision at

most prominent example is the case of EU law taking precedence over national decisions that have obtained *res judicata* attribute. The incidence of this taking place is next to none, yet EU law has shown, that procedural autonomy needs to adhere to EU law even if this means trading off the legal certainty stemming from the barring effect of reopening cases *res judicata*. It must be elaborated however, that this precondition is far from absolute. The first such case was rendered in *Lucchini* (Case C-119/05 Ministero dell'Industria v Lucchini [2007] ECR 6199). Therein, a national decision pertaining to state aid, practically enabled an undertaking to obtain and hold on to unlawfully granted aid. The national decision however, was rendered in spite of a pre-existing Commission decision to the contrary and in full breach of the Commission's competence. In such uncompromising circumstances, *res judicata* must be set aside. This rationale was later on confirmed and even additionally restricted in Case C-507/08 European Commission v Slovak Republic [2010] ECR I-13489. On the other hand, EU law has enabled greater intrusion into national administrative decision which have become final. On these subjects see: Groussot X., Minssen T., *Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?*, European Constitutional Law Review, Vol. 3 (3) 2007, pp. 414-417.

¹⁹ The diction of Article 4(3) TEU should be kept in mind when attempting to tackle national law.

²⁰ The 1994 'Storme Report' showed that inequalities among Member state civil procedures produced effects incompatible with the internal market. Yet the solution could not be pursued by harmonising domestic procedural law, as such a solution would be deemed politically unacceptable. See: Dougan M., *supra*, n. 2, p. 98.

²¹ This comes in direct contradiction with the stance that the CJEU has established beforehand. In Case 158/80 *Rewe v Hauptzollamt Kiel* [1981] ECR 1805, it was originally elaborated that the Treaty was not intended to create new remedies. Ergo, it first seemed that the CJEU omitted the idea of Europeanising remedies, yet obviously changed its stance later on.

stake will suffice. What is in fact paradoxical is that by setting aside a procedural rule will sometimes enable the employment of remedies under national law, which are otherwise unavailable for the concerned individual. Take for instance the ruling in the famous *Simmenthal* ruling,²² usually used to exemplify the point when the principle of primacy matured and is more often than not overlooked when discussing procedural autonomy. In *Simmenthal*, the CJEU ruled that an Italian provision, which reserved judicial review solely to the constitutional court and thereby disabled regular judiciary authorities from withholding the application of (in)properly enacted law, had to be set aside. The CJEU made clear that courts, other than the constitutional court, must also set aside non-conforming provisions of statutory law. We may very well construe, that by doing so, the CJEU has introduced a *remedy* of judicial review into the Italian law, where it had previously not existed, or better put – it was withheld by the constitutional authority. A similar situation was the subject of controversy in the often cited case *Factortame*.²³ Therein, fishing associations alleged, before an UK court, that recently enacted UK legislation, effectively prohibiting the registration of foreign fishing vessels, is utterly contrasted by EU law. Since the decision of the court in question could potentially take years to decide upon, the plaintiffs sought for the issuance of an interim measure, which would suspend the enforcement of the disputed provision, until the court seized of authority would produce a decision on the matter. This request however, could not be entertained by the court, since a parliamentary act prohibited the issuance of interim measures against the Crown and a parliamentary act is deemed to be valid until the competent authority has derogated it. The UK court acknowledged said situation as potentially hindering the effectiveness of EU law and referred to the CJEU a question for preliminary ruling. The latter confirmed the court's angst and decided that in situations such as these, the hyperbole stemming from the judgment in *Simmenthal* should apply. Thus, the parliamentary act had to be set aside so that the court was no longer barred from deciding on the issuance of the interim measure sought.²⁴

²² Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA (II)* [1978] ECR 0629.

²³ Case C-221/89, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd* [1991] ECR I-3905.

²⁴ The decision in *Factortame* has been the subject of a plentiful academic discourse, wherein certain scholars have interpreted it in such a way, that the CJEU has created a *de novo* remedy. However, with the privilege of hindsight, the prevailing opinion nowadays is, that the CJEU accomplished no such deed, as it merely required the removal of a domestic obstacle, which in turn only enabled the option of utilizing an already existent remedy, previously barred from application by a colliding provision. See: Claes M., *The National Courts' Mandate in the European Constitution*, Oxford, 2006, pp. 126-128.

On the other hand, practitioners and scholars alike are of the opinion that the Pandora's Box on this subject was definitively opened²⁵ with the CJEU's ruling in the well-known and a great many times discussed case *Frankovich*.²⁶ Since there is abundant research on said case law (even though the majority focuses on substantive prerequisites for state liability) we shall not attempt to redundantly reproduce it.²⁷ To conclude with this arch, the CJEU has proven that it can go as far as creating new remedies, however it has done so very rarely, exactly because of the action's severity.

4. THE EVOLUTION IN CJEU CASE LAW

The principle of national procedural autonomy is the creature of CJEU case law.²⁸ With it, the principle has – throughout the passage of time – changed considerably, following the ever evolving rationale and *policy* of the CJEU. Most commonly, practitioners and scholars alike differentiate three phases or *generations* of CJEU case law.²⁹

The first phase began with the cornerstone ruling in *Rewe*. Herein the CJEU showed great restraint from actually incurring into domestic procedure as it

²⁵ See for instance: Tomkins A., *European Union Public Law*, Cambridge, 2007, p. 395-397.

²⁶ Joined Cases C-6/90 and C-9/90, *Andrea Francovich et. al v Italian Republic* [1991] ECR I- 5357.

²⁷ Examples of the creation of de novo remedies are in general scarce. Most often the rulings above are cited, together with judgements which perfected the originally given ratio, e.g. the judgements in *Brassiere-du-Pêcheur* (Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Bundesrepublik Deutschland et. al* [1996] ECR I-1029) and *Traghetti del Mediterraneo* (Case C-173/03 *Traghetti del Mediterraneo v Republica Italiana* [2006] ECR-5177) ripened the ruling in *Frankovich*. However, one other field of law is sometimes invoked when discussing the creation of remedies anew. That is the CJEU's evolving case law on interim measures, particularly in cases such as *Zuckerfabrik* (Joined cases C-143/88 and C-92/89 *Zuckerfabrik v Hauptzollamt et al.* [1991] ECR I-0415) and *Atlanta* (Case C-465/93 *Atlanta and others v Bundesamt* [1995] ECR I-3761), where prerequisites for the application of said measures were laid down. Yet it must be mentioned that these remedies differ from the ones described above, since they do not present a genuine invasion into procedural autonomy per se, as they have been intentionally designed to invoke the suspension of EU secondary legislation or national implementation acts.

²⁸ Even though the CJEU never actually used the term 'procedural autonomy' until the Case C-201/01 *The Queen*, on the application of *Delena Wells v Secretary of State for Transport et al.* [2004] ECR I-0723.

²⁹ It is also possible of perceiving these *generations* as periods in which time-specific remedies have been put to scrutiny of judicial review. See for example: Abboud Wisam, *EC Environmental Law and Member State Liability - Towards a Fourth Generation of Community Remedies*, *Review of European Community & International Environmental Law*, Vol.7 (1) 1988, pp. 86-87.

would do so only in cases which made the enforcement of EU law *practically impossible*. Naturally, with great restraint came correspondently great respect for the concept of autonomy itself. The practical problem with this approach became apparent, when national procedural law hindered the enforcement of EU law, yet did not reach the point of rendering it practically impossible. Thus, the need came to expand the criteria for intrusion, which was finally addressed in *San Giorgio*,³⁰ wherein the CJEU explained that situations which render the enforcement of EU rights *excessively difficult* are incompatible with the principle of effectiveness as well.

San Giorgio was the omen of a new era, i.e. the second generation of case law, in which the CJEU made exorbitant and humungous shift in policy. No more did it posture a conservative stance, but began to progressively widen the interpretation of the principle of effectiveness, thus eroding the Member states' procedural autonomy. This period is symbolized by *Factortame* and *Frankovich*, rulings where procedural autonomy was supposedly stressed under maximum constraint, evidenced by the introduction of *de novo* remedies. The turning point, which signified both the end of this generation and its peak was perhaps *Emmot*, where the CJEU managed to sweep away national time limitation periods for initiating proceedings in a case where an EU right had no direct effect.³¹

The third and supposedly latest generation, set out to bring balance by recognizing the shortcomings of the conservative approach and distaining from the extremities of the second generation. A harmonious state, which utilizes the newly established *procedural rule of reason* – a balancing test – wherein the CJEU decides on a categorical basis, whether the effectiveness of EU law should take prejudice over national procedural law, doing so by observing the importance of the colliding provisions, both on their own and in comparison to one another. In sum, the scope and limitations of national procedural autonomy have modulated drastically throughout the CJEU case law, until eventually striking a balance.

5. THE PLURALITY OF SCHOLARLY VIEWPOINTS

While the scope and limitations of national procedural autonomy have changed, so did the overall concept as well. It is only reasonable, that scholars took notice of the developments and indulged into the pursuit of producing a theory

³⁰ Supra, n. 12.

³¹ Case C-208/90 *Emmott v Minister for Social Welfare* [1991] ECR I-411. See in this regard: Foster Nigel [et al.], *Text, Cases and Materials on: European Law*, London, 2003, p. 569.

behind the principle, one which would explain both its inner workings and the outer relationship that it shares with the remaining principles that govern the interplay between EU law and national law. What is of particular interest is the profound skepticism towards national procedural autonomy, observable in the many works of prominent authors.

To begin with, the principle was perhaps first thoroughly (or most influentially) investigated by Kakouris. He argued that Member states do not possess any true procedural autonomy (supposedly as a retained *residual competence*). He went on to argue, that the big picture of the EU as a quasi-federative legal order has to be taken into consideration. In such conceptualization, it comes as evident, that following the dichotomy of enforcement efforts, both by the EU and the Member state, the domestic courts and their judges serve a dual function – as the bodies of the quasi-federative authority on the one hand and Member state authority on the other. When dealing with a case involving EU law, the domestic courts therefore utilize the procedural mechanisms at disposal under national law, for the purpose of enforcing EU law, thereby always functionalizing domestic law and treating it as an ancillary body to EU law.³² Kakouris' skepticism (or perhaps merely realism) served as the starting point and foundational block for further academic discourse, and has often been cited in literature as a great criticism towards procedural autonomy.³³ On the momentum of the critical period, Van Gerven argued that perhaps we should abandon the notion of procedural *autonomy* and opt for a more suiting phrasing of *procedural competence*, for indeed the Member state is not truly autonomous as it must guarantee adequate judicial protection, while at the same time the EU has no true competence for interfering with national procedural law, as the latter remains vested in the domain of the Member state.³⁴ On the notion of procedural competence came further development with the dawn of *procedural primacy*. As it would seem, Delicostopoulos is of the opinion that the CJEU case law created certain instances under which the respect for EU law prompted the national court (or other authority) to respect the demands of EU law as an *obligation of result*, rather than an *obligation of means*.³⁵ For example, the duty to raise points of EU law *ex officio*, in those analogous situations, where the domestic judicial system foresees for the national court to

³² Kakouris C.N., Do the Member States Posses National Judicial “Autonomy”?, Common Market Law Review, Vol. 34 (6),1997, pp. 1389-1412.

³³ Ervo L. [et. al], Europeanization of Procedural Law and the New Challenges to Fair Trial, Groningen, 2009, p. 109-111.

³⁴ Supra, n. 8, p. 502.

³⁵ Delicostopoulos J., Towards European Procedural Primacy in National Legal Systems, European Law Journal, Vol. 9 (5) 2003, pp. 606-608.

invoke points of national law on its own motion, should be deemed as a dutiful result of EU law, thus exerting a *procedural primacy*. The same goes for interim relief, where national courts must respect CJEU case law which in turn provides concerned individuals with the option of suspending the enforcement of national acts, in cases where the national legislation was enacted for the purpose of implementing EU law. While recognizing that interim relief is a matter of national law, the result *in concreto* has already been set out by the CJEU in its praxis, i.e. the duty of the national court to refer a question for preliminary ruling and suspend the domestic provision for the time being. Delicostopoulus concluded with serious questions pertaining to the very fundamentals on the interplay between EU law and national procedural law. He raised the logically appealing construct of national procedural law serving two masters – national (substantive) law and EU (substantive) law, whereas the former will always make way for the latter, thus (possibly) enabling the spill-over of regular (substantive) primacy into procedural primacy.³⁶ It seems to appear that neither the notion of *procedural competence*, nor the notion of *procedural primacy* has caught on. Instead, other concepts have been advanced, for instance *structural primacy*, a notion very much akin (if not synonymous) to procedural primacy, used by De Witte³⁷ and several other authors, when exploring the overreaching effects of regular (substantive) primacy, when paired with *effet utile* and the subsequent creation of *de novo* remedies. The utmost extreme skepticism however, was expressed by Bobek. He argues that there is in fact no such thing as national procedural autonomy. The wholly discussed principle is merely an illusion, since Member states are in fact never truly autonomous, if they are subject to the continuous scrutiny under the principle of effectiveness, the principle of equivalence and other potential limitations.³⁸ Thus, the Member states do not act free of an overseeing authority and are at all times compelled to self-impose necessary restrictions. If they fail to oblige, the CJEU will make amendments or the concerned individual will have grounds for reparation. Last but not least, Galleta sways way from excessively indulging into the abyss of the interrelations of primacy, direct effect and procedural autonomy. Her conclusion is that of which Kakouris foretold, i.e. the *functionalization* of national procedural law for the needs of EU law enforcement.³⁹ To extenuate, the principle of consistent interpretation (and the duty of sincere cooperation

³⁶ Ibid., p. 609.

³⁷ Craig P. [et al.], *The Evolution of EU Law*, New York, 2011, pp. 340-344.

³⁸ Witte B., Micklitz H., *The European Court of Justice and the Autonomy of the Member States*, Antwerp, 2012, pp. 315-31

³⁹ Galleta D. U., *Procedural Autonomy of EU Member States: Paradise Lost? A study on the “Functionalized Procedural Competence” of EU Member States*, Heidelberg, 2010, p. 41-59, 75-79.

enshrined in Article 4(3) TEU seems to play the most vital role in matters of supposed autonomy and provides the national authority with the tools for manipulating the domestic provisions in order to compliment the *effet utile* of EU law.⁴⁰

To conclude on this point; there is a reasonable amount of varying papers which propose different solutions to the understanding of procedural autonomy. None of them seems to provide a holistic overview which would correctly and/or properly explain the inner workings and interconnections of the relevant principles. Perhaps this task is premature at this stage of EU law development or perhaps it is simply not possible to synthesize principles of procedural law, with those of substantive law. In any case, national procedural autonomy is here to stay and will be only considered obsolete, if and when the EU endeavors to harmonize procedure.

6. THE MANY SHAPES AND FORMS OF EFFECTIVENESS

A healthy legal order should strive for coherence and consistency, that much is certain. Both the principle of effectiveness and the principle of equivalence are divisible concepts, without a single, unified understanding. Pure logic dictates that such a discrepancy is inherently flawed in line with the aforementioned.⁴¹ The principle of effectiveness, often used interchangeably with the notion of *effet utile*, has not one single expression in EU law, but several. The most recognizable are the following: *full effectiveness*; *the Rewe/San Giorgio doctrine*; *procedural rule of reason*; *effective judicial protection*.⁴² Each of the preceding notions represents different criteria for the understanding of the principle of effectiveness as such. Some criteria are more stringent than others and therefore provide greater protection for the concerned individual *vis-à-vis* a stronger intrusion into national procedural autonomy.

⁴⁰ I have chosen to exemplify merely the most pronounced works of academia and those specifically pertaining to the very nature and basic understanding of the principle.

⁴¹ The CJEU has in a sense schizophrenically contributed to said divergence on the one hand, while making *ex post* effort to correct it, on the other. Herein, we shall succinctly address the many shapes and forms of effectiveness, since said principle is the cause of a greater amount of distress than that of equivalence.

⁴² See also: Lindholm J., *State Procedure and Union Rights: A Comparison of the European Union and the United States*, Uppsala, 2007, pp. 126-128. It is unknown if the principle of effective judicial protection should be accompanying the above criteria or not. Some are of the opinion, that said principle is merely a corollary of effectiveness, while others propose that is separate and acts in harmony or distain from the latter. Since there is plentiful work that discusses effective judicial protection separately, I will abstain from dealings herein.

First, the most common of all is the so-called *Rewe/San Giorgio* doctrine. This supposed doctrine is nothing more than the recapitulation of the CJEU's diction from the two cases, where it stated that domestic law cannot obstruct the enforcement of EU law to the point of rendering it excessively difficult or impossible in practice (even though the former is an *a fortiori* expression of the latter). In the vast majority of cases concerning procedural autonomy, the CJEU makes use of this test (or doctrine, if you will). In fact, it is utilized so much so, that the commonly accepted definition of procedural autonomy is accompanied by the *Rewe/San Giorgio* prerequisites. Secondly, attention should be brought to *full effectiveness* criteria. This form of effectiveness is the most vigorous of all, being employed as the last instance, when all other have been deemed insufficient. It features prominently in the CJEU's rulings wherein national law made the setting aside of a conflicting domestic provision particularly onerous.⁴³ Lastly, and in recent times most importantly, comes the so-called *procedural rule of reason*.⁴⁴ This *rule of reason* is not a criterion *per*

⁴³ It comes as no surprise that the rulings in *Simmenthal*, *Factortame* and *Francovich* were all adopted on the basis of said criteria for effectiveness, while the same criteria has also been used in landmark cases such as *Köbler* (Case C-224/01) and *Courage* (C-453/99).

⁴⁴ This term is most often used in academic discourse, while some use the terms of *contextual approach*. The criteria was developed in a specific field of national procedural autonomy, i.e. in cases where *ex officio* application of EU law before national courts was raised. Regardless of the duty of sincere cooperation and the principle of primacy, EU law does not possess the capacity for it to be considered by courts on their own motion. The question only remained whether this holds true in instances where national courts were enabled to raise issues of domestic law on their own motion. The paramount case law in this matter is championed in Joined Cases C-430 and C-431/93 *van Schijndel & van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705. Therein, a two physiotherapists argued that their mandatory participation in a government retirement fund violated EU competition law, however only at the stage of the proceedings. The CJEU first produced in §13 that: [...] *where, by virtue of domestic law, courts or tribunals must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding [EU] rules are concerned*. It then, in §§ 20-21, explained that: [...] *the domestic law principle that in civil proceedings a court must or may raise points of its own motion is limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it. That limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas*. As apparent, the CJEU balanced it's decision between goals of civil procedure and the primacy of EU law. See in this respect: Engström J., *National Courts' Obligation to Apply Community Law Ex Officio – The Court Showing new Respect for Party Autonomy and National Procedural Autonomy?*, *Review of European Administrative Law*, Vol. 1 (1) 2008, p. 67-72.

se but a vaguely defined equation intended to supply both the national court and the CJEU as guidance for *case-by-case* evaluation on the scope of national procedural autonomy. Much like the *rule of reason* established in the sphere of internal market regulation, the herein discussed rule demands that the court (or other authority), undertakes a strenuous examination of the colliding provisions. It has to weigh-in between the importance of the goal sought after by the obstructed EU law on the one hand, and the goal pursued under the national provision (the one inciting the obstruction in the first place). The crux of the CJEU reasoning (and consequently that of national authorities which adopt the same balancing test) is therefore to evaluate whether legitimate objective(s) pursued by domestic law, e.g. party autonomy, right of defense, legal certainty, due procedure, are so imperative to the national legal order, that their protection yields a barrier to EU law protrusion.⁴⁵ The forms and shapes of effectiveness are thus many and various, something which definitely causes confusion for a national authority when deciding on the scope of procedural autonomy.

7. CONCLUSION

The current state of procedural autonomy can be described as ‘orderly disarray’. There are several issues not yet universally understood, which in turn prevent academic discourse from producing a holistic approach to the principle, while the CJEU’s fragmented case law and judicial activism render contemporary understanding obsolete in the long run. However, all is not grim, as the compilation of scholarly work allows us – at the very least – to systemize the insufficiencies in an orderly fashion. The purpose of this article was not to produce a miraculous new found understanding, but to provide an up-to-date revision on the subject and its issues. We may finally conclude that the so-called balanced approach, employed in the last two decades follows a grand ambit, yet requires further reinforcement.

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⁴⁵ Too often is the debate on procedural autonomy gestated exclusively as a collision between an international and national legal order, leaving out the nature of procedural law and the stress it is put under. As evidenced thusly, national procedural law’s sole purpose is to make EU substantive law effective. See: Schebesta H., Rott P., *Varieties of European Economic Law and Regulation*, Heidelberg, 2014, p. 858.

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