# National Procedural Autonomy

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## A. Introduction

**1** As once famously said back in 1895, 'procedure substitutes a litigatory process for the rude justice of revenge' (Pollock and Maitland, 1895, 574). A century later and in a multilevel and composite legal order such as the European Union ('EU'), national procedures pursue different and concomitant functions: the validation and upholding of individual rights, the efficient and proper administration of justice and, at the same time, the preservation of the supranational EU law system often in collision with the domestic one. As held in *Costa v Enel*, 'the European Economic Community (EEC) Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply' (*Costa v Enel*, 1964, para 3). National courts thus play a key role in ensuring the full and uniform application of EU law. In the absence of harmonized procedural rules to enforce EU law at national level, the European Court of Justice ('ECJ') (→ *European Union, Court of Justice and General Court*) however stopped short of imposing further obligations on national courts, preferring instead to rely on each national legal system and their relevant procedural rules. The allocation of competences between the ECJ as 'guarantor of rights' and the Member States as enforcers of such rights through their own procedural systems is referred to as the principle of 'procedural autonomy'.

**2** The need to ensure the effective application of EU law at national level and, at the same time, respect the competence of the Member States to design their own procedural rules under the principle of procedural autonomy has posed significant challenges for the ECJ. The Court has thus progressively developed a test to assess the compatibility of national procedural rules with EU law under the so-called principles of effectiveness and equivalence ('procedural autonomy test'). National procedural rules comply with the principle of effectiveness when they do not render the exercise of EU rights impossible or excessively difficult. Compliance with the principle of equivalence is attained, conversely, when procedural rules used to enforce EU rights are not less favourable than those used for similar claims under national law. Essentially a *rule of reason* approach to review national procedures, the procedural autonomy test must co-exist with general principles of EU law such as effective judicial protection, enshrined in Article 6 European Convention of Human Rights ('ECHR') (→ *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)*) and, more recently, in Article 47 EU Charter of Fundamental Rights ('Charter') (→ *Charter of Fundamental Rights of the European Union (2000)*) and Article 19 Treaty on the European Union (TEU) (→ *Lisbon Treaty*). Notably, the principle of effective judicial protection requires that everyone whose EU-derived rights have been breached shall have the right to obtain an effective remedy and a fair trial (→ *Fair Trial, Right to, International Protection*).

**3** This contribution provides an overview of the application of the principle of procedural autonomy and its interplay with those principles and it is structured as follows: section B provides a definition of the principle of procedural autonomy and discusses its evolution though different phases of ECJ case law. Sections C and D analyse how ECJ case law has applied the principles of effectiveness and of equivalence. Section E explores the complex relationship between the principles of procedural autonomy and effective judicial protection.

## B. The Principle of Procedural Autonomy

**4** The principle of procedural autonomy made its first official appearance in the ECJ's decisions of the late 1990s, despite being cited earlier in several opinions of Advocates General ('AG') (→ *Advocate General*) in the 1980s (*Commission v Germany*, 1988). In previous case law (*Comet BV v Produktschap voor Siergewassen*, 1976, para 13) the ECJ had merely acknowledged that, in the absence of any relevant European Economic Community ('EEC' or 'Community') rules, it was for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings aimed to ensure the protection of Community rights. In particular, in *Rewe* the Court held that rules on time-limits applicable to claims based on Community law are the expression of the fundamental principle of legal certainty, and are compatible with the Treaties in so far as they are reasonable and not less favourable than those relating to similar actions of domestic nature (*Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, 1976, para 6). The principle of procedural autonomy can be of course invoked only with reference to national provisions and not in relation to EU institutions' procedural rules (*Akzo Nobel Chemicals and Akcros Chemicals v Commission*, 2010). This principle is thus one of the facets of the Member States' institutional autonomy, according to which EU law is to be implemented at national level through the procedures provided under their respective legal systems (Dimitrakopoulos, 2001, 443). Institutional autonomy ultimately mandates Member States to ensure the effectiveness of EU law through their own administrative apparatus and national courts systems.

**5** Since its introduction, the principle of procedural autonomy has 'survived' as a jurisprudential construct of the ECJ without being constitutionalized in any Treaty or legislative provision. This choice by the EU legislator is logical and justifiable: this principle has an intrinsic dialogic nature, which allows the ECJ to cooperate with national courts in setting the enforcement standards of EU law at national level. The application of this principle is substantiated in two separate criteria: equivalence and effectiveness. Although the very nature of the procedural autonomy of the Member States has been discussed at length, there is no unanimous position among EU legal scholars.

**6** To begin with, Van Gerven (2000, at 502) has argued that the term 'procedural autonomy' should be replaced with that of 'procedural competence', in so far as the Member States are competent to determine which procedural rules are to be used to enforce EU law at national level. Other authors, such as Delicostopoulos (2003, at 600) and Bobek (2012, at 316) have confuted the existence of the procedural autonomy of the Member States, however, on different grounds. Notably, the former considers the increasing scrutiny of procedural law of the Member States under EU law as an expression of the supremacy of EU law over national law. Thus, Delicostopoulos claims that the European legal order has moved from national procedural autonomy to a subtler combination of national procedural competence and European procedural primacy. Bobek, instead, highlights that the use of the term 'autonomy' creates confusion in the legal discourse since it indicates an area in which the Member States are autonomous and should not be subject to any interference from the ECJ. Such a conceptualization of the Member States' competence to design their judicial systems does not reflect reality and disregards that: 'in the areas of domestic enforcement of EU law, the area is either harmonised or the Member States are obliged to ensure the enforcement is equivalent and/or effective. In this area, there is no autonomous space of the Member States.' (Bobek, at 320). Interestingly, Poltorak has argued that procedural autonomy is not a principle developed by the ECJ but just a 'certain legal reality', in so far as Member States have been *de facto* using their

procedural rules to enforce EU law without being expressly mandated to do so (2015, at 33).

**7** The principle of procedural autonomy has, in our view, been used by the Court to accomplish a threefold function, which is reflected in corresponding phases of the ECJ *acquis* on this principle. First, and originally, the principle of procedural autonomy has been introduced to highlight a *competence issue* in so far as the Member States are competent to determine the procedural rules for the enforcement of EU law at national level. In the first judgments in which the principle is referred to (1999 to 2002), it was mainly invoked by Member States to protect their choices about procedural systems and rules. For instance, in *Ciola* (*Ciola v Land Vorarlberg*, 1999, para 24) the procedural autonomy principle was relied upon by the Austrian Government to shield domestic rules on the imposition of administrative fines from the interference of the ECJ (*Peter Pflücke v Bundesanstalt für Arbeit*, 2003, para 24; *Cofidis SA v Jean-Louis Fredout*, 2002, para 38). When considering these arguments submitted by the Member States, the Court did not however engage in any in-depth analysis of the division of competences (*Kingdom of the Netherlands and Gerard van der Wal v Commission of the European Communities*, 2000).

**8** Second, and subsequently, the principle of procedural autonomy has been employed by the ECJ to review national procedural rules jointly with the principles of effectiveness and equivalence, progressively establishing a *procedural autonomy test*. This test relies on a *rule of reason* approach to national procedural provisions as they are presumed compatible with EU law unless they breach the principles of effectiveness and equivalence (Biondi, 1999, 1271; Prechal and Widdershoven, 2011, 43). Arguably, national procedural rules are ‘attracted’ to the domain of application of EU law and thus acquire EU relevance when used to enforce EU rights. National procedural rules are indeed ancillary to EU substantive law, being a vehicle for its enforcement. As explained by AG Jacobs in *Van Schijndel* (*Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten*, 1995, para 25), ‘the primacy of Community law does not require that they [national procedural rules] should be overridden in all circumstances so as to allow Community law to enter the arena at any stage in the proceedings. As the Court's case-law has shown, it is sufficient that individuals are given, by the national procedural rules, an effective opportunity of enforcing their rights.’

**9** Such a ‘revamped’ approach to the procedural autonomy of the Member States may be identified in the case law delivered between 2002 and 2006. For instance, in *i-21 Germany GmbH* (*i-21 Germany GmbH, Arcor AG & Co KG v Bundesrepublik* Deutschland, 2006), the Court considered whether the procedural rules used for the enforcement of a European Parliament Directive regulating the release of individual licences in the field of telecommunications services complied with the procedural autonomy test, and provided detailed guidance to the referring court as to ensuring compliance with the requirements of effectiveness and equivalence. Compliance with these requirements remains within the competence of national courts since it concerns national provisions (*The Queen on the application of Delena Wells and Secretary of State for Transport, Local Government and the Regions*, 2004, para 70; *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera*, 2006, para 56).

**10** Third, and more recently, the procedural autonomy principle has been increasingly deployed by the Court as an instrument to protect individual rights using a → *rule of law* perspective (2007–19). The ECJ has strengthened the role played by national procedure in the protection of EU-derived rights by linking the principle of procedural autonomy with that of effective judicial protection. The most recent ECJ judgments show how the Court now tends to consider the compatibility of procedural rules through the prism of the

principle of effective judicial protection, currently enshrined under Articles 6 ECHR, 47 of the Charter, and 19 TEU.

**11** The *Unibet* judgment (*Unibet (London) Ltd, Unibet (International) Ltd v* Justitiekanslern, 2007) is in this context particularly significant. In this case the Court seemed to suggest that compliance with the requirements of effectiveness and equivalence satisfies the principle of effective judicial protection as well. Although the Court reiterated that this does not mean that Member States must create a free-standing action for the enforcement of EU law if other effective and equivalent remedies are available under national law, the opposite might also be true. It was stated that the

> principle of effective judicial protection of an individual's rights under Community law must be interpreted as requiring it to be possible in the legal order of a Member State for interim relief to be granted until the competent court has given a ruling on whether national provisions are compatible with Community law, where the grant of such relief is necessary to ensure the full effectiveness of the judgment to be given on the existence of such rights (*Unibet (London) Ltd, Unibet (International) Ltd v* Justitiekanslern, 2007, para 77).

A similar approach was followed in *Impact* (*Impact v Minister for Agriculture and Food et al*, 2008, para 48), where the ECJ held that 'A failure to comply with those requirements [effectiveness and equivalence] at Community level is—just like a failure to comply with them as regards the definition of detailed procedural rules—liable to undermine the principle of effective judicial protection.' In these cases, the ECJ has thus relied on the principle of effective judicial protection, stemming from Article 6 and 13 ECHR and national constitutional traditions, as a legal basis for the potential introduction of EU-law based remedies. This more recent case law highlights the symbiotic relationship between rights and remedies under EU law.

## C. The Principle of Equivalence

**12** The first tenet of the 'procedural autonomy test' is the principle of equivalence, which requires that the procedures and remedies used for EU law-based claims are not less favourable than those used for similar claims under national law. Put differently, the principle of equivalence creates a positive obligation for the Member States to treat without distinction claims based on infringements of EU law compared to similar claims under national law. As argued by Tridimas (2006, at 423), the principle of equivalence incorporates EU rights into the national systems under the assumption that the EU and the national legal orders are integrated.

**13** The analysis of compliance with the principle of equivalence is based on two logical steps. First, the claims based on breaches of EU law and national law are to be compared to assess whether they protect the same kind of legal position and/or right. Second, if the claims are similar, there is the assessment of whether they are treated differently under national procedural law. Nevertheless, this analysis is not systematically carried out, and, on many occasions, the two steps have tended to be conflated by the Court.

**14** As held in *Levez* (*BS Levez and TH Jennings (Harlow Pools) Ltd*, 1998, para 44), the focus of the equivalence analysis is the nature of the claim, not of the action. Notably, the equivalence of two procedural rules is considered from the perspective of the role played by '[that] provision in the procedure as well as the operation and any other distinctive features of that procedure before the different national courts.' In subsequent case law, the ECJ has expanded on this statement by affirming that, when assessing compliance with the equivalence principle, the purpose and the essential characteristics of allegedly similar domestic claims should be considered. The purpose of a claim is given by its objective(s) (eg

compensation, injunction, etc) and the type of norm from whose violation that claim arises. Essential requirements can include, among others, time limits to bring an action and the prerequisite of exhaustion of other remedies (*Friedrich G Barth v Bundesministerium für Wissenschaft und Forschung*, 2010).

**15** The purpose/objective criterion to assess equivalence of claims under the principle of equivalence has not been applied in recent case law. In *Scialdone* (*Criminal proceedings against Mauro Scialdone*, 2018), the question arose in relation to penalty measures, in particular, as to whether the provision of different minimum amounts of unpaid corporate taxes and unpaid VAT for the purposes of triggering penalties was compatible with the principle of equivalence. The ECJ agreed with the argument submitted by the Italian government, according to which the two penalty provisions were different as to their constituent elements and the difficulty to detect the violations. Considerations on the constituent elements of penalties as well as the complexity of the detection of violations—if endorsed in future decisions—may render the comparison of claims under the principle of equivalence (ie whether two claims are similar) more complex by imposing further comparative requirements.

**16** In *Santoro v Comune di Valderice* (*Giuseppa Santoro v Comune di Valderice, Presidenza del Consiglio dei Ministri*, 2018), the question concerned the compatibility of implementing national measures of EU employment law in the light of the principles of effectiveness and equivalence. The ECJ found that the principle of equivalence was not applicable to the case since the referring court was comparing claims based on the infringement of national measures implementing different pieces of EU legislation. The principle of equivalence is therefore applicable only when the comparison takes place between national procedures used to enforce EU law and national laws, and not when national procedures are used to implement two different pieces of EU legislation.

**17** The principle of equivalence does not operate, however, to extend the most favourable rule to all actions brought in a certain field of law. In *Orizzonte* (*Orizzonte v Ministero della Giustizia et al*, 2015), the preliminary question concerned the compatibility of a national rule imposing higher fees for administrative proceedings in the area of public procurement compared to civil litigation with, among others, the principles of equivalence and effectiveness. When considering compliance with the principle of equivalence, the Court analysed, firstly, the amount of fees charged for public procurement litigation before administrative courts and, secondly, the cumulation of the standard fees paid within the same administrative judicial proceedings relating to public procurement. As to the first part of the analysis, the Court found that there were no elements indicating that claims based on breaches of national legislation in the field of public procurement were treated differently from claims based on the infringement of EU public procurement legislation. In the second part of the analysis, concerning the cumulation of fees, the ECJ did not identify any breach of the principle of equivalence in so far as charging multiple court fees amounted to a financing measure in favour of the administrative judicial system. Thus, the Court excluded the application of the principle of equivalence to rules applicable to different types of proceedings, such as civil ones on the one hand, and administrative proceedings on the other hand (*Dragoş Constantin Târşia v Statul român and Serviciul Public Comunitar Regim Permise de Conducere si Inmatriculare a Autovehiculelor*, 2015).

**18** One of the few cases in which the Court sanctioned a violation of the principle of equivalence is the *Transportes Urbanos* judgment (*Transportes Urbanos y Servicios Generales, SAL, v Administración del Estado*, 2010). In that decision, the ECJ held that the imposition of the requirement of exhaustion of remedies to bring a claim for damages against the Spanish State, following a breach of EU law, did not respect the principle of equivalence in so far as similar claims for damages against the Spanish State based on

national law infringements were not subject to the same pre-condition. In particular, actions for damages arising from an ECJ judgment given pursuant to Article 226 Treaty Establishing the European Community (currently Art 258 TFEU) and by a judgment of the Spanish Constitutional Tribunal were comparable under the principle of equivalence. Parameters considered by the court to carry the comparative analysis are the purpose and the essential characteristics of the action. The considered case law indicates that the principle of equivalence is an expression of the principle of non-discrimination in the area of procedural law. The objective underlying the application of this principle is ensuring that EU and national rights are subject to the same remedial and procedural rules. The EU and national orders cannot compete in providing an effective enforcement of their respective rights: under the principle of equivalence, EU rights must be subject to the same procedural safeguards provided for corresponding national rights.

## D. The Principle of Effectiveness

**19** The second tenet of the procedural autonomy test is the principle of effectiveness which aims at ensuring that national procedural rules do not make excessively difficult or impossible the enjoyment of EU derived rights. Whilst the principle of equivalence preserves the peculiarities of national procedural orders, the principle of effectiveness is, instead, used to foster the effectiveness of EU law at national level.

**20** Legal scholarship has devoted particular attention to the principle of effectiveness in relation to the principle of procedural autonomy of the Member States. For instance, Delicostopoulos (2003, at 600) suggests that through the principle of effectiveness the European legal order has moved from national procedural autonomy to a subtler combination of national procedural competence and European procedural primacy. Zingales (2010, at 419) has, instead, provided a detailed account on how the principle of effectiveness has allowed the introduction of EU law remedies at national level based on breaches of EU law. Finally, Neframi (2010, 327) has argued that the principle of effectiveness ‘establishes a kind of procedural supremacy’ in favour of EU law and is ultimately ‘a competence regulatory principle, conceived in the framework of national institutional and procedural autonomy (Neframi at 330).’ Thus, according to Neframi the principle of effectiveness within the procedural autonomy test plays an essential role in determining the allocation of judicial powers at EU and national level in the area of protection of rights deriving from the EU.

**21** The principle of effectiveness has been employed by the ECJ to ‘correct’ national procedural rules used to enforce EU derived rights, by imposing positive obligations on national courts. For instance, in *Banca Antoniana Popolare Veneta* (*Banca Antoniana Popolare Veneta v Ministero dell’Economia e delle Finanze and Agenzia delle Entrate*, 2011, para 42), the ECJ held that the principle of effectiveness did not preclude ‘national rules governing the recovery of sums paid but not due, under which the time-limits for a civil law action for recovery of sums paid but not due, brought by the recipient of services against the supplier … are more generous than the specific time-limits for a fiscal law action for a tax refund, brought by the supplier against the tax authority’. The ECJ went on to affirm that the effective possibility to claim reimbursement of VAT was not satisfied under the principle of effectiveness where the application of procedural rules had the effect of totally depriving the taxable person of the right to obtain a refund of undue VAT from the tax authority. The ECJ eventually imposed an obligation of interpretation of the national provisions at issue to the effect that the right to VAT refund had to be preserved, and could not be annulled by applying national provisions on time-limits. The Italian *Corte di Cassazione*, in applying the ECJ ruling, found the claim of Banca Antoniana as admissible and referred the case back to the Court of Appeal (*Corte di Appello*) for further assessment of the facts. Arguably, the ECJ made the VAT refund request ‘justiciable’ under the aegis of

the principle of effectiveness, a claim which would not have been otherwise adjudicated pursuant to national law (see Italian Court of Cassation, decision n. 12666/2012).

**22** In cases where 'the exercise of right is impossible or excessively difficult', the Court can go as far as setting aside national legislation. The *Peterbroeck* judgment is a remarkable example of the remit of the principle of effectiveness. In this case, the ECJ was asked whether such a principle precluded a procedural rule barring national appeal courts to raise of their own motion points of EU law. As a matter of national law, the applicant could have raised a point of EU law in the previous stage of the litigation. Nevertheless, the adjudicating body at first instance could not have submitted a preliminary ruling question to the ECJ, since it did not qualify as a national court. The Court considered that, due to the specific situation, the procedural norm in question was precluded in so far as it did not allow the parties to obtain adjudication over EU-derived rights.

**23** In *Donau Chemie* (*Bundeswettbewerbsbehorde v Donau Chemie and Others*, 2013) the question concerned Austrian procedural rules, according to which third parties had to obtain the consensus of all the parties of the litigation to gain access to the documents used in proceedings concerning anti-competitive cartels, such documents being necessary to support claims for damages against the participants in the competition infringement. Therefore, the issue arose as to whether such a rule was compatible with the right of third parties to claim damages following breaches of EU competition legislation.

**24** In its judgment, the ECJ assessed the compatibility of the national rule with the principles of equivalence and effectiveness and found that the rule at issue rendered excessively difficult the exercise of the right to obtain compensation for infringements of competition rules. It also recognized that the weighing-up of interests justifying disclosure of information and the protection of that information can be conducted by the national courts and tribunals only on a case-by-case basis and taking into account all the relevant factors in the case. National courts should then balance the interest of the parties of the proceedings to protect their data with the legitimate expectations and the general interest in fair competition in the internal market. The ECJ eventually held that the principle of effectiveness precluded a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU by third parties was made subject to the consent of all the parties of that proceeding.

**25** Similarly, in *Danqua* (*Danqua v Minister for Justice and Equality*, 2016) the ECJ found that a national procedural rule providing a time-limit of 15 days to apply for refugee status under the relevant EU legislation does not allow an effective enjoyment of the EU right to receive refugee protection. The Court ruled that the national procedural provision at issue was precluded under the principle of effectiveness in so far as third country nationals applying for such a status may be in a situation of hardship, a factor which needs to be taken into account by the legislator when imposing the time-limits for lodging such application. In this sense, a time-limit of 15 days for the submission of the asylum application made the exercise of rights deriving from EU law excessively difficult. Both in *Donau Chemie* and *Danqua*, the principle of effectiveness is used to balance the effective enforcement of individual rights stemming from EU law with the efficiency of the national procedural systems, with the view to ensure the prevalence of the former. Ultimately, the principle of effectiveness is the legal parameter against which the ECJ sets the extent to which EU rights should be protected at national level.

## E. The Principle of Effective Judicial Protection

**26** The principle of effective judicial protection is one of the cornerstones of the EU legal order. It requires that anyone whose EU-derived rights have been breached shall have the right to access a court to obtain judicial recognition and/or enforcement of his/her rights. The EU general principle of effective judicial protection has acquired the definitive status of an EU fundamental right with the entry into force of the Charter, providing for the fundamental right to an effective remedy and a fair trial under Article 47 thereof. Interestingly, this Article is one of the most referred EU charter provisions in the context of preliminary references (see Grainne De Búrca, 2013, 61).

**27** The relationship between the principle of effective judicial protection and those of effectiveness and equivalence as developed under the procedural autonomy test has not always been clearly set in the ECJ case law. Several scholars have attempted to rationalize the interaction between the principles of effective judicial protection and of effectiveness as part of the procedural autonomy test. In this respect, it has been argued that the *Unibet* case (Taborowski, 2008, 623) indicates that compliance with the principle of effectiveness ensures compliance also with the macro-principle of effective judicial protection. This would imply that the principle of effectiveness is part of the broader principle of effective judicial protection. Such a view is not unanimously shared. For instance, Poltorak (2015, at 42) argues that the principle of effective judicial protection is an expression of the broader principle of effectiveness. Havu (2015, at 4) opined instead that while the principle of effectiveness is about the effective enforcement of EU law, the principle of effective judicial protection concerns the protection of the rule of law. Consequently, the two principles in question would not overlap. Krommendijk (2016, at 1418) has further argued that the two principles should not be considered as conflating. Nevertheless, he demonstrates that the principle of effectiveness under the procedural autonomy test could lead to greater protection of individual rights compared to the principle of effective judicial protection.

**28** Arnull (2018, at 1022) and Biondi and Mehta (2016, at 155) have adopted a broader perspective, by analysing the interplay between the principle of effective judicial protection and the procedural autonomy test as a whole. They agree that the principle of effective judicial protection, currently enshrined under Article 47 of the Charter, is displacing the principle of procedural autonomy. Arnull notes that the ECJ case law is referring to the 'autonomy' principle more sporadically than before due to the broader scope of the principle of effective judicial protection. According to this author, the ECJ interprets this latter principle to impose additional requirements than those stemming from the principles of effectiveness and equivalence. Thus, for instance, in *Mono Car Styling*, the Court explained that EU law 'requires, in addition to observance of the principles of equivalence and effectiveness, that the national legislation does not undermine the right to effective judicial protection' (*Mono Car Styling SA v Dervis Odemis and Others*, 2009, para 49). Biondi and Mehta, instead, make the argument that the shift towards Article 47 of the Charter derives from the architecture of the Lisbon Treaty. According to these authors, the Lisbon Treaty is featured by the following three elements in the area of procedural law: '(a) the basic protections guaranteed within the context of EU law; (b) the flexibility for national legal systems to retain their internal logic and (c) the desire to establish EU standards of procedural protection.' In the light of these innovative elements, the principle of procedural autonomy appears too 'static' compared to the fundamental right to an effective judicial protection to regulate the compatibility between national procedural rules and EU law.

**29** Some recent examples from the ECJ case law can provide further elements to better systematize the relationship between the procedural autonomy test and the principle of effective judicial protection. The *Agrokonsulting* case (*ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie'*, 2013) reinforces the assumption that Article 47 of the Charter provides an additional layer of protection to EU substantive rights. In that case, the question submitted to the ECJ concerned the compatibility with the principles of effectiveness, equivalence, and of effective judicial protection of a procedural rule which made the attribution of jurisdiction in administrative disputes concerning the implementation of the European Union's common agricultural policy dependent solely on the seat of the administrative authority which adopted the contested administrative act. The domestic rule did not take into consideration the place in which the properties were located or the place of residence of the claimant. As to the principles of effectiveness and equivalence, the Court assessed the characteristics of the procedural rule in question both from the perspective of the equivalence with other national provisions as well as in the light of the principles which lay at the basis of the national legal system concerned, such as the protection of the rights of the defence, the principle of legal certainty, and the proper conduct of the proceedings (*ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie'*, 2013, para 48). These latter principles were identified by the ECJ as being relevant to assess the compatibility of national procedural rules with the principle of effectiveness. When considering, instead, the existence of a possible violation of the principle of effective judicial protection enshrined in Article 47 of the Charter, the ECJ considered whether the applicant had an effective remedy under national law for the enforcement of EU rights (*ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie'*, 2013, para 60).

**30** In that judgment, the focus of the assessment carried by the ECJ under Article 47 of the Charter and under the principles of effectiveness and equivalence is markedly different. Under the principle of effective judicial protection, the ECJ is concerned with the *availability of an effective remedy* at national level and whether its design facilitates access to court. Under the principles of effectiveness and equivalence, the ECJ aims at ensuring that EU rights are effectively enforced at national level, thus concentrating on the *attainment of the objectives* pursued by EU law at national level.

**31** Another case highlighting the different role of the principles of procedural autonomy and effective judicial protection is *Toma* (*Direcţia Generală Regională a Finanţelor Publice Braşov v Vasile Toma et al*, 2016). In this reference for a preliminary ruling, the issue was whether rules excluding public authorities from judicial stamping fees in the context of actions for the repayment of taxes levied in breach of EU law and exempting the same entities from lodging a security for a stay of such proceedings was compatible with the principles of equivalence, effectiveness, and of effective judicial protection. All private applicants for the same type of proceedings had indeed the duty to pay the judicial stamping fees and lodge this security. The Court first assessed compatibility of that procedural rule with Article 47 of the Charter and, subsequently, with the principles of equivalence and effectiveness. Notably, the Court considered whether a breach of Article 47 had occurred in the light of the European Court of Human Rights (→ *European Court of Human Rights (ECtHR)*) case law. As requested by Article 52 (3) of the Charter, when rights included in the Charter correspond to rights granted under the ECHR, the former should be interpreted in the light of the latter. Thus, the Court assessed whether the different treatment of stamp fees for public and private bodies in the context of judicial proceedings affected the right to an effective remedy and its sub-components, such as the right to equality of arms. The ECJ concluded that the different provisions applicable to private and public parties were not in breach of Article 47 of the Charter in so far as the parties were not put in a different position as to the possibility to secure an effective remedy before national courts. The Court went on by considering the compatibility under the principles of

equivalence and effectiveness and it held that there was nothing in the file disclosing a breach of these principles. When considering compliance with the requirements of equivalence and effectiveness, the Court focused on the EU rights at stake and their effective enforcement at national level, rather than the breadth of the remedy available at national level.

**32** In conclusion, whilst the procedural autonomy test is concerned with the effective enforcement of EU rights at national level, the principle of effective judicial protection as enshrined under Article 47 of the Charter aims at providing individuals with a further right, that to an effective remedy and a fair trial, which ultimately strengthens the enforcement of EU substantive rights.

**33** The very recent case *Associação Sindical dos Juízes Portugueses* (*Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, 2018) indicates an interesting development of the relationship between the principles of procedural autonomy and effective judicial protection, which should be ultimately analysed under the lenses of Article 19 TEU. In this judgment, the Grand Chamber has provided the first interpretation of that provision and the consequences stemming from it for the procedural and judicial systems of the Member States. This Article has been considered as enshrining the principle of effective judicial protection, with which Member States should also comply when regulating their judicial systems. National judiciary systems which do not comply with the requirements stemming from that principle, including the independence of the members of judicial bodies, would reveal a breach of the principle of effective judicial protection.

**34** The most recent case law further highlights the complementarity between the existence of effective judicial protection at national level and protection of the rule of law in the EU. In the *LM* judgment (2018), the ECJ held that the judicial authority executing an European Arrest Warrant may suspend surrender procedures where it received evidence set out in a reasoned proposal of the European Commission adopted pursuant to Article 7 (1) TEU indicating that there is a real risk of breach of the right to a fair trial as protected under Article 47 of the Charter. Such a decision can be adopted on the basis of different factors, such as the personal situation of the addressee, the nature of the offence for which he is being prosecuted and the factual context that forms the basis of the European Arrest Warrant, and the information provided by the issuing Member State.

**35** Since its introduction with the *Johnston* case (*Johnston v Chief Constable of the Royal Ulster Constabulary*, 1986) the principle of effective judicial protection has not stopped having a significant impact in the allocation of competences between the Member States and the EU from the perspective of the enforcement of rights. Such a principle has ultimately entailed a Europeanization of national procedure, imposing obligations on the procedural autonomy of the Member States in favour of the protection of EU individual rights.

## F. Concluding Remarks

**36** The Treaty of Lisbon did not—at least on a cursory reading—substantially affect the competence of the Member States to lay down procedural rules. Although the EU has been given express powers to harmonize procedural rules for judicial cooperation in civil matters between the Member States (cf Arts 81 TEU and following), the general domain of procedural rules is still mainly left to the competence of the Member States. However, on a deeper analysis, the EU judicial protection constitutional framework has definitively changed: the harmonization of EU substantive law has correspondingly increased litigation at national level concerning EU law. Innovative questions on the compatibility of EU law with national procedural rules have been brought to the attention of the ECJ. Consequently, the ECJ has *de facto* expanded its scrutiny of national procedural rules and, therefore, the

influence of the ECJ's case law on national procedural systems. Further, the harmonization of EU law has also involved the elaboration of *ad hoc* procedural rules, to the extent that EU institutions have enacted procedural rules to be used at national level (see for instance Regulation (EC) No 1896/2006 of the European Parliament and of the Council creating a European order for payment procedure (2006)).

**37** From this perspective, the approach of the ECJ in relation to the procedural rules of the Member States is consistent with the functional perspective of the EU as a legal system where Member States must comply with the obligations imposed on them under the Treaties with all their measures. At the same time, by ensuring that national procedural rules respect the requirements stemming from EU law, the ECJ enhances the protection of individual rights at national level. The fact remains that reconciling the objective of full and effective application of EU law with the competence of the Member States to design their own judicial and remedial systems is a challenging exercise. Yet, we like to think that both national and EU courts are, conscientiously or not, pursuing the same aim: the delivery not of a brute revenge, but of a fair and efficient justice.

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