THE PRINCIPLE OF NATIONAL PROCEDURAL AUTONOMY: SHADOWS AND LIGHTS

Il principio dell'autonomia procedurale degli Stati membri: luci e ombre

Le principe de l'autonomie procédurale des États membre : ombres et lumières

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Introduction

One of the most basic tenets of the EU constitutional order is that, in the absence of supranational rules to enforce EU law and to ensure judicial protection of EU-derived rights, it is necessary to rely upon national legal systems and the rules of their procedural machinery. Such a stance has been articulated in two declinations: the twin principles of equivalence and effectiveness. These find their deep roots in the well-known judgments *Rewe-Zentralfinanz and Rewe-Zentral* and *Comet*[1]. As the classic quote goes:

"[i] n the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature [(principle of equivalence)]. The position would be different only if the conditions made it impossible in practice to exercise the rights which the national courts are obliged to protect [(principle of effectiveness)]".

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[1] Court of Justice, 6 December 1976, Case 33/76, *Rewe-Zentralfinanz and Rewe-Zentral*, para 5 and Case 45/76, *Comet*, para 13.

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This formula has been repeated forever. We have all used it. At first glance, the case law seems set in stone. It seemingly implies a stable, formulaic test that we have been familiar with for decades – and yet, in reality, the use and meaning of this ancient formula have evolved considerably over time. Clearly and undisputedly this early procedural autonomy principle has been gradually evolving and become intertwined with many hard constitutional principles of EU law such as the principle of effective judicial protection now enshrined in Article 47 of the Charter. And yet the twin principles of equivalence and effectiveness are still very much alive and kicking in the case law of the Court. Despite such well-considered practice, more often than not, the Court has been criticised for applying these principles in an unpredictable manner and with different levels of intensity with no apparent explanations.

We all recall Plato's allegory of the cave – where prisoners, facing a wall, perceive only the shadows of reality, mistaking them for truth. When one of them steps outside, he realises that the world he knew was but a reflection – a projection shaped by light and perspective. Much like in Plato's cave, when it comes to the principles of equivalence and effectiveness, what we think we see – these "stable" formulas laid down by the Court – might not always reflect the full reality of their application.

In an attempt to distinguish between what is merely appearance of inconsistency (Part I), and what may reveal the underlying truth of how these twin principles really operate in the case law of the Court (Part II), what follows is a practical discussion of the nuances – the "shadows" and the "light" – in the recent case law of the Court.

I. From the shadows…

1. The shadows of the principle of effectiveness

The principle of effectiveness requires that national procedural and remedial rules must not make it "impossible in practice or excessively difficult"[2] to exercise rights conferred by EU law.

On paper, the Court frames this as deference to Member States: they can design their own procedures so long as they do not make EU rights practically unusable. At first glance, this would seemingly imply minimal intrusion and a minimum standard of procedural compatibility required by the Court.

However, this is not a one size fits all situation. In practice, the Court

[2] See e.g., Court of Justice, 26 November 2015, Case C-166/14, *MedEval,* para 37.

has used the principle of effectiveness in different ways and with a varying level of intensity to review national procedural law.

1. Three different approaches for one principle

If one observes the case law, the Court has adopted at least three different approaches when applying the principle of effectiveness.

a. First approach: to disapply national rules that block EU rights outright

With the first approach the Court uses the principle of effectiveness to disapply national rules that block EU rights outright. Here effectiveness acts almost like supremacy: national law must bend.

We all know the classic examples:

- Cases requiring national Courts to grant interim relief even if national law did not allow for interim relief against the State, *i.e.*, the *Factortame* line of reasoning[3];
- or cases requiring Courts to raise unfair contract terms *ex officio* in consumer litigation even if that departs from national procedural passivity[4].

b. Second approach: to create or shape remedies that EU law did not expressly create

With the second approach, the Court has used effectiveness to justify doctrines like State liability[5], or to insist that individuals must have access to some form of judicial remedy even if EU secondary law is silent[6].

c. Third approach: effectiveness and national procedural rules stricto sensu

The Court sometimes allows procedural barriers (short limitation periods, cost rules, *res judicata*) or, to borrow AG van Gerven words, "procedural rules *stricto sensu*"[7] so long as they do not go "too far". This is a more deferential face of effectiveness but also, in my view, the most arduous to

[3] Court of Justice, 19 June 1990, Case C-213/89, *Factortame and Others*.

[4] Court of Justice, 27 June 2000, Cases C-240/98 to C-244/98, *Editors* and 14 June 2012, Case C-618/10, *Banco Español de Crédito* (hereinafter, the "*Banco Español de Crédito* judgment").

[5] Court of Justice, 19 November 1991, Cases C-6/90 and C-9/90, *Francovich and Others* and 5 March 1996, Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*.

[6] Court of Justice, 13 March 2007, Case C-432/05, *Unibet*.

[7] W. VAN GERVEN, *Of rights, remedies and procedures*, in *Common Market Law Review*, 2000, p. 527.

deal with. However, at first glance, analysing the Court's use of effectiveness under this category can prove to be delicate – the Court's level of intrusion through the principle of effectiveness is sometimes light, sometimes heavy. Most of the recent case law discussed in this paper concerns these procedural rules *stricto sensu*.

2. Tensions resulting from the use of the principle of effectiveness

What is certain is that, today, the principle of effectiveness no longer works as a single, uniform standard. It is context-sensitive and value-loaded. The Court's use of it oscillates between minimal floor and maximal control. The source of the right at issue matters greatly.

a. Maximal control via the principle of effectiveness in cases where there is a fundamental right under the Charter at play (e.g., fair trial, effective remedy, right to be present)

As will be discussed in more detail below, when the right at issue is framed as a fundamental right under the Charter (e.g., fair trial, effective remedy, right to be present), effectiveness is blended with Article 47of the Charter and pushed very hard.

b. Maximal control in criminal proceedings involving core procedural rights or in highly harmonised areas of EU law

In criminal fair-trial contexts, for instance, effectiveness is maximalist. The Court micromanages national criminal procedure: timing of notification, content of information, right to participate, speed of the reopening decision, review of detention, and strictly limited judicial discretion. Here, "not excessively difficult" means that the procedural framework must genuinely ensure an effective, prompt, and fully reviewable route to the exercise of the right. In areas involving core procedural rights in criminal proceedings, the Court becomes intrusive; laying down detailed procedural requirements to make sure the right is not just theoretical.

An example of this can be found in the *VB II* judgment on criminal defence rights and *in absentia* trials, in which the Court interpreted Article 8(4) and Article 9 of Directive 2016/343[8]. In this case the Court is quite demanding. It accepts that Member States can require a defendant convicted *in absentia* to *apply* for reopening rather than giving an automatic

[8] Court of Justice, 16 January 2025, Case C-400/23, *VB II (Information concerning the right to a new trial)* (hereinafter, the "*VB II* judgment").

retrial. However, it then loads that application procedure with strict effectiveness conditions that were not specifically laid out by EU law:

- The reopening mechanism must *guarantee* that a new trial will actually be held whenever the conditions for a valid *in absentia* conviction under Article 8(2) of Directive 2016/343 were not met[9]. The reviewing court cannot have discretion to refuse a new trial for other reasons.
- The convicted person must, when first informed of the conviction (e.g., on arrest), immediately receive a full copy of the *in absentia* decision as well as clear information on the right to seek reopening, where to file it, and deadlines[10]. Otherwise, the procedure is not effective.
- The request for reopening must be processed quickly, with an assessment of continued detention so that the person is not sitting in jail under an *in absentia* conviction that might be unlawful[11]. Delay can itself violate effectiveness.
- The person must be able to be heard (personally or via a lawyer) in the reopening procedure[12] – denying them a voice would undermine both Article 47 of the Charter (effective remedy) and the right to a fair trial.
- The system must respect both the principle of equivalence (do not treat EU-law-based reopening worse than comparable domestic reopening mechanisms) and the principle of effectiveness (do not make the exercise of the EU rights practically impossible or excessively difficult)[13].

Here effectiveness is muscular. The Court basically engineers the national reopening procedure: speed, content of information, ability to participate, and limits on judicial discretion.

c. Minimal floor control when it comes to consumer and financial litigation

In other contexts, effectiveness tends to be minimalist. For instance, the Court often held that EU law does not require a national court to reopen final judgments or administrative decisions even if that is the only way to cure an EU law violation[14]. Legal certainty prevails. National *res judicata* stands, subject only to a light-touch effectiveness review. Here, "not excessively difficult" essentially means that a previous opportunity to

[9] Court of Justice, *VB II*, cit., para 59.

[10] Court of Justice, *VB II*, cit., para 61.

[11] Court of Justice, *VB II*, cit., para 64.

[12] Court of Justice, *VB II*, cit., para 66.

[13] Court of Justice, *VB II*, cit., para 75.

[14] Court of Justice, 16 March 2006, Case C-234/04, *Kapferer*; 19 September 2006, Cases C-392/04 and C-422/04, *i-21 Germany and Arcor*; 12 February 2008, Case C-2/06, *Kempter*; 6 October 2015, Case C-69/14, *Târşia*.

assert the right is sufficient, even if the claimant did not succeed. In areas like consumer and financial litigation and *res judicata*, the Court is deferential to Member States, emphasising legal certainty, finality, and national procedural autonomy. The same verbal test – "impossible or excessively difficult" – is doing radically different work.

Consumer law may provide a good example of the supposedly unpredictable attitude of the Court. In few cases concerning Spanish law, the Court has adopted a very firm stance in ensuring the effectiveness of the Unfair Terms Directive[15]. In *Banco Español de Crédito* judgment, for instance, the Court required national courts to raise unfair consumer terms on their own motion, in disregard of national procedural rules[16]. In a case concerning mortgage loan agreements, the Court went into great detail to define the conditions for national Courts to review the transparency of standardised terms in collective actions, leaving little room of manoeuvre to national Courts[17]. On other occasions, the Court has shown a rather more light-touch approach to the procedural issues surrounding unfair terms in consumer contracts under the Unfair Terms Directive. It has, for instance, found that the review of unfair terms does not have to be available *at all stages* of the procedure, as long as it is available *at some stage* of the procedure[18]; that national Courts do not have to raise unfair terms of their own motion in a dispute between a seller or supplier and the seller or supplier who is the assignee of the rights of a consumer that enforcement proceedings following a finding that an unfair term is invalid can be subject to time limits[19]; that it is for the national court to decide whether a limitation period on an action against the repayment of loan instalments complies with the principle of effectiveness[20]; and that a national court may reduce the amount of a payment sought against a consumer, excluding amounts arising from unfair terms, without finding those terms to be void in the same proceedings[21]. As these cases show, it is difficult to discern the criteria based upon which the Court adopts one approach or the other.

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[15] Directive 93/13/EEC of the Council of 5 April 1993 on unfair terms in consumer contracts, in *OJ* L 95, 21 April 1993, p. 29 ff.

[16] Court of Justice, *Banco Español de Crédito*, cit., paras 53 and 55.

[17] Court of Justice, 4 July 2024, Case C-450/22, *Caixabank and Others (Review of transparency in collective actions)*, paras 34 to 46. See also Court of Justice, 12 December 2024, Case C-300/23, *Kutxabank*, paras 160 to 167.

[18] Court of Justice, 29 February 2024, Case C-724/22, *Investcapital*, para 51.

[19] Court of Justice, 13 March 2025, Case C-230/24, *Banco Santander*, para 31.

[20] Court of Justice, 8 May 2025, Cases C-6/24 and C-231/24, *Abanca Corporación Bancaria (Acceleration clause)*, paras 32 to 37.

[21] Court of Justice, 27 November 2025, Case C-509/24, *Investcapital*, paras 28 to 35.

Another example regarding the use of effectiveness in a more deferential manner can be found in the *Profi Credit Polska* judgment on the finality of judgments and EU consumer protection[22]. The Court found that, in the absence of EU rules, *res judicata* is for national law, subject to the respect of the principles of equivalence and effectiveness. National rules need not be disapplied even if that would fix an EU law problem. In this context, effectiveness is restrained: the Court recognises that the finality of judicial decisions may prevail over the retrospective enforcement of EU consumer rights, and that EU law does not compel national Courts to revisit final judgments in such circumstances. This stance is rather protective of finality and national procedural order.

Further, in the *Banco de Santander* judgment, the Court considered collective consumer actions and cost barriers[23]. Here, the Court was willing to intervene to strike down discriminatory standing rules that undercut *who* can bring EU-based consumer actions (that is seen as core to the EU protective scheme), but it was comparatively hands-off about litigation costs and legal aid[24]. Effectiveness was framed as a factual, almost socio-economic proportionality test: Do the fees make litigation "insurmountably" hard? If not, there is no EU problem. Therefore, the principle of effectiveness acted as a floor, not as a tool to force generous funding.

2. The shadows of the principle of equivalence

The principle of equivalence "requires that the national rule in question apply without distinction to actions based on infringement of EU law and those based on infringement of national law having a similar purpose and cause of action"[25]. This is framed as a non-discrimination test: EU-law claims cannot be given second-class treatment. At the heart of equivalence thus lies the comparability of domestic and EU situations. As long ago as 1997, Advocate General Cosmas set out the steps which such a comparison entails: first, the claims in respect of which judicial satisfaction is sought must be similar; secondly, the procedural rules on which the comparison is based must not be considered in isolation, but in their pro-

[22] Court of Justice, 9 April 2024, Case C-582/21, *Profi Credit Polska (Reopening of proceedings concluded with a final judicial decision)* (hereinafter, the "*Profi Credit Polska* judgment").

[23] Court of Justice, 16 January 2025, C-346/23, *Banco de Santander (Representation of individual consumers)* (hereinafter, the "*Banco de Santander* judgment").

[24] Court of Justice, *Banco de Santander*, cit., para 63.

[25] Court of Justice, 12 February 2015, Case C-662/13, *Surgicare – Undeadens de Saúde*, para 30.

cedural context; and thirdly, those procedures must not be chosen at random but must be of a similar kind[26].

1. Practical issues of comparison between EU and domestic actions

In essence, then, the crucial issue is whether "similar" national and EU actions are treated alike.

While this sounds straightforward on paper, in practice, two issues resurface on a regular basis:

- First, the issue of identifying the relevant comparator. What counts as a "similar" domestic action? Should any claim for annulment, damages, or the reopening of a final decision be treated alike? Should the comparison be made within the same area of law, such as consumer protection or competition? Is the comparison to be made between claimants who are in similar positions? The choice of the comparator will, in most cases, be the decisive issue.
- Second, what is the appropriate level of comparison? If the comparison is made at a high level of generality, the outcome will tend to favour claimants challenging national procedural rules. In contrast, if the comparator is defined narrowly, the national rules are less likely to infringe the principle of equivalence.

These issues can be illustrated through the Court's recent case law.

a. The relevant comparator

In the *Profi Credit Polska* judgment, the Court adopted a narrow comparator – treating the reopening of unconstitutional judgments as structurally distinct from EU-law-based reopening – thereby allowing Member States to maintain different procedural rules. More specifically, under Polish law, a final judgment can be reopened because the provision which has been declared to be unconstitutional has been removed from the national legal order, with retroactive effect. By contrast, a preliminary ruling does not automatically annul a national provision which is incompatible with EU law. Given this structural difference, equivalence does not require the national rule on the reopening of unconstitutional judgments to apply in the same way to judgments which may be incompatible with EU law[27]. The Court thus adopts a rather Member State-friendly reading of equivalence. In practice, this makes it harder for individuals to invoke the reopening of national proceedings which may violate EU law. The narrower

[26] Opinion of AG Cosmas, 23 January 1997, Case C-261/95, *Palmisani*, point 26.

[27] Court of Justice, *Profi Credit Polska*, cit., paras 55 and 56.

the comparator, the weaker the protection.

By contrast, in the *VB II* judgment, the Court defined the comparator broadly. It required Bulgarian courts to ensure that all persons convicted *in absentia* have access to the same reopening mechanism "on the same terms"[28]. Defining the comparator broadly makes it easier to find a violation of the principle of equivalence. Any additional procedural step that only applies when the reopening of a trial is invoked on the basis of EU law may amount to such a violation.

b. The level of comparison

In the *Banco de Santander* case, the Court applied the principle of equivalence in the context of collective consumer actions. Spanish law allowed consumer associations to bring actions on behalf of their members in financial services disputes but, according to Spanish case law, those associations did not have standing for consumers who were "investors with significant financial means who purchase complex and high-risk financial products"[29]. The Court found the exclusion of investor-consumers to violate EU law. Article 52(2) of MiFID did not allow Member States to exclude consumers based on their financial means and the type of their investments where an association is given standing on their behalf[30].

On the issue of whether those associations were entitled to legal aid, however, the Court deferred to the national court. In the absence of any evidence concerning the equivalence of the Spanish rules on legal aid (and considering that effectiveness was not jeopardised), the Court concluded that that question fell within the national procedural autonomy of the State. Again, as for effectiveness, the Court adopts a light-touch approach. It does not require legal aid for collective consumer litigation. It merely requires that the absence of legal aid does not in practice disadvantage consumer actions based on EU law as opposed to national law actions. Moreover, the determination of the relevant comparator, that is the similar domestic action, is left entirely to the national court. The principle of equivalence is thus "domesticated": the Court sets out the test, but it does not apply it itself.

In the *VB II* judgment, the Court took the view that the absence of a full retrial fell within the procedural autonomy of the Member State, subject to specific requirements the national procedure had to satisfy in order to comply with equivalence and effectiveness. In terms of equivalence, the

[28] Court of Justice, *VB II*, cit., para 58.

[29] Court of Justice, *Banco de Santander*, cit., para 24.

[30] Court of Justice, *Banco de Santander*, cit., para 55.

reopening procedure before the higher court had to be available, in practice, "on the same terms to all persons convicted *in absentia*"[31]. There could be no different requirements for the reopening of a case where the claim is based on EU law.

The notable aspect of this case is that the Court was willing to exercise a more robust control in terms of equivalence in the criminal context. Here, contrary to the *Profi Credit Polska* judgment, the Court is much less willing to accept that Bulgarian law may treat the reopening of a trial on the basis of EU law differently from other national reopening mechanisms for *in absentia* convictions. This discrepancy appears, at first glance, as one of the main issues of the Court's current jurisprudence on equivalence.

2. Tensions resulting from the use of the principle of equivalence

Equivalence is formally a non-discrimination test, but it lives or dies on how the Court frames the comparator. In recent case law we see two extremes:

- A narrow comparator (reopening final judgments based on constitutional provisions vs provisions of EU law) that allows Member States to deny the reopening of judgments for EU-law breaches (*Profi Credit Polska* judgment).
- A broad comparator (all people convicted *in absentia*) that pressures Member States to align procedural guarantees for EU-right holders with the best available domestic standard (*VB II* judgment).

Across the analysed cases, two recurring issues arise in relation to equivalence. First, the determination of the relevant comparator; second, the appropriate intensity of review (the level of comparison).

a. The moving target of the "comparator"

As seen above, equivalence only bites if an EU law-based action is treated worse than a comparable national action. However, what constitutes a "comparable" situation is sometimes interpreted broadly, making a breach of the principle of equivalence more likely (*VB II* judgment) and sometimes narrowly, making a breach of the principle of equivalence less likely (*Profi Credit Polska* judgment).

b. Variable intensity of review

Similarly, when it comes to the intensity of review under the principle

[31] Court of Justice, *VB II*, cit., para 58.

of equivalence, the Court is sometimes deferential and sometimes intrusive. In the *Banco de Santander* judgment, the Court limited itself to noting that no evidence was brought on the issue of equivalence, and therefore left it to the national court to ensure that equivalence was safeguarded. In the *VB II* judgment, on the other hand, the Court insisted on both the equivalence and the effectiveness of national reopening procedures for *in absentia* convictions, setting out the requirements these had to meet. It would appear, then, that equivalence sometimes acts as a mere reminder for Member States not to discriminate against EU law, and sometimes as a strong vehicle for redesigning national procedural law. The issue is that it is not entirely predictable which version of equivalence the Court is going to apply in a given case.

3. Survey of the shadows

It may seem that the Court's approach to equivalence and effectiveness is fragmented, oscillating between deference and intervention, between autonomy and control. At first glance, there seem to be no clear guiding principles – only shifting patterns of case-specific reasoning. After all, as acknowledged by the Court itself, for instance in the *Byankov* judgement, the intensity of the scrutiny of national procedural law seems ultimately to depend on "the particular features of the situations and interests at issue"[32].

Yet appearances can deceive. To understand whether there is a deeper logic – a method beneath the seeming inconsistency – what follows is a discussion of the tensions and dynamics at play between the two principles.

II. …to the light

1. A need for flexibility

What results from this (partial) survey of the case law is an internal tension in both doctrines. The Court presents them as technocratic tests ("no less favourable", "not excessively difficult"), but in practice carefully calibrates them within proper constitutional parameters.

In my view a first-draft of their possible classification can be summarized as follows:

– High-intensity scrutiny for "autonomy of EU law" related matters;

[32] Court of Justice, 4 October 2012, Case C-249/11, *Byankov*, para 77.

– Low-intensity scrutiny where there is no need to intervene and intervention would threaten common "procedural values".

That selective intensity cannot be simply equated to incoherence. Depending on the case at hand, different levels of intensity and different approaches may indeed be justified and make sense if inserted in the proper EU constitutional *milieu*. Some flexibility is needed to adapt the twin principles to contemporary cases.

The issue with the Court's case law today is then, in my view, that the control *à géométrie variable* may not be sufficiently explained. Its flexibility is not apparent from the well-known – and regularly cited – "settled" case law deriving from *Rewe-Zentralfinanz and Rewe-Zentral* and *Comet,* which may be considered formulaic. By contrast, the Court's case law reveals a far richer and more dynamic picture.

2. My truth (sort of) – A shared procedural responsibility

In a now rather old famous passage, the Court held that:

"[W]hether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration"[33].

As I have been saying for a while already, the balancing test from the *van Schijndel* judgment might still be the best method to clarify the Court's approach to the twin principles and avoid over-intrusion into national procedure.

The balancing act which any legal system must carry out is one between the effectiveness of the rights of the parties and the efficiency of the judicial body which, if it is to carry out its task effectively, must not be over flooded with unfounded claims and never-ending litigation. The same applies to EU law. Given that procedural limitations on the exercise of (EU) rights must inevitably exist, the solution might be to rely on the procedural patterns which already exist, namely those of Member States[34]. The Court in my view fully embraced shared principles and values (both

[33] Court of Justice, 14 December 1995, Cases C-430/93 and C-431/93, *van Schijndel and van Veen*, para 19.

[34] A. BIONDI, *Effective Judicial Protection of EU Rights before National Courts: Opinion of Advocate General Jacobs in Van Schijndel*, in G. BUTLER AND A. LAZOWSKI (eds), *Shaping EU law the British Way*, Oxford New York, Dublin, 2022, p. 325 ff.

the Court and national judges are trying to do their job as best as they can) and thus gradually recognised a list of 'good national procedural rules' that reflects the struggles and transformations of national procedural systems. Thus, elements that should be taken into account in evaluating the compliance of national procedural law with EU law now include the financial situation of the parties, rules to deal with the length of proceedings, the cost of litigation, or the potentially frivolous nature of the claim[35]. Whilst these elements do not require the setting aside of the national rules in question, they contemporaneously form a *de facto* EU procedural code that applies across different jurisdictions, and against which national rules can be tested. For instance, in *Orizzonte Salute v Ministero della Giustizia et al* the Court held that higher ourt fees in national administrative proceedings, as opposed to national civil proceedings, did not violate the principle of equivalence as such, as they did not differentiate between actions based on national law and actions based on EU law[36]. In other words, Member States can introduce different procedural requirements across different areas of law, as long as, within one area of law, national actions and EU actions are not treated differently.

Needless to say, if national law does not provide for either the remedy to protect individual rights, nor sufficiently guarantee the integrity of the EU legal order, the Court can escalate a response and sanction those inefficiencies. Such a procedural supremacy[37] will always kick in if the institutional framework of the EU legal order is threatened. As discussed above, the Court is usually very respectful towards the principle of *res judicata* in reaffirming the importance of ensuring the finality of judgments as a tool to ensure the proper conduct of proceedings and legal certainty. It has gone as far as to hold that EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of EU law by the decision at issue. However, the Court has shown no hesitation in setting aside a final judgment of a national court if this involved an intrusion into an EU exclusive competence[38]. Likewise, if the *Byankov* judgment is read in its entirety the Court makes it very clear that it is precisely the importance which primary law accords to specific areas of EU law (in that

[35] See Court of Justice, 18 March 2010, Cases C-317/08 to C-320/08, *Alassini and Others*), and 11 April 2013, Case C-260/11, *Edwards and Pallikaropoulos*.

[36] Court of Justice, 6 October 2015, Case C-61/14, *Orizzonte Salute v Ministero della Giustizia et al*, paras 67 to 68.

[37] E. NEFRAMI, *The Duty of Loyalty: Rethinking Its Scope Through Its Application In The Field of EU External Relations*, in *Common market law Review*, 2010, p. 323 ff., p. 330.

[38] Court of Justice, 18 July 2007, Case C-119/05, *Lucchini*. See also Court of Justice, 3 September 2009, Case C-2/08, *Fallimento Olimpiclub*.

case citizenship) that requires that even the most sacred principles like legal certainty need to give way if the application of a certain national procedural rule entirely prevents the assertion of an EU right. In those cases, the illegality, under EU law, of such prohibitions, "cannot reasonably be justified by the principle of legal certainty and must therefore be considered, in this respect, to be contrary to the principle of effectiveness"[39].

Until this point, I have avoided weighing in on an even more delicate debate: the relationship between national procedural autonomy and the ever-extended use by the Court of Article 47 of the Charter, ensuring the right to an effective judicial remedy. The Court's case law indeed recites that "[…] Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such"[40]. I think that the case law of the Court on Article 47 can still fit into the above reconstruction of national procedural autonomy. In those cases where a national procedural framework did not provide for adequate forms of protection, the Court has indeed not hesitated to wield Article 47 of the Charter to set aside national provisions[41]. When fundamental rights are at issue, the Court robustly enforces effectiveness and Article 47.

It is against that background that Article 47 of the Charter has become a self-standing provision. In its recent *Seraing* judgment, the Court examined a Belgian provision which, according to the referring judge, granted an arbitral award, which had been upheld by the Swiss Supreme Court, the status of *res judicata* for the purposes of Belgian law[42]. The Court directly addressed the issue under Article 47 of the Charter, without mentioning the procedural autonomy of Member States. It found that recourse to arbitration by individuals is in principle permissible, provided that, if the arbitral award is to be enforced within the EU, it is subject to effective judicial review to ensure its compatibility with the judicial architecture of the EU and its public policy[43].

By contrast, when the Court is confronted with national procedural rules *strictu sensu*, it reads Article 47 of the Charter in conjunction with Article 52 of the Charter, balancing fundamental rights against "objectives

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[39] Court of Justice, *Byankov*, cit., para 81.

[40] Court of Justice, 17 April 2018, Case C-414/16, *Egenberger*, para 78.

[41] Court of Justice, 19 December 2019, Case C-752/18, *Deutsche Umwelthilfe eV v Freistaat Bayern*; 29 July 2019, Case C-556/17, *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal.*

[42] Court of Justice, 1 August 2025, Case C-600/23, *Royal Football Club Seraing.*

[43] Court of Justice, *Royal Football Club Seraing*, cit., para 82.

of general interest". These include the essential features of national procedural systems, such as the introduction of specific expedite procedures, or the conditions imposed on the right to be heard[44]. An example of this is the judgment in *Alassini*, where a national rule imposed an out-of-court conciliation as a condition of admissibility in the telecommunication services sector[45]. The Court initially carried out the traditional analysis under national procedural autonomy, according to the principles of equivalence and effectiveness. It then went on to examine the proportionality of the national procedural rule under the principle of effective judicial protection. Having separately examined the rule under both principles, the Court concluded that it was under both principles compatible with EU law.

More recently, in *Ferrovienord*, the Court has examined the compatibility with EU law of a national rule which granted the Italian Court of Auditors (Corte dei Conti) exclusive jurisdiction over the survey of public bodies conducted by the National Institute of Statistics (ISTAT)[46]. The Court first recalls the right to effective judicial protection, as enshrined in Article 19 TEU and Article 47 of the Charter. It then proceeds to the analysis of national procedural autonomy under equivalence and effectiveness. On the facts, it concluded that the national rule – *read in the light of Article 47 of the Charter and of the principles of equivalence* and *effectiveness* – was compatible with EU law.

3. You may delay but time will not: Minimum or Maximal control when it comes to time limits?

I will conclude with a final "practical" example of how to balance national procedural autonomy and equivalence and effectiveness: *Caronte & Tourist*[47]. The Court's case law has been through different phases but it can be safely stated that the establishment of reasonable limitation periods for bringing proceedings is considered to be an application of the fundamental principle of legal certainty and is not objectionable *per se*[48]. Time limits are therefore generally presumed to be valid from the perspective of EU law. In the *Caronte & Tourist* case, the Italian Antitrust Authority initiated an investigation into the prices of a ferry provider (under Article 102

[44] Court of Justice, 26 September 2013, Case C-418/11, *Texdata Software*.

[45] Court of Justice, *Alassini e.a.*, cit.

[46] Court of Justice, 13 July 2023, Cases C-363/21 and C-364/21, *Ferrovienord*.

[47] Court of Justice, 30 January 2025, Case C-511/23, *Caronte & Tourist* (hereinafter, the "*Caronte* judgment").

[48] See Opinion of AG Szpunar, 14 December 2023, Case C-746/22, *Slovenské Energetické Strojárne*; 13 May 2015, Case C-8/14, *BBVA*; Court of Justice, 27 February 2003, Case C-327/00, *Santex*.

TFEU) 855 days after it first received a notification regarding potentially anticompetitive conduct. The proceedings were closed two years later, finding a violation of competition rules and imposing a fine on the undertaking. Italian law, as interpreted by the referring court, imposed a 90 days limit on the pre-investigation phase – that is the time running from the moment the authority becomes aware of the potential wrongdoing up to the official initiation of proceedings against an undertaking. The referring Court thus asked whether such a time limit, imposed on the Italian Antitrust Authority, was compatible with Article 102 TFEU, in the light of the principles of protection of competition and effectiveness of administrative action.

Advocate General Pikamäe suggested that the 90 days' time limit would be too stringent, and was thus incompatible with Article 102 TFEU because, in the light of the breadth of pre-investigation procedures on anticompetitive practices, it would make it difficult, if not impossible, to carry them out within such a short timeframe[49].

In the *Caronte* judgment, the Court confirmed the Advocate General's Opinion. To do so, it relied on the principle of effectiveness[50]. More precisely, while it found that reasonable time limits for the pre-investigation phase carried out by an Antitrust Authority are compatible with EU law, as they safeguard the interests of the targeted undertakings and contribute to legal certainty[51], given the complexity of competition cases and of the investigations involved, it concluded that a 90 days' time limit would jeopardise the effectiveness of Article 102 TFEU[52]. In terms of due process, the Court considered that the rights of undertakings were not undermined by a longer pre-investigation phase, as there are sufficient safeguards available once the investigation is officially initiated[53].

In my view, the Court's reasoning in the *Caronte* judgment encapsulates the balanced approach I have sought to describe. Competition law represents a core component of the EU's public order, a competence that the EU legislature has chosen to exercise by delegating its enforcement to national authorities. This arrangement exemplifies the EU model, where different levels of regulation and enforcement coexist in a functional equilibrium. Within this framework, national procedural rules, including time limits, are in principle valid and even desirable, as they reflect the fundamental

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[49] Opinion of AG Pikamäe, 5 September 2024, Case C-510/23 and C-511/23, *Trenitalia and Caronte & Tourist*.

[50] A similar reasoning was followed in Court of Justice, 30 January 2025, Case C-510/23, *Trenitalia*.

[51] Court of Justice, *Caronte & Tourist*, cit., para 45.

[52] Court of Justice, *Caronte & Tourist*, cit., paras 67 and 81.

[53] Court of Justice, *Caronte & Tourist*, cit., paras 55 and 66.

principle of legal certainty. Yet such rules must not compromise the protection and effectiveness of competition law, which lies at the very heart of the EU's economic constitution. The Court's intervention in the *Caronte* judgment thus reaffirms that equilibrium: deference to national autonomy, tempered by the need to preserve the effectiveness of competition law.

This leads me to a truly final consideration. The intensity and the specific application of the twin principles ultimately depend on the degree of harmonisation of national law. Due to the continuous and prolific process of harmonisation, the expression "[i] n the absence of Community rules on this subject" carries a very different meaning today from what it did in 1976. The list of directives and regulations affecting or replacing national procedural law is both long and diverse: extending from rather broad and far-reaching measures aimed at ensuring "judicial cooperation" and a smooth settlement of cross-border litigation[54] to forms of horizontal harmonisation where remedial rules have been introduced by the EU legislator in order to properly enforce sectorial regulatory policies. The Competition Damages Directive[55] is an obvious example, but arguably even the private enforcement model upon which the GDPR[56] is based amounts to a miniature procedural code governing the enforcement of data protection. The Court's case law has therefore necessarily been affected by the creation of such a *corpus iuris processualism europaeum* and has adapted accordingly[57]. Such a process is of course not exempt from the usual tensions that harmonisation entails[58].

In conclusion, I believe there is more light than darkness. The principle of procedural autonomy, which I always wanted to rechristen as principle of procedural efficiency, simply reasserts one of the basic principles of the EU legal order: national judges are the *juges de droit commun*. They are shouldering the primary responsibility for the application of EU law. The Court bears the duty to assist and intervene when the equilibrium is for

[54] See for instance the extremely pervasive Regulation (EU) No 655/2014 of the European Parliament and of the Council, of 15 May 2014, establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, in *OJ* L 189, 27 June 2014, p. 59 ff., as amended in 2025.

[55] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, in *OJ* L 349, 5 Decembre 2014, p. 1 ff.

[56] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), in *OJ* L 119, 4 May 2016, p. 1 ff.

[57] See, for instance, Court of Justice, 28 January 2025, Case C-253/23, *ASG 2*.

[58] For a good example see Opinion of AG Emiliou, 30 October 2025, Case C-198/24, *Mr Green* on the application the EAPO Regulation.

whatever reason disrupted. It is this dialectic – between deference and intrusion, between coexistence and supremacy – that continues to define the constitutional texture of the Union's judicial architecture.

ABSTRACT

One of the most basic tenets of the EU constitutional order is that, in the absence of supranational rules to enforce EU law and to ensure judicial protection of EU-derived rights, it is necessary to rely upon national legal systems and the rules of their procedural machinery. Such a stance has been articulated in two declinations: the twin principles of equivalence and effectiveness. These find their deep roots in the well-known judgments *Rewe-Zentralfinanz and Rewe-Zentral* and *Comet*. The formula on equivalence and effectiveness has been repeated forever. We have all used it. At first glance, the case law seems set in stone. It seemingly implies a stable, formulaic test that we have been familiar with for decades – and yet, in reality, the use and meaning of this ancient formula have evolved considerably over time. Clearly and undisputedly this early procedural autonomy principle has been gradually evolving and become intertwined with many hard constitutional principles of EU law such as the principle of effective judicial protection now enshrined in Art 47 of the Charter. And yet the twin principles of equivalence and effectiveness are still very much alive and kicking in the case law of the Court. Despite such well-considered practice, more often than not, the Court has been criticised for applying these principles in an unpredictable manner and with different levels of intensity with no apparent explanations. Let us therefore try to discuss shadows and lights in the recent case law of the Court, in an attempt to distinguish between what is merely appearance of inconsistency (Part I), and what may reveal the underlying truth of how these twin principles really operate in the case law of the Court (Part II).

Uno dei principi fondamentali dell'ordinamento costituzionale dell'UE è che, in assenza di norme sovranazionali che garantiscano l'applicazione del diritto dell'Unione e la tutela giurisdizionale dei diritti derivati dall'UE, è necessario fare affidamento sui sistemi giuridici nazionali e sulle norme che regolano i loro meccanismi procedurali. Tale posizione è stata articolata in due declinazioni: i principi di equivalenza ed efficacia. Questi principi affondano le loro radici nelle famose sentenze *Rewe-Zentralfinanz e Rewe-Zentral* e *Comet*. La formula dell'equivalenza e dell'effettività è stata ripetuta all'infinito. Tutti l'abbiamo utilizzata. A prima vista, la giurisprudenza sembra essere scolpita nella pietra. Sembra implicare un criterio stabile che conosciamo da decenni, ma in realtà l'uso e il significato di questa antica formula si sono evoluti notevolmente nel corso del tempo. È chiaro che l'iniziale principio di autonomia procedurale si è gradualmente evoluto e si è intrecciato con molti principi costituzionali del diritto dell'Unione europea che sono emersi nel frattempo, come il principio della

tutela giurisdizionale effettiva ora sancito dall'articolo 47 della Carta. Eppure, i due principi di equivalenza ed efficacia continuano a giocare un ruolo di rilievo nella giurisprudenza della Corte. Nonostante questa giurisprudenza ben ponderata, la Corte è stata spesso criticata per aver applicato questi principi in modo imprevedibile e con diversi livelli di intensità senza fornire spiegazioni apparenti. Cerchiamo quindi di investigare le luci e ombre della recente giurisprudenza della Corte, nel tentativo di distinguere tra ciò che è solo un'apparente incoerenza (Parte I) e ciò che può rivelare la verità sottostante su come questi due principi operano realmente nella giurisprudenza della Corte (Parte II).

L'un des principes fondamentaux de l'ordre constitutionnel de l'UE est qu'en l'absence de règles supranationales permettant de faire respecter le droit de l'UE et d'assurer la protection judiciaire des droits dérivés de l'UE, il est nécessaire de s'appuyer sur les systèmes juridiques nationaux et les règles de leurs mécanismes procéduraux. Cette position s'est traduite par deux déclinaisons : les principes jumeaux d'équivalence et d'effectivité. Ces principes trouvent leurs racines profondes dans les célèbres arrêts *Rewe-Zentralfinanz et Rewe-Zentral* et *Comet*. La formule de l'équivalence et de l'efficacité a été répétée à l'infini. Nous l'avons tous utilisée. À première vue, la jurisprudence semble immuable. Elle semble impliquer un critère stable et formel que nous connaissons depuis des décennies, mais, en réalité, l'utilisation et le significat de cette ancienne formule ont considérablement évolué au fil du temps. Il est clair et incontestable que ce principe d'autonomie procédurale, apparu très tôt, a progressivement évolué et s'est entremêlé avec de nombreux principes constitutionnels rigoureux du droit de l'Union européenne, tels que le principe de protection juridictionnelle effective désormais inscrit à l'article 47 de la Charte. Et pourtant, les principes jumeaux d'équivalence et d'efficacité demeurent bien vivants dans la jurisprudence de la Cour. Malgré cette pratique mûrement réfléchie, la Cour a souvent été critiquée pour avoir appliqué ces principes de manière imprévisible et avec des degrés d'intensité différents, sans explications apparentes. Essayons donc d'examiner les ombres et les lumières de la jurisprudence récente de la Cour, afin de distinguer ce qui n'est qu'une apparence d'incohérence (Partie I) de ce qui pourrait révéler la vérité sous-jacente sur la manière dont ces deux principes fonctionnent réellement dans la jurisprudence de la Cour (Partie II).