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Do Member States have procedural autonomy? - Questions and answers on the national framework for the enforcement of EU law

Introduction

The framework for the enforceability of EU law in the Member States can be examined through the pair of principles developed by the Court of Justice of the European Union (hereinafter: CJEU), the principles of equivalence and effectiveness. These principles represent both the minimum and the yardstick for the requirements of procedural rules, and the national legislative competence they limit is often referred to as the procedural autonomy of the Member States.[2] However, many in foreign[3] and domestic[4] legal literature are sceptical about this concept, questioning its existence and its dogmatic basis. For many decades, the CJEU did not even use this concept, it was only used in the references of the parties, in the observations of the Member States, the Commission and the Advocate General. Later on, this terminology appeared in the reasoning of judgments and is also frequently used in Hungarian court decisions and legal literature, but its content and meaning is, in my view, unclear. For this reason, I consider it appropriate to briefly review how procedural autonomy has become a concept accepted by the CJEU and what critical views have been expressed

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2 For a detailed analysis of the two principles, see Róbert Muzsalyi, The impact of EU law on civil procedure. Akadémia Publishing House, Budapest, 2020.

3 See. Bart Krans - Anna Nylund: Procedural Autonomy Across Europe, Intersentia, Cambridge, 2020, Michal Bobek: Why There is No Principle of "Procedural Autonomy" of the Member States? Bruno de Witte - Hans Micklitz: *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Antwerp, 2011. ill. Diana-Urania Galetta: *Procedural Autonomy of EU Member States: Paradise Lost?* Springer, Heidelberg-Berlin, 2010. 7-32., Constantin N. Kakouris: Do the Member States Possess Judicial Procedural "Autonomy"? *Common Market Law Review*, 1997/6. 1405-1406.

4 Zoltán Nemessányi: The impact of the European regulation of unfair contract terms on the principles of national civil procedural law, Scienta Iuris. 2012/1-2. 38., Katalin Gombos: Harmonisation of Procedural Law vs. Procedural Autonomy of the Member States, *Studia Iuridica Cassoviensia*, 2018/6. [hereinafter: Gombos (2018)] 26., and András Osztovits: The most important theoretical and practical issues of preliminary ruling procedure. KJK-Kerszöv, Budapest, 2005 [hereinafter: Osztovits (2005)] 37.

against it. In the first part of the paper, I will examine the doctrinal background to procedural autonomy: its framework at the level of primary EU law sources, and the procedural provisions at the level of regulations and directives. In the second part of the paper, I will analyse the jurisprudence of the CJEU in relation to the concept of procedural autonomy, in a separate chapter I will show the diversity of the jurisprudential understanding of this concept, and finally I will critically point out inconsistencies and misinterpretations in the use of the term.

1. The dogmatic background to procedural autonomy

According to the first sentence of Article 5(1) of the Treaty on European Union (TEU), "[t]he Union's competences shall be delimited in accordance with the principle of conferral". Article 5(2) states, on the one hand, that "[in accordance with that principle] the Union shall act only within the limits of the powers conferred by the Treaties on the Member States to achieve the objectives set out in the Treaties" and, on the other hand, that "any powers not conferred on the Union by the Treaties shall remain vested in the Member States".

Article 81(2)*(f) of* the Treaty on the Functioning of the European Union (TFEU) confers legislative powers on the European Parliament and the Council, in particular where necessary for the proper functioning of the internal market, to remove obstacles to the smooth functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. Article 81(2), however, only allows legislation for the purposes set out in paragraph 1, namely in the area of judicial cooperation in civil matters having cross-border implications. Within the framework of such cooperation, measures aimed at approximating the laws and regulations of the Member States may be adopted.

Articles 114 and 115 TFEU, which provide the general basis for harmonisation, give the EU legislator the power to approximate laws, regulations and administrative provisions of the Member States which have as their object or direct effect the establishment or functioning of the internal market. [5]

The European Union therefore has no legislative competence in the field of national procedural law. This statement is shared by the majority of the legal literature,[6] but there is more controversy as to whether it also means that the Member States have

5 The subject matter of the two articles is the same, but there is a procedural difference: Article 114 gives the European Parliament the right of co-decision, as opposed to Article 115, according to which it only has a consultative role. The latter explicitly allows only for the adoption of directives. Réka Somssich, Article 115 TFEU. In András Osztovits (ed.) *Commentary on the European Union and the Treaties on the Functioning of the European Union*. Osztrosis (in Hungarian).

6 See, for example, Nemessányi i.p. 40, Osztovits (2005) i.p. 162, Galetta i.p. 9-10, Bobek (2011) i.p. 167-168, Gombos (2018) i.p. 26.

'*procedural autonomy*'. According to *Osztovits,* the fact that the European Union currently has legislative competence only with regard to cases with a cross-border element in the Member States, which "(...) means that the EC will not be in a position for a long time to develop rules affecting the whole of national procedural law, i.e. Member States have a *high degree of autonomy* in developing their own enforcement models" (*emphasis* mine). *Galetta's* analysis of the Treaties also leads her to the conclusion that neither the general nor the specific harmonisation provisions provide a basis for approximation of the procedural laws of the Member States. On the basis of these Treaty provisions, it has been argued in the legal literature that, since the EU has no legislative competence, the Member States have procedural autonomy in the development of procedural rules. In my view, this concept is not very fortunate, as it opens the door to misunderstandings. In the early stages of the case law of the CJEU, in all cases where the enforceability of EU law by Member States was raised, the starting point for its reasoning was always the principle of loyal cooperation. This is a principle enshrined in Article 4(3) TEU, whereby Member States have a duty to assist, to act and to tolerate. The obligation to comply with the principle of loyal cooperation extends to all bodies of the Member States, including the courts, in the exercise of their judicial functions.

2. Procedural provisions in secondary EU law

As the CJEU is known to say, "In the absence of relevant EU legislation, it is for each Member State's internal legal order to determine the competent courts and to lay down the procedural rules for judicial remedies to ensure that individuals can rely on the protection of rights derived from EU law."[7] The fact that the CJEU usually begins its reasoning with the reference to "*in the absence of relevant EU legislation*" also points out that there may be procedural provisions at the level of secondary sources of EU law and that national rules are to be applied in the explicit absence of such provisions.[8] The framework of procedural autonomy should therefore be examined not only in the light of the above rules on jurisdiction, but also in the light of the extent of procedural provisions in EU law at the level of regulations or directives.

2.1. Orders

The policy areas covered by the area of freedom, security and justice, for example, contain a significant amount of procedural law provisions at the level of regulations.

7 See, for example, ÖBB Personenverkehr judgment, C417/13, EU:C:2015:38, paragraph 61, and Fiamingo and Others judgment, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 63, and the case law cited therein.

8 I will discuss this reference to CJEU judgments in more detail later.

Among these, regulations to facilitate judicial cooperation between Member States in civil proceedings are significant. EU legislation in this area is explicitly aimed at facilitating access to justice for EU citizens in other Member States in cross-border disputes, in line with the Treaty objective.[9][10]

Generally speaking, these regulations in most cases only provide for the right to an effective judicial remedy, or only set out requirements for the exercise of the right in principle, leaving the details to the Member States. An example is the EU General Data Protection Regulation,[11] which provides in general terms for the right to an effective judicial remedy [(141) Recital 78, Articles 78-79], which in Hungary may mean an administrative procedure (challenging a decision of the NAIH in court) or a separate action on the basis of a claim by the complainant under the law of personality.[12] Interestingly, as a separate legal remedy, the Data Protection Regulation gives the data subject the right to bring an action against the supervisory authority, inter alia, if it fails to inform the data subject within three months of the procedural developments concerning the complaint or of the outcome of the complaint [Article 78(2)]. In addition to the above[13], the Data Protection Regulation also contains,

9 In the course of the integration process, regulatory legislation in the field of civil judicial cooperation has accelerated under the mandate of the Amsterdam Treaty. One of the most important innovations of the Amsterdam Treaty was the transfer of the task of judicial and legal cooperation in civil matters from the third pillar to the first pillar. Article 65 of the EC Treaty set two limits to judicial cooperation in civil matters: the scope of EU rules must cover only civil matters having cross-border implications and must be confined to the proper functioning of the internal market. Article 81 TFEU now only contains the first limitation and, in paragraph 2, only refers to the need to adopt Union rules in order to achieve the objectives set out therein, in particular where this is necessary for the proper functioning of the internal market. See András Osztovits, Limits to EU competence. In András Osztovits (ed.) *Explanation of the Treaties on the European Union and on the Functioning of the European Union. Otavon, OTP and the functioning of the Treaty and the Treaties of the European Union.*

10 It does not therefore aim to "unify the laws of the Member States across the board", nor to create a "European civil procedural code". See Viktória Harsági. Osiris Publishing House, Budapest, 2006, 38.

11 Regulation (EU) 2016/678 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 Regulation (EC) No 95/46/EC (hereinafter the "Data Protection Regulation").

12 Andrea Klára Soós: The procedure of the courts, control of judicial data processing operations. In András Jóri (ed.). HVG-ORAC, Budapest, 2018, 437-448.

13 See Article 81(1) to (2) of the Data Protection Regulation.

for example, procedural rules on jurisdiction[14] or representation,[15] grounds for suspension of proceedings and cooperation between courts in parallel proceedings.

Another example in the field of immigration and asylum policy is the Dublin III Regulation,[16] which contains quite detailed procedural rules on appeals against transfer decisions. In addition to stating the requirement of judicial protection [Article 27(1)], it provides, for example, for the need to provide free legal assistance [in this respect, it specifically lays down the requirement of equivalence with requests from nationals of the country concerned, see Article 27(6)] and also expands the content of this to include the preparation of the necessary procedural documents and representation before the courts.

Because of their direct applicability, regulations do not require a specific legislative act to become part of national law. Legislating by means of a regulation creates uniform procedures in the Member States, so that the task of the national legislator is "merely" to create a legal environment for the proper application of the regulation, which may involve the creation of detailed implementing rules and additional rules. Thus, even in the case of a relevant regulation, EU and national rules must be applied in parallel, with national legal provisions and judicial practice necessarily supplementing the issues not covered by the regulation. An example of this is regulations governing legal relationships with a cross-border element. The Hungarian application of the Insolvency Regulation[17], for example, is necessarily complemented by the relevant provisions of, inter alia, the Cstv.[18] and the Pp.[19] [20] Even if the regulation does not contain rules on the enforcement of the right in question, the relevant procedural rules of the Member States must necessarily be interpreted

14 According to recital 145 of the Data Protection Regulation, proceedings may be brought, at the choice of the data subject, either in the courts of the Member State where the controller or processor is established or in the courts of the Member State where the data subject is domiciled. See Péter Buzás, Remedies, liability and sanctions in the GDPR. In Péter Buzás - Attila Péterfalvi - Balász Révész (eds.). Wolters Kluwer, Budapest, 2018, 352-353.

15 In this context, the Data Protection Regulation stipulates that non-profit (rights protection) bodies, organisations and associations may also represent data subjects in damages actions, see Article 80.

16 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

17 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

18 Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings

19 Act CXXX of 2016 on the Code of Civil Procedure

20 See in this context: Andrea Csőke - Nicoleta Mirela Nastasie - Róbert Muzsalyi: Commitment: mystery or reality? How does the institution of commitment created by Regulation 2015/848/EU work in Romania and Hungary? *Economy and Law*, 2020/1. 23-28.

in accordance with EU law. In fulfilling this obligation, however, the national court is restricting the procedural autonomy of the Member States.[21]

2.2. The guidelines

Directive legislation has a specific role to play in this area, as it is an important instrument for approximating legislation, including in the field of civil procedural law, but it is not intended to supersede or replace it. In this respect, *Krans* notes that EU directives may contain procedural provisions, even if their regulatory nature is of a substantive nature. In his view, a closer look at the EU directives reveals that the number of procedural rules they cover is far from negligible.[22] The most typical areas are the directives on consumer protection, competition and the enforcement of intellectual property rights. As a first example, the Competition Damages Directive,[23] which, among its many procedural provisions (see for example the rules on the discovery of evidence in Chapter II of the Directive), specifically mentions the principles of effectiveness and equivalence as limits to the rules and procedures of Member States for the enforcement of damages claims. The Directive thus sees the procedural rules of the Member States as a complementary instrument for those issues that it does not specify for the enforcement of damages and confirms the proper enforcement of EU law in this area by explicitly setting out these two principles (Article 4).[24] In addition to the enforcement of damages claims under competition law, the EU Directive[25] on the coordination of procedures for review procedures concerning the award of public contracts also contains a number of procedural provisions, laying down the principle of equivalence [Article 1(2)] and the principle of effectiveness [Article 1(1)]. In recital 34 of its preamble, the Directive states that the need for regulation is based on the fact that the improvement of the effectiveness of review

21 See in this respect Folkard Joshua, The effect of Rome II on national procedural law, *Cambridge Law Journal*, 2015/4, 37. Another regulation containing a relatively large number of procedural rules is Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 establishing the Union Customs Code.

22 Bart Krans: EU Law and National Civil Procedure Law: An Invisible Pillar. *European Review of Private Law*, 2015/4. 572.

23 Directive 2014/104/EU of the European Parliament and of the Council on certain rules concerning actions for damages under national law for breach of the competition laws of the Member States and of the European Union.

24 Another example of an EU directive with relatively many procedural provisions is Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

25 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

procedures for the award of public contracts cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community.

The Directive[26] on the enforcement of intellectual property rights requires that the procedures and remedies regulated by the Member States must not be unduly complicated, costly or result in unreasonable time limits or unjustified delays [Article 3]. In addition to these general requirements, the Directive regulates in great detail the evidentiary procedure to be followed before the court (Section 2), what provisional and precautionary measures may be taken (Section 4), what the court may decide (Article 11), and what criteria must be taken into account when determining the amount of damages (Article 13). In terms of its scope, the procedures provided for in the Directive apply not only to infringements of Community law but also to any infringement of an intellectual property right under the national law of the Member State concerned. The Directive is therefore not limited to the settlement of disputes with an EU or cross-border element, but also applies to infringements of intellectual property rights under purely national law. Some argue that these Directives are evidence that the EU can also achieve great results in approximating Member States' procedural law through its so-called sectoral legislative powers. Obviously, this kind of harmonisation is fragmented, and Member States have a great deal of leeway in transposing the Directive, but there is no doubt that the result is that, for example, provisional measures can be sought under uniform procedural rules in cases of infringement of intellectual property rights and that all national courts must consider the same criteria when assessing damages claims.[27]

From the above brief overview, it is clear that at the level of secondary EU law, although territory-specific, procedural law is sometimes quite extensive and diverse. These provisions always prevail over the application of national rules when pursuing claims based on EU law.

3. The concept of procedural autonomy in the legal literature

It is rather difficult to pinpoint when the term procedural autonomy started to be used in the literature. One cornerstone could be the *Rewe/Comet* judgments, since it is clearly identifiable that studies published in the 1990s[28]and 2000s[29] already referred

26 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

27 Magdalena Tulibacka: Europeanization of Civil Procedures: In Search of a Coherent Approach, *Common Market Law Review*, 2009/5. 1546., Anna Wallermann: The Impact of EU Law on Civil Procedure, *Tidschrijt voor Civiele Rechtspieging*, 2013/3. 2.

28 Ari Afilalo, Towards a "Common Law" of Europe: Effective Judicial Protection, National Procedural Autonomy, and Standing to Litigate Diffuse Interests in the European Union, *Suffolk Transnational Law Review*, 1999/2. 358-359., Prechal (1998) op. cit. 681-706.

29 Van Gerven, Walter op. cit. 501-536.

to the principle of "*procedural autonomy*" *as formulated in the Rewe judgment.* The first report that can be found comes from a joint conference of the Europa Institute of Leiden University and the British Institute of International and Comparative Law, held on 28 May 1980. In his lecture, *Professor G. P. R. Vandersanden*[30] identified the principle of procedural autonomy as a possible limit to the direct applicability of EU law, as developed by the CJEU in the *Rewe/Comet* decision and then refined somewhat in the *Salumni* and *Denkavit* judgments.

The literature on "*procedural autonomy*" can be divided into two groups: one group considers that Member States have no procedural autonomy at all, while others - albeit with reservations and with a different meaning than the strict meaning of the term - recognise the existence of the concept.

One of the strong representatives of the first group was *Kakouris*[31], who was firmly of the view that Member States do not have procedural autonomy. He also draws attention to the fact that it is no coincidence that the judgments of the CJEU begin with *"in the absence of Community legislation*";[32] or, in other words, but with a similar meaning, *"in the absence of relevant Community provisions*";[33] and later "*where the (particular) area is not governed by Community law".* Furthermore, it is worth noting that in recent decisions, the CJEU has already used the words "*in the absence of harmonisation*"[34] or "*in the absence of detailed procedural rules for the enforcement of a right provided for in EU law".*[35] These formulations, according to *Kakouris*, cannot be interpreted as meaning that, until such time as legislative competence in the area of procedural law is established in the Treaty. On the contrary, the expression means that the European Union has the power to establish its own procedural system, but until it does so, national law must be applied to the enforcement of claims based on EU law in the absence of a Community rule. When a national court applies EU law, it is acting as an EU body, as an EU court, and therefore, in its view, the European Union has the power to lay down the procedural rules necessary to fulfil this function. The same conclusion is reached by *Gombos*,[36] who argues that the wording of the judgments implies that the Member States do not have exclusive competence in the area of civil procedural law.

30 Professor of Law at the Brussels Free University. Conference Report [notes] *Common Market Law Review*, 1981/1. 99.

31 He was a judge at the CJEU from 1983 to 1997. Kakouris i.m. 1389-1412.

32 Rewe judgment, C-33/76, point 5, Comet judgment C-45/76, point 13,

33 Brasserie du pêcheur SA judgment in Case C-46/93, paragraphs 83 and 90.

34 See, for example, Asociación de Consumidores Independientes de Castilla y León, judgment C-413/12, paragraph 30.

35 Rudigier judgment C-518/17, ECLI:EU:C:2018:757, paragraph 61.

36 Katalin GOMBOS, Harmonisation of Procedural Law vs. Procedural Autonomy of the Member States, Studia Iuridica Cassoviensia, 2018/6 [hereinafter: GOMBOS (2018)] 26.

In the light of this, national procedural law applies where there is no relevant EU procedural rule, so it plays a complementary and subordinate role. As a complementary rule, it applies only to the extent that it is compatible with the objectives of the uniform and effective application of Union law and to the extent that it guarantees the rights of the parties deriving from the direct effect of Union law. Where Member States' procedural provisions do not ensure the proper enforcement and application of Union law, such rules should not be applied.[37]

Secondly, *Kakouris* also points out that the CJEU itself never uses this concept (which was true in 1997, when he wrote his study, since the CJEU started using it only after the *Wells* judgment[38] in 2002). Finally, *Kakouris* explains that the Member States can at most speak of institutional autonomy, since it is clear that the structure of the judiciary, the rules of organisation and jurisdiction of the courts remain part of the sovereignty of the Member States. *Osztovits* agrees that the term "*Member State procedural autonomy*" is incorrect and imprecise, and that the term "*Member State institutional autonomy*" is a more appropriate and more appropriate term to reflect the current structure of the EU.[39]

Other authors - sharing *Kakouris*' view - point out that if by this concept we mean that Member States are "free" from all EU legal restrictions and ECJ scrutiny in the field of procedural law, then there can be no question of autonomy in this area.[40] If '*autonomy*' is to be understood literally, it should mean a freedom in the area of procedural law which would allow the rules to be drawn up without any control. However, there is no such area, since procedural law is not a '*domaine reservé*' in the current EU constitutional set-up, in which EU law cannot intervene.

Compared to the above, there is also a more moderate group that tries to interpret the concept of procedural autonomy - once the CJEU has adopted it in its terminology - as having a content that can be placed in the division of competences between the Member States and the European Union.

In *Prechal*'s[41] approach, the problem lies mainly in the definition of the term. If procedural autonomy is seen as a manifestation of national sovereignty, he can agree to a large extent with *Kakouris*' position. In his view, however, procedural autonomy can also be interpreted as a shorthand for sovereignty, so that if (and to the extent that) there is no Community legislation, Community law has little choice but to rely on national legislation.

37 Kakouris i. m. 1390., Van Gerven op. cit. 502.

38 Wells judgment C-201/02, ECLI:EU:C:2004:12, paragraphs 65, 67 and 70.

39 Osztovits (2005) op. cit. 37.

40 Bobek op. cit. 318.

41 Since 2010, he is currently a judge at the CJEU. Sacha Prechal: Community Law in National Courts. *Common Market Law Review*, 1998/3. 681-706.

W. Van Gerven[42] also sees the need to abandon the notion of procedural autonomy, and believes that instead *the procedural competence of* the Member States can be discussed. For as long as there is no EU legal provision to this effect, or as long as there is no direct EU legal competence, the Member States will remain primarily responsible for defining procedural rules. The same inaccuracy is also pointed out by *Trstenjak* in an Opinion of the Advocate General. In his view, the principle of 'procedural *autonomy*' does not confer real autonomy but rather a degree of discretion on the Member States in relation to procedural rules deriving from EU law for rights the judicial enforcement of which is not regulated in detail by EU law.[43] Trstenjak also pointed out in his submission that the "*procedural* autonomy" of the Member States in the case law of the CJEU was not limited to procedural issues, but also extended in part to substantive rules relating to rights derived from EU law. Thus, as *Nemessányi* and *Gombos* point out, the concept of procedural rules must not be understood in terms of the definition known in national law, but must be given an autonomous European content.[44]

In his opinion, Advocate General *Trstenjak* explains, on the same basis, that national procedural law is not, in principle, subject to harmonisation, nor does it fall within the general legislative competence of the EU, and that accordingly EU law recognises the autonomy of national procedural law.[45]

In his monograph on the subject, *Galetta*[46] completely contradicts *Kakouris*' position. In his view, the literal interpretation of the CJEU's wording, "in the absence of Community legislation", does not imply that the EU has competence in the field of procedural law. Even after the entry into force of the Lisbon Treaty, no legal basis can be found that would give the EU competence in procedural matters. In *Galetta*'s view, the procedural autonomy of the Member States is due to the fact that the European Union has no competence in the area of procedural law. Nevertheless, the principle of *effet utile* and the principle of direct effect of EU law allow the EU legislator to have recourse to national procedural law in order to achieve its objectives.

According to *Bobek*, the application of this concept is not very fortunate, as it implies that Member States have a choice in the implementation of EU law, which is factually untrue. Member States do not have a free margin of manoeuvre when

42 From 1988 to 1994 he was Advocate General of the CJEU. Van Gerven, Walter op. cit. 501-536.

43 While the notion of "*autonomy*" seems to refer to the broad discretion that Member States have in setting procedural rules, such an absolute discretion does not exist according to the case law of the CJEU. Advocate General Trstenjak's Opinion in Littlewoods, C-591/10, ECLI:EU:C:2012:9, paragraphs 23-26.

44 Nemessányi ibid. 3, and Gombos (2018) ibid. 27.

45 Opinion of Advocate General Trstenjak in Case C-137/08, ECLI:EU:C:2010:401, paragraph 65.

46 Galetta op. cit. 10.

implementing EU law. EU legislation in the area of procedural law is purpose-bound and limited and territory-specific. By contrast, the CJEU's interpretation of the law is unlimited: it can rule on any procedural rule of a Member State that affects the implementation of EU law if it is referred to it for a preliminary ruling. All stages of the litigation procedure and all legal institutions can be examined for equivalence and compliance with the requirements of effectiveness: the right of access to the courts, costs, legal representation, the validity of decisions, etc. From this point of view, it is quite wrong to speak of procedural autonomy for Member States, especially if by autonomy we mean the ability to act and take decisions freely and without control.[47]

In the Hungarian legal literature, too, the term "procedural autonomy" is often used without necessarily consciously identifying its content.[48] In his critical approach, *Osztovits* agrees with Kakouris' position and considers it an accurate use of the term to speak of institutional autonomy in this context. At the same time, he notes that the misuse of the term does not lead to erroneous legal conclusions, such as the *acte clair doctrine that* has taken root in Hungarian legal literature. According to *Gombos*, national procedural autonomy is itself an autonomous concept, since it includes substantive rules in addition to classical procedural rules, and he stresses that it "*only applies in conjunction with the principles and limits of EU law.*[49]"

4. The concept of "*procedural autonomy*" in the case law of the CJEU

Generally speaking, until the early 2000s, the concept of "*national procedural autonomy*" was not included in the legal reasoning of the Court in CJEU decisions. In the course of the analysis, I have examined several linguistic versions of the CJEU's decisions: the English equivalent of "*procedural autonomy*", the German equivalent of "*Verfahrensautonomie*", or the French equivalent of "*du l'autonomie procédurale des* États *membres*" have not been used in the language of CJEU. Even in the landmark judgments which, according to some authors[50], have fundamentally influenced the perception of the procedural autonomy of the Member States in the application of EU law, the CJEU has not used this term. In this context, one can mention the

47 Michal Bobek: The Effect of EU Law in the National Legal Systems, in Cahterine Barnard - Steve Peers: *European Union Law*, Oxford University Press, 2017. 169.

48 See e.g. Katalin Gombos: Levels and stages of judicial remedies under EU law. *European Law*, 2011/5. 35-45., Zsófia Varga. *European Law*, 2016/6. 1-18., Mátyás Császár: *European Law*, 2014/2, 17-21, Mátyás Császár: The impact of EU sources of law on the general part of private international law. *Hungarian Law*, 2013/11. 669-679.

49 Katalin Gombos: Member State procedural autonomy - a principle with limits and question marks. *European Mirror*, 2019/3. 35-50.

50 Michael Dougan: *National Remedies Before the Court of Justice*, Hart, Oxford, 2004, 227-229, Prechal op. cit. 681-706.

Rewe/Comet judgments[51], or the later *Emmott*[52], *Factortame* and *van Schijndel*[53] cases, which are known from a much more active and decisive period in terms of the introduction of the CJEU into national procedural law. Until the early 2000s, the concept of '*procedural autonomy*' was mainly known in the legal literature, used and coined by the literature analysing the CJEU's judgments on procedural issues, and much less present in the language of the Court.

Of particular interest is the use of the term "*procedural autonomy*" in the question posed by the national court that initiated the preliminary ruling procedure, while the CJEU continued to refrain from using it in its reply.[54] Subsequently, it has been regularly used in the observations[55] of the Commission and the parties, and increasingly in the Advocate General's Opinions.[56]

For the first time, the CJEU used the concept of procedural autonomy in the *Wells*[57] case, essentially linking it to the previously known and regularly cited principles of equivalence and effectiveness in procedural matters.

The significance of the *Wells* case was much less procedural in nature, but more important in terms of the collateral, horizontal legal effect of EU directives. There is a type of (vertical) litigation against the state, public bodies, where a decision potentially based on an EU directive may have an impact on another private party not involved in the dispute. In this form of vertical litigation, a private party challenges a public measure which at the same time confers a right on a third private party not involved in the proceedings.[58] In the *Wells* case, the plaintiff challenged a public authority's decision to allow mining activities without an environmental impact assessment. According to the CJEU judgment, Directive 85/337/EEC, which requires such an impact assessment, can be directly invoked against the State, even though the impact assessment may lead to the cessation of mining activities, thereby prejudicing other private parties not party to the proceedings who have acquired the right to carry out mining activities.

51 Rewe judgment, C-33/76, ECLI:EU:C:1976:188.

52 Emmott judgment, C-208/90, ECLI:EU:C:1991:333.

53 Van Schijndel judgment, C-430/93, ECLI:EU:C:1995:441.

54 Judgment in Case C-28/05 G.J. Dokter and Others, ECLI:EU:C:2006:408, judgment in Joined Cases C-222/05 and C-225/05 Van der Weerd and Others, ECLI:EU:C:2006:586, paragraph 28.

55 See, for example, European Commission v. Slovakia, judgment, C-507/08, ECLI:EU:C:2010:802, points 30 and 38, Willy Kempter, judgment, C-2/06, ECLI:EU:C:2008:78, point 53, European Commission v. Italy, judgment, C-423/08, ECLI:EU:C:2010:347, point 30, Tele2 Polska, judgment, C-375/09, ECLI:EU:C:2011:270, point 16.

56 Opinion of Advocate General Saggio in Eco Swiss, C-126/97, ECLI:EU:C:1999:97, Opinion of Advocate General Mischo in Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein, C-427/97, ECLI:EU:C:1999:253, Opinion of Advocate General Léger in Shirley Preston and Others, C-78/98, ECLI:EU:C:1999:410.

57 Wells judgment, C-201/02, ECLI:EU:C:2004:12, paragraph 70.

58 Blutman op. cit. 229-230.

Subsequently, the CJEU has increasingly stated in its judgments that "*in accordance with the principle of procedural autonomy*" it is for the domestic legal order of each Member State to determine the procedural rules, provided that they respect the principles of equivalence and effectiveness, and has in fact endorsed this definition. [59]

5. Conclusions on the concept of procedural autonomy

Procedural autonomy is not "procedural", as EU procedural law covers a much wider scope than what is considered procedural under Hungarian procedural doctrine. Many provisions which are substantive in nature under national law are procedural rules for the purposes of EU law. The CJEU classifies as procedural all legal provisions which are intended to enforce substantive law in the broad sense, which determine the conditions for doing so: before which forum, within what time limit, who is entitled to bring proceedings, and anything which limits or excludes the enforcement of claims.

The choice by many Member States to use the unfair contract term in consumer contracts as a sanction for voidness should be considered as a substantive provision from a national perspective, but as a procedural provision from an EU perspective.[60] The conditions for the enforcement of EU law claims can be contained and limited not only by procedural but also by substantive rules. A good example is that in damages actions, the obligation to remedy or prevent damage may exclude or limit the enforcement of claims. In the same group are cases where the CJEU has examined the causal link or, for example, the victim's contribution on the basis of the principles of equivalence and effectiveness.[61] In some jurisdictions limitation is considered a substantive rule, in others a procedural rule, but from the point of view of EU law it excludes the enforcement of a substantive claim and is therefore always considered procedural by the CJEU.[62]

59 From the subsequent case law, see for example, Adeneler and Others v ELOG, C-212/04, ECLI:EU:C:2006:443, paragraph 95, ENEFI, C-212/15, ECLI:EU:C:2016:841, paragraph 30, Nike, C-310/14, ECLI:EU:C:2015:690, paragraph 28, Kušionová, C-34/13, ECLI:EU:C:2014:2189, paragraph 50.

60 Article 6 of Directive 93/13/EEC provides that Member States shall provide that unfair terms used by a seller or supplier in a consumer contract shall not be binding on the consumer under the provisions of their national law (...) From the EU perspective, nullity is therefore a procedural rule. Nemessányi ibid. 40. The same statement has been made in Hungarian case law: '*From the point of view of EU law, the nullity of unfair contract terms is also procedural in nature.*' See, for example, Budapest-Capital Regional Court of Appeal (in Hungarian: Fővárosi Ítélőtábla) Order No 5.Pf.22.086/2013/5, Order No 5.Pf.22.036/2013/3.

61 Brasserie du pêcheur and Factortame judgment, C-46/93 and C-48/93, ECLI:EU:C:1996:79, 65, paragraphs 83-84. For a further list of provisions classified as procedural law in the field of damages, see Mark Brealey - Mark Hoskins: *Remedies in EC Law*. Sweet & Maxwell, London, 1998. 108.

62 Comet judgment, C-45/76, paragraph 18, Emmott judgment C-208/90, ECLI:EU:C:1991:333.

Secondly, it can also be observed that the CJEU is always concerned with two areas of procedural autonomy. It is for the internal legal order of each Member State to 1) designate the courts having jurisdiction and 2) lay down the procedural rules for legal entities to bring actions to ensure the protection of rights derived from Community law.

The first part of the national task is the designation of competent courts, usually referred to as *institutional autonomy.* In this respect, all the legal literature agrees that it is entirely for the Member States to determine the courts and their powers, their composition and the conditions for the appointment of judges. This aspect of autonomy has therefore remained intact.

When implementing EU law, Member States do not have the freedom to set their own procedural rules. This can be supported by several approaches. Firstly, it is important to refer to the EU procedural rules that can be found at the level of regulations and directives, as illustrated in Chapter 2. These rules always prevail over national rules, and the national legislator cannot lay down contradictory or counterproductive procedures in this area.

Secondly, if the question is whether the CJEU, in its interpretative function, can give a judgment that requires a Member State's procedural rule to be disregarded or interpreted in accordance with EU law, or perhaps provide for a procedure that has not yet been provided for in that jurisdiction, the answer is yes. Although the EU legislator has limited competence in relation to procedural law, this is not the case for the CJEU. As the institution responsible for the uniform interpretation of EU law in the European Union, which has direct contact with all national courts through the preliminary ruling procedure, it has a duty to defend and promote the enforcement of EU law and to provide the necessary guidance to the requesting court. The requirement of equivalence and effectiveness implicitly implies that the procedural provisions of the national legal systems are not exempt from review by the CJEU.

Thirdly, if autonomy is understood as the free, uninfluenced right to decide to do something - in our case, to create and apply procedural rules - and if it is made conditional on compliance with the principles of equivalence and effectiveness, then autonomy is impracticable. Procedural autonomy is affected not only by decisions which declare a Member State's procedural rule to be inequivalent or to make it impossible to enforce EU law, but also by decisions which merely examine it.

But, as I have pointed out, the Member States do have institutional autonomy, by which I mean the establishment of the judicial system, the designation of the competent courts. It is not institutional, but this autonomy also includes the fundamental principles that define the legal system of the Member States, such as legal certainty and the principle of equal treatment in court. These are also protected at EU level, and the CJEU does not require that EU law be applied in violation of these principles.

'*Procedural autonomy of Member States*' is a misleading term to describe the impact EU law can have on national procedural law. The requirement of equivalence and effectiveness implicitly implies that the procedural provisions of Member States' legal systems are not immune from review by the CJEU. Among the divergent views in the literature, I agree most with *Bobek*'s approach that Member States do not have a free margin of manoeuvre in the implementation of EU law. EU legislation in the area of procedural law is purpose-bound and limited, as well as territory-specific. By contrast, the CJEU's interpretation of the law is unlimited: it can take a position on any procedural rule of a Member State that affects the implementation of EU law if it is referred to it for a preliminary ruling. All stages of the litigation procedure and all legal instruments may be examined for equivalence and conformity with the requirements of effectiveness. The Member States have procedural autonomy as long as it is not challenged by one of their judges before the CJEU.