Towards an EU law doctrine on the exercise of discretion in national courts? The Member States' self-imposed limits on national procedural autonomy

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Published in Common market law review (ISSN 0165-0750), volume 53, 2016, issue 2, available online:
https://www.kluwerlawonline.com/abstract.php?area=Journals&id=COLA2016033

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Abstract
While it is widely recognised that national procedural law must satisfy the minimum requirements of effectiveness and equivalence, the way in which procedural law is regulated is generally considered a matter of Member State autonomy. However, this article demonstrates that the ECJ tends to award national legislators greater autonomy in procedural matters, than it does national courts. The effect is that the framing of national rules, such as the choice between mandatory regulation and conferral of discretion, matters in EU law. Relying on the principle of sincere cooperation, the Court has on several occasions held that the existence of a discretion or a power on the part of the national court entails a duty to exercise that discretion or power in the way most conducive to the effective enforcement of EU law, even though the rule providing for the discretion is not in itself contrary to EU law. Discretion in national law is thereby used to enhance the impact of EU law. By introducing vague language and increasing discretionary elements in procedural rules, national legislators may thus unwittingly strengthen the impact of EU law in the Member States.

1 Introduction

The scholarly writing on the principle of national procedural autonomy has, especially and perhaps ironically during the decade that the term has been favoured by the Court of Justice,[1] gradually come to resemble Monty Python's famous parrot sketch. National procedural autonomy has purportedly passed on, ceased to be, kicked the bucket and gone to meet its maker;[2] the latter being a particularly appropriate euphemism as the result of said demise would presumably be the transformation of the current, shared competence into one exercised exclusively by the Union and, in the continued absence of legislative harmonisation, by the Court itself.

This article will join the choir of commentators pointing to the limits of national autonomy in procedural law. It will, however, strive to do so in a somewhat different voice. It sets out to explore whether it matters, from an EU law perspective, *how* procedural law is regulated in the Member States. In this it shifts the focus from ECJ to Member State activity, asking if also national measures may affect the balance between Union and Member State competence in the field of procedures and remedies.[3] More specifically, the article will investigate the stance taken by the Court of Justice in cases where decision-making in procedural matters has been left to the discretion of the courts, to be exercised on a case-by-case basis. This will be compared with the position taken in instances of more elaborate rule-making on the part of the national legislator, where national courts function more as Montesquieuian *bouches de la loi*. The examination will show that while the application of the principles of effectiveness and

1 The Court first used the term in its own reasoning in case C-201/02, *Wells*, EU:C:2004:12, paras. 65 and 67.
2 To give but a few examples, see Bobek, "Why There is No Principle of "Procedural Autonomy" of the Member States" in Micklitz and de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012), 305-322; Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer 2010); Haapaniemi, "Procedural Autonomy: A Misnomer?" in Ervo, Gräns, and Jokela (eds.), *Europeanization of Procedural Law and the New Challenges to Fair Trial* (Europa Law Publishing, 2009), 87-119.
3 Thereby offering a perspective contrasting to that provided i.a. by Lenaerts, "Federalism and the Rule of Law: Perspectives from the European Court of Justice", 33 Fordham Int'l LJ (2009/10), 1338-1387, who discusses "the way in which *EU law* imposes negative limits upon the powers retained by the Member States" (p. 1339, emphasis added).

equivalence does not hinge on the way in which a national rule is constructed, the application of the principle of sincere cooperation does. Thereby it provides another avenue for EU law impact on national legal systems.

Understanding the principle of sincere cooperation as a limitation of Member State procedural autonomy alongside the principles of effectiveness and equivalence challenges an understanding of EU law as being solely concerned with the *level* of legal protection ensured by national procedures. This article will demonstrate that the implications of EU law are more far-reaching. It will, more precisely, argue that the use of a certain legislative technique, *discretionary rules,* where the decisive power over procedure is transferred from the legislator to the courts, has provided the Court of Justice with an opportunity to enhance the influence of EU law over national procedure beyond what follows from the *Rewe/Comet* criteria.[4] It will do so based on a renewed reading of three strands of case law of the Court of Justice, where the emphasis will be not on the content of national procedural law or the level of judicial protection it offers, but on the *form* in which it is enacted.

This reading will allow a new pattern to emerge. We will see that the Court has imposed requirements on Member State procedure that go beyond what the minimum requirements of judicial protection would demand, and that in doing so it effectively introduces a new or at least hitherto unacknowledged dimension of EU law procedural influence, covering not only *what* protection national procedural law affords the claimant of an EU law right, but also *how* and *by whom* it is afforded.

The remainder of the article will be structured as follows. Part 2 introduces the principle of sincere cooperation as a limitation on national procedural autonomy and discusses its relation to other such limitations, such as the principles of effectiveness, equivalence and effective judicial protection. Part 3 discusses the legislative choice between the construction of detailed, mandatory rules of procedure and the alternative consisting in leaving procedural choices to the discretion of the courts. It also outlines different modes of discretionary regulation and the different ways in which they are likely to be affected by EU law. Part 4 revisits the judgments in *van Schijndel, Kühne & Heitz* and *Uniplex*,[5] focusing on the discretionary nature of the national rules applicable to the situations before the national courts. These judgments are then considered, in part 5, as the embryo of an EU law doctrine on the exercise of judicial discretion in procedural matters before national courts, and the possible effects of that case law are analysed. It is argued that although the implications for the exercise of discretion are probably unintended, they are nevertheless real and liable to affect the drafting of procedural rules in the Member States, and in the extension the uniformity and effectiveness of EU law. Part 6 summarises the conclusions, points to some possible further implications, and calls for a more conscious approach to the exercise of discretion in national courts.

2 Sincere cooperation as a constraint on national procedural autonomy

As is well-known, the Union relies on national courts for the enforcement of its legislative measures. To strenghten the national courts in this role, the ECJ has in a series of seminal cases developed the doctrines of direct effect, harmonious interpretation, and Member State liability.[6] In this development, it has also emphasised the function of the preliminary ruling

4 Case 33/75, *Rewe,* EU:C:1976:188 and Case 45/76, *Comet,* EU:C:1976:191.

5 Joined Cases C-430 & C-431/93, *van Schijndel*, EU:C:1995:441; Case C-453/00, *Kühne & Heitz,* EU:C:2004:17; and Case C-406/08, *Uniplex,* EU:C:2010:45.

6 See especially Case 26/62, *van Gend & Loos*, EU:C:1963:1; Case 14/83, *von Colson,* EU:C:1984:153; Joined cases C-6/90 and C-9/90, *Francovich,* EU:C:1991:428.

institute,[7] which gives the Court an opportunity to assist or guide the national courts in their application of EU law, and has thereby contributed to the empowerment of national courts, not least those of first and second instance.[8]

The decentralised enforcement of EU law allocates the main responsibility for procedures and remedies to the Member States, as is nowadays explicitly recognised in the Treaty (Art. 19 TEU). The Court of Justice has repeatedly held that, in the absence of harmonising Union law on the subject, it is for the Member States to designate the courts having jurisdiction to hear claims based on EU law and to lay down the detailed rules of procedure, only, however, as long as the thresholds of effectiveness and equivalence are respected.[9] These principles are, along with the principle of effective judicial protection,[10] arguably the most widely recognised limits on national procedural autonomy.

Effectiveness, equivalence and effective judicial protection are all minimum requirements, setting a threshold for national procedures to surpass. In doing so, it is implied that procedural law above this threshold is off-limits to the ECJ. The technical way of achieving that level, as well as procedural standards that go beyond it, have been left to the Member States, and the significance of a legislative choice between different ways of writing procedural rules has so far escaped the attention of legal doctrine. As long as the minimum requirements are complied with, Member States remain free to legislate as they wish – so the orthodoxy goes.

It is however less commonly acknowledged that the principle of sincere cooperation, laid down in Article 4(3) TEU, also functions as a limit on procedural autonomy. This article argues that it does – and not only indirectly as the mother principle from which the requirements of effectiveness and equivalence were derived.[11] When understood as a limit on national procedural autonomy, the principle of sincere cooperation has several characteristics in which it differs from the above-mentioned minimum requirements. For this reason it is able to impose other, and potentially more far-reaching, requirements on the Member States.

From our perspective it should be noted that the principle of sincere cooperation is neither a minimum requirement, nor a standard against which national rules can be reviewed and, if found inadequate, set aside. Instead, it requires Member State courts to take *any appropriate measure within their competence* to ensure the observance of EU law.[12] When applied to the actions of a national court adjudicating a case, it entails that the court cannot stop at satisfying itself that the minimum criteria of effectiveness and equivalence are met. It must also ensure that there is no measure within its competence that would be appropriate and would serve to further the impact of EU law.[13] If no such measure is available, the principle of sincere cooperation does not require the court to set national law aside. If, however, there is such a

7 Case 166/73, *Rheinmühlen*, EU:C:1974:3; Case C-224/01, *Köbler,* EU:C:2003:513.
8 See eg. Case 6/64, *Costa v. ENEL*, EU:C:1964:66; Case C-173/09, *Elchinov*, EU:C:2010:581; Case C-210/06, *Cartesio*, EU:C:2008:723.
9 E.g. in *Rewe,* n. 4 *supra,* para. 5, and *van Schijndel*, n. 5 *supra,* para. 17.
10 See particularly Case 222/84, *Johnston,* EU:C:1986:206. Some commentators argue that the latter principle fully encapsulates the former ones (see e.g. Arnull, "The principle of effective judicial protection in EU law: an unruly horse?", 36 EL Rev. (2011), 51-70, at 55), whereas others maintain that the three principles remain distinct (e.g.. Prechal and Widdershoven, "Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection", 4 REA Law (2011), 31-50, at 46). This question, while interesting, is not crucial to the line of enquiry pursued in this article.
11 See citations in *Rewe,* para. 5 and *Comet*, para. 12 (n. 4 *supra*), and further Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014), pp. 125 f.
12 Opinion 1/09, EU:C:2011:123, paras. 68-69.
13 This is further discussed in section 4.1 *infra*.

measure made possible *inter alia* by a discretionary rule, the principle of sincere cooperation seems to provide that this measure must be taken.

3 Discretion and constraint in procedural law

The concept of judicial discretion remains somewhat obscure; a clear or universally accepted definition is lacking. However, the existence of a freedom to choose between lawful alternatives seems to be at its core.[14] In procedural matters, judicial discretion thus denotes the court's or judge's power to make choices and give directions for the management of the case.

How discretion is created or communicated from the legislative power to the judiciary varies. In some jurisdictions, perhaps particularly in the common law Member States, discretion is considered inherent in the judicial system.[15] Discretionary powers of the courts and judges need not be expressly conferred by legislation, but are presumed as a means to fill the gaps between, or sometimes even depart from, the written rules.[16] In other Member States, discretion is the exception rather than the rule. The power over judicial proceedings is in these jurisdictions considered to originate with the legislative branch of government, and courts are allowed to exercise discretion only following express authorisation in legislation.[17] Discretion is thus created by legal provision, rather than existing as an inherent part of the judicial mandate.

The most basic way of preserving or creating discretionary powers within the judiciary is simply to not regulate a procedural matter. The implication of this absence of rules will however differ depending on the constitutional views outlined above. In jurisdictions where discretionary powers are considered inherent in the designation of a judiciary, absence of regulation will readily be interpreted as authorisation for the judges to act as they see fit. In other jurisdictions, however, the interpretation will depend on the nature of the question. In some matters, typically the imposition of a certain remedy, the silence of the legislator may be interpreted as a prohibition. In other matters – for instance the time limit for lodging a defence or the scheduling of a hearing – courts are positively required to make a decision in order to avoid *non liquet*, and the absence of regulation must be interpreted as leaving the matter to the discretion of the judge.

The non-regulative option is one that has caused problems in EU law since its formative stages. Following the ruling in *Butter-buying cruises*,[18] these situations may have fallen within the "no new remedies" doctrine of the ECJ; this, however, would seem to hinge on whether national courts in the absence of express legislative authority are considered to lack competence on the matter, or conversely to be mandated to handle the situation according to their discretionary judgment. As noted above, this varies across Member States, which means that it is difficult to determine whether the absence of regulation stipulates a prohibition or a discretionary possibility. It is unclear to which extent subtle constitutional underlayings like these would have been brought to the attention of the ECJ, let alone allowed to become a deciding factor in its judgments. Possibly, problems like these have contributed to the difficulties encountered by the "no new remedies" doctrine from the very beginning.

14 See i.a. Barak, *Judicial discretion* (Yale University Press, 1989), pp. 7-12; Hess, "Juridical discretion", in Storme and Hess, (eds.), *Discretionary power of the judge: limits and control* (Kluwer, 2003), 45-72, at 46.
15 Hess, op. cit. n. 16, at 48.
16 Cf. Zuckerman, "Rule making and precedent under the Civil Procedure Rules 1998—still an unsettled field", 29 CJQ (2010), 1-12, at 8-10
17 Hess, op. cit. n. 16, at 48.
18 Case 158/1980, *Butter-buying Cruises,* EU:C:1981:163.

However, even if a breach of EU standards is found, the non-regulation of procedural matters in national law is likely to cause problems. The usual conclusion of the ECJ after application of the principles of effectiveness and equivalence is that the national rule is to be *disapplied*. This effect can be termed exclusionary.[19] However, this is for obvious reasons not a practicable solution, if the problem is that there simply is no rule. If the Court then wishes to guide the case management of the national court, it would instead need to specify the actions precluded – alternatively, those required – by EU law.

Aside from the non-regulative option, a discretion can be conferred (or, depending on perspective, made visible) by the legislator to the judiciary in two main ways, which we shall refer to as classic discretion and interpretive discretion, respectively.[20] Classical discretion is explicit; rules in this category provide that the court ”may”, ”can” or ”is competent/authorised” to take (or omit) a certain course of action. Rules conferring interpretive discretion, on the other hand, use intentionally vague language that appeals to the discretion of the judge, typically incorporating prerequisites such as ”good reasons” or ”appropriateness”. If all prerequisites are fulfilled, the prescribed action or case management direction may well be mandatory, but the open-ended nature of the prerequisites means that it is the court itself that decides whether or not the duty arises in a specific case.[21]

Of course, legal language is rarely clear beyond dispute (the reader might recall the immense criticism against the *CILFIT* ruling,[22] which presumes the existence of such universal and undisputed interpretations) and interpretation is a key feature of any application of law.[23] For this reason, interpretive discretion is a close relative of legal interpretation in general. We will not dwell on the fine distinctions between the two; suffice it to point out that discretion is singular, always exercised in relation to a particular set of circumstances, and thus resistant to generally applicable interpretations and to the establishment of precedent.

From an EU law perspective, interpretive discretion might be argued to fall within the doctrine of harmonious interpretation as established in *von Colson* and more recently elaborated on in *Pfeiffer*.[24] However, the reasoning of the ECJ, in which the duty of consistent interpretation was derived from the national courts' responsibility for guaranteeing the judicial protection of individuals, seems to indicate that harmonious interpretation is mainly a tool to ensure minimum consistency of national and EU law[25] – although of course it hardly precludes Member State courts from adopting an even more integrationist interpretation, should they wish to do so. If the interpretive duty of the courts ends where the compliance with EU law is no longer threatened, the doctrine of harmonious interpretation functions much in the same way as the minimum standards of review described in section 2 above. This

19 Cf. Dougan, ”When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy” 44 CML Rev. (2007), 931-963, at 933.
20 Cf. Craig, *EU Administrative Law*, 2nd ed. (OUP 2012), pp. 404 and 409 f.; Bone, ”Who Decides? A Critical Look at Procedural Discretion” 28 Cardozo Law Review (2006/07), 1961-2023, at 1970.
21 Craig, op. cit. n. 22, at 404.
22 Case 283/81, *CILFIT,* EU:C:1982:335. Among the critics see i.a. Broberg, "*Acte Clair* Revisited: Adapting the *Acte Clair* Criteria to the Demands of Time", 45 CML Rev. (2008), 1383-1397; Bobek, "Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts", in Adams, de Waele, Meeusen, and Straetmans, *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013), 197-234, at 216; AG Colomer in his Opinion in Case C-461/03, *Gaston Schul,* EU:C:2005:415.
23 Cf. Hess, op. cit. n. 16, at 50.
24 *von Colson,* n. 6 *supra*; Joined Cases C-397 to C-403/01, *Pfeiffer,* EU:C:2004:584.
25 See in particular *Pfeiffer,* n. 26 *supra*, paras. 111-113. Cf. also Woods and Watson, *Steiner & Woods EU Law*, 12th ed., OUP 2014, p. 129.

would mean that only those alternatives made possible by the interpretively discretionary rule but falling foul of EU law would be precluded by the indirect effect of the EU law provision in question. The actual exercise of discretion, above the required threshold, would then not be affected by the harmonious interpretation doctrine.

That the ECJ's position on interpretive discretion is more complicated is however evidenced by its judgments in *Uniplex* and *Commission v. Ireland,* where a rule requiring action to be brought "promptly" but leaving it to the discretion of the court to decide how to construe promptness in the case at hand was considered contrary to EU law because of the lack of legal certainty inherent in the rule – i.e. due to the rule's discretionary nature.[26] If procedural discretion in itself is contrary to EU law, discretionary rules should either be interpreted as mandatory where possible, or be disapplied based on the principle of effectiveness or of legal certainty. However, such a far-reaching interpretation of *Uniplex* and *Commission v. Ireland* is not supported by case law; quite on the contrary, there are also examples of the ECJ striking down on mandatory procedural provisions because of their lack of discretion.[27]

The most clear-cut examples of discretionary rules are those providing for classic discretion. Cases concerning such rules will be at the core of the ensuing analysis, where we will revisit the ECJ's rulings in three well-known lines of case law focusing not on the substantive issues settled by those judgments, but on the Court's approach to Member State courts' discretion. The cases selected are distinguished not only by the fact that the national rule applicable to the issue at hand was discretionary in character, but also by the explicit attention paid to this circumstance by the ECJ.

4 Throwing new light on old cases

4.1 The ex officio case law: van Schijndel *and* Kraaijeveld

The first case where the ECJ explicitly deals with discretionary rules of national procedure is *van Schijndel.* The facts of the case are well-known and hardly need to be reiterated in any length. Suffice it to note, that the referring court was faced with the question of whether national courts should raise points of EU law *ex officio*. The first question concerned the duties of a national court as a matter of EU law in general, whereas in the second question the national court asked specifically about a situation where national law would prohibit such activity on the part of the court.

In answer to the *second* question, the Court famously held that EU law does not require national courts to set aside procedural rules precluding *ex officio* court activity, even if those rules prevent the court from raising points of EU law and thus hinder the full enjoyment of EU law rights. This finding, which has been extensively cited in literature and reiterated by the ECJ on numerous occasions, has led several commentators to hail *van Schijndel* and its twin judgment *Peterbroeck*[28] as prime examples of a more "balanced" or Member State-friendly approach of the Court of Justice, indicating a step away from the so-called "activist" phase of the 1980s and early 1990s.[29]

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26 *Uniplex,* n. 5 *supra*, paras. 41-43; Case C-456/08, *Commission v. Ireland,* EU:C:2010:46, paras. 74-75.
27 Case C-536/11, *Donau Chemie,* EU:C:2013:366, paras. 31 and 34 in particular; cf. also case C-360/09, *Pfleiderer,* EU:C:2011:389, para. 31.
28 Case C-312/93, *Peterbroeck,* EU:C:1995:437.
29 See *inter alia* de Búrca, *National Procedural Rules and Remedies: The Changing Approach of the Court of Justice,* in Lonbay & Biondi (eds.), Remedies for Breach of EC Law (Chichester 1997), 37-46; van Gerven, "Of Rights, Remedies and Procedures, 37 CML Rev. (2000), 501-536, at 531-533; Dougan, *National Remedies Before the Court of Justice* (Hart 2004), pp. 47 f.; Arnull, *The European Union and its Court of Justice,* 2nd ed. (OUP 2006), pp. 304-307.

However, *van Schijndel* is a Janus-faced judgment. The answer to the *first* question referred by the national court can hardly be labelled deferential or autonomy oriented; and whereas the above-mentioned, second part of the judgment has been considered atypical or a change of directions in ECJ jurisprudence, the answer to the first question is arguably more indicative of the Court's attitude towards Member State procedural law.[30]

In its answer to the first question the ECJ, instead of outlining the duties of national courts in general, related to the two regulatory options not covered by the second question: the duty of the national court to raise points of law *ex officio* (mandatory, prescriptive rule) and the discretion to do so (discretionary rule), as a matter of national law.[31]

In the former alternative, where a national court is dutybound to raise points of national law of its own motion, the ECJ held that that duty applies also for points of EU law.[32] The same, it further held, applies in the second alternative, where the national court has a discretion as to whether or not to raise points of law not relied on by the parties; i.e. the national court has a duty to raise points of EU law *ex officio*, if it is empowered to do so under national law.[33] In this it departed from the opinion of Advocate General Jacobs, who had suggested that points of EU law should be treated the same as points of national law regardless of the character of the national rule; that is to say, if the court had discretion as regards points of national law, that discretion should also include points of EU law.[34]

Whilst the position of the AG can be considered respectful of the procedural choices of the national legislator, that of the ECJ cannot. Instead, the Court took a more effectiveness-oriented or integrationist stance, arguing that national courts must do everything within their competence to ensure the *effet utile* of EU law. The effect of the judgment was, as has been observed by several commentators, that the discretion of the national court was transformed into an obligation.[35]

As the national rule in question was not, in fact, discretionary, it could be argued that the Court's answer to the first question in *van Schijndel* should be treated as *obiter dictum.*[36]

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30 Cf. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012), pp. 318-330 on the "broadly *communautaire* tendency" of the ECJ. The answer to the second question in *van Schijndel* is also difficult to reconcile with the subsequent judgment in case C-126/97, *Eco Swiss*, EU:C:1999:269, where the ECJ held that EU competition law, on which the applicants in *van Schijndel* sought to rely, belongs to public policy and therefore should be considered by national courts *ex officio*. Cf. Prechal, "Community Law in National Courts: The Lessons from van Schijndel" 35 CML Rev. (1998), 681-706, at 702-705.

31 Cf. Komninos, "Case C-126/97, Eco Swiss China Time Ltd. v. Benetton International NV, Judgment of 1 June 1999, Full Court" 37 CML Rev. (2000), 459-478, at 462.

32 *van Schijndel,* op. cit. n. 5, para. 13.

33 *van Schijndel,* op. cit. n. 5, para. 14. The Court's wording, which did not mention the existence of a duty but only held that "the same" conclusion applies for discretionary rules as for those prescribing mandatory *ex officio* action, is somewhat unfortunate as it is open to interpretations. It is however clear from later cases that the expression is intended to denote a duty, see e.g. case C 40/08, *Asturcom,* EU:C:2009:615, para. 54.

34 Opinion of AG Jacobs in Joined Cases C-430 & C-431/93, *van Schijndel*, EU:C:1995:185, para. 38.

35 See i.a. Prechal, op. cit. n. 32, at 700; Delicostopoulos "Towards European Procedural Primacy in National Legal Systems" 9 ELJ (2003), 599-613, at 607: da Cruz Vilaça, "Le principe de l'effet utile du droit de L'Union dans la jurisprudence de la Cour", in Rosas, Levits, and Bot, (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, (Asser Press 2013), 279-306, at 297.

36 The rule's mandatory character is described i.a. by Prechal, op. cit. n. 32, at 702; and Eliantonio, *Europeanisation of administrative justice? The influence of the ECJ's case law in Italy, Germany and England* (Europa Law Publishing 2009), p. 131. It seems also to be apparent in the autentic, Dutch version of *van Schijndel* (para. 11).

However, the ruling was confirmed a year later in *Kraaijeveld*,[37] where the question of court passivity was indeed left to the discretion of the national court, and has subsequently been upheld in *Kempter, Asturcom, Jőrös, Asbeek Brusse,* and *Faber*.[38] We will hereinafter refer to this strand of cases as the *van Schijndel/Kraaijeveld* case law, to distinguish it from the one following from the more well-known answer to the second question, which we will refer to as *van Schijndel/Peterbroeck.*

4.2 The res judicata case law: Kühne & Heitz

The application of discretionary rules was again brought to the fore in *Kühne & Heitz;* again – as in *van Schijndel* and *Kraaijeveld* – on reference from a Dutch court. Kühne & Heitz, an exporting enterprise, had filed an application for the review of an administrative decision, which had become final but was, pursuant to subsequent case law from the ECJ, incorrect in substance. According to the applicable national rule, the court was always entitled to reopen a decision that had become final, but was under a duty to do so only if the applicant cited new facts or changed circumstances. As Kühne & Heitz only relied on a clarification of the interpretation of EU law, it is clear that the case fell within the scope of the discretionary power of the court. The referring court therefore sought ECJ guidance as to whether EU law made the reopening of a decision under such circumstances mandatory.

The ECJ answered the question in the affirmative and along the same line of argument it used in *van Schijndel/Kraaijeveld*; the fact that the national court, pursuant to national law, had power to reopen the case was decisive for its obligation to do so in an EU law case. This led AG Bot, in the subsequent *Kempter* case, to hold that the ”existence of an obligation of review does therefore depend, above all, on the existence of a national procedural rule conferring such a power upon the competent administrative body”.[39] That the discretionary nature of the national rule was crucial to the outcome is also evidenced by the judgment in *Kapferer,* where the Court ruled out application of *Kühne & Heitz* on account of the national rule being mandatory in that case.[40]

However, the ECJ made its answer in *Kühne & Heitz* conditional on the existence of three additional criteria, which also closely followed the actual circumstances of the case before the national court.[41] This has led the judgment to be criticised as casuistic and obscure;[42] however, as the criteria have been confirmed in subsequent case law, they appear to possess at least some degree of universality.[43] Consequently, the ruling in *Kühne & Heitz* can, from the perspective taken in this article, be described as transforming the discretion of the national court under domestic law into an obligation, subject to the fulfilment of three additional criteria.

4.3 The public procurement case law: Uniplex

37 Case C72/95, *Kraaijeveld*, EU:C:1996:404.
38 Case C-2/06, *Kempter,* EU:C:2008:78; *Asturcom,* n. 35 *supra;* Case C-397/11, *Jőrös,* EU:C:2013:340; Case C-488/11, *Asbeek Brusse,* EU:C:2013:341; Case C-497/13, *Faber,* EU:C:2015:357.
39 Opinion of AG Bot in Case C-2/06, *Kempter,* EU:C:2007:245, para. 80.
40 Case C-234/04, *Kapferer,* EU:C:2006:178, para. 23.
41 These were that the challenged decision had become final as a result of a judgment of a national court ruling at final instance, that that court had neglected to refer to the ECJ and in subsequent case law of the Court had been proved to have misinterpreted EU law, and that the person concerned had brought a complaint immediately after having been made aware of the subsequent ECJ ruling.
42 See Groussot & Minssen, ”Res Judicata in the Court Of Justice Case-Law: Balancing Legal Certainty with Legality?” 3 EuConst (2007), 385-417, at 400; Prechal, *Directives in EC Law,* 2nd ed., (OUP 2005), p. 153.
43 See i.a. Joined Cases C-392 & C-422/04, *i-21 Germany,* EU:C:2006:586, para. 52; *Kempter,* n. 40 *supra,* paras. 38-39; Case C-249/11, *Byankov,* EU:C:2012:608, para. 77.

The more recent judgment in *Uniplex* represents a third approach to the exercise of discretion in national courts.[44] The facts of the case were, to the extent relevant for our purposes, these: Uniplex had placed an unsuccessful tender in a public procurement and brought action before national courts against the contracting authority, which submitted that the action was inadmissible as it had been filed out of time. Both the starting date and the length of the time limit were subject to dispute and settled by the ECJ, but the question as to whether national law could be construed to accommodate the ruling was left to the national court. In this regard, it is of relevance that national law included a discretionary rule permitting national courts to prolong the time limit, if there was good reason to do so.

The ECJ observed however that compatibility with EU law as a first choice, if possible, should be ensured by harmonious interpretation of the national rule providing for the time limit. Only failing this, the Court held that the national court should exercise its discretion to prolong the time limit. This use of discretion was made obligatory only to the extent necessary to avoid a violation of EU law *in casu*. If on the other hand the court's discretion proved insufficient to provide the claimant with a long enough time period to file its claim (which, considering the circumstances of the case and the nature of the rule, seems improbable), the ECJ held that national law would have to be set aside.

Hence, *Uniplex*, as previously *van Schijndel/Kraaijeveld* and *Kühne & Heitz*, involved the transformation from discretion to obligation. However, *Uniplex* differs from the previous rulings in that the ECJ's approach is markedly more cautious. This is evident in that "eurofriendly" exercise of discretion was designated as a subsidiary option to harmonious interpretation, put on a similar footing as disapplication of national law, and limited to what was necessary to ensure compatibility with the claimant's right to an effective remedy. Beyond that point, the discretion of the national court remained intact.[45]

5 Discretion as an engine of effectiveness?

5.1 In search of a legal ground

In this section we will examine the legal basis for the conclusions reached by the Court of Justice in the cases discussed above. It will be argued that the rulings, as regards the exercise of discretion by the national courts, are more intrusive than can be satisfactorily explained by the principle of effectiveness (the *Uniplex* ruling being a notable exception, to which we will return later), and more favourable to the EU law claimant than can be satisfactorily explained by the principle of equivalence. We will thus see that the conclusions reached by the Court fit with previous jurisprudence only if interpreted as based on the principle of sincere cooperation – even though that interpretation is itself not without difficulties.

As for the principle of effectiveness, it has been argued in literature that the rulings in both *van Schijndel* and *Kühne & Heitz* were outflows of that principle.[46] However, there is little in the reasoning of the Court to support such assumptions. First of all, there are no references to the principle of effectiveness in the relevant parts of either judgment; in *Kühne & Heitz* it is not mentioned at all,[47] and in *van Schijndel* it is only mentioned in the latter, *Peterbroeck-*

44 Not referring here to the reasoning concerning the "promptly" prerequisite, cf. *supra* at n. 28.
45 This is particularly clearly put in the opinion of AG Kokott (which was largely followed by the Court), see Opinion in Case C-406/08, *Uniplex,* EU:C:2009:676, paras. 62-63.
46 See e.g. Engström, "National Courts' Obligation to Apply Community Law Ex Officio – The Court Showing New Respect for Party Autonomy and National Procedural Autonomy?", 1 REALaw (2008), 67-89, at 75 f.; Caranta, "Case C-453/00, *Kühne & Heinz NV* v. *Produktschap voor Pluimvee en Eieren*, Judgment of the Full Court of 13 January 2004" 42 CML Rev. (2005), 179-188, at 184-188.
47 Cf. Groussot & Minssen, op. cit. n. 44, p. 401.

related part of the judgment. More importantly, however, the reasoning is difficult to reconcile with the traditional application of the *Rewe* principle. It is, paradoxically, at the same time more respectful and more intrusive towards the Member States.

The requirements of the principle of effectiveness, as opposed to those of the principle of equivalence, are not normally considered to be relative to the level of protection offered by national law. If the principle of court passivity is considered to rob individuals of a practical possibility to enforce their rights, that principle should be in breach of the principle of effectiveness, regardless of the technicalities of the national rule providing for it. However, in *van Schijndel/Kraaijeveld* and *Kühne & Heitz*, the Court of Justice adjusted the bar to suit the policy choices of the national legislator. Only in the cases where national law makes a certain course of action possible does the Court demand it, whereas if national law prohibits it, the Courts aligns its demands to the position taken in national law. If the judgments in *van Schijndel/Kraaijeveld* and *Kühne & Heitz* were indeed dictated by the principle of effectiveness, the ECJ's newfound respect for what is possible under national law is curious.

Meanwhile, in these cases the Court also appears to go beyond the minimum levels required in its *Rewe/Comet* case law. One influential commentator submitted in an early comment to *van Schijndel* that the ruling requested national courts to exercise their discretion if it was necessary to protect the legal interest of the individual.[48] However, no such prerequisite of necessity can be found in the reasoning in *van Schijndel*; indeed, it follows explicitly from the second part of the judgment (*van Schijndel/Peterbroeck)* that such action on the part of the court was actually *not* necessary in order to achieve an adequate level of protection, as, had it been necessary, the mandatory rule prohibiting court activity would have been incompatible with the principle of effectiveness, and therefore would have had to be set aside. In this respect, therefore, the ECJ in *van Schijndel/Kraaijeveld* and *Kühne & Heitz* took a stronger position on effectiveness than the *Rewe/Comet* case law would typically warrant.[49]

As for the principle of equivalence, this principle has been cited by the Court itself in some of its later case law in the *van Schijndel/Kraaijeveld* strand.[50] This reasoning is, however, unfortunate. While it is clear that the statement in *van Schijndel/Kraaijeveld* concerning mandatory rules *prescribing* court activity is based on the principle of equivalence,[51] it is equally clear that the statement concerning discretionary rules is not. Equally favourable treatment of national and EU law cases, where the domestic rule provides for a discretion of the court, would be to let the court exercise that discretion in an objective manner in domestic and EU law cases alike, as was opined by Advocate General Jacobs.[52] To require courts to raise points of law *ex officio,* or review decisions having acquired the force of *res judicata,* as a matter of duty in EU law cases, whereas they would do so only as a matter of discretion in domestic cases, appears to amount to rather *more* favourable treatment of the first-mentioned cases. The ECJ's conclusion thus seems to go beyond also what could reasonably be justified with reference to the principle of equivalence.

48 Prechal, op. cit. n. 32, pp. 697 f.
49 It is perhaps indicative of this stance that the Court cited Case C-213/89, *Factortame I,* EU:C:1990:257, rather than *Rewe* (n. 4 *supra*), in *van Schijndel* para. 14 and *Kraaijeveld* para. 58.
50 E.g. *Asturcom,* n. 35 *supra*, paras. 49-56; *Asbeek Brusse,* n. 40 *supra,* paras. 43-46. Cf. Ward, "Do unto others as you would have them do unto you: Willy Kempter and the duty to raise EC law in national litigation" 33 EL Rev. (2008), 739-754, at 751, concerning *Kühne & Heitz*.
51 Paras. 13 and 57 respectively.
52 See n. 36 *supra.*

An altogether more convincing argument can be based on the principle of sincere cooperation, which was indeed relied upon by the Court in *van Schijndel* and *Kraaijeveld* as well as in *Kühne & Heitz*.[53] If national courts are bound to take ”all appropriate measures within their jurisdiction” to ensure the enforcement of EU law, and it is within their discretion according to domestic law to conduct the trial in a way that provides stronger enforcement of an EU legal right than the other options, then that exercise of discretion could well be described as such an appropriate measure that the principle of sincere cooperation prescribes. This would also serve to explain the respectfulness towards the national legislator shown by the ECJ, as the principle of sincere cooperation only demands that national courts take measures *within their competence*.[54] However, curiously, the reference to the principle of sincere cooperation has been left out in later judgments in the *van Schijndel/Kraaijeveld* strand of case law, where it has – unfortunately, as has been elaborated above – been replaced by the principle of equivalence.

Furthermore, a reasoning based on the principle of sincere cooperation does not account for the differences in outcome between *van Schijndel/Kraaijeveld* and *Kühne & Heitz.* If the legal basis of the discretion pronouncements in these cases is identical, why was the mere existence of a discretionary rule sufficient for the creation of a duty in *van Schijndel,* whereas it was made contingent on three additional criteria in *Kühne & Heitz*? It is submitted that the Court could have reached the same conclusion in *Kühne & Heitz* without recourse to the elaborate criteria, by relying on *van Schijndel/Kraaijeveld* as precedent. This is particularly so as the questions in *Kühne & Heitz* and in *Kraaijeveld* both had arisen in the context of Dutch administrative procedure. With such a reference, the Court could simply have observed that national law conferred a discretion on the domestic courts. It could then have cited *Kraaijeveld* and the principle of sincere cooperation in support of the courts' obligation to exercise their discretion in a way as to ensure the enforcement of EU law rights, and thereby created an obligation to reopen the case regardless of other circumstances of the case.

5.2 Existence of a doctrine

Viewed together, *van Schijndel/Kraaijeveld*, *Kühne & Heitz* and *Uniplex* draw the picture of declining EU law interference in national courts' exercise of discretion, where *van Schijndel/Kraaijeveld* demands unconditional mandatory activity, *Kühne & Heitz* makes such activity subject to certain further conditions and *Uniplex* demands activity only insofar as necessary to obtain the minimum level of EU law compatibility. The reasoning and legal bases cited shift from the strong, *Simmenthal*-inspired effectiveness requirement and the principle of sincere cooperation in the two first strands, to the more Member State-oriented argument put forward in *Uniplex*, where the ECJ appears to strive for EU law compatibility at the smallest cost for the national procedural rules. The Court itself does not explain the inconsistencies in reasoning or outcomes, nor does it cite the earlier cases in this ”discretion series” in later judgments. Only two judgments, *Kempter* and *Asturcom,* contain references to both the *van Schijndel/Kraaijeveld* and the *Kühne & Heitz* strands of case law, and in both cases the references are clearly unrelated and confined to ”their” respective issues: *ex officio* powers of the courts and finality of judgments, respectively.[55]

However, while the lack of cross-references between the *van Schijndel/Kraaijeveld, Kühne & Heitz* and *Uniplex* lines of case law is remarkable if the rulings are regarded as judgments

53 See paras. 14, 58 and 27-28, respectively.
54 See e.g. Case C-91/08, *Wall,* EU:C:2010:182, para. 69; *Byankov*, n. 45 *supra,* para. 64.
55 See *Kempter,* n. 40 *supra,* paras. 40-44 and 45 respectively; *Asturcom*, n. 35 *supra,* paras. 36-37 and 54, respectively.

concerning the exercise of discretion pursuant to national law, it is quite unsurprising if they are considered part of three separate strands. Indeed, there is little to suggest that these cases were ever intended to be viewed together. If the pattern discussed in this article and the approach of the Court as regards discretion is to be criticised, it is for being incidental rather than inconsistent.

That is not to say that these cases cannot be considered a case law on the exercise of discretion in national courts. Incidental as it may be, the judgments nevertheless show that the use of discretionary rather than mandatory rules is liable to make a difference once a case concerns EU law rights in substance, although precisely *how* it will matter is difficult to predict in areas of procedural law not covered by the current jurisprudence. Reading the judgments together as rulings concerning the exercise of discretion arguably reveals a tension between, on the one hand, the effectiveness of (substantive) EU law and, on the other, the procedural principles underlying national law. Seen from this perspective, the ”inconsistencies” could in fact be interpreted as the ECJ striving to strike a balance between competing interests.[56]

5.3 From discretion to duty: effects and application

The diverse and incongruent outcomes in the discretion cases are thus arguably manifestations of the ECJ attempting to strike a balance between competing rules and principles. That balance may well be a sound one. However, the irregularity of the case law is in itself a cause for concern, as it gives rise to uncertainty as regards the exercise of discretion in Member State courts, and in the longer run the enactment of discretionary rules in Member State procedural law. Based on the current case law it is difficult to make out when a discretion will be transformed into an obligation in the encounter with EU law.

Furthermore, in striking such balance the ECJ occasionally, particularly in its *van Schijndel/Kraaijeveld* case law, uses discretionary rules as a means to increase EU law impact on national legal systems. In the process, it removes or diminishes the discretion of the national courts that national legislators (hopefully, and legitimately) intended them to use in order to cater for the specific needs of individual cases and ultimately promote procedural fairness.

The scope of the principle of sincere cooperation is wide, as is signified *inter alia* by the (even) more prominent position in the Treaties, which it was awarded by the Lisbon Treaty.[57] This indicates that the same reasoning may well apply to other problems and in other contexts. However, if taken as a general rule for the exercise of discretion, it would entail some peculiar and presumably unintended effects.

First, the principle, as interpreted in *van Schijndel/Kraaijeveld* and *Kühne & Heitz,* introduces different standards for national legislators and courts in that a procedural option that would be compatible with EU law if laid down in a mandatory rule by the legislator may be contrary to EU law if chosen by the court in its exercise of discretion. For instance, according to the principle of national procedural autonomy the national legislator is permitted to balance the interest of factually and substantively correct judgments against the need for speedy and diligent conduct of the proceedings and as a result of those deliberations decide to introduce

56 Cf. Jacobs, “Enforcing community rights and obligations in national courts: Striking the balance” in Lonbay and Biondi (eds.), *Remedies for Breach of EC Law* (Chichester, 1997), 25-36, concerning the *van Schijndel* ruling.

57 See Klamert, op. cit. n. 11, at 11.

reasonable time limits for the submission of new facts and evidence. The courts on the other hand, if the decision on time limits is left to them, would be required by the principle of sincere cooperation to prioritise the former objective. The result is a rather backward inroad into national procedural autonomy that would limit the discretion of national courts beyond what it limits that of national legislators, even though the allocation of decisive power is likely of little interest to the litigant that the EU procedural principles are meant to protect.

Secondly, heavy reliance on the principle of sincere cooperation risks buying the effectiveness of EU law at the expense of its uniformity. *van Schijndel* is a case in point. By effectively excluding discretion at the national level, the Court created a dichotomy between two polar situations: either national courts are obliged to act (if national law provides for a discretion or for mandatory action) or they are forbidden to do so (if national law prohibits it), but there is no middle way. In contrast, allowing for discretion would possibly create differences in case management *within* a Member State, but would contribute to mitigating systemic differences *between* Member States.

Finally, it may be argued that the EU law optimum should not be defined in opposition to the Member State optimum, and thus not necessarily as the most integration-oriented alternative.[58] Interventionist rulings such as *van Schijndel/Kraaijeveld* set Union law on a collision course with Member State laws. In such collision situations, the principle of primacy will ensure the effectiveness of EU law, but will also consolidate the distinct identities of Union and national law by emphasising the primacy of the former over the latter. This in turn may lead to Member State legislators choosing mandatory rules limiting the influence of EU law over discretionary rules allowing for it, in order to retain control over the procedure. Such rules would then, instead of enabling EU law to take full effect *in casu*, as discretionary rules do, absolutely *prevent* it from doing so beyond the minimum requirement of effectiveness and equivalence.

It is submitted that the better approach is one that ensures the impact of EU law without unnecessarily upsetting the procedural systems of the Member States. Such an approach is also less likely to produce resistance amongst the national courts – and lawyers – on whose application of law the success of legal integration, as the Court has indeed been quick to recognise,[59] ultimately hinges. Such an approach may well take the discretionary nature of a certain procedural rule into account.

It may be useful to remember that the ECJ's interest in national procedure is motivated by the effect of those procedures on the substantive enforcement of EU law. It is thus not the procedural rules in themselves that interest the Court, but the way in which they affect, or are likely to affect, the outcome in substance.

Amongst procedural rules, some will have a more direct impact on the substantive outcome of the dispute than others. It is submitted that inroads into national procedural autonomy are more easily justified with regards to rules with a strong direct impact on substantive enforcement of EU law. Such a stance is also, although not explicitly acknowledged by the ECJ, largely compatible with the existing case law. It may be recalled that in both *van Schijndel* and *Kühne & Heitz*, exercise of the discretionary power of the national court was,

58 Cf. Prechal, op. cit. n. 32, at 686.
59 This is the underlying *rationale* already in classic cases such as *van Gend & Loos*, n. 6 *supra*, and was more recently underlined in opinion 1/09, EU:C:2011:123, paras. 66-70.

under the respective circumstances, a necessary (but not sufficient) condition for the success of the EU law-entitled party. In *Uniplex,* on the other hand, it was not.

This may serve as a compromise or a balance of interests. In the application of discretionary rules with close links to the subject matter of the case, *van Schijndel/Kraaijeveld* could be looked to as a precedent*,* resulting in a duty on national courts to exercise their discretion with a view to further the impact of EU law. The lesser the impact of a procedural rule on the substantive outcome, the lesser the normative force of *van Schijndel/Kraaijeveld* and the wider the discretion of the national court. The effectiveness of EU law would be one factor, but not necessarily the deciding one, in the discretionary decision-making process.[60]

Such an interpretation could be defended along these lines. In *van Schijndel*/*Kraaijeveld*, the Court did not perceive the existence of an opposing interest worthy of protection. Thus, there was no reason to accept a restriction on the full effectiveness of EU law. Granted, the solution arrived at by the Court is at odds with the principles of party autonomy and court passivity, but these principles have, in a situation where a national court has a discretion to act of its own motion, already been compromised by the national legislator. Where the national legislator awards these principles a higher status by making adherence to them mandatory, the ECJ has generally respected this priority in its *van Schijndel/Peterbroeck* case law.[61] Conversely, in *Uniplex*, there was, at least under the circumstances of the particular case, no apparent conflict between the full enjoyment of the rights of the claimant and the time limit imposed by national law; both could be upheld simultaneously, and the discretionary rule only mandated the court to *extend* the time limit.[62] Therefore, there was no need for the Court to intrude on the discretion of the national court, which presumably explains the cautious conclusion.

The situation was different in *Kühne & Heitz*, where enforcement of substantive EU law would come only at the expense of the principle of *res judicata*, which is not only fundamental to most procedural orders of the Member States but also, in contrast to the principle of party autonomy, recognised as a general principle of EU law.[63] Possibly this difference can explain the ECJ's stronger reluctance in *Kühne & Heitz* to set aside the main rule of national procedure, even though the national legislator, as in *van Schijndel/Kraaijeveld*, had already provided for discretionary exceptions to that rule as a matter of national law. Still, the effectiveness of substantive EU law did prevail in the end, but only pursuant to relatively strict criteria that seem to suggest fault on the part of the national judiciary.[64] In this sense *Kühne & Heitz* can perhaps be likened to the earlier ruling in *Emmott*,[65] which is generally understood as a reaction against erroneous public administration *in casu*, or the subsequent one in *Köbler*, where state liability was devised as a remedy against supreme courts' disregard for the duty to refer to the ECJ pursuant to Art. 267(3) TFEU.

6 Conclusion

60 Cf. Biondi, "Minimum, Adequate or Excessive Protection? The Impact of EU law on National Procedural Law", in Trocker and Varano (eds.), *The Reforms of Civil Procedure in Comparative Perspective* (G. Giappichelli Editore 2005), 233-242, at 238-241; and Caranta, op. cit. n. 48, at 188.
61 See in particular Case C-222/05, *van der Weerd*, EU:C:2007:318.
62 It is noteworthy that the Court took a significantly stronger stance as regards the discretion that the court could use to shorten the time limit; see n. 28 *supra* and cf. Maurici, "Delay and Promptness Update" 17 Judicial Review (2012), 87-94, at 93.
63 See *Köbler,* n. 7 *supra,*, para. 38; *Asturcom*, n. 35 *supra,* paras. 35-36.
64 See in particular the third criterion in *Kühne & Heitz,* n. 5 *supra,* para. 28.
65 Case C-208/90, *Emmott,* EU:C:1991:333.

At least for the last few decades, elements of judicial discretion have become more frequent in the procedural rules of many Member States.[66] Regulative powers are conferred on or left to courts, in order to provide for a solution that suits the circumstances of the specific dispute. However, the ECJ's position on national courts' exercise of discretion means that such endeavours risk becoming misguided or even counterproductive. By conferring discretion on the courts the Member States may instead unwittingly be transferring the power over procedural law to the Union.

There is in all likelihood nothing that could be adequately labelled an ECJ case law on the exercise of discretion in national courts, if by "case law" we mean a conscious and thought-through stance on the part of the Court on how to handle a specific question. However, there is a case law on the exercise of judicial discretion in the sense that the rulings in question are applicable only where such discretion exists, and in those cases affect the courts' exercise of it. The judgments in *van Schijndel/Kraaijeveld* and, albeit to a lesser extent, *Kühne & Heitz* show that EU law issues demands on national courts even if they act within their competence according to national law and even if the national rule itself is not to be set aside. The leeway granted to Member State legislators through the principle of national procedural autonomy does not necessarily extend to national courts. That is to say that the decision of a national court can be contrary to Union law, even though the decision is in conformity with national law and national law is in conformity with Union law. Discretionary rules thereby sometimes – although not consistently – function as a back door, through which EU law can enter national procedural systems unhindered by national legal requirements that would otherwise, legitimately, bar it at the front gate.

For procedural law, the effect of this case law is that the choice between mandatory and discretionary rules in procedural matters is not EU law neutral; the choice of the latter over the former will, at least potentially, mean that substantive EU law will gain greater impact in national legal systems at the expense of the procedural principles heralded by the Member States. But procedural law is not, and should not be reduced to being, only a servant of substantive law. While the realisation of substantive legal rights is certainly an important objective of civil justice, it should be balanced against other objectives, such as the fairness of the procedure and the rights of defence. It is noteworthy that the latter aspects are explicitly recognised in *van Schijndel/Peterbroeck,* but wholly absent in *van Schijndel/Kraaijeveld;* this illustrates how procedural objectives opposing the enforcement logic risk being forgotten when procedural decision-making is based on substantive law considerations.

The case law also shows that national legislative action is capable of influencing the balance of powers between Union and Member State – or, seen from the other perspective, that national law can be used as a tool for competence creeps. This quality or capacity of national law could have implications well beyond the field of procedures and remedies.

Lastly, these conclusions raise questions about the national courts' role in the Union judiciary. The ECJ has often stressed that the relationship between itself and its national counterparts is one of cooperation and dialogue. However, studying its case law on judicial discretion in national law one might be inclined to infer that national courts are only trusted when little is at stake from the Union perspective. If this impression is justified, the principle of sincere cooperation may have more authoritative implications than has hitherto been realised.

66 A general overview is provided in Storme and Hess, (eds.), *Discretionary power of the judge: limits and control* (Kluwer, 2003).

The ECJ does not appear to have fully appreciated neither the systemic effects, nor the potentially disadvantageous consequences of its discretion-related judgments. It is submitted that the matter deserves a more conscious, coherent and considered approach.