Contradictory ECJ judgments on the enforcement of final national decisions

The principle of primacy versus the principle of national procedural autonomy

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Contradictory ECJ judgments on the enforcement of final national decisions: the principle of primacy versus the principle of national procedural autonomy, by Rolf Ortlep and Melanie van Zanten

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1 COMMENT

The judgment of the European Court of Justice (ECJ or Court) of 20 May 2021 in the case Purmerend was expected to have considerable influence on Dutch administrative law. In this case, the ECJ was asked to answer preliminary questions about a national procedural rule which entails that administrative decisions which have become final, but are contrary to EU law, can still be enforced because they are considered to be lawful in subsequent enforcement proceedings. The earlier, very comparable Ciola judgment of 1999 raised the expectation that the ECJ would find that this national rule is not in conformity with EU law. However, the Court ruled otherwise, and the expected impact on national (procedural) law seems to remain absent.

Why did these similar cases lead to different outcomes? The different approach of the ECJ in the judgments of Ciola and Purmerend could perhaps be explained by the difference between direct and indirect collisions between EU law and national law.

Highly similar situations …

What makes these two cases comparable? To start with *Ciola*, in this case, two fines were imposed on Mr Ciola for exceeding the maximum quota of moorings on the shore of the *Bodensee* for boats whose owners are resident abroad. The maximum quota was included in an individual administrative decision, which had become final because Mr Ciola had not brought proceedings against this decision. Unlike against the maximum quota, Mr Ciola did bring proceedings against the fines. During those proceedings, the *Verwaltungsgerichtshof* was not sure about the compatibility of the maximum quota with the Treaty provisions on the freedom to provide services, and it referred the question to the ECJ. In addition, the *Verwaltungsgerichtshof* wanted to know the following: if an administrative decision that has become final is contrary to the Treaty provisions on the freedom to provide services, to what extent should that final decision then be **disregarded in another proceeding in which the validity of** the fines is assessed?

The main subject of the *Purmerend* case is also the possibility to enforce a final national obligation that is not compliant with EU law. In this case, the national obligation requires that a service station will be supplied with LPG only by road tankers that are fitted with a particular heat-resistant lining. This requirement turns out to be contrary to Article 5(1) of Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods (Directive 2008/68/EC), but according to national procedural law, this requirement can still be enforced because it becomes final and is therefore considered to be lawful. The question is, however, whether EU law requires that the heat-resistant lining requirement be disregarded in subsequent enforcement proceedings to ensure the **effective application** of EU law.

... different outcomes

In both the *Ciola* and *Purmerend* cases, the question is thus essentially whether final national decisions which are contrary to EU law must be disregarded in proceedings in which those decisions are enforced.

In the *Ciola* case, the Court gave an **affirmative** answer to that question after applying the **principle of primacy**. The Court observed: '[...] since the provisions of the EC Treaty are directly applicable in the legal systems of all Member States and Community law takes precedence over national law, those provisions create rights for the persons concerned which the national authorities must observe and safeguard, and any conflicting provision of national law therefore ceases to be applicable.' After which the Court concludes that: '[...] a prohibition which is contrary to the freedom to provide services [...] must be disregarded when assessing the validity of a fine imposed for failure to comply with that prohibition after the date of accession.'

In the *Purmerend* case, the ECJ concludes, on the contrary, that EU law does not – as a rule – prevent that national courts consider a final national decision, not compliant with EU law, lawful in subsequent enforcement proceedings. The Court reached this conclusion by applying the principle of **procedural autonomy**. According to this principle, national procedural rules are applicable as long as EU law does not have its own procedural rules, provided that those national procedural rules meet the *Rewe* principles of equivalence and effectiveness. The Court assesses the Dutch procedural rule in the light of the principle of effectiveness, meaning that in principle the procedural rule may not make it impossible or excessively difficult to exercise rights conferred by the EU legal order. Although the national procedural rule hinders the effectiveness of EU law, the principle of effectiveness is met according to the

ECJ, because the procedural rule 'seeks to strike a fair balance between the principles of legal certainty and of legality under EU law [...]'.

Seeking an explanation

How could the different outcomes be explained? One difference between the *Ciola* and *Purmerend* cases is that the Court applies the principle of primacy in the former, while it applies the principle of procedural autonomy in the latter. In general, the principle of procedural autonomy is applied **less strictly** than the principle of primacy. That means that the application of the latter does not always have to lead to the conclusion that national law must be set aside, for example, because a national (procedural) rule is justified by the principle of legal certainty, although it does hinder the effectiveness of EU law. The principle of primacy, on the contrary, would become **virtually illusionary** when the application of EU law would not prevail in every case in which EU law and national law are incompatible. The importance of that concept and its absolute application has become clear once again by (the responses to) the recent ruling of the Polish Constitutional Tribunal of 7 October 2021 in which it calls into question the primacy of EU law over national law. Because of its absolute character, the principle of primacy limits the application of national law more than the balanced doctrine of the principle of procedural autonomy, which could explain why the Court considers the enforcement of final national decisions, that are not compliant with EU law, permissible in *Purmerend* and impermissible in *Ciola*.

The difference mentioned above does, however, not yet explain why the Court applied the principle of primacy in the *Ciola* case and the principle of procedural autonomy in the *Purmerend* case. An explanation sought for the choice of the Court for one of the two principles to resolve conflicts between EU law and national law is found in the difference between direct and indirect collisions between EU law and national law. That explanation is inspired also by German law, in which direct and indirect collisions between *Bundesrecht* and *Landesrecht* are solved by either the absolute constitutional rule '*Bundesrecht bricht Landesrecht*' or the more nuanced concept of '*Bundesfreundliche Verhalten*'. In Ortlep & Verhoeven, a **direct collision** is defined as 'a situation in which EU law and national law provide different, incompatible legal regimes for the same factual situation.' **Indirect collisions** could be described as 'cases in which rules of national law hinder the effect of EU law in the national legal order, although EU law and national law do not provide different, incompatible legal regimes for the same factual situation.'

It could be argued that the Court uses the principle of primacy to solve direct collisions, while it applies the principle of procedural autonomy to solve indirect collisions. This can be derived, for example, from the Court's case-law on revoking a final national decision or judgment which is contrary to EU law (see the above-mentioned article of Ortlep & Verhoeven). The ECJ usually approaches this issue as an indirect collision which is examined in the light of the principle of procedural autonomy within the limits of the principles of equivalence and effectiveness (see for example the *Byankov* case), but sometimes the Court applies the principle of primacy since a direct collision is then involved (see for example the *Lucchini* case). In other areas too, the difference between direct and indirect collisions seems to be relevant in the light of the application of the principle of primacy and the principle of procedural autonomy. This is exemplified by the *Boyle* case, in which Irish legislation prohibited a national authority to disapply national law that is contrary to EU law since only a specific court had this jurisdiction. While Advocate-General Wahl examined the EU conformity of this rule in the light of the principle of procedural

autonomy, the Court applied the principle of primacy, presumably because a direct collision was involved: the national rule prohibited a national authority to disapply national law that is not compliant with EU law, while it follows from EU law that all organs of the State have the duty to disapply national legislation that is contrary to EU law in order to ensure that EU law is fully effective (see also the case note of Verhoeven in *SEW* 2019/129).

Back to the cases of *Ciola* and *Purmerend*. It could be argued that there was a direct collision involved in the case of *Ciola* between the Treaty provisions on the freedom to provide services and the maximum quota, which made the Court choose to apply the principle of primacy. Whether the *Purmerend* case involved an indirect collision which made the Court choose for the principle of procedural autonomy, could be questioned. Although it would be possible to **construe** an indirect collision, one could just as well argue that there was a direct conflict between the national obligation on heat-resistant lining and Article 5 (1) of Directive 2008/68/EC, which prohibits Member States to apply more stringent construction requirements. This shows that it is **hard sometimes** to strictly distinguish between direct and indirect collisions. In those cases, a relevant factor may be how the national court has **formulated** its preliminary question, in the sense that in the *Purmerend* case, the question was 'framed' in such a way that would make the Court examine the issue in the light of the principle of procedural autonomy.

Posted by Rolf Ortlep and Melanie van Zanten

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