

The Principles of Equivalence and Effectiveness as a Limit to National Procedural Autonomy

Nicolas Petit, ENTraNCE 2014

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Structure

- ▶ The theory, in general EU law (I)
- ▶ Its evolving nature, in EU competition law (II)
- ▶ And the practice, in Belgian competition law (III)

I. The Theory, in General EU Law

- ▶ The EU is not a State
- ▶ No fully fledged « *judicial* » and « *executive* » branches
- ▶ MS play key role in implementation, enforcement, administration and execution of EU law
 - ▶ Direct effect
 - ▶ Duty of loyal cooperation
 - ▶ Article 4§3 TEU

The principle of procedural autonomy

- ECJ, Case 51-54/71, *International Fruit Company*, §3 and 4:
Application for imports of dessert apples, rejected
"Although under Article 5 of the Treaty the Member States are obliged to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty, it is for them to determine which institutions within the national system shall be empowered to adopt the said measures".
"when provisions of the Treaty or of regulations confer power or impose obligations upon the States for the purposes of the implementation of Community law the question of how the exercise of such powers and the fulfilment of such obligations may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each State".
- ECJ, Case C2/88, *Zwarfeld*, 13 July 1990 (Order)
"This duty of sincere cooperation imposed on Community institutions is of particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system".

The exceptions

- EU law directly governs the matter
- Absent EU law
 - Equivalence
 - ECJ, Case 33/76, *Rewe*, §5: application for annulment of charges having an equivalent effect => dismissed as out of time
 - « *It is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law ... it being understood that such conditions cannot be less favourable than those relating to similar actions of domestic nature* »
 - Effectiveness
 - ECJ, C-261/95 *Palmisani*: Directive on damages for loss of remuneration due to employer insolvency => belated transposition
 - National law « *must not render practically impossible or excessively difficult the exercise of the rights conferred by [EU] law* »

II. Its Evolving Nature, in EU Competition Law

1. Systemic changes
2. Dialectic changes
3. Discussion

1. Systemic Changes

Regulation 17/62

- Limited scope for procedural autonomy: very centralized public enforcement system
- Equivalence rarely at issue (Barbier de la Serre, 2012)
- Effectiveness almost never at stake, with rare and unclear exceptions (eg, CJEU, C-126/97, *Eco-Swiss*: duty to grant application for annulment on grounds of EU competition law violation when national law imposes duty for rules on public policy)

Regulation 1/2003

- ▶ Larger scope for procedural autonomy: decentralized enforcement system, with public and private legs
 - ▶ EU law defines basic constituent elements of the remedies => approach with NCAs
 - ▶ EU law defines nothing, and leaves it to the national order => approach with courts, for several reasons (independence of the judiciary)

2. Dialectic changes

- Procedural autonomy « *shrunked* »
- Procedural autonomy « *subsidiarised* »
- Effectiveness « *enriched* »
- Effectiveness « *horizontalized* »

Procedural autonomy “*shrunk*”

Theory

- ▶ Non-substantive issues
- ▶ Recital 5 of R 1/2003 => rules on proof are for national law
- ▶ AG Kokott, C-557/12, *Kone AG and others*
- ▶ “*Whether*” compensation => EU law
- ▶ “*How*” compensation => domestic law (jurisdiction, procedure, time limits and the furnishing of proof, §23)

Evolution

- ▶ ECJ, C-08/08, *T-Mobile*
- ▶ ECJ, C-429/07, *Inspecteur van de Belastingdienst v X BV*
- ▶ CJEU, Case C-199/11, *Europese Gemeenschap v Otis NV*
- ▶ CJEU, C-681/11, *Schenker&co*

A closer look (1)

- ▶ CJEU, C-08/08, *T-Mobile*
 - ▶ In the *ANIC* case, the EU courts established a presumption of causal connection between contacts and market effect
 - ▶ Dutch CA: rule of substance or procedure?
 - ▶ ECJ says presumption of causal connection is a matter of substance of 101 TFEU, thus not falling within procedural autonomy (§52)
- ▶ CJEU, C-429/07, *Inspecteur van de Belastingdienst v X BV*
 - ▶ Deductibility of fines for infringements of 101 and 102
 - ▶ "*To dissociate the principle of prohibition ... from the penalties*" would "*deprive of any effectiveness*" the action of agencies, §36

A closer look (2)

- ▶ CJEU, C-199/11, *Europese Gemeenschap v Otis NV*
 - ▶ Does the *Masterfoods* rule apply in a follow-on action for damages?
 - ▶ Violation of the right to a fair trial?
 - ▶ The *Masterfoods* rule only requires "*the national court ... to accept that a prohibited agreement or practice exists*", but leaves it control over causal link and existence of loss (§65).
- ▶ CJEU, C-681/11, *Schenker&co*
 - ▶ When “*the Member States establish conditions relating to intention or negligence in the context of application of Article 5 of Regulation No 1/2003, those conditions should be at least as stringent as the condition laid down in Article 23 of Regulation No 1/2003 so as not to jeopardise the effectiveness of European Union law*”.

Procedural Autonomy “*subsidiarised*”

Theory

- ▶ Procedural autonomy is the principle, effectiveness is the exception
- ▶ In practice, the ECJ first affirms the principle of procedural autonomy, and then considers derogations

Evolution in competition law

- ▶ CJEU, C-493/08, *VEBIC*
- ▶ CJEU, C-681/11, *Schenker&co*

VEBIC: the issue

- ▶ Belgian competition act silent on NCA right to appear in appeals against its decisions
- ▶ Previous law entitled it to submit observations
- ▶ Scholarly view that no standing in Court
- ▶ Court of appeals in weird situation: an applicant, no defendant
- ▶ Do articles 2, 15(3) and 35(1) of Regulation 1/2003 mean that NCAs derive a right/no right to appear in appeals?
- ▶ If not, can those provisions be interpreted in such a way that the effectiveness principle not only entitles, but also gives rise to a NCA "*duty*" to appear in appeals?

VEBIC: the answer

- ▶ ECJ relegates procedural autonomy to a secondary issue
- ▶ Article 35(1) requests that the NCAs are designated in such a way that the provisions of Regulation 1/2003 are effectively complied with.
- ▶ Agencies must ensure that the Treaty competition provisions are "*applied effectively in the general interest*" (§56).
- ▶ And this even if the Regulation leaves it to the domestic legal order of each MS to determine the detailed procedural rules (§57).
- ▶ The effectiveness principle "*requires that the authority should be entitled to participate ... in proceedings before a national court*" (§59)
- ▶ The sole concession to procedural autonomy concerns the body that can appear. The Court mentions that "*it is for the MS, in accordance with the principle of procedural autonomy to designate the bodies which may participate*" (§63).

Schenker&co

- ▶ 40 SMEs join in a trade association, and conclude an anticompetitive agreement for transport of parcels in Austria through SKK
- ▶ Notification to Austrian NCA
- ▶ Authorisation under the Austrian *de minimis* rule (SKK has a 2% MS)
- ▶ With R 1/2003, Austria repeals prior authorisation system
- ▶ SKK seeks advice from law firm, which on grounds of national law, finds that *de minimis* rule still applies
- ▶ Inspections from EU Commission
- ▶ One Member Schenker seeks leniency with Austrian NCA
- ▶ Austrian NCA proposes to fine SKK and grants leniency to Schenker. Court refuses fines for firms have made no fault, but refuses to grant leniency to Schenker, for only the EU can find infringements without fines

Schenker&co

- ▶ Can NCAs find infringement without imposing a fine under a “leniency” programme?
- ▶ No EU law on the subject, Article 5 of R 1/2003 does not exclude that power
- ▶ §46 “*However, in order to ensure that Article 101 TFEU is applied effectively in the general interest (see Case C-439/08 VEBIC [2010] ECR I-12471, paragraph 56), the national competition authorities must proceed **by way of exception** only not to impose a fine where an undertaking has infringed that provision intentionally or negligently*”.
- ▶ Procedural autonomy exceptionalised

Effectiveness “*enriched*”

The theory

- ▶ National law “*must not render practically impossible or excessively difficult the exercise of the rights conferred by [EU] law*”
- ▶ Uniformity of EU law is not a value which, in itself, bears the same importance as supremacy and direct effect (Van Gerven, 2000)

Evolution in competition law

- ▶ CJEU, C-375/09, *Tele2 Polska*
- ▶ CJEU, C-360/09, *Pfleiderer AG v Bundeskartellamt*
- ▶ CJEU, C-681/11, *Schenker&co*

A closer look (1) – Uniformity

- ▶ CJEU, C-375/09, *Tele2 Polska*
 - ▶ NCA finding of absence of abuse under national law, and no grounds for action under EU competition law
 - ▶ Quashed on appeals => should have adopted a finding of no infringement under EU law too; Appeals on points of law and preliminary reference in relation to Article 5 RI/2003
 - ▶ The issuance of "*negative decisions*" "*would risk undermining the uniform application*" of EU competition provisions (§28).
 - ▶ Unclear, but idea that other NCAs would subsequently be blocked by *ne bis in idem*
 - ▶ And/or *effective* means "*prohibitive*"
 - ▶ In brief, the "*wording, the scheme of the Regulation and the objective which it pursues*" confirm that the Commission is the sole competent to issue negative decisions.

Uniformity

- ▶ **CJEU, C-681/11, Schenker&co**
 - ▶ §47 *“It should be noted, furthermore, that such a decision not to impose a fine can be made under a national leniency programme only in so far as the programme is implemented in such a way as not to undermine the requirement of effective and uniform application of Article 101 TFEU”.*

Not “*mere*” Effectiveness

- ▶ CJEU, C-453/99, *Courage Ltd v Bernard Crehan*
 - ▶ The “*full effectiveness*” of IOI “*would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition*” (§26).

Effectiveness of EU law???

- ▶ CJEU, C-360/09, *Pfleiderer AG v Bundeskartellamt*
 - ▶ MS must not render the implementation of EU law excessively difficult, and "*specifically in the area of EU competition law*", they must make sure that the rules "*do not jeopardize the effective application of Article 101 and 102 TFEU*" (§24).
 - ▶ The "*effectiveness of leniency programmes could be compromised*" if disclosure was ordered (§26). And those programmes are "*useful tools*" (§25).
 - ▶ But leniency programmes are national law...

Effectiveness “*Horizontalized*” (Barbier de la Serre, 2012)

“*Vertical*” effectiveness

- ▶ Most cases involved an EU right and a national remedy, in one MS
 - ▶ *X BV*
 - ▶ *VEBIC*
 - ▶ *Tele2 Polska*

“*horizontal*” effectiveness

- ▶ New cases involving interplay between
 - ▶ one national remedy and another
 - ▶ a remedy in a Member State, and a remedy in another
 - ▶ Case C-536/11, *Bunderswettbewerbsbehörde v Donau Chemie*

Discussion

- Rules of public policy => judges must go beyond settling private, subjective disputes, and integrate the objective policy concerns (Canivet, 2012)
- The rise of effectiveness marks concern for uniformity => good concern for substantive issues, but for procedural ones, what matters is consistency not uniformity (Barbier de la Serre, 2012)
- Wither effect on trade?

III. And the practice, in Belgian competition law

- ▶ Procedural autonomy has so far played fully in relation to investigative measures
 - ▶ Seizure orders
 - ▶ On the spot investigations
 - ▶ Wiretaps
 - ▶ Videos
 - ▶ Power to take statements
 - ▶ Profiling, etc.

The new Belgian competition act (2013)

- Article IV.79, §1 al 2 of Belgian Competition Act: "*seizures during dawn raids can only be appealed after the SO, and to the extent that the evidence seized is used in support of objections*"
- No possibility to appeal seizure orders before SO
- Ratio is procedural efficiency

The issue

- ▶ Proceedings brought before the Belgian constitutional court
 - ▶ *IJE v Council of Ministers and OBFV v Council of Ministers*:
 - ▶ Plaintiffs are in-house lawyers and the Belgian bar
- ▶ In Belgian criminal law, such measures can be appealed at any time
- ▶ Discrimination between persons being subject to criminal trial, and those not subject to criminal trial
- ▶ Violation of legal professional privilege
- ▶ Infringements of right to property, privacy, etc.
- ▶ But GC, *Deutsche Bahn a.o v Commission*, T-289/11, T-290/11 and T-521/11

My questionnaire
