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4/2004

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Decentralisation of EC Competition Law Enforcement and General Principles of Community Law

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Decentralisation of EC Competition Law Enforcement and General Principles of Community Law

(to be published in *30 Years of European Legal Studies at the College of Europe / 30 ans d'études juridiques européennes au Collège d'Europe : Liber Professorum 1973/74 – 2003/04*, P. Demaret, I. Govaere, D. Hanf (eds.), P.I.E.-Peter Lang - Presses Interuniversitaires Européennes)

Jacques Bourgeois and Tristan Baumé

By virtue of Council Regulation No. 1/2003, as of 1st May 2004 the full application of EC competition law will be entrusted to national competition authorities (hereinafter NCAs) and national courts. The bold reform of EC competition law enforcement adheres to the system of executive federalism¹ which characterises the EC legal system.

The repartition of competences within the Community allocates implementation of Community law mainly at Member States level. Pursuant to Article 10 EC, they are responsible for the implementation of the measures which have been adopted at Community level for the achievement of the objectives specified in the EC Treaty. Consequently, the attainment of the Community objectives depends very much upon the cooperation of national authorities, which act in accordance with their own national procedural rules.² The various national procedural rules present themselves as conduits through which Community law is implemented and enforced. While as a rule Community law is not designed to alter national procedural rules, the Community legal order cannot afford to leave national procedural rules untouched when they are liable to hamper the effective application of Community law.

1 Executive federalism refers to a system where the competences to implement the laws adopted at federal level (the Community) are conferred to the federated entities (the Member States). Such a system is also characterised by the fact that the executives of Member States are integrated in the process of law making through their presence in political institutions, such as the Council of the European Union. See, e.g., LENAERTS, K, "Constitutionalism and the Many Faces of Federalism", *American Journal of Comparative Law*, 1990, Volume 38, pp.205-264, at 232; DANN, P., "European Parliament and Executive Federalism: Approaching a Parliament in Semi-Parliamentary Democracy", *European Law Journal*, 2003, Volume 9, pp.549-574, at 552.

2 Joined Cases 205 to 215/82, *Deutsche Milchkontor GmbH and others v. Germany*, 1983, *ECRp*.2633, paragraph 17. See also TEMPLE LANG, J., "Community Constitutional Law: Article 5 EEC", *Common Market Law Review*, 1990, pp.645-681.

Although Community law was conceived primarily to achieve purely economic objectives, it was bound to evolve into a much more comprehensive set of rules through *inter alia* the gradual recognition of general principles of law. Mostly inspired by the common legal traditions of Member States and tailored to the specific needs of Community law, general principles of law have been developed and refined by the Court of Justice in order to secure the smooth and balanced operation of Community law. More specifically, the recognition of general principles of law allowed the Court to recognise rights for the benefit of individuals which had not been foreseen by the Treaty. This evolving set of rules applies within the entire scope of Community law, the observance of which the Court ensures on the basis of Article 220 EC. Being superior rules of law, general principles of law take precedence over Community legislation and cannot be excluded or restricted by it.³ Community legislation must therefore be interpreted in the light of general principles of law, which may be used to fill any lacunae.⁴ General principles of Community law bind therefore the Community institutions as well as the Member States when they adopt measures implementing Community law⁵ or any measures falling within the scope of Community law.⁶ As from 1st May 2004 therefore, given that EC competition law will mainly be enforced by Member States, the question arises to what extent in this area national authorities will be subject to the observance of general principles of law recognised by past and future case law of the Court of Justice. Although decentralisation of the enforcement of EC competition law will rely on the operation of autonomous national enforcement and procedural rules, general principles of law will afford a framework which will act as a limit to the unfettered application of these national rules. In that respect, the observance of fundamental rights by national authorities when they implement Community law is an issue which certainly deserves an extended

3 See e.g. Case C-260/94, *Air Inter SA v. Commission*, 1997, ECR p.II-997, paragraph 60.

4 TRIDIMAS, T., *The General Principles of EC Law*, Oxford University Press, 1999, pp.9-10.

5 Case 230/78, *Eridania v. Minister for Agriculture and Forestry*, 1979, ECR p.2749, where the Court states at paragraph 31: "[...] the general principles of community law [...] are binding on all authorities entrusted with the implementation of community provisions".

6 See e.g. Case C-260/89, *ERT*, 1991, ECR p.I-2925. See also TRIDIMAS, *supra* footnote 4, p.23.

study.⁷ For reason of space, this contribution intends only to highlight some aspects of Regulation No. 1/2003 with regard to which general principles of Community law are able to condition national procedural rules.

I Limits to National Procedural Autonomy

The Court has consistently held that in ensuring the legal protection conferred on individuals by Community law, and in the absence of relevant Community rules, it is for the national legal order of each Member States to designate the competent courts and to lay down the procedural rules for proceedings.⁸ This so-called principle of national procedural autonomy reflects the fact that Member States remain competent for establishing their procedural rules. The particular features of the latter may consequently vary according to Member States' legislation and legal traditions. However, national rules applying to actions based on Community law must not be less favourable than those governing similar domestic actions (principle of equivalence) and they must not render the exercise of Community rights excessively difficult or virtually impossible (principle of effectiveness).⁹

The principle of national procedural autonomy has been upheld by the Court not only in the context of the protection of rights conferred on individuals by Community law, but also in the context of enforcement of obligations imposed by Community law upon them.¹⁰ Such is the case particularly when Member States impose on private persons sanctions for infringement of EC law. While recalling the autonomy of national procedural rules, the Court stressed that Member States "must ensure [...] that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law

7 Being general principles of law, fundamental rights are binding on Member States when they implement Community rules, see Case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, 1989, ECRp.2609, paragraph 19. For a good review of those principles applying to the Commission when enforcing Articles 81 and 82 EC, see LENAERTS, K. and MASELIS, I., *Procedural Rights and Issues in the Enforcement of Articles 81 and 82 of the EC Treaty*, Fordham Corporate Law Institute, 2001, pp.279-311.

8 See e.g. Case 33/76, *Rewe v. Landwirtschaftskammer für das Saarland*, 1976, ECR p.1989; Case 45/76, *Comet v. Productschap voor Siergewassen*, 1976, ECR p.2043.

9 *Ibid.*

10 See e.g. in the field of recovery of illegal state aids, Case C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland GmbH*, 1997, ECR p.I-1591, paragraph 24.

of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.”¹¹

While formally recognising the autonomy of national procedural rules, the Court does not hesitate to interfere when their operation is liable to hamper the effective application of EC law, be it in relation to the securing of the benefit of rights that individuals derive from Community law, or to the imposition of penalties for infringement of Community law. The obligation of loyal cooperation under Article 10 EC, the principle of primacy of Community law and the principle of *effet utile* are three mutually supportive elements on which the Court of Justice may rely to make inroads into national procedural autonomy, as it may deem necessary.

The Court’s understanding of what is the minimum requirement for effective application of Community law determines therefore the extent to which the Court is prepared to set aside national rules of procedure, i.e. the demarcation between what remains within the reach of Community law and what goes beyond that reach. Although the standard for a “minimum” effectiveness of Community law can be suspected to be high, no clear and systematic criteria can be found in the case law. In the field of remedies, the Court has shown an interventionist approach by upholding the principle of the right to a judge,¹² the obligation to give interim relief,¹³ or Member State liability.¹⁴ Currently though, when Member States’ financial interests are at stake, the Court appears to display more deference to national rules of procedure and to leave more discretion to national judges for determining whether national rules of procedure provide a sufficient level of protection for Community rights. This leads the Court to accept some limits to the full and effective enforcement of Community rights,

11 Case 68/88, *Commission v. Greece*, 1989, ECR p.2965, paragraph 24.

12 Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986, ECR p.1651, paragraph 18.

13 Case C-213/89, *Factortame and others*, 1990, ECR p.I-2433.

14 Case C-6 and C-9/90, *Francovich and others*, 1991, ECR p.I-5357.

provided that national procedures are non-discriminatory.¹⁵ It remains to be seen what position the Court will take in the framework of Regulation No. 1/2003.

On the one hand, the principle of effectiveness requires Member States to ensure effective enforcement of Articles 81 and 82 EC by their NCAs, and to adopt the necessary measures - institutional and/or procedural - to that end (2). On the other hand, Member States must ensure the observance of the rights of defence recognised in general principle of Community law (3). This implies that both the right to judicial remedies as well as effective remedies should be available to legal persons subject to competition proceedings (4).

II Institutional Aspects - Powers of Competition Authorities and Procedures

A. Designation of Competition Authorities

Article 3 of Regulation No. 1/2003 imposes on Member States the obligation to apply Articles 81 and 82 EC to conduct referred to in these provisions which enter within their scope.¹⁶ Member States must therefore designate the competition authorities responsible for the application of Articles 81 and 82 EC and empower them accordingly in order to ensure the enforcement of those provisions.¹⁷ In doing so Member States enjoy significant discretion, as Article 35(2) Regulation No. 1/2003 allows them to “allocate different powers and functions to those different national authorities, whether administrative or judicial.” Member States are therefore at liberty to separate the investigative and prosecutorial powers from the adjudicative power, by attributing the former to an administrative body and the latter to a judicial organ.¹⁸

15 In the field of limitation periods for bringing an action against national measures and limitation periods for the retroactive effect of claims for benefits, see Case C-188/95, *Fantask A/S e.a. v. Industriministeriet*, 1997, ECR p.6783, and Case C-338/91, *H. Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, 1993, ECR p.5475. On this issue, see TRIDIMAS, *supra* footnote 4, pp.281-287, and from the same author, “Judicial Review and the Community Judicature: Towards a New European Constitutionalism?”, *Turku Law Journal*, 2001, pp.119-129, at pp.123-126. See also GIRED, P., “Les principes d’équivalence et d’effectivité: encadrement ou désencadrement de l’autonomie procédurale des Etats membres?”, *Revue trimestrielle de droit européen*, 2002, pp.75-102, at pp.94-00.

16 Articles 81 and 82 EC apply when trade between Member States may be affected. As to the notion of affection of trade, see the Commission guidelines on the effect on trade concept contained in Articles 81 and 82 EC, to be found at: http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/trade_en.pdf

17 See Article 35 (1) of Regulation No. 1/2003.

18 See WILS, W.P.J., “European Competition Law and Policy: The Reform of Competition Law Enforcement - Will it Work?”, FIDE, Dublin, 2004, under publication, pp.55-57.

Member States may also prefer to give all of these functions to an administrative body.

Whereas Regulation No. 1/2003 leaves to Member States the freedom to adopt the institutional structure which appears to them the most suitable, the principle of effectiveness requires them to ensure that NCAs are endowed with the necessary powers to carry out their mission effectively. The allocation of powers and functions among different bodies should therefore not be such as to hamper the effective application of Articles 81 and 82 EC. The principle of effectiveness also requires Member States to make sure that sufficient resources are allocated to their NCAs in order to provide them, for instance, with the means necessary for undertaking investigations.

B. The Burden of Proof

Although Regulation No. 1/2003 leaves national procedural rules generally untouched, it nevertheless deals with certain matters, among which, the issue of burden of proof. Article 2 of Regulation No. 1/2003 provides that

“[t]he burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.”

However, the matter remains largely subject to Member State law. Indeed, paragraph 5 of the preamble states that

“[t]his Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.”

Reference to those general principles should be considered in the light of the principle of *in dubio pro reo*.¹⁹ There is no doubt that it applies to the Commission.²⁰ It also applies to a Member State authority applying EC law.²¹ In practice, this means

19 On this issue, see MONTAG, F. and ROSENFELD, A., “A Solution to Problems? Regulation 1/2003 and the Modernization of Competition Procedure”, *Zeitschrift für Wettbewerbsrecht*, 2003, Volume 2, No. 107, pp.119-120.

20 Case C-199/92 P, *Hüls v. Commission*, 1999, *ECR* p.I-4287, paragraphs 149-150.

21 *Wachauf*, *supra* footnote 7, paragraph 19, “the requirements of the protection of fundamental rights in the Community legal order [...] are also binding on the Member States when they implement Community rules [...]”.

that an undertaking does not have to prove that Article 81(1) EC does not apply, it is up to the Commission or an NCA to prove that Article 81(1) EC does apply. Should it then be established that Article 81(1) EC applies, the question arises whether Article 2 of Regulation No. 1/2003 requiring an undertaking to prove that an agreement benefits from the exemption under Article 81(3) is qualified by general principles of EC law and in particular the principle of *in dubio pro reo*. According to some, when the undertaking establishes a prima facie case that Article 81(3) EC applies, it is up to the Commission or to the relevant NCA to investigate the facts further and a situation of *non liquet* at the end of such investigation would have to be decided in favour of the undertaking.²²

This depends on what is meant by *non liquet* in such case. Article 81(3) EC is an affirmative defence to an infringement of Article 81(1) EC which is admitted or established. If a prima facie case of such defence made out by the undertaking is rebutted, the burden reverts to the undertaking. If it does not meet that burden, the Article 81(3) EC affirmative defence fails and the infringement of Article 81(1) EC stands. The principle *in dubio pro reo* would only come into play for the purpose of weighing conflicting evidence.

C. Inspections on behalf and for the Account of Other Member States' NCAs

Article 22(2) and (3) of Regulation No. 1/2003 provides that NCAs must proceed to inspections on behalf and for the account of the competition authorities of other Member States, as well as inspections requested by the Commission.²³ In doing so, NCAs will act according to their national law. NCAs' investigative powers are likely to vary, with a corresponding variation of the companies' rights of defence, such as e.g. the right to remain silent or the right of legal professional privilege, which is expected to cause some concerns in relation to the exchange of information within the network of competition authorities when that information is relied upon by the receiving NCAs for the imposition of sanctions. Those concerns have been partly dealt with by Article 12(3) of Regulation No. 1/2003, which ensures that evidence can be used by NCAs

22 MONTAG and ROSENFELD, *supra* footnote 19, pp.120-121.

23 See WILS, *supra* footnote 18, p.47.

only when (i) sanctions of a similar kind are foreseen by the transmitting NCA, and when (ii) they have been collected in a way which respects the same standards of protection of rights of defence in force in the Member States of the receiving NCA. In relation to this second point, the application of the rights of defence, as recognised in general principles of Community law, is expected to limit to some extent divergences between national procedural rights.

D. Enforcement by NCAs of Decisions Adopted by Other NCAs

Regulation No. 1/2003 could have provided that a decision of an NCA applying Article 81 or 82 EC would be binding on other NCAs.²⁴ There are certain precedents to that effect in EC law.²⁵ For a variety of reasons, the Commission did not propose this. Likewise, the Regulation leaves the question of the enforcement by an NCA of a decision adopted by another NCA unanswered. Such enforcement might be needed when an undertaking established in Member State A refuses to comply with the decision of the NCA of Member State B. Article 10 EC, read in conjunction with Article 11(1) of the Regulation,²⁶ could justify a finding of a duty of loyal cooperation between Member States, which could entail an obligation on the part of an NCA or court of a Member State to enforce decisions adopted by the NCA of another Member States. Such a duty could be justified as necessary for the proper enforcement of EC competition law.²⁷ However, the recognition of such a duty would certainly raise concerns for the rights of individuals due to the divergences in the standards of

24 See e.g. MESTMÄCKER, E.J., "The Modernisation of EC Antitrust Policy: Constitutional Challenge or Administrative Convenience?" in C.D. EHLERMANN and J. ATANASIU (eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Oxford, Hart Publishing, 2001, p.223, at p.237; BOURGEOIS, J.H.J., "Decentralised Enforcement of EC Competition Rules by National Competition Authorities: Some Remarks on Consistency, Coherence and Forum Shopping", *ibid.*, 323 at 333; IDOT, L., "L'efficacité des décisions dans l'espace", *Les petites affiches*, 28 December 2000, n° 259, p.29.

25 E.g. under the Second Banking Directive (Directive 89/646/EEC, O.J. (1989) L 86/1), the decision of the "home" Member State of a financial institution finding that it fulfils the requirements of the Directive is binding on other "host" Member States on whose territory it offers financial services or establishes a branch or a subsidiary; see also, for insurance companies, the Second Insurance Directive 88/357/CEE, O.J. (1988) L 172/1; for decisions of Member State customs authorities see Community Customs Code (Regulation No. 2913/92, Article 250, O.J. (1992) L 302).

26 Article 11(1) of the Regulation provides: "The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation."

27 To our knowledge, there is no clear jurisprudence recognising a duty of loyal cooperation between Member States based on Article 10 EC, even though several authors have argued that such a horizontal application of the principle of loyal cooperation could be recognised, see e.g. TEMPLE LANG, *supra* footnote 2, p.677 and GORMLEY, L.W., "The Development of General Principle of Law Within Article 10 (ex Article 5) EC" in U. BERNITZ and J. NERGELIUS (ed.), *General Principle of Community Law*, The Hague, Kluwer Law International, 2000, p.116.

protection afforded to procedural rights and the divergences between the sanctions imposed by the laws of Member States. In the future, instruments might be adopted by the Council of the European Union within the framework of the third pillar, which could resolve issues of that kind and foster mutual recognition of final decisions imposing penalties between Member States.²⁸

E. Powers to Adopt Penalties

For the enforcement of the EC competition rules, Article 5 of Regulation No. 1/2003 lists the measures that NCAs may adopt. The latter may:

- Require that an infringement be brought to an end,
- Order interim measures,
- Accept commitments,
- Impose fines, periodic penalty payments or any other penalty provided for in their national law.

The Regulation allows a great variety in the nature and level of the penalties which can be imposed by NCAs. National rules can provide for the imposition of fines on companies, and sometime even on individuals within those companies. The maximum amount of fines provided by national laws may vary between Member States. Some Member States' legislation also provides for imprisonment of individuals (directors) or their disqualification.²⁹

In the absence of harmonisation in the field of sanctions, Member States are competent to adopt such penalties as appear to them to be appropriate for the enforcement of Community legislation. Such penalties are however limited by the general principles of Community law.³⁰ According to *Greece v. Commission*,³¹ Article 10 EC requires Member States to adopt effective and dissuasive penalties, such as to ensure the effective enforcement of Article 81 and 82 EC. However, the Court equally

28 See the initiative of the United Kingdom, the French Republic and the Kingdom of Sweden with a view to adopting a Council Framework Decision on the application of the principle of mutual recognition to financial penalties, O.J. C 278 of 02 October 2001, pp.4 to 8. See also the joint Council and Commission programme of measures to implement the principle of mutual recognition of decisions in criminal matters, O.J. C 12 of 15 January 2001, pp.10-22.

29 See WILS, *supra* footnote 18, pp.60-61. See also ZINSMEISTER, U. and LIENEMEYER, M., "Die verfahrensrechtlichen Probleme bei der dezentralen Anwendung des europäischen Kartellrechts", *Wirtschaft und Wettbewerb*, 2002, Volume 52, No. 4, pp.331-340.

30 Case C-210/91, *Commission v. Greece*, 1992, ECR p.I-6735, paragraph 19.

31 *Commission v. Greece*, *supra* footnote 11.

requires penalties to remain proportionate. Accordingly, penalties must not go beyond what is necessary to achieve the pursued objectives, i.e. the effective sanction of EC competition rules infringements. The question then arises as to the margin of discretion which is left to Member States when appraising the proportionality of their penalties.

On a preliminary note, it should be borne in mind that the Court of First Instance has unlimited jurisdiction to review decisions of the Commission, and may accordingly annul, reduce or increase the fine or periodic penalty payment imposed by the Commission.³² This is not the case in relation to penalties adopted by NCAs. With regard to the latter, the Court of Justice does not act as an appellate body, as the Court of First Instance can do in relation to decisions adopted by the Commission. The Court of Justice may be called upon to give “assistance” within the framework of the judicial co-operation set up by Article 234 EC. Accordingly, the Court of Justice will, in cases referred to it, limit itself to adopting a marginal standard of review of penalties imposed by NCAs. The Court of Justice will only provide national courts with the elements necessary for the interpretation of Community law in order to enable national judges to decide on the compatibility of the penalties with Community law and its general principles. The determination of the nature and level of penalties involves a complex economic and factual appraisal, such as the seriousness and the duration of the anti-competitive conduct. The Court should not enter into such an appraisal when rendering judgements on preliminary references. Nonetheless, it is not to be excluded that the Court of Justice could do so and send a ruling back to the national court which is so detailed as to leave little room for discretion to the national judge.³³ One could, in any case, expect the Court of Justice to react where the penalties imposed are manifestly disproportionate. Overall, the system of preliminary references instituted by Article 234 EC is expected to leave a very significant margin of discretion to national courts for determining the proportionality of sanctions, subject to a possible “manifestly inappropriate” test applied by the Court of Justice.

32 See Article 30 of Regulation No. 1/2003, which is drafted identically to Article 17 of Regulation No. 17.

33 Such a jurisdictional policy could stem from a didactic intention on the part of the Court, as well as from the willingness, in a first period, to limit any important discrepancies between the penalties imposed by the various national competition authorities. See also KAPTEYN, P.J.G. and VERLOREN VAN THEMATAAT, P., *Introduction to the Law of the European Communities*, third edition edited and further revised by L.W. GORMLEY, Kluwer, 1998, p.505.

F. Equal Treatment

This situation poses, in turn, the question of equality of treatment among economic operators. The principle of equality has been recognised as a general principle of Community law which precludes comparable situations from being treated differently unless differentiation is objectively justified.³⁴ The diversity of penalties that can be imposed by the different NCAs because of lack of harmonisation can be held to infringe the right to equal treatment.³⁵ However acute this problem is expected to be, the application by the Court of the general principle of equal treatment will not be able to address this issue, as the absence of harmonisation constitutes an inherent limitation to it.³⁶ This concern could nonetheless be addressed to some extent within the framework of the network of competition authorities or the Advisory Committee, where views concerning the degree and intensity of sanctions could be exchanged. This might lead the Commission to adopt notices and guidelines on the issue.³⁷ Nevertheless, the concerns raised by the decentralisation of the enforcement of EC competition law in relation to the principle of equal treatment could put the legality of Regulation No. 1/2003 into question, given that no measure is provided for the approximation of national rules on penalties. When considered in combination with the absence of clear criteria for the allocation of cases among NCAs, the lack of harmonisation of penalties is bound to raise further concerns in relation to legal certainty for economic operators and may trigger forum shopping in private litigation.

III Procedural Rights to the Benefits of the Parties - Right of Defence

As mentioned above, when enforcing Articles 81 and 82 EC pursuant to Regulation No. 1/2003, NCAs and national courts are bound to observe the general principles of Community law which confer rights on the parties to the proceeding.³⁸ In this respect,

34 See e.g. Joined Cases 117-76 and 16-77, *Albert Ruckdeschel & Co. e.a. v. Hauptzollamt Hamburg-St. Annen*, 1977, ECR p.1753, paragraph 7.

35 See IDOT, L., "A Necessary Step Towards Common Procedural Standards of Implementation for Articles 81 & 82 EC without the Network" in C.D. EHLERMANN and I. ANATANASIU (eds.), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Hart Publishing, under publication.

36 See TRIDIMAS, *supra* footnote 4, p.46.

37 Reference could be made to the Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No. 17, O.J. C 9 of 14 January 1998, pp.3-5.

38 *Eridania v. Minister for Agriculture and Forestry*, *supra* footnote 5, and Case 5/88, *supra* footnote 7.

one can identify several rights: the right to a fair hearing, the right of access to the file, the right to be assisted by a lawyer, the right to legal professional privilege, the protection against self incrimination.

A. Right to a Fair Hearing

The right to a fair hearing has been upheld by the Court of Justice “in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person”.³⁹ It is a “fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings”.⁴⁰ The right to a fair hearing consists in the right “for a person whose interests are perceptibly affected by a decision”,⁴¹ or that will be “adversely affected”⁴² by that decision, to receive in good time an exact and complete statement of the objection raised against him, or of the conditions to which an exemption will be subjected, and to have the opportunity to make known his views on the truth and relevance of the facts, charges and circumstances relied on by the Commission.⁴³ The fact that the right to a fair hearing could be laid down in a specific regulation - for instance the repealed Commission Regulation No. 99/63 on the hearings provided for in Article 19(1) and (2) of Council Regulation No. 17 or Commission Regulation No. 2842/98 currently in force - does not detract from the fact that it is a general principle of Community law whose mention in some instruments of secondary law constitutes merely an expression. Therefore, being hierarchically superior to secondary law, the right to a fair hearing cannot be excluded or restricted by Community legislation⁴⁴ and

39 Case 234/84, *Belgium v. Commission*, 1986, ECR p.2263, paragraph 28, which concerned State aids. In the field of disciplinary proceedings, see Case 32/62, *Alvis v. Commission*, 1963, ECR p.49, p.55; in the field of fisheries, see Case C-135/92, *Fiskano AB v. Commission*, 1994, ECR p.I-2885, paragraph 39 and the references made to other case law; in the field of competition proceedings cases, see e.g. Joined Cases 56 and 58/64, *Consten and Grundig v. Commission*, 1966, ECR p.299, p.338, Case 85/76, *Hoffmann-La Roche v. Commission*, 1979, ECR p.461, paragraph 9.

40 *Hoffmann-La Roche v. Commission*, *supra* footnote 39, paragraph 9.

41 Case 17/74, *Transocean Marine Paint v. Commission*, 1974, ECR p.1063, paragraph 15.

42 *Belgium v. Commission*, *supra* footnote 39.

43 See e.g. Joined Cases 43 and 63/82, *VBVB and VBBB v. Commission*, 1984, ECR p.19, paragraph 25; *Hoffman-La Roche v. Commission*, *supra* footnote 39, paragraphs 9 and 11; *Transocean Marine Paint v. Commission*, *supra* footnote 41.

44 *Air Inter SA v. Commission*, *supra* footnote 3, paragraph 60.

applies as a supplementary rule in cases where an existing legislation does not provide for it, as well as in cases where no legislation has been adopted.⁴⁵

B. Access to the File

The case law of the Court of Justice and of the Court of First Instance seems hesitant and subject to variation on the right of access to the file. The Court of justice has taken the restrictive view that an undertaking may only access documents and evidence of the file on which the Commission has based its decision. There are no provisions which require the Commission to disclose the contents of its files to the parties concerned.⁴⁶ The Court of First Instance has however held that access to the file is one of the procedural safeguards intended to protect the rights of the defence in that it enables the addressees of statements of objections to examine evidence in the Commission's file so that they are in a position to express effectively their views on the conclusions reached by the Commission.⁴⁷ In later cases, the Court of First Instance appeared to limit its former jurisprudence by rejecting pleas alleging that access to documents of the file was unduly denied, where the applicants had not adduced evidence to show that the Commission had based its decision on undisclosed documents or that the file might have contained information exonerating them.⁴⁸

C. Legal Representation and Privileged Nature of Correspondence between Lawyer and Client

As part of the rights of defence, the Court requires the observance of the right to legal representation, which must be respected from the preliminary-inquiry stage.⁴⁹ The

45 *Ibid.*, and Case C-32/95 P, *Commission v. Lisrestal and Others*, 1996, ECR p.I-5373, paragraph 30.

46 *VBVB and VBBB v. Commission*, *supra* footnote 43, paragraph 25; Case C-62/86, *AKZO v. Commission*, 1991, ECR p.I-3359, paragraph 16.

47 See Case T-30/91, *Solvay v. Commission*, 1995, ECR p.II-1775, paragraph 59; Joined Cases T-10/92 to T-12/92 and T-15/92, *Cimenteries CBR and Others v. Commission*, 1992, ECR p.II-2667, paragraph 38; Case T-65/89, *BPB Industries and British Gypsum v. Commission*, 1993, ECR p.II-389, paragraph 30.

48 Joined cases T-213/95 and T-18/96, *SCK and FNK v. Commission*, 1997, ECR p.II-1739, paragraph 220; Case T-145/89, *Baustahlgewebe v. Commission*, 1995, ECR p.II-987, paragraph 34, and the references made to other case law. See nonetheless LENAERTS and MASELIS, *supra* footnote 7, at pp.310-311, where the authors state that "parties must have access to the Commission file in its entirety, except for the institution's internal notes and those elements of the file which are confidential to third parties". See however TRIDIMAS, *supra* footnote 4, p.265, according to whom the law does not provide a clear and satisfactory answer to the parties' right of access to the file.

49 Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, 1989, ECR p.2859, paragraph 16.

Court has also upheld the privileged nature of correspondence between lawyers and their clients.⁵⁰ The confidentiality of lawyer-client written communications is subject to two conditions: such communications must be made for the purposes and in the interests of the client's rights of defence, and they must emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.⁵¹ The principle of protection of written communications between lawyer and client extends to the internal notes which are confined to reporting the text or the content of communications between lawyer and client,⁵² as well as to memoranda drafted for the purpose of a telephone conversation with a lawyer, or to working documents prepared for the purpose of gathering the information which the lawyer might need to provide his assistance.⁵³

D. Protection against Self-Incrimination

The protection against self-incrimination has equally been recognised by the Court in the *Orkem* case,⁵⁴ although in a qualified form. The Commission can compel an undertaking to provide all information and documents in its possession, even if they may be used to establish, against it or another undertaking, the existence of an anti-competitive conduct.⁵⁵ However, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement.⁵⁶ The *Orkem* case shows how the Court had to strike a balance between on the one hand, the need to ensure the effectiveness of the power conferred on the Commission by Article 11 of Regulation No. 17 in order to gather the

50 Case 155/79, *AM & S v. Commission*, 1982, *ECR* p.1575, paragraph 22.

51 *Ibid.*, paragraph 21. This second condition seems however to be nuanced in Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission*, 2003, not yet reported, paragraphs 125-126, where the President of the Court of First Instance states that "the recognition of the protection of written communications to which [independent lawyers] are parties is capable of being shared, to a certain degree, by certain categories of lawyers employed within undertakings on a permanent basis where they are subject to strict rules of professional conduct".

52 Case T-30/89, *Hilti v. Commission*, 1990, *ECR* p.II-163, paragraph 18.

53 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission*, *supra* footnote 51, paragraphs 95-104.

54 Case 374/87, *Orkem v. Commission*, 1989, *ECR* p.3283, Case T-34/93, *Société Générale v. Commission*, 1995, *ECR* p.II-545, paragraph 74, Case T-112/98, *Mannesmannröhren-Werke AG v. Commission*, 2001, *ECR* p.II-729, paragraph 65.

55 *Orkem*, *supra* footnote 54, paragraph 34.

56 *Ibid.* paragraph 35.

relevant information, and on the other hand, the right against self-incrimination. This rule has been inserted in paragraph 23 of the preamble of Regulation No. 1/2003.

E. Obligation to Act within a Reasonable Time

According to the Court of Justice, “it is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy”.⁵⁷ The assessment of whether the time of proceedings is reasonable is determined in relation to the particular circumstances of each case. Due consideration will be given to the various procedural stages followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved.⁵⁸ The difficulties in carrying out investigations in complex cases, as well as the fact that the undertakings under investigation have brought action for annulment of decisions adopted by the Commission during the administrative proceedings are taken into account.⁵⁹

F. Standard of Protection

Member States will have to ensure that their procedural rules applicable to the enforcement of EC competition law respect the aforementioned rights. In relation to the standards applied by national procedural rules for the protection of these rights, the principle of equivalence and effectiveness should be observed. Therefore, when, on the one hand, a national rule provides for the protection of a right which is not protected under Community law or, on the other hand, when a national rule applies standards that are stricter than the standards applied under Community law for the protection of a right which is recognised by the latter, the principle of equivalence requires the Member State - within the framework of enforcement of EC competition law - to protect that right according to its own national standards. However, in so doing, the Member State must make sure that the application of its stricter standards will not be an obstacle to the effective enforcement of Articles 81 and 82 EC. When a

57 *SCK and FNK v. Commission*, *supra* footnote 48, paragraph 56; Joined cases T-25-26/95, T-30-32/95, T-34-39/95, T-42-46/95, T-48/95, T-50-65/95, T-68-71/95, T-87-88/95 and T-103-104/95, *Cimenteries CBR and Others v. Commission*, 2000, *ECR* p.II-491, paragraph 707.

58 *SCK and FNK v. Commission*, *supra* footnote 48, paragraph 57.

59 *Cimenteries CBR*, *supra* footnote 56, paragraph 709.

procedural right has been recognised under Community law after having been balanced against the need to ensure effective enforcement of EC competition law, the application of stricter national standards for the benefit of legal persons could hamper effective enforcement beyond that which the Court of Justice is prepared to accept. The difficult question is whether the higher national standard should be set aside on that account. Such question could especially arise in relation to the protection against self-incrimination, as qualified in the *Orkem and Mannesmannröhren-Werke* case.⁶⁰

⁶¹ Conversely, when a national law does not provide for the protection of a particular right recognised as a general principle of Community law, or when national law standards offer a lesser degree of protection, the principle of effectiveness requires the Member State to observe and to secure the protection of the relevant right by applying the same standards as those upheld by the Court of Justice.⁶²

IV Judicial Review and Remedies

In order to secure observance of the rights operators have under EC law, enforcement of EC competition rules by Member States entails the obligation to maintain a system capable of affording effective judicial review of decisions adopted by NCAs.

The right to an effective judicial remedy was upheld by the Court of Justice in *Johnston*,⁶³ where it was characterised as “a general principle of law which underlies the constitutional tradition common to the Member States”, which is also enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

Accordingly, economic operators must have the possibility to bring before national courts NCAs’ decisions that affect rights conferred on them by Community law. The

60 *Supra* footnote 54.

61 It should be borne in mind that the precise rules attached to the rights of defence have been developed by the Court of First Instance and by the Court of Justice within the context of infringement proceedings initiated by the Commission within the framework of Regulation No. 17. It could be said that considered within the context of other (national) procedural rules, the rights of defence would be “worked out” differently. However, general principles of Community law being hierarchically superior to secondary law, the rights of defence they encapsulate can be expected to be absolute and inalterable. See *supra*, at point a (Right to a fair hearing) and the case law referred to in notes 44 and 45).

62 See, in relation to fundamental rights, WEILER, J.H.H., “Fundamental Rights and Fundamental Boundaries: on Standards and Values in the Protection on Human Rights” in N. A. NEUWAHL and A. ROSAS (eds.), *The European Union and Human Rights*, 51-76, at 68-69. In the same sense, see TRIDIMAS, *supra* footnote 4, p.227.

judicial review should ensure that the rights of defence are observed by NCAs. Moreover, it seems fair to deduce that judicial bodies should have full jurisdiction to review NCAs' decisions, and especially the proportionality of penalties imposed. Complainants should also be entitled to bring before national courts decisions by NCAs rejecting their complaints.

The right to an effective judicial remedy implies that reasonable locus standi must be provided to addressees of individual acts, as well as to complainants. As the Court emphasised, it is up to national law to determine an individual's standing and legal interest in bringing proceedings. However, national legislation must not undermine the right to effective judicial protection so as to render virtually impossible the exercise of the rights conferred by Community law.⁶⁴ The principles of effectiveness and equivalence, once again, apply.

The principle of effective protection of Community rights means that national Courts must have the possibility to grant interim measures when the contested decision is liable to cause serious and irreparable damage to the applicant. While the Court of Justice has underlined the obligation of national courts to grant interim relief against national measures affecting rights which individuals derive from Community law,⁶⁵ it has conversely recognised the possibility for national courts to grant interim relief against national measures implementing Community law.⁶⁶ The first case addresses the situation where a national measure is incompatible with a rule of Community law. The second case deals with the situation where the national court faces a national measure implementing a rule of secondary Community law the legality of which is indirectly challenged. Accordingly, the granting of interim relief against an NCA's decision enforcing Article 81 or 82 EC belongs to the situation addressed in *Factortame*,⁶⁷ in so far as the national measure would be incompatible with a rule of EC law. Interim measures allow economic operators against whom penalties are

63 *Johnston v. Chief Constable of the Royal Ulster Constabulary*, *supra* footnote 12, paragraph 18.

64 See Case C-87 to 89/90, *Verholen and others v. Sociale Verzekeringsbank Amsterdam*, 1991, ECR p.I-3757, paragraph 24.

65 Case C-213/89, *Factortame and others*, 1990, ECR p.I-2433.

66 Case C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, 1991, ECR p.I-415.

67 It should be noted that in *Factortame*, interim relief had to be granted against a national measure which did not intend to implement Community law, whereas in the present situation, interim relief would be asked for against a national measure which intends to apply Treaty provisions.

imposed to defend their rights under EC law when, under national law, action brought in national courts do not have suspensive effect in relation to the execution of sanctions imposed by NCAs.

When a decision adopted by an NCA is enforced against economic operators, and is subsequently quashed by national courts, the question arises whether an action for Member State responsibility could be founded. Member State's liability would not be established easily, as the applicant would have to demonstrate that the NCA had manifestly and gravely disregarded the limits on its discretion.⁶⁸ This condition would only be satisfied where an NCA had applied Articles 81 and 82 EC in a manner which overtly contradicts the Commission's settled interpretation, or the case law of the Court of Justice and the Court of First Instance. It should be borne in mind that when an NCA exercises its power under Regulation No. 1/2003, it necessarily enjoys a wide margin of discretion. Member States liability could also be engaged for breach of the rights of defence recognised under Community law. Recently, the Court of Justice also recognised Member State liability for an infringement of Community law by a decision of a national court of last instance.⁶⁹ In such a case, liability can be incurred where the national court has manifestly infringed the applicable law.⁷⁰ Such would be the case, *inter alia*, in situations where a national court of last instance manifestly disregards the case law of the Court of Justice, where for example the Commission, by virtue of Article 15(1) and (3) of Regulation No. 1/2003, had made clear its position during the proceedings, or where the national court refuses to comply with its obligation to make a reference for a preliminary ruling under Article 234 EC.⁷¹

The right to effective judicial review and to interim measures could be expected to be particularly relevant in relation to sanctions against agreements which come within the scope of Article 81 EC. Contrary to what is the case in relation to Article 82 EC, national competition authorities cannot prohibit under national competition law agreements which do not restrict competition within the meaning of Article 81(1) EC,

68 Joined Cases C -46/93 and C -48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, 1996, ECR p.I-1029, paragraph 55.

69 Judgment of the Court of Justice of 30 September 2003 in case C -224/01, *Gerhard Köbler v. Austria*, not yet reported.

70 *Ibid.*, paragraph 53.

71 *Ibid.*, paragraphs 55 and 56.

or which satisfy the conditions of Article 81(3) EC.⁷² In relation to Article 82 EC, judicial control and interim measures can only be of interest when a penalty is imposed exclusively to sanction an abuse of dominant position within the meaning of Article 82 EC, and not of national competition law. Member States are not precluded from applying, on the basis of domestic law, stricter standards in relation to unilateral conducts than those attached to the application of Article 82 EC.⁷³

The concern of affording effective judicial protection should give important roles to both the Commission and the Court of justice, since in applying Articles 81 and 82 EC, Member States will discharge their tasks under their supervision. Pursuant to Article 15(3) of Regulation No. 1/2003, the Commission may be present in proceedings before national courts through the possibility to submit on its own initiative written observations to national courts, and where the latter permit it, to make oral observations. According to Article 15(1) of the Regulation, national courts may also seek the Commission's opinion concerning the application of Community competition rules. Furthermore, pursuant to Article 16 of Regulation No. 1/2003, national competition authorities and national courts must not take decisions which would run counter to the decisions adopted by the Commission. Article 11(6) of Regulation No. 1/2003 allows the Commission to initiate proceedings, with the effect of relieving national competition authorities of their competence to apply Article 81 and 82 EC to the case at issue. Thus the Commission keeps a "trump card". It intends to make use of this possibility when the national competition authorities envisage conflicting decisions with consolidated case law.⁷⁴ It should be recalled that according to the Court of Justice,⁷⁵ the Commission is responsible for defining and implementing the orientation of Community competition policy. It does so, however, subject to review by the Court of First Instance and the Court of Justice. Pursuant to Article 220 EC, the Court of Justice has the final say in interpreting Community law. Likewise, national courts are likely to review NCAs decisions with the assistance of

72 See Article 3(2) of Regulation No. 1/2003.

73 *Ibid.*

74 See Joint statement of the Council and the Commission on the functioning of the network of competition authorities, Council Document 15435/02 ADD 1 of 10 December 2002, paragraph 21, available at: <http://register.consilium.eu.int/pdf/en/02/st15/15435-a1en2.pdf>.

75 See Case C-344/98, *Masterfood Ltd v. HB Ice Cream Ltd*, 2000, ECR p.I-11369, paragraph 46.

the Court of Justice,⁷⁶ which will provide guidance for the interpretation of Articles 81 and 82 EC, as well as for the application of general principles of Community law. The role of the Court of Justice could become particularly important at the stage of judicial review in order to ensure the consistency of the enforcement of EC competition rules. Likewise, the number of requests for preliminary rulings could be expected to increase significantly. This is even more the case now that the Court of Justice has made clear that Member States are liable when national courts adjudicating at last instance do not comply with their obligation to make a reference for a preliminary ruling under Article 234 EC.⁷⁷

Conclusion

Within the process of the decentralisation of enforcement of EC competition law, general principles of Community law will afford a framework to national procedural autonomy which is expected, although to a limited extent, to temper the diversity of national procedural rules. Such is especially the case with regard to the rights of defence recognised at Community level, which NCAs and national courts will have to observe in the day to day enforcement of Articles 81 and 82 EC. In the current stage of European integration, according to the principle of subsidiarity, emphasis is increasingly placed on the decentralisation of Community policies. Regulation No. 1/2003 is, in part, inspired by this trend. Whereas it might be considered that such a move will bring about the fragmentation of the implementation of EC competition law, the operation of general principles of Community law can be expected to bring about a degree of convergence between the procedural rules of the Member States. Inspired by the traditions common to the Member States, general principles of law are adopted by the Court of Justice and fashioned according to the requirements of the Community legal order. Those general principles will now condition the application by Member States of their procedural rules in the context of Community competition

76 Pursuant to Article 234 EC, national courts are entitled, or under the obligation, when they are courts of last instance, to refer the matter to the Court of Justice via a preliminary reference when issues of Community law which have not been dealt with previously (*acte éclairé*) are raised by the parties. National courts can also ask for a preliminary ruling for questions of interpretation raised *ex officio*, see Case 283/81, *Srl CILFIT et al. v. Ministry of Health*, 1982, ECR p.3415 and Case 166/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1974, ECR p.33, paragraph 3.

77 Köbler, *supra* footnote 69.

rules. Thus decentralisation of the application of Community law may paradoxically foster the emergence of a *ius commune* in the field of national procedural rules.



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