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Procedural Convergence in Competition Law

Towards a Spontaneous *Ius Commune?*

Dr. Anna Gerbrandy[1]

Europa Institute, University of Utrecht, the Netherlands

Abstract

In this article I will address the question of whether substantive statutory convergence, by which is meant that national statutory law holds norms that are substantively the same as European law norms, is followed by spontaneous procedural convergence. This question will be addressed in focusing on Dutch competition law, which is substantively the same as EC competition law. This means that at the statutory level there is substantive convergence, but not necessarily statutory procedural convergence. Following a general assumption that procedural law is shaped by substantive law, the expectation may be that the statutory substantive convergence in Dutch competition law will give rise to procedural convergence at the level of the courts. Though this article focuses on the influence of European procedural law on national Dutch court proceedings, its findings have a wider relevance, because of the implications these findings may have on the thesis of a general developing procedural ius commune.

1 Introduction[2]

In researching whether substantive statutory convergence in Dutch competition law is followed by procedural convergence, the focus of this article is on administrative law. This question will be addressed through focusing on Dutch competition law. In this area of law, procedural administrative law can relate to procedures at the level of the competition authority or to procedural law as applied in courts. I will focus on convergence of procedural law in court proceedings, as it is at this level that procedural law is given final shape. The underlying supposition relating to the interplay between substantive law and procedural law seems to be that procedural law is shaped by substantive law, to which it is ancillary.[3] The function of

[1] The author would like to thank Marloes Ramp for her assistance in preparing this article.

[2] This paper is based partly on my dissertation, *Convergentie in het mededingingsrecht. De invloed van het EG-recht op materiële toepassing, toegang, bewijs en toetsing bij de Nederlandse mededingingsbestuursrechter, bezien in het licht van effectieve rechtsbescherming* (Den Haag 2009).

[3] See for example: W. van Gerven, 'Of Rights, Remedies and Procedures' [2000/3] *CMLR* 501-536; M. Accetto and S. Zleptnig, 'The Principle of Effectiveness: Rethinking Its Role in Community Law' [2005/3] *European Public Law* 375-403; J.S. Delicostopoulos, 'Towards European Procedural Primary in National Legal Systems' [2003/5] *ELJ* 1429-1462; C.N.

procedural rules is to enable claims that are based on substantive law to be adjudicated. Though procedural law in itself can lay claim to legitimacy,[4] it is its ancillary nature that shapes this expectation of adaptability.

The focus of this article is administrative competition law. In this area of law, procedural administrative law can relate to procedures at the level of the competition authority or to procedural law as it is applied in courts. I will focus on convergence of procedural law in court proceedings. Following this general assumption relating to the ancillary nature of procedural law the expectation arises that at the level of the national administrative competition courts, the statutory substantive convergence in Dutch competition law will shape procedural judicial convergence.

Outline

The article is structured as follows: first I will introduce the Dutch Competition Law Act and sketch how judicial review is structured in this area of administrative law (par. 2). Then I will briefly discuss ways in which procedural convergence may be shaped, after having introduced the concept of convergence in a slightly more rigorous manner than this introduction allows (par. 3). In paragraph 4, I will discuss some examples of Dutch administrative competition law where substantive convergence is indeed followed by procedural convergence: the examples relate to standing rights for the competition complainant and evidentiary rules relating to a presumption of proof. In the concluding paragraph (par. 5), I will return to the question of whether or not a spontaneous bottom-up convergence in administrative competition law – a procedural *ius commune* in this area – may be taking shape and if interferences can be drawn that relate to a wider picture of the shaping of a spontaneous procedural *ius commune*.

2 Dutch Competition Law and the Decentralised Application of EC Competition Law

Transplants and bypasses in the Competition Act

The Dutch Competition Law Act (the *Mededingingswet,* hereinafter the Competition Act) came into force in 1998 and contains substan-

Kakouris, 'Do the Member States Possess Judicial Procedural "Autonomy?" [1997/6] *CMLR* 1389-1412; T. Eilmansberger, 'The Relationship between Rights and Remedies in EC Law: In search of the Missing Link' [2004/5] *CMLR* 1199-1246, and more fundamentally, R.G. Bone, *Making Effective Rules: the Need for Procedure Theory* (Boston 2009), at http://www.bu.edu/law/faculty/scholarship/workingpapers.

4 See S. Hampshire, *Justice is Conflict* (Princeton/Oxford 1999); C. Jetzlsperger, *Legitimacy Through Jurisprudence? The Impact of the European Court of Justice on the Legitimacy of the European Union* (Florence 2003), at p. 30-32.

tive provisions which are legal transplants of substantive provisions of EC competition law. A legal transplant, as is well known, means the transposition of a 'foreign' concept, doctrine or legal construction into another legal system.[5] In this way the provisions on the prohibition of anticompetitive agreements,[6] the prohibition of abuse of a dominant position,[7] and both the idea of *ex ante* review of concentrations and the substantive standard applied to the review thereof,[8] have been laid down in the national Competition Act. Of course, these provisions relate to competition on the Dutch market or parts thereof, instead of – as the European provisions do – relating to the common market, or parts thereof. The Competition Act also contains some transplants of procedural concepts. The concept of legal privilege, for example, has been incorporated in the Competition Act,[9] though such a concept is not widely known in other areas of Dutch administrative law.[10]

Apart from legal transplants, the Competition Act also contains provisions encompassing a *legal bypass*.[11] In the national Competition Act legal bypasses hold a *direct* reference to concepts in European competition law.[12] This use of legal bypasses means that the interpretation of these concepts by the European Court of Justice (also: ECJ) is also the leading interpretation for the understanding of these concepts contained in the national act. Any change in interpretation by the ECJ is directly applicable in the national context in which the Competition Act is applied, *without* there being an obligation in European law to do so. This follows from the national statutory

5 On legal transplants see: O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' [1974/37] *Modern Law Review* 1-27 and A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh 1974), who hold diametrically opposed positions relating to the value of legal transplants. See for a synthesis: J. Bell, 'Mechanisms for Cross-Fertilisation of Administrative Law in Europe', in *New Directions in European Public Law* (Oxford 1998), 147-168.

6 Article 6, par. 1 Competition Act is a transplantation of Article 81 par 1 EC.

7 Article 24 Competition Act contains the transplantation of Article 82 EC.

8 Articles 26 to 49 Competition Act contain the provisions on *ex ante* merger control in which the concepts of EC merger control have been transplanted. These provisions, however, are less an exact copy of the EC merger control regulation than are the provisions on anticompetitive agreements and abuse of dominance.

9 See Article 51 Competition Act.

10 As can be read in the Preparatory Works, its inclusion in the Competition Act is based primarily on the wish of the legislator to bring protection in line with the protection afforded by the ECJ.

11 I have coined the term 'legal bypass' in my dissertation (Gerbrandy 2009, at p. 66), to keep in line with the medical-biological metaphors of transplants, fertilization and cross-fertilization, used in literature pertaining to this subject.

12 For example, Article 1, under f Competition Act provides that an 'undertaking' is defined as 'undertaking as meant in Article 81, par. 1, EC'.

legal bypass itself, not from European competition law. For legal transplants of the central substantive provisions of competition law, of course, a general *expectation* of courts following the legal interpretation by the ECJ of the legally transplanted provisions may be the fundament on which statutory substantive convergence is built, but this interpretation of the transplanted provision is theoretically in the autonomous hands of the national judiciary: there is no obligation, either in the national statutory law or in European law. Scholars of legal transplants in general warn that a transplanted provision will probably be interpreted differently than its original conception would lead one to expect.[13] Such a general expectation, however, does not take into account the specific circumstances of competition law (in the member states, at least). In competition law the national competition law provisions are supplemented by EC competition law (or the other way around),[14] to which it is usually intimately connected, at least substantively. In addition, EC competition law has to be applied at the national level, both by courts and competition authorities, following Regulation 1/2003.[15] It can logically be expected that this intimate connection between substantive national competition law and substantive European competition law will not lead so much to a divergent substantive interpretation but rather to an 'old-fashioned' kind of legal transplant.[16]

Organisation

The Netherlands' Competition Authority (de *Nederlandse Mededingingsautoriteit,* here also referred to as Competition Authority), is the competition authority to whom the public enforcement of the Competition Act is entrusted. Its decisions, which are of an administrative nature, can be reviewed by the district court of Rotterdam in first instance, and the Trade

[13] See for example G. Teubner, *The Europeanisation of Law: The Legal Effects of European Integration* (Oxford/Portland Oregon 2000), 243-68.

[14] In the Netherlands the Competition Act was preceded by the Act on Economic Competition (*Wet Economische Mededinging)*, in which a system of *control* of cartels was laid down: cartels would (or should) be reported to the Ministry of Economic Affairs, were registered, and only prohibited under specific circumstances. This system was later complemented by some general prohibitions on certain forms of cartels, but as a system not repealed until 1998 with the entry into force of the Competition Act. Is it therefore not surprising that in such a legal environment the enforcement by the Commission of the European competition provisions came somewhat as a shock: in many of the larger cartel-cases and more serious infringements penalized by the Commission Dutch companies were involved.

[15] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1-25.

[16] See for substantive research that underscores this expectation at least for the provisions on anti-competitive behavior and merger control in the Competition Act: Gerbrandy 2009.

and Industry Appeals Tribunal in appeal (the *College van Beroep voor het bedrijfsleven*: the Appeals Tribunal). The appointment of the district court of Rotterdam as the *only* district court to have jurisdiction relating to decisions of the Competition Authority means that it is appointed as a *specialised* court. The appellate court, the Appeals Tribunal, was already a specialised administrative court in areas of economic law, and has been appointed as appellate instance for competition cases. Together they are the administrative competition courts. In contrast to the powers of judicial review of the ECJ, which in direct appeals in competition cases is the appellate court to judgments of the Court of First Instance (also: CFI), but has jurisdiction limited to questions of law, the powers of judicial review for the Appeals Tribunal are not limited to questions of law.

The Competition Authority is also entrusted with the decentralised enforcement of EC-competition law. Its powers to do so are based on the national Competition Act and on Regulation 1/2003. This regulation, as is well known, contains an *obligation* to apply EC competition rules (Articles 81 and 82 EC) in conjunction with national competition rules, when the EC provisions are applicable.[17] This means that judicial review of decisions in which *both* national and community law is applied, is also in the hands of the district court of Rotterdam and the Appeals Tribunal.

Rules governing administrative procedures are laid down in national law. The Dutch procedural rules, rules of *national administrative law*, can be found mostly in the General Administrative Law Act (the *Algemene wet bestuursrecht*: the Gala). The Competition Act also contains some provisions of a procedural nature. The Gala lays down the general principles pertaining to decisions, the obligation for the administrative authority to balance the interests concerned, and the obligation to give sound grounds for a decision. The Gala also contains provisions relating to access to court and some procedural rules on court proceedings generally. When applying EC-law on a national level – in decentralised enforcement of EC competition law – of course these provisions of national administrative law also govern administrative procedures, both before the Competition Authority and before the competition courts. The general rule on *procedural autonomy* applies equally in competition law cases as elsewhere in European law. This well known principle of European law provides that as far as there are no harmonising measures, rights deriving from EC-provisions are to be upheld and applied in a national procedural environment.[18] Equally well-known will be that this national procedural competence is limited – or even non-existent, according to some[19] – by the rules flowing from the principle of effectiveness, or effec-

[17] Article 3, Regulation 1/2003.

[18] On procedural autonomy see for example: Van Gerven 2000 and literature in note 3.

[19] Most notably the position taken by Kakouris 1997.

tive judicial protection.[20] The requirements that flow from these principles must always be met when EC-law is at stake. Thus, the *minimum* requirements of equivalence and effectiveness must be taken into account when the national competition authority and the national competition courts enforce and apply European competition law.[21] Also, from the principle of effective judicial protection may flow a *positive* obligation to provide remedies, even remedies that as yet do not exist in national law.[22] Of course, these general requirements already lead to some form of European-wide convergence in procedural law, the issue to turn to in the next section.

3 Convergence

The concept of convergence is used in many disciplines, ranging from mathematics to plate tectonics, and in telecommunication.[23] In a *legal* environment it means that legal systems, legal concepts or legal constructions are growing to be more alike. In European law, the concept of convergence is very much linked to the concept of a European *ius commune*, for example (and in this article), in administrative law. There seems to be a

[20] On this principle of EC law bookshelves full of literature have been written. See for example: J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007); A. Ward, *Judicial review and the Rights of Privvate Parties in EC Law* (Oxford 2007); M. Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentation* (Oxford 2004); J. Temple Lang, 'Judicial Review in European Union Law', in *Liber Amicorum Lord Slynn of Hadley* (the Hague/London/Boston 2000) 235-274; R. Craufurd Smith, *Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection* (Oxford 1999), 287-320.

[21] Case law on these points includes (but is not limited to) the following Cases: 33/76 *Rewe-Zentalfinanz and Rewe- Zentral AG/Landwirtschaftskammer für das Saarland* [1976] ECR 1989; 45/76 *Comet BV/Produktschap voor Siergewassen* [1976] ECR 2043; C-92/89 & C-143/89 *Zuckerfabrik Süderdithmarschen AG/Hauptzollamt Itzehoe en Zuckerfabrik Soest GmbH/Hauptzollamt Paderborn* [1991] ECR I-415; C-106/89 *Marleasing/Comercial Internacional de Alimetación* [1990] ECR I-419 ; C-6/90 & C-9/90 *Francovich and Bonifaci* [1991] ECR I-5357; C-213/89 *The Queen/Secretary of State for Transport, ex parte Factortame (Factortame I)* [1990] ECR I-2433; C-48/93 & C-46/93 *Brasserie du Pecheur (Factortame III)* [1996] ECR I-1029; C-5/94 *The Queen/Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)* [1996] ECR I-2553; C-178/94 a.o. *Dillenkofer* [1996] ECR I-4845; C-453/99 *Courage and Crehan* [2001] ECR I-6297; C-253/00 *Muñoz and Superior Fruiticola* [2002] ECR I-7289; C-13/01 *Safalero* [2003] ECR I-8679; C-432/05 *Unibet* [2007] ECR I-2271.

[22] See Case C-432/05 *Unibet*, but earlier on this topic also W. van Gerven, 'Bridging the Gap between Community and National Laws: towards a Principle of Homogeneity in the Field of Legal Remedies?' [1995/3] *CMLR* 679-702.

[23] See on any of these topics wikipedia, at www.wikipedia.org.

fairly strong current of scholars in European administrative law advocating such a convergence towards a European *ius commune*,[24] though an anti-movement in which the idea of differentiation in an area of multi-level jurisdictions is embraced seems to have gained momentum.[25] The idea of what can be coined the '*ius commune* thesis' seems to be that not only is there a factual tendency towards convergence, but also that such a convergent *ius commune* is something to be wished for, helped along, shaped, guided, and, if all else fails, to be provided for top-down by harmonisation of national procedural law.[26] The question of whether or not a European administrative *ius commune* is *factually* forming (on which opinions differ),[27] and the question of whether such harmonisation is something to be strived for, *normatively,* is

[24] See for example: Van Gerven 1995; T. Koopmans, 'European Public Law: Reality and Prospects' [1991/Spr] *Public Law* 53-63; R. Caranta, 'Judicial Protection Against Member States: A New Jus Commune Takes Shape' [1995/32] *CMLR* 703-726; C. Himsworth, 'Things Fall Apart: the Harmonisation of Community Judicial Procedural Protection Revisited' [1997/4] *ELRev.* 291-311; C. Brown, *Remedies for Breach of EC Law* (Chichester 1997); J. Schwarze, *The Europeanisation of Law: The Legal Effects of European Integration,* (Oxford/Portland Oregon 2000) 163-82.

[25] See on divergence as a general value in EU-law: G. De Búrca and J. Scott, *Constitutional Change in the EU. From Uniformity to Flexibility?* (Oxford 2000); A. Ott, *The Constitution for Europe and an Enlarging Union: Unity in Diversity?* (Groningen 2005) 105-135; A. Von Bogdandy, *Principles of European Constitutional Law,* (Oxford/Portland Oregon 2006); p. 3-52; and D. Thym, 'The Political Character of Supranational Differentation' [2006/6] *ELRev.* 781-799. On diversity in procedural law see also: C. Harlow, *The Evolution of European Law* (Oxford 1999) 261-285; and Dougan 2004. On the relationship between freedom and diversity in a philosophical sense also: I. Berlin, *Four Essays on Liberty* (London/Oxford/New York 1969).

[26] Those holding to an integrationalist *ius commune* thesis clearly will have no fundamental objections to harmonisation of procedural law. On the contrary, a step towards harmonisation follows logically from the way convergence, integration and *ius commune* are viewed: see for example M. Storme, *Approximation of Judiciary Law in the European Union* (Dordrecht/Boston/London 1994); Van Gerven 1995; Caranta 1995; Brown 1997; McKendrick 2000; and Schwarze 2000. Kadelbach 2002, at p. 205, calls this approach to *ius commune* the 'federalist approach'. In this view harmonisation not only brings greater integration but may even lead to greater acceptance of further integration by EU-citizens, as put forward by Schwarze 2000, at p. 179-181.

[27] Doubts are raised by P. Legrand, 'European Legal Systems are not Converging' [1996/1] *ICLQ* 52-81, who states hat the problem with the approach of the *ius commune* thesis is that it 'present[s] but a surface image of a legal system', as such studies 'indicate nothing about the deep structures of legal systems'. In that same vein: J.H. Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law' [1981/17] *Stan. J. Int'l L,* 357-388, at p. 379; C. Hilson, 'The Europeanisation of English Administrative Law: Judicial Review and Convergence' [2003/1] *European Public Law* 125-145, at p. 128.

often interchanged, and not always as well separated as it should be for the sake of sound argumentation. It seems that in an integrationist vision of European administrative law the dangers of *not* having a harmonised *ius commune* are ominous: not only are differing national procedural regimes a danger to a common European standard and to legal certainty, but it will lead to forum-shopping, and finally a fear that the project of European integration itself is endangered if not complemented with the integration and harmonisation of national procedural law.[28] Contrary to this view it is also possible to hold the opinion that these dangers are greatly exaggerated and that member states should not be too trigger-happy to give up their own, usually fully grown and embedded national provisions.[29] This latter stance may be based on several ideas, for example the idea of competition between legal regimes, a fear of the European standard not being high, but merely adequate (or less), a sense of national pride, or on the idea that law and culture are inextricably linked,[30] even more so for areas of procedural law than in (some) areas of substantive law.[31]

Of course, part of the research question of this article is to see whether or not such a procedural *ius commune* is taking shape in Dutch administra-

[28] See e.g. McKendrick 2000; A. Arnull, 'Case note on Case C-432/05, Unibet' [2007/6] *CMLR* at p. 1779, and literature in note 25, above.

[29] See on Dutch administative law for example: R.J.G.M. Widdershoven, *Europees recht en het Nederlands bestuursrecht* (Alphen aan de Rijn 1996), at p. 101.

[30] See on European standards as being merely adequate: Van Gerven 2000. That law and culture are linked seems to be the leading paradigm in the EU (and also in the USA), but can be seen as either very strong or more loosely defined, see: W. Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' [1995/43] *Am.J.Comp.L* 489-510; B.Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford 2001). For a critical note on the intimacies between law and culture see M. Krygier, 'Law as Tradition' [1986/2] *Law and Philopsophy* 237-262; Legrand 1996; Bell 1998, esp. at p. 156-157; Teubner 2000; J.C. Reitz, 'Doubts About Convergence: Political Economy as an Impediment to Globalisation' [2002/12] *Transnat'lL. & Contemp. Probs.* 139-60; C.A. Jones, *The Evolution of European Competition Law. Whose Regulation, Which Competition?* (Cheltenham 2006).

[31] See on the relationship between culture and administrative law: Bell 1998; but differently Tamanaha 2001, at p. 87-88; between culture and procedural law: Kahn-Freund 1974, at p. 20; Harlow 2000, at p. 80-81. Both areas of law are seen as more closely related to national culture than other areas of law. This would, of course, point to these areas of law being less convergence-prone. However, for substantive competition law there are pointers towards a more relaxed attitude towards foreign influences: it is relatively new law, intrinsically international, and part of economic law where the bindings between morality and law are less tightly wound. See on the development of a *lex mercatoria* for example: G. Teubner, *Global Law without a State* (Darthmouth 1997); B. De Sousa Santos and C.A. Rodríguez-Garavito, *Law and Globalization from Below. Towards a Cosmopolitan Legality* (Cambridge 2005), and on these points generally also Tamanaha 2001, at p. 86-87.

tive competition law. Though this paper is limited in scope, it may provide a clue for answering the bigger question as to whether or not a *general ius commune* might be forming. I will come back to this topic in the last section of this article. However, there seem to be at least some trends leading to a *ius commune* actually taking shape, at least on a general level. One can point to the growing influence of European law on national administrative law – the widening of topics governed by European law means that less and less areas of substantive law are immune to European law, the deepening of the concept of effective judicial protection means that the conditions relating to the concept of procedural autonomy are stricter. Also, the convergence between fundamental-rights standards that can be discerned in the judgments of the Court of Justice in relation to the judgments of the European Court on Human Rights seems to give rise to a general European standard of protection.[32] However, quite a chunk of administrative law, both substantive and procedural, is still outside the reach of European law.

Phenomenology of judicial procedural convergence

In administrative competition law there are several ways in which procedural convergence at the level of the national courts – *judicial* convergence as opposed to *statutory* convergence – may take form. The following phenomenology of procedural convergence may be helpful in disentangling the strands of the convergence-web.

The first way in which procedural convergence may take shape has already been mentioned: through the *European law principles of effective judicial protection and effectiveness*. The requirements of equivalence and effectiveness govern procedures in which EC law is at stake. These requirements only apply directly, however, when – in relation to the subject matter of this article – the national court is applying *European* competition law. The decentralised enforcement of EC competition law means that this application of European substantive law will in administrative competition court proceedings almost always be applied *in conjunction with* national competition law: both national and European competition law provisions are applied to the case at hand simultaneously. This influence on national procedural law exerted by the general EC-law principles is *mandatory* and based directly on supranational European law. The national court, also the national competition courts, may therefore, when in doubt, ask preliminary questions to the ECJ relating to the scope of effective judicial protection. Here then, the role of the ECJ is one of a constitutional court, though of course the ECJ itself likes to stress the collegial nature of its relationship with national courts.

[32] Bell 1998, at p. 151; C.M. Radaelli, 'Whither Europeanization? Concept Stretching and Substantive Change' [2000/4] *European Integration online Papers (EIoP)* no.8, at p. 12; and also: Delicostopoulos 2003.

Secondly, if the principle of effectiveness provides the bottom-line for national procedural law-governing procedures in which rights deriving from European law are at stake, this would mean that in a procedure in which *both* national law and EC law are applied jointly – for competition law purposes substantively the same provisions – the effect of the European law principle can hardly be ignored by the national court for the 'national' part of the dispute before it. Others have already pointed out that this effect of *spill over* from the EC law principle of effectiveness to not only 'dual' procedures (where both EC law and national are applied together), but also to procedures governed only by national substantive law (procedures in which rights deriving from EC law are not at stake) is almost inevitable.[33] These spill-over effects seem to be especially unavoidable in areas of law where EC law and national law are substantively linked, as in competition law.[34] The spill-over effectively means that no two sets of rules will govern one dispute, nor similar disputes.[35] The obligatory nature of the European law principle, setting aside or amending a national procedural provision, is extended *spontaneously* by the courts into national law.

The third form of judicial procedural convergence stems not from European law principles but flows from *national* law. Where the national Competition Act provides for statutory procedural convergence – which means that the Competition Act contains procedural rules that are based on procedural rules of European competition law – the national competition courts obviously will follow these statutory provisions. Such procedural convergence is *spontaneous* as seen from the European perspective. It is, however, *mandatory* for the national court: its obligation lies in the provisions of national law. One could say that such procedural convergence is less of a judicial nature, but clearly for the interpretation of these procedural aspects, in the Competition Act, for example, concerning legal privilege, the national court will build on the European law provisions that are the original source of the legal provision in the national Competition Act.

Fourthly, spontaneous convergence may also take place through *parallelism*. This is truly a form of *spontaneous* judicial procedural convergence. By parallelism is meant the copying by the national court of provisions, or surrounding interpretations, of European administrative law – the administrative law governing procedures at the European level at the Commission and in direct actions against decisions of the Commission – by reason of its *equivalent* place in the hierarchy of public enforcement of competition

[33] See on the influence of the *Factorame I*-judgment in the UK and Spain, for example: Caranta 1995; though Himsworth 2002 plays down this influence.

[34] See for this expectation relating to Dutch competition law: L.F.M. Verhey and N. Verheij, *De macht van de marktmeesters. Markttoetzicht in constitutioneel perspectief* (Deventer 2005).

[35] Van Gerven 1995, at p. 700. Also: 'two different spheres', Temple Lang 2000, at p. 262; 'two-speed justice', Bell 1998, at p. 160.

law. The provisions of European administrative law can either be laid down in regulations governing the procedures at the Commission, in case-law of the ECJ, or in guidelines or other non-binding instruments of EC law. To understand this form of convergence in competition law it must be recalled that the place of the Dutch administrative competition courts is *functionally equivalent* to the place of the CFI and ECJ in relation to the Commission. In this sense, the national competition courts and the European courts are, in effect, colleagues, dealing with the same kind of competition law issues. Parallelism is therefore, at least in this article, restricted to competition law parallelism. This is not to say that competition courts may not also copy procedural rules coming from outside EC competition law cases, in which case it is sometimes called *congruence*.[36] Judicial convergence through parallelism is *spontaneous* both from the European perspective and from the national perspective, there being no obligation in either to follow or copy the European procedural rule. In this sense, if parallelism actually occurs in administrative competition law, it may be the real test for the thesis that procedural convergence will follow substantive convergence.

The last form of convergence is really not convergence at all, but *divergence*. It may be that the national court applies national procedural law, which is different from European administrative law. There is no obligation to follow European administrative law in national cases, especially as long as the case remains outside the boundaries of the principle of effective judicial protection. In competition law, these are cases that are not based on the decentralised application of EC competition rules but only based on national law. The national court may also decide *not* to follow European administrative law examples where the national statutory provisions leave a gap open for interpretation. The competition courts may freely decide not to interpret the gap in an EC-law friendly manner, but in analogy to – divergent – national procedural law. Only in cases where EC law is also applied, and the national procedural rule contravenes the principle of effective judicial protection, will the court cross the boundaries of European law.

Bottom-up convergence, autonomy and the preliminary procedure

It is clear, as noted above, that in applying national competition law, which is substantively based on EC competition law, the national court may ask for a preliminary ruling by the ECJ on the interpretation of the national act.[37] However, it is less clear that where the national court *spontaneously* applies European administrative law principles in a national context

[36] See Widdershoven 1996, at p. 190. See also the use of the terms '*mimetism*' en '*isomorphism*' by Radaelli 2000, at p. 17. Note that parallelism and the principle of effectiveness do not necessarily lead to the *same* standard of judicial protection, as the Court of Justice may demand more from national courts than it applies in its own procedures.

[37] See Case C-28/95 *Leur-Bloem* [1998] ECR I-6017.

through judicial procedural convergence, that the national court has the same power. There seems to be no limitation on the power of the national court to questions of substantive law, however, and considering the place the ECJ reserves for itself in the multi-level system of European courts, it will probably not decline an answer even on questions of convergent procedural law. Having said that there seem to be no obstacles from the European perspective, there may, however, be considerations of *national autonomy* that may lead the national court to reconsider the preliminary procedure in these instances. Consider, for example, a question relating to the requirements of direct and individual concern, that the national competition court wishes – usually prompted by parties, but not necessarily so – to use to delimitate standing rights in the national context, where (equivalent, but different) access concepts are generally used. Should the ECJ deign to answer, and there seems to be no fundamental reason for it not to, the national court can hardly continue to decide the case in a different line than the ECJ indicated. The difference between following a line of procedural reasoning *spontaneously* and following a line of procedural reasoning laid down as an answer to a preliminary question – even though the ECJ has not held it up in the Leur-Bloem-type of cases there is an *obligation* to follow its rulings – is subtle, but for that matter no less real. In the first form of convergence there is no surrender of the national courts' autonomy – it can reverse its spontaneous parallelism; in the second form this might be much more difficult.

4 Examples of Bottom-Up Convergence in Competition Law

Some examples from the Dutch practice of competition case-law may clarify whether substantive convergence is indeed followed by procedural convergence. In this section of the paper I will focus first on standing rights and the complainant in competition law and second on presumptions of proof in cases relating to concerted practices. Access rights (rules on standing), rules of evidence and – for that matter – judicial review are areas of procedural law that have strong ties to substantive provisions, but are generally, and at least in Dutch perspective, seen as parts of procedural law.

4.1 Standing rights and the Complainant in Competition Law

Introduction

Generally, standing rights in Dutch administrative law are governed by the Gala (the general administrative law act). The Gala governs both the question of *who* can bring proceedings in court and as a corollary

has standing rights as a complainant in competition proceedings before the Competition Authority, and the question relating to *which acts* can be appealed in court. The competition complainant will be the focus of this section. To discover whether the Dutch competition courts, in a process of spontaneous judicial convergence, follow the ECJ and the CFI both of whom in administrative proceedings before them also have to rule on standing rights in competition procedures, first the *general* administrative law rules on access should be determined. If these are already the same on the European level and on the Dutch national level, then obviously the same outcome – in the sense of equal standing rights both on the national level as on the European level – does not necessarily mean that the statutory substantive convergence has actually been the reason for these parallel access rights.[38]

Standing in EC law

As is well-known, in EC competition law standing in direct actions to the CFI is governed by Article 230, par. 4 EC. This article gives a right of access to Court to parties who are *directly and individually concerned* by, in this case, a competition decision of the Commission.[39] In relation to competition complainants this generally means an action against the dismissal of the complaint, either on grounds of a lack of community interest or on substantive grounds. Competitors are generally perceived to be directly and individually concerned in relation to final decisions pertaining to complaints about actions of a competitor.[40] The same holds true for other parties, such as those with a contractual relationship to the undertaking that is subject of the complaint.[41] Also, more recently it has been held that consumers have access to Court in recourse against the dismissal of their competition complaint.[42] It should be noted, however, that access to the Commission as a competition complainant and access to the Court in a direct action is

[38] See for an elaboration on this point of methodology of this type of research: Gerbrandy 2009, at p. 75.

[39] The interpretation of Article 230, par. 4 in competition cases is generally perceived to give more generous access than in other areas of European law, see: A. Arnull, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty' [1995/32] *CMLR* 7-49, at p. 30-31; J. Shaw, *Law of the European Union* (Hampshire, 2000), at p. 517-520; E. Biernat, *The Locus Standi of Private Applicants Under Article 230(4) EC and the Principle of Judicial Protection in the European Community* (New York, 2003) and M.P. Granger, 'Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts' [2003/66] *Modern Law* Review, 124-38 at p. 127-128.

[40] See for example: Case T-86/96 *ADLU/Commission* [1999] ECR II-1733; Case T-528/93 *Métropole* [1996] ECR II-649; C.S. Kerse and N. Khan, *EC Antitrust Procedure* (London 2005), at p. 471.

[41] See Case 26/76 *Metro I* [1997] ECR 1875.

[42] See Joined Cases T-213 & 214/01 *Österreichische Postsparkasse* [2006] ECR II-1601.

not necessarily granted to the same – legally delineated – group of (legal) persons. There is a possible difference in test, as access to the Commission as a complainant is governed by the requirement of having a *legitimate interest*,[43] which should be discerned from the requirement of being *directly and individually concerned* of Article 230 par. 4 EC. It seems, however, that a complainant with a legitimate interest, actively involved in the subsequent proceedings (against the undertaking that is the object of the complaint or investigation by the Commission), even if the complaint is dismissed, means being individually and directly concerned by this dismissal.[44] The *active participation* of the complainant may influence the right of standing against the Commission's decision.[45] This is an important aspect of standing to note here, because, as will be shown below, in Dutch administrative law the concepts governing access to the competition authority and access to the competition court are expected to be exactly *the same;* active participation does not change this legal qualification.

Standing in Dutch administrative law

In Dutch administrative law access is granted to 'interested parties'.[46] An interested party is a party, a complainant for the purpose of this article, who has an individual interest, which is objective, personal and directly related to the requested decision.[47] For competition proceedings it seems that especially the required *directly* related interest (directly related to the decision that is being asked, or – in court proceedings – directly related to the decision of the Competition Authority), may be problematic.[48] For consumers, however,

[43] Article 7, par. 2 Regulation 1/2003.

[44] See Arnull 1995, p. 33; Kerse & Khan 2005, at p. 469. Also, it seems that 'establishing a legitimate interest is not particularly difficult', says M. Forbes Pirie, 'The Complainant in EC Competition law' [2000/1] *World Competition,* at p. 112.

[45] See Arnull 1995, at pp. 11 and 31; Ward 2007, at p. 301-305.

[46] Article 1:2 Gala.

[47] See Dutch literature on administrative law, specifically: R.M. van Male, 'Enkele aspecten van het begrip belanghebbende in de Algemene wet bestuusrecht' in *De belanghebbende* (Den Haag, 1992) 13-87, at p. 46; M.B. Koetser, 'Belanghebbende volgens de rechtsprekende Afdeling van de Raad van State', in *De belanghebbende* (Den Haag 1992) 101-190, at p. 131; J.C.A. de Poorter, *De belanghebbende* (Den Haag 2004), at p. 135-136; R.J.N. Schlössels, *De belangehebbende* (Deventer 2004), at p. 49-89.

[48] Zie generally on direct concern: De Poorter 2004, at p. 154-156; A.J.C. de Moor-van Vugt and J.C.A. de Poorter 2004, 'Annotatie bij Hof van Justitie, 11 september 2003, zaak C-13/01, Safalero', *AB* 2004/18. See in competition proceedings for example District Court Rotterdam 25 February 2002, *Snelcore* (LJN: AU4958), who is held not to be directly concerned as contractual partner to the parties asking for clearance of an agreement. In District Court Rotterdam 20 September 2000, *Wegener* (LJN: AA7514) employees of merging parties, whose jobs would be jeopardized, are not directly concerned; in District

the stumbling block for both access to court and access as a complainant to the Competition Authority is the requirement of having an *individual* interest.[49] This requirement is generally interpreted as meaning that the complainant should have an interest that is different from or can be separated from the general *super*-individual interest.[50]

It should be emphasised here that in Dutch administrative law only an interested party can request a decision from an authority, and only interested parties can have recourse to the administrative court in relation to the requested decision: the concept for access to the authority and access to the court is substantively the same. It is not surprising that the Dutch competition courts have construed the concept of interested party mostly in light of this general interpretation. The very idea of the Gala is to create a concept that is valid across the board: all administrative law procedures are governed by the same conceptual framework. In competition law, this means that access as complainant and access to court against a dismissal of a complaint is *generally* the equivalent to access in European competition law proceedings.[51] For example, at both levels access is granted to competitors and to parties in direct contractual relations.[52] However, there seems to

Court Rotterdam 10 April 2002, *Avebe* (LJN: AE1768) a joint venture partner is not directly concerned in relation to an exemption decision relating to the activities of the joint venture; and a daughter company infringing the Competition Act does not have standing relating to the fine levied to its mother company in CBb 7 December 2005, *Secon* (LJN: AU8309).

49 Especially problematic for the individual consumer-complainant; see on this point also: J.C.A. de Poorter, 'De belanghebbende in het mededingingsrecht' [2000/1] *M&M* 37-40; A.T. Ottow, 'De obstakels voor het indienen van een klacht bij de NMa' [1999/1] *M&M* 5-9; P.J.M. Koning and N.U.N. van den Heuvel-Kien, *Formeel mededingingsrecht: bestuursrechtelijke aspecten vsn uitvoering en handhaving van de Mededingingswet* (Den Haag 2000), at p. 52.

50 See on this 'singled-out' criterion generally: De Poorter 2004.

51 See Gerbrandy 2009, at p. 142-170.

52 See for competitors that have been granted standing in Dutch administrative law, District Court Rotterdam 3 August 2004, *Loterijenfusie* (not published in LJN), in which the competitor to two merging Lotteries was granted standing in relation to the decision to clear the merger in first phase proceedings; also competitors to merging parties in second phase clearance proceedings have standing, as in the interim order of the District Court Rotterdam 17 December 1998, *MKB* (*Vendex & KBB*) (not published in LJN) and District Court Rotterdam 19 April 2007, *NVV* (LJN: BA3538). Potential competitors have standing, as can be seen in District Court Rotterdam 1 May 2003, *Broadcast I* (LJN: AF9122). Also, complainants who are competitors are granted standing in relation to that complaint, not primarily because they are complainants, but because undertakings are given standing rights in relation to decisions pertaining to competitors, see: District Court Rotterdam 11 March 2003, *Carglass* (LJN: AF8902) and CBb 17 November 2004, *Carglass* (LJN: BB7105). Not all competitors are granted standing automatically, however. The CBb has held that

be a *divergent* situation concerning access for *some* complainants and some conceptualisation problems relating to the competition complaint in Dutch administrative law in the first place. Therefore, this merits further attention.

4.2 The Competence to Act Pursuant to a Complaint

There are several interesting aspects to competition complaint proceedings from the perspective of spontaneous judicial convergence. As explained above, the general result of applying the Gala provisions is that only an interested party can file a legitimate complaint with the Competition Authority. In competition law, the idea of a complaint is to request a decision from the competition authority in relation to an infringement of competition law by *another* party. In administrative law relations, however, usually a request is made on behalf of the person itself: the person wanting to add an annex to a house will request permission to do so; the person claiming social security benefits will file a request. This is not to say that outside of competition law (and regulatory affairs) other administrative bodies never act on a complaint, but the institutionalised place of the competition complaint in EC competition law is relatively new to Dutch administrative law in general.

Following the Gala, in the Dutch system of administrative law, only a complainant who is an interested party can actually request a decision; this means that only an interested party has a *right* to a decision, following the request/complaint. The *competence* of the Competition Authority to act on such a request for a decision by a complainant, however, is *not* expressly regulated in the Competition Act: there is no express conferral of such power on the Competition Authority. This is in contrast to EC competition law, where the Commission has been granted the competence to act on complaints explicitly.[53] Therefore, before being able to decide whether or not access to court could be granted in relation to a dismissal of a complaint, it first had to be decided whether the Competition Authority could actually act on such a complaint. In other words: did the Competition Authority have the power to act on a complaint by taking a decision? It should be recalled here that in general Dutch administrative law only a *request* can lead to a decision, and only an *interested party* can *request* such a decision, in the sense of having 'standing' before the Competition Authority. Of course, just as the Commission does, the Competition Authority also has the power to start an investigation *ex officio* – and this investigation may lead to substantively the same result as a complaint would – so to formulate this paradigm here may

there still has to be a connection between the decision appealed and the undertaking concerned. However, being a competitor usually will be sufficient to establish such a link.

[53] See Article 7, par. 1 Regulation 1/2003; see also Case 210/81 *Demo Studio Schmidt* [1983] ECR 3045, at par. 15.

seem superfluous to those outside Dutch administrative law. That is not the case, however, because parties who are *not* interested parties have no procedural rights, whereas interested parties requesting (and having the legal status to be able to request) a decision do have (some) procedural rights. For the complainant, therefore, to have a right to a decision and corollary procedural rights during the examination of the complaint by the Authority, to fill this gap in statutory powers might become very important.

This gap in statutory powers was filled by the competition courts. First the district court and later the Appeals Tribunal held that in the system of the Competition Act a complaint should be understood as meaning the request for a decision to impose a sanction on the undertaking concerned.[54] Of course, not all complaints are actually intended to have a sanction imposed – some would be happy with just the alleged infringement ending – and the national courts are well aware of this.[55] However, the power to impose a sanction for breach of competition law was (naturally) explicitly provided for in the Competition Act.[56] To thread a string of beads from the complainant to the competence of the Competition Authority to act on the complaint by imposing a sanction, however, was a necessary first step. Those beads can be seen as spontaneous judicial convergence regarding the powers of the Competition Authority and the place awarded to complainants in competition law. The beading of such a necklace has made it possible to 'fit' the competition complaint as seen in European competition law in the framework provided for by the general administrative law provisions in Dutch administrative law. However, this also means that all general procedural provisions relating to requesting a decision, as provided for in the Gala, will fully apply in competition complaint proceedings, and not necessarily the procedural rules governing the Commission's complaint procedure. Or, to provide another metaphor: the bedding of the river is provided by the Dutch administrative law, the competition complaint is (part) of the European-scented water, guided by this bedding.

4.3 A Policy of Priorities

The second point of interest concerning convergence and parallelism relates to the policy to prioritise complaints. Prioritising means that complaints may be summarily dismissed for having a lack of interest for

[54] See District Court Rotterdam 11 September 2002, *Vodafone Libertel and Unipart* (LJN: AF0065) and CBb 3 July 2008, *Aesculaap* (LJN: BD6635), CBb 3 July 2008, *AUV* (LJN: BD6629).

[55] See explicitly: District Court Rotterdam 11 September 2002, *Vodafone Libertel and Unipart* (LJN: AF0065).

[56] In Article 56 Competition Act. Since 2007 the Competition Authority has also expressly been granted the power to give a binding instruction.

the Competition Authority, in light, of course, of the competition law objectives and provisions. The need to prioritise stems, it seems, from having the power to formally act on complaints; in the Dutch system a complaint by an interested party is a request as covered by the Gala, which means that an interested party is a legitimate complainant and therefore has a *right* to a decision on its request. The right for the complainant to receive a decision (that can be scrutinised in court), also brings with it the power for the Competition Authority to *reject* complaints. However, as is true at the European level for the Commission, the power to reject complaints *only* after duly examining their substantive content would seriously hamper the work of the Competition Authority; most of its resources would have to be routed towards investigation of complaints, some of which will clearly not be of great substantive interest. To resolve this tension, the Commission has been granted leave to only investigate complaints that are of Community interest, first in case-law of the ECJ but further elaborated on by the Commission itself.[57] Broadly speaking this means that the Commission, after a preliminary investigation (which has been subject of several ECJ judgments and has been elaborated upon fairly extensively so that the rights of the complainant will be upheld),[58] may decide *not* to pursue the complaint in a more in depth manner. The Commission may dismiss a complaint for *priority* reasons.[59]

The Competition Act did not expressly provide for a basis on which the Competition Authority could claim that priority dismissals of competition complaints were among its powers. The preparatory works, on which courts in general draw (and are expected to draw) when a statutory provision is unclear or leaves room for interpretation, only scarcely provide pointers on this issue.[60] By contrast, in general Dutch administrative law – especially in environmental law – it has generally been held that there is an *obligation* on the administrative body to substantively act on complaints.[61] A comparison of this generally accepted duty under environmental law and the Commis-

[57] See Case T-24/90 *Automec II* [1992] ECR II-2223, par. 77, and the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ EU 2004, C 101, p. 65-77.

[58] See for example: Cases 210/81 *Demo Studio Schmidt* [1983] ECR 3045; T-64/89 *Automec I* [1990] ECR II-1177; C-282/95 P *Guérin* [1997] ECR I-1503; C-119/97 P *UFEX* [1999] ECR I-1341.

[59] Though the way in which the Court has formulated the corresponding duty to examine the facts is still fairly strict: see for the 'duty of vigilance' Case 210/81 *Demo Studio Schmidt*, op. cit., at par. 22.

[60] See Preparatory Works (*Memorie van Toelichting*), pp. 47 and 90; and also Gerbrandy 2009, at p. 389-390.

[61] There is a dearth of Dutch literature on this duty to enforce (*beginselplicht tot handhaving*), see generally: P.J.J. van Buuren a.o., *Bestuursdwang en Dwangsom* (Deventer 2005); and ABRvS 30 June 2004, JB 2004/293 m.nt. CLFGHA.

sion's authority to dismiss a complaint due to lack of community interest and without having ascertained whether an infringement has actually taken place, shows some points in parallel. However, the point in time upon which a competition complaint may be summarily rejected is an earlier point in time.[62]

The competition courts had to fill a blank here: *if* the complaint in competition law is held to be a *request for a decision,* which has as its corollary that there is a *right* to a decision, should the Competition Authority have recourse to a policy to prioritise in which only those complaints are actually substantively examined that hold a promise of infringement or a point of general interest? The Dutch competition courts answered this question in the affirmative: the Competition Authority has the power to dismiss complaints based on priority, in effect a summarily dismissal of a complaint.[63]

This is yet another example of a power for the Competition Authority that, it seems, can only be explained by parallelism. Though the national courts do *not* expressly point to the equivalent power of the Commission, having regard to the fact that a priority-policy is not generally accepted in Dutch administrative law, it is only through the step of granting interested parties a right to a decision (by having recourse to the legal concept of the requesting of a decision, as explained above), that the corollary power of the Competition Authority which allows it not to investigate all complaints (made by interested parties) is necessary. This is the same reasoning that led the ECJ to grant the Commission leave to not investigate all complaints in an equally rigorous manner. The beads of the judicial convergence-string therefore start with a parallel in which the way complaints are regarded in EC competition law and national competition law, through the national law obligations of the Gala, to the parallel power of the Commission and the national Competition Authority to dismiss complaints for priority reasons.

As in the example above, this is not to say that the actual requirements of investigating a complaint before deciding to summarily reject it are also the same on national and European levels. Though the power to have recourse to a priority policy is a parallel power, the surrounding requirements for wielding this power seem to be *less* stringent in national law than as laid

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[62] On this comparison: Gerbrandy 2009, at p. 390-392; C.T. Dekker, *Nederlands Mededingingsprocesrecht* (Deventer 2002); G.T.J.M. Jurgens, 'Prioritering en Gedogen' [2000/2] *M&M* 83-85.

[63] See: CBb 17 November 2004, *Carglass* (LJN: AR6034) for confirmation. See for more elaboration: District Court Rotterdam 3 December 2004, *CZ* (LJN: AS3852); District Court Rotterdam 13 December 2004, *VVR* (LJN: AS2354); District Court Rotterdam 2 September 2005, *VVV II* (LJN: AU9056); District Court Rotterdam 22 December 2005, *Gidi* (LJN: AV9019); and District Court Rotterdam 17 October 2007, *CNV* (LJN: BB7105).

down by case-law of the ECJ for the Commission.[64] One can see that parallelism in powers does not necessarily entail parallelism in the requirements of exercising this equivalent power: again, the bedding of the stream is given by Dutch administrative law. It must be noted, however, that here the requirements for the national Competition Authority are, also in light of general administrative law duties of care and reasoning, being interpreted by the District Court of Rotterdam in a way that gives the Competition Authority too much leeway, one could say.

4.4 Standing Rights for Complainants

All of the above does not mean that *everyone* can request a decision of the Competition Authority for a sanction to be placed on another undertaking. In other words: not everyone is a legitimate complainant, only interested parties are. As stated above, there is a difference in standing rights in EC competition law and in general Dutch administrative law that is of interest here. In EC competition law, it will be recalled, the active participation of the complainant in the proceedings before the Commission may influence its standing before the CFI and ECJ. This is possible because the concepts of, on the one hand, a legitimate complainant that governs access to the Commission, and 'direct & individual concern' that governs access to the Court, are not necessarily the same. The Dutch Gala, however, provides for one and the same concept of an interested party. This brings with it that it would be expected for a complainant in Dutch competition law to have a standing right relating to its 'objective' status, as a competitor, for example, and not relating to the procedure before the Competition Authority. It seems, however, that the Appeals Tribunal has widened the scope of the concept of interested party for some complainants. What this means in the context of judicial convergence will be discussed next.

Complainant and 'something else'

In light of the discussion on procedural convergence following substantive convergence, it is interesting to note a development that can be discerned in the *judgm*ents of the Appeals Tribunal. The Appeals Tribunal held that in national competition law, so as not to diverge too much from EC competition law, standing should be accorded to the complainant whose competition interests – apart from being a *direct* competitor to the undertaking to whom the complaint concerns (who already is held an interested party) – are touched. The case in which the Appeals Tribunal thus broadens the scope of access merits some further attention. The facts concern *Electroburo Vos,* a company offering electro-technical services, that filed a complaint at the Competition Authority relating to what can be described as

[64] See for elaboration of this point: Gerbrandy 2009, at p. 418-434.

a common policy of the united energy companies. At the same time, Electroburo Vos objected to the decision of the Competition Authority in relation to this common policy, in which the Competition Authority held that there was no infringement of the Competition Act and that therefore individual exemption was not necessary.[65] Both the objection and the complaint were dismissed by the Competition Authority on the ground that Electroburo Vos was not an interested party. On higher appeal, the Appeals Tribunal held that indeed the Competition Authority had been correct in not granting standing to the electro-technical company in relation to the exemption decision, as this company was not directly concerned in relation to this decision. However, the Appeals Tribunal ruled differently on the complaint. It must be borne in mind that basically the complaint and the objection to the exemption concerned *the same conduct* of the energy companies. The Appeals Tribunal held that the single *filing* of a complaint did not make this complainant an interested party (in the sense of the Gala); 'something else' would have to be presented to come to a different conclusion. This 'something else' was found by the Appeals Tribunal in the circumstance that the policy of the energy companies – who in itself are not direct competitors on the market for electro-technical services – did affect competition on the market for these services, the market on which Electroburo Vos was active. [66]

Though the Appeals Tribunal does not explicitly hold that this widening of the concept of interested party is inspired by access for complainants on the Community level, this seems a clear example of spontaneous judicial convergence: standing accorded under general administrative law is widened in scope so as to cover parties that would have standing in EC competition law, but would normally not be considered an interested party under national law. The reason for this widening in scope is to be found in the underlying substantive convergence: outside the area of national competition law, it is to be seen whether in such instances standing will also be accorded, though it is expected that this is not necessarily so.

Standing for individual consumers

Following the line of reasoning the Appeals Tribunal put forward, it might be expected that *individual consumers* could also be granted standing rights enabling them to file a legitimate complaint at the Competition Authority. In EC competition law, the Court of First Instance has held that

[65] The case started under the 'old' system of individual exemption. Following the overhaul of the EC system, the Competition Act now also contains a directly applicable exception in the third paragraph of the article prohibiting anti-competitive agreements (see Article 6, par. 3 Competition Act).

[66] CBb 21 March 2006, *Electroburo Vos* (LJN: AV6537); see for an earlier indication of this widening of the scope of standing rights, to be read between the lines: CBb 17 November 2004, *Carglass* (LJN: AR6034).

individual consumers whose interests are directly concerned can file a legitimate complaint with the Commission.[67] This is a far broader category than consumers granted standing under general Dutch administrative law, where consumers are usually held to have only a non-individual interest; an interest which can not be discerned from the interest of other consumers, and therefore cannot lead to standing (nor to a right to request a decision as a complainant). In this vein an airline passenger, complaining about high tariffs for a certain air-route, even though he is a frequent flyer on this route, is not individually concerned by the alleged abusive behaviour of the airline company.[68] Nor is the postal box holder individually concerned by the alleged abusive behaviour of the Postal Company renting out postal boxes, even though he has had a long-standing contractual relationship with the Postal Company.[69] These consumers are not 'singled out'; their interest is the same as the interest of many others, and therefore they have no standing.[70]

This means that there is an indication of a difference between access for individual consumers under European competition law and under Dutch competition law. The difference can, in part, be traced back to the different value given to procedural activism: the idea that an active role of the complainant – its stance in proceedings before the Authority – may influence standing in court, is foreign to Dutch administrative law. It is the *objective* legal status of the complainant and not its *subjective* activities that governs both access to the Competition Authority and access to court. However, in both European competition law and national competition law, at the very least on a rhetorical level but according to both authorities in practice as well (should those two be different), the consumer is the focal point of competition law: European competition law as well as national competition law centres around *consumer* welfare.[71] Paying more than lip

[67] Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse* [2006] ECR II-1601, par. 110-115. The Commission had already held several times that individual consumers could be legitimate complainants, see Kerse & Khan 2005, p. 77.

[68] CBb 20 February 2004, *Shiva I* (LJN: AO5968).

[69] District Court Rotterdam 9 August 2001, *Postbussen* (LJN: AB6591).

[70] This is not to say that the individual consumers could not, if they *united* in some sort of group, claim standing as a group: the collective interest of the group would lead to standing under Article 1:2, par. 3 Gala. Also consumer organizations have since 2007 been granted *general* standing under the Competition Act (note that this is a *lex specialis* in relation to the general rules of the Gala). At the very least, however, *some* organization of consumers is then necessary.

[71] And it is in this regard that European competition law might have a different focus from the straight Chicago-school economists. See on these general goals of competition law amongst many others: A. Jones and B. Sufrin, *EC Competition Law* (Oxford 2008), at p. 13 ff; on Chicago School economics also: R.H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York 1978); O. Budzinski, *Puralism of Competition Policy Paradigms and the Call for*

service to this focal point of consumer welfare does not necessarily mean that to each and every individual consumer a standing right in complaint procedures and subsequent appeals should be granted in relation to every allegedly anti-competitive behaviour; there is also a theoretical difference between the concept of consumer welfare in which consumers are seen as an abstract group, and the interests of the individual consumer. In light of this general goal of competition law, however, one could argue that there is a tension in the very strict interpretation of the requirement of an individual interest. Should the line of reasoning of the Appeals Tribunal relating to the complainant 'with something extra' be extended to also cover these individual consumers and include the idea that the activity in proceedings before the Competition Authority would influence standing in court, this would mean another very clear instance of judicial convergence. So far, however, individual consumers have not been accepted as having standing rights before the Competition Authority or competition courts.

4.5 Presumption of Proof

A completely different aspect of procedural competition law relates to proof. To complement a picture of possible judicial procedural convergence outside the realm of the complainant, one aspect of the rules on evidence will be discussed: the presumption of proof in cases concerning anti-competitive concerted practices.

Regulatory Diversity (2003), available at http://ssrn.com/abstract=452900, at p. 8-11; and critically: A. Cucinotta a.o., *Post Chicago Developments in Antitrust Law* (Cheltenham 2002). On other goals of competition law, such as the protection of the weaker party: A. Buttigieg, 'Consumer Interests Under the EC's Competition Rules on Collusive Practices' [2005/3] *EBLR* 643-718; and in a slightly different meaning also: W.H. Page, *The ideological Origins and Evolutions of U.S. Antitrust Law* (2005) available at http://ssrn.com/abstract=692821, at p. 13-15. A broader public interest goal is advocated by G. Monti, 'Article 81 EC and Public Policy' [2002/5] *CMLR* 1057-1099; and see also W. Kerber, *Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law* (2008), available at: http://ssrn.com/abstract=1075265. Consumer welfare has been accepted by the Court of First Instance as a legitimate goal of competition law: see Case T-168/01 *GSK* [2006] ECR II-2969, pnt. 118; and Joined Cases T-213 & 214/01 *Österreichische Postsparkasse*, pnts. 110-115. See on the Commission standpoint also the Guidelines on the application of Article 81(3) of the EC Treaty (OJ C 101 of 27.04.2004) and J. Bourgeois and J. Bocken, 'Guideliness on the Application of Article 81 (3) of the EC Treaty or How to Restrict a Restriction' [2005/2] *LioEI* 111-121, at p. 114. This is not to say that the concept of 'consumer welfare' is actually *clear* or *settled*: see on this, for example, J.F. Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' [1987] *N.Y.U. Rev.* 1020-1053, at p. 1032-1033; Kerber 2008, at p. 5-15; and on post-Chicago economics also Budzinski 2003, at p. 8-15.

Presumptions of proof as a test case for procedural convergence

As in most jurisdictions the *basic* rules on the burden of proof[72] are fairly clear in Dutch administrative competition law, even though for the most part these rules are not laid down in legislation but are generated by the courts.[73] One of these basic rules is that for an infringement decision the burden of proof rests on the Competition Authority. It follows that the undertaking can bring forward arguments in rebuttal. The undertaking wishing to rely on an exception holds the burden of proof for arguing the application of the exception. These general rules on shifting the burden of proof, also partly codified in Regulation 1/2003,[74] are consistent with the general rules in Dutch administrative law; almost none of which have been legislated upon. Therefore, if the national competition courts actually apply the same rules on burden of proof as the European courts in competition proceedings, the resulting application of these rules will be a convergent application of burdens of proof. However, this result is not necessarily (or more likely: not at all), brought about *as a consequence* of substantive convergence.[75] On the contrary, the systems for distributing the burden of proof between parties in proceedings are *already* alike, and an outcome in a given competition case that is alike on the national level and the European level is not a surprising outcome.

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[72] The burden of proof connotes the question who will have to proof a fact. If it is not discharged, the fact can not be relied upon: this is also called the *legal burden of proof*. In literature relating to the UK a further distinction is made by discerning also a burden of adducing evidence, an evidential burden and a tactical burden (see Brealey 1985, at p. 254 and Nazzini 2006, at p. 523). These concepts are not developed as such in Dutch administrative law, though they connote, apparently, the *movement* of the burden of proof between parties. The *standard of proof* relates to the level of certainty a judge has to be convinced of the facts so as to rely on them. Generally speaking there is a difference between the standard of proof in criminal law and the standard of proof in administrative law. The general standard of proof in Dutch administrative law may be described as 'voldoende aannemelijk', roughly translated by 'sufficiently plausible'. The concepts of burden of proof and standard of proof need to be strictly separated, though, of course, the standard of proof may be *expressed* in terms of the burden of proof in the sense that this burden may be heavier for a high standard of proof and lighter for a low standard of proof. However, this is not *logically* necessarily so.

[73] See generally on Dutch rules relating to proof in administrative law: Y.E. Schuurmans, *Bewijslastverdeling in het bestuursrecht: zorgvuldigheid en bewijsvoering bij beschikkingen* (Deventer 2005).

[74] See Article 2 Regulation 1/2003.

[75] See generally on 'alternative explanations' for procedural convergence – that is: an explanation for an equal outcome as not being necessarily a result of substantive convergence, but (usually) resulting from the general systems of administrative law being alike – Gerbrandy 2009, at p. 75.

However, as is well known, *presumptions of proof* change the general picture. The ECJ has formulated several of these presumptions in competition law that may be relied upon by the Commission.[76] Generally a presumption of proof means that the party on whom the burden of proof rests – the Competition Authority in an infringement case – may rely on fact B as to be proven, when it is fact A that *is* actually proven. The discharge of the burden of proof (to the requisite standard of proof) of fact A means that there is a legal presumption of fact B. It is then up to the other party to rebut either fact A or fact B; actually, since fact B has not been proven positively in the first place, it is to the other party to either positively prove (in terms of logics) that fact B is not, or to rebut fact A. Such a presumption changes the distribution of the burdens of proof from one party to another. Presumptions of proof can thus be seen as constituting a test case for substantiating the hypothesis that procedural law follows substantive law. If indeed the presumptions of proof that have been formulated by the ECJ are used by the Dutch administrative competition courts, this might well be a strong argument to support the general thesis.

Presumption of causality in concerted practices

One such presumption in competition law and its application in Dutch competition law can illustrate the several ways in which procedural judicial convergence can take place. The *presumption of causality* is laid down in case-law of the ECJ concerning concerted practices as covered by Article 81 EC. For an infringement decision to be upheld the three elements of concerted practice must be fulfilled; it is the Commission on whom the burden of proof would normally rest. The elements that must be met are, firstly, that there is collusion, secondly that there is a competition law-sensitive conduct on the market (an increase or decrease in prices for example), and thirdly, that a causal link between these two elements must exist.[77] Concerted practices are notoriously hard to prove, because what might be seen as anti-competitive conduct on a market may actually be economically sound behaviour that is not based on collusion at all. However, where anti-competitive collusion and market conduct are proven (the first and second element), the causal link – meaning that it was *this* collusive action that led to *this* increase

[76] See for example on the presumption that having participated in an anti-competitive meeting includes participation in the anti-competitive behaviour: A. Capobianco, 'Agreements, Concerted Practices (Horizontal Side)' in *EC Competition Law: A Critical Assessment* (Portland, 2007) 25-80, at p. 37; or the presumption that above a 50% market share there is a dominant position. Safe havens, given by market share thresholds may also act as presumptions of proof, but usually these work to protect undertakings, and they do not necessarily *change* the burden of proof.

[77] See Case C-49/92 P *Anic Partecipazioni* [1999] ECR I-4125.

in price – it is supposed to exist. In other words, there is a *presumption* of causality in these cases.[78]

This presumption plays a role in one of the high profile Dutch competition law cases, a case in which several undertakings in the mobile telecommunications sector (the Mobile Operators) were fined heavily for having violated both Article 81 EC and the equivalent provision of the Competition Act. The undertakings were fined for having coordinated their market behaviour regarding pricing components in their relationship with dealers reselling their product to consumers. They were said to have met at a roadside restaurant, where, at the very least, pricing issues were discussed.[79] There were several very interesting points of law raised in the proceedings before the district court and in appeal, but I will focus here on the role of the presumption of proof of causality. One of the questions posed by the Appeals Tribunal to the ECJ also focuses on this point.[80]

Application through spontaneous parallelism by the District Court

The district court in first instance proceedings against the infringement decision of the Competition Authority had applied the presumption of causality to the facts of the case without asking the question (at least not explicitly in its judgment) as to whether or not national administrative law had room for such a presumption of causality.[81] In essence, this is a clear example of spontaneous judicial convergence in the form of parallelism: the national court applies the European procedural rule in a national environment because of the underlying substantive convergence. It uses the presumption of proof not only for the aspect of the case concerning the decentralised EC law, but also to the national aspects of the case *as if it were* a procedural rule of national law. Of course, as mentioned above, the two aspects of the case – Community law or national law – can in reality hardly be separated; at the very least it would be totally impractical to use the presumption of proof when applying Article 81 EC, but not when applying the equivalent Article 6 of the Competition Act, especially when these provisions are applied jointly. However, theoretically such an outcome would be possible.

Application trough the principle of effectiveness or through the concept of concerted practice

The Appeals Tribunal was not sure about applying the EC-law presumption as a national procedural rule, however, and therefore turned to the ECJ

[78] See Case C-49/92 P *Anic Partecipazioni*, op. cit.

[79] See decision of the Competition Authority of 30 December 2002, in Case 2658, *Mobiele Operators*.

[80] See Case C-8/08 *T-Mobile*, 6 April 2009, n.y.r.

[81] District Court Rotterdam 13 July 2006, *Mobiele Operators (*LJN: AY4035).

in preliminary proceedings. It asked the ECJ the question (among other interesting questions) as to whether such a procedural rule of EC competition law should also apply in the decentralised application of EC competition law. It must be noted that the Appeals Tribunal apparently holds that such presumption of proof is *not* necessarily in line with national administrative law and the general rules on shifting the burden of proof; a question that did not arise before the district court. Following the EC-presumption would therefore be a clear example of convergence. The Appeals Tribunal sketches two possible routes through which the EC presumption may have to be applied in a national procedural environment in which EC competition law is applied, both different from the one taken by the district court in first instance.[82]

The first route that the Appeals Tribunal points to is the route of convergence through application of the EC-principle of effective judicial protection or the principle of effectiveness. The concept of procedural autonomy brings with it that it is generally national procedural rules, including rules on the burden of proof, which will be applied in national court proceedings, also when the decentralised application of EC competition law is at stake. But procedural autonomy is, of course, hemmed in by the requirements of equivalence and effectiveness.[83] This means, among other things, that when the application of the national rules on evidence will make the application of EC competition law ineffective, the national rule will have to be set aside. In this case, this would occur if the application of the national rules on the burden of proof would seriously undermine the effectiveness of EC competition law. Opinions on this point may differ – is the effectiveness of EC competition law very much at stake when the presumption of causality is *not* applied – but the ECJ did not (have to) rule on this point. As set out in section 3 above, a corollary to application of the EC law principle of effectiveness is that a resulting positive ruling by the ECJ holding that indeed the national rule on burden of proof should be set aside, and the EC presumption of proof relating to causality in concerted practice cases should be applied, needs further steps for application of the same Europeanised rule of proof for the national aspects of the case. That is, a spill-over effect is needed to apply only one rule on burden of proof – the European rule – to a case that is based both on national competition law and EC competition law. This is not the route taken by the ECJ, however.

The ECJ follows the second route the Appeals Tribunal sketches: this is the possibility that the presumption of proof as formulated by the ECJ in cases concerning concerted practices is part of the *substantive concept* of a concerted practice and that therefore it should be applied in cases of

[82] CBb 31 December 2007, *Mobiele Operators* (LJN: BC1396).

[83] See above, paragraph 3, on these principles.

decentralised enforcement of EC competition law.[84] The convergence following this route is easy to follow. It will bring about immediate convergence also for the national aspects of the case, because in the Dutch Competition Act the definition of the concept of concerted practice is laid down by direct reference to the EC concept of concerted practice: the legislator has made use of a legal bypass. Therefore, where the presumption is inherent in the concerted-practice concept, it applies equally to the national concept of concerted practice. From the point of view of EC competition law, this convergence to the national aspects of the case is *spontaneous*. From the point of view of the national courts, however, its application is *obligatory*, following the statutory substantive convergence laid down in the Competition Act.

Resulting picture

Wrapped up in the *Mobile Operators*-case are several ways in which procedural convergence may take place. It shows that the difference between them is not so much the result that the European rule of the presumption of proof is also applied in national competition cases, but the route leading towards that outcome. The *difference* between those routes, however, is whether or not there is *room* for autonomous reading of procedural law in national cases. Where, from the perspective of European law, there is an obligation to apply the European presumption, there is no room for national procedural law; at least not in cases where EC competition law is applied but practically neither in national cases. But where the route is governed by spontaneous convergence, the result might still be the application of the European presumption of proof, both in 'European' and in national cases, but by a spontaneous act of the court.

5 The Wider Picture and Conclusions

The analysis above leads to an easy assumption that the central question of this contribution – does substantive statutory convergence lead to spontaneous judicial procedural convergence – can be answered in the affirmative when it comes to Dutch administrative competition law. It is certainly true that in the abovementioned examples – in the way the competition complaint is viewed and in the specific presumption of proof in concerted-practice cases – substantive convergence is followed by convergence in procedural administrative law. This might lead to the conclusion that these examples support the overall thesis of a developing procedural *ius commune*. However, the picture that is painted here is not complete. As the example of standing rights for an individual complainant before the Competition

[84] Case C-8/08 *Mobile Operators*, 6 April 2009, n.y.r.

Authority shows, the instances of convergence are offset by contrary examples, in which the substantive convergence is *not* followed by procedural convergence. And other examples can be added here. For instance, when looking at the question relating to which acts or decisions can be appealed in court a different picture emerges, one of divergence with the situation on the European level. Some decisions of the Competition Authority that are equivalent to those of the Commission and would be contestable before the CFI and ECJ, cannot be appealed before the Dutch administrative competition courts. Also for judicial review, there seems to be a general trend in which especially the Appeals Tribunal does not necessarily follow the way judicial review in European competition cases is undertaken by the CFI and ECJ.[85]

What does this imply for the thesis of a developing procedural *ius commune* as was discussed in paragraph 3? One could easily state that it does not bode well for those with warm and fuzzy feelings towards such a *ius commune*. As has been shown (and also substantiated by others in relation to other areas of administrative law)[86] it seems that instances of procedural convergence do happen. But the question remains as to whether these instances are the proverbial tip of an iceberg and will be followed by many others currently below the waterline, or if these instances remain isolated, cold, islands. It must be pointed out that in general the Dutch climate for procedural convergence is fairly mild: the systems of administrative law in general do not diverge sharply (though of course, there are differences).[87] Also, the Dutch legal system has been described as classically very open towards outside influences.[88] Outside influence by European law indeed is generally accepted by the national courts as non-problematic, as can be learned from the fact that the Netherlands' judiciary seems to be one of the only European judiciaries to accept the European concept of supremacy without question. Also, the substantive provisions of Dutch national competition law have been explicitly modelled on EC competition provisions and the preparatory works refer to the judgments of the Court and decisions of the Commission as pointers for leading the way, at least for substantive competition law. All these circumstances point to a favourable climate for bottom-up judicial procedural convergence. As has been shown, indeed such examples of bottom-up convergence can be found, though this conclusion cannot be held across the board of procedural competition law in the Dutch adminis-

[85] For both these examples, and others, see extensively: Gerbrandy 2009.

[86] See the literature mentioned above, among others: Legrand 1996; Hilson 2003.

[87] See for example: H. Battjes, *Europees recht effectueren. Algemeen bestuursrecht als instrument voor de effectieve uitvoering van EG-recht* (Alphen a/d Rijn 2007) 47-72.

[88] See M. Claes and B. De Witte, *The European Court and the National Courts – Doctrine and Jurrisprudence: Legal Change in Its Social Context,* (Oxford 1998) p. 171-195; J.H. Jans and M. de Jong, *The Europeanisation of Administrative Law* (Aldershot 2002).

trative competition courts. The seesaw will tip again, however, if one takes into consideration that the Dutch Competition Act has only been applied for a decade: bottom-up convergence may take time; it could be that the iceberg is only slowly exposed.

The weighing of these influences – pointing all at once in different directions – can be placed in a wider context. It would seem that for the adherents to the necessity of a procedural *ius commune* the example of Dutch competition law can be interpreted as meaning that even in favourable national circumstances there is not necessarily a development towards a consistent bottom-up judicial procedural convergence. This may mean that in other jurisdictions, with less favourable weather patterns for convergence, such spontaneous convergence is even less likely. How one rates such an outcome *normatively* depends, of course, very much on the perspective that is chosen. If the integrationist view of European law is followed, in which a procedural *ius commune* is to be strived for, this outcome might lead to renewed activity in the area of *top-down* harmonisation of European procedural law.[89] However, if one is more cautious and sees procedural law in the context of national culture and identity, the route of top-down harmonisation is less inviting. As mentioned above, differentiation of national procedural law seems not inherently problematic when seen from a multi-level European legal perspective. The developing principle of differentiation lends strength to this position. The examples mentioned in this article show, however, that procedural *bottom-up* convergence does take place, albeit glacially and maybe even slightly haphazard. As long as the overall effectiveness of European law is not jeopardised, however, there seems to be no necessity for European harmonising measures.

[89] See for an idea on how such a project would work the still very important ground work laid down in the Storme-report by Storme 1994, op.cit.