Case Law Analysis

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National Courts' Obligation to Apply Community Law *Ex Officio* – The Court Showing new Respect for Party Autonomy and National Procedural Autonomy?

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"Still confused, but on a higher level" (Enrico Fermi)

Abstract

This article addresses the question of when national courts must raise Community law issues on their own motion under the principle of effectiveness. It discusses what are the different interests that must be balanced under the "procedural rule of reason" when deciding whether an issue must be raised by the Court ex officio *or not. It examines the Court of Justice's case law delivered in the past as well as the recent* Van der Weerd *case with an aim to discern some guidelines or trends as to how such different interests should be balanced, an analysis which shows that there is still a great deal of legal uncertainty as to when national courts must raise Community law issues on their own motion and it appears futile to seek tendencies and trends in the Court's case law on effectiveness. The article argues that the Court's ruling in* Van der Weerd*, showing deference to the national procedural autonomy, fits well into the general approach of the recent years where the Court seeks to avoid too drastic incursions into the national procedural landscape and merely ensures a minimum common level of judicial protection.*

1 Introduction

National law often contains limitations to the *ex officio* powers of the courts[1], for example, out of respect of the principle of party autonomy, proper conduct of procedure, rights of defence or legal certainty.

[1] When referring to the *ex officio* powers of a court, I intend to indicate all action that a court can be required to take and which make it go outside the ambit of the proceedings as set by the parties. In most systems courts are presumed to know the law according to the device *jura novit curia,* and the parties need not engage the legal rules under which invoked circumstances and facts are to be subsumed. Only applying Community law rules to circumstances and facts correctly invoked by the parties therefore does usually not mean that a court acts *ex officio* and goes beyond the ambit of the proceedings. The *ex officio* powers that national courts can be required to exercise rather concern the possibility of introducing new circumstances not cited by the parties, and to establish the facts by searching for proof in relation to these circumstances.

Such procedural limitations might hinder the effectiveness of Community law; if a claimant fails to claim a Community law right, or to invoke a directive as basis for reviewing a conflicting domestic provision, the aims underlying Community law will not be realised in that case. The effectiveness of Community law appears best served if national courts were always obliged to raise and apply Community law issues on their own motion. It is, however, a well-established fact that national courts adjudicate Community law within the framework of the national remedial and procedural law (the so-called principle of remedial and procedural autonomy) and thus national rules are able to limit the effectiveness of Community law. Nonetheless, this "autonomy"[2] is limited by the principles of equivalence and effectiveness.[3] The Court of Justice has on a number of occasions found that national courts are obliged to raise issues of Community law on their own motion by virtue of the principle of effectiveness, and that they must go beyond the ambit of the proceedings set by the parties and by national law in order to comply with Community law. This intervention brings about a certain Europeanisation of such rules.[4] In the intersection between, on the one hand, national procedural rules, and the need for effectiveness of Community law on the other, there is a complex balancing of competing but deserving interests under the "*procedural rule of reason*"[5], i.e. between the need for effectiveness and the underlying aim that the national procedural rules pursue (for example legal certainty and party autonomy). On the basis of the Court of Justice's law, it is rather challenging to determine the more precise scope of the requirement

[2] The use of the word "autonomy" has been under debate in view of the incursions into the national procedural landscape which the Court has undertaken on the basis of the principle of effectiveness, see e.g. W. Van Gerven, 'Of Rights, Remedies and Procedures', [2000] *CMLRev*, pp. 501-536, J. Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems', [2003] *ELJ*, pp. 599-613.

[3] See e.g. Case 33/76 *Rewe* [1976] ECR 1989.

[4] For a more general discussion of whether the Court is, or even should, undertake a harmonisation of remedies and procedures through judge-made law see for example C. Himsworth, 'Things fall apart: The harmonisation of Community Judicial procedural Protection Revisited', [1997] *ELRev*, pp. 291-311, S. Prechal, 'Judge-made harmonisation of national procedural rules: a bridging perspective', from J. Wouters and J. Stuyck (eds), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune*, Intersentia, Antwerpen, 2001, pp. 39-58, C. Harlow, 'A common European law of Remedies?' in C. Kilpatrick, T. Novitz and P. Skidmore (eds.), *The Future of Remedies in Europe*, pp. 69-83, or M. Dougan, *National Remedies before the European Court of Justice : Issues of harmonisation and differentiation*, Hart Ltd 2004.

[5] For a detailed discussion of the 'rule of reason' see e.g. S. Prechal, 'Community Law in National Courts: The Lesson from Van Schijndel, [1998] *CMLRev*, pp. 681-706, A. Biondi, 'The Rule of Reason and National Procedural limitations, Is it really Reasonable?' pp. 129-141 in A. Schrauwen (ed.) *The Rule of Reason – Rethinking another Classic of European Legal Doctrine*, Europa Law Publishing, 2005.

upon national courts to raise Community law *ex officio,* and this article will seek to unravel what the principle of effectiveness requires from national courts in this regard and hence whether they have the right to, or are obliged to, apply Community law in a case where the parties have not relied on it.

I will start by looking at the Court's approach to remedies and procedures in general and explain the understanding of "effectiveness" as a balancing of competing but equally deserving interests, and what deserving interests there might be that justify limiting the effectiveness of Community law (2). After these initial considerations, I will analyse the case law delivered by the Court preceding its recent *Van der Weerd*[6] decision, with an aim to establish some guidelines as to the national courts' obligation to raise issues on their own motion. I will, in particular, seek to understand whether courts adjudicating in first instance administrative cases are required to be judicially active in order to ensure effectiveness (3). The following section will analyse the recent *Van der Weerd* case in the light of previous case law and show the difficulties that the balancing approach presents to the national courts, as well as the legal uncertainty as to the precise requirements contained in the principle of effectiveness (4). Although elements in previous case law supported the view that administrative courts should be judicially active to ensure the effectiveness of Community law, the Court finds in *Van der Weerd* that the party autonomy principle essentially can limit effectiveness in administrative judicial proceedings. This ruling once more reminds us of the futility of attempts to look for tendencies and trends in the Court's case law on effectiveness, and the difficulty for national courts applying the principle of effectiveness without a preliminary reference.

2 Effectiveness of Community Law and the Need to Raise Issues *Ex Officio*

In the introduction it was noted that the effectiveness of Community law is best served if national courts, in both civil and administrative cases, are obliged to always raise and apply Community law issues on their own motion, and that the principle of effectiveness, to a certain extent, can limit the barrier to effectiveness that national procedural rules might entail. The principle of effectiveness is a blunt and vague concept; the Court usually states that "*rules that [make] it virtually impossible or excessively difficult to protect rights should be set aside*"[7], a statement which does not enlighten us as to what the role of the court should be when setting the ambit of the proceedings. The inherent vagueness in the concept of effectiveness[8] leaves it open to interpretation, and the national courts, (ultimately

6 Joined cases C-220-225/05 *Van der Weerd* [2007] ECR I-4233.

7 Case 199/82 *Amministrazione delle Finanze dello Stato* v. *San Giorgio* [1983] ECR 3595.

8 For a closer analysis of the concept of effectiveness see M. Accetto & S. Zleiptnig 'The principle of Effectiveness: Rethinking its role in Community law' [2005] *EPL*, pp. 375-403

the Court of Justice), are left with considerable discretion to fill this Trojan horse with contents. It would, in theory, be possible for the Court to require national courts to treat all Community law issues *ex officio* on this basis. In practice, this would entail major incursions into the national procedural landscape and the Court is rather careful not to interpret effectiveness in too intrusive a manner. Effectiveness of Community law is instead understood as an interest which must be balanced against other interests. I will in this section look more closely at this balancing operation (2.1) as well as the different interests at stake that are being balanced against each other in rules governing the ambit of proceedings (2.2).

2.1 Effectiveness of Community Law and National Procedural Rules – Striking the Balance Between Competing Interests

By setting out the so-called "*procedural rule of reason*"[9] in the cases of *Peterbroeck* and *Van Schijndel* (1995),[10] the Court of Justice made clear that principle of effectiveness is not about Community law claims and interests being supreme over all other deserving interests which, for example, national procedural rules aim to protect. The limitations to the exercise of Community law rights that are laid out in national law aim to ensure the protection of vital interests of an effective legal system, such as an efficient working of the administration of justice, legal certainty, the respect of the party autonomy principle[11], or the interest in cheap and speedy proceedings.[12] The Court held that "*each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.*"[13] The principle of effectiveness should thus be understood as a balancing of competing, but equally deserving interests

and M. Ross '*Effectiveness in the European legal order(s): Beyond supremacy to constitutional proportionality*?' [2006] *ELRev*, pp. 476-498.

9 S. Prechal, 'Community Law in National Courts: The Lesson from Van Schijndel', [1998] *CMLRev*, pp. 681-706.

10 Case C-312/93 *Peterbroeck* v. *Belgium* [1995] ECR I-4599, Joined cases C-430 & C-431/93 *Van Schijndel & van Veen* v. *Stichting Pensioenfonds voor Fysiotherapeuten* [1996] ECR I-4736.

11 Joined cases C-430-431/93 *Van Schijndel* [1995] ECR I-4736.

12 Case C-63/01 *Samuel Sidney Evans and the Secretary of State for the Environment, Transport and the Regions, and The Motor Insurers' Bureau* [2003] ECR I-14447.

13 Joined cases C-430-431/93 *Van Schijndel* [1995] ECR I-4736, para 19, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para 14, Case C-276/01 *Joachim Steffensen* [2003] ECR I-3735, para 66, Case C-125/01 *Peter Pflücke and Bundesanstalt für Arbeit* [2003] ECR I-9375, para 33, C-63/01 *Samuel Sidney Evans and The Secretary of State for the Environment, Transport and the Regions, and The Motor Insurers' Bureau* [2003] ECR I-14447, para 46.

– the need to protect Community rights and ensure an effective Community law regime has to be weighed against the legitimate interests underlying national procedural rules. When requiring that national procedural rules comply with the principle of effectiveness, the Court is therefore rather concerned with rendering *the law and the enforcement system as a whole effective* and not to let European interest trump other interests.[14]

While the rule of reason might have furthered the understanding of an effective enforcement of Community law on a theoretical level, its usefulness has been questioned from a practical perspective.[15] This is mainly the balancing operation is done *contextually* by looking at whether the rule pursues a legitimate aim and is proportionate to reach that aim in the *very case at hand*.[16] It is therefore difficult for national courts to use the Court's case law for guidance in how to apply the rule of reason on their own, and it is on the basis of the lack of predictability and legal certainty that the rule of reason has been subject to criticism.[17] The Court often underlines the case-sensitiveness of the balancing operation, which complicates using prior case law as guidelines.

It is important to note that when a national court, or the Court of Justice, balances competing interests and considers whether the legal protection provided under national law is sufficiently effective, it is 're-evaluating' policy choices made by the national legislator.[18] In, for example, requiring a national civil court to raise issues *ex officio* in consumer disputes, despite the fact that the national legislator has decided that the party autonomy principle should apply, the Court of Justice 'corrects' a policy choice to favour party autonomy. Although the rule of reason is sometimes described as a "*judicial*

[14] For this argument see Advocate General Jacobs' opinion in Joined cases C-430-431/93 *Van Schijndel* [1995] ECR I-4736, paras 24-27.

[15] See for example S. Prechal, 'Community Law in National Courts: The Lesson from Van Schijndel', [1998] *CMLRev*, pp. 681-706.

[16] The Court has for example stated that its balancing is *"merely the result of assessments on a case by case basis, taking account of each case's own factual and legal context as a whole, which cannot be applied mechanically in fields other than those in which they were made"*. Case C-473/00 *Cofidis SA* v. *Jean-Louis Fredout* [2002] ECR I-10875, para 37.

[17] See *supra* footnote 15.

[18] On this basis it has been argued that the Court must be careful to not intrude too much on national interests and strike balances anew but leave this to the Member States, as their rules on remedies and procedures are set to pursue the same aims that the Court's harmonisation of procedural law pursue: to ensure mechanisms for a fair composition of litigation, for the protection of the parties involved and to promote the efficiency of the legal process, see A. Biondi, 'The Rule of Reason and National Procedural limitations, Is it really Reasonable?' p. 131 in A. Schrauwen, (Ed.) *The Rule of Reason – Rethinking another Classic of European Legal Doctrine*, Europa Law Publishing 2005, For a similar point of view, see C. Harlow, 'A Common European Law of Remedies?' in C. Kilpatrick, T. Novitz and P. Skidmore (eds.), *The Future of Remedies in Europe*, pp. 69-83.

retreat",[19] it allows the Court to enter into the heart of the national procedural system and the national balance of interests.[20] In this light, the outcome of the Court's balancing under the rule of reason, although contextual, expresses a certain policy choice and therefore appears as quite a sensitive issue. By examining how the Court balances different interests and values in individual cases, one might consequently be able to form an opinion about the weight given to different interests and whether there appears to be a 'trend' to favour judicial activity in order to uphold Community law effectiveness, and one perhaps may even discern a general trend as to what role courts should have vis-à-vis the parties. In section 3, I will try to establish how the Court balances the different competing interests in the cases on *ex officio* action and whether, in prior case law, one can find guidelines for the balancing operation. However, we will in section 4, become aware that the case-sensitiveness of the balancing operation makes it risky to seek tendencies and trends in the Court's case law and that, at best, case law should be interpreted very narrowly.

2.2 Aims Underlying Rules Governing the Ambit of Judicial Proceedings

In this section I will look more closely at what different interests that might justify *ex officio* action and what reasons, on the other hand, speak for limiting the judiciary's opportunity to alter the ambit of proceedings. The societal function of proceedings is partly reflected in the courts' role in determining the ambit of the proceedings, as well as in the rules regulating the right to dispose and vary the procedural material, e.g. limitations on raising new issues after a certain time or on appeal. It is mostly the nature of the proceedings that decide what constitutes the issues to be raised by the court on its own motion. *Civil procedure* is traditionally regulated by the principle of *party autonomy* and its counterpart, judicial passivity. As the main rule, it is the parties to the proceedings that put forward claims and invoke factual circumstances and proof as basis for its claim.[21] This means that the court is bound by the ambit that the parties set to the

[19] S. Prechal, 'Community Law in National Courts: The Lessons from Van Schijndel', [1998] *CMLRev*, pp. 681-706, p. 706, G. de Búrca, 'National Procedural Rules and Remedies: The Changing Approach of the Court of Justice', in A. Biondi & J. Lonbay (eds.), *Remedies for Breach of EC Law*, Chichester Wiley 1997, p. 45.

[20] It is, of course, another matter whether the Court really would find it appropriate to strike down on national rules at the heart of the system (those that express the aim of proceedings), as the Member States rarely appreciate interference into their national procedural landscape. This will be further discussed in section 4.

[21] Case C-429/05 *Rampion* v. *Franfinance*, judgment of 4 October 2007, n.y.r. See paras. 51-56 which offer some interesting reading as to the problems national courts encounter in deciding what pleas of law the defendants have, and hence whether the national court needs to raise an issue of its own motion.

proceedings. The procedural freedom enjoyed by private parties is considered corollary to the freedom to dispose freely of one's private law rights. Leaving the litigation entirely in the hands of the parties involves a risk of materially 'wrong' decisions, but the interest in correctly enforcing the law according to its letter is as far as civil procedure is concerned, considered inferior to liberal ideas of contractual freedom. Judicial activism might entail costs for the parties, and besides, who would be better placed to take care of the interests at stake than the parties themselves?[22]

Other interests can still prevail over the party autonomy principle in civil proceedings and it is then justified that the court has power to advise and assist the parties and engage in an 'official search for the truth'. This is, for example, the case when the interests at stake are considered too important to be left to the discretion of the parties, such as third party interests (e.g. the best of the child), or a public interest (e.g. the environment) or respect for public policy. The protection of certain interests are consequently entrusted to the court which must, on its own motion, raise certain issues or collect evidence if that is necessary. Also in other situations, the interest in respecting the party autonomy principle can be lessened, and a court can, for example, be required to raise issues *ex officio* in the case of an unbalanced relationship in order to protect a weaker party, e.g. in consumer or employment law.

In *administrative law judicial proceedings*, e.g. proceedings on judicial review or an appeal of a denied application to undertake an environmentally hazardous activity, it is common that the court plays a more active part in setting the ambit of the proceedings. This, however, varies between the different Member States, and while some see *ex officio* action on behalf of the court as the main rule, others instead adhere to the party autonomy principle in such proceedings. The reason for *ex officio* action in such cases can be justified on grounds such as the need to protect a weaker party (individuals) from the State or to protect interests that are too fundamental to be left to the interests of the parties, e.g. public policy, as described above.

The court's role in setting the ambit of the proceedings is also closely related to the aim that a particular legal system ascribes to judicial proceedings and to the societal function of procedure. Certain systems see the protection of individual rights as the main aim of court proceedings, so-called *recours subjectif*. Other systems see judicial proceedings as seeking to produce a materially correct decision, realise the policy behind legal rules independent of the creation of individual rights, uphold the general effectiveness of law and the guarantee of the legality of administrative decisions, hence favouring a *recours objectif*.[23] In the light of the aim of adjudication

[22] This aspect is of special importance in European law cases as the referral of a question to the Court of Justice might lengthen and render the proceedings very costly for the parties. The parties might therefore choose to keep European law out of the proceedings.

[23] See J. Jans *et al. Europeanisation of Public Law*, pp. 312-313 describing the change in Dutch administrative procedural law in 1994 changing the primary function of Dutch administra-

in such systems, the *ex officio* powers conferred on the court are usually wider, and a court can thus review the legality of a decision in relation to all relevant rules of law and circumstances, notwithstanding the pleas of the parties. While the aim of civil procedure in most Member States is mainly understood along the lines of *recours subjectif,* the understanding of the aim of administrative judicial proceedings is more varied. In some Member States it is understood as *recours objectif,* while other Member States find administrative litigation as aiming at the protection of individual rights, and in the light of this, the need for courts to go beyond the claims of the parties is reduced and their *ex officio* action is thus often limited. Hence, by requiring national courts to sometimes raise issues *ex officio,* the Court of Justice can affect the societal function that a national system normally ascribes to, for example, litigation in administrative court.

3 The Court's Case Law Pre-*van Der Weerd* – Setting Judicial Activity and Community Law's Effectiveness Before the Respect of the Party Autonomy Principle?

In this section I will look at the Court's case law as it stood before *Van der Weerd* and discuss how and whether a national court such as the one in *Van der Weerd* (a first instance administrative court which was prevented by national law to apply Community law on its own motion), could possibly find an answer in prior case law to the question whether Community law requires it to act *ex officio. Van der Weerd,* which will be discussed in section 4, indeed provides us with the answer as to this particular question, but seeking for the answer through the winding road of prior case law gives a sense of what national courts go through when seeking to apply the principle of effectiveness. The contextual approach to effectiveness leaves it to national courts to find the "exact pitch" at which to set effectiveness. If , through analysing case-law, one could extract some general direction in the Court's understanding of effectiveness in relation to *ex officio* obligations and what function courts should in general have in setting the ambit of the proceedings, the predictability of Community law would be enhanced. National courts' application and adaptation of the principle of effectiveness to 'new' situations would be facilitated and they might be able to decide the issue without resorting to a preliminary reference.[24] Can one find proof of the Court wishing for national courts to work as guardians of the law and

tive courts' judgments from controlling the legality of administrative decisions, to ensuring the protection of individual rights. The implications of this change gave rise to the preliminary reference in *Van der Weerd,* see *infra* section 4.

[24] This would hence reduce the length of the proceedings before the national court and avoid adding to the case load of the Court of Justice.

adopt a *recours objectif in administrative proceedings*? Or does it generally accept that national courts adjudicate only on the facts brought before them by the parties, risking diminishing the effectiveness of Community law? In the coming sections we will become aware that it is very difficult to discern a pattern as to how the Court weighs the different interests, and it will emerge that a tendency that one seems to have identified can be quite misleading.

3.1 Initial Steps as to the National Courts' Obligation to Raise Community Law *Ex Officio*

The first time the Court addressed the question of national courts' obligation to apply Community law *ex officio* was in *Verholen* (1991),[25] and although Advocate General Darmon suggested in his opinion that national courts have an obligation to raise the existence of a Community rule on its own motion,[26] the Court of Justice merely stated that when a national court had the *right* to raise an issue *ex officio*, Community law did not preclude it from doing so. The Court hence applied the *principle of equivalence*, obliging the national courts to raise Community law *ex officio* under the same conditions as it has to apply national law *ex officio*. As the issue before it could be solved with a less intrusive answer than the one given by the Advocate General, the Court preferred to refer to the principle of equivalence and defer to national procedural autonomy. The first obligation for the national courts is hence to comply with the principle of equivalence.

The next time the Court was faced with national rules limiting the *ex officio* application of Community law, it elaborated the principle of equivalence while at the same time aiming at maximising the effectiveness of Community law. In *Van Schijndel* (1995), the Court stated that when domestic law confers *discretion* on a national court to apply binding rules of law on its own motion, Article 10 and the obligation to provide for legal protection obliged national courts to raise EC law issues on its own motion.[27] Disguised as a principle of equivalence, in the sense that there must be a possibility to raise the issue *ex officio* under national law, the Court applies the principle of effectiveness and turns a possibility under national law into an obligation when a Community law claim is concerned. The Court's intervention is, in my opinion, not justified by the prevention of discrimination between national and Community law provisions (which is its main concern under the principle of equivalence), but it rather enables permissive national rules to enhance the effective application of Community law. This is the first evidence that the Court was ready to use the obligation to raise Community

[25] Joined cases C-87/90-C-89/90 *Verholen* [1991] ECR I-3757.

[26] Joined cases C-87/90-C-89/90 *Verholen* [1991] ECR I-3757, para 29.

[27] A similar reasoning, where Community law 'free-rides' on permissive national standards which leave a choice to the judiciary or administration, is found in Case C-453/00 *Kühne & Heitz NV* v. *Produktschap voor Pluimvee en Eieren* [2004] ECR I-837.

law issues *ex officio* as a tool to enhance its effectiveness, but by this requirement it did not step on any sore procedural autonomy toes... The second obligation for a national court to raise issues *ex officio* is hence to do so when national law permits them to do so.

As mentioned previously, most challenging for the national court is, however, compliance with its third obligation – to raise Community law issues on its own motion when the principle of effectiveness requires it to do so. In the first cases where the principle of effectiveness was applied by the Court of Justice in relation to *ex officio* rules, in *Van Schijndel*[28] and *Peterbroeck*[29] (1995), the complexity in applying the rule of reason already showed. For what many have claimed to be unclear reasons,[30] the Court came to opposite conclusions in the two cases but without clarifying what factors and facts were determinative for its different approaches. Let us look closer at the two cases to discern what particular circumstances might have led the Court to find an *ex officio* obligation warranted in *Peterbroeck* but not in *Van Schijndel*. *Van Schijndel* concerned individuals challenging the compulsory membership to a pension fund (in civil proceedings), and it was only in front of the last instance (the Dutch Hoge Raad) that it was observed that this might be incompatible with Article 81 TEC. Dutch procedural law[31] precluded the parties from raising the alleged incompatibility at last instance and the Hoge Raad asked the Court of Justice whether it had to raise the compatibility with Community law on its own motion. The Court for the first time articulated effectiveness in terms of *balancing* competing interests. It held that "*in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in* exceptional cases *where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the*

[28] Joined cases C-430-431/93 *Van Schijndel* [1995] ECR I-4736.

[29] Case C-312/93 *Peterbroeck* [1995] ECR I-4599.

[30] See for example G. de Búrca, 'National Procedural rules and Remedies – The changing approach of the Court of Justice' in J. Lonbay & A. Biondi (eds.) *Remedies for Breach of EC Law,* John Wiley & Sons, 1997, pp. 36-46, M. Hoskins, 'Tilting the Balance, Supremacy and National Procedural Rules', [1996] *ELRev,* pp. 365-377, A. Ward *Judicial Review and the Rights of Private Parties in EC law,* 1st ed., p. 48. This is also reflected in the Advocate General's opinion, coming to the same conclusion – in favour of party autonomy – in both cases.

[31] The position of Dutch law was in the case explained as follows; "*In Netherlands law, a plea in cassation by its nature excludes new arguments unless on pure points of law, that is to say that they do not require an examination of facts. Furthermore, even though Article 48 of the Netherlands Code of Civil Procedure requires courts to raise points of law, if necessary, of their own motion, the principle of judicial passivity in cases involving civil rights and obligations freely entered into by the parties entails that additional pleas on points of law cannot require courts to go beyond the ambit of the dispute defined by the parties themselves nor to rely on facts or circumstances other than those on which a claim is based.*" Joined cases C-430-431/93 *Van Schijndel* [1995] ECR I-4736, para 11.

individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas."[32] A court of last instance in a civil suit was therefore not required to raise a potential incompatibility with competition law rules on its own motion. From the Court's ruling it appeared as if the judicial passivity was the main rule, at least in civil proceedings.

In the *Peterbroeck* case,[33] delivered the same day, the Court found that the effectiveness of Community law required an administrative Belgian court adjudicating in first instance proceedings to abandon its passive role and raise Community law on its own motion. The Belgian rule precluded the appellant from raising issues 60 days after documents had been handed over from the administration to the court. This rule was not justified on the facts of the case. This was so, firstly, because the imposition of the time limit totally precluded the court from making a preliminary reference; this is despite the fact that this was supposedly the first opportunity to make such a reference. Secondly, the time limit was not really justified by the principle of legal certainty or the proper conduct of procedure, i.e. those interests did not really require that there was such a short time limit when this meant depriving the individual of exercising his right and therefore the rule was not proportionate to its aim.[34]

The rationale for the different outcomes generated lively debate concerning what factors were of importance for the balancing to fall to the benefit of judicial activity and the promotion of effectiveness, or to the preservation of judicial passivity and the principle of party autonomy.[35] The character of proceedings (public/civil), the moment in the proceedings when the alleged incompatibility was detected (first instance/last instance) and the possibility of having the Community law question raised by a judicial body in order for a preliminary reference to be possible, were some factors discussed.[36] The Court has, however, on several later occasions explained its differentiated approach in *Van Schijndel/Peterbroeck*. It stated that *Peterbroeck* was justified

[32] Joined cases C-430-431/93 *Van Schijndel* [1995] ECR I-4736.

[33] Case C-312/93 *Peterbroeck* [1995] ECR I-4599.

[34] Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para 16 *et seq.*

[35] See especially G. de Búrca, 'National Procedural Rules and Remedies – The changing approach of the Court of Justice', pp. 43-44, in J. Lonbay & A. Biondi (eds.) *Remedies for Breach of EC Law*, John Wiley & Sons, 1997, T. Tridimas, *General Principles of EC Law*, p. 300.

[36] M. Hoskins, 'Tilting the Balance, Supremacy and National Procedural Rules', [1996] *ELRev*, pp. 365-377, A. Ward, *Judicial Review and the Rights of Private Parties in EC law*, p. 50 et seq, G. de Búrca, 'National Procedural rules and Remedies, The changing approach of the Court of Justice' in J. Lonbay & A. Biondi (eds.) *Remedies for Breach of EC Law*, John Wiley & Sons, 1997, p. 45, R. Craufurd Smith, 'Remedies for Breaches of EU law in National Courts : Legal variation and selection', p. 316 in P. Craig & G. de Búrca (eds.), *The Evolution of EU law*, OUP, 1999.

by reason of circumstances peculiar to the dispute, as the applicant would have been deprived of the opportunity to rely effectively on the incompatibility in the case at hand if the court did not act *ex officio*.[37] On the basis of the 'guidelines' and factors provided in the two cases, however, a national administrative first instance court having a judicially passive role under national law would have difficulties in ascertaining whether it must act *ex officio*. On the one hand, *Peterbroeck* required judicial activity by a national first instance administrative court to protect individual rights, seemingly supporting that it acts *ex officio*. *Van Schijndel,* on the other hand, suggested that judicial passivity is in principle accepted and many reasons justify remaining passive. What importance should the court attach to the fact that *Van Schijndel* was litigated in *last instance* and in a *civil court*? Did the Court decide in favour of judicial passivity because the principle of legal certainty and proper conduct work more strongly against *ex officio* action in a last instance? I would not be surprised if national administrative courts in this situation rather would take *Peterbroeck* as point of departure, thereby assuming a more judicially active role than *Van der Weerd* has now taught us is necessary. An extensive interpretation of the obligations under the principle of effectiveness might be a natural reaction to the uncertainty of the principle. Courts prefer 'playing safe' to avoid infringing the principle of effectiveness, whilst not prolonging the procedure through a preliminary reference.

The preceding discussion illustrates how difficult it is for a national court to know what factors might impact on the weight of the interests at stake and what weight to ascribe to each interest. The following string of cases, leading up to *Van der Weerd,* might, however, have given/reinforced the impression that the national court had to be judicially active to ensure Community law's effectiveness. Despite the statement in *Van Schijndel* that national *civil courts* would only have to abandon the judicially passive role in *exceptional* circumstances, the Court did, on all following occasions, find that national courts were obliged to act *ex officio*. In the first case to be examined, it seems as if the Court of Justice requires courts to act on their own motion to protect public interests that are too important to be left in the hands of the parties (3.2), and in the other string of cases the *ex officio* action was necessitated by the need to protect a weaker party in unbalanced relations (3.3). To what extent can those cases help a national first instance administrative court to better evaluate its obligation under Community law?

3.2 *Eco Swiss* – Potential for *Ex Officio* Court Action for the Protection of General Interests?

I have previously mentioned that the need to protect public policy or other general interests of importance for society can be one reason for courts to be judicially active, protecting interests that are too important to

[37] Joined cases C-220-225/05 *Van der Weerd* [2007] ECR I-4233, para 40.

leave in the hands of the parties. In fact the Court of Justice often expresses the need for effectiveness of Community law as an imperative of protecting the *rights* it confers on individuals, but it appears to take a wider approach to what interests the national courts must ensure are effectively enforced.[38] How far is the Court of Justice willing to oblige national courts to act on their own motion to protect matters of European public policy or maybe even less fundamental public interests? *Eco Swiss*[39] (1999) concerned the possibility for a national civil court, reviewing an arbitration award, to annul the award because it infringed competition law rules (Article 81 TEC) an argument that had not been raised in the arbitration proceedings. Under Dutch law, a civil court could on its own motion introduce the incompatibility and annul an arbitration award on certain grounds, one being that the award was contrary to *public policy*. The referring court, however, pointed out that under national law the non-application of competition law was not regarded as contrary to public policy. The Court of Justice recognised the need for a limited scope of judicial review of arbitration awards,[40] but held that the respect for the EC competition law regime was an overriding interest of fundamental importance for the completion of the Community's tasks and Article 81 TEC was therefore a matter of public policy. As rules of public policy should be raised *ex officio* under national law, the Court held that the national court was obliged to raise EC competition law rules on its own motion.

The ruling can be understood in various ways and through the adoption of either a wide or restrictive reading of the judgment[41], one comes to quite different conclusions. One the one hand, *Eco Swiss* can be argued to have a very limited importance as to when a national court is obliged to act *ex officio* under the principle of effectiveness as Eco Swiss can be seen as a mere application of the principle of equivalence. National law provided for a possibility to raise public policy matters, and therefore it also had to raise European public policy matters. The Court has argued that this is how to interpret the case, but one can indeed object as Dutch law did not regard competition law as a matter of public policy and the ruling therefore goes

[38] See for instance R. de Lange, 'Enforcement of law and enforcement of rights', in N. Jareborg (ed.) *Towards Universal Law – Trends in national, European and international Law making*, de Lege, Uppsala Universitet, Juridiska Fakulteten, Iustus Förlag, Uppsala, 1995, S. Prechal, 'Judge-made harmonisation of national procedural rules: a bridging perspective', in J. Wouters and J. Stuyck (eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune*, Intersentia, Antwerpen, 2001, pp. 39-58.

[39] Case C-126/97 *Eco Swiss China Time Ltd* v. *Benetton International NV* [1999] ECR I-3055.

[40] Case C-126/97 *Eco Swiss China Time Ltd* v. *Benetton International NV* [1999] ECR I-3055, para 35.

[41] An interpretation possibly coloured by whether one prefers to let courts play a more active or passive role in the proceedings.

beyond the mere understanding of equivalence.[42] The fact that the case deals with the particular issue of judicial review of arbitration awards could also be argued to disqualify it as precedent for *ex officio* action for normal decisions taken by administrative and civil courts.[43] On the other hand, the *Eco Swiss* case could be interpreted more widely, showing an inclination towards letting the national courts ensure, *ex officio*, the respect of certain paramount values of public interest that the Court considers too important to be left to the parties. The Court does, indeed, in *Manfredi* (2006) refer to *Eco Swiss* stating that "Articles 81 and 82 are matters of public policy which must automatically be applied by the national court", hereby undermining its own argument that *Eco Swiss* is only about the principle of equivalence.[44] A justification for a wide interpretation could be found in the fact that the Court includes competition law in the notion of public policy[45] although competition law usually does not have this status. This, one could argue, suggests that also other interests, not necessarily fundamental to society but still important, such as environmental policy, should be considered as "European public policy" and be protected through *ex officio* action.[46]

Through speculation, one easily gets far from what the Court really says in *Eco Swiss* and hereby we have 'found' an obligation on national courts to raise not only public policy matters *ex officio*, but possibly also other public interests. This is, in my opinion, rather a wish about European law *de lege ferenda* and not a description *de lege lata*. The Court of Justice might be careful in obliging the national court to protect public policy or other public interests when this is not required under national law. Doing so could

[42] For an opposite view, see Tridimas who means that the case goes beyond equivalence as competition law does not qualify as public policy, T. Tridimas, *General Principles of EC Law*, 464 *et seq*.

[43] Prechal argues that the conclusions of the case should be restricted to review of arbitration awards and not be given any general application, see S. Prechal, *Directives*, p. 163.

[44] Joined cases C-295/04 to 298/04 *Manfredi* [2006] ECR I-6619. This point is also made by J. Jans *et al*., *Europeanisation of Public Law*, p. 311.

[45] For a critique of the Court's classification of competition law as forming a part of public policy, a concept which is normally reserved for the protection of principles and values that are more fundamental to society and not to all sorts of mandatory rules, see e.g. N. Shelkoplyas, *Application of EC Law in Arbitration Proceedings*, p. 123 and p. 361.

[46] See also Joined cases C-240/98-244/98 *Océano* [2000] ECR I-494 and Case C-473/00 *Cofidis SA* v. *Jean-Louis Fredout* [2002] ECR I-10875 (discussed below) where the public order argument could have been used. AG Saggio did in *Océano* discussed whether the unfair contract terms constitute a public economic order. It can only be added that by widening the scope of public order beyond the recognisable, only in the aim of the possibility to take it into account for national courts, might not be a wise way to enhance the effectiveness of Community law. In *Mostaza Claro* the Court expressly recognises that consumer protection constituted a public interest supporting *ex officio* action, see Case C-168/05 *Mostaza Claro* [2006] ECR I-10421.

amount to Community law requiring administrative courts to perform a different societal function (*recours objectif*) than they usually do within the national system, and the Court would thereby strike at the very core of the national procedural system. Although it might sometimes seem that the Court does not pay much attention to procedural autonomy, I would be very surprised if it were to take such a blunt approach. *Eco Swiss* does not, therefore, considerably help to establish any clearer guidelines as to when a national court must act *ex officio* to protect matters of public policy or other public interests when no such possibility exists under national law.

3.3 *Ex Officio* Application of Community Law as an Imperative of Protecting Weaker Parties

In the other strand of cases, namely the *Océano* (2000), *Cofidis* (2002), and *Mostaza Claro* (2006),[47] the Court found that the national courts had to abandon their judicially passive role to ensure that rights of consumers were sufficiently protected under Directive 93/13/EEC on unfair consumer contracts. This raises the question as to what other weak parties national courts might be obliged to protect, and whether this case law could apply to administrative courts so that they have to raise Community law *ex officio* to protect the weaker individuals against the State in administrative proceedings. In this strand of case law the Court has step-by-step 'widened' national civil courts' obligation to raise the existence of an unfair contract term *ex officio*. In the first case, *Océano* (2000),[48] the Court held that the national courts must raise the question of whether a contract is unfair in consumer proceedings *ex officio*, when assessing its own jurisdiction and consequently at a stage where the defendant has not been able to raise any objection to the jurisdiction as he/she has not yet been served.[49] The reason for this decision was that there was a real risk that the consumer was unaware of his right.[50] In *Cofidis* (2002)[51], the Court, however, clarified that the national courts were obliged to apply Community law *ex officio* also at later stages of the proceedings, i.e. when the plaintiff actually had had the opportunity to raise an issue but had failed to do so either because he was unaware of his rights or because he was deterred from enforcing them on

[47] Joined cases C-240/98-244/98 *Océano* [2000] ECR I-494, Case C-473/00 *Cofidis SA* v. *Jean-Louis Fredout* [2002] ECR I-10875, Case C-168/05 *Mostaza Claro* [2006] ECR I-10421.

[48] Joined cases C-240/98-244/98 *Océano* [2000] ECR I-494.

[49] Joined cases C-240/98-244/98 *Océano* [2000] ECR I-4941, para 29; "*It follows from the above that the protection provided for consumers by the Directive entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment* as to whether a claim should be allowed to proceed before the national courts."

[50] Joined cases C-240/98-244/98 *Océano* [2000] ECR I-494, para 26.

[51] Case C-473/00 *Cofidis SA* v. *Jean-Louis Fredout* [2002] ECR I-10875.

account of the costs which judicial proceedings would involve.[52] In *Mostaza Claro* (2006)[53], besides basing the *ex officio* obligation on the need to protect the consumer's individual right, the Court also underlined that the nature and importance of the *public interest* underlying the protection which the Directive confers on consumers justified the requirement that national courts must assess unfair contractual terms on their own motion, thereby compensating for the imbalance which exists between the consumer and the seller or supplier.

In consumer cases concerning unfair contract terms, both the need to protect the weaker parties' rights as well as the safeguarding of the public interest in consumer protection justify that national courts act on their own motion. Could these cases not be interpreted as a part of a larger picture, where the Court sees proceedings as having a social aim and having to ensure the protection of weaker parties and the interest in upholding the law? The Court especially mentions the risk of consumers being unaware of their rights; cannot this be true also for individuals in administrative proceedings where they, in certain legal systems, mostly do not use counsel or are not entitled to legal aid? Coming to such a conclusion, however, necessitates a very wide reading of the cases. The Court has indeed constantly widened the obligation to act *ex officio* in the aforementioned cases and it has recently even widened its case law to apply to other consumer disputes; in *Rampion and Godard*[54] (2007) the Court extended the *ex officio* obligation to apply also in relation to the Directive on consumer contracts. However, this is a small step compared to transferring the case law to administrative proceedings and a whole different area of law where there might not be any express legislative measures aiming at reinforcing the individual's judicial protection. Adopting a narrow interpretation is safer, but it does little to further the understanding of the national administrative courts' obligation to act on their own motion.

3.4 Concluding Remarks

It is difficult to form a coherent view of the Court of Justice's underlying idea of the courts' role in proceedings vis-à-vis the parties on the basis of the cases discussed in this section, and it might be wiser to not do so. Should the fact that, in all cases (except for *Van Schijndel)*, the Court found that the national court should abandon its judicially passive role as assigned to it by national law, be interpreted as intrusiveness on behalf of

[52] The defendant had argued that *Océano* should be interpreted narrowly and should be read as obliging the national court to raise issues *ex officio* only in order to determine its own jurisdiction, but the Court did not agree, see Case C-473/00 *Cofidis SA* v. *Jean-Louis Fredout* [2002] ECR I-10875, para 27.

[53] Case C-168/05 *Mostaza Claro* [2006] ECR I-10421.

[54] Case C-429/05 *Rampion* v. *Franfinance*, judgment of 4 October 2007, n.y.r.

the Court, and a demonstration that it is ready to require judicial activity and involvement in the case, seeing truth-finding and ideas of ultimate justice as the prevailing aim of procedure? The more daring interpreter could find that the Court's case law shows tendencies of adopting a 'social' view of judicial proceedings, taking a stance from individualist ideas and a strong principle of party autonomy, possibly because this approach best furthers the effectiveness of Community law. Both the Court's strand of cases law requiring *ex officio* action to protect weaker interests in consumer cases as well as its ruling in *Eco Swiss* on the (possible) need for courts to act on behalf of protecting public policy and/or other important general interests, could be argued to support this view. If national courts were obliged to protect public policy and other general interests, administrative courts might perceive this bulk of case law as requiring them to adopt *recours objectif* and ensure the legality of administrative decisions. The strand of consumer protection cases could, on its part, be interpreted as administrative courts having to act *ex officio* to protect individual Community rights when such are at stake, as the individual is in an unbalanced legal relationship with the State, comparable to consumer relations. Speculations are, however, a very risky business, all the more so in relation to Community law, and especially when it concerns the Court's case law on remedies and procedures! By its *Van der Weerd* case, the Court shows that the possible impression of 'sacrificing' the party autonomy principle on the altar of Community law effectiveness is wrong. There is no 'presumption' for judicial activity to be extracted from the cases discussed above. Instead, none of the cases discussed in this section are of importance when seeking an answer to whether first instance administrative courts have to abandon the judicially passive role prescribed by national rules to ensure the effectiveness of Community law. The balancing of interests under the rule of reason is indeed very difficult to grasp and it is fruitless to search for tendencies and trends in the Court's case law for additional guidelines as there is, arguably, no coherent idea as to the role of courts vis-à-vis parties to extract from its balancing operations.

4 *Van der Weerd* – The Answer to Some Questions Concerning Administrative Courts' Obligation to Raise Community Law *Ex Officio*

In its ruling from June 2007, *Van der Weerd,* the Court answers the question of whether a national administrative court acting in the first instance must abandon its passive role to ensure the effectiveness of Community law, a question which I, in the previous section, quite futilely tried to answer with guidance from past case law.[55] Although the Court, in all rulings but two, found that a national court had to abandon its passive

[55] Joined cases C-220-225/05 *Van der Weerd* [2007] ECR I-4233.

role to further the effectiveness of Community law, the *Van der Weerd* case makes clear that this should not be interpreted as the Court seeking to promote the idea of a judiciary which actively participates in setting the ambit of the proceedings. The Court confirms its position from *Van Schijndel*: it is in principle legitimate that national procedural rules preventing *ex officio* action limit the effectiveness of Community law and that it is only *exceptionally* that courts will have to abandon their passive role. *Eco Swiss, Peterbroeck, Océano, Cofidis* and *Mostaza Claro* should therefore be interpreted narrowly, and one should be careful of inferring 'trends' from the Court's balancing of interests under the rule of reason.

4.1 The Factual Background in *Van der Weerd*[56]

In 2001, a foot and mouth disease broke out in the Netherlands. In order to control the virus and prevent it from spreading, the competent Dutch authority decided that the parts of the stocks receptive to the disease in the vicinity of the infected holdings should be slaughtered. Many of the cattle-breeders, among them Mr Van der Weerd, challenged the validity of the measures, eventually in front of the Dutch Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*). The appellants argued, *inter alia*, that the authorities had misinterpreted the clinical signs of the presence of the disease, that they had misinterpreted the definition of animals suspected to be infected and infringed the procedure applying when blood samples were to be taken. The Dutch Tribunal rejected all the appellants' pleas. However, it observed that it previously had dealt with the validity of such decisions, eventually leading up to the Court of Justice's judgment C-28/05 *Dokter and Others*.[57] In those cases the appellants had, however, challenged the validity on the basis of different pleas in law, arguing that the decision to slaughter the stocks infringed Articles 11 and 13 of Directive 85/11/EEC introducing Community measures for the control of foot and mouth disease.[58] They had argued that the Director was not entitled to take the measures on the basis of the results carried out by the laboratory in question, as that laboratory was not authorised under the Directive to carry out such tests. Furthermore, it had been argued that it was insufficient for the Director to make the decision to slaughter the stocks only on the basis of the laboratory results. The *College van Beroep* considered that those arguments might influence the proceedings in the question, but as those pleas in law had not been raised by the appellants, national procedural law prevented it from taking them into account. The national court was, how-

[56] Joined cases C-220-225/05 *Van der Weerd* [2007] ECR I-4233.

[57] Case C-28/05 *Dokter and Others* [2006] ECR I-5431.

[58] Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot-and-mouth disease (OJ 1985 L 315, p. 11) as amended by Council Directive 90/423/EEC of 26 June 1990, OJ 1990 L 224, p 13.

ever, uncertain whether Community law obliged it to supplement the pleas of law on its own motion and whether it should find that the national procedural provision rendered excessively difficult the exercise of rights conferred by Community law. The national provision governing the question, Article 8:69 in the Dutch general law on administrative judicial procedure, provides that the court is to give its ruling solely on the basis of the issues which are brought before it. While Paragraph 2 of the Article reads that a court is to supplement the pleas in law on its own motion, in the national context this only means that the court is to put the applicant's objections into legal form. A distinction is hence made between the duty to supplement the pleas in law on the Court's own motion, and requiring the Court to make an analysis of its own initiative. The latter is only required in cases involving matters of public policy, such as the admissibility, the powers of the court or the administrative bodies.

4.2 The Court's Ruling

The Court started by analysing whether the national court would have to raise the issues of its own motion by virtue of the principle of equivalence. Under national law, the court is allowed to raise issues on public policy on its own motion, and under Dutch law, public policy is construed to mean issues on the power of courts, i.e. matters at the very heart of the system. The Court did not find that the provisions of Directive 85/11/EEC occupied a similar position to such rules in the national legal order and the rules in Directive 85/11/EEC were not equivalent to the national rules of public policy.[59] The Court then moved on to examine whether the Dutch court was required to examine the issue on its own motion by virtue of the principle of effectiveness, finding that this was not the case, mainly basing itself on *Van Schijndel*, apparently finding the two situations comparable. The Court recalled that the analysis of whether a procedural rule makes the exercise of rights excessively difficult must be made with reference to the role of the provision that hinders the procedure, its progress and special features, viewed as a whole, before the national courts. It thereafter reiterated its reasoning from *Van Schijndel* as to the purpose of national rules limiting the *ex officio* powers, stating that such are justified by the principle that, in a civil suit, it is up to the parties to take the initiative and that it is only in exceptional circumstances involving the public interest that the court is able to act on its own motion. The principle that the parties set the ambit of the proceedings safeguards the right of the defence and ensures the proper conduct of proceedings, in particular by avoiding the delays inherent in the examination of new pleas. In *Van Schijndel*, the Court had, on these grounds,

[59] Interestingly, the Court looks at what position the Directive has in the national legal order and not in Community legal order, which appeared to be the case in *Eco Swiss*, see Case C-126/97 *Eco Swiss China Time Ltd* v. *Benetton International NV* [1999] ECR I-3055.

found that the principle of effectiveness did not require the national court to abandon its passive role, and it was not required to rely on facts and circumstances not invoked by the parties. In the present case, the Court decided that the national court would go beyond the ambit of the dispute if it raised the issues on its own motion. The Court did not find the proceedings to differ in such a way as to justify a different conclusion from *Van Schijndel*. The only difference, said the Court, was that *College van Beroep* did not rule as last instance, but as both last and first instance; this did not place the parties in a situation which called the principle into question, though. The Court did not make any reference to the fact that *Van der Weerd* concerned administrative proceedings and *Van Schijndel* civil proceedings. Thereafter the Court explained why its result was not called into question by the case law in which it had found an obligation to raise issues on the national courts own motion, i.e. *Peterbroeck, Ecoswiss, Océano, Cofidis* and *Mostaza Claro*. In fact, none of these cases were, according to the Court, relevant for deciding *Van der Weerd*. *Peterbroeck* was irrelevant as its ruling in that case was "justified by reason peculiar to the dispute" (which one could, however, say about every case decided under the rule of reason) – which led the applicant to be unable to rely effectively on the incompatibility of a domestic provision with Community law unless there was an obligation upon the national court to raise the issue *ex officio*. The cases *Océano, Cofidis* and *Mostaza Claro* were irrelevant as they were justified by the need to ensure that *consumers* were given effective judicial protection under the directive of unfair contract terms. And *Eco Swiss* was not relevant as it only concerned the application of the principle of equivalence and not the principle of effectiveness. Instead, only the *Van Schijndel* case, even if concerning last instance civil proceedings, was of importance as precedence for the court deciding in *Van der Weerd*. Therefore, the Court concluded that it follows that the principle of effectiveness does not impose a duty on national courts to raise a plea based on a Community law provision on their own motion, irrespective of the importance of that provision in the Community legal order where the parties are given a genuine opportunity to raise such a plea before a national court. Since the appellants in the case had such an opportunity, they could not rely on the principle of effectiveness as a basis for an *ex officio* obligation.

4.3 Discussion

There is no easy answer to the question as to when the Court of Justice requires administrative national courts to be judicially active and apply Community law on their own motion in order to ensure that Community law is effective. This has to be decided through a balancing of the various interests at stake under the rule of reason; a balancing carried out in the individual case. As is demonstrated by the discussed case law, the case-sensitive approach to effectiveness makes it difficult for national courts to appre-

ciate what is required by them under the principle of effectiveness, what weight to give to the various interests and what factors influence the operation.[60] Although the Court, in all rulings but two, has found that a national court had to abandon its passive role to further the effectiveness of Community law, the *Van der Weerd* ruling shows that the previous string of case law should not be interpreted as establishing any general obligation on national courts to raise Community law on their own motion, or as establishing some kind of presumption in favour of effectiveness when weighing the competing interests under the rule of reason. Instead, at least what the Court would have liked us to understand by its case law so far, is that the cases requiring the national courts to abandon the judicially passive role are all "exceptions" to the main rule in *Van Schijndel*; a main rule stating that it is principle justified that Community law effectiveness is limited in the interest of preserving the party autonomy principle, protecting legal certainty and the proper conduct of proceedings, as long as the individual has had a genuine opportunity to raise the plea in front of a national court. *Ex officio* action is required to ensure effectiveness only when there are special reasons therefore. The Court makes it clear that in administrative first instance proceedings (at least as the facts were in *Van der Weerd*) no such special reasons are present. The relationship between the individual and the State should apparently not be perceived as an unbalanced relationship comparable to the one between consumers and sellers. It is therefore legitimate for the national legal orders to let the administrative process be adversarial and limit the effectiveness of Community law, as far as there is a genuine chance of raising the Community plea before the national judicial instance. Consigning all cases where judicial activity has been required as exceptions to the main rule gives the impression that the Court is concerned to demonstrate that there is no agenda or 'trend' of judicial activity, only pointed interventions. As stated before, this is a reminder that one should be careful in not seeking too much beyond the words of the Court, although this is tempting, given the scarcity of reasoning in certain cases. Previous case law should thus not be seen as forming a general picture wherein Community effectiveness normally outweighs the parties' freedom to dispose of their rights.

In *Van der Weerd,* the Court seeks to reconcile the different strands in case law. Its reasoning is open to criticism; it might have been good to have argumentation as to why to equate *Van Schijndel* concerning civil law litigation with administrative law proceedings in *Van der Weerd*, and it might also be too simple to perceive *Eco Swiss* as a case of pure equivalence. Nonethe-

[60] Whether the national court is obligated to raise a question *ex officio* is now also a requirement to take into account when assessing whether to re-open an administrative decision as a requirement of European law, Case C-2/06 *Willy Kempter AG* v. *Hauptzollamt Hamburg-Jonas Ausfuhrerstattung,* delivered 12 February, n.y.r. This means that the rather complex assessment of the national courts' obligation to apply European law *ex officio* has to be done also in such cases.

less, the Court makes a longed-for attempt to clarify and 'mainstream' its confusing case law on the national courts' obligation to raise Community law *ex officio*. It does this, in my opinion, in the only way possible, trying to steer clear of establishing a general obligation on administrative courts to raise Community law *ex officio*, which would not have been desirable. Its motive for the decision in *Van der Weerd* is not too difficult to guess; the need to respect national procedural autonomy and not to create undue interferences with national policy choices as to the role given to the courts vis-à-vis the parties. Had the Court decided Van *der Weerd* differently and found there to be an obligation to raise Community law *ex officio* when there actually was a real possibility for the applicant to raise it, the decision would have resulted in major changes in the administrative judicial procedure in many Member States, and I believe that this is a situation which the Court wishes to avoid. Be it as it may that one might wish for individuals to benefit from a higher protection in administrative law proceedings by *ex officio* action or that national courts always should have to raise Community general interests on their own motion; the principle of effectiveness is not the tool to pursue an agenda of setting common aims for the role of courts vis-à-vis individuals. The societal aim of proceedings is, in the first place, a matter to be decided by the national legislator and it is only in cases where there are serious deficiencies that the Court of Justice should step in and ensure that individuals at least have the possibility to enforce their rights by using the principle of effectiveness, and possibly also ensure that important general interests are not disregarded. Indeed, this might result in a lower level of approximation of national rules governing the ambit of proceedings than if the Court sets higher standards for effectiveness, but Europeanisation is best achieved through a slow merging of values and not through superimposing them. Hence, in view of the objections which can be raised against 'judge-made' rules and creating far-reaching obligations on the rather wobbly basis of the principle of effectiveness, the Court's decision in *Van der Weerd* is wise. Its approach is also in line with the Court's general approach of deference to national procedural autonomy and avoiding making too drastic intrusions therein. *Van der Weerd* thus fits well into the general picture of reluctance to stick one's neck out too much in relation to remedies and procedures, trying only to set a reasonable minimum level.

Despite the attempt to clarify and reconcile its case law, many questions remain unanswered. The fact that I agree with the outcome of *Van der Weerd* does not mean that this case resolves all problems of predictability and the difficulties that national courts encounter when trying to weigh different interests, and identify what factors are important in case law, in order to use a prior case as a precedent' or at least as a guideline. The difficulties in how to apply the principle of effectiveness and the rule of reason persist. The national court will still have to analyse the rule's true aim and whether it is proportionate in relation to the facts of the case, but as long as the individual

has a genuine opportunity to raise the issue, the Court will most possibly defer to national procedural autonomy. In order to be certain of this, national courts, however, will still have to refer to a preliminary ruling in order to be certain to set the principle of effectiveness at the right pitch. Furthermore, the question as to what extent national courts might be obliged to act on their own motion to protect matters of public policy or other general interests is yet to be settled, and we can look forward to further interesting developments in this field.

Finally, it should be added that although an active participation of the national courts and an obligation upon them to raise arguments with a Community law dimension on their own motion might in theory seem a good way to ensure respect for Community law and repair the individual's 'knowledge deficit', I remain sceptical as to whether even a far-reaching obligation on the national courts to raise Community law *ex officio* would really in practice do much to enhance its effectiveness. This would presuppose that the national judges have a very good knowledge of Community law legislation, case law and methodology which is regrettably not always the case. Seen from this practical perspective one should therefore not overestimate the importance of *ex officio* action by national courts.