

# The Influence of Court of Justice Case Law on the Procedural Law of the Member States

*A.F.M. Brenninkmeijer*

---

The case law of the Court of Justice is exerting a steadily increasing influence on the manner in which the national courts reach judgments to which Community law applies. In this way, the Court of Justice makes an important contribution to European unification. This development is viewed against the background of the constitutional development of the EC, which is not proceeding without difficulties.

## 1 Introduction

The ongoing economic and social integration of Europe is accompanied by juridical integration. European law is in the process of development and with it also the relations between the EC and the Member States. A European constitutional structure is gradually taking form. Because of lack of agreement among the political leaders responsible for giving shape to European integration, it is not sufficiently clear in which direction that constitutional structure will develop. In the process of drafting Maastricht Treaty, there were debates over whether or not Europe should be federalized<sup>1</sup> and over the lack of democracy. These debates have made it clear that as yet no consensus has been reached as to the final form the Community will take.<sup>2</sup>

The Court of Justice has a strong steering influence on the relationship between Community law and the national legal orders. On the basis of ECJ case law – and not primarily on the basis of the political will of the Member States – the Community legal order has in several ways acquired influence over national law. Member State compliance with duties under Community law is monitored on the institutional level within the Community. The Commission is authorized to summon a Member State before the ECJ for failure to comply. The ‘European citizen’ has no such competence. He is dependent upon the national court, which

---

1 T Koopmans, *Federalism The wrong debate*, CMLRev 1992, p 1047 *et seq*

2 See on the background and problems J H H Weiler, *The Transformation of Europe*, The Yale Law Journal 1991, p 2405 *et seq*

may request a preliminary ruling from the ECJ. On the basis of the above, a hybrid constitutional relationship has developed between the organs of 'State'. The ECJ is not a court in a system of checks and balances, partly because no separation of powers can be indicated at Community level. The predominant influence of the Commission and the Council, the limited authority of the European Parliament and the special position of the Court of Justice (and the Court of First Instance) are such that there is no real balance of power within the Community.<sup>3</sup> This hybrid relationship has influence on the division of responsibilities between the ECJ and the national courts. The ECJ as constitutional court within the Community has a steering role in further European integration. The ECJ considers it part of that steering role to put the national courts as much as possible in a position to take part in European integration. This necessitates exerting influence on national procedural law. The case law of the ECJ has shown that by step, the influence of European integration is also increasing in the area of procedural law. It does not make much sense in this connection to make a distinction between the law of administrative and civil procedure, since ECJ case law development ignores this distinction. The question is whether harmonization of procedural law is within the realm of possibilities, and aside from that, it can be predicted that harmonization will not be realized any time soon. The differences in legal systems within the Community are great. The relationship of public to private law and whether or not one or more separate channels exist for administrative law, and in this connection the rules of justice concerning unlawful acts of government, are examples of matters which are regulated differently. Moreover, considering the subsidiarity principle, it remains to be seen whether far-reaching harmonization of procedural law is possible.

## 2 ECJ and the National Courts

For the European Community, the year 1992 does not primarily mark the removal – much heralded in the media – of internal boundaries, but rather evidences the boundaries of Community development itself. Although the Treaty of Maastricht may represent progress on a few points of European unity, it is obvious that certain developments have reached a stalemate. The referenda in Denmark and France have made it clear that the drafters of the Maastricht Treaty did not take adequate account of the question whether – as might be expected under the

---

3 K. Lenaerts, Some reflections on the separation of powers in the European Community, *CMLRev* 1991, p. 11 *et seq*.

democratic rule of law – the ‘European citizens’ were sufficiently involved in European developments. Moreover, the question arose as to whether European development, as it took further shape in the Maastricht Treaty, enjoyed any legitimacy among the ‘European citizens’. The initial reaction to the referenda of the European leaders and representatives of the Community institutions was one of disbelief. The adage seemed to be that as long as the citizens were informed of the blessings of Europe, every right-thinking citizen would be in favour of it. It is, however, gradually becoming clear that the problem is not primarily with the European citizen but with the political leaders who keep the development of the European Communities going, or are supposed to keep it going. There is a blind spot in the constitutional vision of the architects of Europe. Because of this blind spot, something is overlooked that is of essential importance for the development of the European constitutional order: the democratic legitimacy of that legal order.

The Community is a supranational legal order with specific characteristics. The direct effect and primacy of European law, based on the case law of the Court of Justice, implies that a role is played, not only by the duty of the State as a subject of international law to comply with the obligations issuing from the European legal order, but also by the fact that a European legal order has been created which is assimilating with the national legal order. This assimilation is a process, not a static situation. Important developments on the European level can have influence on this process.

In the European power structure, which could be termed ‘dual’, the Court of Justice has a powerful role as constitutional court. The task of the national court is fundamentally different from that of the Court of Justice of the European Communities. The national court has its place in the constitutional structure of the Member State, in which the separation of powers and the system of checks and balances are very important. On the basis of the Treaty, the Court of Justice has certain specific judicial tasks, the purpose of which is to help guarantee the smooth functioning of the Community. For legal protection of individuals, the Court of Justice is to a great degree dependent on the national courts, which have come to act as ‘*juge de droit commun*’ for the Community. Important elements of the effect of European law on the national legal order are based on the case law of the Court and not – or precisely not – on political decision making on this matter. Whereas political consensus has sometimes been lacking in the past, the Court of Justice has put the juridical aspect of European unity into operation. This has provided a strong guarantee for the optimal penetration of Community law into the national legal order. Not only treaty law, regulations and decisions,

---

but also the directives aimed at the Member States can result in direct legal consequences. Unwritten law in the form of general principles developed in the case law of the Court of Justice is also playing an increasingly important role. The Court of Justice has developed the legal instruments on the basis of which the European citizens are granted the power to compel compliance, mostly via the national courts, with the results generated by Community law, and these instruments have recently been expanded with even more powerful means.

The *Van Gend en Loos* and *Costa-Enel* judgments gave the initial impetus in the sixties to the considerable strengthening of European law in relation to the national legal orders of the Member States. The case law shows that the Court of Justice took as its starting point that the Member States in creating the EC had brought to life a separate legal order to which the sovereignty in certain areas has been transferred. This development has intensified as a result of that case law.

The trouble with this development is that the strong legally guaranteed effect of European law does not always meet the standard of constitutional legitimacy which should underlie every 'generally binding provision' in a constitutional democracy. The democratic element in European decision making is weak, and is likely to remain so for the time being. The reason for this is simple.

The discussion surrounding the Maastricht Treaty has shown that primacy in political decision making still lies with the national authorities. Federal union could not even be discussed, since that idea represented too much impingement on national autonomy. From a constitutional point of view, however, the problem arises that if real democratization of the EC were to take place through the conferring of substantial powers on the European Parliament, the constitutional focus would also inevitably shift from the individual Member States to the EC. It is this very perspective that prevents some Member States from taking any real steps towards furthering European constitutional integration. The truth of the matter is: the Community is not yet a fully fledged constitutional democracy.

### 3 The Structural Elements of Community Law

From a constitutional point of view, not just the organization and the authority structure of the Community institutions are important, but also the relationship to the Member States. Here, four (very familiar) main elements can be distinguished.

In the first place, the duty under Article 5 of the Treaty: on the one hand, the positive duty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from the Treaty, and on the other, the

---

negative duty to abstain from any measures which could jeopardize the attainment of the objectives of the Treaty. The case law of the ECJ shows that these duties are not only aimed at the Member States as such – which are legally bound by the duties arising from the Treaty on the basis of international law – but also directly at the bodies of the Member State. The case law concerning the *duty of cooperation* has important consequences particularly for the national courts, because the courts are also expected to contribute in both a positive and negative sense to the effective carry-over of Community law.

In the second place, the *direct effect* of Community rules, and third, the *primacy* of these rules over national legislation regardless of whether it is dated earlier or later.

The fourth main element concerns what I should like to call the Community *ban on judicial review*, to be understood as the prohibition on declaring a certain legal rule inapplicable or non-binding because it is in conflict with another (higher) legal rule. From the case law of the ECJ, it is apparent that the national court – just as the other Member State bodies – may not test Community law against national (constitutional) law, or against other international law, for example the fundamental rights laid down in treaty law. This ban on judicial review is very important from the point of view of the national constitutions. The extent to which testing against the constitution or against treaty law is possible depends on the national constitutional structure, but in so far as national courts have such powers, the Community law ban on judicial review means a considerable restriction exactly with respect to the constitution. As compensation for this loss of legal protection, the Court of Justice has developed two solutions in its case law. The national court is competent in the framework of a preliminary question to put forward *invalidity due, among other things, to conflict with a higher rule of Community law*, and the court has the power prior to preliminary presentation under strict conditions to suspend the working of Community legislation in summary proceedings. In this manner, constitutional review is shifted from the national to the Community level, but that review – on conditions set by the ECJ – is guaranteed. Furthermore, the ECJ has taken steps within the framework of the Community to test against fundamental rights as laid down in treaty law, including the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>4</sup> The ECJ hereby anticipates the formal accession of the

---

4 K. Lenaerts, *Fundamental rights to be included in a Community Catalogue*, ELRev. 1991, p. 367 *et seq.*, A. Sassese, A. Clapham and J. Weiler, *Human rights and the European Community*, Baden-Baden 1991.

EC to that Convention. Apart from that, in its case law, the ECJ appears to rely for interpretation on the 'constitutional tradition' of the Member States and on legal principles. This interpretation tends – considering the vagueness of this complex of standards – to test against vague standards and unwritten law, which gives the Court considerable lawmaking power.

It can be ascertained that in the case law of the ECJ, from the viewpoint of legal technique, the continuance and safeguarding of Community law has been optimally realized. The duty to cooperate, the primacy and the uniform application of Community law could be placed in jeopardy by national constitutional justice, because not European but national or even nationalistic interests might gain the upper hand. In the course of time, however, two fundamental starting points have grown apart. On the one hand, the relationship of the State to international law as a subject of international law, which in principle precludes the testing of international law against domestic law, on the other hand, the formation of a separate European legal order, based on the direct effect and primacy of Community legislation. Through the convergence of the international law perspective and the supranational European perspective, the European legal order, from the constitutional viewpoint, has acquired an insufficiently lucid character. The decision making involved in the Maastricht Treaty has shown that the political will to create a sharper constitutional perspective for the Communities is inadequate.

One more observation must be added. The discussions surrounding the Maastricht Treaty have also demonstrated that – partly because of the lack of a real European democracy – Community decision making, which is partly intergovernmental and partly dependent upon official (intergovernmental) preliminary consultations and decision making by the Commission, has a predominantly bureaucratic slant. The multitude of rules achieved in this manner is not always justifiable from a social point of view. Neither is the quality of Community rule-making very well thought-of.

In the meantime, the concept 'subsidiarity' has been brought up as a solution in this respect.<sup>5</sup> Community rules should be tested against this principle.<sup>6</sup> However,

---

5 EUROPE/Documents No 1804/05 dd 30 October 1992, Position of the European Commission on defending and implementing the principle of subsidiarity. A G Toth, The principle of subsidiarity in the Maastricht Treaty, CMLRev 1992, p 1079 *et seq* and D Z Cass, The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community, CMLRev 1992, p 1107 *et seq*.

6 See, on the relationship between subsidiarity and free movement, J P H Donner, De nationale wetgever en de Gemeenschap, SEW 1992, p 464 *et seq* (467).

not enough account has been taken of the problem that such a vague concept as subsidiarity first has a need for political interpretation, while it can be predicted that the final interpretation of the concept subsidiarity will be given by the ECJ. Here, too, there is a problem for the future of the Community in that choices that should be made on a democratic/political level (just as the earlier-mentioned direct effect, primacy and prohibitions on review) are structurally passed on to the court, *i e*, the ECJ. This state of affairs approaches the limit – in the perspective of the democratic rule of law – of the court's lawmaking task.

#### 4 Effective Legal Protection

From the constitutional viewpoint, the relationship between the ECJ and the national courts is unique. The ECJ – as I have stated – has only a limited task and therefore tries to put the national courts in the position to realize Community objectives in the most effective manner possible. The national courts, in turn, are stimulated to adopt an active attitude, because the direct effect and primacy of Community law confer upon the citizens the right to demand compliance with Community legislation before the national courts. It is a legal policy choice of the ECJ to grant the citizens these rights in order to safeguard the effect of Community law as effectively as possible. The citizen thus acts as a watchdog for the proper implementation of Community legislation, partly because that implementation is dependent upon the activities of the Member State bodies. ECJ lawmaking has often been inspired by precisely this approach. Much case law concerns preliminary questions, and much of it involves inadequate implementation of Community legislation, particularly directives

The starting point of the ECJ's case law is that in principle, the national court applies domestic procedural law in response to questions of Community law.<sup>7</sup> This is on condition that there is no difference in effectiveness between domestic legal protection and legal protection aimed at giving effect to Community law, and that the domestic legal channels are sufficient and effective.<sup>8</sup>

7 For a summary, see, among others, the contribution of P J G Kapteijn, *De organisatie van de rechtsbescherming van particulieren in de EG*, also in *NTB 1993*, p 38 *et seq*, P Oliver, *Le droit communautaire et les voies de recours nationales*, *Cahiers de droit européen*, 1992, p 348 *et seq*, A Barav, *La plénitude de compétence du juge national en sa qualité de juge communautaire*, in *L'Europe et le droit*, *Mélanges à Jean Boulois*, Paris 1991, p 1 *et seq* and F Grévisse and J-C Bonichot, *Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle dans les états membres*, *idem*, p 297 *et seq*

8 ECJ Case 33/76 *Rewe* [1976] ECR 1989 and Case 45/76 *Comet* [1976] ECR 2043

The requirement of effective legal protection is especially topical now that several directives have also given attention to this aspect. For example, in directives concerning equal treatment of women and men, rules have been included requiring the Member State to provide effective protection of rights.<sup>9</sup> Since in the final analysis this is primarily a positive and not primarily a negative duty, it cannot be maintained that such rules will take direct effect automatically. Therefore, whether or not the citizens enjoy effective protection of their rights will depend on the structure of domestic procedural law.<sup>10</sup>

In the *Emmott* case, the ECJ has expressed this principle as follows: '( ) it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law, provided that such conditions are not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by Community law'

This case law is a confirmation of the precedent formed in the *Rewe* and *Comet* cases.<sup>11</sup>

Interpretation in conformity with directives may offer a solution in certain specific situations. In the most extreme case – effective legal protection is lacking, so that the breach of equality in the sense of the directive cannot be challenged in court – the Member State is liable for the damage this causes the citizen to suffer. In such a case, it is required that the conditions set down in the *Francovich* decision<sup>12</sup> be met.

Future Court of Justice case law will have to show what the limits are of the liability issuing from this judgment.

In the future, however, the effect of Community law on domestic procedural law might have a broader scope. The key issue is to what extent Court of Justice case law confers procedural rights and powers on the citizens to demand compliance with Community law before the domestic court. The *case law of the Court of Justice* is explicitly mentioned here, since the above has made it clear that, for instance, when a directive includes the right to effective legal protection concerning compliance with the directive, the execution of this provision

---

9 Directives 75/117, 76/207 and 79/7

10 Apart from that, further Court case law, for example the *Marshall II* case (C-271/91), will have to bring more clarity to this issue. Cf. the opinion of A-G Van Gerven dd. 26 January 1993 on that case.

11 See footnote 8.

12 Joined Cases C-6/90 and C-9/90 *Francovich/Bonifaci* [1991] ECR I-5357

---

primarily depends on the legislator's activity in implementing the directive. Nevertheless, there are perhaps more positive tendencies which can be distinguished in the case law of the ECJ.

## 5 The Positive and Negative Effects of the Case Law

The influence the case law of the ECJ has on national procedural law can be characterized according to whether it sets a negative boundary or whether it has a positive effect – a constitutive effect – on national procedural law.

The following judgments can be cited as examples<sup>13</sup> of the negative boundaries set by ECJ case law:

The *Emmott* case is significant for the commencement of periods of appeal under domestic procedural law. Although the commencement of a period of appeal under domestic law can be linked to the date on which a decision is published or acquires the force of law, the ECJ has determined that a period of appeal may not yet commence if a Member State has neglected to implement a directive. Indeed, as long as this implementation has not yet taken place, the citizens cannot exercise the full extent of their rights.<sup>14</sup>

The conditions under which a claim in summary proceedings can be referred in connection with the allegation that a domestic measure implementing a Community regulation is invalid, because the regulation on which it is based lacks legal force, have been elaborated in the *Zuckerfabriken* judgment. The requirements set by domestic law for referring a claim in summary proceedings are not valid for actions in Community law, including domestic implementing measures.<sup>15</sup> Here again, domestic procedural law is inapplicable in so far as it offers a greater possibility for reference than is allowable with respect to the Community. This case law builds on the judgment in the *Foto-Frost* case, in which it was decided – by way of the ban on judicial review – that when a national court finds that a decision by a Community institution is unlawful, a preliminary ruling must be requested from the ECJ.<sup>16</sup>

In the *Factortame-I* judgment, it was decided that a ban on judicial review arising from domestic law could not be applied. If a national court is not authorized to

---

13 For a more complete summary of the case law, see the sources cited in footnote 7

14 Case C-208/90 *Emmott* [1991] ECR I-4269, SEW 1992, p 783 ann I Sewandono and AB 1992, I, ann A J Meij

15 Judgment of 21 February 1991, Joined Cases C-143/88 and C-92/89 [1991] ECR I-535

16 Judgment of 22 October 1987, Case 314/85 *Foto-Frost* [1987] ECR 4199

suspend the applicability of a certain domestic measure, while there is fear that this will be in breach of Community law, the national court must then ignore the ban on judicial review.<sup>17</sup>

Besides these types of negative boundaries, a more positive effect of the ECJ's case law seems to be gaining ground. It should be noted that there is no sharp contrast here between positive and negative. The *Factortame-I* judgment in a certain sense 'introduces' Community summary proceedings, though only on the basis of the already existing authority of the court to proceed, for example, with suspension. Only the nationally determined legal impediment to, in this case, suspension of an *Act of Parliament* must remain inapplicable. It goes without saying that it depends on the creativity of the ECJ on the one hand, and the structure of domestic law on the other whether or not the strengthening of effective legal protection can be formulated as the removal – meant in a negative sense – of domestic limitations.

An initial example of the more positive effect is perhaps the case law leading to the prohibition of discrimination between the enforcement of domestic and Community law. The abolishment of this unequal treatment can have as a result that the procedural powers conferred on the citizen in regard to compliance with domestic law are similarly conferred on him regarding compliance with Community legislation.<sup>18</sup>

A second example can be found in Member States' liability (based on ECJ case law) for failure to implement directives, as stemming from the *Francovich-Bonifaci* case. In general, it can be said that whatever the domestic form may be of the citizens' right to institute proceedings against unlawful government acts, this judgment implies that an action for damages must be possible before the national court.<sup>19</sup>

The *Johnston* judgment heralds a case law development which is very important for effective legal protection. The subject of the dispute was a preliminary question involving, among other things, the duty under Council Directive 76/207 of 9 February 1976 on implementation of the principle of equal treatment for men and women. Article 6 of this Directive contains the duty of the Member State to make effective legal protection possible, and makes explicit reference to the internal legal order: 'Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider

---

17. Judgment of 25 July 1991, Case 221/89 [1991] ECR I-2443.

18. *Rewe and Comet*, see footnote 8.

19. Joined Cases C-6/90 and C-9/90 *Francovich v Bonifaci* [1991] ECR I-5357.

themselves wronged by failure to apply to them the principle of equal treatment ( ) to pursue their claims by judicial process after possible recourse to other competent authorities '

In this case, the ECJ concluded that in order to achieve the objective of this provision – effective protection of rights – the Member State must take measures which are sufficient and effective. The effectiveness as such is an issue for ECJ review. The ECJ states further that this provision is the expression of a general principle of law which lies at the basis of the constitutional heritage common to all Member States, and which is laid down in Articles 6 and 13 of the ECHR. Concerning the applicability of the ECHR in a Community context, the Court refers to the joint declaration of the European Parliament, the Council and the Commission of 5 April 1977,<sup>20</sup> as well as to the ECJ's own case law. The ECJ then goes on to interpret the content of Article 6 of the Directive in the light of this principle. The subject of dispute in the *Johnston* case was a declaration which on the basis of domestic law was irrefutable proof that the condition for deviating from the principle of equal treatment had been met, so that there was no more room for judicial review. This was found to be in conflict with Article 6 of the Directive. Also in this case, it comes down to the fact that a domestic provision was rendered inapplicable because of conflict with this provision of the Directive. The *Johnston* case precluded a later case in which the ECJ goes one step further the *Heylens* case.

Here, too, a preliminary ruling was involved, but this time it concerned the free movement of persons, in this case a football coach who in France was accused of an unlawful act for bearing the title of football coach without the proper credentials. This case did not concern the interpretation of a directive, but free movement as laid down in the EC Treaty itself. The ECJ looked to the *Johnston* case for a precedent concerning effective legal protection.

'Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right. As the Court held in its judgment of 15 May 1986 in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, at p 1663, that requirement reflects a general principle of Community law which underlies the

---

20 OJ 1977, C 103, p 1

constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.’

This case focused on the question of whether disclosure of the motives for the refusal of recognition as a football trainer could be demanded. The ECJ observed the following:

‘But where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.’

These decisions taken together point to the conclusion that the demand for effective legal protection of fundamental rights issuing from Community law is in itself a fundamental right which the citizen can invoke against the national authorities. What is striking about the judgment in the *Heylens* case is that here no provision such as Article 6 of the Directive could be cited as a basis for the right to effective legal protection.

In the future, the Court of Justice will attach effective legal protection to every ‘fundamental right’.<sup>21</sup> One indication of such a development can be found in the *Verholen* case.<sup>22</sup> Here, among other things, the following is observed:

‘While it is, in principle, for national law to determine an individual’s standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (...)’<sup>23</sup> and the application of national legislation cannot render virtually impossible the exercise of the rights conferred by Community law (judgment in Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595.’

---

21. C.W.A. Timmermans, note on the *Heylens* judgment (222/86), *Ars Aequi* 1989, p. 287 *et seq.*

22. Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen et al.* [1991] ECR I-3757 and SEW 1993, p. 163 *et seq.*, ann. S. Prechal. See also case C-340/89 *Vlassopoulou* [1991] ECR I-2357.

23. Reference to *Johnston* and *Heylens*.

It appears from this consideration that in future situations it is possible that the determination of authority to proceed and the interests involved in the proceedings – *in principle* a national right – will be approached from the viewpoint of effective legal protection.

The *Borelli* case<sup>24</sup> contains a consideration which strongly confirms the above. It involved the question whether the correctness of a preparatory action preceding an action of the Commission taking place on the domestic level could be challenged. The ECJ found:

‘Il appartient, dès lors, aux juridictions nationales de statuer, le cas échéant après renvoi préjudiciel à la Cour, sur la légalité de l’acte national en cause, dans les mêmes conditions de contrôle que celles réservées à tout acte définitif qui, pris par la même autorité nationale, est susceptible de faire grief à des tiers, et, par conséquent, de considérer comme recevable le recours introduit à cette fin, même si les règles de procédure internes ne le prévoient pas en pareil cas ’

This expansion of the authority of the national court is once again based on the right, which meanwhile has become an independent right in the case law, to effective legal protection.

For the future, it is interesting to focus on directives which may have as their subject effective legal protection in detail. The directive concerning the legal means as to the placement of government contracts for supply and for carrying out projects<sup>25</sup> can be taken as an example. In Article 2 (1) of this directive, the Member States are required to provide for the following powers.

- a) In summary proceedings, to take preliminary measures as soon as possible to reverse the alleged violation or to prevent further damage to the interests involved, including measures to suspend or rescind, as the case may be, the tender procedure or the execution of any decision by the contracted agencies;
- b) To nullify illegal decisions or have them nullified, including the removal of discriminating technical, economic or financial specifications in calls for tenders, in plans or any other document in connection with the tender procedure;
- c) To award damages to the parties injured by a violation.

If the competent bodies are other than judicial authorities, Article 8 requires that the grounds be stated in writing and – in brief – appeal against their decisions must be open before an independent court

---

24 ECJ 3 December 1992, Case 97/91 *Borelli* [1992] ECR I-6313

25 Dd 21 December 1989, 89/665/EEC, OJ 1989, L 395/33

It can be seen from this provision that the rights of legal subjects have been laid down in quite some detail. It is not improbable that when implementation has not taken place in the correct manner – which, among other things could involve the manner in which arbitration has been arranged – the court, interpreting along the line of the duties arising from this directive, will make its competences clear<sup>26</sup>. Then, too, the question arises to what extent this directive will have a more positive import for domestic procedural law. Considering the earlier case law, it does not appear unlikely that provisions such as this will clear the way for a more positive influence of the Court on the powers of the national courts. It is, however, important to note that the right to effective legal protection has acquired an independent significance in the Court's case law.

## 6 Conclusion

Tension exists between the right to effective legal protection issuing from Court of Justice case law which, on the one hand, has a positive – constitutive – effect on domestic procedural law and, on the other, the fact that this effective legal protection is given by the domestic court on the basis of domestic procedural law. Legal protection of the citizen with regard to the application of Community law is to a large degree given by the national courts, not the EC Court. Only in a limited number of cases, for example, damages as a remedy for unlawful actions by Community institutions, does the 'European citizen' have direct access to the European Court. For the rest, the citizen is mostly dependent on the national court and national arrangements for access to that court. Of no little importance is that through the case law of the ECJ on the right to effective legal protection, the ECJ has made a legal policy choice for the further penetration of Community law by calling upon the courts, a policy which as such has no strong guarantees under Community law, and for optimizing its effect by way of the national courts. This legal policy choice contributes to the constitutional development of the EC as a 'two-speed Europe'. What has been stated in the first part of this paper about the constitutional development of the EC as a 'separate legal order', partly in the light of Maastricht, illustrates the slow track of the EC. Little is contributed on the

---

26 Concerning the problems for the Netherlands, see E H Pijnacker Hordijk, *Tenuitvoerlegging van de nieuwe EG-richtlijnen inzake overheidsaanbestedingen binnen de Nederlandse rechtsorde*, *Bouwrecht* 1992, p 99 *et seq* and E M A van der Riet, *Rechtsbescherming voor aannemers onder het Europese aanbestedingsrecht*, *Bouwrecht* 1992, p 117 *et seq* as well as the special issue of *Bouwrecht* 1993, p 1-60.

political level to the responsible constitutional development of the EC. The fast track is the case law of the Court of Justice. Through the Court, direct effect, primacy, the ban on judicial review and the right to effective legal protection have become established structural elements laid down in the jurisprudence of the separate 'European legal order'.

Development of the right to effective legal protection as it must be applied by the national courts makes deep inroads on the constitutional relationships within each Member State. The national courts are faced with the challenge – under the inspiring leadership of the Court of Justice – of carrying out a lawmaking task that directly influences their own competences and tasks. The Court of Justice hereby involves itself in the constitutional balance governing the relationship between the judiciary and the legislature in every Member State. Considering the objective – effective legal protection – there is nothing against this involvement. It should, however, also be borne in mind that the Court of Justice itself does not participate in a system of 'checks and balances', and in particular that it does not function in a legal order with a democratic foundation.

Nevertheless, the case law of the Court of Justice, on the basis of which the effective penetration of Community law into the national legal orders has been made possible, coincides very well with the social and economic developments in Europe. The Court is apparently in a position – perhaps even better than the political leaders of the European States – to follow the heartbeat of the developments in society. The ECJ's fast track of legal development appears to be setting the tone for the current social situation, and not the slow track of – intergovernmental – decision making by the political leaders of the Member States. It is therefore time for the political leaders to view European developments with more understanding of constitutional matters, and provide for institutional developments that are in keeping with the social developments in Europe.