Shaping Procedural Autonomy of the Member States of the European Union – A Case of "Market Regulators"

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Summary: The paper confronts procedural autonomy of the Member States to selected procedural requirements established by EU directives for so-called market regulators, i.e.sectoral and utilities regulators, competition authority as well as public procurement surveillance body. The analysis tries to identify some common features as well as estimate features of future development.

Keywords: Market regulators – procedural autonomy – public procurement – competition – EU law – inspections – sanctions – corrective mechanism

1. Introduction

There is a well-established triad of principles that shape enforcement rules of Members States stablished for implementation of EU law – procedural autonomy, effectiveness and equivalence. Indeed, requirement for effectiveness and equivalence in application of EU law by national bodies limit their procedural autonomy. On the other hand, the procedural autonomy of the Member States can be limited in two ways: (1) states shape powers of their judicial and administrative bodies themselves without any interference or guidance of EU law, or (2) EU law provides standards, basic requirements or stipulates exact rules that shall be transposed into respective national legal orders. Level of this direct interference into national legal orders can vary, usually depending on the necessity of harmonization, however certain features can be found common. For purpose of the analysis provided by this paper, rules laid down for so-called market regulators will be taken into account. "Market regulators" are national authorities empowered to govern economic activities of undertaking or other market

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players in conformity with the principles of market economy, so, in other words, remove negative externalities. Following bodies can be included in this group: authorities regulating specific sectors – e.g. utilities, gas, water or electricity supplies, networks and telecommunications, postal and financial services, also competition authorities as well as public procurement surveillance authorities can be included in this group. Common features of all of these authorities can be found also in their power to regulate common EU policies and enforce common EU interests via national law.

Procedural powers and requirements of public procurement authorities are given by Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts[1] (hereinafter „Remedies Directive") and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[2] as they were amended. Since the Remedies Directive and Directive 92/13/EEC are quite similar, for the purposes of this paper the Remedies Directive will be analysed.

Gas and electricity market regulators are covered mainly by Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (hereinafter „Electricity Directive")[3] and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC[4] (hereinafter „Gas Directive").

In general, electronic services sector is governed by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)[5].

Finally, powers of competition authorities are addressed by directive-like provisions of regulation as well as directive: Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.[6]

[1] OJ L 395, 30. 12. 1989, p. 33–35.
[2] OJ L 76, 23. 3. 1992, p. 14–20.
[3] OJ L 326, 8. 12. 2011, p. 1–16.
[4] OJ L 211, 14. 8. 2009, p. 94–136.
[5] OJ L 108, 24. 4. 2002, p. 33–50.
[6] OJ L 1, 4. 1. 2003, p. 1–25.

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market[7] (hereinafter „ECN+ Directive“).

On a basis of analysis of aforementioned regimes following procedural features requirements for powers and operational framework of national authorities can be assessed: principle of effectiveness of procedure, specification of powers of national authorities, administrative and judicial review, fines and other sanction.

2. Effectiveness of powers of the national authority and procedure

Indeed, effectiveness of enforcement of European law is the basic duty for national legislator stemming from article 4 of the Treaty on European Union. This principle is enshrined in analysed legal instrument in both – preambles and operative parts. The principle of effectiveness is furthermore explicitly tied to specific powers or performance, in particular:

- effective carrying out duties – Rec. 13 of the Framework Directive, Preamble of the ECN+ Directive as a whole, Art. 1 of the ECN+ Directive, Art. 35(1) of Regulation 1/2003
- effective decision-making – Preamble and Art. 1(1) of the Remedies Directive,
- effective penalties – Rec. 33 and 34, Art. 4(4)(d) of the Gas Directive, Rec. 37 and 38, Art. 37(4)(d) of the Electricity Directive, Art. 13 of the ECN+ Directive, Art. 2e(1) of the Remedies Directive
- effective dispute settlement and consumer protection – Rec. 51, Art. 4(1)(o) of the Gas Directive, Art. 37(1)(n) of the Electricity Directive,
- effective review mechanism and remedies – Art. 2a(1) of the Remedies Directive, Art. 3 of the ECN + Directive, Art. 4 of the Framework Directive.

Requirement for rapid procedures can be seen as an integral part of the principle of effectiveness (effective enforcement), however particularly the Remedies Directive stresses this requirement as a specific feature of enforcement procedure (Art. 1 par. 1 subpar. 3). The interplay between effectiveness and rapidity is interesting and “separates” general principle of effectiveness (effective application) from specific duties of Member States to establish effectiveness of application

[7] OJ L 11, 14. 1. 2019, p. 3–33.

of particular rights. Therefore according to *Unilpex* judgment "the objective of rapidity pursued by Directive 89/665 does not permit Member States to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law, a principle which underlies the objective of effective review proceedings laid down in Article 1(1) of that directive."[8] Furthermore, objective of rapidity "must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations...".[9] This quite broad explanation of relationship between effectiveness and rapidity of enforcement procedures vis-a-vis procedural autonomy of Member States can be, however, linked to general values of the European Union, particularly rule of law. Hence Member States are limited in their procedural autonomy by the requirement of effectiveness, which includes rapidity of procedure, while this rapidity cannot frustrate effectiveness itself as well as fundamental rights and principle of rule of law. Rapidity of procedures cannot be seen as a specific requirement, even though it is explicitly stipulated in the Remedies Directive only, but an integral part of the principle of effectiveness.

3. Powers of national bodies and authorities

Description of explicit powers and procedural powers of national bodies can be seen as direct exemption form the general principle of procedural autonomy because Member States cannot chose its own set enforcement tool but they have to follow at least minimal toolkit laid down by respective directive. This minimal set can include investigation powers, e.g. inspections, preliminary and interim measures, decisions and sanction mechanism.

Both, the Gas Directive [Art. 41 par. 3(e) and Art. 41(5)(g)] and the Electricity Directive require national regulatory authority [Art. 36 par. 3(e)and Art. 36(5)(g)] to "have the powers to carry out inspections, including unannounced inspections, at the premises" of relevant undertakings and operators. These directives give no further details for the conditions and design of inspection powers. In this context, description powers of national competition authorities described in Art. 6 and 7 of the ECN+ Directive is much more detailed and distinguishes between inspection of business premises and other premises. The ECN+ Directive also

[8] Judgment of 28 January 2010, Uniplex (UK), C-406/08,EU:C:2010:45, p. 40.
[9] Judgment C-406/08 Uniplex (UK), p. 39.

stipulates minimum list of powers of competition authorities and their officials in order to conduct inspection[10].

Although there is no legal interplay between the Gas Directive and the Electricity Directive on the one hand and the ECN+ Directive, Rec. 4 of the ECN+ Directive can, however, link them: "Providing NCAs with inspection powers of a different scope, depending on whether they will ultimately apply only national competition law or also apply Articles 101 and 102 TFEU in parallel, would hamper the effectiveness of competition law enforcement in the internal market." Description of minimal powers of national competition authorities to inspect business premises can be, therefore, considered a legislative reaction to ineffectiveness of inspections, if they do not meet these minimal standards. In other words, from the point of view of the European legislator, list given in Art. 6(1) represents minimal standards for inspection of business premises in order to maintain effectiveness of enforcement of particular duty of national authority. Even though the Electricity Directive and the Gas Directive does not provide list of minimal powers for inspection and effectiveness is still the only scrutiny, non-compliance with the list laid down by Art. 6(1) of the ECN+ Directive in electricity and gas sector can lead to non-compliance with the requirement of effectiveness of inspection. Moreover, similarity of duties of national competition authorities and electricity and gas regulators vis-à-vis undertakings in dominant position cannot be overlooked in this context.

Interim measures, injunctions orpreliminary orders represent tool that have to ensure that real effects of the decision in particular case will have not been frustrated or diminished by time delay caused procedure itself. Their aim is, mainly, to maintain status quo or to prevent creating situations that could appear irreversible. Interim measures are directly required by the Remedies Directive [Art. 1(1)(a)][11]. The directive does not provide further details or criteria for interim measures except possibility to provide "that the body responsible for

[10] "… (a) to enter any premises, land, and means of transport of undertakings and associations of undertakings; (b) to examine the books and other records related to the business irrespective of the medium on which they are stored, and to have the right to access any information which is accessible to the entity subject to the inspection; (c) to take or obtain, in any form, copies of or extracts from such books or records and, where they consider it appropriate, to continue making such searches for information and the selection of copies or extracts at the premises of the national competition authorities or at any other designated premises; (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.".

[11] „Member States shall ensure that the measures taken concerning the review procedures (…) include provision for powers to (..) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the

review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits"[12] and rule that "decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures"[13]. Lack of further details and conditions for interim measures can be seen from the two points of view – either it gives full procedural autonomy to Member States or no further conditions or criteria can be established by national legislation. Also in this case is procedural autonomy of the Member States restricted and even though the Member States can establish criteria for interim measures they cannot deviate from autonomous character of interim measures, as it was explained by the ECJ: "… under Article 2 of the directive, the Member States are under a duty more generally to empower their review bodies to take, independently of any prior action, any interim measures 'including measures to suspend or to ensure the suspension of the procedure for the award of a public contract'."[14]

Interim measures were briefly mentioned by Art. 5 of Regulation 1/2003. This provision empowered national competition authorities to apply Art. 101 and 102 TFEU and allowed them to adopt four types of decisions (requiring that an infringement be brought to an end, ordering interim measures, accepting commitments, and imposing fines, periodic penalty payments or any other penalty provided for in their national law). Thus all these types of decisions were subject to national rules and this provision could have been hardly read as duty to establish interim measures. Duty to introduce interim measures in competition matters has been introduced by the ECN+ Directive while conditions are much more detailed:

- interim measures can be imposed from own initiative of the authority;
- they must be imposed at least in cases where there is urgency due to the risk of serious and irreparable harm to competition,
- can be imposed only on the basis of a prima facie finding of an infringement of Article 101 or Article 102 TFEU.
- decision shall be proportionate and shall apply either for a specified time period, which may be renewed in so far that is necessary and appropriate, or until the final decision is taken.
- the legality, including the proportionality, of the interim measures can be reviewed in expedited appeal procedures.[15]

suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority.."

[12] Remedies Directive, Art. 2(5).

[13] Remedies Directive, Art. 2(5).

[14] Judgment of 19 September 1996, Commission v Greece, C-236/95, EU:C:1996:341, p. 11.

[15] ECN+ Directive, Art. 11.

Again, requirement to introduce interim measures is not legally stipulated by gas and electricity directives, but Rec. 38 of the ECN+ Directive explains their importance "Interim measures can be an important tool to ensure that, while an investigation is ongoing, the infringement being investigated does not seriously and irreparably harm competition. This tool is important to avoid market developments that could be very difficult to reverse by a decision taken by an NCA at the end of the proceedings." Therefore Member States are not legally obliged to introduce power to impose interim measures for sector regulators, but they are still obliged to introduce such a set of powers and procedural tools in order to achieve effectiveness of performance of powers these authorities and effective enforcement of internal market rules. Similarly to competition rules, gas and electricity regulators are obliged to avoid situation when investigated activity "seriously and irreparably harm competition" and "avoid market developments that could be very difficult to reverse by a decision taken by an authority at the end of the proceedings."(mutatis mutandis Rec. 38 of the ECN+ Directive). Thus the Member States have procedural autonomy to avoid market deformities and ECN+-Directive-like interim measures can serve as a guideline, even not mandatory.

4. Quality of decisions and judicial review

Regarding quality of decision of competent authorities and their review the analysed directives feature on two elements – fully reasoned decision and possibility of judicial review, if the decision is not adopted by judicial authority itself:

- „decisions taken by regulatory authorities shall be fully reasoned and justified to allow for judicial review" [Art. 41(16) of the Gas Directive and Art. 37(16) of the Gas Directive]
- „party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government" [Art. 41(17) of the Gas Directive and Art. 37(17) of the Gas Directive and Art. 4 of the Framework Directive]
- „where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given" [Art. 2(2) of the Remedies Directive] and similarly in the Framework Directive (Art. 4): „Where the appeal body (...) is not judicial in character, written reasons for its decision shall always be given.[16]

[16] Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 267 of the TFEU.

All these requirements appear to be features of right to fair trial. This is much more obvious from the case-law that requires full judicial review of the decision of regulatory authorities with full access to facts of the case[17] and power to annul decision with effects ex tunc.[18] The Court of Justice made link between abovementioned provisions and Art. 47 of Charter of Fundamental Rights of the European Union (Right to an effective remedy and to a fair trial) apparent, particularly in Prezes Urzędu Komunikacji Elektronicznej and Petrotel case.

If we read provisions dealing with quality of decision and review as an expression of Art. 47 of the Charter Fundamental Rights of the European Union, it is not relevant that the list of these requirements is incomplete, unsystematic and is not included in all analysed directives. In this context, these provisions have no impact on procedural autonomy of the Member States since it is constitutionally subject to rule of law and fair trail scrutiny.

5. Fines and sanction mechanism

Properly designed sanction mechanism is one of the tool for achieving effectiveness ofenforcement of relevant rules. This mechanism shall consist of two groups of sanctions – sanctions for infringement of procedural duties and sanctions as remedies for infringement.

Art. 2e of the Remedies Directive requires Member States to establish alternative penalties for infringement of rules stipulated in that directive – the

[17] Judgment of 13 July 2006, Mobistar, C-438/04, EU:C:2006:463: „ Article 4 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) must be interpreted as meaning that the body responsible for hearing an appeal against a decision of the national regulatory authority must have at its disposal all the information necessary in order to decide on the merits of the appeal, including, if necessary, confidential information which that authority has taken into account in reaching the decision which is the subject of the appeal. However, that body must guarantee the confidentiality of the information in question whilst complying with the requirements of effective legal protection and ensuring protection of the rights of defence of the parties to the dispute."

[18] Judgment of 13 October 2016, Prezes Urzędu Komunikacji Elektronicznej and Petrotel, C-231/15, EU:C:2016:769: „Article 4(1), first subparagraph, first and third sentences, and second subparagraph, of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, is to be interpreted as meaning that a national court hearing an appeal against a decision of the national regulatory authority must be able to annul that decision with retroactive effect if it finds that to be necessary in order to provide effective protection for the rights of the undertaking which has brought the appeal."

imposition of fines on the contracting authority or the shortening of the duration of the contract. The directive does not elaborate on level of the fine, require merely that penalties must be "effective, proportionate and dissuasive. More details regarding notion "effective, proportionate and dissuasive penalties" provide the Gas Directive and the Electricity Directive [Art. 41(4)d) and Art. 37(4) d) respectively]. Under these directives this penalties shall include the power to impose or propose the imposition of penalties of up to 10 % of the annual turnover of respective undertaking. This „benchmark" level of the fine san be found within the powers of the Commission under Regulation 1/2003 which was also copied to the ECN+ Directive into powers of competition authorities [Art. 15 thereof]. Moreover, sanction mechanism under the ECN+ Directive is much more detailed and provide rules for sanction for infringement of substantial rules as well as for non-compliance with procedural duties, such as subject to inspection, provide information.[19] Again, sanctions shall be "effective, proportionate and dissuasive" [Art. 13(1) and again Art. 13(3) of the ECN+ Directive]. Thus in this context the pattern is obvious. The European legislator considers "effective, proportionate and dissuasive"sanction mechanism that include fines at least up to 10 % of undertaking's turnover.

6. Position of the European Commission in national procedure

The analysis will omit involvement of the European Commission in consultations and other soft-law means of convergence of enforcement of European rules, since it will focus on involvement of the European Commission in enforcement cases. This involvement does not preclude, indeed, power of the European Commission to launch infringement procedure under Art. 258 TFEU.

The Remedies Directive introduce "corrective mechanism" in case the Commission "considers that a serious infringement of Union law in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU." [Art. 3(1)]

[19] "(a) they fail to comply with an inspection as referred to in Article 6(2); (b) seals affixed by the officials or other accompanying persons authorised or appointed by the national competition authorities as referred to in point (d) of Article 6(1)) have been broken; (c) in response to a question referred to in point (e) of Article 6(1), they give an incorrect, misleading answer, fail or refuse to provide a complete answer; (d) they supply incorrect, incomplete or misleading information in response to a request referred to in Article 8 or do not supply information within the specified time limit; (e) they fail to appear at an interview referred to in Article 9; (f) they fail to comply with a decision referred to in Articles 10, 11 and 12."

This procedure may give some resemblance to infringement procedure under Art. 258 of the TFEU because the Commission addresses its reasoned opinion to the Member State[20]. The corrective mechanism does not establish further sanctions for non-compliance of the Member State and if the Member State does not enforce proper correction vis-a-vis contracting authority it can itself face responsibility for infringement of EU law.[21]

Involvement of the European Commission in electricity, gas and electronic communication sector focuses mainly to harmonization and cooperation between regulation authorities. The strongest power has the Commission under Regulation 1/2003 because the Commission can handle cases of infringement of Art. 101 and 102 TFEU itself and its action relieves national competition authority from their competence enforce these provisions of the TFEU [Art. 11(6) of Regulation 1/2003]. The difference between approach under public procurement regime and competition regime is that under public procurement regime the Commission can only try to "coerce" a Member State to enforce EU law properly, while under competition regime, the Commission can act in its own capacity.

[20] The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected;

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a).

[21] Judgment of 24 January 1995, Commission v Netherlands, C-359/93, EU:C:1995:14, par. 12 to 14: "It is clear from the letter and spirit of Directive 89/665 that it is very much to be preferred, in the interest of all the parties concerned, that the Commission should give notice of its objections to the Member State and the contracting authority as soon as possible before the contract is concluded, thereby giving the Member State and the contracting authority time to answer it, in accordance with Article 3(3) of Directive 89/665, and if necessary to correct the alleged infringement before the contract is awarded.

However, that special procedure under Directive 89/665 is a preliminary measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty. That article gives the Commission discretionary power to bring an action before the Court where it considers that a Member State has failed to fulfil one of its obligations under the Treaty and that the State concerned has not complied with the Commission's reasoned opinion.

Furthermore, a declaration that a State has failed to fulfil its obligations under Article 169 does not depend on the existence of a clear and manifest infringement within the meaning of Directive 89/665. Such a declaration is confined to the finding that a Member State has not fulfilled an obligation under Community law and does not in any way prejudge the nature or seriousness of the infringement."

7. Conclusion

There are no common European administrative code and no common rules for enforcement of EU law in Member States and Member State enjoy broad discretion and procedural autonomy when they fulfilling their duty to effectively implement and enforce EU law. Nevertheless, specific directives are shaping this procedural autonomy by more or less detailed procedural standards. Although requirement of effective enforcement is the "umbrella" principle in this context, this general rule appeared insufficient and EU law provides gradually more and more detailed standards. The ECN + Directive can serve as an example of detailed harmonization of procedural rules. It opens a question whether such detailed harmonization of procedural rules that was manifestly reaction to ineffectiveness regime based on more procedural autonomy, can serve as a benchmark of some procedural standards designed to achieve and maintain effectiveness of enforcement, such as minimum sanctions, interim measures, inspections. On the other hand, some requirements laid down by the directives appear to be unnecessary (e.g. duty to provide reasons for decision, right for judicial review), because they are stemming from the Charter of fundamental rights of the European Union as well as values of the Union, such as rule of law.

Although directives subject to analysis were not selected randomly since covered areas of regulation have some common features, there is still little convergence between them. However, common features shall converge on a basis of recent development (e.g. inspection powers or interim measures on a basis of the ECN+ Directive can serve as an example of reform of gas and electricity as well as electronic communication sector rules).

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