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The Application of EC Law *Ex Officio* – Some News From the Italian Administrative Courts

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Abstract

This paper seeks to provide an overview of the application, by the Italian administrative courts, of the ECJ's rulings on the duty of national courts to apply Community law of their own motion. The relevant national legislative provisions and the potential impact that the ECJ's case law may have on the Italian system of administrative justice are analysed. Furthermore, the national case law where the ECJ's standards have been applied by the national administrative courts is examined. Some concluding remarks discuss the feasibility of the approach adopted by the ECJ with regard to the duty of national courts to act ex officio.

I Introduction

In the absence of a general Community competence for the harmonisation of national procedural rules, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing the actions intended to enforce the rights which individuals derive from Community law. However, in order to ensure a minimum degree of uniformity in the enforcement of EC law and to guarantee the '*effet utile*' of Community law, the ECJ has, on numerous occasions, intervened into national procedural rules.¹

¹ In general on the ECJ's approach to domestic remedies, see R. Craufurd Smith, 'Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford 1999) 287, for an attempt to explain the rationale underlying the ECJ's case law on domestic remedies; R. Caranta, 'Judicial Protection against Member States: a New *Ius Commune* Takes Shape' [1997] *CMLRev* 703; S. Prechal, 'EC Requirements for an Effective Remedy', in J. Lonbay and A. Biondi (eds.), *Remedies for Breach of EC Law* (Chichester 1997) 3; B. Hofstätter, *Non-compliance of National Courts – Remedies in European Community Law and Beyond* (The Hague 2005) 9 ff; M. Accetto and S. Zleptnig, 'The Principle of Effectiveness: Rethinking its Role in Community Law' [2005] *EPL* 375; A. Ward, *Judicial Review and the Rights of Private Parties in EC Law* (Oxford 2007) 86 ff; J. Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' [2003] *ELJ* 599; A. Arnall, *The European Union and its Court of Justice* (Oxford 2006) 267 ff; P. Craig, *EU Administrative Law* (Oxford 2006) 789 ff. On the influence of the ECJ's case law in the Italian, German and English systems of administrative justice, see M. Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ's Case Law in Italy, Germany and England* (Groningen 2008).

In particular, the ECJ has generated a substantial amount of case law with regard to the duty of national courts to apply European law of their own motion. In *van Schijndel*² and *Peterbroeck*,³ and more recently, in *van der Weerd*,⁴ the Court examined the question of whether national courts are obliged to raise *ex officio* points of EC law when they, pursuant to the applicable national procedural rules, are not able to raise points of national law of their own motion. In particular, the ECJ clarified that the application of Community law by national courts of their own motion is not a necessary follow-up of direct effect and supremacy. Instead, the ECJ seems to have introduced a kind of ‘proportionality test’,⁵ whereby, in order to judge the lawfulness a national procedural rule which restricts the power of a national court to raise *ex officio* points of EC law, the intrinsic nature, the aim and the purpose of the rule, and its application to the set of circumstances of the concrete case all have to be analysed.

While this solution certainly has the advantage of striking a balance between national procedural autonomy and the requirement of an adequate and effective protection of EC rights, it also introduces a high degree of uncertainty from case to case.⁶ This renders the outcome of the case much less predictable,⁷ and may even impede the fundamental principles of uniform application and primacy of EC law.⁸ Moreover, this approach complicates the role of national courts, which are entrusted to apply the ‘proportionality test’, mentioned above.⁹ The national courts, indeed, are given a great deal of responsibility by the ECJ in this context and are required to cooperate in applying the proportionality test advanced by the ECJ, where this proves necessary. Should the national court fail to adequately apply the European standards of protection, the effective judicial protection of EC rights and the uniform enforcement of Community law might be impaired.

² Joined cases C-430-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705.

³ Case C-312/93, *Peterbroeck, Van Campenhout & Cie v. Belgian State* [1995] ECR I-4599.

⁴ Joined cases C-222-225/05, *J. van der Weerd and others v. Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I-4233.

⁵ Prechal talks about a ‘Cassis de Dijon test’ applied to procedural law. S. Prechal, ‘Community law in National Courts: the Lesson from *Van Schijndel*’ [1998] *CMLRev* 691.

⁶ M. Hoskins, ‘Tilting the Balance: Supremacy and National Procedural Rules’ [1996] *ELRev* 375.

⁷ G. De Búrca, ‘National Procedural Rules and Remedies: the Changing Approach of the Court of Justice’, in J. Lonbay and A. Biondi (eds.), *Remedies for Breach of EC Law* (Chichester 1997) 45. Along the same line also J. McKendrik, ‘Modifying Procedural Autonomy: Better Protection for Community Rights’ [2000] *ERPrivL* 585.

⁸ T. Heukel, ‘Comment on *Peterbroeck* and *Van Schijndel*’ [1996] *CMLRev* 349.

⁹ S. Prechal, ‘Community law in National Courts: the Lesson from *Van Schijndel*’ 692.

In order to assess whether the ECJ's rulings have been correctly applied by the national courts, it is necessary to examine the national case law in which the issue of the compatibility of national law with EC law was at stake but had not been raised by the concerned party. This article seeks to provide an overview of the application, by the Italian administrative courts, of the ECJ's rulings on the duty of national courts to apply Community law of their own motion. In particular, first, the relevant national legislative provisions and the potential impact that the ECJ's case law may have on the Italian system of administrative justice are analysed. Thereafter, the national case law where the ECJ's standards have been applied by the national administrative courts is examined. The analysis is closed by some concluding remarks on the feasibility of the approach adopted by the ECJ with regard to the duty of national courts to act *ex officio*.

2 The Italian Rules on the *ex officio* Powers of the Administrative Courts

In the Italian legal system, administrative courts are not allowed to raise *ex officio* grounds of unlawfulness of an administrative decision that have not been brought forward by the applicant. In other words, the courts are bound to assess the lawfulness of the contested decision on the basis of the legal grounds explicitly put forward by the applicant (principle of party autonomy – *principio dispositivo*). This principle flows from Article 112 of the Code of Civil Procedure, pursuant to which 'the court must adjudicate on the whole claim and not beyond its scope; and it cannot rule *ex officio* on exceptions that only the parties can put forward'.¹⁰

This principle is also confirmed by Article 6, No. 3, of the Rules of Procedure of the Council of State,¹¹ pursuant to which the act introducing the claim must contain, amongst others, an exposition of the facts, the grounds of the claim, with the specific indication of the provisions which have allegedly been violated and the conclusions. The grounds of the claim – that is, the specific reasons supporting the claim – are an essential element of the claim itself. Pursuant to Article 17 of the Rules of Procedure of the Council of State, if there is absolute uncertainty on these grounds, the act introducing the claim is null and void.¹² It flows from what was described above that the respect for the *principio dispositivo* prevents administrative courts from

¹⁰ Please note that this translation does not have official character.

¹¹ Royal Decree of 17 August 1907, No. 642, Rules of Procedure for the proceedings before the judicial chambers of the Council of State, GU of 25 September 1907, No. 227.

¹² In general on these rules, see F. Caringella, *Giustizia Amministrativa* (Napoli 2003) 560 and 583 ff; F.G. Scoca, *Giustizia Amministrativa* (Torino 2006) 250 ff; A. Travi, *Lezioni di Giustizia Amministrativa* (Torino 2006) 242 ff; A. Sandulli, *Diritto Processuale Amministrativo* (Torino 2007) 175 ff.

raising of their own motion any grounds of unlawfulness which have not been brought forward by the parties. This principle is a true cornerstone of the system of administrative justice, and it has been argued¹³ that it seems to be so well-established in the Italian administrative legal system that it was reaffirmed only on very few occasions.¹⁴

While the *principio dispositivo* pervades the whole administrative trial, administrative courts are, nevertheless, vested with some powers to act of their own motion. Firstly, the courts can raise *ex officio* some preliminary exceptions at any stage of the proceedings. These preliminary questions may relate to the jurisdiction of the administrative court.¹⁵ Accordingly, administrative courts may *ex officio* declare the lack of jurisdiction in relation to the subject-matter of the controversy in question.¹⁶

The preliminary exceptions may also relate to some requirements of the claim. They are generally classified into requirements of *ammissibilit *, *ricevibilit * and *procedibilit *. These are briefly examined in turn. The requirement of *ammissibilit * concerns the existence of a legal position held by the applicant and allegedly harmed by the contested administrative decision. The *ammissibilit * also concerns the applicant's initial interest in bringing the claim, that is to say, the possibility of obtaining an actual advantage or utility from a decision upholding his claim.¹⁷ The administrative courts, therefore, will declare *ex officio* the lack of *ammissibilit * when the contested administrative decision does not harm the applicant's legal position, because the harm itself is merely possible or objectively uncertain, and might only come into existence as an effect of future and uncertain acts or facts. The requirement of *ricevibilit * concerns the deadline for bringing the claim. This means that administrative courts may declare *ex officio* the lack of *ricevibilit * of a claim when the act introducing the claim has been notified after the deadline provided for by the law.¹⁸ The requirement of *procedibilit * concerns the applicant's interest in the decision during the proceedings. This means that a court may declare *ex officio* the lack of *procedibilit * for lack of procedural

¹³ G. Cocco, 'Incompatibilit  comunitaria degli atti amministrativi. Coordinate teoriche e applicazioni pratiche' [2001] *Riv. it. dir. pubbl. com.* 464.

¹⁴ See, for example, Cons. Stato, Sez. IV, Judgment of 30 September 2002, No. 4986, *Foro amm.* CDS, 2002, 2027; Cons. Stato, Sez. IV, Judgment of 8 June 2000, No. 3246, *Foro Amm.*, 2000, 2114.

¹⁵ Article 30 of Law of 6 December 1971, No. 1034, GU of 13 December 1971, No. 314.

¹⁶ Cons. Stato, Sez. IV, Judgment of 2 July 2002, No. 3606, *Foro amm.* CDS, 2002, 1635; Cons. Stato, Sez. IV, Judgment of 8 June 2000, No. 3215, *Foro Amm.*, 2000, 2107.

¹⁷ T.A.R. Campania Napoli, Sez. V, Judgment of 8 April 2002, No. 1939, *Foro amm. TAR*, 2002, 1362; T.A.R. Trentino-Alto Adige Trento, Judgment of 6 November 2001, No. 627, *Foro Amm.*, 2001, 2916.

¹⁸ T.A.R. Puglia Bari, Sez. I, Judgment of 2 May 2000, No. 1713, *Giust. civ.*, 2000, I, 2767; T.A.R. Veneto Venezia, Sez. I, Judgment of 7 October 2003, No. 5134, *Foro amm. TAR*, 2003, 2909.

interest when, in the course of the proceedings, it considers that it would be impossible or useless for the applicant to obtain the advantage arising from a decision upholding his claim.¹⁹

Secondly, administrative courts, also in the absence of a request coming from the parties and regardless of the grounds on which an administrative decision has been challenged, may raise the question of constitutionality of the law upon which the contested decision is based, and order the stay of the proceedings until the Constitutional Court rules on the issue.²⁰ In relation to the power of the courts to raise *ex officio* the question of constitutionality, the Council of State held that, although the administrative courts in this case may have to raise a point that has not been brought forward by the parties, this power is granted to the courts by a law of a constitutional rank.²¹ Since the power of the administrative courts to raise *ex officio* a question of constitutionality is provided for by a constitutional law, taking into account the hierarchy of legal sources, this rule prevails over the one (provided for in an ordinary law, i.e. Article 112 of the Code of Civil Procedure), pursuant to which the scope of review of the administrative courts must be limited to the grounds of unlawfulness brought forward by the parties.

Apart from these (very limited) *ex officio* powers, the Italian administrative courts cannot, in principle, supplement legal grounds to those put forward by the parties.

3 Potential Consequences of the ECJ's Rulings for the Italian Legal System

As set forth above, in the ECJ's view, when a national court is not able to raise points of national law of its own motion, it might, despite this national procedural limitation, have to raise points of Community law *ex officio*. This jurisprudential position may have an impact on the Italian legal system given that, as shown above, administrative courts are, in principle, bound to adjudicate exclusively on the grounds of unlawfulness of the

¹⁹ T.A.R. Basilicata Potenza, Judgment of 4 October 2002, No. 617, *Foro amm. TAR*, 2002, 3390; T.A.R. Toscana Firenze, Sez. II, Judgment of 7 August 2002, No. 1769, *Foro amm. TAR*, 2002, 2453.

²⁰ Article 1 of Constitutional Law of 9 February 1948, No. 1, GU of 20 February 1948, No. 43 and Article 23(3) of Law of 11 March 1953 No. 87, GU of 14 March 1953, No. 62. See also Cons. Stato, Sez. V, Judgment of 6 February 1999, No. 138, *Foro Amm.*, 1999, 355; Cons. Stato, Sez. IV, Judgment of 27 April 1989, No. 268, *Foro Amm.*, 1989, 960; Cons. Stato, Sez. IV, Judgment of 23 May 1986, No. 363, *Foro Amm.*, 1986, 724. On the power of the administrative courts to raise *ex officio* the question of constitutionality, see C. Anelli, 'La rilevanza delle questioni di legittimità costituzionale nel giudizio amministrativo', in *Studi in onore di F. Piga* (Milano 1992) 77.

²¹ Cons. Stato, Ad. Plen., Judgment of 8 April 1963, No. 8, *Cons. Stato*, 1963, I, 508.

contested administrative decision brought forward by the applicant. Thus, in order to ensure compliance with the European standards of protection, the administrative courts may have to perform the ‘proportionality test’ set forth in the ECJ’s case law when confronted with a situation in which the parties have not put forward grounds based upon the violation of EC law. When performing this test, the courts would need to assess whether the procedural rule preventing them from analysing *ex officio* a possible violation of EC law renders the exercise of the rights conferred upon individuals by EC law excessively difficult or impossible in practice.

The ruling in *Peterbroeck* had a major impact on the Italian academic writing, since it seemed to have affected, and even to have swept away, the *principio dispositivo*.²² In particular, it was pointed out that, on the one hand, the rulings concerning the power of the courts to raise *ex officio* questions based upon the violation of EC law do not introduce an absolute duty upon the courts, but rather a proportionality test. On the other, when the Italian administrative courts perform this proportionality test, they may come to the conclusion that it is necessary to set the *principio dispositivo* aside in order to ensure an effective judicial protection of the rights stemming from EC law.

A parallel may be drawn between the power of the courts to raise a question of constitutionality of their own motion, and the duty (in certain circumstances) to raise *ex officio* a question of violation of EC law. However, in the first of the two cases, the situation is fundamentally different from

²² E. Barbieri, ‘Diritto comunitario ed istituti generali del diritto amministrativo nazionale’ [1994] *Riv. it. dir. pubbl. com.* 11; G. Cocco, ‘Incompatibilità comunitaria degli atti amministrativi. Coordinate teoriche e applicazioni pratiche’ 452; A. Russo, ‘E’ sempre più “diffuso” il controllo di conformità al diritto comunitario ad opera del giudice nazionale?’ [1996] *Riv. it. dir. pubbl. com.* 709. According to the author, this judgment could be seen as a breaking point with regard to the cornerstone principle of party autonomy. See also R. Caranta, ‘Impulso di parte e iniziativa del giudice nell’applicazione del diritto comunitario’ [1996/1/1] *Giur. it.* 1294. While commenting on the different outcomes of *van Schijndel* and *Peterbroeck*, the author points out that the Italian system of administrative justice (and in particular the *ex officio* powers of the courts) resembles the situation of *Peterbroeck* rather than the one in *van Schijndel*; hence, in a case similar to the one at issue in *van Schijndel* and *Peterbroeck*, the Italian courts would have to follow the ruling in *Peterbroeck*. In relation to the possible effects that *Peterbroeck* may have on the Italian system of administrative justice, see L. Daniele, ‘L’effettività della giustizia amministrativa nell’applicazione del diritto comunitario europeo’ [1996] *Riv. it. dir. pubbl. com.* 1389; D.U. Galetta, ‘Giustizia amministrativa italiana e diritto comunitario: problemi e prospettive di sviluppo nell’ottica di una giustizia amministrativa europea’ [1999] *Riv. it. dir. pubbl. com.* 1014; M.P. Chiti, ‘L’effettività della tutela giurisdizionale tra riforme nazionali e influenza del diritto comunitario’ [1998] *Dir. proc. amm.* 519; A. Gatto, ‘I poteri del giudice amministrativo rispetto a provvedimenti individuali e concreti contrastanti con il diritto comunitario’ [2002] *Riv. it. dir. pubbl. com.* 1443.

the one put forward in *Peterbroeck*.²³ Indeed, while an administrative court may raise *ex officio* the question of constitutionality of the law upon which the contested administrative decision is based, the decision on the constitutionality of that law can only be issued by the Constitutional Court itself. Conversely, following the ruling in *Peterbroeck*, each administrative court may decide on the question of the compatibility of a rule of national law with Community law without any involvement of the Constitutional Court. It is thus apparent that the limitation posed to the *principio dispositivo* in cases concerning EC law is much greater, since it entails not only the power for the administrative courts to raise a point which had not been brought forward by the parties, but also to decide upon that point.

It is, therefore, necessary to examine whether, and, if so, to what extent, the Italian courts have, in cases where EC law was in question but was not invoked by the applicant, decided to by-pass the *principio dispositivo* and have extended the claim also to those grounds of unlawfulness relating to the violation of the rules of EC law which the applicant did not explicitly mention in his judicial claim. The section below analyses this case law.²⁴

4 Application of the Standards Set Out in the ECJ's Judgments by the Administrative Courts

At an initial phase, the Italian administrative courts seemed to be quite eager to extend the scope of the claim also to EC law aspects.

For example, the Regional Administrative Court of Lombardia applied a provision of EC law of its own motion, where grounds based upon its violation had not been brought forward by the parties.²⁵ This case concerned the determination of the tariffs for the collection of urban solid waste. The applicants brought a claim for the annulment of a decision of the municipality of Milan, arguing that the contested decision was unlawful for a number of reasons. The court, having held that the administrative decision in question was indeed in breach of several rules of national law, decided to go further

²³ M.P. Chiti, 'L'effettività della tutela giurisdizionale tra riforme nazionali e influenza del diritto comunitario' 519; A. Russo, 'E' sempre più "diffuso" il controllo di conformità al diritto comunitario ad opera del giudice nazionale?' 713.

²⁴ Please note that this case law was found by using the following methodology: for case law issued after 1 January 1998, the cases have been selected by performing searches in a case law database (i.e. the Juris Data database offered by the publishing house Giuffrè Editore, available at <www.iuritalia.it>), using as keywords the names and/or case numbers of the ECJ's rulings on the *ex officio* application of EC law by national courts. For case law issued before 1 January 1998, given the unavailability of electronic databases with case law, the cases have been selected by searching law journals.

²⁵ T.A.R. Lombardia Milano, Sez. I, Judgment of 14 July 1993, No. 532, *T.A.R.*, 1993, I, 3026; *Riv. it. dir. pubbl. com.*, 1996, 784.

than the parties' submissions: in particular, it proceeded to take into account the principle of loyal co-operation and to analyse *ex officio* the 'Community profile' of the situation at hand. In this context, the court explicitly mentioned the ruling of the ECJ in *Verholen*.²⁶ The Italian court held that it 'had to' find *ex officio* the rules applicable to the decision of the case at hand. In particular, the Regional Administrative Court of Lombardia held that the competent public administration had mistakenly considered that the issue in question was exclusively governed by Italian law, although today the 'Italian law of waste' has been substituted by a 'European law of waste'. The court, therefore, considered that the controversy submitted to it had to be solved on the basis of a legal scenario composed of Italian rules and prevailing Community rules. Thus, the court ordered a further discussion of the case.

In the follow-up of this case,²⁷ despite the fact that grounds based on the possible violation of EC law had not been brought forward by the applicant, the Regional Administrative Court of Lombardia decided to analyse this aspect of its own motion in order to assess whether to set aside the relevant piece of national legislation pursuant to which the contested administrative decision had been adopted. In relation to the power of national courts to raise *ex officio* grounds that have not been put forward by the parties, the Italian court again recalled the ruling in *Verholen*, pursuant to which EC law does not preclude a national court from examining of its own motion whether national rules are in conformity with a directly effective provision of EC law. The Regional Administrative Court of Lombardia, however, went further than the ECJ's conclusion in *Verholen*. In particular, in the Italian court's view, not only must a national court be allowed to raise points based upon EC law of its own motion, but it is under an *obligation* to examine *ex officio* the compatibility of a rule of national law with Community law. This obligation had to be derived, in the court's view, from the principle of loyal cooperation set forth in Article 10 EC and from the *effet utile* of EC law. In this sense, the Regional Administrative Court of Lombardia seems to have anticipated the ruling of the ECJ in *Peterbroeck*.

A couple of months later, the Regional Administrative Court of Lombardia reached the same conclusion in a very similar case concerning the same subject-matter. In this case, too, the court considered *ex officio* the 'Community profile' of the dispute in question and recalled the principle of loyal cooperation and the *effet utile* of EC law.²⁸

²⁶ Joined cases C-87-89/90, *A. Verholen and others v. Sociale Verzekeringsbank Amsterdam* [1991] ECR I-3757.

²⁷ T.A.R. Lombardia Milano, Sez. I, Judgment of 5 April 1994, No. 267, *T.A.R.*, 1994, I, 1853; *Riv. it. dir. pubbl. com.*, 1996, 785.

²⁸ T.A.R. Lombardia Milano, Sez. I, Judgment of 16 July 1994, No. 602, *Riv. giur. amb.*, 1995, 499, annotated by S. Civitarese Matteucci, 'Il primato del diritto comunitario nei giudizi amministrativi in materia ambientale'.

The Council of State also did not ignore the rulings of the ECJ concerning the *ex officio* powers of national courts. In an order for a preliminary ruling, even before *Peterbroeck*, it held *obiter* that ‘national courts have an unconditional obligation to set aside a rule of national law which is deemed incompatible with EC law, also of their own motion and without a specific complaint of the parties regarding this incompatibility’.²⁹

It seems, therefore, that until this point Italian administrative courts were ready to apply EC law of their own motion despite the procedural rules restricting their *ex officio* powers. After an initial phase of enthusiasm, however, one can detect, in the attitude of the administrative courts, a more cautious approach towards the European jurisprudence relating to the *ex officio* powers of national courts. The Council of State, for example, stated in clear terms that, although it is for the national courts to ensure the *effet utile* of EC law, the principle of party autonomy is to be taken into account. In this respect, the Italian court quoted the ruling in *van Schijndel* in order to support its view.³⁰

Recently, the same conclusion was reached by the Council of State in a case concerning an appeal against a ruling which had rejected the applicant company’s claim for the annulment of an administrative decision requesting it to repay a State aid which had been declared incompatible with EC law.³¹ On appeal, the applicant company not only reproduced the same grounds proposed during the first instance trial, but also added another ground, based upon the alleged unlawfulness of the EC measure which ordered the Italian government to recover the aid. However, this additional ground was brought forward in an act that had not been duly notified to the other parties to the dispute, and hence, technically, it fell outside the scope of the dispute as defined by the parties. Thus, the only way for the court to take it into account was to raise this point of its own motion.

Concerning this issue, the Council of State acknowledged the existence of the power of national courts to verify *ex officio* the compatibility of national law with EC law, as set forth in the ruling in *Peterbroeck*. However, it considered that the situation of the Italian administrative courts fell under the scope of the ruling in *van Schijndel*, and held that, if grounds based upon the invalidity of an EC measure (brought in order to support a claim for the invalidity of a national administrative decision) are not explicitly put forward according to national procedural rules, a national court is not authorised to consider this point of its own motion.

Along the same lines, the Regional Administrative Court of Sicily held that the *principio dispositivo* prevented it from examining, of its own motion,

²⁹ Cons. Stato, Sez. IV, Order of 8 May 1995, No. 327, *Giur. it.*, 1996, III, I, 86.

³⁰ Cons. Stato, Sez. VI, Judgment of 5 December 2002, No. 6657, *Foro amm. CDS*, 2002, 3243.

³¹ Cons. Stato, Sez. VI, Judgment of 16 February 2005, No. 516, *Dir. proc. amm.*, 2005, 797, annotated by C. Malinconico, ‘Il recupero degli aiuti di Stato tra preclusioni processuali nazionali e limiti alla proposizione d’ufficio del ricorso pregiudiziale alla Corte di giustizia’.

the conflict between an administrative measure and a legal rule which had not been referred to by the applicant, even where this rule stems from a Community source.³² In this case the applicant company was challenging a measure which excluded its offer from a tender procedure, all other measures relating to the tender and the notice of invitation to tender. In the claim, no mention was made of the possible violation of the EC rules on public procurement. While the court acknowledged that such a violation could, indeed, exist, it made it clear that it would not rule on this aspect because the ground had not been raised by the applicant.

5 Conclusion

The analysis carried out above shows that, at an initial phase, the Italian administrative courts were fairly receptive to the European standards concerning the power of national courts to act *ex officio*. Subsequently, the Italian courts became more cautious and upheld the principle of party autonomy. However, in order to reach this conclusion, the courts did not perform the proportionality test advanced by the ECJ: in other words, they did not carry out any in-depth analysis as to the intrinsic nature, aim and purpose of the rule, and its application to the set of circumstances of the concrete case. Instead, they simply stated that the Italian system of administrative justice falls within the scope of the ruling in *van Schijndel* because it provides for rules similar to those at issue in *van Schijndel*, and concluded that, consequently, there was no obligation upon them to raise *ex officio* grounds not brought forward by the parties.

In general, the impression is that, despite the fact that the Italian courts did not seem to have ignored the European case law, they nevertheless failed to apply it correctly. In the light of these findings, doubts can be raised as to the efficacy and sustainability of the approach adopted by the ECJ. Of course these results only concern the attitude of the Italian courts vis-à-vis the European jurisprudence and further research would be necessary to establish whether this misapplication of the ECJ's case law is a purely Italian problem or seems to be a more widespread phenomenon. Should it appear that similar problems have taken place in more Member States, one could conclude that, with the *van Schijndel/Peterbroeck/van der Weerd* jurisprudence, the ECJ has placed a burden on the shoulders of the national courts that is too heavy, and has not achieved its goal of guaranteeing a more effective judicial protection of EC rights. Furthermore, one could ultimately even doubt the usefulness of the ECJ's 'balanced approach' altogether.

The question to be answered would then be: which alternative solutions can be proposed? If the aim is the uniform and effective enforcement of

³² T.A.R. Sicilia Palermo, Sez. III, Judgment of 30 May 2006, No. 1354, *Foro amm. TAR*, 2006, 1886.

Community law, it would probably be best if the ECJ simply ruled that EC law *must* be raised *ex officio* by the national courts.³³ This solution, however, might be in conflict with legitimate national interests, such as the need to protect fairness and efficiency in the administration of justice. If arguments based upon Community law had to be raised by courts *ex officio*, this might increase the likelihood of EC law being effectively enforced throughout the Community. However, it might also endanger the fair administration of justice by granting the parties whose claim presents an EC law aspect a procedural advantage over those whose rights are rooted solely in national law³⁴. This solution might also endanger efficiency in the administration of justice by greatly increasing the workload of the courts. Furthermore, even an obligation imposed by the ECJ to the effect that EC law be examined *ex officio* would not necessarily ensure an effective judicial protection of EC rights in national courts. The judges' knowledge of and sensitivity to European law would then still determine whether EC law aspects are examined *ex officio* or not. The only remaining solution, therefore, seems to be to let national procedural autonomy prevail. Surely this solution would have the disadvantage that relevant EC law aspects might remain unexplored: this problem is, however, to a certain extent intrinsic in the administration of justice and may occur also with respect to provisions of national law. Furthermore, while this solution would not eliminate the procedural differences between the Member States, it nevertheless seems to be the most fair and efficient one.

³³ This seems to be the approach adopted by the Opinion of Advocate General Bot in case C-455/06, *Heemskerk BV en BV v/h Firma Schaap v. Productschap Vee en Vlees*, nyr. However, it should be pointed out that in this case the rule of EC law at stake did not confer a right upon the concerned individual, but imposed an obligation.

³⁴ M. Dougan, *National Remedies before the European Court of Justice – Issues of Harmonisation and Differentiation* (Oxford 2004) 106.